

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL DIVISION

CRIMINAL SESSION CASE NO. 0277 OF 2013

(FORMERLY COURT OF APPEAL CASE NO. 050 OF 2005 MBALE)

UGANDA ----- PROSECUTOR

VERSUS

WAKUMIRE MOSES ----- ACCUSED / CONVICT

MITIGATION OF SENTENCE

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

Background

The Convict was indicted for murder contrary to Section 188 and 189 of the Penal Code Act. The offence is said to have been committed at Siira Village Mbale District on 21.09.03.

He was found guilty of the offence and was convicted by Hon. Justice Rugadya Atwoki on 22.03.05 and sentenced to death. It was the mandatory sentence for murder at that time.

On 19.11.13, the Convict appeared before the same Judge for re-sentencing but was found mentally unfit to go through the sentencing process. The court directed that he be placed in a mental institution for treatment up to two years or sooner until he was declared fit to go through the sentencing process.

On 10.02.18, the Convict was produced before court and it was ordered that the Director of Public Prosecutions be served to appear on 18.12.18.

On that date, court was informed that the psychiatric report had not yet been obtained. The case was then adjourned to 09.01.19.

The same situation still presented on 09.01.19, when court was informed that the Convict had been examined but the report had not yet been received.

5 On 15.01.19, court was informed by Counsel for the Convict that they had just received the psychiatric report and they needed time to review the same to be able to ably represent the Convict.

10 The matter was adjourned to 21.01.19, but was not called again until 05.02.19.

Counsel for the Convict after giving a brief background to the case submitted that the Convict had appeared for mitigation of sentence pursuant to the decision of the Supreme Court in the case of **Attorney General vs. Kigula and 147 Others Constitutional Case 03/2006.**

20 She contended that, the case for the State is that at 6am on the morning of 22.09.03, the body of Magoola Robert was found at the side of the road. It had wounds on the right side of the head.

Following the discovery of the body, clothes believed to have been worn by the Convict together with a panga were recovered from the Convict's house.

25 Forensic analysis was done and the blood group of the deceased was the same as that found on the clothes of the Convict.

30 The Chairman of the village where both the Convict and the deceased lived said that, on the day before the deceased was found, the Convict had told him that Magoola Robert had befriended his wife and infected her with Aids.

It was then argued by Counsel for the Convict that, the case for the death penalty had not been met as the case was not exceptional.

35 That the Convict had demonstrated the capacity to reform. And therefore a deterrent sentence between fifteen to seventeen years from the date of conviction less remand time would be an appropriate sentence.

40 Further that, the Convict's case is neither exceptional nor is he incapable of rehabilitation.

She observed that, while every murder is of the utmost seriousness requiring substantial punishment, this case was not the rarest of the rare. Therefore that, a life sentence was unnecessary as the Convict could be adequately punished by a custodial sentence.

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It was emphasized that a fixed term custodial sentence would be appropriate in light of the mitigating factors.

10 Court was referred to the sentencing guidelines paragraph 9 (3) (a) which requires the court to consider the mental state of the offender before considering a custodial sentence.

Paragraph 21 thereof provides that mental disorder or disability linked to the commission of the offence is a mitigating factor.

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Counsel pointed out that, it is well established that an offender suffering from schizophrenia or other serious psychosis should not be executed.

20 The attention of court was then drawn to the various psychiatric assessments of the Convict in this case:-

- He has been diagnosed as suffering from severe and chronic mental illness.

25 Prior to his incarceration, he was suffering from psychotic mental illness and has been treated in custody.

30 There is a report from Dr. Muran indicating that his condition has improved. However that, court should note that the Convict suffered from side effects of the medication which has brought about involuntary facial movements.

35 Further that, the deceased having had an affair with the Convict's wife, who then contracted Aids, was a powerful factor in the commission of the offence.

Counsel also presented the following other mitigating factors in respect of the Convict:-

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1.
 - a) The Convict was 37 years of age at the time he was arrested.
 - b) He is married and had six children.
 - c) He worked and supported his family

2. The Convict suffers from a serious chronic psychiatric illness that is schizophrenia.

The illness began prior to the offence and is still ongoing.

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While in custody, Counsel pointed out, the Convict has participated in a number of rehabilitation programs and held responsible positions as an elder in a Pentecostal Church and as an advisor in the condemned section.

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Court's attention was drawn to the report of the Officer in charge Prisons, dated 13.12.18, which concludes that the Convict has exhibited a high level of discipline, abides by the Prison rules and regulations and is a changed person.

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This, Counsel argued, clearly shows that the Convict is capable of rehabilitation.

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Counsel also laid out the mitigating factors as per the case of **Attorney General vs. Kigula and 417 Others (Supra)**.

1) The Convict resides in the condemned section of the Prison, living in the ever present shadow of death, in demeaning physical conditions.

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She pointed out that, the issue of prison conditions was explicitly considered by the Supreme Court in the Kigula Case, with specific reference to the prison conditions at Luzira when considering the components of the death row syndrome.

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Further that, under Article 28 of the Constitution, the Convict is entitled to a speedy hearing. However that, not only has the Convict been subjected to a sentence of thirteen years, he has also waited almost ten years since the Supreme Court judgment in Kigula case, in 2009, to be resentenced. That this is a very powerful mitigating factor.

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It would therefore be appropriate Counsel added, to review the Convict's sentence, taking into account the delay in re-sentence, together with the physical and psychological effects of the death row syndrome.

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That given all those mitigating factors including the Convict's obvious mental health issues, a lower custodial sentence would be appropriate.

Counsel further pointed out that the Convict spent one year, five months and twenty one days on remand prior to conviction. She prayed court to deduct that period from the sentence imposed by this court.

5 In reply, Counsel for the State submitted that the punishment for murder under S.188 and 189 of the Penal Code Act is death.

10 But that, since the Convict has produced evidence that he has a mental condition- report dated 14.01.19, the death sentence was not appropriate.

15 She agreed that the Convict be sentenced to a custodial sentence. And taking into account the seriousness of the offence committed, and the brutal manner in which it was committed she proposed a custodial sentence of twenty one years. Also taking into account the mitigating factors, the mental health of the Convict and the defence of provocation. But Counsel also noted that, a life once taken away cannot be regained. That the sentence would serve to meet the ends of justice.

20 In rejoinder, Counsel for the Convict reiterated her earlier submissions on the mitigating factors.

25 I have taken into account both the mitigating and aggravating factors. The fact that the death penalty has been declared unconstitutional and more so the Convict's mental condition – schizophrenia which is a chronic illness.

30 It has been established that a mental impairment may affect a sentence in a number of ways. These include the following:-

- 1) It may reduce an offender's "**moral capability**" or blameworthiness for the offence.
- 2) It may affect the kind of sentence imposed for example suspending the sentencing process and requiring the Convict to get treatment, which was done in this case. The offender was put on treatment for two years pending re sentencing.

40 In these circumstances the mental impairment makes it inappropriate to send a deterrent message to the community or to the Convict.

However, court has taken cognizance of the fact that the psychiatric medical report dated 14th 01.18 forwarded to court on 15.01.19

indicates that at the time the Convict committed the offence, **“he was sober and was not suffering any mental illness episode”**.

5 But it does not take away the fact that his mental condition is permanent and that too a heavy a punishment they result into the risk of causing deterioration in his mental health despite the fact that he has undertaken rehabilitation programs and participated in several courses, and he exhibits high levels of discipline and has changed.

10 I would have given twenty years but considering that he spent a period of almost two years on remand before conviction I find that a sentence of 18 years will suffice to meet the ends of justice.

The sentence to run from the date of conviction.

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FLAVIA SENOGA ANGLIN
JUDGE
19.02.19

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