THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 234 OF 2010

1. **BALIGEYA PATRICK**
2. **LUBEGA REAGAN::APPELLANTS**

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Mr. Justice Eldad Mwangusya in the High Court of Uganda at Fort Portal in Criminal Session Case No.0044 of 2010)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT

This is an appeal from the decision of the High Court of Uganda at Fort Portal in Criminal Session Case No.0044 of 2010 delivered on 29th September, 2010 by Eldad Mwangusya, J in which the appellants were convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to death.

Prosecution alleged that on the 30th day of August, 2009 at around 3pm, Oluka Gaitano, the LC1 Chairperson of Lutale A Village, Kityerera Sub-County in Mayuge District called a village meeting to resolve a dispute between Onyango Atanasio and John Kaisuka, the deceased. Onyango Atanasio was accusing Kaisuka of killing his wife using witchcraft. As the meeting was going on, the said Onyango together with his sons, Lubega Reagan, Baligeya Hakim and others still at large attacked Kaisuka with benches and pangas causing him grievous harm. As a result of the attack, the meeting dispersed in disarray.

One Kabaale James, a son to Kaisuka, reported the incident to Kityerera Police Post whereupon police officers were dispatched to the scene only to find that Kaisuka was unconscious and his assailants had fled the village. Kaisuka was rushed to ADRA hospital where he died shortly after arriving. The body was taken to Kityerera Health Centre where it was examined upon PF48B and the cause of death stated as severe anaemia due to excessive bleeding secondary to extensive cuts. The trial Judge convicted the appellants and sentenced them to suffer death in the manner authorized by law.

Being dissatisfied with the decision of the trial Judge, the appellant with leave of Court appealed to this Court against sentence only. The sole ground of appeal reads;

The learned trial Judge erred in law and fact when he passed a harsh and excessive sentence against the appellants.

At the hearing of the appeal, Ms. Mutamba Berna appeared for the appellants while the respondent was represented by Ms. Josephine Namatovu, Assistant DPP.

Counsel for the appellants submitted that the appellants where first offenders and death penalty should only be given in the "rarest of the rare" cases and the instant appeal is not one of those cases. She added that Courts should maintain consistency while sentencing and invited Court to consider the authority of ***Oyita Sam V Uganda, Court of Appeal Criminal Appeal No.307 of 2010*** where this Court reduced the sentence from death penalty to 25 years and ***Twikirize Alice V Uganda, Court of Appeal Criminal Appeal No/ 0764 of 2014*** where this Court found the sentence of 37 years for murder was very harsh and the same was reduced to 25 years. She prayed that the sentence be reduced to 25 years imprisonment.

In reply, Ms. Namatovu opposed the appeal and submitted that the death sentence imposed by the trial Judge on the appellants was justified because according to guideline 18 paragraph (d) of the sentencing guidelines, the present case qualifies as the rarest of the rare. She added that the rarest of the rare includes cases where the Court is satisfied that the commission of the offense was planned, pre-meditated, executed, and the commission of the offense was caused by a person or a group of persons acting in execution or furtherance of a common purpose or conspiracy.

She further submitted that the facts of the instant case show that this was a pre-meditated murder that arose as a result of suspicion of witchcraft that was purported to have been committed by the deceased. That this was a common intention which the appellants pursued and executed in such a brutal manner. Counsel prayed that the sentence be maintained.

In rejoinder, counsel for the appellants invited this Court not to treat the instant appeal as a rarest of the rare case because the rest of the people who had come to attend the meeting and resolve the issues with the deceased had a duty of restraining the appellants from attacking the deceased but they did not do so. She reiterated her earlier prayers.

We have carefully considered the submissions of both counsel and perused the Court record as well as the authorities cited to us.

This being a first appeal, we shall exercise our duty under ***Rule 30 (1) (a)* of the Rules** of this Court to reappraise the evidence adduced at trial, draw inferences of fact and come to our own conclusion. This mandate of the Court was reiterated in ***Kifamunte Henry v Uganda SCCA NO. 10 of 1997***, where it was held that, *"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

The circumstances when an appellate court can interfere with the sentence imposed by a trial Judge are well settled. The Supreme Court in ***Kyalimpa***

Edward v Uganda, SCCA No 10 of 1995 made reference to the case of ***R v De Haviland (1983) 5 Cr. App (R)s 109*** and held that;

> *"An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a Judge exercises his discretion. It is a practice as an appellate court; this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."*

Counsel for the appellants submitted that the appellants where first offenders and death penalty should only be given in the "rarest of the rare" cases and the instant appeal is not one of those cases.

