

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 319 OF 2014

BANDEBAHO BENON.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM: HON MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE BYABAKAMA MUGENYI SIMON, JA

HON. MR. JUSTICE ALFONSE C. OWINY -DOLLO, JA

(Appeal from Criminal Session of the High Court presided over by Hon. Justice Albert Frank Rugadya-Atwooki dated 18th day of November 2013 in Criminal Case No. 028 of 2013.)

JUDGMENT OF THE COURT

This is an appeal from the decision of Hon. Justice Albert Frank Ragadya Atwooki. J in High Court Criminal Appeal No. 319 of 2014 at Kampala dated 18th November 2013.

The appellant was convicted of murder and sentenced to 35 years imprisonment. He now appeals against sentence only. The sole ground of appeal is set out as follows;

“That the learned trial Judge erred in law and in fact

when he sentenced the appellant to a harsh and excessive sentence of 35 years imprisonment causing miscarriage of justice.

When the appeal came up for hearing Mr. Jadison Agaba learned counsel appeared for the appellant, who was present in court.

Ms. Jennifer Amumpaire learned Principal State Attorney appeared for the respondent.

Upon application by counsel for the appellant, leave was granted for extension of time within

which to file both the Notice of appeal and Memorandum of appeal which had been filed out of time, thus regularizing their late filing.

Brief Background:

The appellant was on 29th April 2005 charged with murder of one Kyorimpa Vasta, who was at the time his wife. The appellant and the deceased were living together as husband and wife. There appears to have developed a misunderstanding between the two on the evening of that day. The appellant picked a 'panga' and cut the deceased several times, she later died of her wounds at a hospital.

The appellant was arrested and charged with the murder of his deceased wife. On 25th September 2009 he was convicted of the murder and sentenced to suffer death by the High Court Holden at Rukungiri and presided over by the Hon Justice Augustus Kania J.

At that time, the death penalty was the only sentence prescribed by law for any person convicted of murder.

Subsequent to the conviction in 2009, the Supreme Court in **Suzan Kigula and others Vs Attorney : Constitutional Appeal No. 03 of 2006** declared as unconstitutional the mandatory death penalty. The Supreme Court in that case ordered that in all cases in which persons had at the time been sentenced to the mandatory death penalty, be sent back to the High Court for mitigation of sentence.

The appellant appeared before Hon. Justice A. F Rugadya-Atwoki J on 18th November 2013 for mitigation of his sentence. Mitigation proceedings were conducted and the learned Judge sentenced the appellant to 35 years imprisonment. The appellant being dissatisfied with the sentence appealed to this court.

The Appellant's case.

It was submitted for the appellant that the sentence of 35 years imprisonment was harsh and excessive in the circumstances of this case. The trial Judge, counsel contended, did not consider all the mitigating factors in favour of the appellant. The mitigating factors that the Judge is said not to have taken into account, counsel submitted, were that the appellant had children he was looking after who depended solely on him. Further that, he was 43 years old and repentant.

Counsel also argued that the appellant had since conviction reformed.

He asked court to reduce the sentence to 20 years imprisonment relying on *Suzan Kigula Vs Uganda: Supreme Court Criminal Appeal No. 1 of 2004*, in which the mandatory death sentence of the appellant in that appeal was reduced to 20 years imprisonment.

The Respondent's reply.

Ms. Amumpaire opposed the appeal and supported the sentence. She submitted that the appellant had been convicted of murder and sentenced to 35 years imprisonment, upon mitigation of sentence. Counsel argued that the 35 years of imprisonment was appropriate in the circumstances of this case in which the appellant brutally killed his wife. Counsel contended that the sentence of 35 years was in the normal range and was neither harsh nor manifestly excessive.

Resolution of the ground of Appeal.

We have carefully listened to the submissions of both counsel. We have also carefully perused the Court record and the authorities cited to us. We are alive to the law that requires us as first appellate Court to re-appraise all the evidence before Court and make our own inferences on all issues of law and fact. See: *Rule 30(1)* of the Rules of this Court, *Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses Vs Uganda Supreme Court Criminal Appeal No. 1 of 1997*.

The appellant was convicted of murder, the maximum sentence of which is death. The Judge before whom mitigation proceedings were conducted did not impose the death penalty, instead he sentenced the appellant to 35 years imprisonment. Therefore, he must have taken into account mitigating factors in favour of the appellant. The mitigating factors he took into account were that, the appellant was still young and capable of reform, he had a family and that he had spent 8 years on remand before conviction. He also considered aggravating factors specifically the prevalence of gender based violence.

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5 The appellant murdered his wife, with whom he had young children. At the time of the murder, the children were with both parents in the same house. His own son who was 8 years at the time of commission of the offence in 2005 testified against him in court. He narrated how his father (appellant) had killed his mother. At the trial, the appellant denied the offence. He contended that the evidence against him had been fabricated by his brother because he was jealous of him. We know from the

evidence against him that this was not true. The appellant had run away to DRC Congo after the death of his wife. He was not there to bury her or console his children which he ought to have done had he been remorseful or innocent. He was arrested at Uganda's border with DRC Congo much later, without having returned home to his beloved family.

