THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[*Coram: Egonda-Ntende, Bamugemereire, Madrama, JJA*]

CRIMINAL APPEAL NO. 93 OF 2017

(*Arising from High Court Criminal Session Case NO. 266 of 2012 at Mbarara*)

BETWEEN

Musozi Stephen ========== ==========Appellant

AND

Uganda==========Respondent

(*An appeal from the Judgement of the High Court of Uganda [Gaswaga, J] delivered on 22nd February 2017*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the appellant on the 18th day of October 2002 murdered Kansime Scovia with malice aforethought. The learned trial judge sentenced the appellant to 55 years' imprisonment.

[2] Dissatisfied with the decision of the trial court, the appellant appealed against both conviction and sentence on the following grounds:

> '1. The learned trial judge erred in law and fact when he relied on evidence of a child of tender years at the time of commission of the crime.

2. The learned trial judge erred in law and fact when he relied on weak and circumstantial evidence thereby arriving at a wrong decision.

3.The learned trial Judge erred in law and fact in sentencing the Appellant to a harsh and excessive sentence using a wrong principle of sentencing which renders the sentence against the Appellant illegal.'

[3] The respondent opposed the appeal.

[4] At the hearing of this appeal, the appellant was represented by Mr. Turyahabwe Vicent while the respondent was represented by Ms. Nabisenke Vicky, Assistant Director of Public Prosecutions. Both counsel relied on their written submissions on record.

Submissions of Counsel

[5] Counsel for the appellant contended that the learned trial judge failed to exercise caution before admitting the evidence of PW1, who was a child of tender years at the time the offence was committed. He contended that considering the amount of time that had passed, it is highly likely that the events of that fateful night, if not faded, were no longer fresh in her memory. Counsel argued that there was a possibility of mistaken identity given the age of the child and the fact that there was no lighting. Mr. Turyahabwe relied on Kagunda Fred v Uganda Criminal Appeal No. 14 of 1998 (unreported)) for his submission that the trial court should not have discarded the appellant's defence while relying on the evidence of PW1 that was unreliable. He also contended that it was wrong for the learned trial judge to place on the defence the burden of proving its defence. The evidence of PW1 raises doubt and that any doubt should be resolved in favour of the accused. Counsel concluded by submitting that the prosecution failed to prove its case beyond reasonable doubt.

[6] In reply, counsel for the respondent submitted that the trial court was alive to the conditions of identification and that PW1 testified 15 years after the offence was committed. She referred to the decision of the trial judge and also relied on Ntambala v Uganda [2018] UGSC 1 where it was held that a conviction can be solely based on the testimony of the victim as a single

witness provided the court finds her to be truthful and reliable. What is essential is the quality and not the quantity of evidence.

[7] Counsel contended that it was uncontested that the appellant was the biological father of PW1. PW1 testified that she knew the appellant as her father prior to the incident and was able to identify his voice. She cited Mutachi Stephen v Uganda [2003] UGCA 7 where this court agreed with the trial court's finding that where there is frequent interaction between the appellant and the witness, voice identification could be relied upon. She also relied on Boniface Gitonga v Republic [2015] eKLR.

[8] Ms. Nabisenke submitted that the conditions in this case favored correct voice identification of the appellant by PW1 as the deceased's assailant. The appellant was well known to PW1 since they lived together as a family. He lifted her and her brother and carried them from the bedroom to the sitting room. So she was in close proximity to him. She was the one who opened for him when he came back that night and he uttered threats directly to PW1 when cautioning her against calling for help when the deceased urged her to do so.

[9] Counsel further contended that the evidence of PW1 was not that of a child of tender years. She was an adult at the time of her testimony. Her testimony therefore did not need corroboration. Counsel relied on Bukenya Patrick v Uganda [2002] UGSC 37. She submitted that PW1's evidence was corroborated by the conduct of the appellant running away from his home. She referred to Bukenya Patrick v Uganda (supra) where the appellant's conduct of disappearing from the village was found incompatible with his innocence. Counsel for the respondent also stated that PW3 testified that when he went to visit the appellant at police, the appellant admitted to him that he had killed the deceased because of her adultery. Counsel contended that the learned trial judge weighed the evidence of PW1, the circumstances surrounding the commission of the offence against the appellant's defence of alibi and rightly found that the chain of circumstantial evidence was so overwhelming in pointing to the guilt of the appellant.

