

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT MASAKA**

*[CORAM: Egonda-Ntende, Obura & Musota JJA]*

CRIMINAL APPEAL NO.189 OF 2012

(Arising from High Court Criminal Session Case No.147of 2004 at Masaka)

**Between**

KALYAMAGWA SAMUEL .....APPELLANT

**And**

UGANDA .....RESPONDENT

*(An appeal from the judgement of the High Court of Uganda [Moses Mukiibi, J.,] delivered on 7<sup>th</sup> June 2012)*

**JUDGEMENT OF THE COURT**

**Introduction**

1. The appellant was indicted and convicted on two counts, murder contrary to sections 188 and 189 of the Penal Code Act and robbery contrary to sections 285 and 286(2) of the Penal Code Act. On count one, the particulars of the offence were that the appellant, Kato Swaibu Yuda, Wasswa Dirisa and others still at large on the 3<sup>rd</sup> day of January 2004 at Kyesiiga, Buggo village in Masaka District murdered Ssentongo Moses. On count 2, the particulars of the offence were that the appellant, Kato Swaibu Yuda, Wasswa Dirisa and others still at large on the 3<sup>rd</sup> day of January 2004 at Kyesiiga village in Masaka District robbed Moses Ssentongo of his motor cycle Reg. No. UDC 348 S Yamaha and at or immediately before or immediately after the time of the said robbery caused his death. The learned trial judge on 7<sup>th</sup> June 2012 sentenced the appellant to death in respect of the conviction for murder and passed no sentence for aggravated robbery.
2. With the leave of this court, the appellant now appeals only against sentence on the ground that the trial court erred in law when it passed a harsh and excessive sentence upon the appellant thus occasioning a miscarriage of justice.
3. The respondent opposed the appeal.

## **Facts of the Case**

4. The facts of this case are that the deceased was a boda boda rider, riding a motor cycle, belonging to Joseph Kiddu, (PW1). On the 3<sup>rd</sup> January 2004, the deceased, was hired by two passengers from Dimo-Milange landing site but he did not return. His fellow boda boda riders having waited for him in vain, reported to the Chairman LC1 of Katwe North Kalisizo Town council. The chairman reported the disappearance of the deceased to police whereupon investigations began.
5. On or about 2<sup>nd</sup> April 2004, the LC officials of Lwagulwe village impounded a black numberless motorcycle and arrested its rider, Kato Swaibu Yuda, on suspicion that it was stolen. News of the recovery of the motorcycle reached Kiddu Joseph who identified the motorcycle as his and the one which the deceased was riding at the time of his disappearance. Kato Swaibu Yuda who had been arrested escaped from the custody of the LC1 official. However, he had disclosed that the motor cycle belonged to the appellant.
6. The appellant was traced and arrested. Upon interrogation, the appellant gave information to the police as to where the deceased had been buried. The deceased's body was exhumed from a shallow grave behind the appellant's home without a head. The appellant was at the scene. In his defence the appellant decided to keep quiet and called no witnesses.

## **Submissions of Counsel**

7. At the hearing, the appellant was represented by Mr. Jurugo Isaac on state brief and Mr David Bakibinga, Senior State Attorney, in the Office of the Director, Public Prosecutions, represented the respondent.
8. Counsel for the appellant submitted that under the circumstances of the case, the death penalty imposed upon the appellant was harsh and excessive. That the learned trial judge should have granted the appellant a custodial sentence in consideration of the factors he stated in mitigation. He submitted that this is not one of the rarest of the rare cases in which the death sentence ought to be imposed. Basing on previous decisions of this court, the death penalty should be substituted with a custodial sentence of 35 years imprisonment taking into account the period spent on remand. He

relied on the case of Bandebaho Benon V Uganda, CA Criminal Appeal No. 319 of 2014

9. Mr David Bakibinga opposed the appeal. He submitted that this is one of the rarest of rare cases in which a death sentence ought to be passed. He referred to Regulation 18 and Regulation 20 of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013. He also submitted that the appellant was not remorseful during trial as he threatened the trial court.

