THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: Hellen Obura, Catherine Bamugemereire and Christopher Madrama, JJA.)

CRIMINAL APPEAL NO. 0211 OF 2011

1. **OPENDI MICHAEL**
2. **OKOTH VINCENT::APPELLANTS**

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Tororo before Mike Chibita, J (as he then was) in Criminal Session Case No. 044 of 2010 delivered on 14/09/2011.)

JUDGMENT OF THE COURT

Introduction

The appellants were indicted, tried and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act before the High Court (Mike Chibita, J, (as he then was). The 1st appellant was sentenced to life imprisonment while the 2nd appellant was sentenced to 14 years' imprisonment. The particulars of the offence were that Opendi Osako Michael, Okech Rueben, Okoth Vincent and others still at large, on the 28th day of February 2009 at Amagoro A Central Zone in Tororo District murdered Obbo Stephen Wekera.

Background

The brief facts of the case as found by the learned trial Judge were that Opendi Osako Michael and Okoth Vincent together with others at large gathered and attacked members of the deceased person's family along a common road after they had responded to an alarm by one Oyuki Andrew. In the end, Obbo Stephen lay dead having been fatally struck by Okoth Vincent

at the urging of Opendi Michael, his uncle. The appellants were arrested, indicted, tried and convicted of the offence of murder and sentenced as aforementioned.

By the time of hearing the appeal the 2nd appellant who had been sentenced to 14 years' imprisonment had been released from prison, having completed serving his sentence. His appeal was therefore dismissed for that reason. This judgment is therefore in respect of the 1st appellant's appeal. For that reason, we shall henceforth be referring to the 1st appellant as the appellant.

The appellant has appealed to this Court on only one ground on sentence and the ground of appeal is;

> ***"That the learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence of life imprisonment against (A1) the 1st Appellant."***

Representation

At the hearing, Ms. Luchivya Faith represented the appellant on State Brief whereas Aliwali Kizito, Chief State Attorney from the Office of the Director of Public Prosecutions (ODPP) appeared for the respondent. The appellant was present in Court. Counsel for the appellant sought and was granted leave to appeal out of time and against sentence only under **rules 5 and 43 (a) of the Judicature (Court of Appeal Rules) Directions** (the Rules). Counsel for both sides filed written submissions which were adopted and have been considered in this judgment.

Appellants' Submissions

It was submitted for the appellant that the Supreme Court in **Tigo Stephen vs Uganda (Criminal Appeal No. 08 of 2009) [2011] UGSC 7 (10 May 2011);** held that; life imprisonment means imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned.

Counsel argued that it can clearly be seen in the judgment of the lower court that the learned trial Judge condemned the first appellant to a custodial sentence for the rest of his life which was extremely excessive. Counsel submitted that in sentencing there must be consistency and that this position was enunciated by the Supreme Court **in Aharikundira vs Uganda [2018] UGSC 49 (03 December 2018.)**

She further submitted that in **Adiga vs Uganda (Criminal Appeal No. 157 of 2010) [2021] UGCA 2 (25 February 2021);** this Court quoted its previous decision in **Anywar Patrick and another vs Uganda, CACA 166 of 2009,** where it had set aside a sentence of life imprisonment imposed on the appellants for the offence of murder and substituted it with a sentence of 19 years and 3 months' imprisonment. Counsel prayed that this Court exercises its power under **S.11 of the Judicature Act** to impose an appropriate sentence so that the principle of consistency is achieved. She also prayed that this Court allows the appeal, varies the sentence of the High Court by imposing a sentence that is reasonable.

Respondent's Submissions

Counsel opposed the appeal and supported the sentence of life imprisonment, arguing that it is appropriate in the circumstances. He submitted that the learned trial Judge sentenced the appellant to life imprisonment having put into consideration both the aggravating and mitigating factors. Further, that he also balanced the need for leniency with the requirement for justice and deterrence.

It was pointed out that in **Aharikunda vs Uganda (2018) UGSC 49,** the Supreme Court observed that the discretion of sentencing rests with the trial Judge because he has the opportunity to observe the proceedings and assess the demeanour of the accused and witnesses first hand. He noted that there is a high threshold to be met for an appellate court to interfere with the sentence imposed by a trial Judge on grounds of being manifestly excessive. Counsel argued that sentencing is not a mechanical process but a matter of

judicial discretion, therefore perfect uniformity is hardly possible and that an appellate court will only interfere where the sentence imposed exceeds the permissible range or sentence variation.

It was also submitted that the learned trial Judge exercised his discretion judiciously and imposed a sentence within the permissible range, given the fact that the maximum punishment for the offence of murder is death. According to counsel, imprisonment for life was not excessive in the circumstances. Counsel urged this Court, as the first appellate court, to give a fresh scrutiny of the circumstances under which the murder was brutally executed at the instigation of the appellant and arrive at its own conclusion that life imprisonment was appropriate in the circumstances.

