

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA CRIMINAL
APPEAL NO.27 OF 2015
CORAM:
(Tumwesigye, Kisaakye, Arach-Amok,Opio Aweri,Tibatemwa,JJSC)**

AHARIKUNDIRA

YUSITINA:..... APPELLANT

VERSES

UGANDA :.....

.....RESPONDENT

*arising from Judgment of Court of Appeal dated 29th day of October, 2014,
Criminal Appeal No. 033/2008 at Kabale, before Hon. Justice Remmy
Kasule, Eldad Mwangusya, Richard Buteera, JA)*

JUDGMENT OF THE COURT

Introduction

This is a second appeal by the appellant, Aharikundira Yustina, against conviction and death sentence for the murder of her husband.

Brief Facts

The brief facts forming the background to this appeal as given in the judgment of the Court of Appeal delivered on the 29th October 2014 are as follows:-

The deceased **Kajura Vicensio** was a sixty five year old resident of

Rutundwe Cell, Kyasano, Kamuganguzi SubCounty in Kabale District. He used to work in the Tea Estates in Toro District but had returned home following his retirement. He lived with his wife, **Aharik'indira Yustina** (the appellant) and their daughter **Scola Orikiriza** (PW7), a student at a nearby school.

On the 6th June 2006 Orikiriza (PW7) left the deceased at home and went to attend school. She returned home at 6.00 p.m. She did not find the deceased at home and asked the appellant where the deceased had gone and she told her that the deceased had gone to clear bushes in the garden (shamba). The deceased did not return home that night. The appellant explained that the deceased had other women where he could have slept.

The deceased did not appear for two days. The appellant kept on telling people that the deceased was around. Eventually when pressure was made to bear on the appellant, she went to report to the area chairman that the deceased was missing in the village. A search for the deceased was mounted and his body was subsequently found some distance away from his home. His throat, arms and legs had been cut. The arms had been severed from the shoulders and the legs were missing. There were no signs of struggle at the scene, indicating that the body had been brought to the scene from somewhere else.

After the recovery of the body, the home of the deceased was searched by **D/SGT Tumwebaze (P.W5)**. During the search, the deceased's mattress and a piece of cloth belonging to the appellant soaked in blood were recovered from the deceased's bedroom. According to Orikiriza (P.W.7), the appellant had locked the room from the time the deceased disappeared up to the time it was searched. P.W7 was forced by the Police to open it. The appellant was no longer sleeping in the bedroom but in the kitchen.

Following the recovery of the body, a post mortem examination was

performed by **Dr. Tom Mugisha** (P.W1), a Medical Officer whose evidence was admitted at the commencement of the trial. His findings were that the arms and legs had been cut off and the body appeared as if it had been washed. There were no blood stains and the trousers had been cut into two pieces. Both arms had been cut from the shoulders and the legs were severed from mid-thigh. There was a cut wound on the left parietal, measuring 4cm long and 1cm deep and a cut wound on the epigastrium. The cause of death was hemorrhagic shock due to excessive bleeding.

The piece of cloth and mattress recovered from the bedroom of the deceased were 10 sent to the Government Analytical Laboratory together with a sample of blood from the deceased. The examination of the blood-stains on the mattress and the appellant's old dress carried out by **Mr. Ali Lugudo (P.W6)**, an Acting Commissioner, Government Analytical Laboratory, matched the blood group of the deceased which was stated to be group "be O". The prosecution also adduced evidence that when the deceased retired from work in the Tea Estate, he , found that the appellant had sold some cows and land witho of his cows without his knowledge and had taken his Shs.300,000/= which caused a strain in their relationship leading relationship to a fight about two weeks before the deceased was killed.

The appellant had been arrested together with **Scola Orikiriza** (PW7), **Mbareeba Francis** (A2), **Bayona Silas** (A3) and **Muhoozi Alifunsi** (A4) with whom she was tried but were later acquitted.