## Analysis

10. This court as an appellate court can only interfere with the trial court's discretion in sentencing on limited grounds as has been set out in various decisions of the Supreme Court including the case of Bernard Kiwalabye V Uganda, SC Criminal Appeal No. 143 of 2001 (unreported). In this case, the Supreme Court stated,

'The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle.'

11. The death penalty is no longer mandatory. However in an appropriate case it is still a lawful sentence. It is now firmly established that courts may only pass a sentence of death in exceptional circumstances in the "rarest of the rare" cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate.
12. In this instant case, the appellant was convicted of both murder and robbery. He was sentenced to suffer death in respect of the conviction for murder and no sentence was imposed for robbery in light of the sentence of death imposed for murder. The proper position for the trial court was to pass a sentence on both offences and suspend one sentence in case one of the sentences was the death penalty.

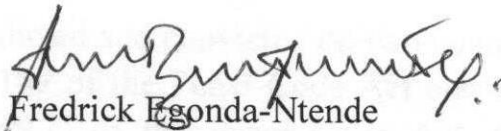
13. In passing the sentence the trial judge considered both the mitigating factors and aggravating factors. The mitigating factors were that the convict was a first time offender with two children and had been on remand for a period of eight months.
14. The aggravating factors included the manner of the death of the deceased. It was gruesome, violent and inhumane. According to the post mortem report (Exh. P2), the deceased died from haemorrhage shock due to severe haemorrhage following decapitation. The nature of weapon used to decapitate the deceased was a sharp cutting instrument. The body of the deceased was found with the head, right hand and toes on both feet missing. The missing body parts were never recovered. This must have been traumatic to the victim's family. The appellant never expressed any remorse for what he had done.
15. The decapitation and dismembering of the body of the deceased outrages humanity. After taking the life of the deceased, the appellant violated the dignity of the deceased even in death.
16. In the case of Aharikundira v Uganda, Criminal Appeal No. 104 OF 2009 (unreported), the deceased was murdered by his wife who dumped his body some distance away from his home. His throat, arms and legs had been cut. The arms had been severed from the shoulders and the legs were missing. The legs had been severed from mid-thigh. There were no signs of struggle at the scene indicating that the body had been brought to the scene from somewhere else. According to the findings of the medical officer who carried out the post mortem examination, the cause of death was haemorrhagic shock due to the excessive bleeding. Upon conviction, a death penalty was imposed on the appellant which this court confirmed on the ground that the trial court had properly exercised its discretion.
17. In Mugabe Stephen v Uganda, C A Criminal Appeal No. 412 of 2009 (unreported) this court confirmed the death penalty imposed upon an appellant that had been convicted of murder. The deceased's body had been dismembered. The heart, lungs and genitalia had been removed from the body of the deceased and were not recovered.


18. We find no reason to interfere with the sentence imposed by the learned trial judge. The decision is consistent with previous decisions of this court. The learned trial judge took into consideration the mitigating and aggravating factors. In the learned trial judge's discretion he found that the most appropriate sentence was the death penalty. Without proof that this discretion was abused or that the judge acted on a wrong principle or ignored some relevant factor this court would have no lawful reason to interfere with the decision of the court below. The sole ground of appeal fails.

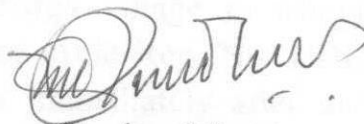
### **Decision of the Court**

19. This appeal is dismissed and the death penalty is upheld.

Signed, dated and delivered at Masaka this 30<sup>th</sup> day of July 2018

  
Fredrick Egonda-Ntende  
**Justice of Appeal**

  
Hellen Obura  
**Justice of Appeal**

  
Stephen Musota  
**Justice of Appeal**