THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL No. 194 OF 2013

(An appeal against sentence, upon conviction, by Justice Paul Mugamba, in Mbarara High Court Criminal Session Case No. 162 of 2004)

BYAMUKAMA HERBERT.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM:

1. **HON. MR. JUSTICE KENNETH KAKURU, J.A.**
2. **HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.**
3. **HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.**

JUDGMENT OF THE COURT

This appeal is against the decision by Mugamba J., in ***MBARARA H.C. CRIM. SESSION CASE NO. 162 OF 2004,*** wherein the learned judge convicted the appellant of murder c/ss 188 and 189 of the Penal Code Act; and, in a resentencing ruling, following the Supreme Court's directive in ***S.C. CONST. APPEAL OF 2006 ~ ATTORNEY GENERAL VS SUSAN KIGULA [2009] UGSC 6,*** he reversed his earlier sentence of death; and, instead, sentenced the appellant to 30 (thirty) years in prison. The appellant is aggrieved by both the conviction and sentence; and so, he has appealed against both. The memorandum of appeal sets out two grounds as follows: -

who was the suspect in the case. He submitted further that the prosecution had not adduced evidence to destroy the *alibi* raised by the appellant that he was at his house at the material time it was believed the murder was committed. Accordingly, the prosecution had failed to place the appellant at the scene of the crime.

He then concluded that the reason the appellant was suspected of the murder, was his alleged notoriety for attacking and raping older womenfolk in the area; hence, when the deceased was assaulted sexually and strangled to death, the appellant's alleged notoriety was the circumstantial evidence used to pin him down as the perpetrator. He however contended that there was no basis for this suspicion; as, in fact, there was no direct evidence of such adverse antecedent of the appellant. Second, even if the appellant had earlier sexually molested some old women, this was the weakest form of circumstantial evidence to pin him in the murder for which he has been convicted.

Ms Jacquelyn Okui, learned Senior State Attorney, who represented the Respondent, opposed the appeal; and supported the conviction. She countered the submissions made by learned Counsel for the appellant, contending that there was no error committed by the learned trial judge in finding that the appellant had participated in the murder for which he has been convicted. Counsel contended further conclusion there from. It is from our appraisal of the evidence on record that we can determine whether, or not, the trial Court properly evaluated the evidence adduced at the trial, and came to a correct finding thereon. A number of cases have restated this duty. In ***KIFAMUNTE VS UGANDA - S.C. CRIM. APPEAL NO. 10 OF 1997,*** the Supreme Court reaffirmed this duty of the first appellate Court as follows: -

> "*We agree that on first appeal from a conviction by a judge, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole, and its own decision thereon. The first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it.*"

Other authorities on this, includes ***PANDYA VS R. [1957] E.A. 336,*** and ***BOGERE MOSES VS UGANDA - S.C. CRIM. APPEAL NO. 1 OF 1997.*** These cases also point out that in exercising the duty, as a first appellate Court, to appraise the evidence afresh, we must always remind ourselves that we

never had the benefit of observing the witnesses testify in Court at the trial; hence, we lack the competence to judge their demeanour.

In the instant case before us, the evidence adduced to prove the participation of the appellant was by various prosecution witnesses. Tinkamanyire Jackson (PW1) testified that he detained, that he had murdered the deceased, and taken her blanket which he hid in the banana plantation at his home. Following the direction given by the appellant, he (PW7) and PW4, together with local leaders, recovered the blanket, which was covered with banana leaves, from a banana plantation which he learnt from the chairperson LC1 as that of the appellant's grandfather.

Mable Bagambe (PW8) the chairperson LC1 of the village, and maternal aunt to the appellant testified that she and her LC committee members suspected the appellant of having committed the crime, because the appellant had the habit of ambushing and raping old women as two old women had reported to her that the appellant had tried to rape them. She testified further that they caused the arrest of the appellant who was brought to the scene of the crime; and upon examining him, they found him with scratch marks on his neck. However, when they asked him about the scratch marks, the appellant did not answer back; and so they forwarded him to the Parish Chief.

It is the evidence above regarding the participation of the appellant in the murder for which he has been convicted, which Ngaruye Ruhindi, learned Counsel for the appellant, attacked vehemently as riddled with discrepancies and based on unfounded hearsay allegation of the appellant's notoriety for attacking and raping old women. In ***KALULU***

We, ourselves, have subjected the prosecution evidence, and the judgment of the trial judge in the instant matter before us, to fresh appraisal and scrutiny. We wish to point out from the outset that it is true that in his judgment, while evaluating the evidence adduced before him, the trial judge referred to the evidence regarding the appellant's alleged notoriety for attacking and raping older womenfolk in the area. However, as is clear from the judgment, this allegation did not influence the trial judge or play

any part in his making a finding that the appellant is guilty as charged.

Similarly, we do not find any discrepancies at all in the prosecution evidence regarding the recovery of the deceased's blanket. All the prosecution witnesses testified that the blanket was recovered from the place the appellant had directed them to; following his admission that he had taken it and hidden it. True, whereas some of the witnesses stated that the blanket was recovered from under an avocado tree, one witness stated that it was recovered from a banana plantation. We however do not consider this to amount to a discrepancy at all. It is noteworthy that there is consensus in all the witnesses' evidence that the blanket was found in a garden belonging to the appellant's grandfather.

There is no evidence, for instance, that the avocado tree was not in a banana plantation of the appellant's grandfather. Hence, the two sets of witnesses have merely differed in the the Judges' Rules apply to none of those to whom the confessions were made. It was put to us in the course of argument that the confessions were in any event inadmissible because they were made to persons in authority, but before a confession is declared to be inadmissible when made to such persons it must, as s. 26 of the Evidence Act makes clear, have been made because of some inducement, threat, or promise, and there are none such in this case. But then, not all of those to whom the appellant made his confessions was a person in authority, for such a person is one who has, or appears to have, the powers of influencing the course of the prosecution ..."

