

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

CRIMINAL SESSION CASE NO. 0124 OF 2014

(FORMERLY COURT OF APPEAL CASE NO. 037 OF 2004)

UGANDA ----- PROSECUTOR

VERSUS

OBONG TOM ----- ACCUSED

MITIGATION OF SENTENCE

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

SENTENCING RULING

Background

Obong Tom the Convict was charged with murder and was convicted of the same by Justice Kania on 27.02.04, and sentenced to death. The death sentence was by then the mandatory sentence for murder.

The Convicts appeal to the Court of Appeal against the death sentence was dismissed on 18.06.10.

After the Supreme Court decision in the case of **Attorney General vs. Susan Kigula & 417 Others Constitutional Appeal No. 03 of 2006** which declared the mandatory death sentence unconstitutional, the Convict appeared before Justice Lameck Nsubuga Mukasa in Criminal Mitigation case No. 0124/2014, for mitigation of sentence.

However, following a psychiatric report presented to court, it was found that the Convict was uncoordinated and could therefore not follow and understand the sentencing proceedings, although he could respond to treatment and improve.

The court then directed that the Convict be put on treatment until he was certified as capable of following and appreciating the court

proceedings, when he would then be produced before any other judge for mitigation of sentence. The order is dated 30.07.14.

5 On 10.12.18, this court directed that the Convict be re examined and a new report concerning his mental status availed and production warrant was issued for Convict to appear in court on 18.12.18.

By 18.12.18, the psychiatric report was not ready and the matter was adjourned to 09.01.19.

10 Again on 09.01.19, the psychiatric report was not availed. Court then directed the Medical Superintendent of the Prison to carry out psychiatric evaluation of the Convict and make a report by 15.01.19.

When the case was called on 15.01.19, Counsel for the Convict who had just been served with a copy of the psychiatric report prayed to be given time to analyze the report so as to be able to ably represent the Convict. The case was adjourned to 21.01.19, but did not take off until 05.02.19.

15 When the case was called for hearing on that date, Counsel for the Convict submitted that the Convict was before court for resentencing pursuant to the decision of the Supreme Court in the case of **Attorney General vs. Susan Kigula & 417 Others (Supra)** which found that the mandatory death sentence was unconstitutional.

20 Counsel then summarized the case of the State as follows: The Convict took a child away from her home, sexually assaulted her and then killed her. The cause of death was manual strangulation.

The deceased Akello Susan had bruises to the face and injuries to her genital area.

25 When arrested, the Convict purported to make a confession saying that when he began to assault the child, she cried out, he then strangled her and continued to abuse the dead body.

30 It was then argued for the Convict that the case for the death penalty was not met as the case was not the exception. Secondly that the Convict had clearly demonstrated capacity to reform.

And that a deterrent sentence between seventeen to twenty years from the date of conviction less the remand time would be an appropriate sentence.

5 Counsel asserted that, a court may only pass a sentence of death in exceptional circumstances. That is, the rarest of rare cases, where the alternative of life imprisonment or other custodial sentence is clearly inadequate. And that the death penalty may only be given where reform or rehabilitation is impossible.

10 Further that, while every murder is a crime of utmost seriousness requiring substantial punishment, the present case was not the rarest of the rare such as to persuade court to take the exceptional course of imposing the death sentence.

15 It cannot be said that the Convict is incapable of reform or rehabilitation, Counsel argued that a report from the O.C. Luzira Prison dated 13.12.18, indicates that the Convict has changed.

But also that, a life sentence is unnecessary because the Convict can adequately be punished by imposition of a custodial sentence.

20 Further that mental health is a mitigating factor. The Constitution Sentencing guidelines paragraph 3(a) confirms that the mental state of the offender be considered before imposing a custodial sentence.

And that paragraph 21 (c) thereof also confirms that mental disorder or disability leading to the commission of the offence is a mitigating factor.

25 Counsel pointed out that, while no mental health inquiry of the Convict was made at the time of trial, there is a substantial body of evidence to support the claim that the Convict was mentally unwell before and after the offence of which he was convicted and remains unwell to this day.

30 That the Convict, who joined the army in 1986, was discharged after he began to act oddly. One example is that he burnt his pay and other documents. He returned to the village where he was treated by a witch doctor. He improved somewhat but after a while, his condition became worse.

