

THE REPUBLIC OF UGANDA

**IN THE SUPREME COURT OF UGANDA
AT MENGO**

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, JJ.S.C)

CRIMINAL APPEAL NO. 16 OF 2004

BETWEEN

PHILIP ZAHURA.....APPELLANT

AND

UGANDA.....RESPONDENT

(Appeal arising from the judgment and decision of The Court of Appeal (Okello, Engwau, Kituinba, JJ.A.) dated 11th November, 2004 in criminal appeal no. 140 of 2002,)

JUDGMENT OF COURT

The appellant, Philip Zahura, was convicted for murder and sentenced to death. His appeal to the Court of Appeal was dismissed. Hence this appeal.

The appeal to this Court was originally on the following two grounds

1. **That the Learned Justices of Appeal did not properly consider the principles of self - defence and provocation in the instant case and as a result wrongfully confirmed the appellant's conviction.**
2. **The Learned Justices of Appeal considered the principle of the dying declaration in isolation, thus they erred in law when they confirmed the appellant's conviction.**

Subsequently, we allowed the appellant to file a supplementary ground of appeal which was framed as follows:-

That the Learned Justices of the Court of Appeal erred in law and occasioned a miscarriage of justice in not giving the appellant an opportunity to be heard on the question of mitigation of sentence.

On the first two grounds, Mr Tayebwa, counsel for the appellant filed written submissions under rule 63 of the Rules of this Court and Mr. Ssemalemba, Principal State Attorney, filed written submissions in reply.

Having perused the record of proceedings and read counsel's submissions, we find no merit in the appeal. We find that the Court of Appeal correctly applied the law to the facts of this case and arrived at the correct decision. The appeal against conviction is accordingly dismissed.

On the supplementary ground of appeal, Mr. Katende, also counsel for the appellant, drew our attention to the decision of the Constitutional Court in *Susan Kigula & Others v Attorney General*, Constitutional Petition No. 6 of 2003 in which that court held that it was unconstitutional to make the death penalty mandatory and ordered, inter-alia, that -

"The petitioners whose appeals are still pending before an appellate court -

- (a) ***Shall be afforded a hearing in mitigation.***
- (b) ***The court shall exercise discretion whether or not to confirm the sentence,"***

Counsel prayed that if we uphold the conviction, we should remit the case to the High Court with directions for that Court to hear the appellant in mitigation on sentence. Mr. Katende informed Court that the decision of the Constitutional Court in ***Susan Kigula (supra)*** is the subject of appeal to the Supreme Court and each side has filed notice of appeal.

Mr. Wamasebu, Assistant Director of Public Prosecutions, for the respondent, in reply submitted that this supplementary ground was premature in view of the pending appeal. He urged the Court to stay proceedings in all appeals where the death sentence was imposed on the basis that it was mandatory.

We have considered all the submissions on this novel point. In our view accepting the submissions of counsel for the appellant would tantamount to pre-empting the decision of the Supreme Court in the pending appeal.

While the decision of the Constitutional Court must be respected for the moment, we cannot implement it while the appeal against it is pending. At the same time, it would be imprudent to postpone all the cases in which the mandatory death sentences have been imposed. In our view, this Court shall determine the appropriate order to be made in each case to ensure that the death penalty is not carried out before the determination of the pending constitutional appeal.

In the unusual circumstances created by the decision of the Constitutional Court, we exercise our discretion and postpone confirmation of sentence in this case under Article 22(1) of the Constitution, until the determination of the pending constitutional appeal against the decision of the Constitutional Court in Constitutional Petition No. 6 of 2003.

Dated this 18th day of July, 2005.

SIGNED:

A.H.O.ODER
JUSTICE OF SUPREME COURT

J.W .N. TSEKOOKO
JUSTICE OF SUPREME COURT

A.N. KAROKORA
JUSTICE OF SUPREME COURT

J.N. MULENGA
JUSTICE OF SUPREME COURT

G.W. KANYEIHAMBA
JUSTICE OF SUPREME COURT