

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**AT KAMPALA**

{Coram: Odoki, CJ., Tsekooko, Katureebe, Tumwesigye & Kisaakye, JJSC.}

*Criminal Appeal No. 10 of 2009*

1. AMBAA JACOB..... APPELLANTS  
2. ASIKU JAMIL.....

VERSUS

UGANDA ..... RESPONDENT

*{Appeal from the judgment of the court of appeal at Kampala (Twinomujuni, Kitumba & Byamugisha,, JJA) dated 02<sup>nd</sup> April, 2009 in Criminal Appeal No.203 of 2004}*

**JUDGMENT OF COURT:**

This is an appeal from the decision of the court of appeal which upheld the conviction of and sentence imposed on the two appellants by the high court at Arua. The appellants were convicted of robbery contrary to Sections 285 and 286(2) of the penal code and were both sentenced to death.

The spelling of the names of the two appellants and the order in which those names appeared on various documents in two courts below and in this appeal keep

changing. They are different from high court as correctly observed by Mr. Byansi, the Principle State Attorney. We are adopting the order and spelling which appears in the present memorandum of appeal.

The brief facts of the case as found by the two courts are clear. On the night of 28<sup>th</sup> April, 1999, a number of robbers attacked the homes of Buleni Ronald (PW1), Amoni Medina (PW2) and Asumpta Amina (PW3). These three witnesses were robbed of money and some other property. During the course of the robbery, PW1 was shot at in the left thigh. The matter was reported at the nearby Okello police post in Arua District. The next morning, a number of policemen including IP Justus Idia (PW4) and one OlemaAlifayo, LC2 Chairman, followed the footmarks of the attackers which led them to the home AsikuJamil the 2<sup>nd</sup> appellant. His wife informed the policemen that A2 had just left home for Arua. The policemen found wet clothes in the home. The same wife informed police that those clothes belonged to 2<sup>nd</sup> appellant and that he wore those clothes the previous night which he had not spent at home. Police also learnt that the appellant had come with visitors who were at that night sleeping in another house in the same compound. When the police PW4 tried to check on the so called visitors, the visitors shot at policemen instantly killing one policeman. The thugs ran way. However, one of the policemen, DC Angunyo Omari Juria (PW6), saw and recognized the first appellants pick the gun of the dead policeman before he ran from the scene with another thug. Later on, the appellants were arrested were arrested and indicted for the offence of robbery with aggravation. They were tried. At the conclusion of the two assessors advised conviction. The trial judge convicted the appellants and sentenced each to death. They unsuccessfully appealed to the court of appeal.

Hence this appeal which is based on three grounds of appeal was filed on behalf of the two appellants.

During the hearing of this appeal Mr. John Bosco Mudde of Katende, Sempembwa & Co. Advocates, represented the two appellants on state briefs. Mr. Mudde who had filed what he described as a summary of his submissions supplements with oral submissions. Mr. G.W. Byansi, Principle State Attorney, (PSA), appeared for the respondent. The learned Principle State Attorney made oral submissions.

**Ground 1:-**

The complaint in the first ground is that ***the learned Justices of Appeal erred in law and fact when admitted the evidence of the identification parade which was irregularly organized.***

**COUNSELS'S SUBMISSIONS:**

This ground is a reproduction of 2<sup>nd</sup> ground in the Court of Appeal. In both his written and oral submissions in this Court, Mr. Mudde contended that the identification parade conducted by DASP Andima Robert(PW7) was not properly conducted and alluded to identification parades as set out in the cases of **R. Vs Mwangi S/o Manna (1936) 3 EACA, 29 and Ssentale Vs Uganda(1968) EA 365** which is to the effect that

*“the accused should be placed among at least eight persons, who are as far as possible of similar age, height, general appearance and class of life as himself or herself”*

He contended that whereas A2 (who was A1 in the trial court) was aged 19 years, the other persons on the parade had a very big age difference (variance) with the 2<sup>nd</sup> appellant. These were aged 29, 36, 45, 32, 34, 55, 20, 24, 22, 23, 23, 28, and 40

respectively. He also argued that there was no comment made about the appearance of the participants in the parade which ought to be of the same class of life like the accused. In the instant case the appellant was a butcher aged 19 years, and was placed among policemen, which prejudiced the fairness of the identification parade and in effect made thee accused to stand out distinct from the other participants in the parade. He cited a number of cases such as *Njiru and others Vs Republic [2002] 1 EA 218 (CAK)*

Mr. Byansi, the PSA, in reply submitted that the identification parade Rules were not violated. That there was no objection to the holding of the parade. That the majority of the participants in the parade were within the range of the same age group. He also contended that the Court of appeal considered all evidence against the appellants before it upheld their convictions.