He became isolated and withdrawn distancing himself from others and he was seen talking to himself. Members of his community stated that, lack of failure of mental health treatment led to the deterioration of his behavior.

5 Also that, Counsel who appeared for the Convict in 2014, noted that the Convict did not know why he was in the condemned section of the prison. Although he had been told that he had killed someone, he had no idea of the offence with which he was convicted.

10 Courts attention was directed to a number of psychiatric reports, where it is indicated that the Convict's mental condition has deteriorated over the years.

In May, 2017, Dr. Muran reported that the Convict, who suffers from schizophrenia a severe and chronic illness, was unfit to participate in the hearing.

15 There is also a recent report from Dr. Birungi dated 14.01.18, which indicates that while the Convict has standing psychiatric problems namely schizophrenia, he is never the less fit to participate in this hearing.

20 The Doctor observed that, the Convict's illness started before he was arrested and he could hear voices instructing him to carry out certain commands, which he could obey.

Counsel then asserted that, the report supports the fact that the Convict was suffering from mental illness at the time of the offence.

25 The following are other mitigating factors referred to by Counsel for the Convict.

1) There is no evidence that the offence was premeditated or sophisticated.

30 Therefore that, the court may and should conclude that, given the circumstances in which the offence was committed, it was an impulsive act, committed by someone who was mentally unwell at that time.

2) No weapon was used in the commission of the crime/offence.

3) The age of the Convict cannot be ascertained but it is believed to be sixty years.

4) He has no previous conviction.

5) He was suffering from the mental disorder at the time of the offence.

5 6) While in custody, he has held position of a cleaner. Maintained a high level of discipline and abided by the rules.

According to the report of the O.C. Upper Prison, he is a changed person from the one when he was first imprisoned.

10 Courts attention was also drawn to the social inquiry report dated 05.07.14, where the community travelled to see the Convict in October, 2013. It states that he will be accepted back in the community and support will be provided to him upon his release.

15 Also that, the father of the deceased child will forgive the Convict once the balance of the settlement agreed upon between the families has been fully discharged.

It was further submitted that, the Convict is clearly capable of rehabilitation. He is unlikely to be dangerous and can be rehabilitated in the community.

20 It was also emphasized that, the report from the Prison authorities shows the Convict's progress in prison, including his participation in different rehabilitation programs, his impeccable disciplinary record and the assessment that he is a changed person.

And that the fact that the Convict was suffering from a mental disorder at the time of the offence, operates to reduce his capability.

25 At that time, his mental illness was untreated and he was hearing voices.

By contrast, Counsel pointed out he is now treated and his latest report describes him as stable; and he is said to have insight in his illness.

30 Court's attention was also drawn to a mitigating factors drawn from the **Kigula Case (Supra)** to the effect that the Convict resides in the condemned section of Luzira Prison in demeaning physical conditions.

The issue of prison conditions, Counsel stated was explicitly considered by the Supreme Court in the **Kigula Case (Supra)** with specific mention made of prison conditions at Luzira, when considering the components of death row syndrome.

5 It was the further submission of Counsel that, under Article 28 of the Constitution, the Convict is entitled to a speedy hearing. However that, the Convict in this case has been in custody for fourteen years pending re-sentencing. Therefore that, the delay is a powerful mitigating factor that featured prominently in the Kigula case.

10 Court was urged to reduce the Convict's sentence, taking into account the delay in passing sentence and the physical and psychological effects of the death row syndrome.

15 That a lower custodial sentence would be appropriate. And that a sentence between seventeen to twenty years from the date of conviction would be proportionate.

It was also pointed out that the Convict spent three years, four months and eight days on remand prior to the conviction. And that the period should be deducted from the sentence.

20 In reply, it was submitted for the state that, the maximum punishment for murder under SS.188 and 189 of the Penal Code Act is death.

And that, considering the facts as summarized by Counsel for the Convict, this is a case that might qualify to fit the description of the rarest of the rare. In which case, the Convict qualifies to be given the death sentence.

25 However that, considering that the Convict has a mental condition as evidenced by the report of 14.01.18, from Murchison Bay Hospital, Counsel stated that, he does not qualify for a death sentence but qualifies for imprisonment for life.

