

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL CASE No. 0067 OF 2014**

**UGANDA** ..... **PROSECUTOR**

**VERSUS**

**BAIGA KUCHIKA** ..... **ACCUSED**

**Before: Hon Justice Stephen Mubiru.**

**SENTENCE AND REASONS FOR SENTENCE**

The convict was indicted with one count of murder c/s 188 and 189 of the *Penal Code Act*. When he appeared for plea taking before this court on 19<sup>th</sup> July 2016, he readily pleaded guilty to the indictment. He was therefore convicted on his own plea of guilt after he confirmed the correctness of the facts as read to him. The facts were briefly as follows;

There were two clans that were involved in a dispute over land in Koboko District. The dispute was between the Nyori clan and the Mudisa clan. The convict belongs to the Nyori clan. On 10<sup>th</sup> December 2012 at around 10.00 am, a group of the Nyori clan attacked another of the Mudisa clan as they harvested crops in the garden. They were armed with bows arrows, pangas and clubs. During the attack, the deceased was badly injured by the accused and his group. He was cut with a panga in the head and shot with a gun in the chest. He was rushed to Koboko health center for treatment but he died on the same day. The matter was reported to the police. The convict was arrested and charged.

In her submissions on sentencing, the learned State attorney prayed for a deterrent custodial sentence of not less than fifteen years on grounds that the maximum penalty for the offence is death and the fact that it was committed by the convict as part of a group in exercise of mob justice, which is a menace in the region as a common means of settling disputes over land. Counsel on state brief for the accused, Mr. Ben Ikilai prayed for a lenient custodial sentence of

not more than seven years on grounds that the convict is only 39 years old, a first offender who had readily admitted his guilt, a family man with three wives and six children who has been on remand since 10<sup>th</sup> December 2012, a period of three years and seven months.

In his *allocutus*, the convict prayed for a term of imprisonment not exceeding six years on account of his expressed remorsefulness for having caused the death, it was his first time to commit an offence and he will never do it again and that he has an aged mother with a fistula complication who requires his constant care.

The offence for which the accused was convicted is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. Despite the language expressed in the Act, i.e. "shall suffer death," the sentence is not mandatory (see *Attorney General v Susan Kigula and 417 others, S.C. Const. Appeal No. 03 of 2006*).

The court is mindful of the purposes for which punishment may be imposed, i.e; - to punish the offender to an extent and in a manner which is just in all of the circumstances (just punishment); to denounce the type of conduct in which the offender engaged (denunciation); to deter the offender (specific deterrence) or others (general deterrence) from committing offences of the same or a similar character; to facilitate the offender's rehabilitation; to protect the community from the offender (incapacitation); or a combination of one or more of those purposes.

A court must have regard to the sentencing factors that are present in a particular case when determining the nature and length of the sentence that will appropriately give effect to the purposes for which the sentence is imposed. Among the many sentencing factors the maximum penalty is listed first and is considered to be of primary importance in the sentencing process. In reaching a sentence, judges are guided by the maximum penalty, rather than directed towards it. The maximum is the penalty prescribed for the worst class of case. It is used as a navigational aid and the court may decrease the sentence that might otherwise be imposed, if the circumstances so warrant.

The penalty for murder as prescribed by section 189 of the *Penal Code Act* is death. It should at once be said that this represents the maximum sentence and this is reserved for the worst

of the worst cases of murder. For example in *Mugabe v Uganda C.A. Cr. Appeal No. 412 of 2009*, in its decision of 18<sup>th</sup> December 2014, the Court of Appeal confirmed the death sentence for a thirty year old convict who following an allegation of rape against him, was heard threatening that he would kill a member of the deceased's family. The deceased was aged twelve years and on the fateful day he was sent by his father to sell milk at a nearby Trading Centre. He never returned home. The relatives made a search for him and his body was discovered in a house in a banana plantation. The appellant had been seen coming out of this house. On examination of the body of the deceased, it was revealed that the stomach had been cut open and the heart and lungs had been removed. His private parts had also been cut off and were missing from his body. The cause of death was severe hemorrhage due to cut wounds and the body parts removed. The accused pleaded guilty on arraignment. He was sentenced to death despite his plea of guilty. His appeal against the sentence of death was dismissed on grounds that the killing was cold blooded and senseless, and after the killing, the body was dismembered and some organs removed, for whatever reason. Furthermore, the appellant was not a first offender; he was serving a twenty seven year term of imprisonment for rape, in which case the court could not find any factor that would go towards mitigating the sentence. The case before me does not fall in that category. I am not faced with a situation of a callous, calculated, well planned and pre-meditated killing but rather a retaliatory or reprisal attack in assertion, albeit unlawfully, of assumed clan proprietary rights over a disputed tract of land. I have for that reason discounted the death sentence.

Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 1 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment. There is a duty to impose a sentence within the range specified by these guidelines. Although significant, the maximum penalty is only one of many sentencing factors that must be considered by a judge. Other factors include current sentencing practices (the actual sentences given for past examples of the offence), the nature and gravity of the offence, the offender's level of responsibility and moral culpability for the offence, the previous character of the convict and any

aggravating or mitigating circumstances. A Judge can in some circumstances depart from the sentencing guidelines but when doing so is under a duty to explain reasons for doing so.

I have considered the aggravating factors in this case being; the manner in which the offence was carried out i.e. the use of a pangas and a firearm, targeting vulnerable parts of the body of the deceased (being the head and chest of the deceased), the fact that the convict was part of a group or gang attacking a defenseless victim, the offence was motivated by and demonstrated hostility based on the victim's clan as a discriminating characteristic and the impact of the crime on the victim's family, relatives and the community at large, having lost one of their innocent own. Loss of life in such circumstances deserves a deterrent punishment. These aggravating factors operate to increase the sentence from the starting point stipulated in the sentencing guidelines. The present case involved the use of a firearm which by any view is a lethal weapon. The deceased was the victim of a single gunshot to the chest. This emphasized the lethal nature of the firearm. It should be understated that incidents of mob justice over land disputes and firearm offences have become a scourge in this region incurring the indignation and profound concern of law-abiding citizens. Accordingly, in light of the above-mentioned aggravating factors, I have adopted and raised a starting point of forty five years.

From this, the convict is entitled to a discount for having pleaded guilty. The practice of taking guilty pleas into consideration is a long standing convention which now has a near statutory footing by virtue of regulation 21 (k) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. As a general principle (rather than a matter of law though) an offender who pleads guilty may expect some credit in the form of a discount in sentence. The stipulation though in the guidelines for considering a plea of guilty is a mere guide and does not confer a statutory right to a discount which, for all intents and purposes, remains a matter for the court's discretion. As seen in *Mugabe v Uganda C.A. Cr. Appeal No. 412 of 2009*, in some extreme cases of murder, a plea of guilty will not mitigate the death sentence. Where a judge takes a plea of guilty into account, it is important that he or she says he or she has done so (see *R v Fearon [1996] 2 Cr. App. R (S) 25 CA*). In this case therefore I have taken into account the fact that the convict readily pleaded guilty, as one of the factors mitigating his sentence.

The sentencing guidelines leave discretion to the Judge to determine the degree to which a sentence will be discounted by a plea of guilty. As a general, though not inflexible, rule, a reduction of one third has been held to be an appropriate discount (see: *R v Buffrey (1993) 14 Cr App R (S) 511*). Similarly in *R v Buffrey 14 Cr. App. R (S) 511*, the Court of Appeal in England indicated that while there was no absolute rule as to what the discount should be, as general guidance the Court believed that something of the order of one-third would be an appropriate discount. In light of the convict's plea of guilty, and persuaded by the English practice, because the convict before me readily pleaded guilty, I propose at this point to reduce the sentence by one third from the starting point of forty five years to a period of thirty years.

I must now take into account and seek guidance from current sentencing practices (the actual sentences given for past examples of the offence). In this regard, I have considered a few cases including the case of *Uganda v Businge Kugonza H.C. Cr. Sess. Case No. 162 of 2012* where the accused was convicted of murder after a full trial and was on 11<sup>th</sup> September 2013 sentenced to 20 years' imprisonment. The convict in that case had dug hole in the wall of the victim's house and cut him to death with a panga while he slept in his bed. In another case of *Sebuliba Siraji v Uganda C.A. Cr. Appeal No. 319 of 2009*, in its decision of 18<sup>th</sup> December 2014, the court of appeal confirmed a sentence of life imprisonment. The facts of the case were that the victim was a businessman and the accused was his casual labourer. At one time certain goods belonging to a customer of the deceased were stolen and the deceased identified the appellant as the culprit after which, the appellant was arrested. The police granted him bond, which he jumped and threatened to deal with the deceased. On August 9, 2005, the accused waited for the deceased with a panga hidden in a kavera (polythene bag) and when the deceased opened his vehicle, the appellant attacked him and cut him with a panga on his head, neck and hand. Witnesses who were at the scene came and rescued him and took him to Mulago hospital but he died hours later. The appellant was convicted on his own plea of guilty.

Lastly, in *Uganda v Ocitti and Another H.C. Cr. Sess. Case No. 428 of 2014*, a 43 year old accused who pleaded guilty to the offence of murder was on 7<sup>th</sup> November 2014 sentenced to twenty five years' imprisonment. The convict in that case used an axe to hit the deceased at the

back of the skull multiple times. The trial Judge expressed the view that had the accused not pleaded guilty, she would have sentenced him to fifty years' imprisonment.