In her defence which she gave on oath, the appellant denied that there was any misunderstanding between her and the deceased. She testified that the deceased used to drink daily and would sometimes quarrel. Further, that the deceased had gone missing on 6th June 2006 and she reported to the home of the chairperson of the area on 7th June 2006 and that when the body was found, she recognized it by the clothes he had worn. The body had been cut into pieces. She further testified that the mattress recovered from their house was not wet with blood but had blood stains from the head injury the deceased had sustained two weeks

before he died.

The trial Court believed the prosecution evidence and found the appellant guilty of murder C/S 188 and 189 of the Penal Code Act and duly sentenced her to suffer death in a manner prescribed by law. The Court of Appeal upheld the findings of the trial judge. The appellant being dissatisfied with the decision of the Court of Appeal appealed to this Court against the legality of her sentence, hence this appeal.

This appeal is premised on only one ground of appeal, namely:-

1. The learned Justices of Appeal erred in law when they failed to re-evaluate and re-appraise factors in mitigation of sentence for the appellant thereby arriving at the wrong conclusion of confirming the death sentence of the appellant which sentence was based on wrong legal principles and led to miscarriage of justice.

At the hearing of this appeal, Mr. Sebugwawo Andrew appeared for the appellant, the appellant was in Court. Ms. Samali Wakholi represented the respondent. Both counsel filed written submissions.

Submissions for the Appellant

It was submitted for the appellant that she was a first offender who had been on remand for almost three years. Further, thus she was of advanced age of 63 years, had six children in her care since she was the sole surviving parent. Learned counsel contended that the learned trial Judge did not consider the above mitigating factors.

It was also argued for the appellant that the trial judge seemed determined to hand the death penalty to the appellant when he began by saying, "frankly what message would this court send out to society if a spouse is found guilty of killing the other spouse from their bedroom in cold blood should I release her to enjoy the fruits of bumping off the deceased. I answer in the negative. I sentence the accused to suffer

death in a manner prescribed by law. ’

Learned counsel relied on the Supreme Court case of **AG v. Susan Kigula & 417 Ors, Constitutional Appeal No. 3 of 2006**, and submitted that the death sentence should be reserved for the rarest of the rare cases. Counsel contended that women and wives are considered loving, caring, nurturers and mothers of the nation and it is only in exceptional and rare cases that women are involved in murder cases and this explains why sentences handed to them have always been lighter. Counsel gave examples in the followings cases: **Uganda v Susan Kigula, HCT-00-CR- SC-0115-2011** where in mitigation the accused was sentenced to 20 years imprisonment, **Uganda v Jackie Uwera Nsenga, Nakawa High Court Case No.0312 of 2013** where the accused was sentenced to 20 years imprisonment and in **Uganda v Lydia Draru**, where the accused was acquitted of murder, convicted of manslaughter and sentenced to 14 years imprisonment.

Learned counsel contended that the Court did not address the issue of whether this was the rarest of the rare cases to deserve a death sentence.

Counsel for the appellant further contended that the death sentence being the heaviest sentence in the land had to be carefully examined at all levels of the appeal process. Counsel argued that the Court of appeal as obliged under the law did not examine the facts of the case, the mitigating and aggravating factors and determine on its own findings whether the death sentence was appropriate in the circumstances of the case.

In conclusion, counsel submitted that the death sentence handed to the appellant was not based on the correct principles of law set out in the **Susan Kigula’s Case** (supra). In counsel’s view, the Prosecution did not prove that this was a murder which qualified as the rarest of the rare to warrant a death sentence. Counsel prayed this court to allow the appeal, set aside the death sentence and replace it with a sentence of 20 years

imprisonment.

Submissions for the Respondent

It was contended by counsel for the respondent that in sentencing, the trial judge took into consideration all the mitigating factors before passing his sentence and gave the reasons why he believed the death sentence was the most fitting sentence. Counsel submitted that the trial Judge considered the violent manner in which the appellant murdered her husband and her motive for doing the same.

Counsel also contended that it was not the duty of the Court of Appeal to handle the mitigation. She argued that this is done by the trial court. Further that in this case, the appellant and his advocate gave mitigating factors on page 142 and 143 of the record of proceedings of the High Court. In counsel's view, the attempt by counsel for the appellant to do mitigation again at the Court of appeal on page 18, paragraph 2 of the record of Court of Appeal was wrong.

