THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.025 OF 2014

CORAM:
Hon. Lady Justice Elizabeth Musoke JA,
Hon. Lady Justice Catherine Bamugemereire JA,
Hon. Mr. Justice Stephen Musota JA

KAWOOYA MOHAMMED :::::::::::::::::::::::::: APPELLANT
VERSUS
UGANDA:: RESPONDENT

(Appeal from the decision of Wilson Masalu Musene J sitting at Entebbe High Court Session dated 15th January 2014)

JUDGMENT OF THE COURT

Background

The Appellant was indicted for the offence of Murder contrary to sections 188 and 189 of the Penal Code Act. It was alleged that on the night of 4th November 2011 in the Lake Victoria area of Kitinda, Katabi sub-county in Wakiso district, the Appellant murdered Ronald Buwembo.

Grounds of Appeal

1. **That the learned Trial Judge erred in law and fact when he convicted the Appellant relying on an uncorroborated dying declaration thereby occasioning a miscarriage of justice.**

2. **That the learned Trial Judge erred in law and fact when he sentenced the Appellant to suffer death, which is illegal harsh and excessive thereby occasioning a miscarriage of justice.**

Representation:

The Appellant was represented by Mr. Richard Kumbuga for Messrs Kumbuga & Co. advocates on state brief while the respondent was represented by Ms Caroline Marion Acio, learned Chief State Attorney from the office of the Director of Public Prosecutions.

Appellant's Submissions

Regarding Ground No.1, Counsel submitted that there was no sufficient evidence to corroborate the dying declaration relied upon by the Respondent. Counsel attacked the evidence of **PW4** and asked this court to find that the statement he heard did not amount to a dying declaration although **PW4** claimed to have heard it. Counsel submitted that it was on record that **PW4** did not mention anywhere in court that he recognised this as the voice of the deceased. Counsel questioned the findings of the Trial Judge when he relied on the 'dying declaration' when there was no credible independent information or evidence to corroborate the dying declaration. It was counsel's submission that the Trial Judge erred in law and fact when he based on such evidence to convict the Appellant.

In regards to Ground No. 2, counsel for the Appellant submitted that the Trial Judge did not take into account the mitigating factors including that; that the Appellant was a first offender and a parent with eight children, thus arriving at a harsh and excessive sentence of death. Counsel contended that had the Trial Judge addressed his mind to the mitigating factors and the court's past decisions in similar matters, he would have arrived at a more lenient sentence.

Further, it was counsel's submission that according to the Constitution **(Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** a death sentence is only handed down in the rarest of rare cases and no circumstances existed in the instant case to qualify it as the rarest of rare cases. Counsel submitted that it was therefore erroneous of the learned Trial Judge to sentence the Appellant to death.

Counsel prayed that this Court considers the sentence passed against the Appellant as harsh and excessive and substitute it with a fairer and more lenient sentence bearing in mind the time the Appellant has spent in lawful custody.

Respondent's submissions

In reply to Ground No.1, counsel for the Respondent submitted that the dying declaration was corroborated by the evidence of **PW4**. It was **PW4's** evidence that he heard

an alarm emanating from the waters of the lake at 5:30 am. Soon thereafter he saw Kawooya, the appellant, emerging from the lake. It was PW4's testimony that the appellant informed him that he had fought a boy over theft of nets and left him in the lake waters. Counsel equally relied on the evidence of **PW3** which corroborated, in material particulars, the evidence of **PW4**. It was PW3's evidence that the deceased and the Appellant left the village on the of 3rd November 2011. The deceased was never seen alive again.

Counsel added that the totality of the various pieces of evidence including the medical report, the immediate appearance of the Appellant from the direction of the alarm, the instantaneous admission by the Appellant that he had a fight with a boy over theft of his fish nets and the corresponding injury on his figure, corroborated the dying declaration led to the inference that the circumstantial evidence unequivocally pointed to no other person but the appellant.

