

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL No. 296 OF 2009**

(An appeal against sentence, upon conviction, by Justice Lawrence Gidudu, in High Court Criminal Session Case No. 0129 of 2009, at Kabale)

No. 017 LDU KYARIKUNDA RICHARD.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM:

- 1. HON. MR. JUSTICE KENNETH KAKURU, J.A.**
- 2. HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.**
- 3. HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.**

JUDGMENT OF THE COURT

The Appellant has appealed against the decision by Gidudu J. in which the learned judge sentenced him to death upon conviction in **Kabale Criminal Session Case No. 0129 of 2009 (Uganda vs No. 017 LDU Kyarikunda Richard)**, for murder c/ss. 188 and 189 of the Penal Code Act. Dissatisfied with the conviction and sentence, the Appellant initially appealed against both conviction and sentence. However, at the hearing of the appeal, the Appellant abandoned the ground of appeal by which he had challenged the conviction; following which he obtained leave of Court to appeal against sentence only. The remaining ground of appeal - that against sentence - stated that: -

"The learned trial judge erred in law and fact when he imposed a manifestly excessive and harsh sentence of death, disregarding the mitigation in the circumstances".

Franco Barekensi, who argued the appeal for the Appellant, submitted that the death sentence imposed by the trial judge was harsh and manifestly excessive in the circumstance of the

case, since the circumstance under which the offence was committed did not place it in the category of the rarest of the rare cases. He referred to the case of **Mbunya Godfrey vs U. - S.C. Crim. Appeal No. 4 of 2011**, where the Supreme Court set aside the death sentence the trial judge had imposed on the Appellant therein for murder, and replaced it with a sentence of 25 years instead. Counsel urged Court to impose a sentence ranging between 15 to 20 years instead; which would be the appropriate punishment.

Brian Kalinaki, Counsel for the Respondent, however opposed the appeal; and urged Court to confirm the death sentence as being appropriate in the circumstance of the case. His argument was that the Appellant was a government official; and his possession of the gun was owing to that official responsibility. He had abused the trust placed in him to protect lives and properties of people, and instead turned the gun against an innocent person; which is a very grave act warranting the imposition of the maximum sentence.

RESOLUTION OF THE APPEAL

While this is an appeal against sentence only, this Court is nevertheless duty bound, as a first appellate Court, to comply with the provisions of **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions**. This duty is well articulated in numerous cases. In **Kifamunte vs Uganda s.c. Crim. Appeal No. 10 of 1997**, the Supreme Court reaffirmed this position of the law when it stated as follows: -

"We agree that on first appeal from a conviction by a judge, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole, and its own decision thereon. The first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it."

It is from the appraisal of the evidence that we can determine whether, or not, the trial Court erred in imposing the sentence against which the Appellant has appealed. Other authorities on this proposition of the law include cases such as **Pandya vs R. [1957] E.A. 336, Bogere Moses vs Uganda - S.C. Crim. Appeal No. 1 of 1997**. The other point of importance, emphasised in the numerous authorities on the matter, is that in the exercise of the duty to make fresh appraisal of evidence, as a first appellate Court, we must bear in mind that we have not had the benefit of observing the witnesses testify in Court.

Pursuant to our duty to reappraise the evidence on record, our own finding of the relevant facts of the instant case before us, is briefly that the Appellant, a Local Defence Unit (L.D.U) officer, while in the company of another LDU officer, went to one Alex Mbabazi's house; from which he called Mbabazi out. While Mbabazi was walking in front of him, the Appellant shot Mbabazi dead at Mbabazi's compound. He was arrested, indicted for the murder of Mbabazi, and underwent a full trial. He put up a defence that while he was chasing the deceased and his gun was on his back, his sweater thread, on which the gun trigger had got stuck accidentally fired thus killing the deceased.

The trial judge rejected this; and convicted him of murder after making the following finding: -

"In this case I have come to the conclusion that the accused and his accomplice on the run set out to murder a person in cold blood and did exactly that. After the murder they went to the pit and saw his fallen body and were retreating when the GISO intercepted them and disarmed the accused."

After conviction, the trial judge sentenced him to death. It is against this sentence that he has now appealed. During the allocutus, the prosecution acknowledged that the Appellant was a first offender. However, it prayed for the maximum sentence stating that the Appellant had misused a gun he had been entrusted with, for the protection of people's lives and properties, instead against an innocent person. It sought the maximum sentence to serve as a deterrent against those charged with the responsibility of safeguarding people, from turning the weapons of protection against them.

