

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL CASE No. 170 OF 2012

UGANDA PROSECUTOR

VERSUS

CHARLES SEKAMATTE RESPONDENT

(Arising from Nakawa Court Criminal Session Case No. 496 of 2001 & Court of Appeal Criminal Case No. 188 of 2002)

Hon. Lady Justice Monica K. Mugenyi

SENTENCE

On 25th October 2002 Charles Sekamatte was convicted of murder contrary to sections 183 and 184 of the Penal Code Act and sentenced to the then mandatory death penalty. The present *allocutus* proceedings arose from the Supreme Court decision in **Attorney General vs. Susan Kigula & 417 others Constitutional Appeal No. 3 of 2006** which declared the mandatory death penalty unconstitutional.

At the present hearing, Ms. Fiona Kwezi appeared for the prosecution, while Mr. Henry Kunya represented the convict. Ms. Kwezi conceded that the convict was a first offender but raised a number of aggravating factors. She contended that the convict killed his child because he had failed to look after him; described the murder of a child by its father as sacrilegious, and the manner in which it was executed as cold-blooded, inhuman and indicative of complete disregard for human life. Ms. Kwezi further contended that out of fear for the other children's lives, the victim's aunties took his siblings away.

On his part, Mr. Kunya contended that the convict was very remorseful and had been so since the murder incident. He argued that although learned state counsel had alluded to the rampancy of child murders by people in positions of trust, she did not provide any statistics in support of her assertion. Mr. Kunya further argued that each case should be considered on its own merits, contending that the circumstances of the present case were that the convict and his family were engaged in reconciliatory discussions; the family was willing to receive him back to undertake his parental responsibilities to his surviving children, and it had vouched for the convict's good

character prior to the child's murder. A report of a reconciliatory meeting held 18th July 2012 was availed to court.

Mr. Kunya further contended that depicting the convict as a danger to other children would be speculative and invited court to consider the following personal mitigating circumstances: that the convict was a first offender; he had been in incarceration for close to 13 years; was about 50 years old and therefore still productive; had 3 children; was the sole surviving parent and, finally, that the convict be given a second chance since he might have been driven into murdering his child by mental shortcomings but had since undertaken self-improvement courses. He referred this court to the cases of **Wofeda Steven vs. Ug. Crim. Appeal No. 169 of 2003** and **Ug. vs Kyomukama Crim. Appeal No. 60 of 2005** (both, court of appeal) in support of his plea for leniency on the basis of the convict being a first offender and a sole surviving parent.

In turn, the convict informed court that he considered the death penalty unfair; that at the time he committed the murder he was consumed by anger but had since learnt anger management and attended self-help courses; he had since sought forgiveness from his family, as well as that of his deceased wife prior to her death, and had in July 2005 undergone a stomach operation that left him weak and unable to eat prison food.

The present proceedings entail a 'reference-back' case having been referred back to this court on the premise of a prior mandatory death sentence that was subsequently declared unconstitutional. The fundamental issue in such proceedings would be whether or not, with recourse to the mitigating and aggravating circumstances peculiar to a case, the death sentence should be sustained and, if not, what would be an alternative and appropriate sentence.

Article 6(1) of the International Covenant on Civil and Political Rights is quite instructive on the applicability of the death penalty in countries where it remains an option such as post-Kigula Uganda. The provision reads:

“In countries that have not abolished the death penalty, it may be imposed only for the most serious of crimes”

What constitutes 'the most serious of crimes' has been persuasively addressed by a number of common law jurisdictions. In India a very restrictive approach has been applied that reserves the death penalty for the 'rarest of rare' cases when the alternative of life imprisonment is demonstrably inadequate. See **Fitzgerald, Edward QC & Starmer, Keir QC, 'A guide to sentencing in capital offences', Death Penalty Project Ltd, 2007 at p. 13.**

In South Africa the applicability of the death sentence was most persuasively summed up in the case of **State vs. Makwanyane 1995 (3) SA 391, para.46 (constitutional court)** as follows:

“Mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence

of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied upon by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighted with the main objectives of punishment ... deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objectives of punishment would not be properly achieved by any other sentence." (*emphasis mine*)

This position has since been re-echoed in the Caribbean case of Harry Wilson vs. The Queen (28th November 2005) where it was held:

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

In the present case, the personal circumstances of the convict as borne out by the trial court record and documents availed to this court are that he was a first offender; was about 50 years old; has been in incarceration for 13 years, and had undertaken a self-improvement course and pursued reconciliation while in custody. A convict's being a first offender is a factor that warrants a degree of leniency to distinguish his penalty from that earned by repeated offenders. Further, at 50 yrs, the convict does still have some productive years ahead of him. This court also notes the reconciliatory overtures made by the convict viz his family as depicted in the reconciliatory meeting of 18th July 2012. Indeed, the convict's aunty and sisters were present during the present proceedings. I consider all these circumstances to be general mitigating factors.

The trial court record did also allude to the convict having been 'possessed' into murdering his child and, contrary to the contention of defence counsel, that his 3 surviving children were born of different mothers from that of the deceased and lived with their mothers not the deceased. However, these circumstances are quite subjective given that they were neither sufficiently established in the trial proceedings nor proved or disproved in the present proceedings. This raises questions as to the burden and standard of proof in *allocutus* proceedings, as well as how sentencing courts should address mental factors of possible diminished responsibility by a convict.