[10] Regarding the sentence, counsel for the appellant contended that lack remorsefulness should not have been a consideration while sentencing because the appellant had not pleaded guilty. He submitted that a person who has maintained their innocence throughout the trial cannot be expected to be repentant otherwise their right to appeal would be fettered and rendered nugatory. He relied on Kakooza v Uganda [1994] UGSC 17 and Mattaka v

Republic [1971] EA 495. Mr. Turyahabwe argued that this court can interfere with the sentence because the trial court acted on a wrong principle while sentencing. He relied on Ogalo s/o Owoura v R (1954) 21 EACA 270 for the submission. He concluded that that this misdirection goes to the root of the case and renders the appellant's conviction null and void.

[11] On the other hand, counsel for the respondent submitted that whereas it is true that the trial court should not rely on lack of remorse as an aggravating factor, it is not true that such consideration by the trial court renders the conviction a nullity. She contended that the consideration of lack of remorse did not occasion a miscarriage of justice.

[12] Regarding the sentence being excessive, counsel for the appellant submitted that the learned trial judge did not take into consideration the fact that the appellant was a first offender while sentencing. Counsel relied on Naturinda Michael v Uganda Court of Appeal Criminal Appeal No. 244 of 2014 (unreported) where this could held that it is an obligation of the trial judge to explain which factors, both aggravating and mitigating are being considered to arrive at the sentence. He also relied on Kakooza v Uganda (supra) where the Supreme Court reduced a sentence of 18 years imprisonment to 10 years imprisonment because the appellant was a first offender. Counsel prayed that his court takes into consideration the fact that the appellant was a first offender with huge family responsibilities, remorseful and capable of reform. Counsel also prayed that this court finds the sentence of 55 years imprisonment harsh and excessive in the circumstances.

[13] In response to the counsel for the appellant's submissions, counsel for the respondent relied on Turyamuhebwa v Uganda [2016] UGCA 79 and conceded that the sentence imposed against the appellant was excessive. Counsel set out the objectives of sentencing as provided by the Constitutional (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013. She contended that court has a duty to protect the society and victims of crime from such persons as the appellant by withdrawing them from community for such durations as court deems fit. She stated that this court should take into consideration the aggravating factors while sentencing, that the appellant in a fit of anger strangled his wife, cut off her chin and fled leaving their two children in the house with their mother's dead body. She contended that for the purpose of proportionality, consistency and uniformity in sentencing, a sentence of 35 years imprisonment would be appropriate.

Analysis

[14] It is our duty as a first appellate court to subject the evidence adduced at the trial to a fresh re-appraisal and to draw our own conclusions regarding the law and facts of the case, bearing in mind, however, that we did not have opportunity to observe the witnesses testify and be able to determine their demeanour in assessing their credibility. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10, Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

Grounds 1 and 2

[15] Grounds 1 and 2 shall be handled together since they are interrelated. Counsel contended that the prosecution failed to prove the participation of the appellant in the murder of the deceased. Counsel for the appellant mainly challenged the propriety and credibility of the evidence of PW1.

[16] PW1, Nayebare Joan was a single identifying witness. It was her testimony that on the night of 28th October 2002 while she was at home with her mother (the deceased) and her sibling Nabimanya Jonas who was then a breastfeeding baby, the appellant, her father knocked on the door and the deceased told her to open the door. She had gone to bed but had not yet fallen asleep. The appellant entered the house and asked her where her mother was, and she told him that she was in the bedroom. When she went back to sleep, they all slept. She stated that they were sleeping in the same room, the children slept on the floor while the parents slept on the bed. When she was about to fall asleep, the appellant asked her where the panga was, but she was not sure where it was. She then slept. Next, she heard her mother telling her to make an alarm, but the appellant threatened to kill her if she did so. The appellant then carried her and her young sister to the sitting room and he went back to the bedroom. She then heard a sound of a bed that was about to break. After sometime, the appellant came and took them back into the bedroom. When they returned to the bedroom, they did not speak to their mother. They just slept. The appellant went outside and the door remained open until morning.

