

DUNCAN
ONDIMU

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
INTERNATIONAL CRIMES DIVISION
CRIMINAL SESSION CASE No. 0001 OF 2010
(Arising from Nakawa Chief Magistrate's Court Crim. Case No. 574 of 2010)

UGANDA PROSECUTOR

VERSUS

- 1. HUSSEIN HASSAN AGAD }}
- 2. IDRIS MAGONDU }}
- 3. ISA AHMED LUYIMA }}
- 4. MUGISHA MUHAMOUD }}
- 5. NSUBUGA EDRIS }}
- 6. HASSAN HARUNA LUYIMA }} ACCUSED
- 7. MUZAFAR LUYIMA }}
- 8. BATEMATYO ABUBAKARI }}
- 9. YAHYA SULEIMAN MBUTHIA }}
- 10. HABIB SULEIMAN NJOROGE }}
- 11. OMAR AWAD OMAR }}
- 12. MOHAMMAD HAMID SULAIMAN }}
- 13. SELEMAN HIJAR NYAMADONDO }}
- 14. MOHAMED ALI MOHAMED }}

VERSUS

UGANDA RESPONDENT

BEFORE:- THE HON MR. JUSTICE ALFONSE CHIGAMOY OWINY - DOLLO

SENTENCE

When the Accused persons herein were arraigned before this Court to answer charges of terrorism c/s 7(1) and (2)(a) of the Antiterrorism Act of Uganda, as well as other offences, Nsubuga Edris alias Eddy alias

Easy (otherwise known as A₅) informed Court that he was pleading guilty to the charge of terrorism contained in the first three counts of the indictment. In pleading guilty, he however stated that he had not intentionally committed those acts he was pleading guilty of. I found this plea to clearly equivocal, owing to his denial of an essential ingredient of the offence charged; and therefore I entered the plea of 'Not guilty' instead.

The following day, to which the case had been adjourned for further plea taking, A₅ informed Court that he wished to change his plea from the previous day's, with regard to the first three counts of terrorism. I took it upon myself to explain to him, and cautioned him to be cognisant of the import of his intended plea, given that the offence of terrorism as charged is a capital one which attracts a possible death sentence. He assured me that he had understood my explanation; but nonetheless, he stood his ground and pleaded guilty to each of the three counts of terrorism. State Counsel Mr Lino Anguzu then gave a detailed account of the facts of the offence charged.

His account included the wilful participation of A₅ in the planning for and placement of the explosive devices at the Rugby Club, Ethiopian Village Restaurant, and a Makindye house; all in the district of Kampala, as well as the discharge of those deadly devices; and the reason given for so doing was to punish the Americans and Ugandans for interfering in Somalia. After the State Counsel had presented the facts, A₅ admitted the correctness of the statement and reiterated his plea of guilt to each of the three counts of terrorism; which I accordingly entered, and then convicted him on his own plea of guilt with regard to each of those counts.

State Counsel then informed Court that as far as the State was aware, the convict was a first offender; and that he had, in a charge and caution statement he made to police soon after his arrest and later an extra judicial statement he made to a magistrate, confessed his participation; and fully cooperated with and assisted the police in their inquiries, thereby leading to the arrest of several other suspects. Counsel further informed Court that the State had decided to drop all the other charges against the convict, and a nolle was entered. Counsel further disclosed that the convict would appear at the trial as prosecution witness against his erstwhile co-accused persons.

Finally Counsel urged Court to impose only a custodial sentence on the convict on each of the counts in view of his conduct from the time of his arrest, and owing to the fact that he has not wasted Court's time and national resources, on top of being of immense use to the police in the course of their investigations. Defence Counsel also submitted in mitigation that the convict had shown remorse for what he has done; and, from prison, had written to the President of Uganda confessing his guilt and expressing his remorse, and seeking to be pardoned. A copy of this letter was availed to Court.

Counsel further submitted that in owning up to his grave deeds, the convict has exhibited not only contrition for the tragic consequence thereof, but also courage; and accordingly this is a proper situation where the Court should exercise leniency while exercising its discretion in imposing sentence on him. Counsel cited several useful authorities on sentencing in support of his submissions. After this, I allowed the convict to address Court. He seized the opportunity to lay bare his soul by giving a long and winded account of his participation in the horrible project that was intended to punish the Americans for their intervention in Somalia and scare Ugandans out of that country.