### **CONSIDERATIONS:**

Ground one is really in respect of the second appellant of the second appellant who was the first accused during the trial in the High Court. Like the Court of Appeal we note that no objection was raised about the conduct of the identification parade at the time it was held. The trial Judge did not comment on the ages of the participants in the parade although the majority of the participants were older than A2. But the learned judge evaluated the evidence properly. Most interestingly, the appellant's advocate (Mr. Onyarmoi) at the trial did not cross examine D/ASP Anduna Robert(PW7) who testified about how he conducted the parade in respect of A2 and co-accused called Rajab who was acquitted after the trial.

After PW7 testified that none of the participants objected to the manner of conducting the parade in which twelve volunteers took part, he tendered in

evidence the Police Form 69 on which he had recorded the proceedings of the parade. Mr. Onyarmoi, who was counsel for the appellant during trial neither, objected to the form nor did he cross examined PW7 at all on anything regarding the conduct of the parade. It is therefore not surprising that the learned trial judge hardly made comments on the parade procedures. The Court of appeal held that the learned trial judge followed the guidelines in identification of accused at the scene of crime as set out in the now famous case of **Nabulele Vs Uganda[1979] HCB 77** (the name was misspelt in the typed judgment). As already mentioned, this was the second ground of appeal in the court of appeal. After considering submissions on that ground, the court of appeal concluded (page 7 of this judgment) as follows:-

**“The learned trial judge did not comment on the conduct of the identification parade and now it affected the accuracy of the identification. However; Mr. Matovu did not point out anything that could have fatally affected the validity of the parade. It may not have been perfect but all in all, we find that it was a valid exercise and the identification of the first appellant at the parade was accurate. We are satisfied that the trial judge subjected all the evidence to scrutiny. We agree with his findings that the two appellants took part in the robbery”.**

We agree with these conclusions by the Court of appeal. The authorities cited by Mr. Mudde are distinguishable from this case. Ground one must fail.

## **GROUND 2**

The ground states that the *Learned Justices of Appeal erred in law and fact when they held that the appellants were properly identified.*

### **COUNSEL’S SUBMISSIONS:**

This ground was in effect the same as the 1<sup>st</sup> ground in memo of appeal in the Court of Appeal. Mr. Mudde contended both in his written and oral submissions that A1 was never identified. He contended that the evidence on identification is contradictory and that as time of robbery was at night at around 01:00am under difficult circumstances, the prosecution witnesses were in a state of fear. He argued that whereas PW1 and PW2 stated that they identified A1 and PW1 claims there was bright moon light while PW2 stated that he was aided by a candle light which according to learned counsel does not tally with what PW3 observed despite of the fact that all the three were in the same room.

According to learned counsel, PW2 stated that

*“the person covered his face with a cap and it was at night so I could not identify him.”*

Counsel considered this to be a major contradiction since PW2 claimed to have seen A2 yet the two witnesses were together. He relied on, inter alia, Kenya Court of appeal case of **Kiarie v Republic [1976- 1985] 1 EA 213 (CAF)**. {We would here state that in that case the Kenya Court of Appeal referred to guidelines which are stated in **Nabulele case** [Supra].}

Learned counsel contended that PW1 and PW3 contradicted each other and that there was need for caution. In reply Mr. Byansi (PSA) submitted that the Court of Appeal properly reevaluated all the evidence on record before it concluded that conditions were favourable for proper identification of A1. Learned Principle State Attorney submitted that PW1 and PW3 did not contradict each other their evidence during the trial. He also submitted (quite correctly) that there was no evidence to support Mr. Mudde's view that the prosecution witnesses feared.

### **CONSIDERATION:**

We are not persuaded by the arguments counsel for the appellants. The evidence upon which learned trial judge relied to convict the appellants is clear. Apart from the oral evidence of PW1 and 3, there is circumstantial evidence. PW1 is a close relative of A1 and had known A1 for a long time before the robbery. The robbers who robbed PW1 and PW3 left the scene of robbery and walked to the home of A1. It had rained that night. So the trail of the robbers' foot prints was visible the following day. LC2 Chairman and PW4 followed the foot marks to A1's home where they found his wet clothes. His wife informed police that those wet clothes belonged to A1 who had worn them the previous night during which night he was not at home. It seems he arrived home, changed his clothes and proceeded to Arua where he was arrested. Contrary to speculation by Mr. Mudde, PW1 testified that he did not fear. PW2, PW3 and PW4 who also testified were not cross examined by counsel for the appellants. At page 5 of its typed judgment, the Court of Appeal considered the question of identification this way:-

**“it is the duty of this Court, as s first appellant court, to re-evaluate all the evidence that was adduced before the trial court and to determine for itself whether the findings of the trial should be supported or not. In**

