3)

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KOLOLO

CONSTITUTIONAL APPLICATION NO.1 OF 2016

(Arising from Constitutional Appeal No. 3 of 2006)

JOHN SANYU KA TURAMU AND 49 OTHERS:::::::APPLICANTS

VERSUS

ATTORNEY GENERAL OF

UGANDA::RESPONDENT

Coram: Tumwesigye; Kisaakye; Nshimye; Mwangusya; Opio Aweri; Mwondha; Tibatemwa -Ekirikubinza; JJSC.

RULING OF THE COURT.

Introduction

This is a ruling on an application brought by Notice of Motion under Section 99 CPA 0.52 r 1 CPR, Rules 2 (2), 34 (2), 35 (1) and (2), 42 (1) of the Supreme Court Rules, OR in the alternative under section 82 (b) CPA 0.46 (1) (b) CPR Rules 2 (2),42 (1) SCR. The application sought for the following orders:-

1) A declaration that the order of court dated 21ST January 2009 in Attorney General *VS* Susan Kigula and 417 others SCCA No.3 of 2006 referred to as the I" order, was an

accidental *slip or omission or was a mistake or error of law apparent on the face of the record".*

2) An order that the accidental slip or omission be corrected with the result that the applicant shall be entitled to remission on their sentences as per the relevant provisions of the Prisons Act.

4) Or in the alternative to paragraph 2 above, an order that the mistake or error of law apparent on the face of the record be corrected with the result that the applicants shall be entitled to remission on their sentences as per the relevant provisions of the Prisons Act.

4) An order that the respondent bear the costs of the application.

The application was supported by the grounds set out in the affidavits of the head applicant John Sanyu Katuramu and Gabula Africa Evans Bright Ronald.

Briefly they are:-

1) *The applicants had all been sentenced to suffer death for various offences for which each had been convicted*

2) The applicants' death sentences arose from their respective convictions for offences where court could only mandatorily impose a death sentence.

3) *That when the applicants appealed to the Supreme Court the highest court the applicants could only appeal against conviction since the death sentence was mandatory.*

4) *That when the Supreme Court confirmed the sentences, it is only because the court had confirmed their respective convictions.*

5) *That when the Supreme Court in* **Attorney General VS Susan Kigula SCCA No. 3 of 2006** *upheld the findings of the Constitutional Court that mandatory death sentences were unconstitutional It meant that the sentences of the appellants in that appeal were unconstitutional*

6) *That consequently court revisited the sentences and in order No. 2 asked the High Court to hear submissions in mitigation of sentences.*

7) *That by slip or omission the court ordered that the applicants to whom order No. 1 pertains, should serve life imprisonment without remissions.*

8) *Or in the alternative, because of the mistake or error apparent on the face of the record court ordered that the applicants, to whom order No. 1 pertains, serve life imprisonment without remission.*

9) *That order No. 1 was not a logical consequence of the holding of the court that each convict is entitled to be heard in mitigation of sentence.*

10) That If the accidental slip or omission had not occurred court would have ordered that the applicants are entitled to remission of sentence as per the Prisons Act

11) That If the mistake or error apparent on the face of the record had not occurred court would have ordered that the

appellants are entitled to remission of sentences as per the Prisons Act

12) That it is only fair and just that the applicants be allowed to benefit from the provisions of the Prisons Act on remission of sentences.

The application was opposed by way of affidavit deponed by Elisha Bafirawala, a Principal State Attorney in the Attorney General Chambers.

Briefly that-

1) The findings of the Court in Constitutional Appeal No.3 of 2006, Attorney General VS Susan Kigula sought by the applicants.

2) The application is devoid of sufficient grounds to merit the remedy sought under the slip rule.

Background facts.

The applicants were parties to Constitutional Appeal No.3 of 2006 Attorney General VS Susan Kigula and others (the Kigula case). They had filed a petition in the Constitutional Court challenging the constitutionally of the death penalty under the Constitution of Uganda. They were persons who at different times had been convicted of diverse capital offences under the Penal Code Act and had been sentenced to death as provided for under the laws of Uganda. They petitioned that the imposition on them of the death sentence was inconsistent with Articles 24 and 44 of the Constitution.