In regard to Ground No. 2, counsel for the Respondent submitted that the learned Trial Judge took into consideration the mitigation but the aggravating factors were so compelling that they made the death sentence justifiable. It was counsel's contention that the defence of provocation was raised at the tail end of the trial and so it seemed like an afterthought. It was counsel's submission

that the above coupled with the fact that the deceased was a young man of 22 years with a wife and 2 children made a good case for the death penalty.

In conclusion, counsel submitted that the appeal lacks merit and should be dismissed.

Considerations of the Appeal

This Court as a 1st Appellate court has a duty to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. See **Kifamunte v Uganda SCCA No. 10 of 1997.**

We have considered the submissions on behalf of both parties, critically analysed the evidence available on the court record, reviewed the case law relied on by learned counsel for both sides and have relied on other authorities beyond what was supplied by learned counsel. We now proceed to resolve the grounds of appeal in the order in which the parties argued them.

Considering Ground No. 1, we note that counsel for the appellant faulted the trial Judge for relying on the uncorroborated evidence of a dying declaration. We have carefully examined the statement allegedly attributed to the deceased which the trial Judge believed to be a dying declaration. We also closely scrutinized the learned Trial Judge's findings in this regard. We addressed our mind to

the law on dying declarations, which is **Section 30 of our Evidence Act, Cap 6.** It stipulates as follows;

"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases – (a) when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question;"

The Supreme Court of Uganda in the case of **Tindigwihura Mbahe v Uganda S.C.C.A No. 9 of 1987** clearly elaborated on the scope of dying declarations as follows;

"Briefly the law is that evidence of a dying declaration must be received with caution because the test of cross examination may be wholly wanting; and particulars of violence may have occurred under circumstances of confusion and surprise, the deceased may have stated his inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised when an attack takes place in the darkness when identification of the assailant is usually

more difficult than in daylight. The fact that the deceased told different persons that the appellant was the assailant is no guarantee of accuracy. It is not a rule of law that in order to support conviction, there must be corroboration of a dying declaration as there may be circumstances, which go to show that the deceased could not have been mistaken. But it is generally speaking very unsafe to base conviction sorely on the dying declaration of a deceased person made in the absence of the accused and not subjected to cross examination unless there is satisfactory corroboration"

Our understanding is therefore that for a dying declaration to be admissible, it must be corroborated other cogent evidence. In **Uganda v George Wilson Simbwa S.C.C.A No. 37 of 1995** it was held that:

"Corroboration affects the accused by or tending to connect him with the crime. In other words, it must be evidence, which implicates him, which confirms in connecting some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at common law or within the class of offences for which corroboration is required."

In **Kazibwe Kassim v Uganda SCCA No.1 of 2003** the supreme court of Uganda expressed its views on circumstantial evidence as follows:

'In our view, although the prosecution case wholly depended on circumstantial evidence, we think that in order

for the court of appeal to act on such evidence, the inculpatory facts against an appellant must be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt.'

In the instant case, we have critically analysed the evidence which was laid before the trial Judge. We agree that the Trial Judge correctly directed himself on the law in regard to a dying declaration in **Tuwamoi v Uganda [1967] EA 84** where the court echoed the principles on which a dying declaration should be acted upon, thus; *'The law on dying declaration is that it is made by the deceased person on the verge of death when all hope in life is gone. And when his/her conscious is silenced by no other motive other than to tell the truth.'* The learned Trial Judge noted that the deceased made the dying declaration in utter despair for his life, as he was being strangled and drowned in the lake. Knowing that at that point there was no one to rescue him, all he managed to utter was *"kawooya onzita, kawooya onzita"* meaning kawooya you are killing me. More importantly in this case, we find that the dying declaration was corroborated by the testimonies of PW1, PW2, PW3 and PW4. These were all independent accounts of what transpired on the fateful day. It was PW4's testimony that he saw the appellant swimming from the lake. The Appellant is said to have told PW4 that he had fought with a boy who was stealing his fishnets and that in the course of the fight the boy had bitten his finger. PW4

confirmed that he saw a wound on the appellant's finger. The Appellant further told PW4 that he left the boy on the waters of the lake. The following day police discovered a floating dead body at the very spot the Appellant had shown PW1 and PW2. The rising anger against the Appellant was so great that PW1 and PW2 had to rescue him from the mob, which sought to lynch him.