In mitigation, it was submitted that the Appellant was 46 years old, was remorseful, has six children, has an ailing mother, and two dependant orphans of his deceased brother. The Appellant informed the trial judge that he suffers from a condition whereby his rectum protrudes out whenever he answers the call of nature. In his sentencing ruling, the trial judge was aware of his powers to exercise discretion in sentencing, owing to the fact that following the decision by the Supreme Court in **Suzan Kigula vs Uganda - S.C. Const. Appeal No. 1 of 2004**, the death sentence is no longer mandatory.

He however berated the Appellant's action as a misuse of the gun, which he was in possession of for the protection of people, but which he instead used for the killing of a person he was meant to protect; hence, he condemned the misuse of the gun as an abuse of power. He was unable to find any factors in the circumstances of the killing that would

mitigate the sentence from that of death. Accordingly, he handed down the death sentence on the Appellant to suffer death in a manner prescribed by law.

It is now settled that as an appellate Court, it is only under limited instances that we can interfere with sentence imposed by the trial Court. We can do so, only where the sentence is either illegal, or based on an erroneous principle of the law, or the trial Court failed to consider a material factor, or the sentence is harsh and manifestly excessive in the circumstances of the case. This proposition of law is well stated in numerous cases; such as **James vs R. (1950) 18 E.A.C.A. 147, Ogalo s/o Owoura vs R. (1954) 24 E.A.C.A. 270, Kizito Senkula vs Uganda - S.C. Crim. Appeal No. 24 of 2001, Bashir Ssali vs Uganda - S.C. Crim. Appeal No. 40 of 2003, and Ninsiima Gilbert vs Uganda - C.A. Crim. Appeal No. 180 of 2010).**

In the case of **Kyalimpa Edward vs Uganda - S.C. Crim. Appeal No. 10 of 1995**, the Supreme Court reiterated the principles that should govern our exercise of interference with a sentence imposed by the trial Court, by stating 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 sentencing 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 Owoura vs R. (1954) 21 E.A.C.A. 270, R. vs Mohamedali Jamal (1948) 15 E.A.C.A. 126."

In **Livingstone Kakooza vs Uganda - S.C. Crim. Appeal No. 17 of 1993**, the Supreme Court upheld the same principles; adding thereto that an appellate Court can alter a sentence imposed by a trial Court if it the trial Court had '*overlooked some material factor*'. It also advised that '*sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration:*

See **Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 270.**' In the case of **Kiwalabye Bernard vs Uganda - S.C. Crim. Appeal No. 143 of 2001**, the Supreme Court expressed itself further on the principles governing intervention with sentence imposed by a trial Court, by stating that: -

"The appellate Court is not to interfere with the sentence imposed by the trial Court which

has exercised its discretion on sentence, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where a trial Court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."

The Courts have, in numerous decided cases, laid down the rules that should guide Courts on sentencing. The governing principle reserves the death sentence, being the maximum sentence, for offences committed under circumstances falling within the category of the rarest of the rare cases. In **Kakubi Paul & Muramuzi David vs Uganda - C.A. Crim. Appeal No. 126 of 2008**, the Appellants had used pangas to hack their victim to death; and were sentenced to death. This Court set aside the death sentence, and instead imposed a custodial sentence of 20 (twenty) years in prison as an appropriate punishment in the circumstances of the case.

The Court bolstered its position in this regard with persuasive decisions from outside our jurisdiction. It relied on the case of **Atkins vs Virginia 536 US. 304 [2002]** wherein the Supreme Court of United States of America restricted the category of persons to who the death penalty should be imposed; by clarifying that it should only be: -

"... those offenders who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them the most deserving of execution."

The Court also relied on the case of **State vs Makwanyane [1995] (3) S.A. 391** where the Constitutional Court of South Africa stated that: -

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

It further relied on the Privy Council decision in **Tido vs The Queen [2011] UK PC 16**, from the Bahamas, involving an appalling murder, in which the body of the victim was found partially burnt, and having clear evidence of sexual abuse. The Privy Council nevertheless set aside the death penalty; finding that the murder did not fall in the category of the '*rarest of the rare*' cases, being the most horrific murders for which, sadly, human beings are known to be capable of.

After citing these authorities with approval in the **Kakubi Paul & Muramuzi David vs Uganda** case (supra), the Court then urged Courts to impose the death penalty only in the '*rarest of the rare, or worst of worst*' manner or category of murder. It stated as follows: -

"Consequently, the death penalty should only be imposed in circumstances which establish the gravest of extreme culpability and where a Court determines that individual reform and rehabilitation consequent to a custodial sentence would be impossible. This consideration should only be made upon consideration of expert evidence." (emphasis added).

In **Mbunya Godfrey vs Uganda** (supra) the Appellant had murdered his own wife by cutting her neck. He was sentenced to death. This Court upheld the sentence; but the Supreme Court set aside the death sentence and instead imposed a custodial sentence of 25 (twenty five) years. It referred to its decision in **Attorney General vs Susan Kigula & others** (supra) where it stated that murders are committed in various circumstances, and murderers are of varying characters as some are first offenders, others are remorseful; and these should be taken into account before imposing the death sentence.

