THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

[Coram: Richard Buteera, DCJ; Cheborion Barishaki, JA and Hellen Obura, JA]

CRIMINAL APPEAL NO. 235 OF 2010

KWOBA ZAKARIA::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Arising from the Judgment of Mwagusya E, J in High Court Criminal case No.137 of 2007, dated the 28th day of September 2010)

JUDGMENT OF THE COURT

Introduction

The appellant, Kwoba Zakaria, was indicted with the offence of Murder contrary to **Sections 188 and 189 of the Penal Code Act.** He was convicted and sentenced to suffer death by Mwangusya E, J.

Background

It was alleged that the appellant murdered his wife, a one Martin Fatuma Ouma Jennifer, during the month of October 2004 at Lugala Beach village, Lugala Parish in Bugiri District.

The case for the prosecution was that the appellant and his wife (the deceased) lived together with their daughter aged about 2 years. On 25th October 2004, Rose Nekesa, (PW3), a close neighbour to the appellant's family, stated that she observed the appellant and his family retire to their room. On 26th October 2004, she observed that the appellant's family room was locked with a padlock from outside. On 27th October 2004, PW3's children were playing outside the appellant's family room and were hit by an unusual stench / bad smell coming from the said room. One of the children went back home and informed her about the bad smell emanating from the appellants family room. PW3 went to the appellant's family room and was hit by the same bad smell. She

reported the matter to the Chairman LCI Lugala Beach, one Ogalo Wandera (PW4) who reached the scene. He too smelt the bad stench and reported the matter to the Police.

The chairman together with D/AIP then a Sergeant Mafabi Robert (PW5) went back to the scene and broke the padlock. On entering the room, the body of the deceased was found lying near the doorway with legs facing the bedside. Inside the room, there was a knife, a hoe and a hat on a table belonging to the appellant. The body of the deceased had a deep cut on the head, a cut on the neck and a cut on her private parts which according to PW5 appeared to have been removed. The body was lying in a blood of blood where foot marks of a child were observed leading outside the room.

Neither the appellant nor his two year old daughter could be traced. The accused disappeared from the area until he was arrested on 15th April 2007 at Bungoma, Kenya by No. 61411 SGT. Morris Amwayi (PW2) a Kenyan Police Officer. The appellant was handed over to No. 18927 SGT. Mafabi Robert who brought him back to Uganda to face the murder charges.

The appellant denied having committed murder. He testified that he married the deceased in Kenya in 2011, moved to Uganda where they lived together until July 2003 when they separated. He averred that he left for Kenya with their daughter while the deceased remained in Uganda.

The appellant was tried and convicted of the offence of Murder. He was sentenced to suffer death. The appellant was aggrieved by both conviction and sentence. The appellant initially appealed to this Court on the following grounds:-

1. **That the learned trial Judge erred in law and fact when he disbelieved the appellant's defence of alibi.**
2. **The learned trial Judge erred in law and fact when he sentenced the appellant to death which sentence is manifestly harsh.**

Legal Representation

At the hearing the appellant was represented by Mr. Turyamusiima Geoffrey on Private brief while the respondent was represented by Ms. Nabasa Caroline Hope, Senior Assistant Director of Public Prosecutions. Due to the COVID-19 pandemic restrictions, the appellant was not physically present in Court but attended the proceedings via video link using Zoom technology from Jinja Prison.

During the hearing, counsel for the appellant withdrew the appeal on conviction and retained only ground 2 on sentence. Counsel for the appellant raised a preliminary objection on a point of law, contending that counsel for the appellant ought to have sought leave of Court to appeal against sentence only following **section 132 (1) (b) of the Trial on Indictments Act.** Counsel for the appellant sought leave of Court to appeal on sentence only and the same was granted by the Court.

The appeal therefore proceeded with one ground which stated:-

> **"The learned trial Judge erred in law and in fact when he sentenced the appellant to death, a sentence that was unduly harsh and manifestly excessive in the circumstances."**

Both counsel filed and adopted their written submissions.

Submissions of counsel for the appellant.

Counsel for the appellant submitted that the learned trial Judge failed to correctly apply the test for imposing a discretionary death penalty and therefore passed a death sentence that was harsh and manifestly excessive in the circumstances.

