

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT MBALE**

(Coram: Egonda Ntende, Cheborion Barishaki & Muzamiru Kibeedi, JJA)

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CIVIL APPEAL NO. 507 OF 2014

(Arising from High Court Criminal Session

Case No. 274 of 2013 and HCT-04-CR-SC-0163 of 2002 at Mbale)

10 **KASISI DOMINIC** **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

(Appeal from the Re-sentence of the High Court of Uganda at Kampala)

(Hon. Lady Justice Percy Night Tuhaise-as she then was) dated 25.11.2013, in

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Criminal Session case No. 274 of 2013)

JUDGEMENT OF THE COURT

Introduction.

20 The Appellant was indicted for the murder of his father-in-law, Wamutanga Charles (deceased) contrary to Section 188 and 189 of the Penal Code Act.

The facts as established by the prosecution before the trial court were that the deceased had commenced a civil suit against the Appellant in a claim for dowry. When the Appellant was served the Court Summons in the said civil suit, he swore that he would kill the plaintiff (now deceased) or the deceased's wife or their daughter (the Appellant's wife at the time).

25 On the 3rd of February 2002 at around 8pm the Appellant went to the deceased's home armed with a panga and cut off the deceased's head at the neck. The deceased's wife, Grace Kakai, was present and she raised an alarm. The alarm attracted her sons and other people to the scene. The deceased was found dead, lying in a pool of blood with
30 deep cuts on his neck and shoulder.

Muzamiru Kibeedi

A report was made to Bugobero Police Post. The Police Officers immediately went to the Appellant's home where it was found that he had run away with all his belongings and family.

35 The accused was later arrested in Malaba, tried and convicted on the 19th of February 2004 of the murder of his father-in-law by the High Court of Uganda at Mbale presided over by the Hon. Lady Justice Faith Mwonda (then High Court Judge) in HCT-04-CR-SC-0163 of 2002. The Appellant was sentenced to suffer death.

40 Following the judgment in Susan Kigula & Others Vs A.G, Constitutional Appeal No. 3 of 2006 which declared the death penalty not to be mandatory in capital offences, the Appellant's case was remitted to the High Court for mitigation hearing and re-sentencing by the Hon. Lady Justice Percy Night Tuhaise (then Judge of the High Court) in High Court Criminal Session No. 274 of 2013.

The High Court re-sentenced the Appellant to imprisonment for life. The Appellant was dissatisfied with the sentence and appealed to this court on two grounds, namely:

- 45
1. *That the learned judge erred in law and fact when she failed to take into account the period spent on remand;*
 2. *That the learned judge erred in law and fact when she sentenced the Appellant to imprisonment for life which is manifestly harsh and excessive.*

Representations.

50 The Appellant was represented by Counsel Obedo Deogratius of M/s Owori & Co. Advocates, on state brief, while the Respondent was represented by Ms Nyanzi Macrina Gladys, an Assistant Director of Police Prosecutions in the Office of Director of Public Prosecutions. Both Counsel filed Written Submissions.

Appellant's Arguments.

55 With regard to ground 1, counsel for the appellant submitted that the failure of the re-sentencing judge to consider the period that the Appellant spent on remand was in

contravention of Article 23(8) of the Constitution of the Republic of Uganda, 1995 which rendered the sentence illegal. For this submission, counsel relied on Wabamutabwine Jamil Vs Uganda, Supreme Court Criminal Appeal No. 74 of 2007.

60 With regard to ground 2, counsel for the Appellant submitted that the sentence of imprisonment for life is harsh and manifestly excessive. Counsel relied on the case of John Kasimbazi & Others Vs Uganda, Court of Appeal Criminal Appeal No. 167 of 2013 where the Appellants who had been convicted of murder and sentenced to life imprisonment by the trial court had their sentence reduced to 12 years when they
65 appealed to this court.

Counsel also referred to the case of Odongo Ronald Vs Uganda, Court of Appeal Criminal Appeal No. 048 of 2010 where the Appellant's sentence to a death penalty for murdering two people was, on appeal, found by this court to be harsh and manifestly excessive and substituted with a sentence of 18 years and 4 months' imprisonment.

70 Counsel for the Appellant also submitted that there were also mitigating factors which included the appellant having suffered from the "infamous death row syndrome", having a poor health after undergoing a hernia operation in 2010 and being disciplined and having reformed as indicated in the re-sentence and social inquiry report prepared by Ms Nyanzi Agnes, a Social Worker of Mukono District Local Government and dated
75 09.11.2013.

Counsel concluded by inviting this court to allow the appeal and grant the Appellant a lenient sentence that will result in his release.

Respondent's Arguments.