**doing so, the court must bear in mind that it did not have the opportunity, which the trial court had, to see witnesses give evidence in court and to assess their credibility. We have done this. We must observe that it is not fair to attack the judgment on the grounds that the trial did not adequately evaluate the evidence before him. In fact, we find that the trial judge carefully considered and evaluated at length the evidence of identification. Taking all the evidence, including the defence evidence before him, he came to the conclusion that the two appellants took part in the robbery. First, he accepted the prosecution evidence against them was circumstantial. Third, he accepted that the condition for correct identification laid in the famous case of Nabulele Vs Uganda [1979] were present. Fourth, he accepted the evidence that given that it rained on the night of the robbery, it was possible to follow the foot prints of the robbers, as the police did in this case.**

**The learned trial directed, correctly in our view, himself and the assessors as follows”**

We have already reproduced what the learned Justices of Appeal stated at page 7 of their typed judgment. Clearly these conclusions are two concurrent findings of fact by the trial court and the first appellant Court. We have not been persuaded that these concurrent findings of facts are erroneous to make us interfere. The defence of alibi could not stand. In the circumstances, ground 2 must fail. The consequence of this is that the appeal against conviction is dismissed.

***Ground 3:***

This ground is framed as follows:



***“In the alternative but without prejudice to the above (grounds 1 and 2) the file should be remitted to trial court for mitigation of sentence”.***

**COUNSEL’S SUBMISSIONS:**

We understand ground 3 to pray that the case be remitted to the trial court for submission in mitigation of death sentence. Both in his written and oral submission, Mr. Mudde wrongly cited **Constitutional Petition No. 06 of 2003 Suzan Kigula and 416 Vs The Attorney General** and contended that this court decided that the various laws of Uganda that Prescribe mandatory death sentences are inconsistent with Articles 21,22(1), 24, 28, 44(a) of the Constitution. The affected provisions include section 189 of the penal code Act which imposes a mandatory death sentence for murder, the offence for which both Kigula and her co-appellant were convicted.(Actually the proper reference of the Appeal is **Supreme Court Constitutional Appeal No. 03 of 2006- Attorney General Vs. Suzan Kigula 416 & Others**)

Learned counsel contended (correctly) that in the Kigula Constitutional Appeal decision, this court held that for those *“respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law.”*

On the other hand, Mr. Byansi, PSA, contended that submissions in mitigation were made during the hearing of the appeal in the High Court for mitigation because the court of Appeal was competent to make the order it made.

There is no gain saying that as an appellant Constitutional Court in the Kigula Constitutional Appeal [*Supra*] this Court pronounced itself as stated by Mr.Mudde.

In fact the conclusion of the Supreme Court was a modification of the order made by the constitutional Court which did not specify which court would hear submissions in mitigation. The present record of appeal shows that some of the admissions regarding mitigation of sentence were made on behalf of the two appellants during the hearing of their appeal in the court of appeal. Thus at page 5 of the hearing, record of appeal, Twinomujuni., who presided over the hearing, records the appellant's counsel as Submitting-

“In case you maintain the conviction, pray you reduce sentence. The victims were not greatly harmed and the amounts stolen were small. They have been in prison for 10 years.”

In record of Byamugisha, JA., on submission on sentences, though it contains what looks like typing errors seems to be to the same effect. Counsel for the state said nothing.

In their judgment which was delivered on 02<sup>nd</sup> April, 2009 just about two months after this Court had delivered its judgment in **Kigula Constitutional Appeal** [*Supra*] on 21<sup>st</sup> January, 2009, the learned justices justify us to interfere with the sentence"

The issue before us therefore is whether in view of the decision of this Court in the **Kigula Constitutional Appeal** [*Supra*] the Court of Appeal ought to have remitted the case to the High Court to enable the appellants to make submissions in mitigation of the death sentences there? The answer is yes because that is what this Court, as a final appellate Court in constitutional cases, ordered. In our view, and with the greatest respect to the learned Justices of the Court of Appeal, the Court erred when it heard the appeal against the death sentence by entertaining

submissions on mitigation of sentences by the appellants Counsel. Sections 11 of the Judicature Act upon which the Court of Appeal relied is headed

***“Court of Appeal to have powers of the court of original jurisdiction”***

It reads:-

***For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from exercise of the original jurisdiction of which the appeal originally emanated.***

