THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL SESSION CASE NO. 0273 OF 2013

(FORMERLY COURT OF APPEAL CASE NO. 037 OF 2004)

UGANDA ---------- PROSECUTOR

VERSUS

OKIROR HAZARA AND OTHERS ---------- ACCUSED

MITIGATION OF SENTENCE BY OCHIENG SAM

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

Background

The Convict together with others were charged with aggravated robbery in 2001. He together with A_1 were convicted and sentenced to death on 18.06.04, by Hon Justice Rugadya. By then the death sentence was mandatory.

On 19.11.12, the Convict and his co accused appeared before Justice Rugadya Atwooki for mitigation of sentence.

The co. Convict (A_1) was sentenced to twenty four years imprisonment.

The Convict before court now, then A_2 was mentally ill according to the psychiatric report presented to court and could not understand the proceedings. It was contended that the mental illness arose after the conviction.

Court then directed that he be detained in a mental hospital for a period not exceeding two years when a report would be made indicating whether the Convict was mentally fit to go through the sentencing process.

When the matter was called before court on 10.12.18, his Counsel informed court that the psychiatric report had been made but was not dated. She applied for a new report to be made and the prayer was granted by court and matter was adjourned to 18.12.18. Production warrant was issued for the accused to appear on that date and it was also directed that the Director of Public Prosecutions be served.

On 18.12.18 although the Convict and both his Counsel were present, the Director of Public Prosecutions was not represented. The matter was accordingly adjourned to 09.01.19.

By 09.01.19 when all parties were in court, the psychiatric report was still missing. Fresh orders were issued to the Medical Superintendent of the Prison for psychiatric examination of the Convict. The matter was adjourned to 15.01.19.

On 15.01.19 the matter was stood over until 1.10pm when the psychiatric report was presented. But Counsel for the Convict had not had a chance to review it and be able to ably represent the accused. The case was accordingly adjourned to 21.01.19.

On 21.01.19, the Judge was indisposed. The matter was called again on 05.02.19.

Counsel for the Convict gave a brief background of the case. She stated that on the 10.12.01, the Convict together with his co accused Okiror Hazara (A_1) and others unknown broke into the home of the deceased, tied him up in the main room and beat him up.

A_1 then shot the deceased in the throat and chest, causing fatal injuries.

A number of properties were stolen together with three million shillings.

It was then submitted that, the Convict having been sentenced to death pursuant to the mandatory death provisions, was before court for resentencing pursuant to the decision of the Supreme Court in the case of **Attorney General vs. Kigula and 147 Others Constitutional Case 03/2006** which found that the mandatory death sentence unconstitutional.

It was also pointed out that on 18.11.13, when the Convict appeared for re sentencing it was accepted that he suffered from mental illness and

remained unwell. He was sent to a mental hospital for two years to receive treatment.

That while an update on his condition was provided to the Director of Public Prosecutions in 2016, his case was not returned for resentencing then.

Counsel emphasized that his co convict A_1 had been resentenced to twenty four years imprisonment in 2013, yet he was the one who actually shot the deceased. But court had found that the death sentence was not appropriate.

Court was accordingly urged to reconsider the Convict's case as it was not exceptional and as found by the Judge in the case of A_1 his co accused; the case can be dealt with by a custodial sentence.

Counsel argued that, the Convict should receive a lesser sentence than his co accused as he played a lesser role in the offence and was less capable.

That the facts of his case are not exceptional compared to other cases of aggravated robbery or other capital offences.

Also that, it is not the case that the Convict is incapable of reform and rehabilitation, on the contrary, there is a great deal of evidence to support the fact that he is a reformed character as indicated in the report dated 13.12.18 from the Prison authorities. The report shows that he has exhibited a high degree of discipline, hard work, abides by prison regulations and has changed from the person he was.

Further that, the Sentencing Guidelines paragraph 9 (3) (f) provide that court should consider the mental state of the offender before considering a custodial sentence.

While paragraph 21 (1) thereof confirms that mental disorder or disability linked to the commission of the offence is a mitigating factor.

Counsel argued that, paragraph 21 of the said guidelines is not an exhaustive list and does not bar consideration of mental health concerns arising after the commission of the offence. To do so, Counsel asserted, would be contrary to international law which prohibits the imposition of death sentence on individuals suffering from mental disorder at the time of the offence.

Further that, there are a number of psychiatric assessments in this case which demonstrate that the Convict was mentally unwell both before and after the offence with which he was convicted.

The first report indicates that the Convict suffers from schizophrenia which is an ongoing condition.

That at the time, he was severely mentally unwell and not capable of giving consent to be examined. However, examination was completed in his best interests.

That in the most recent psychiatric report by Dr. Birungi, he commented that the illness started before he was arrested and it is most likely that he was suffering from the mental disorder at the time of the offence.