Counsel further argued that the sentence is being legal and all factors of mitigation having been considered and there being no indication that the trial judge followed wrong principles in sentencing, it could not be argued that the Court of Appeal erred when it did not interfere with the sentence. Counsel accordingly submitted that there was no miscarriage of justice occasioned to the appellant.

prayed this court to allow the appeal, set aside the death sentence and replace it with a sentence of 20 years imprisonment.

In conclusion, counsel submitted that the death sentence was handed to the appellant following the right principles. Further that the **Susan Kigula** case

did not in any way set out guidelines for sentencing. Furthermore, that the powers to sentence are provided by law and that therefore, the Court of Appeal acted within the law and rightly confirmed the death sentence. Counsel prayed court to dismiss this appeal.

Court Findings

The sentencing regime in this country is guided by the Constitution, statutes Practice Direction and case laws. While the Constitution lays down the general frame work on sentencing, the statutes, Practice Direction and case laws provide guidelines on sentencing.

Sentencing is the end tail of a Criminal Justice system. It is important that at the end of the trial an appropriate sentence is passed by the trial court. Sentencing is the heart and soul of Article 126 of Constitution. It is one of the various ways Courts of law are accountable to the people of Uganda on whose behalf they exercise Judicial Power under Article 126 of the Constitution. The people of Uganda expect Courts of law to pass sentences which are in conformity with law and must bear in mind the values, norms and aspirations of the people.

Before a convict can be sentenced, the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, statutes, Practice Directions together with general principles of sentencing as guided by case law.

In the instant case, the appellant was found guilty of murder and sentenced to suffer death. It is trite that 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 other pre-sentencing requirements. This is because a death **sentence is no longer mandatory** in this **country**: see **Susan Kigula** (supra). According to the

above case, death Sentence should be visited on a convict in the rarest of the rare cases.

It is also important to bear in mind that a death sentence being the heaviest sentence in the land should be carefully examined at different levels including at the appellate level to ensure its propriety. The above obligation is more compelling to this Court, since it is a Court of last resort. The Supreme Court should not merely rubber-stamp sentences passed by the trial courts and the Court of Appeal. In **Kyalimpa Edward versus Uganda, Criminal Appeal No. 10 of 1995**, the Supreme Court referred to **R vs. De Haviland (1983) 5 Cr. App. R(s) 109** and held as follows:

*“An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this Court will not normally interfere with the discretion of the trial 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: **Ogalo s/o Owousa vs. R (1954) 21 E.A.C.A. 270** and **R vs. Mohammed Jamal (1948) 15 E.A.C.A. 126**”*

While meting the death sentence in the instant case, the learned Trial Judge had this to say;

“The prosecution has called for a maximum sentence due to the brutality in which the deceased was killed by his own wife and in their own bedroom. The defence prays for lenience on account of age of the convict and the need to have support for the young six children since their father is dead.

*Frankly, since the Supreme Court decision in **Constitutional Appeal No. 3 of 2006, A.G. v Kigula and 147 others**, the High Court should exercise discretion and is under no compulsion to impose the maximum sentence.*

However, what message would this court send out to society if a spouse is found guilty of killing other spouse from their bedroom in cold blood when there is no violence from the deceased. Indeed the prosecution and even some of the accused testified that the deceased was a peaceful man and wherever he would complain about his sold cow and land, the convict would turn violent and the deceased would hold his peace. It is proven that the convict sold the deceased's land and cows and even squandered his pension funds. Should I release her to enjoy the fruits of bumping off the decease, I answer in the negative.

Dismembering a husband and father of one's children from one's bedroom calls for meting out a serious punishment whether the convict is young or old. In the circumstances of this case, I sentence the accused to suffer death in a manner prescribed by law

While confirming the above sentence the Court of Appeal observed as follows:

*“Interfering with the sentence is not a matter of emotions but rather one of law. Unless it can be proved that the trial Judge flouted any of the principles in sentencing, then it does not matter whether the members of this Court would have given a different sentence if they had been the one trying the appellant. See **Ogalo S/O Owousa v R [1954] 24 EACA 270**. In the instant case, he found that the most appropriate sentence was death. Without proof that this discretion was biased or unlawful, this Court would have no lawful means of interfering with the same”.*

The justice process starts upon arraignment of an accused person until the accused is sentenced by court. Therefore sentencing is the end tail of the justice process. It entails protecting the public interest as well as compensating victims of the crime.