[17] PW1 further testified that there was no light in the house. When they woke up, they tried to wake up their mother, but she was not responding. She was

lying in a pool of blood on the bed that was now broken. Their father was not at home, and she did not know where he had gone. Then people kept on coming to their home, but she did not know who had called them. They were taken away from home later in the evening by their relatives from the maternal side. She stated that she did not see the appellant again until August 2016.

[18] Upon cross examination, PW1 testified that she had not seen the appellant from 2002 until 2016. At the time the appellant knocked on the door, there was no light. She stated that it was her father that she opened the door for that night because she knew him.

[19] In Nzabaikukize Jamada v Uganda [2017] UGSC 30, the Supreme Court stated the approach to be taken by the trial court in dealing with evidence of identification by a single witness in a criminal case as hereunder:

> 'The law on identification by a single witness has been laid out in several cases. The leading authority is that of **Abudullah Bin Wendo and another vs. R (1953) 20 EACA 583**. The law was further developed in the authorities of **Abdulla Nabulere vs. Uganda Criminal Appeal No.9 of 1978** and **Bogere Moses vs. Uganda** (supra). The principles deduced from these authorities are that-
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> i) Court must consider the evidence as a whole.
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> ii) The court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.
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> iii) The court must caution itself before convicting the accused on the evidence of a single identifying witness.
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> iv) In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailants, the quality of light, and material discrepancies

in the description of the accused by the witness.'

[20] In the present case, the appellant is PW1's father. The appellant did not dispute this fact in his evidence. PW1 testified that she knew him as his father prior to the incident. He was well known to her. She is the one who opened the door for the appellant. The appellant talked to her. And he also carried her and her sibling twice that evening. PW1 was familiar with the voice of the appellant. PW1 was also in close proximity to the appellant to enable proper identification despite the fact that there was no lighting in the house. The length of time that the appellant was in the house was also sufficient to make a proper identification.

[21] While evaluating the evidence of PW1, the learned trial judge stated:

'[6] I have considered submissions for both parties in regard to whether the accused was properly identified by the 5 year old (PW1) during the night of the murder. The position of the law on the test of correct identification has been laid down in various leading authorities. Notably in the case of Abdallah Nabulere and Anor. Vs Uganda [1979] HCB 77 it was held that;

"The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused."

[7] It is the evidence of PW1 that the accused had carried her together with her sibling from the bedroom to the living room and back. The accused even talked to her and inquired about the whereabouts of the panga and when the deceased asked her to make an alarm the accused threatened her. From this testimony it is clear that PW1 was close enough to identify the voice of the accused. It is an agreed fact

that PW1 was the daughter of the accused. The accused even admitted during his defence that PW1 was his biological daughter and knew him very well.

[8] The evidence of a sole identifying witness who is also a child of tender years is also admissible in evidence except that court must exercise caution before admitting it. See: **Susan Kigula Sseremba and Anor Vs Ug S.C Crim Appeal No. 1/2004.** This court has taken great caution on the evidence of PW1 the minor and sole identifying witness and has concluded that proper identification should not be limited to visually looking at the accused's face. A party can be properly identified by his gait or even the voice alone especially in instances where parties have known and interacted with each other for a period of time.

[9] In **Sarkar on Evidence Vol. 1 14th Edition, 1993 at page 170** it was stated that:

" If the court is satisfied about the identification of persons by evidence of identification of voice alone no rule of law prevents its acceptance as the sole basis for conviction. Possibilities of mistakes in identifying persons by voice especially by those who are closely familiar with voice could arise only when the voices heard are different from the normal voices on account of the situation or when identical voices are possible from other persons."