Counsel argued that the death sentence should be passed in the most exceptional cases, in the "rarest of the rare" cases. He relied *on* ***Attorney General vs. Susan Kigula and 417 others, Supreme Court Criminal Appeal No.03 of 2006; Mbunya Godfrey vs. Uganda, Supreme Court Criminal Appeal No.04 of 2011; Kakubi Paul and anor vs Uganda, Court of Appeal Criminal Appeal No.126 of 2008*** and **The Constitution**

(Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 to support his argument.

Counsel argued that the learned trial Judge erred when he failed to consider the appellants mitigating factors. He submitted that there was evidence of mitigating factors on record to the effect that the appellant was a first offender, had been on remand since 2007, had family responsibilities, had capacity to reform, was of advanced age of 52 years and suffered from ill health, including HIV and kidney complications. In light of the above mitigating factors, counsel contended that this case did not fall under the 'rarest of the rare' cases where an alternative sentence is demonstrably inadequate.

Counsel further submitted that Courts have repeatedly emphasised the need to achieve consistency in sentencing. He relied on ***Attorney General vs. Susan Kigula and 417 others, (Supra); Mbunya Godfrey vs. Uganda, (Supra)*** and ***Akabar Hussein Godi vs Uganda, Supreme Court Criminal Appeal No.03 of 2013***, among others in which the appellant's murder sentences were reduced between the range of 14 years and 25 years imprisonment terms.

Counsel prayed that Court finds that this case did not fall under the 'rarest of the rare' cases to warrant a death penalty. He prayed that Court sets aside the death sentence, considers the mitigating factors, takes into account the 3 years period spent on remand and impose an appropriate sentence considering the circumstances of this case.

Submissions of Counsel for the respondent.

Counsel for the respondent submitted that the appellant has not demonstrated how the sentence is manifestly harsh in light of the aggravating factors and the facts of this appeal. She argued that the appellant's submissions are majorly founded on the sentencing guidelines which are not legally binding on the trial Judge.

Counsel argued that the learned trial Judge heard and recorded submissions from the prosecutor, counsel for the accused and the also the appellant himself. She argued that

the trial Judge was alive to all the aggravating and mitigating factors before him. According to counsel, Court has settled a similar issue in the case of ***Karisa Moses vs. Uganda, Supreme Court Criminal Appeal No. 23 of 2016.***

Counsel further submitted that the appellant's being a first offender, of advanced age or being sick is irrelevant in a matter where the aggravating factors outweighed the mitigating factors. She relied on the case of ***Turyahabwe and 12 others vs Uganda, Supreme Court Criminal Appeal No. 50 of 2015*** to support her argument.

Counsel contended that uniformity and consistency in sentencing is not among the particular instances where the appellate Court may interfere with a sentence given by the trial Court. According to counsel, the argument on uniformity and consistency in sentencing amounts to emotions and not law. Counsel relied on ***Aharikundira Yustina vs. Uganda, Court of Appeal Criminal Appeal No.104 of 2009*** and ***Bashasha Sharif vs Uganda, Supreme Court Criminal Appeal No. 82 of 2018.*** She argued that each case presents its facts and circumstances and therefore uniformity does not apply.

Counsel prayed that the Court re-evaluates the facts and evidence including the mitigating factors and send a clear message that atrocities against women cannot be tolerated.

She further prayed that Court confirms the maximum sentence of death and dismisses the appeal.

Consideration of the appeal

It is trite law that for an appellate Court to interfere with a sentence imposed by the trial Court which has exercised its discretion, the sentence must be shown to be illegal or founded on a wrong principle of law or where the trial Court failed to consider an important matter; or circumstances which ought to be considered when passing the sentence; or the sentence was manifestly excessive or so low as to amount to an

injustice. See: ***Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No.17 of 1993 [unreported]; Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No.19 of 1995; Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001 [unreported]*** and ***R v. Mohammedi Jamal (1948) 15*** **E.A.C.A 126.**

From the record, Mr. Muwaganya, counsel for the prosecution, made the following submissions during alloctus:

> ***"The murder was a brutal one. The injuries on the deceased in form of a smashed head, a deep cut on the neck and cut private parts were extremely malicious. Life is God given. Whoever unlawfully takes away should pay a heavy price for it. This is the reasons why section 189 of the Penal Code prescribes death as a maximum sentence.***
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> ***The deceased was not only a wife but a mother of the convict's child. Out contention is that only the maximum sentence would serve public interest. We pray for maximum."*** *[Sic]*

Mr. Ngobi Balidawa, counsel for the accused/appellant made the following submissions in mitigation:

> ***"The convict is a first offender with a good previous record. This honourable Court, it is prayed should be put into consideration to offer a chance to the convict to reform. Other than passing the maximum sentence. Section 189 cited by the learned State Attorney gives this honourable Court discretion to determine sentence. It is our humble prayer that this honourable be pleased to exercise that discretion to pass a reformatory sentence.***
>
> ***The second mitigating factor is the period spent on remand. The convict has been in prison since 2007.***
>
> ***The third mitigating factor is the age of the offender. He is about fifty two years. He is of advanced age. It is our humble prayer puts this factor into consideration.***
>
> ***The accused is repentant as exhibited by his testimony that he has got saved and is ready to reform. He is sickly.***

In light of the five mitigating factors we pray for lenience while Court passes the sentence. We pray that court does not consider the maximum sentence because it will not help in reforming anybody." *[Sic]*

The accused/appellant stated as follows:

"I pray court to have mercy on me if I could be allowed to home. I have a family. I have taken three years without seeing them. I am HIV positive and I have kidney complications. I pray to be given chance to reach home."

The trial Judge while sentencing stated as follows:

"The deceased was killed in the most gruesome manner by somebody with whom she was married and probably trusted that he could not do such a thing to her. Spouses should feel safe in their homes and the danger to their lives should never come from their spouses. This is one killing that calls for the maximum death sentence which this Court will pass.

ZAKARIA KWOBA having been convicted of the offence of murder is sentenced to suffer death in the manner authorised by law."

From the above, it is clear that the learned trial Judge considered the aggravating factors and did not consider the mitigating factors. The trial Judge ought to have weighed the aggravating factors against the mitigating factors while sentencing the appellant.

We therefore set the death sentence aside for that reason only and invoke **section 11 of the Judicature Act (CAP 13)** which vests this Court with powers of original jurisdiction to determine an appropriate sentence in the circumstances of this case.

The **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013,** provide for the starting point in sentencing for murder as 35 years and the maximum as death.

The appellant killed his own wife in a brutal manner. A person she was married to and trusted him with her own life. He deprived the deceased of her right to life. He also deprived the deceased's daughter of the opportunity to live with her mother. Their daughter was only two years old when she witnessed her own mother's murder, this must have scarred her for life! We take into consideration, that the appellant is a first

offender, of advanced age of 52 years, had family responsibilities, is remorseful and is suffering from ill health including HIV and kidney complications.

As we assess the appropriate sentence for the appellant, we shall consider sentences in similar cases by the Supreme Court.

The Supreme Court handled a similar matter in ***Aharikundira Yustina vs Uganda, Criminal Appeal No. 27 of 2015,*** where the appellant murdered her husband and was convicted and sentenced to suffer death. The Court of Appeal upheld both the conviction and sentence as passed by the trial Judge. The Supreme Court confirmed the conviction but set aside the death sentence because the trial Judge did not consider the mitigating factors raised by the appellant. The Justices substituted the death sentence with a 30 years term of imprisonment.

In ***Supreme Court Criminal Appeal No.54 of 2016, Abaasa Johnson and Muhwezi Siriri vs Uganda,*** Court upheld a sentence of 35 years imprisonment for murder as varied by the Court of Appeal. The trial Judge had sentenced the appellants to life imprisonment and the same was set aside by the Court of Appeal and substituted with a sentence of 35 years imprisonment.

We have considered all the aggravating and mitigating factors in this case and hereby sentence the appellant to 35 years imprisonment. We deduct the 3 years and 5 months that the appellant spent on remand. The appellant will therefore serve a sentence of 31 years and 7 months' imprisonment. The sentence shall run from 28th September, 2010 the date of conviction.

We so order.

Dated at Jinja this 24th day of Sept 2021

BSC

RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

CHEBORION BARISHAKI
JUSTICE OF APPEAL

HELLEN OBURA
JUSTICE OF APPEAL