

**THE REPUBLIC OF UGANDA,  
IN THE COURT OF APPEAL OF UGANDA AT ARUA  
CRIMINAL APPEAL NO 307 OF 2010**

**OYITA SAM}..... APPELLANT**

**VERSUS**

**UGANDA}..... RESPONDENT**

*(Appeal from the judgment of the High Court sitting at Apac in Criminal Session Case No. 081 of 2010, arising from Criminal case No. 33 of 2009) delivered by His Lordship Hon. Mr. Justice Byabakama Mugenyi on the 1<sup>st</sup> of December, 2010)*

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA**

**Hon. Mr. Justice Ezekiel Muhanguzi, JA**

**Hon. Mr. Justice Christopher Izama Madrama, JA**

**JUDGMENT OF THE COURT**

**Background to the appeal**

The appellant was charged with murder contrary to section 188 and 189 of the Penal Code Act. The facts in the indictment are that, the appellant on the 24<sup>th</sup> of June, 2009 at Agwila Village in Apac District murdered Okello Simon. On the 30<sup>th</sup> of November, 2010 the appellant pleaded guilty to the offence of murder and was convicted on his own plea of guilt and on 1<sup>st</sup> of December, 2010 he was sentenced to suffer death. Being dissatisfied with the sentence he has now appealed to this court against sentence alone.



The facts of the case as contained in the statement of facts read to the appellant are that; on 12<sup>th</sup> June, 2009, the appellant assaulted his brother Okello Simon, now deceased, over a piece of land over which they were wrangling. The deceased was admitted at Lira hospital and discharged on 17<sup>th</sup> June 2009. Again on the night of 24<sup>th</sup> June 2009, while the deceased was sleeping, the appellant went and hacked him with an axe on the head causing his death. The deceased's wife made an alarm which attracted a crowd and the matter was reported to Apac Police station. The appellant was arrested and upon interrogation, admitted having murdered his brother with an axe which thereafter he threw in water (river or stream).

### **Representation**

When the appeal came up for hearing, Ms. Patience Bandaru appeared for the appellant on state brief while Senior Assistant DPP Mr. David Ndamurani Ateenyi appeared for the respondent.

### **Submissions of the appellant**

With leave of court sought and granted under section 132 (1) (b) of Trial on Indictments Act, the appellant's counsel argued the appeal against sentence only. Counsel submitted that since the appellant pleaded guilty to the charge of murder, the sentence of death was harsh and excessive. The plea also saved Court's time and resources and the appellant demonstrated by the plea that he was remorseful as admission of guilt occurred at the beginning of the trial. Counsel argued that there is need for rehabilitation of the appellant since he was willing to change and live a more useful life.

The appellant's counsel relied on the case of **Twikirize Alice v Uganda; Criminal Appeal No 0764 2014** where the appellant was sent for resentencing by the High Court after being sentenced to death under the mandatory death penalty regime. He was resentenced to 37 years imprisonment. On appeal to the Court of Appeal against sentence, the

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Court held that a sentence of 37 years was harsh and excessive for a first offender and reduced the sentence to a term of 30 years imprisonment. Furthermore, the court of appeal relied on **Godi Akbar v Uganda; Court of Appeal Criminal Appeal No 3 of 2013**, the appellant's 25 years imprisonment sentence for murder was upheld by this court and affirmed by the Supreme Court.

The appellant's counsel prayed that the sentence of death imposed on the appellant be set aside for being harsh and excessive and be substituted with a sentence of 20 years imprisonment.

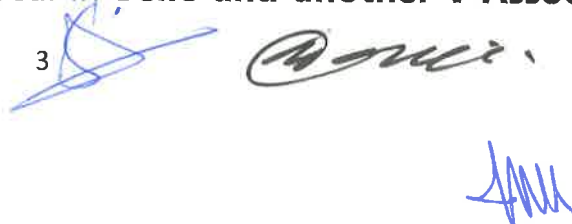
### **Submissions of the respondent**

Counsel for the respondent submitted that since the appellant pleaded guilty, the death sentence was appropriate. Counsel cited section 17 of the sentencing guidelines in which it is written that *'the Court may only pass a sentence of death in exceptional circumstances in the rarest of the rare cases where the alternative or imprisonment for life or other custodial sentence is demonstrably inadequate.'*

The rarest of the rare cases is defined in Part A of the sentencing guidelines to mean where the commission of the offense was planned or meticulously premeditated and executed. He prayed that the sentence is upheld and the appeal dismissed.

### **Consideration of the appeal**

We have carefully considered the appeal and there is nothing controversial about the facts as the appellant pleaded guilty and agreed to the facts as presented by the prosecution. Nonetheless, the duty of this court as a first appellate court is spelt out under **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions** and is to reappraise the evidence and draw its own inferences of fact. The duty of the Court of Appeal was considered by the then East African Court of Appeal in **Selle and another v Associated**



**Motor Boat Company Ltd and others [1968] 1 EA 123**, when they held that the conduct of an appeal from the High Court in the exercise of its original jurisdiction to the Court of Appeal may be by way of a retrial of issues of fact. In this regard, the Court of Appeal is not bound to follow the findings of fact of the trial Judge but will review the evidence and may reach its own conclusion:

“In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”

The question in this appeal is simply whether the appellant’s case should be considered the rarest of the rare which would attract the death penalty. The facts are not in dispute. It was a premeditated murder that arose as a consequence of a land dispute where the two brothers were, to use the words record in the statement of facts, “wrangling” over a piece of land. It is therefore apparent that there was no issue between the brothers except what occurred as a result of the land dispute and hence the assault and subsequent murder of the deceased. The deceased was hacked to death with an axe. Was this the rarest of case deserving the death penalty?