80 With regard to ground 1, counsel for the Respondent submitted that the provisions of Article 23(8) of the Constitution requiring the remand period to be considered by court while sentencing an accused does not apply to the appellant's sentence of imprisonment for life. In support of her submissions, counsel relied on the case of

Kaddu Kavulu Lawrence vs Uganda, Supreme Court Criminal Appeal No. 17 of 2014
(unreported).

85 As for ground No. 2, counsel submitted that the sentence of imprisonment for life was neither harsh nor manifestly excessive. She submitted that the sentence was legal under the law, that the maximum sentence for the charge of murder is a death penalty; and that the re-sentencing judge took into consideration the mitigating factors of the Appellant but noted that the aggravating factors out-weighed the mitigating factors.

90 Counsel submitted that an appropriate sentence is a matter for the discretion of the sentencing court. That each case presented its own facts upon which a court exercises its discretion. For this submission, counsel referred to the case of Kaddu Kavulu Lawrence Vs Uganda, Supreme Court, Civil Appeal No. 72 of 2018 where the Supreme Court upheld the sentence of life imprisonment for the offence of murder.

95 Counsel also referred us the case of Sebuliba Siraji Vs Uganda, Court of Appeal Criminal Appeal No. 031 of 2009 where the court upheld the sentence of imprisonment for life in a murder conviction.

Counsel ended by inviting us to dismiss the appeal and uphold the sentence of imprisonment for life.

100 **Analysis by Court.**

It is now settled that for the Court of Appeal, as a first appellant court, to interfere with the sentence imposed by the trial court which exercised its discretion, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law; or where the trial Court failed to take into account an important matter or circumstance; or made an error in principle; or imposed a sentence which is harsh and manifestly excessive in the
105 circumstances. See Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No.16 of 2000 (Unreported); Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported); Wamutabanewe Jamiru Vs Uganda,

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It is with the above principles in mind that we shall now proceed to consider the grounds of appeal.

Ground 1 – Remand Period.

115 The Appellant submitted that the sentence of life imprisonment was illegal on account of the re-sentencing judge not considering the period spent by the Appellant on remand as required by Article 23(8) of the Constitution of the Republic of Uganda.

The Respondent's counsel disagreed and submitted that the said provision of the Constitution was inapplicable to a sentence to imprisonment for life.

Article 23(8) of the Constitution of the Republic of Uganda provides:

120 *"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spent in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."*

125 The Supreme Court of Uganda while considering the applicability of the above provision in sentences of life imprisonment in case of Magezi Gad Vs Uganda, Supreme Court Criminal Appeal No. 17 of 2014 stated:

130 *"We are of the considered view that ... life imprisonment is not amenable to Article 23(8) of the Constitution. The above article applies only where sentence is for a term of imprisonment i.e. a quantified period of trial which is deductible. This is not the case with life or death sentences."*

The above position was re-echoed and re-confirmed by the Supreme Court in Kaddu Kavulu Lawrence Vs Uganda Criminal Appeal No. 72 of 2018 (unreported). We are bound by the above decisions under the principle of stare Decis. Ground No. 1 would fail.

Ground 2 – Manifest Harshness and Excessiveness of the Sentence.

The complaint of the Appellant under this ground is that the sentence of life imprisonment was manifestly harsh and excessive.

On the other hand, the Respondent's counsel disagreed.

140 Before arriving at the decision to re-sentence the Appellant to life imprisonment, the re-sentencing judge stated thus:

145 *"I have listened to and addressed the mitigation from counsel. The convict was sentenced to death after being found guilty of murder by the trial court. He committed the offence when he was aged thirty six years and is currently forty eight years. He has been in custody close to twelve years.*

150 *This is a very grave offence of a capital nature carrying a maximum penalty of death. The convict committed the offence in a cruel and brutal manner. He used a panga, which is a deadly weapon, to cut the deceased three times, severing his head and hand. This was in the presence of the deceased's wife. The deceased was the convict's father in law. The deceased, a carpenter, was a breadwinner to the family. The deceased's death left his family helpless under the care of a younger brother now aged seventy years. The convict took the law in his own hands with complete disregard of the sanctity of human life. These factors aggravate the circumstances of the manner in which the offence was committed, as spelt out in regulation 20(a)(b)(c)(e)(k)(p)&(q) of the Sentencing Directions 2013, which are now operational.*

155 *This court does not condone such conduct. The public needs to be protected from such ruthless inhumane and gruesome acts.*

160 *The convict is a first offender with no previous record of conviction. He is a widower with nine children aged between twelve and twenty six years. The pre-sentence and social inquiry report on the court record indicates that he was a peasant farmer and carpenter, and that he initiated a reconciliation process with the deceased's family. He suffered from hernia but it was operated on. He is reported to be disciplined in prison. He has been making steel containers and he repairs broken furniture while in prison. I consider the foregoing to be factors mitigating a sentence of death under regulation 21(f)(i)&(o) of the Sentencing Directions, 2013.*

170 *I have taken into account the Sentencing Directions 2013. In this case of murder, the maximum penalty is death. The starting point is thirty five years. The sentencing range is from thirty years up to death. In the instant case*

where death is the maximum sentence, regulation 19 of the Directions requires this court to consider the aggravating factors and the mitigating factors and determine the sentence in accordance with the sentencing range.

