THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 86 OF 2015

(An appeal from the judgment of the High Court of Uganda at Kampala before Her Lordship Elizabeth Alividza, J dated 11/03/2015 in Criminal Session Case No. 0413 of 2014)

SEKANDI HASSAN ::APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE HELLEN OBURA, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA

JUDGMENT OF THE COURT

Introduction

This appeal arises from the decision of ***Alividza***, J at the High Court of Uganda at Kampala delivered on 11th March, 2015 in Criminal Session Case No. 0413 of 2014 in which the appellant was re-sentenced to death for the offence of murder.

The background to this appeal is briefly as follows:-

The appellant, and Rita Kemigisha (hereinafter referred to as the deceased) were lovers since 1999. Both of them resided in Wakiso, but in different

homes. The deceased, who was at the time of her death aged sixteen years, lived with her mother, Sarah Nalugya, (PW3) and her younger brother Patrick Busobozi, (PW4). The appellant was a married man and had his own family and home. Apparently during some evenings the appellant would stealthy go to PW3's residence and cause PW4 to get the deceased to sneak out of her mother's home and go out with the appellant to have sex. The appellant used to pay some money to PW4 for his clandestine services. The deceased would normally return home. Eventually the deceased became pregnant which displeased her mother. The latter reported the matter to LC officials of the area.

On the evening of 14/3/2000 at around 10:30 p.m, the appellant once more went to PW3's residence and as usual requested PW4 to call the deceased. PW4 obliged. The deceased went out with the appellant. This time she did not return. So PW3 was concerned and went out that night searching for the deceased but failed to trace her.

On the following morning the deceased was found lying by the village path at Kisimbiri Zone, Wakiso Trading Centre, in a critical condition with serious acid burns. She could not talk comprehensibly. Margaret Nandaula, PW5, one of the people who went to the scene gave her a piece of paper and a pencil and asked her to write down her own name, the name of the person who had taken her where she was found in that condition, the name of her mother and the name of her home village. The deceased wrote down the names of herself, as Kemigisha, of her mother, and of Hassan as the person who took her to the place where she was found. She also wrote Wakiso as her home area. At the trial, the Khaki piece of paper on which the deceased

wrote these particulars was admitted in evidence as Exhibit P3.

Later on the deceased's mother and Police Constable, Ngwonzebwa Margaret, PW6, and many other people went to the scene. PW6 observed that the body of the deceased and the clothes she was wearing were burnt with acid. The deceased was taken to Mulago hospital where she died on that day. A post mortem report on the body of the deceased (Exhibit P1) which was made by Dr. Sendi Bwogi revealed the cause of death as severe burns and pulmonary oedema.

Following the deceased's death, the appellant was arrested as the suspect since he was the last person seen with deceased when she was still alive and well and she had written his name down on the said paper. He was charged, with murder contrary to Sections 188 and 189 of the Penal Code Act and eventually prosecuted.

In his defence at the trial the appellant totally denied commission of the offence. He also denied going to PW3's home on the material day. He put up a defence of alibi.

The learned trial Judge rejected his defence. She believed the prosecution case and convicted him of murder on 23rd September 2002 and sentenced him to death. He appealed to this Court on the following grounds:-

"1. The learned trial judge erred in law and in fact when she relied on very weak circumstantial evidence to convict the appellant.

2. The learned trial judge misdirected herself when she failed to give due consideration to the defence of alibi raised by the appellant at the trial".

The Court of Appeal considered these grounds, re-evaluated the evidence on record and dismissed his appeal. Following the dismissal of the said appeal on 15/6/2005, the appellant filed a subsequent appeal in the Supreme Court vide Criminal Appeal No. 012 of 2005. When the matter came up for hearing, the members of the panel re-evaluated both the evidence of this Court and trial court and found no merit in the appeal and hence dismissed it with an order that the matter be sent back to the High Court for re-sentencing.

During the re-sentencing proceedings, the appellant appeared before Alividza, J who after, considering all the mitigating and aggravating factors set out by both counsel had this to say:-

> ***"I accordingly find that imprisonment for life or any other alternative custodial sentence is not adequate. The mitigating factors do not convince this court to be lenient and I find that due to the exceptional circumstances outline above, this is one of the few cases falling under the category of the "rarest of the rare" and I accordingly pass the sentence of death penalty on the convict. May God have mercy on your soul! "***

Being dissatisfied with the decision of the re-sentencing Judge, the appellant with leave of this Court granted under Section 132 (1) (b) of the Trial on Indictment Act, Cap 23, has now appealed to this Court on the following ground:-

> ***The learned re-sentencing judge erred in law and fact when she imposed a manifestly harsh and excessive sentence against the appellant.***

Legal Representation:

At the hearing of the appeal, the appellant was represented by learned Counsel Mr. Henry Kunya on State Brief, while the respondent was represented by Mr. David Ndamurani Ateenyi learned Assistant Director Public Prosecutions. The appellant was in court.