They further contended in the alternative that:-

1) The various provisions of the Laws of Uganda which provide for a mandatory death sentence were unconstitutional because they are inconsistent with Article 20,21,22,24 and 44 (a) of the Constitution because they deny the convicted persons the right to appeal against sentence, thereby denying them the right of equality before the law and the right to a fair hearing as provided for in the Constitution.

2) The long delay between the pronouncement by the court of the death sentence and the actual execution, allows for the death row syndrome to set in. Therefore the carrying out of the death sentence after such a long delay constitutes cruel, inhuman and degrading treatment contrary to Articles 24 and 44 (a) of the Constitution.

3) Section 99 (1) of the Trial on Indictments Act which provides for hanging as legal mode of carrying out the death sentence, is cruel, inhuman and degrading contrary to Article 24 and 44 of the Constitution.

The Attorney General opposed the petition contending that the death penalty was provided for in the Constitution of Uganda and its imposition, whether as a mandatory sentences or as a maximum sentence, was constitutional.

The Constitutional Court heard the petition and made the following declarations:-

1) The imposition of the death penalty does not constitute cruel, inhuman or degrading punishment in terms of Articles 24 and 44 of the Constitution and therefore the

various provisions of the laws of Uganda prescribing the death sentence are not inconsistent with or in contravention of Articles 24, and 44 or any provisions of the Constitution.

2) The various provisions of the laws of Uganda which prescribe a mandatory death sentence are inconsistent with Articles 21, 22, (1) 24, 28, 44 (a) and 44 (c) of the Constitution and, therefore, are unconstitutional.

3) Implementing the carrying out of the death sentence by hanging is constitutional as it operationalizes Article 22 (1) of the Constitution. Therefore, section 99 (1) of the Trial on Indictment Act is not unconstitutional or inconsistent with Articles 24 and 44 (a) of the Constitution.

4) A delay beyond three years after a death sentence has been confirmed by the highest appellate court is an inordinate delay. Therefore, for the condemned prisoners who have been on death row for three years and above after their sentences had been confirmed by the highest appellate court, it would be unconstitutional to carry out the death sentence as it would be inconsistent with Articles 24 and 44 (a) of the Constitution.

Consequently, the court made the following orders:-

a) *For those petitioners whose appeal process is completed and their sentence of death has been confirmed by the Supreme Court their redress wJ!1 be put on hold for two years to enable the Executive to exercise its discretion under Article* 121 *of the Constitution. They may return to court for redress after the expiration of that period*

b) For the petitioners whose appeals are still pending before an appellate court:-

(1). Shall be afforded a hearing in mitigation of sentence.

(ll). The court shall exercise its discretion whether or not to confirm the sentence.

(III). Therefore, in respect of those whose sentence of death will be confirmed, the discretion under Article 121. Should be exercised within three years.

The Attorney General was not wholly satisfied by the above decision and appealed to the Supreme Court. The petitioners were also dissatisfied with parts of the decision of the Constitutional Court and filed a cross appeal to the Supreme Court.

By unanimous decision, the Supreme Court dismissed the appeal and by majority decision the same court also dismissed the cross-appeal.

The Supreme Court confirmed the declarations made by the Constitutional Court but modified the Orders made by the court as follows:-

1) For those respondents whose sentences were already confirmed by the highest court, their petitions for mercy under Article 121 of the Constitution must be processed within three years from the date of confirmation of sentence. Where after three years no decision had been made by the Executive, the death sentence shall be deemed commuted to imprisonment for life without remission.

2) 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 mitigations of sentence, and the high Court may pass such sentence as it deems fit under the law.

3) Each party shall bear its own costs.

The instant application is challenging the first order on the ground that it was issued in error which error should be corrected.

Representation.

The applicants were represented by Mr. Kiiza Rwakafuzi assisted by *MIS* Carol Namara while the Respondent was represented by Mr. Batanda, State Attorney in the Attorney General's Chambers.