The above quotation highlights two factors which should be considered when disregarding voice identification.

1.If the voice heard is different from normal voices.

2.If there is presence of two identical voices.

As earlier discussed, PW1 was the accused's daughter and although she was only 5 years old then, she was familiar with the accused and

could recognize his voice and identify it even in darkness. During his testimony in court I found out that the accused's voice was not different or unique from other normal voices.'

[22] It should be noted that the learned trial judge dealt with the evidence of a single identifying witness and evidence of voice identification in the above extract. He considered the law applicable and applied it to the facts of the case. The learned trial judge directed himself on the law regarding the evidence of a single identifying witness before proceeding to evaluate the evidence of PW1. He pointed out the need to be cautious with such evidence and the need to ensure that the conditions of identification are favorable before a conviction can be secured. He was satisfied that the evidence of PW1 was sufficient to place the appellant at the scene of the crime. We find no reason to depart from the findings of the learned trial judge. We are satisfied that the evidence of PW1 placed the appellant at the scene of the crime.

[23] Counsel for the appellant contended that the evidence of PW1 is unreliable because she was a child of tender years and that the learned trial judge did not exercise caution while relying on her evidence. It should be noted that while the offence was committed when PW1 was 5 years old, a child of tender years, she was an adult when she testified. She gave her evidence on 9th February 2017, 15 years after the murder of the deceased. She was then 20 years old. In handling the same issue, the Supreme Court in Bukenya Patrick and Anor v Uganda [200] UGSC 37 stated:

> 'We reiterate what we stated in **John Muchani alias Kalule v Uganda (supra)** that the issue as to whether a child is of tender years arises only at the trial but not when the offence was committed. We may add that corroboration in such a case is not a requirement by law.'

[24] In that case counsel for the appellant argued that it was wrong for the trial judge to rely on the evidence of PW8 who was 11 years old without corroboration. PW8 was 14 years at the time of the trial.

[25] Although there is no need for corroboration in this case, the conduct of the appellant disappearing following the murder of the deceased provided sufficient corroboration to PW1's evidence. PW2 and PW3 testified that they were involved in the search for the appellant who had had gone into hiding. PW3 testified that when a one Twinomugisha Nicholas who was grazing cows told them that the appellant was hiding in the hills, they went and searched for him, but he ran away and hid in the swamp. PW2 also stated that they went with the residents and the police up the hill to search for the appellant, but he ran and disappeared in the swamp. The appellant reported himself to Bwizibwera police post after 3 days.

[26] PW2 and PW3 testified that the appellant after release on bail, jumped bail and disappeared. PW2 got a warrant for his arrest in 2003 but he never saw the appellant until 2016. PW3 testified that in 2016 between August and October, he kept on seeing the appellant on the road riding his bicycle about three times. He reported to police, and he was informed that the appellant's case was pending. The policeman later informed PW3 that the appellant had told him that his case had been completed. When he inquired from PW2, he showed him the warrant of arrest issued in 2003. They went to Mbarara O/C CID and renewed the warrant of arrest, and the police was ordered thereafter to arrest the appellant.

[27] In his defence, the appellant stated that he was not home when the deceased was murdered. He was staying and working in Rubaya in Mbarara district at the time. He was informed by his young brother Mabarebaki Vicent on 9th October 2002 at around midday that his wife had died. Upon hearing this sad news, he asked for money from his boss so that he could go home. His boss gave him UGX 100,000 and he went home. Before reaching home between 1:00 pm and 2:00pm, he met three men he did not know plus the chairman. Two of them were armed with sticks and one hit him on the head, another also hit him and he saw blood coming from the head. At that point he decided to run fearing for his life. The people attacking him raised an alarm and the number increased. He ran towards the hill and slopped down through the swamp. He kept hiding until the people left and he reported himself to police thereafter. He stated that he had been away from his home for about one and half months. He stated that he jumped bail because he had to take care of his sick mother who eventually died in 2005.