Obviously this section empowers the Court of Appeal in Ordinary appeals to impose any order or sentence which a High Court could do. Our understanding of section 11 is that in cases where the Court of Appeal reverses a decision of court from which the appeal emanated, the Court of Appeal has the same powers, authority or jurisdiction as the Court of first instance to pass the sentence or make any order which the Court of first instance could have made. In this appeal if Kigula Supreme Court decision was not in existence, the Court of Appeal could have entertained submissions on mitigation of the death sentence and decided the third ground of the appeal as it did. However on 21<sup>st</sup> of January, 2009, this Court sitting as the final Constitutional Court of Appeal confirmed the decision of the Constitutional Court to the effect that the death sentence was not mandatory. That meant that from the day the Constitutional Court made that decision, the mandatory death sentence no longer existed. The Court ordered that all pending cases where appeals against death sentences were pending cases where pending before an appellate Court shall be remitted to the High Court for purposes of hearing appellants in those pending appeals only on mitigation of sentence. The appeal of the present appellants was one of such appeals. It was filled in the Court

of Appeal on or about 24<sup>th</sup> November, 2004. It had not been decided by the time this Court decided Kigula appeal on 21<sup>st</sup> January 2009. It is possible though that when the Court of Appeal heard the appellants' appeal, it did not appreciate that the Constitutional Court order in Kigula case was modified by the Supreme Court. Thus at page 63 of his judgment, Okello JA., as he then was, as presiding Justice of Appeal, entered the relevant order in these words-

***“(2) For the petitioners whose appeals are pending before an appellate Court:-***

***(a) Shall be afforded a hearing in mitigation on sentence.***

We would like to emphasize that after the Constitutional Court held that the mandatory death sentence was unconstitutional, and that decision was confirmed by this Court, it meant that the condemned persons remained with their convictions, but without death sentence. Normally the sentence is passed by the trial court (High Court in this case) so that the convicted person may exercise his or her right to appeal against a conviction and sentence to the Court of Appeal. This was the reason why this Court decided that pending cases go back to trial court which was now in a position to exercise judicial discretion in passing sentence. It is within the jurisdiction of the High Court as trial court to maintain the death sentence even after receiving submissions in mitigation. The convicted person, as indicated, could then still appeal the Court of Appeal against sentence. Indeed where pending appeals are remitted to High Court before appellate courts decide on merit of those convictions, appellate courts would on any subsequent appeals against convictions consider the merits of conviction.

When the Court of Appeal decided to disregard the decision of this Court in Kigula Constitutional Appeal case, because of section 11 of the **Judicature Act**, The Court of Appeal ought to have addressed itself to the fact that at that point there was no sentence being appealed since the mandatory death had been declared unconstitutional first by the Constitutional Court itself and later by this Court as the final appellate Court in Constitutional matters. The Court of Appeal would therefore be passing sentence as if it were a Court of first instance. For the Court of Appeal at this stage, to state that:-

***“We have not found any reason to justify us to interfere with the sentence”***  
is erroneous.

There is no sentence to interfere with, since it had been declared unconstitutional.

After hearing the Kigula Constitutional Appeal this Court upheld the decision of the Constitutional Court and decided that all those appeals pending consideration of the death sentence be returned to the High Court for the appellants to make submissions in mitigation of the death sentence. We did this in spite of the fact that we also had powers under section 7 of the **Judicature Act** similar to those of the Court of Appeal. Indeed during our conferencing after hearing Kigula Constitutional Court of Appeal we initially entertained the idea that in order to save time, we could ourselves consider submissions in the mitigation of the death sentence. We rejected that idea because we were bound by our constitution decision in Kigula. As a result, a number of appeals in which we had upheld convictions for capital offences but suspended decision on sentence were all returned to the High Court for hearing convicts on mitigation of the death sentence only. Such cases include ***Suzan Kigula Sserembe & Namsamba Patience Vs***

***Uganda [Supreme Court Criminal Appeal No 01 of 2004]***. We decided the merits of the conviction in the Criminal Appeal on 15/10/2008 before deciding the Kigula Constitutional Appeal itself. We suspended consideration of the appeal against the death sentence pending the determination of the Kigula Constitutional Appeal. After determining the latter appeal, we remitted the Criminal Appeal case along with many others to the High Court heard Kigula and her co-appellant on the question of mitigation and indeed reduced the sentence.

In conclusion we hold that both for the sake of consistency, but essentially in accordance with Kigula Constitutional Appeal decision all appeals against the sentence of death in capital offences where such appeals were lodged in the Court of Appeal and in this Court between 2005 and 21<sup>st</sup> January, 2009 when this Court confirmed the decision in Kigula Constitutional Appeal No. 03 Of 2006 should be remitted to the High Court for submissions in mitigation of the death sentence.

For the foregoing reason we set aside the order of the Court of appeal confirming the death sentence. We order that the file be Remitted to the High Court for the appellants to make submissions in mitigation of sentence. As Kania, J., the trial judge has since retired, this aspect of the case should be heard by any other judge of the High Court.

Dated at Kampala this 16<sup>th</sup> day of May 2012

B.J. Odoki

The Chief Justice.

J.W.N. Tsekooko

Justice of the Supreme Court.

B.M. Katureebe

Justice of the Supreme Court.

J. Tumwesigye

Justice of the Supreme Court.

E. Kisaakye

Justice of the Supreme Court.