THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT MBARARA

CRIMINAL APPEAL NO. 109 OF 2010 AND 393 OF 2011

1. **AYITA TUKWASIBWE**
2. **TUMUBWEINE LYDIA.....APPELLANTS**

VERUS

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 against the sentence of the High Court at Rukungiri before his Lordship Hon. Justice J.B.A. KATUTSI dated 14th day of June 2010)

JUDGMENT OF THE COURT

This is an appeal from the judgment of Hon. Mr Justice J.B.A. KATUTSI in High Court Criminal Case No. 115 of 2008 at Rukungiri, dated 14th/10/2010, in which the appellants were convicted of murder

contrary to sections 188 and 189 of the Penal Code Act and sentenced to suffer death.

Brief Background.

The facts as found by the trial Judge were that Turyagenda Calebu, deceased, was father to the 1st appellant and husband to 2nd appellant. The deceased always complained about soured relationship with the two. At one time he abandoned their home due to repeated threats to kill him but he was convinced to return by PW4, his cousin. On the 26-1-2008, at about 2am, the appellant assaulted the deceased with a hoe and a big stick. The deceased raised an alarm that attracted the neighbours. The 2nd appellant was complaining that the deceased had wasted Shs. 30,000 /= at Kashenyi market. They stopped the beatings when the neighbours intervened but resumed after they had left. The deceased sustained injuries on the neck, back and head that resulted into death. Both appellants were arrested, tried, convicted and sentenced to suffer death.

Dissatisfied with the decision and sentence of the trial Judge, the appellants appealed to this Court on the following grounds:

1. **That the trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thus reaching a wrong decision.**
2. **That the trial Judge erred in law and fact when he based his decision on the evidence of PW2 to convict which was unbelievable and untruthful, full of contradictions thus causing a miscarriage of justice.**
3. **That the learned trial Judge erred in law and fact when he considered the evidence of the prosecution in isolation of the defence, thus causing a miscarriage of justice.**
4. **That the learned trial Judge erred in law and fact when he sentenced the appellants to a harsh and excessive sentence to suffer death, thus causing a miscarriage of justice.**

Legal Representation

At the hearing of this appeal, learned Counsel Mr Agaba Jadson appeared for the appellant who was in Court, while Ms Tumuheise Rose, Principal state Attorney, appeared for the respondent.

Appellant's Case

At the hearing, Court was served with a Medical Certificate of death of the 2nd appellant, hence her appeal abates under rule 71 of the Rules of this Court. Hearing proceeded with respect to the 1st appellant's appeal only.

Counsel for the appellant abandoned grounds 1, 2 and 3 and sought leave of Court to appeal against sentence only. Leave was accordingly granted.

Counsel submitted that the sentence of death was harsh and manifestly excessive. The appellant's mitigating factors were not considered at sentencing which were that; the appellant was a first offender, he was HIV positive and he was the bread winner in his family. He further submitted that the sentence is high compared with other sentences for the same offence.

Counsel cited the case of, **TUMWESIGYE ANTHONY Vs UGANDA, Court of Appeal Criminal Appeal No. 46 of 2012**, where the appellant had been convicted of murder and sentenced to a term of 32 years imprisonment. The sentence was considered to be harsh and manifestly excessive by this Court which set it aside and substituted it with a sentence of 20 years.

He also relied on the case of **HON. AKBAR HUSSEIN GODI Vs UGANDA Supreme Court Criminal Appeal No. 3 of 2013**, in which the Supreme Court upheld the sentence of 25 years imprisonment that was passed by the High Court on conviction of murder.

Counsel submitted that the victims in the above cases were close relatives, and the sentences imposed were less compared to this particular case. He prayed that this honourable Court finds the sentence is harsh and manifestly excessive and reduce it to 20 years.

Respondent's reply

Counsel for the respondent opposed the appeal and supported the sentence. She argued that the trial Judge considered both the aggravating and mitigating factors before arriving at the decision he made. Counsel however conceded that the trial Judge did not take into consideration that the appellant was a first offender, but she contended that it did not cause a miscarriage of justice. She invited Court to evaluate these factors and arrive at its own decision as stipulated under section 11 of the Judicature Act and rule 30 of the Judicature Court of Appeal Rules.

Counsel submitted that the sentence was not harsh and manifestly excessive in the circumstances of this case. She cited the case of **TURYAMWIJUKA VS UGANDA, Court of Appeal Criminal Appeal No. 65 of 2008**, where the appellant was convicted of murder of his two wives and was sentenced to death. This Court dismissed the appeal and confirmed the sentence. She prayed that this court dismisses the appeal and confirms the death sentence.