Sadly, Appellant's defence does not present a solid alibi and he was positively placed at the scene of the crime. The weakness of his defence notwithstanding, the prosecution case was compelling and proved the case against him beyond reasonable doubt. The appellant testified that on that fateful day, he was at home with his children and not near the scene of crime. It is trite that where an accused raises the defence of alibi, he bears no duty to prove it. As soon as the defence of an alibi is put up, the burden shifts to the prosecution to disprove the defence of alibi and to place the appellant at the scene as the perpetrator of the offence. See **Festo Androa Asenua and another v Uganda SCCA No. 1 of 1998** and **Cpl Wasswa and another v Uganda SCCA No. 49 of 1999.** To place the appellant at the scene of the crime, the prosecution relied on the evidence of PW1 and PW2. The Appellant confirmed that he was rescued by DPC Nyabongo PW1 and Corporal Wambi, PW2 but he did not mention why they rescued him. This corroborates the evidence of PW1 and PW2 who separately testified that they saved the appellant from a belligerent mob. PW1 and PW2

each testified that on 4th November 2011 they participated in rescuing the appellant from a mob which was close to lynching him. The mob accused him of murdering someone on Lake Victoria close to Entebbe. The trial Judge relied on the testimony of PW4 which was that Kawooya explained that he fought with a young man on the lake and that the young man bit his finger. PW4's testimony was that he was able see the that the appellant had an injured finger. In his defence, the appellant slightly adjusted his story when he testified that a fish bone had pierced him and that's why he had a would on his finger and that he neither showed PW4 the wound nor alluded to a fight with the deceased.

We note also that the trial Judge relied on the post-mortem report which indicated that the cause of death was Asphyxia following drowning. The defence found a contradiction in the cause of death. We have cautiously examined the facts as adduced in the evidence of PW1, PW2 and PW4 and the report of the government pathologist. We find no contradiction. After a granular look at the evidence of PW4 we find that what the medical evidence does is that it confirms the testimony that the appellant first assaulted the deceased and then pushed him down into the lake and left him to drown. We base the cause of death on scientific proof that the deceased was still alive following the fatal injury and therefore drowning accelerated his death. It was not up to the appellant to prove that the man he had fatally assaulted was dead. However, we now know from the post

mortem report that the cause of death simply put was that by letting the weakened boy drown helplessly in the water the appellant caused his death. The conviction stands. Ground No. 1 of this appeal therefore fails.

Considering Ground No.2, the Appellant faulted the Trial Judge for meting out a death penalty, which he concluded was illegal, harsh and excessive.

It is trite that an appellate court should not interfere with the discretion of a trial Judge by tampering with a sentence unless the trial Judge acted on a wrong principle or overlooked a material factor or where the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of justice. See **Kyalimpa Edward v Uganda S.C.C.A No.10 of 1995.**

In the case of **Aharikundira v Uganda S.C.C.A** No. 27 of 2015, the Supreme Court noted that;

'It is trite that a person convicted of a capital offence in this country cannot be sentenced to suffer death as a matter of course without the court considering mitigating factors and other pre-sentencing requirements. This is because a death sentence is no longer mandatory in this country: see Susan Kigula (supra). According to the above case, a death Sentence should be visited on a convict in the 'rarest of the rare cases'.

The Supreme Court further held that;

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

The Court relied on; **Suzan Kigula v Ug HCT- 00 CR-SC-0115** *(in mitigation)* where the accused cut her husband's throat with a sharp panga to death before their children and was sentenced upon mitigation to 20 years imprisonment, **Uganda v Uwera Nsenga, Criminal Appeal No. 312 of 2013** where the accused ran her husband over with a car and eventually killed him at the gate in their home and was sentenced to 20 years imprisonment and in **Akbar Hussein Godi v Uganda Supreme Court Criminal Appeal No. 3 of 2013** who shot the wife dead and was sentenced to 25 years imprisonment.

