

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
Coram: Arach Amoko, Opio Aweri, Mwendha, Buteera; JJSC;
Tumwesigye Ag. JSC)

CRIMINAL APPEAL NO.57 OF 2016

BETWEEN

NDYOMUGENYI
PATRICK.....APPELLANT

AND

UGANDA.....RESPONDE
NT

(Appeal from the decision of the Court of Appeal at Kampala by Kiryabwire, Mugamba, Bamugemereire JJA in Criminal Appeal No. 508 of 2014 dated 25th day of October 2016)

JUDGMENT OF THE COURT

This is a second appeal in which the appellant dissatisfied with the sentence as confirmed by the Court of Appeal appealed to this Court on one ground as hereunder:-

1. That the learned Justices of Appeal erred in law when they upheld a harsh, illegal and excessive sentence of the lower court which did not take into account all mitigating factors.

Background

The appellant was convicted of murder contrary to Sections 188 and 189 of the Penal Code Act by the High Court at Mbarara and was sentenced to suffer death. Pursuant to the Supreme Court decision **in Attorney General Vs Suzan Kigula and 417 Ors Constitutional Appeal No.03 of 2006**, this case was referred back to the High Court for mitigation of sentence only. On re-sentencing the High Court substituted the death sentence with a term of imprisonment of 32 years. The appellant

appealed against the subsequent sentence to the Court of Appeal. The Court of Appeal upheld the sentence and dismissed the appeal hence this appeal.

Submissions

The appellant's counsel in her submissions submitted that the learned Justices of the Court of Appeal did not exercise their duty properly when they failed to take into account all the mitigating factors particularly the death row syndrome before confirming the sentence of 32 years. She relied on the case of **Tumwesigye Anthony Vs Uganda Criminal Appeal No. 46 of 2012** in which the appellant had been convicted of murder and sentenced to 32 years imprisonment. In that Case, the court quashed the sentence and substituted it with 20 years imprisonment from the date of conviction. She further submitted that Court was not uniform in its sentencing since in that case, the sentence was reduced from 32 years to 20 years imprisonment and yet in this case, the 32 years imprisonment was maintained.

Counsel concluded by praying that this Court sets aside the sentence of 32 years and substitutes it with a more lenient sentence of 18 years imprisonment.

On the other hand, counsel for the respondent opposed the appeal and submitted that the appellant was sentenced to 20 years imprisonment after taking into account all the aggravating and mitigating factors and not 32 years as submitted by the appellant's counsel. That the death row syndrome was not a material factor and it was not proved that the appellant suffered from mental, psychological or emotional stress or disorder and the submission is thus based on mere speculation and conjecture. He further submitted that this being a second appeal, the appellant has a right to appeal only against the legality of the sentence and not its severity. Counsel relied on the case of **Tigo Stephen Vs Uganda Supreme Court Criminal Appeal No.08 of 2009** for this position. Counsel also submitted that none of the conditions as stated in the case of **Rwabugande Moses Vs Uganda Supreme Court Criminal Appeal No. 25 of 2014** exist or have been proved to warrant interfering with the sentence against the appellant. Counsel concluded by praying that the appeal is dismissed and sentence upheld.

Consideration of the Appeal:-

This is a second appeal and the Court is alive to its duty as settled in a host of cases and it is to decide whether the first appellate court failed in its duty to re-evaluate the evidence presented before the trial court to reach its own conclusion. **(See Kifamunte Henry Vs Uganda Criminal Appeal No.10 of 1997, Banco Arabe Espanol Vs Bank of Uganda (1998) LLR 84) (SCU).**

The appeal is against sentence only. In the case of **Tigo Stephen Vs Uganda (supra)** it was stated that on a second appeal, the appellant has a right of appeal only against the legality of the sentence, not its severity. In this case, the appellant argues that the sentence is illegal because the Court of Appeal did not take into account all the mitigating factors particularly the death row syndrome when it confirmed the sentence of 32 years imprisonment.

We accept counsel for the respondent's submissions that the appellant's counsel misdirected herself when she submitted that the learned Justices of the Court of Appeal confirmed the sentence of 32 years' imprisonment. At page 5 of their Judgment, the learned Justices of the Court of Appeal stated:

We are satisfied that the learned re-sentencing Judge took into account all aggravating and mitigating factors. She also considered the fact that the appellant had served close to twelve(12) years which period she ordered be deducted from the custodial sentence of 32 years. This means the appellant was subsequently given 20 years imprisonment....Accordingly, we find that the sentence imposed by the learned re-sentencing Judge was appropriate and did meet the ends of Justice. We therefore uphold the sentence and dismiss the appeal.

It is clear from the above excerpt that the sentence as confirmed by the Court of Appeal was 20 years imprisonment and not 32 years as erroneously submitted by the appellant's counsel.

The re-sentencing Judge whose decision was confirmed by the Court of Appeal went to great length to consider all the mitigating and aggravating

factors available at pages 1 & 2 of the Judgment before re-sentencing the appellant to twenty years imprisonment. The Court noted thus:

The convict is a first offender with no previous record of conviction. He is a family man with six children aged between twelve and twenty three years. He has been in touch with his family and they are ready to accept him back. His counsel submitted that the convict initiated a reconciliation process with the deceased's family in a letter written on 1/12/2011. The deceased's relatives responded in a letter of 12/2/2012 and accepted to forgive him. The local council executives of his area attest to his good conduct in a letter of 3/10/2011. He committed the offence at twenty eight years which falls within the bracket of a youthful age as defined by the Sentencing Directions 2013. He is living with HIV and there is a medical certificate on record to that effect. The Pre-sentence and social inquiry report on the court record indicated that he was aged twenty eight years at the time he committed the offence. He pursued various courses while in prison in the area of theology, HIV/AIDS counselling, peacemaking among others. The report of the head teacher indicated that the convict is on the process of self rehabilitation, reformation and transformation. I consider the foregoing to be factors mitigating a sentence of death under clauses 21(f)(i)(l)(m) & (o) of the Sentencing Directions, 2013.

....., In my opinion, in view of the highlighted mitigating factors, but mindful of the grave nature of the offence and the aggravating factors, if the trial court had heard the mitigation, and if the death penalty had not been mandatory at the time of conviction, a custodial sentence of thirty two years would be appropriate in the circumstances. Accordingly the death sentence on the conviction for the offence of murder is substituted by a custodial sentence of thirty two years. I note that the convict has already served close to twelve years in custody. This period should be deducted from the custodial sentence.

The Court of Appeal observed that the learned re-sentencing Judge took into account all the mitigating and aggravating factors and upheld the sentence of twenty years imprisonment.

In the circumstances, we find no reason to interfere with the sentence as confirmed by the Court of Appeal.

We therefore uphold the sentence and dismiss the appeal.

Dated at Kampala this....26TH.....day of.....APRIL.....2018

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ARACH AMOKO
JUSTICE OF THE SUPREME COURT

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OPIO AWERI
JUSTICE OF THE SUPREME COURT

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MWONDHA
JUSTICE OF THE SUPREME COURT

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BUTEERA
JUSTICE OF THE SUPREME COURT

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TUMWESIGYE
AG. JUSTICE OF THE SUPREME COURT