Court Resolution.

This being a first a first appeal, this Court is required to re-appraise all the evidence and make its own conclusions 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.**

We have carefully considered the submissions of both Counsel and the authorities cited to us. We have also carefully perused the Court record and the judgment of the trial Court.

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,** where Court held;

> ***"The appellate court is not to interfere with the sentence imposed by the trial court which 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 other words, interfering with the sentence is not a matter of emotions but rather one of law and it has to be proved that the trial judge flouted any of the principles of sentencing.

In sentencing the appellant in the instant matter, the trial Judge stated that:-

> ***"In cold blood the two, mother and son, killed an innocent man who was father and husband. They did not hesitate to commit one of the most heinous crimes that cannot be committed. A2 had no stigma of shame to set her son***

against her father and A1 had no slightest fear to end the life that gave him his. They did not show mercy even when the deceased went on his knees and asked them to forgive him and spare his life. I think this is a case where mercy should not be extended to either of these beats (sic).

I will in the circumstances pass the maximum sentence as provided. The two shall suffer death in the manner provided by the law."

While we do agree that the appellant and his mother committed a heinous crime, it was incumbent on the trial Judge to consider the appellant's mitigating factors as well. These included; the appellant was a first offender, HIV positive and the sole bread winner. At 35 years of age there was a possibility of him reforming and turning into a better citizen for his own good and others around him.

The other factor that ought to have been considered is the need to maintain uniformity in sentencing. In **LIVINGSTONE KAKOOZA Vs UGANDA, Supreme Court Criminal Appeal No. 17 of 1993**, it was held 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 OWORA V R (1954) 21 E.A.C.A. 270." *(emphasis added)*

The Supreme Court was more explicit in **MBUNYA GODFREY Vs UGANDA, Criminal Appeal No. 4 of 2011**, when it stated;

"With the greatest respect to the two Courts below, we are of the view that the death sentence should be passed in very grave and rare circumstances because of its finality. When a death sentence is executed, the appellant has no chance to reform and / or to reconcile with the community. We are alive to the facts that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing". (emphasis added)

In order to maintain uniformity we therefore have to look at sentences imposed by this court and the Supreme Court in cases of similar nature.

In ***KISITU MAJAIDIN Vs UGANDA, Court of Appeal Criminal Appeal No. 28 of 2010,*** this Court upheld a sentence of 30 years imprisonment. The appellant had killed his mother.

In **UWIHAYIMANA MOLLY Vs UGANDA, Criminal Appeal No. 103 of 2009,** this Court reduced the death sentence to 30 years imprisonment. The appellant had killed her husband.

In **KYATEREKERA GEORGE WILLIAM Vs UGANDA, Criminal Appeal No. 0113 of 2010,** the appellant was convicted of murder by stabbing the deceased on the chest with a knife. He was sentenced to 30 years imprisonment by the trial Judge. On appeal, this Court upheld the said sentence.

In the **MBUNYA GODFREY** case (supra), the appellant had been sentenced to death for the murder of his wife by cutting her neck. The Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment.

In **AKBAR HUSSEIN GODI Vs UGANDA, Supreme Court Criminal Appeal No. 3 of 2013,** the Court upheld a sentence of 25

years imprisonment. The appellant had been convicted of murder of his wife by shooting.

In the instant appeal, the appellant is a first offender and aged 35 years at the time of conviction. He deserved to be accorded an opportunity to reform and re-join his community as a positively transformed person. We also note that he had spent 2 ½ years on remand.

Considering the circumstances of this case, and in line with the authorities cited above, we set aside the sentence of death and substitute it with a term of 30 years imprisonment. The sentence is to run from 14-6-2010 the day he was convicted by the High Court.

We so order.

Dated at **Mbarara** this.....6th.....day of.....December..... **2016.**

.....

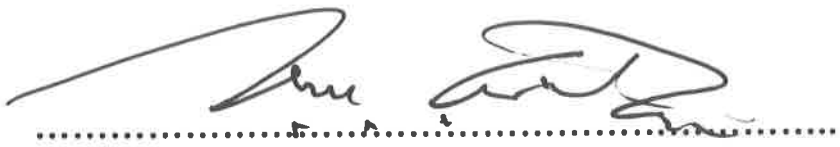
HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL

.....

HON. JUSTICE BYABAKAMA MUGENYI SIMON

JUSTICE OF APPEAL



HON. JUSTICE ALFONSE C. OWINY-DOLLO

JUSTICE OF APPEAL