So, it Stated in the **Mbunya Godfrey vs Uganda** case (supra), that: -

"With the 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 of 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."

It pointed out that in the **Akbar Hussein Godi vs Uganda - S.C. Crim. Appeal No. 3 of 2013** and the **Attorney General vs Susan Kigula & others** cases (supra), the Appellants had murdered their spouses, but were finally sentenced to twenty five and twenty years respectively; hence, it urged Courts to '*try as much as possible to have consistency in sentencing*'. Therefore, because the Appellant in the **Mbunya Godfrey vs Uganda** case (supra) was a first offender, it set aside the death sentence; and, instead, imposed '*a long term of imprisonment*' for 25 (twenty five) years.

In the case before us, the Appellant had as was found by the trial judge abused the trust that had been accorded him to protect people's lives and properties. Instead he turned the gun entrusted with him to commit the vile cold blooded murder for which he was convicted. This killing could not be justified under any circumstances whatever. Even then, the trial Judge, in the exercise of his discretion, ought to have considered all aggravating and mitigating factors presented to Court. He stated correctly that the death penalty was no longer mandatory, and took consideration of the fact that the Appellant was a first offender.

However, he appears to have been persuaded by the fact that the Appellant had misused his official gun to murder a civilian in cold blood to blur his mind from the consideration whether this would fall within the category of the rarest of the rare cases. We are of the view that the misuse of the gun under the circumstance of this case certainly further aggravated the crime. Notwithstanding this, we believe that the circumstance of the offence did not bring it within the category of the exceptional or rarest of the rare murders for which a convict should suffer death.

Had the trial judge had this in mind, he would have sought guidance from decided cases, to enable him impose such sentence as would maintain consistency in punishment for cases of a broadly similar nature. In **Kyaterekeru George William vs Uganda - C.A. Crim. Appeal No. 113 of 2010**, this Court confirmed the sentence of 30 (thirty) years in jail, handed down to the Appellant by the trial Court, for killing the deceased by stabbing on the chest. In **Kisitu Majaidin alias Mpata vs Uganda - C.A. Crim. Appeal No. 28 of 2007**, this Court confirmed the 30 (thirty) years sentence the trial Court had imposed on the Appellant for murdering his own mother.

In **Uwihayimana Molly vs Uganda - C.A. Crim. Appeal No. 103 of 2009**, the trial Court had sentenced the Appellant to death for murdering her husband. This Court however reduced the sentence to 30 (thirty) years in prison. As has been stated in the **Akbar Hussein Godi vs Uganda** and the **Attorney General vs Susan Kigula & Others** cases (supra), the Appellants had each murdered their respective spouse. They were sentenced, respectively, to 25 (twenty-five) years, and 20 (twenty) years, by the Supreme Court. In **Ayikanying Charles vs Uganda - C.A. Crim. Appeal No. 8 of 2012**, the Appellant had stabbed the victim to death over a land dispute. This Court confirmed the sentence of 25 (twenty-five) years in prison.

In **Atuku Margaret Opii vs Uganda - C.A. Crim. Appeal No. 123 of 2008**, the Appellant, a single mother of 8 (eight) children, had drowned an infant whose body was never recovered. This Court reduced her death sentence to 20 (twenty) years in prison. In **Koreta Joseph vs Uganda - C.A. Crim. Appeal No. 243 of 2013**, the trial court had sentenced the Appellant to 25 (twenty-five) years imprisonment for murder. This Court took into consideration the mitigating factors of the Appellant's advanced age, and was remorsefulness, and reduced the sentence to 14 (fourteen) years. These authorities are quite instructive to Court in the exercise of its discretion in imposing sentence in cases bearing some similarities.

From the above authorities, we find that the death sentence handed down by the trial Judge in the instant case before us is harsh and manifestly excessive in the circumstance of the commission of the murder. We agree that the Appellant had misused the gun he had officially been entrusted with; and there is serious need for deterrence of the culture of abuse of the gun. We are however persuaded that a custodial sentence that would reflect the gravity of the offence as pointed out by the trial judge would be appropriate punishment.

Accordingly, we set aside the death sentence appealed against; and after taking into account the aggravating factors alongside the fact that the Appellant was a first offender, and had been on remand for slightly over a year, we instead impose a sentence of 35/ (thirty\five) years in_nrison. Sentence will run from the date of conviction.

Dated at Mbarara this 6th day of December 2016

HON .MR. JUSTICE KENNETH KAKURU,JA

HON.MR. JUSTICE SIMON MUGENYI BYABAKAMA,JA

HON.MR.JUSTICE ALFONSE C. OWINY-DOLLO,JA