

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 167 OF 2009

BATALINGAYA CHARLES =====
5 **APPELLANT**

VERSUS

UGANDA

10 **=====**
RESPONDENT

CORAM: HON. MR. JUSTICE ELDAD MWANGUSYA, JA
HON. LADY JUSTICE SOLOMY B. BOSSA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

15 *(Appeal against the conviction and sentence by High Court at Masaka before
Her Lordship Lady Justice Kiggundu Jane F.B., J dated 11/8/2009 in Criminal
Session Case No. 10/2005)*

JUDGEMENT OF THE COURT

20 This Appeal is against sentence only. The appellant was indicted
for Murder contrary to Sections 188 and 182 of the Penal Code
Act on 18th January 2005.

On 11th August 2009 Hon. Lady Justice Kiggundu Jane F.B., J
convicted him of a lesser offence of manslaughter and sentenced
25 him to 14 years imprisonment.

The appellant was convicted having unlawfully killed his girl friend whom he suspected to have been having affair with other men. At the time the offence was committed he was intoxicated. On that account alone the learned trial judge found that the offence of
5 murder had not been proved and accordingly convicted him of a lesser offence of manslaughter.

At the hearing of that appeal Mr. Edison Ruyondo learned counsel appeared for the appellant on state brief while Ms. Ainebyona Happiness learned State Attorney appeared for the respondent.

10 Mr. Ruyondo sought and was granted leave to appeal against sentence only as the respondent had no objection.

Learned counsel Mr. Ruyondo submitted that the sentence of 14 years was harsh and excessive considering the period of 5 years which the appellant had spent on remand and also his age. He
15 prayed that the appeal be allowed and the sentence reduced to 8 years. According to him the learned trial judge did not seem to have taken into account the remand period.

In reply Ms. Ainebyona contended that the trial judge had taken into account all aggravating and mitigating factors and had in fact
20 given the appellant a lenient sentence.

She submitted that the learned trial judge had taken into account the age of the appellant, the fact that he was a first offender and the period he had spent on remand before sentencing the accused.

On the other hand there were serious aggravating factors she contended which included the fact that the accused knew the victim who was his girl friend and the brutal manner in which he killed her.

5 He prayed for the dismissal of this appeal and confirmation of sentence.

We have heard the submissions of both counsel. We have also carefully perused the court record and the judgment of the trial judge. Taking into account all the circumstances of this case we
10 could possibly have come up with a different decision from that of the learned trial judge. We have however, to uphold the principles upon which this Court can interfere with the trial judge's discretion in imposing punishment on a convicted person. The Court of Appeal for Eastern Africa had this to say on this principle
15 in **James S/o Yoram vesus Rex 1950 [EACA] 18 P.147**.

*"It may be that had this Court been trying the appellant it might have imposed a less severe sentence but that by itself is not a ground for interference and this Court will not ordinarily interfere with the discretion
20 exercised by a trial judge in the matter of sentence. Unless it is evidence that the judge had acted on some wrong principle or over looked some material factor"*

In the above cited case a sentence of 15 years on three separate counts of burglaries was upheld. In the case of **Ogalo versus Owoura [1954] 24 EACA 270**
25 the same court reduced to six

years a 10 year sentence imposed by the High court upon the appellant who had been convicted of manslaughter. The appellant in that case had killed the deceased upon provocation whilst both of them were drunk. In this case the appellant had hit the
5 deceased with a sisal pole once on the head. the court followed the principle set out in **James versus R (supra).**

Mr. Ruyondo submitted that the sentence of 14 years was excessive and harsh. However this is not the legal test. The legal test is that the sentence must be manifestly excessive in the
10 circumstances of the case.

See **Nilsson versus Republic [1970] EA 599.**and **R versus Sharshevsky [1912] EACA 28.**

The **Supreme Court in Kiwalabye versus Uganda Criminal Appeal No. 143 of 2001 (SC)** set out the principle as follows:

15 *“The appellant court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to*
20 *amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle”*

We agree with learned counsel for the respondent Ms. Ainebyona that the learned trial judge took into account all the mitigating factors and the aggravating factors before imposing the sentence of 14 years including the time the appellant has spent on remand.

5 We do not agree with Mr. Ruyondo that a sentence of 14 years imprisonment is harsh and manifestly excessive in the circumstances of this case.

In fact we are of the opinion that the learned trial judge was lenient taking into account all the circumstances of the case.

10 However, we have no reasons to interfere with her discretion as she did not act on a wrong principle nor did she overlook any material factor in mitigation.

We note that in his allocutus the appellant he stated that he was a father of two children whose mother died while he was in prison and that further imprisonment would deny the children a parental care. The learned trial judge did not seem to have taken the above factor into account in mitigation. However, we do not think that having a family and children is a mitigating factor. In **Nilsson versus Republic (supra)**. In reference to the above it was stated as follows:

25 *“The second matter argued by way of mitigation is that the appellant is married and has three small children. This argument so often pressed, is curiously illogical, suggesting as it does that the degree of criminality attached to a breach of law is in some way lessened if*

the perpetrator is married and lessened further if he is a father.

A more realistic approach would seem to be that a man who is married and a father should for that very reason give some additional thought to his position and that of his wife and children before permitting himself to become embroiled with Criminal Law.”

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We agree and adopt the reasoning in the above case although the judgment is of the High Court of Kenya. We find that the learned trial judge did not err when she did not consider the issue of children as one of the mitigating factors.

We have found no reason to interfere with the Judge’s discretion in this case. The appeal therefore fails and is accordingly dismissed.

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We hereby confirm the sentence of 14 years imprisonment imposed by the High Court. It is so ordered.

Dated at Kampala this **19th** day of **December, 2013.**

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HON. ELDAD MWANGUSYA
JUSTICE OF APPEAL

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HON. SOLOMY B. BOSSA
JUSTICE OF APPEAL

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HON. KENNETH KAKURU
JUSTICE OF APPEAL.

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