Paragraph 17 of the ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** provides that;

> *"The Court may only pass a sentence of death in exceptional circumstances in the "rarest of the rare" cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate."*

Paragraph 18 of the ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** further provides for the "rarest of the rare cases to include cases where:

a) the Court is satisfied that the commission of the offence was planned or meticulously premeditated and executed;

b) the victim was-

i. a law enforcement officer or a public officer killed during the performance of his or her functions; or

ii. a person who has given or was likely to give material evidence in Court proceedings;

c) the death of the victim was caused by the offender while committing or attempting to commit-

i. murder;

ii. rape;

iii. defilement;

iv. robbery;

v. kidnapping with intent to murder;

vi. terrorism; or

vii. treason;

(d) the commission of the offence was caused by a person or group of persons acting in the execution or furtherance of a common purpose or conspiracy;

(e) the victim was killed in order to unlawfully remove any body part of the victim; or

(f) the victim was killed in the act of human sacrifice.

In the case of ***State V Makwanyane (1995) (3) S.A 391,*** the Constitutional Court of South Africa stated that;

"The death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation; and the object of punishment would not be achieved by any other sentence."

In the instant case, the deceased, Kaisuka John had lodged a complaint against Baligeya Joachim and others for having attacked him and tried to stab him. A local council meeting was called. During the meeting, the deceased made his complaint against the three people and each of them was required to respond to the allegations which they all denied. Baligeya picked a bench and hit the deceased twice on the head. Reagan Lubega pulled out a panga from his trousers and cut the deceased on the shoulder. They were joined by Onyango Tanansi who hit the deceased with a chair and ordered for the attack of the local council officials who all run away leaving the deceased at the scene. The appellants were convicted of murder.

The above facts show that the offence was planned or meticulously premeditated and executed and further that the commission of the offence was caused by a person or group of persons acting in the execution or furtherance of a common purpose or conspiracy hence falling within the ambit of paragraph 18(a) and (d) of the ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** because one would wonder why Reagan Lubega, the 2nd appellant had to attend a meeting with a panga hidden in his trousers and Baligeya picked a bench and hit the deceased. Such actions show that the

appellants had already formed a plan to kill the deceased under a common intention.

In passing the sentence, the trial Judge noted that;

> *"When the deceased registered his complaint with the Local Council authorities and the persons he had complained against attended the gathering one would have thought the deceased's assailants had submitted to the authority of the Local Councils. Nobody would have expected that the assailants attended the meeting with hidden weapons to attack the deceased and eventually kill him. The perpetrators of such act deserve no mercy and no sentence other than the maximum death penalty fits the actions of the convicts who took away a life that can never be replaced. This Court will pass the maximum death penalty." SIC.*

In ***Mugabe Stephen V Uganda, Court of Appeal Criminal Appeal No.412 of 2009 (unreported)*** this Court confirmed the death penalty imposed upon an appellant that had been convicted of murder. The deceased's body had been dismembered. The heart, lungs and genitalia had been removed and were not recovered.

In ***Aharikundira V Uganda, Court of Appeal Criminal Appeal No.104 of 2009 (unreported)*** this Court imposed the death penalty upon the appellant. 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. The arms had been severed from the shoulders and the legs were missing. There were no signs of

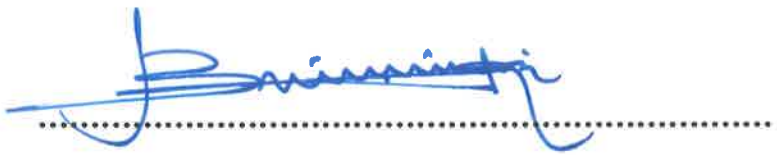
struggle at the scene indicating that the body had been brought to the scene from somewhere else.

In the circumstances of this case, we find that the death sentence for murder is neither harsh nor manifestly excessive and find no reason to interfere with the sentence. We accordingly confirm the same.

In the result, the appeal has no merit and is dismissed. The conviction and sentence imposed by the trial Judge are accordingly upheld.

We so order

Dated at Jinja this.....17th.....day of.....May.....2019



HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

HON. MR. JUSTICE STEPHEN MUSOTA

JUSTICE OF APPEAL

HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUSTICE OF APPEAL

17-7-19

Appellants present.

Mr. Mugizi for the Resp.

Mr. [illegible] for the Appellant

[illegible]: Clerk.

Court: Judgment delivered in the presence of the above.

17-7-19