THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Kasule, Mwangusya & Egonda-Ntende, JJA*]

Criminal Appeal No. 147 of 2009

Muhwezi Obedi==========Appellant

Versus

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

[*An appeal from a judgment of the High Court of Uganda sitting at Kyenjojo (Chigamoy Owiny-Dollo, J.), in FPT-00-CR-AA-0113 of 2004,[Criminal Session Case No. 0066 of 2005 delivered on the 12 June 2009*]

Judgment of the Court

Introduction

1. The appellant was convicted by the High Court on 12 June 2009 of the murder of Kisembo Atwooki on 25th day of June 2004 at Kibale trading centre in Kyenjojo district, contrary to section 188 and 189 of the Penal Code Act. He was sentenced to suffer death. With leave of this court he now appeals only against sentence.

2. The facts of the case are that the appellant, deceased and others were drinking in a bar in Kibale trading centre on the evening of 25 June 2004. The deceased talked to one lady, called Baruzimana and became intimate with her, touching her breasts. The appellant took offence and pushed the deceased out of the bar. The appellant and other patrons left the bar and the owner closed it. The appellant went home, picked a knife and found the deceased still in the trading centre. He stabbed him in the stomach and the intestines spewed out.

3. The appellant ran to the camp where he found Turyatemba, his wife, and others. Turyatemba asked him why he was carrying a knife. He replied that ‘he has done it.’ Turyatemba saw blood on the knife and got it from

the appellant. The appellant walked home. As Turyatemba was following he saw someone lying down in a pool of blood. This was the deceased. He asked him what had happened. The deceased replied that it was the appellant that had stabbed him. Neighbours were informed and the deceased was rushed to Kyarusozi Health Centre where he died soon after admission. Post mortem revealed that the deceased died due to Haemorrhagic shock from extensive intro-external bleeding.

4. The sentence hearing was brief and so was the order. We shall set them out in full.

> '**Kizito:** The murder was committed in the most brutal manner. Murder leads to loss of life. The deceased's children are fatherless. Murder is high in the district.
> **Nyamutale:** The convict is first offender. He is 27 years old. He has been on remand for 5 years. Single parent with one child.
> **Court:** This was a dastardly act of taking human life Kisembo Atwooki's life was cut short by the wanton act of the convict. All this was over the heart of a woman. Justice can only be done here by imposing the maximum sentence. I therefore sentence the convict to suffer death in the manner prescribed by the law. Right of appeal against conviction and sentence explained.'

5. It is against that sentence that the appellant now appeals before this court.

Counsel's Submissions

6. Ms Angella Bahenzire, learned counsel for the appellant, reformulated her one and only ground to the effect that the learned trial judge erred in law when he failed to take into account the period the appellant had spent in remand in determining the sentence and imposed an excessive punishment leading to a miscarriage of justice. She submitted that the learned trial judge was obliged to take into account the period spent on remand prior to trial by the appellant in accordance with article 23(8) of the Constitution. Failing to comply with this provision rendered the sentence unconstitutional.

7. Secondly turning to the second leg of her attack on the sentence imposed by the trial court she submitted that the learned trial judge had failed to take into account the mitigating factors available on record, including the

fact that the appellant was a first offender, aged only 27 years, and a single parent with one child to look after. The appellant had spent 5 years in pre trial detention. She prayed that this court should set aside the sentence of death and impose a custodial sentence. She proposed 10 years.

8. Mr Byansi, learned Principal State Attorney, opposed the appeal. He submitted that the learned trial judge listened to both the prosecution and defence before it determined the sentence. Much as the learned judge did not specifically advert to the mitigating factors he must have had them in mind in arriving at the sentence he did. He submitted that it was the most appropriate sentence in the circumstances of this case and should not be disturbed by this court.

9. Mr Byansi further submitted that in event this court decided to set aside the sentence of death this court should impose a long custodial sentence upon the appellant. He proposed 20 years.

Analysis

10. It has been consistently held in numerous cases both by the Supreme Court and the predecessor Court of Appeal for East Africa, and more specifically in the case of Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993 [unreported] that:

> 'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.'

11. The foregoing principles are equally applicable in the instant case.

12. It has been contended by learned counsel for the appellant that the learned trial judge did not comply with Article 23(8) of the Constitution of Uganda. Article 23(8) provides,

> 'Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.'

13. In our view the foregoing provision imposes an obligation on the trial court to take into account the period of pre trial detention in the determination of the appropriate sentence of imprisonment. Where the trial court finds that the appropriate sentence is the death sentence there is no obligation on the trial court to take this period into account under article 23(8) of the Constitution. This period is taken into account only when a term of imprisonment is considered as the appropriate sentence. If, as in this case, the trial court opted for the maximum punishment of death it was not necessary to take this into account to comply with article 23(8) of the Constitution.

14. The second line of attack on the sentence of the trial court is that the sentence is harsh or manifestly excessive in the circumstances of this case. We note from the sentencing order of the trial court that the learned trial judge did not take into account the fact that the appellant was a first offender aged 27 years old, a relatively young person, with the possibility of rehabilitation. It is a rule of practice that first offenders are ordinarily not punished with the maximum sentence. See Livingstone Kakooza v Uganda [supra].

15. The appellant spent 5 years in pre trial detention. Whereas we have stated that the court was under no obligation to take this into account where it decided that a sentence of death was the most appropriate punishment the fact that a person has spent an unusually long period in pre trial detention, delaying to bring such a person to trial, may itself mitigate against the imposition of a death penalty where the court has discretion as to which punishment to impose. We arrive at this position by way of analogy in relation to a delay in executing a death sentence as held by the Supreme

Court in Suzan Kigula and others v Uganda SC Constitutional Appeal No. 3 of 2006 [unreported].

16. We are satisfied that the learned trial judge ignored a number of material factors in determining the appropriate sentence which resulted in the court reaching for the maximum punishment in this case. This was wrong in law and resulted in an excessively harsh sentence in the circumstances of this case. We set aside the sentence of death.

17. This court has the same powers as the High Court, pursuant to Section 11 of the Judicature Ac. It states,

> '**11. Court of Appeal to have powers of the court of original jurisdiction.**
> For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated'

18. In the instant case the appellant was a first offender. He had spent 5 years on remand prior to his trial and conviction. He was 27 years old, a relatively young man at the time of the commission of offence. Nevertheless he committed a very serious offence which led to the loss of a life. This was a somewhat senseless and brutal murder sparked by rivalry for the attention of a member of the fair sex.

Decision

19. We are satisfied that a sentence of 18 years imprisonment from the date of conviction [15 June 2009] will meet the ends of justice in this case. We so order.

Dated, signed and delivered at Fort Portal this18th day of December 2014

Remmy Kasule
Justice of Appeal

Eldad Mwangusya
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal