THE REPUBIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

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

CRIMINAL APPEAL NO. 0123 OF 2011

(Arising from High Court Criminal Session Case No.16 of 2008 at Masaka)

Between

BASHASHA SHERIF .....APPELLANT

And

UGANDA .....RESPONDENT

(*An appeal from the judgement of the High Court of Uganda [V.F Musoke Kibuuka, J.,] delivered 30th May 2011*)

JUDGEMENT OF THE COURT

Introduction

1. The appellant was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the appellant and three others on the 3rd day of June 2017 at Ddegeya village in Masaka District murdered Ssekaja Isma. On 4th April 2009, the learned trial judge sentenced him to death in the manner authorised by law. He now appeals against sentence only.

2. The appellant contends in the ground of appeal that the learned trial judge erred in law and fact when he imposed a mandatory death sentence upon the appellant and failed to exercise his discretion in the matter before imposing the death sentence upon the appellant and taking into account the mitigation factors which led to a serious miscarriage of justice to the prejudice of the appellant.

3. The respondent opposes the appeal.

Facts of the case

4. The facts of this case are that on 3rd June, the deceased at about 5:00 pm left the home of his parents with his baby brother, Jafari Kyaddondo for Nalunga Zam (A2)'s home. He never came back home. Nalunga Zam returned the Baby brother that same evening to their parents' home. Nalunga Zam was arrested by the police and subsequently the appellant was arrested.

5. On 9th June 2007, following the information given by the appellant to Sauda Namatovu (PW4), the head of the deceased was found in a trench at Kabalungi along Masaka-Mbarara Highway. On 10th June 2007, the appellant led a team of police officers to an anthill at Dgegeya, in Masaka District, where the rest of the deceased's body was found hidden. On 14th June 2007, Nalunga Zam the co-accused led a police team to the toilet of PW2 and PW3 where they recovered the clothes of the deceased tied in a polythene bag.

6. The appellant in his unsworn statement denied participation in the crime and he put up a defence of alibi. Nalunga Zam in her sworn statement stated that the appellant had written to her a note admitting to have committed the offence while she and the appellant were under police custody. He stated that he had killed the deceased because he feared that the deceased would report his presence to A3 who had been looking for him against the allegation that he had defiled Nalunga Zam.

Submissions of Counsel

7. At the hearing, the appellant was represented by Mr. Sserunkuma Bruno and the respondent by Ms Barbra Masinde, Senior State Attorney. Mr. Sserunkuma Bruno applied for leave to appeal against sentence only under section 132(1) (b) of the Trial on Indictment Act which was granted by this court.

8. Mr Sserunkuma submitted that the learned trial court erred in law when he imposed a mandatory death sentence upon the appellant. That the learned trial judge did not exercise its discretion judiciously while imposing the death sentence. He cited the case of Attorney General V Susan Kigula & Ors, S C Constitutional Appeal No. 03 OF 2006

(unreported). He submitted that the learned trial judge did not take into account the mitigating factors in imposing the sentence. He prayed that this court substitutes the sentence with a lesser one.

9. Ms Barbra Masinde submitted that the trial court did not impose a mandatory death sentence. That in line with the case of Attorney General V Susan Kigula (supra), the death sentence is still in our books and it is discretionary. That the learned trial judge did not misuse the discretion as he took into consideration all the sentencing principles in arriving at the sentence. She prayed that this court maintains the sentence and finds that the trial court properly exercised its discretion. She relied on the case of Muhingire Emmanuel V Uganda C.A Criminal Appeal No. 269 0f 2010 (unreported).

Analysis

10. An appellate court will not ordinarily interfere with the sentencing discretion of the trial judge unless a limited number of circumstances arise. This is explained in Kiwalabye v Uganda, SC Criminal Appeal No. 143 of 2001, (unreported), by the Supreme court in the following words,

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

11. Counsel for the appellant submitted that in light of the case of Susan Kigula & 417 Ors V Attorney General, (unreported), the learned trial judge did not properly exercise its jurisdiction in passing a mandatory death sentence. In the above case, the Supreme Court upheld the constitutionality of the death sentence but declared that the mandatory imposition of the death sentence was unconstitutional.

12. In the case of Ssekawoya Blasio V Uganda, S C Criminal Appeal No. 024 OF 2014, the Supreme Court stated,

> 'The implication of the Kigula decision was that a sentencing Judge retained his or her discretion to

> determine an appropriate sentence for a person convicted of murder, whereas previously the only sentence that a trial Court could mete out to a person convicted of murder was a death sentence..

13. This means that the trial court has the discretion to impose a death penalty upon a convict where the circumstances deem it necessary. The learned trial judge did not impose a mandatory death sentence. The parties were given an opportunity to submit on mitigation of sentence.

14. What is left to decide is whether the learned trial judge properly exercised his discretion in imposing the sentence. Counsel for the appellant submitted that the learned trial judge did not take into consideration the mitigating factors of the appellant. In passing the sentence the learned trial judge stated as follows;

> 'Sentence And Reasons
> A1 is convicted of a very gruesome murder of a child of 9 years who was completely innocent. He says he did so because he feared that the deceased would reveal his presence at the home of A2 to the prejudice of whom he had committed defilement.
> It is general knowledge that acts of this nature against children have been on the rise in this country. The courts ought to send a clear message that atrocities against children would fetch the full force of the law without any mercy.
> Court, considering all the facts and circumstances of this case agrees with learned counsel for the prosecution that the maximum sentence ought to be imposed.
> Court, thereof sentences A1 to suffer death in a manner authorised by law.

15. The mitigating factors were that the appellant was a first time offender, aged 35 years with 6 children and other dependants. He was remorseful. He pleaded guilty saving the courts time and resources. If given a chance he may be a law abiding citizen and avoid re-offending. It is true that the learned trial judge did not consider the factors in mitigation which was a

serious omission and would be sufficient to warrant this court to interfere with the sentence imposed upon the appellant.

16. However, this is a serious offence that attracts the maximum penalty of death. An innocent young boy of 9 years was murdered in a very gruesome manner with no regard to the sanctity of life. The deceased's body was dismembered. Though the appellant attempted to explain why he killed the deceased he does not explain why he dismembered the body increasing the trauma suffered by the relatives of the deceased.

17. This Court in the case of Mugabe v. Uganda, C.A. Cr. Appeal No. 412 of 2009, (unreported) confirmed the death penalty against an appellant who had committed murder in almost similar circumstances like in this case. The brief facts of that case as narrated by the prosecution and admitted by the appellant were that following an allegation of rape against him, the appellant was heard threatening that he would kill a member of the deceased's family. The deceased who was aged twelve years, on that fateful day was sent by his father to sell milk at a nearby Trading Centre. He never returned home. The relatives made a search for him and his body was discovered in a house in a banana plantation. The appellant had been seen coming out of a house near that plantation. On examination of the body of the deceased, it was revealed that the stomach had been cut open and the heart and lungs had been removed. His private parts had also been cut off and were missing from his body. The cause of death was severe haemorrhage due to cut wounds and the body parts removed. The accused pleaded guilty on arraignment. He was sentenced to death despite his plea of guilty.

18. In the circumstances of this case we are satisfied that this is one of a specie of cases where the death penalty is appropriate. We dismiss the appeal and uphold the death penalty imposed by the trial court.

Signed, dated and delivered at Masaka this 30th day of July 2018

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal

Stephen Musota
Justice of Appeal