The sentencing regime in Uganda as we elaborated earlier is guided by among others the Penal Code Act which stipulates the various offences

and the punishments handed down to guilty persons. The regime is further guided by the **Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions Legal notice No. 8 of 2013** the purpose of which is inter alia to provide principles and guidelines to be applied by courts in sentencing; to provide sentencing ranges and other means of dealing with offenders; to provide a mechanism for considering the interests of victims of crime and the community when sentencing and to provide a mechanism that will promote uniformity, consistency and transparency in sentencing.

The discretion of sentencing rests with the trial judge because he or she has the opportunity to watch the case proceeding before him or her and detect the accused and witnesses' behavior. The discretion must however be exercised judiciously. In the persuasive Nigerian case of **African Continents Bank V Nuamani [1991] NWLI (part 86) 486**, it was observed that,

“The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

Therefore, the judge has to apply his or her wisdom to the law applicable regarding the offence in issue. The offence in question is murder contrary to Section 188 of the Penal Code Act. The punishment of murder is well laid in Section 189 of the Penal Code Act and it is to the effect that any person convicted of murder shall be sentenced to death.

The mandatory death penalty was however overruled in the case of **Susan Kigula and Ors V AG Constitutional Appeal No. 3 of 2006** where court observed interalia that;

“Not all murders are committed in the same circumstances and all murderers are not necessarily of the same character. One may be a first offender and the murder may have been committed in circumstances that the accused deeply regrets and is very remorseful. We see no reason why these factors should not be put before the court before it passes the ultimate sentence.....”

The **Susan Kigula** case brought in the factor of mitigation in murder cases. Guideline 19 of the Sentencing Guidelines is to the effect that in a case where a sentence of death is prescribed as the maximum sentence for an offence, the court shall, consider the aggravating and mitigating factors to determine the sentence in accordance with the sentencing range.

With that back-ground, we shall now consider whether the sentence handed down to the appellant in the instant case was appropriate.

Legality of the sentence.

The appellant was convicted of murder and the maximum sentence as provided by the Penal Code Act and the Sentencing Guidelines is death penalty. The sentence handed down to the appellant was therefore legal.

Whether the trial judge ignored any circumstances to be considered while sentencing.

The appellant’s counsel submitted that the trial court did not consider the mitigating factors raised by the appellant and in the same vein, he contended that the Court of Appeal also failed in its duty to re-evaluate and consider the mitigation factors.

Counsel for the respondent argued that the trial judge considered the

mitigation factors of which some were lies.

The appellant while mitigating her sentence stated that she was a first offender, had been on remand for 3 years, she was of 63 years old mother with six children who needed her attention and therefore prayed for lenience.

The holdings of the trial court as laid out above do not reflect consideration of any of the mitigating factors but rather only the aggravating factors. The appellant mitigated her sentence before the trial judge however when giving his decision, the learned Judge did not weigh the mitigating factors against the aggravating factors. These included the fact that the convict was first offender, of advanced age and had **children who needed her attention as the surviving spouse.**

The trial judge therefore ignored putting in consideration the mitigating factors raised by the appellant while passing the sentence.

The same trend prevailed in the Court of Appeal when it failed in its duty to re-evaluate the mitigating factors. We disagree with the respondent's argument that **the** Court of Appeal does not have to handle mitigation and that mitigation process is done only in the trial court as was done in the instant case.

In the instant case, since the trial judge did not weigh the mitigating factors against the aggravated factors this automatically placed a duty on the Court of Appeal to weigh the raised factors. In the case of **Kifamunte Henry Vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, this court observed that

“It was the duty of the first appellate court to re hear the case on appeal by reconsidering all materials which were before the trial court and make up its own mind. Needless to say that failure by the first appellate court to evaluate the material evidence as a whole constitutes an error in law....”