The appellant used a panga to inflict several fatal cut wounds upon the deceased on vulnerable parts of her body. The deceased was cut on the head, the neck and the waist which were almost severed from the body. She also had cut wounds at her back.

As an appellate Court, the circumstances and principles upon which we can interfere with the sentence of the trial court are limited. These principles are now well settled and were set out by the Supreme Court in ***Kiwalabye Bernard Vs Uganda Supreme Court Criminal Appeal No. 143 of 2001.***

“the appellate court is not to interfere with the 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 while passing the sentence or where the sentence imposed is wrong in principle?”

In ***Semanda Christopher and Another vs Uganda Court of Appeal No. 77 of 2010***, this court declined to reduce a sentence of 35 years on the appellant who had been convicted of murder. In that case this court stated as follows at page 2 of the Judgment:

“we do not agree with Ms. Wakabala learned counsel for the appellants that a sentence of 35 or even 37 years imprisonment in the circumstances of this case is manifestly excessive, the appellants having been convicted of murder which offence carries a maximum sentence of death.”

In Kyatereka George William vs Uganda: Court of Appeal Criminal Appeal No. 713 of 2010, Court of Appeal upheld a sentence of 30 years for murder likewise Kisitu Mujaidin vs Uganda: Court of Appeal Criminal Appeal No. 128 of 2010

this court upheld a 30 years sentence for murder.

In ***Nkonge Robert vs Uganda: Court of Appeal Criminal of Appeal No, 148 Of 2009*** this court upheld a death sentence imposed upon the appellant in that appeal. The appellant had been convicted of murdering the deceased with a hoe without provocation.

We do find that a sentence of 35 years imprisonment is neither harsh nor manifestly excessive in the circumstances of this case where the appellant was⁵ convicted of murdering his wife in the manner

he did.

We note that the ground of appeal challenges the decision of the High Court on ground that the sentence is **“harsh and excessive**

We cannot interfere with the sentence of the High Court simply because it is harsh and excessive. The law requires that before this court can interfere with a sentence imposed by the High Court, that sentence must be either illegal, was arrived at using a wrong principle, or the court ignored to consider an important matter, or where the sentence imposed **is, harsh and manifestly excessive.**

We find that 35 years imprisonment for murder is not manifestly excessive. However, in this case the trial Judge appears to have ignored to consider an important factor that the appellant was a first offender. We find that the omission ought to be resolved in favour of the appellant. Taking into account that the appellant was a first offender and the other factors that were already taken into account by the High Court, we now sentence him to 30 years imprisonment, to run from the date of conviction.

The appeal therefore succeeds to that extent.

Before we take leave of this matter we would like to note as follows:-

That appeals of this nature resulting from the Supreme Court decision **Susan Kigula vs Attorney General (Supra)**, the High Court hearing the mitigation is sitting as the trial court and as such is not reviewing its earlier decision on sentence. It appears to us that the effect of the **Kigula vs Attorney General (Supra)** was to set aside the mandatory death sentences in each of the affected cases leaving the conviction intact. Therefore, in our humble view, the Judge presiding over the mitigation proceedings is in a way continuing with the earlier trial only that this time he is only concerned with sentence. The Judge in our view should put himself/herself in the shoes of the Judge who heard the case and convicted the accused then.

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The mitigating Judge ought to take into account⁶ only those mitigating and aggravating factors

available to the trial Judge and not those that came up subsequent to the conviction. The taking into account of post conviction factors, both mitigating and aggravating, would create a class of convicts known as “*Kigula beneficiaries*” Such convicts would benefit from mitigating factors occurring between the period of conviction and re-sentence. All the other convicts whose cases were completed before the *Kigula case* did not have this opportunity and those who have been convicted after the *Kigula vs Attorney General (Supra)* have also not had such an opportunity either.

It is an error, in our humble view, for the High Court in sentencing mitigation proceedings of post *Kigula vs Attorney General* cases, to take into account any mitigating or aggravating factors that occurred between conviction and re-sentence. In most of the cases this period ranges from 2-6 years. It would likewise be an error for this court to take into account those factors as they were not available to the trial Judge at the time of conviction. The only factors that ought to be taken into account are only those that would have been available to the Judge at the time of conviction . For this reason, we declined to accept a request by Foundation for International Legal Assistance a human Rights Non- Government Organisation (NGO) to act as *Amicus curiae*” at this court for the appeal against the sentence after mitigation proceedings on sentence following the *Kigula Vs Attorney (Supra)* decision.

Dated at *Mbarara* this 26th day of October 2016

HON.JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL

HON.JUSTICE BYABAKAMA MUGENYI SIMON

JUSTICE OF APPEAL

HON.JUSTICE ALFONSE C. OWINY DOLLO

JUSTICE OF APPEAL

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