Both counsel filed written arguments but were allowed to orally highlight their written arguments in court.

Issues for determination.

1) Whether the applicants are guilty of dilatory and indolent conduct in the institution of the instant application.

2) Whether the order of the court mandating commutation of the applicants' sentences to imprisonment for life without remission was an accidental slip or omission; and

3) If *SO* whether the applicants are entitled to remission on their sentences.

RESOLUTION

ISSUE No.1

It was the contention of counsel for the respondent that the applicants are guilty of indolent conduct in the institution of the instant application. This was because the applicants filed the instant application 8 years and two months from the date the decision in **Kigula** case was handled down on 21st January 2008.

Learned counsel contended that the above dilatory conduct did offend the principle of "interest republican finis litmus (in the interest of society as a whole, litigation must come to an end). Counsel relied on the case of **DAVID Muhende VS Humprey Mirembe SCCA No.5 of 2012** to support the above contention.

In reply the learned counsel for the applicants contended that they could not file this application on time because at that time the Supreme Court lacked Coram. Counsel further contended that in matters concerning enforcement of constitutional rights there is no time limit. That was why the Kigula case was filed in 2003; it benefitted people who had been on death row in the 1990's. In view of the above argument, counsel contended that it cannot be said that this application is late.

It is trite law that under the inherent powers of the court and slip rule; the court's jurisdiction is circumscribed and must not be invoked to circumvent the principle of finality of the court's decisions. The above position was emphasized in the case of **David Muhende** (supra) which was cited by counsel for the respondent. In that case, the applicant filed his application under rules 2 (2) and 35 of the Judicature (Supreme Court Rules) Directions. The application was filed 12 (twelve) years after the date of court's judgment under slip rule. An objection was raised on the question of delay by the applicant in filing the application after 12 years.

While upholding the objection this court observed as follows:-

"We think that the reasons the applicant is advancing to justify his delay are not convincing, considering the long period of his inaction, and so there was inordinate delay in bringing this application in court .....The court will refuse to entertain delayed application brought under rules 2 (2) and 35 of the rules of this court unless sufficient reasons are shown to justify the delay. We agree with the learned counsel for the respondent that the phrase "at any time" appearing in rules of this court should not be interpreted to mean that inordinately delayed applications without justification will be permitted by this court".

It must be noted that this court handed down its decision in the Kigula case on 21st January, 2008. The instant application to correct the error in the above judgment was filed on 22nd March, 2016. It is not denied that this application was indeed filed 8 years and two months from the date of the decision.

It is clear from the record that controversy surrounding the impugned order arose within one year from the decision of the court. One would wonder why it took the applicants over eight years to file their application under slip rule.

The reason that by that time the Supreme Court had no Coram is untenable. The above allegation was not based on evidence at all. It was submission from the bar. We agree with counsel for the respondent that during the alleged period this court had Coram and continued in its business and entertained applications and delivered rulings and judgments. In any case even if the court had no Coram the applicant was still bound to file this matter in court, and to leave the issue of constituting the Coram to the

court. Lack of Coram could not have given the applicant license to sit back and twiddle their thumbs.

Another reason which counsel gave for the delay was that matters of enforcement of human rights have no limitation.

With greatest respect to counsel, the issue at hand was not about enforcement of human rights. It was about the inherent powers of the court and slips rule where the jurisdiction of the court is circumscribed and where relevant principles have to be adhered to and followed strictly.

In conclusion, we find that the applicants have failed to give sufficient reasons to justify the filing of the application after eight years and two month for the delay. We accordingly find the conduct of the applicant latter and dilatory and should suffer the same fate as Muhenda in the Muhenda application.

