

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL No.67 OF 2013

(Arising from the sentence in mitigation of the High Court of Uganda before Her Lordship Lady Justice Monica Mugenyi dated 20th September 2012 in Criminal Case No. 170 of 2012)

SEKAMATTE CHARLES:::::::::::::::::::::::::::::::::::::APPELLANT

Versus

UGANDA::::::::::::::::::::::::::::::::::::: RESPONDENT

CORAM:

Hon. Mr. Justice Remmy Kasule JA

Hon. Lady Justice Faith E.K. Mwendha JA

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

JUDGMENT OF THE COURT

The appellant was aggrieved with the sentence passed against him of 32 years imprisonment and appealed to this Court against sentence only.

Background

The appellant was charged with murder contrary to section 183 and 184 now section 188 and 189 of the Penal Code Act. It was alleged by the prosecution that the appellant Sekamatte Charles between 15th and 16th of

November 1999 at Mazzi village, Ssisa Sub County in Entebbe Sub District murdered Kayiwa Ronald aged 2 years old. He was tried, convicted and sentenced to suffer death on 25th October 2002. He was sentenced to suffer death which was a mandatory sentence for murder at that time.

In accordance with the Supreme Court decision in Attorney General vs. Jusan Kigula and 417 others Constitutional Appeal No.3 of 2006

which declared the mandatory death penalty unconstitutional, the appellant appeared before Hon. Lady Justice Monica K. Mugenyi of the High Court on 07.09.2012 for mitigation hearing. On 20.09.2012, the learned Judge passed a sentence of 32 years imprisonment to run from 20.09.2012 against the appellant.

Representation

The appellant was represented by Mr. Kunya Henry while the respondent /as represented by Ms. Nabisanke Vicky, Principal State Attorney.

Originally the appellant had filed a memorandum of appeal with 6 grounds of appeal. However at the hearing he sought for leave of Court to proceed only against one ground of sentence.

Therefore the memorandum of appeal filed on the 24th April 2015 had only one ground. It stated as follows:

"1) (with leave) that the learned trial judge erred in law and fact when she sentenced the appellant to 32 years imprisonment which is deemed to be manifestly harsh and excessive on account of the obtaining circumstances".

The appellant prayed that this Court be pleased to allow the appeal and vary the sentence.

Appellant's counsel prayed Court to grant the appellant the requisite leave to appeal against sentence only.

The respondent's counsel did not object to the application. Court granted the leave to the applicant.

Mr. Kunya submitted that the sentence of 32 years imprisonment was manifestly harsh and excessive. He argued that all mitigating and aggravating factors were raised during the hearing of the mitigation proceedings and the mitigating Judge was alive to them. The Judge considered the convict's mental state as a mitigating factor to the death penalty. However later in the proceedings, she changed her position and considered the same as an aggravating factor.

Je further submitted that the learned judge quoting from Justice B. Odoki's book *M guide to Criminal Procedure in Uganda LDC Publishers 2006 (3rd Ed.) at page 164* retribution was advanced as one of the objectives of sentencing to wit punishment is also said to be an expression of society's disapproval of the accused's conduct. At page 165 reformation is advanced as another objective of sentencing in so far as punishment is believed to bring remorse, repentance and reform.

.Counsel submitted that the learned judge, having properly considered by relying on Justice B. Odoki's book "A guide to criminal procedure in Uganda" 3rd Ed. Page 164, that retribution and reform are some of the considerations Court looks at when passing sentence, diverted from the application of the said principles she stated that "this Court is unable to dispel its doubts that such an obviously unbalanced and possibly deranged human being would over 13 years metamorphose into a harmless and responsible member of society".

Counsel went further and argued that there is no clear formula to calculate how long it takes for one to reform like the learned Judge implied. It was also speculation on the part of the Judge when she said that the appellant had ably subsisted with the health condition in his stomach for 7 years when there was no evidence supporting this assertion. He submitted further that it was erroneous for the Judge to pass a sentence running from the date when the decision on mitigation was given. S. 40(6) of the Criminal Procedure Act, Cap 116, Laws of Uganda, provides that a sentence once pronounced is deemed to run commencing from the date of the original sentence. Even where the sentence was death, the sentence is deemed to run from the date the sentence of death was passed, which in this case was 25.10.2002.