From the foregoing, we find that the Court of Appeal erred in law when it failed to re-evaluate and re-consider the mitigating factors before it came to its conclusion. This court as second appellate court and court of last resort can interfere with a sentence where the sentencing judge and the first appellate court ignored circumstances to be considered while sentencing; See **Kyalimpa Versus Uganda (supra), Kiwalabye Benard Vs Ug (supra)**

The appellant committed murder at a relatively old age, she was a first offender and a mother to 6 children.

There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is “**manifestly excessive**”. An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation.

In the Third schedule to the Constitution (Sentencing Guidelines), the sentencing range for murder is from 30 years imprisonment to death penalty which is the maximum penalty upon consideration of the mitigating and aggravating factors.

Guideline No. 6(c) of the Sentencing Guidelines provides that

“Every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances”

While sentencing, an appellate court must bear in mind that it is setting guidelines upon which lower courts shall follow while sentencing.

According to the doctrine of stare decisis, the decisions of appellate courts are binding on the lower courts. Precedents and principles contained therein act as sentencing guidelines to the lower courts in cases involving similar facts or offences since they provide an indication on the appropriate sentence to be imposed.

According to Andrew Ashworth, a re-known English Legal Author on Criminal Justice and Sentencing, in his works “Techniques of Guidance on Sentencing [1984] Crim LR 519 at 521, he states as follows:-

“judgments of appellate courts are often substantial and consider sentencing for a whole category of similar offences including the particular offence committed by the accused, it sets down factors which are appropriately considered to be aggravating or mitigating the seriousness of the offence and state the proper range of sentences for the relevant offence. It is therefore the appellate court to consider interrelationships of sentences between the different forms of an offence. Secondly, instead of having to deal with a series of potentially conflicting appellate decisions, sentences in the lower courts are given a specific frame work to operate within.”

We are in agreement with the above passage. It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation.

Cases in point include inter alia Suzan Kigula in **Suzan Kigula Versus Ug HCT- 00 CR-SC-0115 (in mitigation)** where the accused cut her husband’s throat with a sharp panga to death before their children and was sentenced upon mitigation to 20 years imprisonment, **Uganda v Uwera Nsenga, Criminal Appeal No. 312 of 2013** where the accused ran her husband over with a car and eventually killed him at the gate in their home and was sentenced to 20 years imprisonment and in **Uganda**

Versus Lydia Draru alias Atim HCT- 00-CR-SC-0404 of 2010 where the accused hit the husband with a metal /rod , Akbar Hussein Godi in **Godi Versus Uganda Supreme Court Criminal Appeal No. 3 of 2013** who shot the wife dead AND was sentenced to 25 years imprisonment to mention but a few.

Further in a recent case of Mbunya Godfrey Versus Uganda, Supreme Court

Criminal Appeal No. 04 of 2011, the appellant murdered his wife in cold blood and court while dealing with sentence observed that;

'With greatest respect to the two courts below, we are of the view that the death sentence should be passed in very grave and rare circumstances because of its finality. When a death sentence is executed, the appellant has no chance to reform and /or to reconcile with the community. 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... '

In the instant case, the appellant brutally murdered her husband and cut off his body parts in cold blood. The maximum sentence for this offence is death sentence. That notwithstanding, the appellant was a first offender with no previous criminal record and is of an advanced age. Further, she did not bother court on second appeal regarding her conviction and displayed remorsefulness. The appellant was the surviving spouse and mother of six children.

In consideration of the aggravating factors and mitigating factors of the case, and in the interest of consistency we are of the view that the death sentence in this case should not stand. The death sentence is hereby set aside and substituted with a sentence of 30 years to run from the time of conviction in the High Court.

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The Appeal is hereby allowed.

Dated at Kampala this 3rd day of December 2018

Hon .Justice Tumwesigye

JUSTICE OF THE SUPREME COURT

Hon. Justice Kisaakya

JUSTICE OF SUPREME COURT

Hon. Justice Arach- Amoko

JUSTICE OF SUPREME COURT

Hon. Justice Opio Aweri

JUSTICE OF SUPREME COURT

Hon. Justice Tibatemwa Ekirikubinza

JUSTICE OF SUPREME COURT