[28] Counsel for the appellant in his submission faulted the learned trial judge for placing the burden to prove the defence of alibi on the appellant, however, we find this allegation baseless. It is trite that once an accused person pleads

an alibi, he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of the crime. See Bogere Moses v Uganda [1998] UGSC 22. While considering the appellant's alibi, the learned trial judge stated:

> 'His defence was that he was not around during the material time and only came back to the village when he heard about his wife's death and was shocked to see people chasing him with sticks when he arrived at the village. That he only ran away to the hills to defend himself. His defence of alibi does not hold water. It was all a pack of lies. See **Nashaba Paddy Vs. Ug. Crim. Appeal (SC) No. 39 of 2000**. According to Rwambagwere (PW3), a herdsman, one Nicholas, had earlier seen him in the morning hiding behind a hill even before the villagers chased him in the evening. Moreover, when he was arrested and later released on bail, he hid himself for 14 years in the disguise of looking after his sick mother and never bothered to show up to report to court or even look for the place where his wife was buried. He was only brought to court after PW2 the deceased's father pursued the matter and a new arrest warrant was issued. With these deliberations I find that this chain of circumstantial evidence is so overwhelming and points to nothing than the accused's guilt. See: Teper (supra).'

[29] After a careful evaluation of all the evidence, we come to a similar conclusion as the learned trial judge. We find that the appellant was properly placed at the scene of the crime and that the prosecution discharged its burden of proof.

[30] Grounds 1 and 2 have no merit.

Ground 3

[31] As an appellate court, we can only interfere with a sentence where it is either illegal, or founded upon a wrong principle of the law, or a result of the trial's failure to consider a material factor, or when the sentence is harsh and manifestly excessive in the circumstances of the case. See Kakooza v Uganda [1994] UGSC 1, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No.143 of 2001 (unreported).

[32] Counsel for the appellant faulted the learned trial judge for taking into account the appellant's lack of remorsefulness as an aggravating factor when sentencing. While sentencing the appellant, the learned trial judge stated:

> **'SENTENCE**
> Aggravating and mitigating factors have been considered. This was a very unfortunate incident where accused killed his wife apparently for no reason and thereby rendered their children motherless at a tender age. He also caused a lot of pain to the relatives and family of the deceased especially the father (PW2).
> For sure this would call a very tough sentence, either a death penalty or removing convict from society for a very long time to enable him to reform.
> Nobody has authority to take away another person's life. A clear and loud message should be sent out to the public so that would be offenders can desist from such conduct.
> He also asked for lenient sentence which I do not think he deserves as he did not sound that remorseful. Be that as it may, court will save him of the death penalty and after considering the period of about 2 years spent on remand, I sentence him to a period of **fifty five (55) years'** imprisonment which should start running from today.

[33] In Mattaka and others v Republic [1971] EA 495 at page 512, the Court of Appeal at Dar es Salaam stated:

> '...A person who has pleaded not guilty and has maintained his innocence throughout and who intends to appeal cannot be expected to express repentance, which would amount to a confession of guilt. A person who has been found guilty may believe himself innocent, as a matter of fact or law, and that belief may be upheld by an appellate court. If, however, lack of repentance could be treated as an aggravating factor, the right of appeal would be fettered, because the convicted person would, in effect, be put to a choice, whether to risk a heavier sentence by maintaining his innocence or to abandon his right of appeal in the hope of leniency.
> The position is analogous to that when a person is pleading to a charge. It is well established law that a plea of guilty springing from genuine repentance may be treated as a factor in mitigation. It is equally well established that the fact that a person has pleaded not guilty may not be treated as an aggravating factor, because that would derogate from the right of every accused person to be tried on the charge laid against him.'