Counsel contended that, the fact that the Convict was or is likely to have been suffering from a mental disorder at the time of the offence is a significant indicative factor.

And that the Convict's mental condition has made his time in prison even more difficult than it would have been for a Convict who was mentally stable. Court was urged to consider this as a mitigating factor when passing sentence.

Further that, there were also other mitigating factors court should consider:

1) The Convict did not intend to kill the deceased.

   This was accepted by the State who had originally charged the Convict with murder but amended the charge to robbery at the trial.

2) Prior to this offence, the Convict had no other convictions.

3) The Convict was of a youthful age at the time of the offence.

In his unsworn statement at the trial, he stated the he was nineteen years of age. The evidence given by Dr. Kirya was that he was approximately twenty years of age.

The Convict was or was likely to have been suffering from a mental disorder at the time of the offence.

At the times when the Convict has been mentally well, he has sought to improve himself in prison. He has accordingly completed his education up to Primary four and done a course in Conflict Resolution.

He also participates in church services and his change of character is confirmed in a report dated 14.12.18.

The Convict is a beneficiary of the **Kigula case**, which sets out mitigating factors.

He still remains in the condemned section of the Prison and has suffered physical deprivation, mental anguish and poor physical health which has resulted in suffering from ulcers which require regular treatment.

Counsel asserted that, the issue of prison conditions was explicitly considered by the Supreme Court in the **Kigula case**, when considering components of the death row syndrome.

And also that while under Article 28 of the Constitution, the Convict is entitled to a speedy hearing, in this case not only has the Convict been subjected to a sentence for fourteen years, seven months and four days but he has also waited for ten years since the Supreme Court decision in the Kigula case, to be resentenced. Delay, Counsel insisted, is a very powerful mitigating factor.

Given the mitigating factors outlined above, and the fact that the Convict was convicted of aggravated robbery and not murder, Counsel was of the view that a sentence of not more that seventeen years from the date of conviction would be appropriate.

Prior to conviction, the Convict was on remand for two years and six months, and the period should be deducted from the sentence imposed by the court, Counsel prayed.

In reply, it was the contention of Counsel for the State that, whether or not the Convict was charged with murder or aggravated robbery, the maximum sentence for the two offences is death. Therefore as to which of the two offences he was charged with is not a mitigating factor. The two offences carry the same sentence, Counsel emphasized.

However, Counsel conceded that the death sentence was not the appropriate sentence considering the fact that the case is not the rarest

of the rare. This is coupled with the mental problem the Convict suffers from, and the report from Luzira that he is capable of reforming.

But that despite that, the court should punish him for the unlawful act he committed and instead of death give him a custodial sentence of twenty four years, taking into account the grave nature of the offence he was convicted of.

The report dated 14th January, 2019 shows he had a mental illness before and after the offence but chose not to show it. He was mentally ill at the time of commission of the offence.

And that, since the record does not indicate that defence, the Convict should be given the same punishment as his co accused. That is, twenty four years imprisonment from the date of conviction.

In rejoinder, Counsel for the Convict reiterated her earlier submissions, adding that she agrees that the gravity of the offence is high and the offence very serious. But that court ought to take into account that the Convict is not the one who pulled the trigger and that he had a mental disability at the time of the offence twenty six years to twenty four years from the date of conviction.

Upon hearing the submissions of both Counsel and taking note of the evidence of the Convict's health condition, this court observes that, it has been established that mental impairment may affect a sentence of a convict in a number of ways for example

- It may reduce on offenders **"moral capability" or blameworthiness for the offence.**

This will be the case where there was a link between the mental health condition and the offence. For example, if the condition impaired the offender's ability to think clearly about the offending behavior. In the circumstances, there is less need to punish the perpetrator as harshly.

In the present case, the mental impairment was the reason for suspending the Convict's re-sentencing and require him to get treatment for two years until he was able to understand the proceedings. But it was contended then that the illness arose after the conviction.

While the report from Prison now indicates he has participated in different rehabilitation programs, exhibited a high level of discipline and

hard work and shows he is a changed person, it would not be appropriate to give him a sentence meant to send a deterrent message t the community or himself. Too heavy a punishment could weigh heavily on him in his condition and pose a risk of further deterioration.

However, A_1 was given twenty four years at re-sentencing and I therefore find that the Convict before court should be given the same for purposes of consistency.

Although Counsel for the Convict argued that he did not pull the trigger that resulted into a death during the robbery, the fact that he was with A1 who pulled the trigger brings into play S.20 of the Penal Code Act.

The section providing that, ***"when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence"***

This court therefore finds that a sentence of twenty four years will suffice to meet the ends of justice.

The sentence to run from the date of conviction.

FLAVIA SENOGA ANGLIN
JUDGE
27.02.19