We have reviewed some judicial precedents on the issue of appropriate sentence in similar cases.

In **Kakubi Paul and Muramuzi David v Uganda; Criminal Appeal No 03 of 2009**, the appellants were convicted of the offence of murder and sentenced to suffer death by the High Court. The facts were that they had killed the deceased in a brutal manner with a cutlass. The Court of Appeal held that the case did not fall among the rarest of the rare or the worst of

the worst. Given the manner of execution of the murder, the age of the appellants and the opportunity for reform, the case did not merit the death penalty which sentence they reduced to 20 years imprisonment.

Furthermore, we have further considered the judicial precedents cited by the appellant's counsel of **Twikirize Alice v Uganda; Criminal Appeal No 0764 2014**. In that case the appellant had initially been sentenced to suffer death under the then mandatory death penalty provisions for the offence of murder under the Penal Code Act and his appeal against the sentence was dismissed. Following the decision of the Supreme Court affirming the Constitutional Court declaration that the mandatory death penalty was a nullity in **Susan Kigula and 417 others v Attorney General; Supreme Court Constitutional Petition Appeal No. 03 of 2006**, the appellant's case was sent back to the High Court for resentencing whereupon the High Court resented the appellant to 37 years imprisonment. On appeal to the Court of Appeal, the Court held that a sentence of 37 years was harsh and excessive for a first offender and reduced the sentence to a term of 30 years imprisonment.

The facts of the appellant being a first offender mitigated the death penalty. Furthermore, in **Godi Akbar v Uganda; Criminal Appeal No 3 of 2013**, the appellant had murdered his wife and was sentenced to 25 years imprisonment which sentence was upheld by this court and affirmed by the Supreme Court.

In **Francis Bwalatum v Uganda; Court of Appeal Criminal Appeal No. 48 of 2011**, the appellant had been charged and convicted of the offence of murder on two counts and sentenced to 50 years imprisonment on each count to run concurrently. On the ground of appeal against sentence, that it was harsh and excessive in the circumstances, the Court of Appeal noted that prior to his trial the convict had spent one year and seven months on remand. He was 57 years at the time and, he was charged when he was 54

   
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years old. He had been convicted of two very serious offences involving the loss of two lives and the maximum penalty for the offence of murder is death. However, the appellant was a first offender and was spared the death penalty. Taking into account the mitigating factors, the Court reduced the sentence of 50 years imprisonment on each count to 20 years imprisonment on each to run concurrently.

In **Kasaija Daudi v Uganda; Court of Appeal Criminal Appeal No 128 of 2008**, the appellant had been convicted of two counts of murder and was sentenced to imprisonment for life on each count to run concurrently. The Court of Appeal considered the fact that the appellant was a first offender and was 29 years old at the time of commission of the offences as mitigating factors. They noted that it was a case involving the senseless and brutal murder of two suspects already under arrest which act undermined the due process of the rule of law which had been set in motion in respect of the suspects. The Court of Appeal reduced the sentence of life imprisonment to 18 years imprisonment on each count to be served concurrently from the date of conviction. Further, in **Atiku Lino v Uganda; Criminal Appeal No 0041 of 2009**, the appellant attacked the deceased at night. He was armed with a cutlass, a bow and arrows. He cut the deceased several times causing her death. The appellant was convicted and sentenced to life imprisonment by the High Court whereupon he appealed against conviction and sentence. On the issue of sentence, the trial Judge had considered the fact that the appellant was a first offender and a young man who could still reform and play a role in nation building; the ferocity and brutality of the attack as well as the delusion the appellant suffered that the deceased bewitched his child. The Court of Appeal took into account the mitigating factors and reduced the sentence of life imprisonment to 20 years' imprisonment.



Last but not least it was held by this Court on appeal against sentence in **Nkurunziza Julius v Uganda Criminal Appeal No 12 of 2009**, in a case where the appellant had been convicted on his own plea of guilty and sentenced to 17 years imprisonment that a plea of guilt is normally a mitigating factor.

In this case the appellant was presented as being 36 years old at the time of commission of the offence. He pleaded guilty and was remorseful. He was not given a chance to be rehabilitated through reform and to have a second chance. The death penalty only applies retributive justice with no room for rehabilitation which offers an offender, and especially a first offender, a chance to become a better citizen and to be re-integrated into society. He was a first offender and this ought to have mitigated the death penalty.

We are of the view that in the circumstances of this case, the death penalty was a harsh and excessive punishment. The appellant was a first offender and pleaded guilty to the offence charged.

In the premises, we allow the appeal and reduce the sentence to a term of 25 years imprisonment after taking into account the period of 1 year and five months the appellant spent in lawful custody prior to his sentence. The sentence shall run from the date of conviction on 30<sup>th</sup> November, 2010.

Dated at Arua the 28<sup>th</sup> day of November, 2018



**Hon. Justice Kenneth Kakuru**

**JUSTICE OF APPEAL**





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**Hon. Justice Ezekiel Muhanguzi**

**JUSTICE OF APPEAL**



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**Hon. Justice Christopher Izama Madrama**

**JUSTICE OF APPEAL**