THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 103 OF 2009

(Appeal against Sentence of the High Court of Uganda at Kabale before His Lordship Justice Lawrence Gidudu dated 20th/04/2009 in Criminal Case No. 034 of 2008))

UWIHAYIMAANA MOLLY ========== APPELLANT

VERSUS

UGANDA ========== RESPONDENT

CORAM: HON MR. JUSTICE REMMY KASULE, JA

HON MR. JUSTICE RICHARD BUTEERA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGEMENT OF THE COURT

The appellant was charged with the offence of Murder C/S 183 and 184 of the Penal Code Act on 20th day of April 2009. She was convicted of that offence by His Lordship Justice Lawrence Gidudu in High Court Criminal Case No. 0034 of 2008 and sentenced to suffer death.

When this appeal came up for hearing the appellant was represented by learned counsel Ms. Sylivia Susan Wakabala and the respondent was represented by Mr. Simon Semalemba learned Acting Chief State Attorney with the Directorate of Public Prosecutions.

The grounds of appeal set out in the appellants' memorandum of appeal dated 5th May, 2014 are as follows;

1. **The Learned Trial Judge erred in law and fact when he failed to properly evaluate the appellant's evidence thereby convicting her of murder instead of manslaughter.**

2. **The Learned Trial Judge erred both in law and fact when he rejected the appellant's defences of intoxication and self defence.**
3. **The Learned Trial Judge erred in law and fact when he sentenced the appellant to a death sentence, a sentence which is unduly harsh, severe and excessive.**

Through her counsel the appellant abandoned grounds 1 and 2 of the memorandum of appeal and applied for leave of court to appeal against sentence only. Leave was duly granted.

Ms. Wakabala submitted that the trial judge erred when he sentenced the appellant to suffer death, a sentence that is harsh and manifestly excessive in the circumstances of the case. Counsel contended that the trial judge concentrated only on the aggravating factors and did not consider any factors in favour of the appellant that would have mitigated the sentence.

She contended that there were a number of mitigating factors that the learned trial judge ought to have taken into account. She enumerated them as follows;

The appellant was a first offender who had for a long time suffered as a victim of domestic violence subjected to her by the deceased. She was routinely beaten by the deceased who accused her of unfaithfulness and of having produced a child outside their marriage. Further, she had three young innocent children who would suffer as a result of loss of both parents. She had been on remand for a period of one and half years. She was young, aged only 32 years at the time of commission of the offence and is still capable of reform. Counsel thus prayed court to reduce the sentence.

Mr. Semalemba opposed the appeal and asked court to uphold the sentence. He submitted that the appellant committed an extremely serious offence in a gruesome manner. The body of the deceased had several cuts on the head as well as on both his wrists. The murder was clearly pre-meditated and in the circumstances of the case the sentence was justified.

He cited the authority of **Aharikundira Yustina Vs Uganda: Criminal Appeal No. 104 of 2009 (COA)** in which this Court upheld a death sentence in circumstances similar to those in this appeal.

He asked court to dismiss this appeal.

Ms. Wakabala in reply submitted that in the case of **Aharikundira (supra)** referred to by Mr. Semalemba, the appellant in that case had stopped his advocate from presenting mitigating factors and thus there were no mitigating factors for court to consider in favour of the appellant. However, in this particular case before us there were mitigating factors in favour of the appellant but the trial court did not consider them. She retaliated her earlier prayers.

We have listened carefully to the submissions of both counsel. This being a first appeal, this court has a duty to re-evaluate all the evidence adduced at the trial and come up with its own inferences on all issues of law and fact including sentence. See ***Rule 30 (1)*** of the Rules of this Court and **Kifamunte Henry Vs Uganda, SCCA No**. **10 of 1997** and **Bogere Moses Vs Uganda SCCA No. 1 of 1997.**

It is now a well settled principle of law that an appellate Court can only interfere with a sentence imposed by the trial court in limited circumstances. This is because sentencing is a discretion of the trial court.

In the case of **James S/o Yaram versus Rex 1950, [18] (EACA) 147 at P.149**, the then Court of Appeal for Eastern Africa set out the above principle as follows:-

> ***'It may be that had this Court been trying the appellant it might have imposed a less severe sentence but that by itself is not a ground for interference and <u>this Court will not ordinarily interfere with the discretion exercised by a trial judge</u> in the matter of sentence <u>unless it is evident that the judge had acted on some wrong principle, or over looked some material factor</u>'*** *(Emphasis added).*

The Supreme Court in the case of **Kiwalabye versus Uganda Criminal Appeal No. 143 of 2001 [SC]** (unreported) set out the principle as follows:

> ***'The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that 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 when passing the sentence or where the sentence imposed is wrong in principle"***

In this case the record of appeal reads as follows on the Allocutus;

"***Allocutus***:-

Prosecution:

Convict is a first offender and has been on remand for one year 10 months. She committed a serious offence. The deceased was brutally murdered in his own bed.