He admitted that he was clear headed when participating in the enterprise; but found himself manipulated and trapped, without the power to extricate himself. His soft spot, he claimed, had been his domestic problems and financial woes which his manipulators exploited. He reiterated his plea to the people of Uganda, on whom he has inflicted so much loss and grief, to forgive him. He described himself as a remorseful and reformed young man who is still of use to the country, especially the youth who are gullible to manipulation by the forces of Al Shabaab who are a reality to reckon with. He undertook to sensitise the youth of this country on positive living, if he were to find favour with this Court and he regains his freedom.

Part of the letter he wrote to the President, from prison, read as follows:

"It is only through the grace of God that I have this opportunity to write to you ... I feel very humbled at this opportunity. Your Excellency, it is very absurd that I was involved in the acts that shook the nation that you lead, on the 11th July 2010. I have always felt obliged to apologise and ask for forgiveness from you, the President of this country, Uganda. I am a man of sound mind who honestly just happened to be caught in a web of delusions, deceit, manipulation, hatred, and spite towards everything that was going on in my life at the moment, as well as threats from a trusted friend ... who happens to be a member of the Al shabaab."

He warned of the susceptibility of other members of the youth to this form of victimisation as a consequence of similar intrusion; and thus the need to have them sensitised about the dangers of not being careful with their lives. He then continued that:

“As a victim of manipulation, I am ready to set forth and grasp fully the enormity of this task in order to limit the scope of propagation of evil and terrorism and prevent our country from living in fear and trepidation inflicted on its people at the behest of these aggressors.”

The convict herein was, on his own plea, found guilty on three counts of the offence of terrorism. Mandatory death sentence has since been outlawed in Uganda; accordingly, at most, he is only liable to suffer death in accordance with the provisions of the section of the law he has been indicted under. To exercise my discretion to determine the sentence which is best suited for the circumstance of this case, I am under duty to act judiciously; and in this, I am fortunate to be guided by a well trodden field of authorities. Punishment is the age old aim in sentencing, although there are other principles in play alongside it.

Societal deterrence is the principal purpose of punishment; and to achieve this, the sentence imposed must be commensurate with the gravity of the offence committed, and for which the accused has been convicted; (per Ssekandi Ag. J. (as he then was) in *Uganda vs Solomon Odaba & Anor, Crim Revision No 275 of 1974*. However, as was elucidated by the South African Constitutional Court in the multiple murder case of *The State vs Makwanyane & Mchunu (CCT3/94), [1995] ZACC 3, [1996] 2 CHRLD 164*, the trial Court must identify mitigating and aggravating factors in each case.

The purpose for which punishment is usually imposed, which the Court listed as deterrence, prevention, reformation, and retribution, must be weighed against any subjective factor which might have influenced the criminal conduct of the accused; and imposing of such

heavy punishment as the death sentence should only arise in the most exceptional cases where: -

“there is no reasonable prospect of reformation and the object of punishment would not be properly achieved by any other sentence.

... ..

One of the relative theories of punishment (the so called purposive theories) is the reformatory theory, which considers punishment to be a means to an end, and not an end in itself - that end being the reformation of the criminal as a person, so that the person may, at a certain stage, become a normal law abiding and useful member of the community once again. The person and the personality of the offender are the point of focus rather than the crime, although the crime is, however, not forgotten. And in terms of this theory of punishment ... the offender has to be imprisoned for a long period for the purpose of rehabilitation.”

It is therefore clear from this that in certain cases, Courts should focus on giving the convict space for reformation; but without losing sight of the crime committed. In determining which of the two rivalling principles, which both enjoy universal application to varying degree, Court should pursue, each case must be considered in the light of its own facts and circumstance; while being informed by similar circumstances. For instance, commission of even the most gruesome crime by a child or civilian who might have been helplessly caught up in the cobweb of societal degeneration in a war situation, may attract less punishment than where the commission of the culpable deed was, say, by a professional soldier, or even a civilian operating under an otherwise peaceful environment.