Similarly, the admission or information the appellant gave to the police, that he had taken the deceased's blanket and hidden it in a place, and it was from this very place that the people recovered the blanket from, made the admission or information admissible evidence, pursuant to the provision of section 29 of the Evidence Act (Cap. 6 Laws of Uganda, 2000 Edn.); which states as follows: -

> "*Notwithstanding sections 23 and 24, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of that information, whether it amounts*

to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." or confessions to these persons not only admissible; but it also rendered the recovery of the deceased's blanket not entirely circumstantial evidence. It was evidence, which stood alongside the evidence of his admission to the local authorities of his having committed the crime for which he was indicted. The weight to attach to evidence which is not entirely circumstantial was well stated in ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209,*** *where the Court of Appeal for Eastern Africa explained, at p. 211, as follows: -*

"...circumstantial evidence, although not wholly inconsistent with innocence, may be of great value as corroboration of other evidence. It is only when it stands alone that it must be inconsistent with any other hypothesis other than guilt. "

Had the evidence regarding the participation of the appellant in the commission of the crime been entirely circumstantial, we would have had to apply the strict rule governing the treatment to be accorded such circumstantial evidence. This would have required us to determine whether the inculpatory fact of the recovery of the blanket was incompatible with the innocence of the appellant, and was incapable of explanation upon any other reasonable hypothesis than that of his guilt. We would also have had to establish whether no co-existing circumstances existed, reiterated the law in the case of Sekamatte vs Uganda - C.A. Crim. Appeal No. 67 of 2013, as follows: -

"*It is trite law that sentencing is a discretion of the trial judge. This Court can only interfere with that discretion when it is apparent that the Judge acted on a wrong principle or overlooked a material fact or if the sentence is illegal. This Court can also interfere where sentence is manifestly harsh and excessive in the circumstances of the case. See* ***Crim. Appeal No. 143 of 2001 - James s/o Yoram vs Rex (1950) 18 E.A.C.A. 147.***"

This position was also reiterated in the case of ***Kyalimpa Edward vs U. - S.C. Crim. Appeal No. 10 of 1995,*** where the Supreme Court re-affirmed

the position in law that the primary responsibility for sentencing rests on the trial Court. It also pointed out further the principles that govern interference, by the appellate Court, on sentence; expressing that: -

> "*An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate Court, this Court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal, or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice:* ***Ogalo s/o Owoura vs R.*** *it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where a trial Court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle.*"

In exercising its sentencing discretion, there is always need for Court to maintain consistency or uniformity although crimes are not identical or committed under exactly the same circumstance; see ***Kalibobo Jackson vs Uganda - C.A. Crim. Appeal No. 45 of 2001, Naturinda Tamson vs Uganda - C.A. Crim. Appeal No. 13 of 2011, Kyalimpa Edward vs Uganda*** (supra), and ***Livingstone Kakooza vs Uganda*** (supra). This position was well expressed in ***Mbunya Godfrey vs Uganda - S.C. Crim. Appeal No. 4 of 2011,*** where the Supreme Court stated as follows: -

> "*We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing.*"

This necessitates our seeking guidance from precedents on sentencing in cases that share similarity, in the commission of the offence, with the instant case before us; to enable us determine the appropriate sentence in the circumstances.

In Attorney General vs Susan Kigula & Others - S.C. Const. Appeal No. 3 of 2005, where the Supreme Court was referring to record that he was 25 (twenty-five) years of age when he committed the crime in issue

- was a first offender, and had been on remand for a period of time; *and* ***so, he revisited and altered the earlier sentence of death, and instead imposed one of 30 (thirty) years in prison.***

In ***KAKUBI PAUL & MURAMUZI DAVID VS. UGANDA - C.A. CRIM. APPEAL NO. 126 OF 2008,*** where the Appellants had hacked their victim to death with pangas, and were sentenced to death, this Court set aside the death sentence, and replaced it with a custodial sentence of 20 (twenty) years. It cited ***AKBAR HUSSEIN GODI VS UGANDA - S.C. CRIM. APPEAL NO. 3 OF 2013*** and the ***ATTORNEY GENERAL VS SUSAN KIGULA & OTHERS*** (supra), where the Appellants who had murdered their spouses, were handed custodial sentences of 25 (twenty-five) and 20 (twenty) years respectively. Hence, it urged Courts to '*try as much as possible to have consistency in sentencing*'.

In ***KYATEREKERA GEORGE WILLIAM VS UGANDA - C.A. CRIM. APPEAL NO. 113 OF 2010,*** this Court confirmed the sentence of 30 (thirty) years in jail, imposed by the trial Court, on the Appellant who had fatally stabbed his victim on the chest. Similarly, in ***KISITU MAJAIDIN ALIAS MPATA VS UGANDA - C.A. CRIM. APPEAL NO. 28 OF 2007,*** this Court confirmed the 30 (thirty) years sentence the trial Court had imposed on the Appellant who had murdered his own mother. In ***UWIHAYIMANA MOLLY VS UGANDA - C.A. CRIM. APPEAL NO. 103 OF 2009,*** this Court set aside the death sentence years instead. The sentence herein imposed, shall run from the date the appellant was convicted by the trial Court.

Dated at Mbarara; this day of 7th day of December 2016

HON.MR.JUSTICE KENNETH KAKURU, JA

HON.MR. JUSTICE SIMON BYABAKAMA MUGENYI, JA

HON.MR.JUSTICE ALFONSE C OWINY –DOLLO,JA