Counsel prayed that the appeal be allowed.

Ms. Nabisanke for the respondent opposed the appeal. She submitted that Court can only interfere with the Judge's discretion in sentencing where it is clear that the sentence was harsh and manifestly excessive or too low to result in a miscarriage of justice or if the sentence is illegal. The sentence of 32 years imprisonment was not excessive. It was neither proved at the trial nor at the hearing of mitigation proceedings that the appellant had anything wrong with his mental status at the time the offence was committed.

She argued that the learned Judge having considered the mitigating and aggravating factors as the Court proceedings clearly show, as well as all circumstances that would make the death sentence not appropriate, the Judge was right to impose the sentence that she imposed. The Judge did so after looking at the deplorable and perverse circumstances under which the appellant killed the deceased. The appellant had tied the child victim, took and left it at the pit latrine, then later went back and strangled it and threw it into the latrine.

The Judge considered reform of the appellant and took into account how long it can take the appellant to reform as a mitigating factor. She came to the conclusion that instead of death, 32 years in prison would make

the appellant reform.

Counsel for the respondent prayed that Court upholds the sentence of 32 years imprisonment.

Counsel Kunya in a brief reply submitted that it was wrong for prosecution to suggest that the appellant would kill other children if out of prison when there was no basis for such a proposition.

Consideration of the Appeal

This was a first appeal and under Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions SI. 13 - 10, this Court is empowered to reappraise evidence and draw inferences of fact, among others, to facilitate it to come to its own independent conclusion, as to whether or not, the decision of the Lower Court can be sustained. See: Bogere Moses versus Uganda SCCR Appeal No.1 of 1997. In Kifamunte V. Uganda: Criminal Appeal No.10 of 1997 (SC) it was held that": "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it" the appeal had only one ground which was in respect of sentence, namely:

"That the learned trial Judge erred in law and fact when she sentenced the appellant to 32 years imprisonment which is deemed to be manifestly harsh and excessive on account of the obtaining circumstances ".

We carefully perused the record of the Court proceedings, and have carefully listened and considered the submissions of both counsel.

It is trite law that sentencing is a discretion of the trial judge. This Court can only interfere with that discretion when it is apparent that the Judge acted on a wrong principle or overlooked a material fact or if the sentence is illegal. This Court can also interfere where the sentence is manifestly harsh and excessive in the circumstances of the case. See *Criminal Appeal No. 143 of 2001, James s/o Yoram versus Rex (1950) 18 EACA 147.*

The facts surrounding the conviction and eventual sentence of death from which these mitigation proceedings arose were briefly laid down by Ms. Kwezi who was counsel for the respondent at the mitigation hearing as hereunder:

The appellant (convict) was tried, convicted and sentenced to death for murder of a 2 year old child (son) by the names of Kayiwa Ronald. He was sentenced in 2002. The Court found that the appellant had killed the deceased and the deceased's body was recovered from a pit latrine. The convict (appellant) according to the record of the trial Court confessed to tying the deceased because the deceased was crying a lot. The convict after taking the tied child to the pit latrine left it there for sometime then he went back to the latrine and removed a log that was covering the pit latrine and threw the deceased into the pit latrine and put back the log. He thus had the intent to kill his own child.

Ms. Kwezi told Court that those actions portrayed the appellant/convict as a cold blooded murderer, incapable of having any feelings and with absolutely no consideration for human life among others.

Counsel for the appellant hardly contesting those facts, replied at the trial and we quote: "I wish to reply to my learned colleague's submission; she has gone to great length to give an account of what transpired. I shall not belabor this" I even add that all what happened is very regrettable and the Convict is quite remorseful..."

Appellant's counsel invited Court not to look only at the gravity of the offense but also to look at the personal circumstances of the Convict as a first offender. He cited the case of ***WOFED Steven V. Uganda (Court of Appeal) Criminal Appeal No.169 of 2003*** where it was held that "***a 1st offender does not deserve a maximum sentence***".