Issue No.2

It was the contention of the applicants that order No.1 was not a logical consequence of the findings of the court in SCCA No.3 of 2006. Counsel for the applicants submitted that the Supreme Court having held that the highest court has jurisdiction in confirming both conviction and sentence and that the mandatory death sentences were unconstitutional could not have issued order No.1 in that form. The applicants argued that referring to them in order **No.1 of SCCA NO.3 of 2006** as "those respondents whose sentences were confirmed by the highest court...." was not a logical inference from the findings and holdings of the Supreme Court because the court had only confirmed their conviction and sentence was guaranteed by law. The learned counsel concluded that since the **SCCA NO.3 of 2006** was about

the constitutionality of mandatory death sentence and the Supreme Court having found that the mandatory death sentences was unconstitutional and allowed the respondents in respect of Order No, 2 to appear before the High Court to mitigate sentence, the same court should have also accorded the respondents in order No.1 to benefit from remission. Therefore, denying the respondent remission was accidental slip or omission or mistake or error of law apparent on the face of the record which this court should correct.

Counsel for the Respondent on the other hand contended inter alia that the instant application was devoid of sufficient grounds to merit the remedy sought under slip rule. Counsel argued that the court's order mandating commutation of the applicants' sentences to imprisonment for life without remission was not accidental slip or omission. He submitted that this court made its position clear as the import of the impugned order by adopting the opinion of the Solicitor General on the issue. The learned counsel concluded that the applicants were baiting this court to sit on appeal in its own decision.

We have carefully perused the notice of motion, the affidavits in support and objection to the same. We have also studied the submissions of the parties and the authorities they relied upon in support and opposition to this application. The circumstances under which this court is required to apply slip rule under Rules 2 (2) and 35 of the Rules of this Court to correct the error or injustice have been put beyond doubt in a number of authorities. The recent case of David Muhenda **VS Humprey Mirembe** (supra) summarizes them all as follows:-

"Under Rule 2 (2) of the Judicature (supreme Court Rules) Directions 51 11-13, This court has power to recall its judgment and make orders as may be necessary for achieving the end of justice. In doing so, it is not limited to rule 35 of the rule of this court, see for example Livingstone 5ewanyana VS Martin Aliker Misc. Application No. 40 of 1991 and Nsereko Joseph Kisukye V5 Bank of Uganda, Civil Appeal No.1 of 2012 and Orient Bank Ltd V5 Fredrick Zaabwe and another, Civil Application No. 17 of 2007. In Nsereko Joseph Kisukye case, for example, the court recalled the judgment and made clarifications on the orders it had made to make them implementable.

However, the power of the court in this regard is not open ended. As it was stated in Orient Bank V5 Fredrick Zambwe (supra) *lithe decision of this court on any issue or law is fina~ so that the unsuccessful party cannot apply for its reversal". This principle is based on the decision of* Lakhamshi Brothers Ltd V5 R. Raja and sons [1966] EA 313 *page* 314 *where Sir Charles Newbold P. stated*

" .....There are circumstances in which the court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter. But this application and the two or three others to which I have referred go far beyond that. It asks, as I have said, this court
in the same proceeding to sit on its own previous judgment. There is a principle which is of the greatest importance in the administration of justice and the principle is this, it is in the interest of all persons that there should be an end to litigation".

This principle was restated in the case of Fangmin VS Dr. Kaijuka Mutabazi Emmanuel SCCA No. 06 of 2009".

In UDB VS Oil Seeds (U) Ltd Civil Application No. 15 of 1977, it was held thus;

"A slip order will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, or in the case of a matter which was overlooked, where it is satisfied beyond reasonable doubt, as to the order which it would have made had the matter been brought to its attention".

In the instant case we are persuaded that the two orders this court made were deliberate, well intended and were meant to serve independent purposes. The two above orders were first made by the Court of Appeal and later slightly modified by the Supreme Court on appeal. The first order applied to those who were convicted under mandatory death sentences whose convictions had been affirmed by the Supreme Court while the 2nd order was in respect of those convicted under mandatory death sentences whose appeals were still pending before the appellate court. In the 1st category, the Supreme Court commuted their sentences from death to life imprisonment without remission. In the 2nd order, the convicts were to be remitted to the High Court for mitigation of sentences.