Appellant's Submissions

Counsel for the appellant submitted that the sentence of death was harsh and manifestly excessive in the circumstances of this case. At the time of sentencing the appellant was a first offender who had two children under his care and had reformed as manifested by self improvement courses undertaken in prison. He should not have been given the maximum sentence authorized by law. Counsel asked Court to reconsider the sentence and hand down a more lenient sentence such as a custodial sentence of 20 to 25 years' imprisonment.

Respondent's Submissions

Mr. Ateenyi, learned Senior Assistant D.P.P, opposed the appeal and supported the sentence. He submitted that this was one of the rarest of rare cases in which a death sentence ought to be passed. He added that the alternative of imprisonment for life or other custodial sentence is apparently inadequate. He referred to ***Regulation 16 and Regulation 18*** of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, and submitted that the appellant committed an extremely serious offence in a gruesome manner. He asked Court to confirm the sentence.

Resolution of Court

We have carefully listened to the submissions of counsel on either side, and carefully studied the court record and the authorities cited to us.

We are alive to the law that requires us as an appellate Court to re-appraise all the evidence and come up with our own inferences of law and fact. ***See Rule 30 (1) of the Rules of this Court and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No.10 of 1997.***

The Supreme Court has in ***Kiwalabye Bernard vs. Uganda, Criminal Appeal No.143 of 2001 (unreported)*** held that:-

> ***"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 sentence or where the sentence imposed is wrong in principle."***

We shall bear the above principles in mind, as we consider this appeal.

We note that the death penalty is no longer mandatory. However in an appropriate case it is still a lawful sentence. It is now firmly established that courts may only pass a sentence of death in exceptional circumstances and in the "rarest of the rare" cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate. ***See Direction 17 of the Constitution (Sentencing Guidelines for Court of Judicature) (Practice) Directions, Legal Notice 8 of 2013.***

In passing the sentence the re-sentencing judge considered both the mitigating and aggravating factors. The mitigating factors were that the convict was a first offender who had been on remand for over 2 years. He was a family man with two children and a wife, and most importantly he has been in custody for over 17 years.

The aggravating factors included the fact that the appellant committed an extremely serious offence in a gruesome manner. After impregnating the deceased who was only 16 years old, the appellant burnt her with acid to avoid possible prosecution of a defilement case since she was still a minor. The degree of injuries inflicted on the deceased's body were severe as revealed in the findings of Dr. Sendi Bwogi, who carried out the post mortem report which indicated that the cause of death was due to acid external deep burns covering about 54% of the body surface area including all the skin on the scalp, face, the arms, upper half of the legs and the trunk. The death of the deceased must have been quite traumatic to the victim's family. The appellant never expressed any remorse for what he had done.

In ***Aharikundira vs. Uganda, Criminal Appeal No. 104 of 2009*** (Unreported), the deceased was murdered by his wife who dumped his body some distance away from his home. His throat arms and legs had been cut. There were no signs of struggle at the scene indicating that the body had been brought to the scene from somewhere else. According to the findings of the medical officer who carried out the post mortem examination, the cause of death was hemorrhagic shock due to the excessive bleeding. Upon conviction, a death penalty was imposed on the appellant which this court confirmed on the ground that the trial court had properly exercised its discretion.

In ***Mugabe Stephen vs. Uganda, Criminal Appeal No. 412 of 2009*** (unreported) this court confirmed the death penalty imposed upon an appellant who had been convicted of murder, in a case where the deceased's body had been dismembered. The heart, lungs and genitalia had been removed from the body of the deceased and were not recovered.

We find that the aggravating factors in this case far outweighed the mitigating factors.

We find no reason to interfere with the sentence imposed by the re-sentencing Judge as it appears consistent with previous decisions of this court. The learned re-sentencing Judge took into consideration the mitigating and aggravating factors. In the learned re-sentencing Judge's discretion she found that the most appropriate sentence was the death penalty. We do not find the sentence too harsh or excessive in the circumstances. Without proof that this discretion was abused or that the

learned re-sentencing Judge acted on a wrong principle or ignored some relevant factor, this court would have no lawful reason to interfere with the decision of the court below. This appeal accordingly fails. We uphold the sentence of death upon the appellant and dismiss this appeal.

It is so ordered.

Dated at Kampala this 27th day of June 2019.

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Elizabeth Musoke

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL

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Ezekiel Muhanguzi

JUSTICE OF APPEAL