[34] While agreeing with the decision in Mattaka and others v Republic (supra), the Supreme Court in Kizito Senkula v Uganda [2002] UGSC 36 stated:

> 'In the instant case, it is clearly our view that it was a misdirection in law for the learned trial judge to have regarded appellant's absence of repentance as an aggravating factor in sentencing him. Equally, with respect, the learned Justices of Appeal failed to direct themselves on the matter. We agree with the view of the law as stated in the decision in Mattaka's case (supra). Absence of repentance

by an accused person should never be an aggravating factor in considering what sentence the trial court should impose. However, we are of the view that in the instant case, the misdirection by the trial court and the failure of the learned Justices of Appeal to direct themselves on the matter, did not cause a failure of justice. There were legitimate aggravating factors which the learned trial judge took into account, namely, that what the appellant did to the victim was treacherous; and that he spoilt her when he introduced her to sex at such a young age of 11 years.
We note that the learned trial judge also took into account certain factors in favour of the appellant.
In this regard, the Court of Appeal referred to Ogalo s/o Owowa (supra) and concluded:
"In the instant case, the trial Judge considered the appellant's own personal responsibility, the period he spent on remand against the gravity of the offence and within his discretion chose a sentence of 15 years imprisonment. In our view, he did not act on a wrong principle in assessing the sentence and the sentence he imposed is not manifestly excessive. We thus find no Justification to interfere with the sentence."'

[35] Upon consideration of the above authorities, we find that the learned trial judge misdirected herself on the law by taking into consideration the appellant's lack of remorse as an aggravating factor when sentencing. We can therefore interfere with the sentence of the trial court as it took into account a matter that it ought not to have taken into account in determining sentence imposed upon the appellant.

[36] The appellant's mitigation factors were that he was a first offender with little children to look after. The aggravating factors were that the appellant murdered his wife in a gruesome manner and rendered his children motherless at a very tender age. It was established that the appellant spent about 1 ½ years on remand.

[37] In Turyahika v Uganda [2016] UGCA 83, the appellant was convicted of murder and sentenced to death. Following the directive of the Supreme court in Attorney General v Susan Kigula & 417 Ors [2009] UGSC 6, the case was returned to High court for mitigation proceedings whereupon the appellant was resentenced to 36 years imprisonment. On appeal to this court on severity of sentence, the sentence was reduced to 26 years imprisonment. This court noted that in cases of murder, this Court and the Supreme Court have confirmed or imposed sentences ranging from 20 to 30 years. In exceptional circumstances, the sentences have been lower or higher.

[38] In Tusigwire Samuel Vs Uganda [2016] UGCA 53, this court found the sentence of life imprisonment imposed against the appellant for the offence of murder harsh and manifestly excessive and reduced the sentence to 30 years' imprisonment. The appellant had attacked and killed an old woman of 60 years without provocation. He inserted a sharp object into her vagina pushing it deep into her abdomen. The intestines were protruding through her birth canal when she died. While arriving at the sentence, this court took into consideration the fact that the appellant was a young man of 23 years capable of reform. The appellant had been remorseful at the time of conviction and that he was capable of reform.

[39] In Akbar Godi v Uganda [2015] UGSC 17, the convict shot his wife to death. He had earlier been threatening to kill her. The deceased had informed her relatives and friends that her life was in danger. The convict eventually executed his plan. He was convicted and sentenced to 25 years' imprisonment. In Osherura Anor v Uganda [2018] UGSC 24, where the appellants assaulted the deceased to death with a panga, the Supreme Court upheld a sentence of 25 years imprisonment for the offence of murder that was imposed against the appellant. In Tumwesigye Anthony v Uganda [2014] UGCA 61, the appellant was convicted of murder and sentenced to 32 years of imprisonment. This court reduced the sentence to 20 years on appeal.

[40] In consideration of the aggravating factors and mitigating factors of the case, and in the interest of consistency we are of the view that a term of 25 years imprisonment is appropriate from which we deduct the period of 1 year and 6 months that the appellant spent on remand.

[41] We therefore sentence the appellant to serve a term of 23 years and 6 months imprisonment from the 22nd February 2017, the date of conviction.

Signed, dated and delivered at Mbarara this 3rd day of March 2022

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Christopher Madrama
Justice of Appeal