30 Admitted the Convict has a mental health condition, Counsel stated. And as indicated in the social inquiry report from his community, dated 05.07.14, **"lack and failure of mental health treatment led to the deterioration of his behavior"**. Therefore, Counsel argued, if the Convict is left to go, he will have no medical treatment yet, if he is kept

in prison, he will access to medical treatment which will keep his mental condition stable. Court was referred to the report of 14.01.18 which shows that the Convict is stable and on medication. That the medication would control the Convict and prevent him from committing other similar offences. And that the girl child will also be protected from such persons like the Convict.

Further that, the report of Dr. Birungi also shows that the Convict was a business man with no child. He could therefore not feel the pain of a child, which is evidenced by the fact that the child cried for help but he did not stop abusing her and also strangled her. Even after the victim was dead, he continued abusing her.

The actions, Counsel asserted, were degrading to the dignity of the girl child in general and the deceased in particular.

While the report from Luzira shows that the Convict attained a certificate in life skills training in 2016, the record shows that he was convicted and sentenced to death in 2004. And this is the only achievement attained by the Convict since he was sentenced. Although this shows he has a high level of discipline and hard work, Counsel argued that, considering the seriousness of the offence and his medical condition, he should be imprisoned for life.

In rejoinder, Counsel for the Convict reiterated her earlier submissions, emphasizing that the social inquiry report indicates that, the community is ready to receive the Convict back and the family of the victim has forgiven him pending a settlement.

While agreeing that the offence committed by the Convict is very serious in nature, Counsel insisted that the court should take into consideration the fact that the Convict was suffering from a mental disorder at the time of committing the offence.

Although appreciating the report of Dr. Birungi that the Convict is stable under medication, Counsel disagreed with the submissions of the State that it is only within the prison walls that the Convict can get treatment for his mental disorder. Observing that not all mental patients receive treatment at Luzira Prison. And there are other hospitals that provide this treatment.

Court was urged to consider the said factors while coming to a decision in this matter

5 I have given the submissions of both Counsel the best consideration I can in the circumstances taking into account both the aggravating and mitigating factors.

Among the mitigating factors, emphasis was placed on the mental disorder of the Convict at the time of commission of the offence, although this was never brought out at the trial. The Convict suffers from schizophrenia.

10 Court's attention was also drawn to the report from prison indicating that the Convict is a changed person, together with the social inquiry report of 05.07.14 which indicates that the Convict will be accepted back in the community and supported.

15 And that a settlement was reached between the family of the Convict and that of the bereaved family. And once the balance of the settlement agreed upon is paid the father of the deceased will forgive the Convict, interalia.

20 Counsel for the State agrees that since the Convict has a mental condition he does not qualify for a death sentence, but he qualifies for a life sentence considering the gravity of the offence and the fact that it was degrading to the dignity of the deceased in particular and women in general.

25 It has been established through research and it is also provided for in the sentencing guidelines of Uganda that mental illness is a mitigating factor which may affect a sentence in a number of ways.

Where there was a link between the mental health condition of the Convict and the offence, it may reduce the offender's **"moral capability or blameworthiness for the offence"**.

30 It may also affect the kind of sentence that is imposed or its conditions for example requiring an offender to get treatment.

I wish to point out from the outset that, in the present case, when the Convict reappeared for re-sentencing 30.07.2014, it was found that due

to his mental condition he could not follow and understand the sentencing proceedings. The court directed that he be put on treatment until he was certified capable of following the proceedings. This was done.

5 There is also the social inquiry report that indicates that his condition has attracted community sympathy, making him an unsuitable vehicle for sending a deterrent message to the community and also makes it inappropriate to send him a deterrent message.

10 Considering the life imprisonment for life proposed by Counsel for the state, I find that it may result into the punishment weighing more heavily on him than a person of normal health. It could also pose the risk of further deterioration in the Convict's mental health.

15 All the factors outlined above point to a more lenient sentence being given. But considering the gravity of the offence committed by the Convict and circumstances in which it was committed, there is need to balance all the conflicting considerations and determine a most appropriate sentence.

20 Despite the mental condition of the Convict, the circumstances of the offence point towards need for a more severe sentence, although not as severe as imprisonment for life.

25 Since there is treatment available at the prison, I find in the circumstances of this case that a sentence of imprisonment of twenty five years will suffice to meet the ends of justice. I would have given him thirty years but have taken into consideration the period of almost four years spent on remand before conviction.

The sentence to take effect from the date of conviction.

30 **FLAVIA SENOGA ANGLIN**
JUDGE
19.02.19