Counsel referred this Court to page 36 of the record where the learned trial Judge pointed out how the 2nd appellant cut the deceased with a panga on the head while the appellant commanded "**you kill, don't leave him, kill him**". He submitted that on the day before the fight, the appellant had sought for permission from PW5 (L.C 1 Chairman) to fight the deceased's family. He then argued that this was a premeditated murder orchestrated at the instance of the appellant which justifies the sentenced of life imprisonment. In support of this argument, counsel relied on **Sebuliba Siraji vs Uganda, CA No. 0319 of 2009** where the appellant attacked and cut the deceased with a panga on his head, neck and hand thereby causing his death and this Court upheld a sentence of life imprisonment that was imposed by the trial Court. He also cited **Kato Kajubi Godfrey vs Uganda, Criminal Appeal No. 173 of 2012,** where the appellant was not an active participant in the murder but he aided and procured the same. Upon conviction, the appellant was sentenced of life imprisonment which was upheld by both this Court and the Supreme Court.

Counsel quoted what the Supreme Court observed in **Kato Kajubi Godfrey vs Uganda** (supra) as follows;

"The right to a fair hearing not only encompass the rights of the accused person or convicted person during the sentencing stage. It also encompasses the rights of the victim of crime as well as public interest…it has to instill confidence in the criminal justice system with the public, including those who are close to the accused, as well as those distressed by the audacity and the horror of crime".

He submitted that in the circumstances of this case, it would be unreasonable for anyone to contend that a sentence of life imprisonment was excessively harsh in the circumstances. It was counsel's view that the learned trial Judge did not give an illegal sentence and neither did he apply a wrong principle of law nor ignore a material fact so as to occasion a miscarriage of justice. Counsel concluded that the sentence was reasonable and appropriate. He urged this Court not to interfere with it and prayed that it be upheld and the appeal dismissed.

Resolution by the Court

We have carefully perused the record of appeal and considered the submissions of both counsel together with the law and authorities cited to us. In addition, we have also looked at other authorities which we find relevant to this matter. We are cognisant of the duty of this Court as a first appellate court to review the evidence on record and reconsider the materials before the trial Judge, and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See **Father Narsensio Begumisa & 3 Others vs Eric Tibebaga [2004] KALR 236, Supreme Court.**

This appeal is premised on only one ground on sentence. The issue this Court is required to resolve is whether the sentence of life imprisonment passed against the appellant is harsh and manifestly excessive and did cause a miscarriage of justice as contended for the appellant. Counsel for the respondent opposed the appeal and supported the sentence of life imprisonment passed against the appellant by the learned trial Judge. He argued that the learned trial Judge considered both the mitigating and aggravating factors.

While sentencing the appellant, the learned trial Judge stated as follows;

> *"I have heard the two sides. In balancing the need for leniency with the requirement for justice and deterrence I have decided not to apply the death penalty. I therefore sentence the accused A1 to life imprisonment. I sentence A2 to 14 years in the belief that he was influenced by A1 and that he can reform."*

Although counsel for the appellant did not address us on it, we note two anomalies from the above excerpt of the sentencing ruling that we feel obliged to point out for purposes of guiding the lower court. The first one is the fact that the learned trial Judge never took into account the period spent on remand as stipulated under article 23 (8) of the Constitution when he was sentencing the 2nd appellant to a term of imprisonment. We regret that the 2nd appellant, whose appeal would have been successful for the learned Judge's failure to take into account the period he spent on remand, served and completed his illegal sentence before this appeal was heard.

As for the appellant, we are alive to the fact that this constitutional command is not applicable to his life sentence in light of the Supreme Court decision in **Magezi Gad vs Uganda, Criminal Appeal No: 17 of 2014**. In that case, it was held that a sentence of death or life imprisonment is not amenable to Article 23 (8) of the Constitution as it applies only where the sentence is for a term of imprisonment, that is, a quantified period of time which is deductible which is not the case with life or death sentences.

The second anomaly we note is the fact that the learned trial Judge made a general statement that he had heard the two sides and went ahead to sentence the appellant without stating the specific factors that informed his decision. In **Ramathan Magala vs Uganda, (Criminal Appeal No. 01 of 2014) [2017] UGSC 34 (20 September 2017),** the Supreme Court held that a judicial officer must record what the accused submitted in mitigation and this should be

evident on the record. The judicial officer must state that the sentence was arrived at with both the mitigating and aggravating factors in mind. It is only then that the accused will be sure that the judge addressed his or her mind to the cited mitigating factors but nevertheless came to the conclusion that the aggravating factors outweighed the mitigating ones. (See also **Alemiga James vs Uganda, Criminal Appeal No. 234 of 2017** and **Odyambo Juventine, Criminal Appeal No. 081 of 2016** where this Court followed the decision in **Ramathan Magala vs Uganda** (supra)).

