REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT FORT PORTAL

CRIMINAL APPEAL NO. 0412 OF 2009

(Arising from High Court at Fort Portal Criminal Session Case No. 139 of 2011)

Mugabe Stephen:::Appellant

Versus

Uganda :::Respondent

Coram: **Hon. Mr. Justice Remmy Kasule, JA**

Hon. Mr. Justice Eldad Mwangusya, JA

Hon. Mr. Justice F.M.S. Egonda-Ntende, JA

JUDGMENT

The appellant was indicted for the offence of murder c/s 188 and 189 of the Penal Code Act. The particulars were that on the 6th day of May 2011 at Nyakakika village in the Kamwenge District he murdered one, ABRAHAM NATUKUNDA.

He was arraigned before the High Court sitting at Fort Portal (Batema, J.) on 9th December, 2013 and pleaded guilty to the indictment. He was convicted accordingly and sentenced to death. He appeals against the sentence on the ground "that the sentence of death given by the trial Judge was manifestly excessive, harsh and unfair in the circumstances".

The facts of the case, as narrated by the prosecution and admitted by the appellant, were that following an allegation of rape against the appellant, he was heard threatening that he would kill a member of the deceased's family. The deceased was aged twelve years and on the fateful day he was sent by his father to sell milk at a nearby Trading Centre. He never returned home. The relatives made a search for him and his body was discovered in a house in a banana plantation belonging to one, Kyalimpa. The appellant had been seen coming out of this house. On examination of the body of the deceased, it was revealed that the stomach had been cut open and the heart and lungs had been removed. His private parts had also been cut off and were missing from his body. The cause of death was severe haemorrhage due to cut wounds and the body parts removed.

After his conviction the prosecution submitted that the appellant was not a first offender. He was serving a twenty seven year sentence for rape and, given the gravity of the offence and the brutal manner in which the murder was executed on a defenceless young boy, the prosecution prayed for a fifty year term of imprisonment.

In mitigation the defence prayed for a lenient sentence. Court was invited to take into consideration the fact that the appellant had been on remand for more than two years and was serving a twenty seven year sentence, which he would complete when he was over fifty seven years. He was twenty seven at the time of his arrest. It was stated that he had had time to reflect on his crime and was

remorseful. He had readily pleaded guilty and he had three brothers to look after who looked forward to seeing him back from prison.

In passing sentence, the trial Judge acknowledged that the appellant had readily pleaded guilty to a murder charge, was still a young man and was looking after three brothers. However he expressed in very strong words the aggravation factor, that was the manner in which an innocent young boy was killed and his body disemembered. He looked at all the sentencing options open to him, and came to the conclusion that in the circumstances under which the young boy was killed, a death penalty was the most appropriate sentence.

Mr. Acellam Collins represented the appellant both at trial and on appeal. The Respondent was represented by Mr. Brian Kalinaki, a Principal State Attorney.

Mr. Acellam submitted that the death sentence, though legal was excessive. He, like he did at the trial at the High Court, raised factors which to him should have mitigated the sentence passed against the appellant. According to him the trial Judge did not consider the remand period he had spent on remand, that he was already serving a sentence of 27 years, had learnt a lesson from his action, had pleaded guilty and saved court's time, was looking after his siblings and that he was remorseful. While agreeing with the trial Judge about the brutality of the killing, he submitted that a more lenient sentence should be considered by this Court.

Mr. Brian Kalinaki, on the other hand, supported the sentence of death passed on the appellant. He submitted that the trial Judge had considered all the mitigating and aggravating factors before opting to pass the death sentence. He considered that the appellant was not a first offender and was serving a sentence after being convicted for rape.

The principles upon which an appellate Court will act in exercising its jurisdiction to review sentences, have been re-stated in numerous decisions of our Courts following the case of Ogalo s/o Owoura V. R (1954) 21 EACA 270. The appellate Court will only interfere when it is evident that the trial Judge has acted on some wrong principle or overlooked some material factor or that the sentence is manifestly excessive in view of the circumstances of the case. In the case of NAMWANJE PAULINE versus UGANDA Supreme Court Criminal Appeal No. 14 of 2009, where the Supreme Court declined to interfere with the death sentence passed on the appellant, it was stated at follows:-

"We were urged to allow the appellant to make mitigation on the sentence. We note that the appellant was sentenced to death on 05.03.2003, long before our decision in the case of Susan Kigula and 417 others vs Attorney General [Supreme Court Appeal No. 03 of 2006]. So no mitigation of the sentence was made in the High Court. But submissions in mitigation were made in the Court of Appeal. The Court of Appeal found no merit in those submissions and so the Court upheld the death sentence. There was no appeal on this aspect of the case.

However, Mr. Tumwine in rejoinder to Assistant DPP, submissions, half heartedly asked us to pass a *"sentence lesser than death", if we uphold the conviction for murder. Obviously, learned Counsel for the appellant was unable to point to any circumstances that go to mitigate the death sentence and nor can we find any. Accordingly, we reject the plea. As a result we confirm the death sentence".*

The killing in the above case was not as cold bloodied and senseless as the killing in this case, where after the killing, the body was disimembered and some organs removed, whatever the reason. In this case the appellant is not a first offender, which contrary to the

submissions of his Counsel is an aggravating factor rather than a mitigating factor. The brothers he purportedly looks after may miss him as a relative but as a convict already serving a long term sentence he cannot look after them.

In the circumstances of this case we do not find any factor that would go towards mitigating the sentence and we dismiss the appeal and uphold the Death Penalty imposed by the High Court.

We so order.

Dated at Fort Portal this 18th day of December 2014.

Hon. Justice Remmy Kasule
Justice of Appeal

Hon. Justice Eldad Mwangusya
Justice of Appeal

Hon. Justice F.M.S. Egonda-Ntende
Justice of Appeal