In setting aside, the death penalty in **Aharikundira** the Supreme Court alluded to the circumstances of the case;

'In the instant case (see **Aharikundira**), the appellant brutally murdered her husband and cut off his body parts in cold blood. The maximum sentence for this offence is death sentence. That notwithstanding, the appellant was a first offender with no previous criminal record and is of an advanced age. Further, she did not bother court on second appeal regarding her conviction and displayed remorsefulness. The appellant was the surviving spouse

and mother of six children. In consideration of the aggravating factors and mitigating factors of the case, and in the interest of consistency we are of the view that the death sentence in this case should not stand. The death sentence is hereby set aside and substituted with a sentence of 30 years to run from the time of conviction in the High Court.'

In the instant case, while meting the death sentence, the trial Judge made the following statements '...**This court further finds that the murder of the deceased was maliciously planned and pre-meditated, following the earlier four warnings and threats to the deceased as brought out in evidence of the helpless mother (PW3). Such a highly planned and maliciously executed murder of the deceased by the convict deserves a very harsh penalty...counsel for the convict in mitigation has stated that the convict was provoked. This is now too late, as the defence of provocation was not raised at or during trial. And much as the convict is said to be having a wife and 8 children, so is the deceased, who I have already stated was 22 years and left equally a wife and 2 children.... reckless killing and murder have to be eliminated if not avoided altogether. In the circumstances, and in view of what I have outlined, I am constrained to give the maximum penalty. You are therefore hereby sentenced to suffer death in the manner prescribed by law.'**

From the above excerpts we are concerned that the aggravating circumstances so weighed on the mind of the trial Judge that he did not consider the mitigation.

We have considered the **Susan Kigula (supra)** case, in which on re-sentencing, the procedure for mitigation in convictions of murder was introduced. We recognize that the Trial Judge followed **Guideline 19 of Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions) 2013,** which is to the effect that in a case where a sentence of death is prescribed as the maximum sentence for an offence, the court shall consider the aggravating and mitigating factors to determine the sentence in accordance with the sentencing range. We shall now consider whether the sentence handed down to the appellant in the instant case was appropriate. We have noted from the trial Judge's final remarks that he considered both the aggravating and the mitigating factors and came to a conclusion that this was indeed the rarest of the rare cases and a death penalty was most deserving. We appreciate the discretionary role of the learned Trial Judge in passing sentence. However, we have enumerated above similar cases some of which, our view, were more sordid than the matter now before us.

After careful review of case law and of the facts at hand, we have come to the following conclusions:

The circumstances under which the appellant committed this gruesome murder deserve a severe sentence. The murder was premeditated. We however, agree with the counsel for the appellant that a death penalty was a rather harsh and excessive sentence. Indeed, although this was a murder, it did not amount to circumstances falling within

the rarest of the rare. The death sentence is herewith set aside the death penalty.

We now proceed to pass a fresh sentence against the appellant in accordance with rule 39 of the Rules of this court. In doing so we take into account the aggravating factors of cold-blooded murder alongside the mitigating factors which include that the appellant was a first offender and has 8 eight children to look after. In the interest of consistency and in the light of earlier decisions as discussed above, we consider a sentence of 25years to be appropriate in the circumstances.

However, in line with **Article 23 (8) of the Constitution** we are required to set off the period the Appellant spent on remand. In this case the Appellant had spent 2 years 1 month and 3 weeks on remand. The Appellant is therefore sentenced to 22 years, 11 months and 1 week to run with effect from the 15th day of January 2014; being the date he was initially convicted and sentenced.

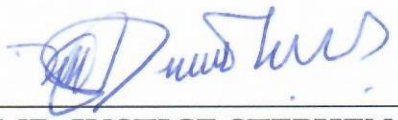
Ground No. 2 of the appeal therefore succeeds.

This appeal fails on Ground No. 1 but succeeds on Ground No. 2.

Dated at Kampala this 7th Day of March 2022.

HON. LADY JUSTICE ELIZABETH MUSOKE
JUSTICE OF APPEAL

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL



HON. MR. JUSTICE STEPHEN MUSOTA
JUSTICE OF APPEAL