The head was almost severed off the body. There were multiple cuts. The death was inflicted by a wife who would instead protect him. In the circumstances of this case we pray for a maximum sentence.

Rev. Bikangiso:

Convict is first offender, has been on remand for one year and ten months. She is remorseful. She admitted to a lesser charge. She is a young lady of 32 years. She deserves a lenient sentence to help her reform. She has 3 children. She already had one child before she went to the deceased. Court should consider the circumstances under which she killed the deceased.

The deceased would assault the convict whenever he would come home drunk. Even that night, the deceased attempted to strangle the deceased. The deceased provoked the fight. I pray court gives a lenient sentence.

Convict:

I pray for lenience. My two children are still young. I produced by caesarian section. I reacted in anger because of suffering where the deceased used to beat me frequently. I was an orphan and had no parents.

COURT:

I have heard both sides in allocutus.

From my judgment the convict had abundant opportunity to mitigate the violence by withdrawing from the society and deceased but built up plans to eliminate the deceased first.

It is not in dispute that the convict and the deceased had frequent misunderstandings but the convict's option to dispose of the deceased in a cruel and gruesome manner cannot be a reason to temper the punishment against her. If she had disposed him off with a fatal blow, maybe there would be consideration but the savage cuts and particularly slaughtering the deceased almost taking off the head goes beyond anger. It confirms a pre-meditated plan to decimate the deceased. There cannot be justification for this and I agree with the prosecution that a maximum sentence reserved for serious situations such as this be imposed.

Consequently, I sentence the convict to suffer death in a manner prescribed by law"

It is very clear to us from the above extract of the trial court record that the learned trial judge did not, before passing sentence, take into account any of the mitigating factors set out by the appellant in her favour.

We accept the submissions of Ms. Wakabala that the learned trial judge only considered aggravating factors. With all due respect to the learned trial judge we find she erred in law when he considered only the aggravating factors and failed to take into account the mitigating factors.

The learned trial judge therefore over looked material factors and in the result reached a wrong conclusion in respect of sentence.

We find that this is a proper case for this court to interfere with the discretion of the trial court in accordance with the Supreme Court decision of **Kyewalabye Vs Uganda (Supra).**

Accordingly we allow the appeal.

The sentence of death imposed by the trial court is hereby set aside. This Court having set aside the sentence it now invokes the provisions of **Section 11** of the Judicature Act that grants this Court the same powers as that of the trial court. That Section stipulates as follows;

"**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"

This Court therefore having set aside the sentence has the power to impose a sentence it considers just and appropriate.

We now consider the mitigating factors in favour of the appellant. From the court record and submissions of Ms. Wakabala those factors are:- The appellant was a first offender and was a young mother of 32 years at the time. She has three young children who would lose both parents if the death penalty is imposed. She was a victim of domestic violence which had been continuous over a long time. She appears to have been constantly under fear for her life. She was an orphan with nowhere else to flee. The deceased was a habitual drunkard who was violent and the night he was killed, he had attempted to strangle the appellant. The appellant attempted to plead guilty to manslaughter and had spent on remand one and half years before conviction. She has now appealed against sentence only.

On the other hand there are a number of aggravating factors. The murder was pre-meditated. The wounds inflicted on deceased indicated extreme violence, having been inflicted on the head, the neck and wrists of the deceased. The deceased had 7 head wound cuts. There was an attempt by the appellant to conceal the evidence of the murder as she made a false report that the deceased had been killed by unknown assailants. The deceased was the appellant's husband. The crime had an impact on the deceased's young children.

We accept the submissions of Ms. Wakabala that the factors in the case of **Aharikundira Yustina (Supra**) are distinguishable from those of this case. In that case there was no mitigation, the appellant in that case having refused to mitigate. In this case the appellant set out mitigating factors but the trial judge ignored to consider some of them while passing the sentence.

Taking into account both mitigating and aggravating factors as set out above, including the fact that the appellant had spent one and half years on remand, we consider a sentence of 30 years imprisonment appropriate in the circumstances of this case.

We therefore set aside the sentence of death imposed by the trial court and substitute it with that of 30 years imprisonment.

That sentence shall run from the date the original sentence was passed by the High Court.

Dated at Kampala this 16th day of April 2015.

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HON. REMMY KASULE

JUSTICE OF APPEAL.

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HON. RICHARD BUTEERA

JUSTICE OF APPEAL.

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HON KENNETH KAKURU

JUSTICE OF APPEAL.