175 In my opinion, owing to the highlighted mitigating factors, but mindful of the grave nature of the offence and the fact that the aggravating factors outweigh the mitigating factors, and, being guided by the Sentencing Directives, if the trial court had heard the mitigation, and if the death penalty had not been
180 be appropriate in the circumstance. Accordingly the death sentence on the conviction for the offence of murder is substituted by a sentence of imprisonment for life."

From the above re-sentencing decision, it is clear that the re-sentencing judge took into account both the mitigating and aggravating factors which the Appellant's counsel is
185 complaining about. So she cannot be faulted in that aspect. However, we note that the re-sentencing judge never alluded to the principle of "consistency" or "parity" or "uniformity" of sentences which the courts of law are enjoined to consider pursuant to sentencing principle No. 6(c) of the Constitution (Sentencing Guidelines for Courts of
190 the following terms:

"Every court shall when sentencing an offender take into account ... the need for consistence with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances."

195 The Supreme Court and the Court of Appeal have time and again emphasized the need for courts of law to try as much as possible to maintain consistence and parity in sentencing while bearing in mind that no two crimes are identical. See Mbunya Godfrey Vs Uganda, Supreme Court Criminal Appeal No. 04 of 2011; Livingstone Kakooza Vs Uganda Supreme Court Criminal Appeal No. 17 of 1993.

200 In light of the law above, we hold the view that the failure of the re-sentencing judge to consider the principle of consistency in the re-sentencing the Appellant would entitle this court to interfere with the sentence imposed by the re-sentencing judge and substitute it with our own sentence pursuant to Section 11 of the Judicature Act, cap

13. In so doing it is pertinent to bear in mind our duty as set out by the Supreme Court
205 in Aharikundira Yusitina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015
below:

210 *"It is the duty of this Court while dealing with appeals regarding sentencing to ensure consistency with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that law be applied with equality and without unjustifiable differentiation."*

In Uganda Vs Suzan Kigula, HCT-00-CR-SC-0115-2011 (in mitigation) where the accused cut her husband's throat with a sharp panga to death before their children, she was re-sentenced upon mitigation to 20 years' imprisonment.

215 In Aharikundira Yusitina Vs Uganda (supra) where the appellant brutally murdered her husband and cut off his body parts in cold blood, the Supreme Court set aside the death sentence imposed by the trial court and substituted it with a sentence of 30 years imprisonment.

220 In Akbar Hussein Godi Vs Uganda, Supreme Court Criminal Appeal No.03 of 2013 where the appellant had shot his wife to death after having previously threatened her several times to kill her, he was sentenced to 25 years' imprisonment upon being convicted of murder.

225 In Rwabugande Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014 where the trial court had sentenced the appellant to 35 years for beating the deceased to death with his herdsmen for failing to release appellant's cattle which had trespassed into the deceased's land, the Supreme Court reduced the sentence to 21 years on appeal.

230 With the above precedents, we are of the view that the sentence of imprisonment for life that was passed against the appellant was not a proper exercise of discretion to the extent to which it failed to take into account decisions of the courts of judicature for similar offences. We find that this is an appropriate case in which we should reduce the sentence. Ground 2 would accordingly succeed.

Decision.

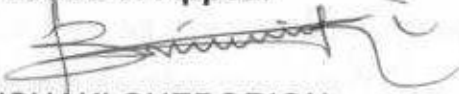
The sentence of life imprisonment is hereby reduced to 25 years imprisonment. From that sentence, we deduct the period of 1 year and 11 months that the
235 appellant spent on pre-trial detention. We therefore sentence the appellant to a term of 23 years and 1 month imprisonment to be served from the 19th day of February 2004, the date of conviction.

Signed, dated and delivered at Mbale this ...¹⁵... day of *September* 2020.

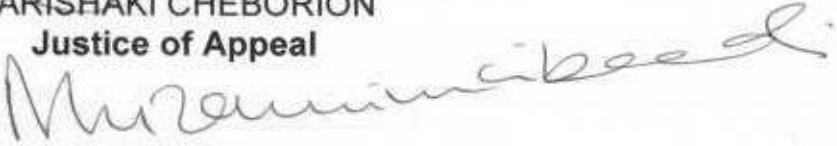
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FREDRICK EGONDA-NTENDE
Justice of Appeal

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BARISHAKI CHEBORION
Justice of Appeal

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MUZAMIRU KIBEEEDI
Justice of Appeal