It is trite law that the onus to prove aggravating circumstances beyond reasonable doubt lies with the state, as does the onus to disprove mitigating circumstances to the same standard. See State vs. Makwanyane (supra). With regard to mental factors, Fitzgerald, Edward QC & Starmer,

Keir QC, 'A guide to sentencing in capital offences', Death Penalty Project Ltd, 2007, pp. 22, 23, paras. 40, 42 advanced the following position:

“Failure to establish the defence of diminished responsibility at trial does not exclude the relevance of mental factors at the sentencing stage. The underlying principle is that nobody should be convicted of a capital offence, sentenced to death or executed if they suffer from significant mental disorder at the time of the offence.”

In the present case, defence counsel sought to argue the convict's mental state as a mitigating factor. This was not disproved by state counsel. The convict's mental state was also attested to by PW1 at trial. In the present proceedings the convict himself stated that at the time he committed the offence he was extremely angry. In my view, a person that is so consumed by anger that he is driven to kill his own, innocent 2 year old child may be deemed to be possessed of so unbalanced a mental state as would be tantamount to significant mental disorder. I would therefore accept the convict's mental state as a mitigating factor against the imposition of the death sentence.

In the result, I decline to uphold the death sentence originally imposed by the trial court for the following reasons. First, the convict's mental state at the time he committed the present offence connoted a degree of diminished responsibility that would exclude him from the death penalty. Secondly, given his unbalanced mental state at the time, the convict belongs to a category of offenders that could be reformed; has demonstrably commenced self-help courses while in custody – an important first step in the reformation process and, therefore, the objectives of sentencing would be served better by a term rather than death sentence. With recourse to the foregoing considerations, in my view, the present convict is a first offender against whom the maximum sentence is not warranted.

I now revert to a consideration of an appropriate sentence. In Odoki, B. J, 'A guide to Criminal Procedure in Uganda', LDC Publishers, 2006 (3rd Edition) at p.164, retribution was advanced as one of the objectives of sentencing to wit: **‘punishment is also said to be an expression of society's disapproval of the accused's conduct.’** In the same literature (at p.165) reformation is advanced as another objective of sentencing in so far as **‘punishment is believed to bring remorse, repentance and reform.’** It is also a principle of sentencing that the more wicked the circumstances under which an offence is committed the stiffer the penalty.

In the present case the convict was convicted for the murder of his own 2 year old child. He tied up the child, took him to a pit latrine but, because the child was crying profusely, he initially left him there. He later went back, strangled the child and threw him into the latrine. Although at trial the convict denied responsibility for the child's death, during the present proceedings he conceded this critical fact, demonstrated willingness to take responsibility for his actions and did appear fairly remorseful. I am alive to the possibility that the passage of time between the

convict's conviction and initial sentencing and the present proceedings was a contributory factor in the convict's remorse.

In Fitzgerald, Edward QC & Starmer, Keir QC, 'A guide to sentencing in capital offences', Death Penalty Project Ltd, 2007 at p. 29, considering the effect of post-conviction delay on sentencing, it is posited that **'where a defendant's case is referred back to the courts on the basis that the sentence imposed on him (earlier) was unlawful because it was mandatory ... the effect of the delay has to be placed alongside the other factors, which must be weighed cumulatively.'** Therefore, the present convict's remorse shall be weighed alongside all available aggravating and mitigating circumstances.

I would agree with learned state counsel that the convict was convicted of a grave offence which he executed inhumanly and with complete disregard to the sanctity of human life. The homicide in question was not the result of a sporadic fit of anger but rather entailed pre-meditated murder. Having noted the crying of the distressed child, the convict could have re-thought his murderous intent but instead went ahead and brazenly executed it. These, in my view, are aggravating circumstances.

Perhaps more importantly, I am acutely aware that the convict was at the time he committed the murder the deceased child's father; a person in a very unique position of trust viz his victim; arguably the single most important person as far as the child's security and wellbeing was concerned. It is an extremely deplorable, despicable and perverse inventory of the convict's sense of paternal responsibility and civic duty, as well as an affront to the social-moral norms that define a civilised society that a father would extinguish the life of his young and innocent offspring the way the present convict did. If he was so desperate about his circumstances in life, it is his life and not that of the innocent child that should have been in contention. Indeed, the general rule on first offenders notwithstanding, the murder of children by the people they most hold in trust – their parents – should be considered an exception to this rule. If, as an introduction to crime, a deranged parent degenerates into murdering his own child what more offence(s) must the courts await before s/he can be severely punished? There is, therefore, need to express societal and indeed this court's disapproval of the present convict's actions.

While the convict's mental state was a mitigating factor against the death sentence, in my view, it is an aggravating factor with regard to a possible term sentence. This court is unable to dispel its doubts that such an obviously unbalanced and possibly deranged human being would over 13 years metamorphose into a harmless and responsible member of society. I am aware that the convict has a post-operation health condition that merits a special 'soft' diet but am also cognisant of the fact that he has ably subsisted with this condition in custody for the last 7 years. I have already considered the objective of reformation as a premise for declining to pass the death sentence in this case. Nonetheless, the convict must face appropriate retribution for his gruesome and inhuman act.

Therefore, I hereby sentence the convict to 32 years imprisonment to run from the date hereof.
The convict has a right to appeal this sentence within 14 days hereof.

Monica K. Mugenyi

JUDGE

20th September, 2012