We noted that the Judge at mitigation considered both the aggravating and mitigating factors when she passed the 32 year sentence of imprisonment upon the appellant. She went as far as considering ***Article 6 (1) of the International Covenant on Criminal and Political Rights***. It states "***In Countries that have not abolished the death penalty it may be imposed only for the most serious crimes...***"

She discussed what constitutes the most serious crimes and referred to the Indian Persuasive Restrictive Approach in reservation of the death penalty for the rarest of rare cases. See (Fitzgerald, Edward Q C. and Starmer Keir QC, A guide to sentencing in Capital offences, Death Penalty Project Ltd 2007 at page 13.

The judge also considered the mitigating factor of diminished responsibility from the defence counsel's argument which she said was not disproved by state counsel. She said the appellant's mental state was alluded to by PW1 at

the trial. And that in present proceedings the convict himself said that he killed the child when he was very angry. From that the learned Judge concluded that he was deemed to be possessed of unbalanced mental state which tantamounted to significant mental disorder. That would exclude the appellant from the death penalty and she declined to uphold it.

From the record of the trial Court, PW1 was not a medical doctor qualified to testify on the mental status of the appellant. PW1 was a peasant and a village Vice Chairperson under the Local Council system.

It is apparent that the learned judge considered in her own mind and concluded that, given the circumstances of the case, the appellant, due to his conduct, would be excluded from the death penalty.

The learned judge referred to the Fitzgerald, Edward QC and Starmer Keir QC (Supra) at pages 22, 23 paragraphs 40, 42 and quoted the position as hereunder: "failure to establish the defence of diminished responsibility at trial does not exclude the relevance of mental factors at the sentencing stage... the underlying principle is that No body should be convicted of a capital offence sentenced to death or executed if they suffer from significant mental disorder at the time of the offence"

That quotation is authority that a Court while sentencing should not be oblivious to the mental factors of the convict at the time of commission of the offence.

Therefore what counsel Kunya submitted that the judge at first took mental status of the convict as a mitigating factor but later diverted from it, is not correct. The Judge considered the mental factors relating to the appellant and relied on that consideration to set aside the death penalty.

The other issue counsel Kunya submitted on was the issue of reform, which he argued that the Judge never considered. The learned Judge stated in her decision that: "secondly given his unbalanced mental state at the time, the convict belongs to a category of offenders that could be reformed, has demonstrably commenced self help courses while in custody; an important first step in the reformation process and therefore the objectives would be served better by a term rather than death sentence". The Judge therefore addressed herself to the issue of the reform while sentencing the appellant.

Indeed when she considered the appropriate term of sentence she referred to Odoki B. J. "A guide to Criminal

Procedures in Uganda (Supra) particularly at page 165; where reformation is advanced as another objective of sentencing in so far as punishment is believed to bring remorse, repentance and reform.

the learned Judge also considered the fact that the appellant was a first offender of whom the maximum penalty was not warranted. The period spent on remand was also considered.

We are unable therefore to find that the sentence of 32 years imprisonment was manifestly harsh and excessive or that the same was illegal. We uphold the decision of the learned Judge on this point.

On the issue of the learned judge making an order that the sentence was to run from the date thereof, S.40 (6) of the Criminal Procedure Act Cap ,16 provides: "where a convicted appellant elects in accordance with subsection (5) to be treated as convicted prisoner, sentence passed by the Court of trial or the sentence passed by the appellate Court of appeal shall subject to any directions by the appellate Court to the contrary, commence from the date of the original sentence"

On that issue we accept that it was erroneous in law for the learned Judge to order that the sentence was to run from the date hereof. That order is accordingly set aside. The sentence of 32 years imprisonment is to run from 25.10.2002 the date when the first sentence that is being appealed against was pronounced.

His Lordship Justice F. M. S. Egonda Ntende has not signed this judgment as he dissents on the sentence of 32 years in that, to his Lordship, the same is harsh and excessive.

Dated at Kampala this 27th day of May 2015

Hon. Mr. Justice Remmy Kasule JA

Hon. Lady Justice Faith E. K. Mwendha JA

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