The cases I have cited do not reveal a consistent pattern of sentencing for this type of situation. At one extreme, in the case of *Sebuliba Siraji v Uganda C.A. Cr. Appeal No. 319 of 2009*, a life sentence was imposed for a pre-meditated murder despite a plea of guilty. At the other end, in the case of *Uganda v Businge Kugonza H.C. Cr. Sess. Case No. 162 of 2012*, an apparently lenient sentence of twenty years' imprisonment was imposed following a conviction for murder after a full trial.

In imposing discretionary custodial sentences, there is a requirement that custodial sentences should be for the shortest term commensurate with the seriousness of an offence. The seriousness of this offence is mitigated by a number of factors. In my view, making allowance for the public expression of remorse by the convict during his *allocutus*, the fact that he is a first offender and a relatively young person at the age of thirty nine years, with a family and dependant mother, the severity of the sentence he deserves has been tempered and is reduced further from the period of thirty years, proposed after taking into account his plea of guilty, now to a term of imprisonment of twenty five years.

There is however an additional mandatory constitutional requirement enshrined in Article 23 (8) of the Constitution to take into account the period spent on remand while sentencing a convict. It provides;

Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends 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.

This provision was applied in *Naturinda Tamson v Uganda C.A. Cr. Appeal No. 13 of 2011* where the Court held that 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.

This obligation was further emphasized by the Supreme Court in the case of *Kabwiso Issa v Uganda [2001- 2005] HCB 20*, when it held that:

Clause (8) of Article 23 of the Constitution of Uganda is construed to mean in effect that the period which an accused person spends in lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the Court pronounces the term to be served.

The manner of doing this was explained in *Kizito Senkula v Uganda S.C. Cr. Appeal No.24 of 2001*, and *Katende Ahamad v Uganda, S.C. Criminal Appeal No.6 of 2004* where the Supreme Court held that in Article 23 (8) of *the Constitution*, the words “to take into account” do not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand, from the sentence to be meted out by the trial court. This decision was followed by the Court of Appeal in *Zziwa v Uganda Cr. Appeal No. 217 of 2003*, and *Kaserebanyi v Uganda Cr. Appeal No. 40 of 2006*, among other cases, where it was decided that to take into account does not mean a mathematical exercise. What is necessary is that the trial Court makes an order of sentence that is not ambiguous. The Supreme Court was understood as having made it clear that what is important is clarity by the trial Judge. He or she should explain and be clear that the period spent on remand has been taken into consideration.

Unfortunately, the practice after those decisions does not seem to have construed “taking into account” with such clarity as the Supreme Court anticipated would settle the controversy of that provision. Many appeals against sentence have since then continued to be raised demanding that rather than the hardly verifiable sentencing pronouncement of taking into account suggested by the Supreme Court, a mathematical deduction, by way of set-off would remove all doubt. There is therefore a school of thought by sentencing courts of considering the Supreme Court interpretation as having been based on the peculiar facts of the appeals before it at the time and instead chosen to defer to a growing practice of the less ambivalent approach of undertaking a mathematical deduction by way of set-off.

I find support for this approach in the practice of courts outside this jurisdiction such as the Caribbean Court of justice, (Appellate Jurisdiction), Belize, in the case of *Romeo Da Costa Hall v The Queen [2011] CCJ 6 (AJ)* at paragraph 42 where the Justices of appeal stated as follows;

[42] Those who perceive giving full credit for time spent on remand as being “soft on crime”, and I am mindful that there might be many with such a perception, are simply wrong. Crediting pre-sentence time is exactly what it says it is: crediting. It has nothing to do with mitigation but it has everything to do with computation and calculation. Time spent on remand should therefore be set off against the sentence, and not be used to reduce it. This is also the reason why in some jurisdictions the crediting of pre-sentence time is done by the administration instead of by the courts. It is therefore important to distinguish between, on the one hand, the length of the sentence and, on the other hand, the manner in which that sentence is to be executed or served. These two aspects of the sentencing process should not be confused. This is the reason why time spent in custody has to be counted as time already served under the sentence without it having an effect on the length of the sentence itself.

I am persuaded by the practice of set-off for purposes of removing all doubt that the period of remand has been taken into account in sentencing the convict before me. This practice is consistent with Regulation 15 (2) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. From the earlier proposed term of twenty five years, arrived at after consideration of all the aggravating factors evident from the facts of this case and the mitigating factors in favour of the convict, I hereby take into account and set off three years as the period the convict has already spent on remand. I therefore hereby sentence the accused to a term of imprisonment of twenty two (22) years, to be served starting from today.

Having been convicted and sentenced on his own plea of guilty, the convict has a right of appeal against the legality and severity of this sentence, within a period of fourteen days.

Dated at Arua this 25<sup>th</sup> day of July, 2016.

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Stephen Mubiru  
Judge.