The above intention of the Supreme Court in Kigula case was confirmed in the case of Ambaa Jacob and another VS Uganda, Criminal Appeal No. 10 30f 2009 (SC) where Supreme Court confirmed the differences between the 1st and 2nd order. In the above case, the Court of Appeal dismissed the appellant's appeal

[14]

and proceeded to hear submissions on mitigation of sentence.

The Supreme Court held that in view of the decision in the Kigula case, 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 sentence.

The court stated as follows:-

"We would like to emphasize that, after the Constitutional Court held that the mandatory death sentence was unconstitutional, and the 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 of appeal against a conviction and sentence to the Court of Appeal. This was the reason why this court decided that the pending cases go back to the 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 submission in mitigation. The convicted persons as indicted, could then still appeal to the Court of Appeal against sentence"

It is clear from the above passage and decision in the Kigula case that the above two orders of the Supreme Court were in respect of two categories of cases; I'' order was in respect of convicts whose death sentences had gone through the appeal processes and had been confirmed by the Supreme Court and were waiting execution. Due to their pleas of death syndrome, they were saved from execution by the court deliberately substituting their sentence with one of life without remission. For the second

category, their appeals were still pending in either the Court of

[15

Appeal or Supreme Court; they were referred to the High Court for mitigation of their sentences.

In the same vein, we also find that there was no mistake on the face of the record. It was a manifest intention of the Court when it made the first order commuting sentence from death to life imprisonment without remission for convicts whose death sentences had been confirmed by the Supreme Court. This was logical because their cases could not be remitted to the High Court for mitigation.

An error or mistake on the face of the record would have occurred under the 1st order if the court had allowed the execution to be carried on after concluding that mandatory death sentence was unconstitutional.

In view of the above analysis, we find that this application is - misconceived and untenable under rule 2 (2) and 35 of the Supreme Court Rules. It is an attempt to induce this court to correct a mistake arising from misunderstanding law with regard to remission under the Prisons Act. To do so, would tantamount to the court sitting on appeal in its own judgment. In **Ahmed** Kawoya **Kanga VS Banga Aggrey Fred [2007] KALR 164,** it was held as follows:-

"The **error or omission must be an error in expressing manifest intention of the court. Court cannot correct a mistake of its own in law or otherwise even where apparent on the face of the record. Under slip Rule court cannot correct a mistake arising from its misunderstanding of the law"**

In the result, we find that the instant application is devoid of sufficient grounds to merit remedy sought under slip rule.

Issue No.3

We are of the view that issue No.2 disposes of issue NO.3. We would only add that remission would only be available in the circumstances after presidential prerogative of mercy under Article 121 of the Constitution.

In conclusion, we find that the present application attempts to implore this court to correct what the applicants perceive to be a misunderstanding by the court of the law on mitigation of sentences under the Prisons Act which is not tenable under the Slip rule. The application is dismissed.

In the interest of justice parties should bear their own costs.

Dated at Kololo this 28th.....day of.. April.....2017

Hon. Justice Jotham Tumwesigye, JSC

Hon. Justice Dr. Esther Kisaakye, JSC

Hon. Justice Augustine Nshimye, JSC

Han. Justice Eldad Mwangusya, JSC

Hon. Justice OPio-Aweri, JSC

Hon. Justice Faith Mwondha, JSC

Hon. Justice Prof. Dr. Lillian Tibatemwa-Ekirikubinza, JSC

We also find that the present application attempts to implore this court to correct what the applicants perceive to be a misunderstanding by the court of the law on mitigation of sentences under the Prisons Act which is not tenable under the Slip rule, The application is dismissed.

In the interest of justice parties should bear their own costs.

Dated at Kololo this 28th day of April 2017

Hon. Justice Dr. Esther Kisaakye, JSC

Hon. Justice Opio-A

Hon. Justice Faith Mwondha, JSC

Hon. Justice Jotham Tumwesigye, JSC

Hon. Justice Prof. Dr. Lillian

Hon. Justice Augustine Nshimye, JSC

Hon. Justice Eldad Mwangusya, JSC.

weri, JSC

Tibatemwa-Ekirikubinza, JSC