In this case, a blanket statement by the learned trial Judge that he had heard the two sides does not indicate that he addressed his mind to the cited mitigating factors, especially the fact that he was a first offender and had two wives and 19 children. There is a difference between hearing on the one hand and taking into consideration on the other hand. We therefore find that the learned trial Judge erred when he omitted to state that he had considered both the aggravating and mitigating factors. However, in light of section 139 (1) of the Trial on Indictment Act, we are of the considered opinion that the omission did not occasion a failure of justice in this case given that the appellant was not sentenced to the maximum penalty for murder which is death penalty.

We now turn to consider whether the appellant's sentence was harsh and excessive in the circumstances. In doing so, we shall be guided by the aggravating and mitigating factors. In addition, and, in keeping with the principle of consistency of sentences as held in **Aharikundira Yustina vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015)**, we shall consider the range of sentences in offences of a similar nature committed in more or less similar circumstances.

In terms of mitigating factors, it was pleaded for the appellant that; he is a first offender; that a long custodial sentence would wipe away his future and that of his dependants which

consisted of his two wives and 19 children and that he is remorseful. The aggravating factors were that; the weapons used and the manner in which the appellant treated people who had run to the scene was behavior inconsistent with human dignity; the system of dispute resolution adopted by the appellant was vengeful and malicious which caused death and that society must be taught how to resolve disputes amicably.

Indeed, we note that the weapons used and the gruesome manner in which the offence was committed at the instigation and urging of the appellant makes the aggravating factors outweigh the aggravating factors. In our view, that would justify a sentence of life imprisonment and we would not be inclined to interfere with the sentence on that ground. Be that as it may, we have also looked at the range of sentences in offences of a similar nature in the following cases in a bid to ensure that the appellant's sentence is consistent with sentences previously imposed in offences of murder.

In **Magezi Gad vs Uganda** (supra), this Court confirmed a sentence of life imprisonment that was imposed on the appellant by the trial court for the offence of murder. On a 2nd appeal to the Supreme Court, the sentence was also confirmed. In that case, the appellant and another man went to the home of the deceased claiming to be his relatives who wanted to spend the night at his home. Although the deceased failed to recognise them he nevertheless entertained them. After a while, the deceased left for the kitchen and the appellant's colleague followed him with the excuse that he wanted to speak to him. The deceased was later found dead in the kitchen. When the appellant who had remained in the main house was informed about this, he got up, opened the main door and fled. Unfortunately for him, he got lost in the village and was arrested under suspicion of being a wrong character. The appellant was taken to the chairman LC1 (PW8) who interrogated him and upon being satisfied about his identity as Magezi s/o Sebbi of Kitojo, gave him direction to Kitojo Village. The appellant was later arrested from his home in Rubare, Ntungamo District and identified vide an identification

parade at Kabale Police Station.

We have given the above brief facts of that case because, just like in this case, the appellant did not physically assault the deceased but he was found guilty under the doctrine of common intention, convicted and sentenced to life imprisonment and the sentence was confirmed by both appellate courts.

In **Budebo Kasto vs Uganda, Criminal Appeal No. 0094 of 2009**, this Court confirmed a sentence of life imprisonment imposed on the appellant by the trial court for murder. In **Mbunya Godfrey vs Uganda, SCCA No. 004 of 2011,** the Supreme Court set aside the death sentence imposed on the appellant for the murder of his wife which was confirmed by this Court and substituted it with a sentence of 25 years' imprisonment.

In **Wodada Moses vs Uganda, Court of Appeal Criminal Appeal No. 0758 of 2014,** the appellant was convicted of murder and sentenced to death by the trial court. Following the decision in **Attorney General vs Suzan Kigula and 417 others Supreme Court Constitutional Appeal No. 03 of 2006,** a plea in mitigation of sentence was made and the appellant's sentence was reduced to 39 years' imprisonment. The appellant appealed against the sentence to this Court and it was reduced to 25 years' imprisonment.

In **Aharikundira Yustina vs Uganda (Supra),** the appellant who brutally murdered her husband in cold blood by cutting off his body parts, was sentenced to 30 years' imprisonment by the Supreme Court which set aside a death sentence that had been meted out against her by the trial Court and confirmed by this Court.

Taking into consideration the range of sentences for murder in the above cases and the aggravating and mitigating factors in this case, we are of the considered view that the sentence of life imprisonment imposed by the learned trial Judge is appropriate in the

circumstances of this case. We therefore find no reason to interfere with it. We accordingly dismiss the appeal and uphold the sentence of life imprisonment.

We so order

Dated at Mbale this.....22.....day of.....Feb.....2023.

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Hellen Obura

JUSTICE OF APPEAL

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Catherine Bamugemereire

JUSTICE OF APPEAL

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Christopher Madrama

JUSTICE OF APPEAL