THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

(Coram: Richard Buteera, DCJ, Elizabeth Musoke & Cheborion Barishaki, JJA)

CRIMINAL APPEAL NO. 352 OF 2014

RWANYAGA CHARLES::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal against the sentence of the High Court of Uganda at Kampala before V.F. Musoke Kibuuka, J dated 19th October, 2011)

JUDGMENT OF COURT

The appellant was convicted of murder contrary to sections 188 and 189 of the Penal Code Act on 16th July, 2002, by the High Court at Kampala presided over by V.F. Musoke Kibuuka, J and sentenced to death.

He appealed to this Court against conviction and the appeal was dismissed on 9th of April, 2009 for lack of merit.

On the 21st of January, 2009, the Supreme Court in ***Attorney General V Suzan Kigula and 417 Others, Constitutional Appeal No.03 of 2006,*** declared the mandatory death penalty as unconstitutional. The Supreme Court went further and directed inter alia that;

"For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall

be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law."

On 19th October, 2011, the appellant appeared before V.F. Musoke Kibuuka, J for mitigation and re-sentencing. While re-sentencing the appellant, the learned trial Judge stated as follows;

> ***"I have listened to both counsel in these proceedings for mitigation. I note that the convict in this case committed that offence of murder in extremely aggravating circumstances and the mitigating factors heard by Court today would not have changed the sentence of death imposed upon him then. The sentence remains in place."***

The appellant being dissatisfied with the sentence appealed to this Court on ground that the learned trial Judge erred in law and fact when he confirmed the death sentence against the appellant which was illegal, harsh and excessive thereby occasioning a miscarriage of justice.

At the hearing of this appeal, Mr. Mugweri Ambrose holding brief for Mr. Kumbuga Richard appeared for the appellant on State brief while the respondent was represented by Ms. Sharifa Nalwanga, Chief State Attorney.

Due to the COVID-19 Pandemic restrictions, the appellant was not physically in Court but attended the proceedings via video link in prison. Both parties sought, and were granted leave to proceed by way of written submissions which they adopted at the hearing.

Counsel for the appellant submitted that the trial Judge did not take the mitigating factors into consideration while re-sentencing the appellant. He added that the appellant was a first offender, was 29 years old at the time of commission of the offence, he was a family man with 2 wives and five children and was the one taking care of his elderly parents. According to counsel, had the learned trial Judge addressed his mind to these mitigating factors, he would have arrived at a more lenient sentence. Counsel prayed that the appeal be allowed and the sentence reduced to 30 years taking into account the period the appellant had spent in lawful custody.

Counsel for the respondent opposed the appeal and submitted that the death sentence as confirmed by the learned trial Judge was neither harsh nor excessive in the circumstances of the case, taking into account the fact that murder carries a maximum penalty of death. She added that the learned trial Judge took into account both the mitigating and the aggravating factors and found that the aggravating factors outweighed the mitigating factors hence justifying the sentence imposed by the learned trial Judge.

Counsel further submitted that Courts have the discretion to pass a death sentence although it is not mandatory. He relied on ***Bashasha V Uganda, Supreme Court Criminal Appeal No.82 of 2018*** for the proposition that the death sentence is no longer mandatory but it is a legal sentence in the country and therefore, Courts exercising discretion can pass it. She prayed that this Court upholds the sentence.

We have studied the Court record and perused the authorities availed to us by both counsel. As a first appellate Court, we are required to re-appraise all

the evidence adduced at the trial and to make our own inferences on all issues of law and fact. See: - ***Rule 30 of the Rules of this Court and Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997.***

An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a Judge exercises the discretion. It is the practice that 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. ***See Kyalimpa Edward V Uganda, Supreme Court Criminal Appeal No.10 of 1995.***

The exercise of Courts discretion is said to be judicial if the Judge invokes his powers in his capacity as a Judge qua law. Exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes and based on sound and sensible judgment with a view to doing justice to the parties. See persuasive Nigerian decision in ***Africans Continents Bank V Nuamani (1991) NWLI 486.***

In the instant case, the appellant killed one Kidega George by multiple shooting and after killing, he attempted to shoot the LC1 Chairman who had come to rescue the victim.

While re-sentencing the appellant, the learned trial Judge stated as follows;

> *"I have listened to both counsel in these proceedings for mitigation. I note that the convict in this case committed that offence of murder in extremely*

aggravating circumstances and the mitigating factors heard by Court today would not have changed the sentence of death imposed upon him then. The sentence remains in place."

It is clear from the above extract that the learned trial Judge did not take into consideration the mitigating factors as presented for the appellant. As was held by the Supreme Court in ***Aharikundira Yusitina V Uganda, SCCA No.27 of 2015***, 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 pre-sentencing requirements. This is because the death sentence is no longer mandatory in this country following the decision in ***Susan Kigula V Attorney General (supra).***

We find that the re-sentencing Judge erred in law when he failed to consider the mitigating factors before he sentenced the appellant to death. This Court as a first appellant Court can interfere with a sentence where the sentencing Judge ignored circumstances which ought to have been considered while sentencing.

Counsel for the appellant prayed that this Court reduces the sentence to 30 years taking into account the period which the appellant had spent in lawful custody.

We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing. See ***Mbunya Godfrey V Uganda, Supreme Court Criminal Appeal No.4 of 2011.***

In ***Kyaterekera George William V Uganda, Court of Appeal Criminal Appeal No.113 of 2010,*** this Court confirmed the sentence of 30 years imposed by the trial Court on the appellant who had fatally stabbed his victim on the chest.

In ***Kisitu Majaidin alias Mpata V Uganda, Court of Appeal Criminal Appeal No.28 of 2007***, this Court confirmed the 30 years sentence imposed by the trial Court on the appellant who had murdered his own mother.

In ***Uwihayimana Molly V Uganda, Court of Appeal Criminal Appeal No.103 of 2009,*** this Court reduced a death sentence of 30 years imprisonment. The appellant had killed his mother.

We note that the appellant was a first offender, he had been on remand for 2 years and 11 months. He was 29 years old at the time of commission of the offence with 2 wives and 5 children and was taking care of his elderly parents.

Having considered both the aggravating and mitigating factors, we find that had the sentencing Judge taken into account the mitigating factors, he would not have sentenced the appellant to death. For that reason, we set the death sentence aside and substitute it with a sentence of 32 years imprisonment from which we deduct the period of 2 years and 11 months spent on remand. The appellant shall therefore serve a sentence of 29 years and 1 month in prison to run from 16th July, 2002, the date of conviction.

Delivered at Kampala this 24th day of Feb 2022.

RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

ELIZABETH MUSOKE
JUSTICE OF APPEAL

CHEBORION BARISHAKI
JUSTICE OF APPEAL