Similarly where an accused, of his or her own volition, genuinely comes out and confesses guilt, this is the clearest manifestation of contrition. It does require a lot of courage and soul searching to be able to do so. And indeed the Court would be hard pressed to show leniency to such a person by not imposing the ultimate punishment. In the case of *Prosecutor v Moinina Fofana & Ors*, where the accused, like other civilians, had been recruited into the role of a combatant in the devastating Sierra Leonean civil war, but had not been accorded the requisite military training regarding discipline, the appeal chamber of the Special Court of Sierra Leone found that this mitigated his moral culpability; and stated in part that:

“An accused’s acknowledgment of responsibility can be a mitigating circumstance in sentencing because it makes an important contribution to establishing the truth, and thereby an accurate and accessible historical record. Moreover, such an acknowledgment of responsibility may ... set an example for other persons to make the same moral choice, and alleviate the pain and suffering of the victims. Further, acknowledgment is part of the rehabilitative purpose of sentencing, and therefore an accused who acknowledges responsibility can properly be credited with a reduced sentence(emphasis mine).

... ..

In assessing the appropriate sentence, the obligation of the [Court] is, therefore to impose sentences that reflect the revulsion of [society] to such crimes as those for which the accused have been convicted, after taking into consideration all factors that may be considered, legitimately, in mitigation as well as in aggravation (emphasis mine).”

With regard to the instant case before me, the convict has pleaded guilty and sought forgiveness. His plea has been that he was manipulated by forces which seized on his domestic difficulties as an entry point. He however also disclosed that the intrusion took place at a time when he had been promised opportunities in Rwanda. He was therefore not altogether helpless. As a person of his education and obvious exposure, he knew that he could have reported the matter to police or at the very least avoided his manipulators. He did neither. He revealed having defied some of the directives of his manipulators. He was therefore not perpetually under their spell or authority. To use his own expression, he was clear headed in all that he did.

He participated in the meticulous scouring and reconnoitre of the Kampala district to identify the place best suited for execution of the diabolical enterprise; and these places turned out to be the soft underbelly of the Ugandan State (the unsuspecting non combatant community). By his admission, he could not gather the courage to blow himself up; yet he had no qualm in blowing up other humans with whom he and his cohorts had no quarrel whatever; and some of whom might have, themselves, been opposed to the Somalia intervention. He was even mindless of the possibility that the victims of his deeds could have included his own relatives; in which case he would have rendered unto himself a painful act of poetic justice.

None of these crossed his clear mind; or if any did occur to him, he callously went ahead to execute the heinous plan, regardless. I rejected outright, in his his face during his presentation in Court, his attempt to explain his participation in the despicable acts by dragging Islam into it. Islam, which derives its greatness from its purpose which is to submit to the will of Allah, is one of the great religions of the world. It has contributed immensely to world civilisation and spiritual

healing. The living God is never complicit in, and certainly never condones senseless killing of His people. Neither the Rugby Club, nor the Ethiopian Village Restaurant was a place of belligerence or military frontline by any stretch of description.

Infact other than write to the President of Uganda seeking pardon from prosecution, he should have openly pleaded with Allah for having desecrated His temple - the souls of innocent people. As it is, his plea to the President of Uganda was to no avail. The President, under the Constitution of Uganda or any other law, has no power to intervene in criminal prosecution. His prerogative of mercy only comes at the tail end of the criminal litigation process. The duty to determine whether or not an accused should be prosecuted lies squarely and solely with the Director of Public Prosecution, as was evidenced by the decision to drop charges of murder and others he (the accused) was faced with.

That said, notwithstanding the gravity of the offences committed, and the callousness with which they were executed by the convict, and the indelible mark they have left in the bleeding hearts of many unconsolable families, I have hearkened to his expression of contrition which I consider genuine. Accordingly, I should spare him the heaviest sentence permissible under the law; which is the death sentence. However I consider that it is desirable that the custodial sentence I impose should reflect the gravity of the offence charged and the revulsion with which society has received the heinous deeds regardless of the convict's expression of remorse.

I am cognisant of the fact that he is only slightly above the age of 30 years, and of remarkably good education, albeit his having misplaced it by putting it to negative use. He can still, given the appropriate space in time, and conducive environment, reform and be of use to

himself and the society he lives in at large. Accordingly taking all the factors into consideration, I sentence him (A₅) to 25 (twenty five) years in jail in each of the counts I have convicted him. Sentence shall run concurrently. I do hope he uses his time in prison as a retreat to reflect on the full enormity of the action for which I have had to keep him away from society. He has the right to appeal against sentence.

As for A₄ (Mugisha Muhamoud) who has been convicted, on his own plea of guilty of the offence of conspiracy to commit acts of terrorism c/s 25 of the Antiterrorism Act 2002 of Uganda, the State Counsel urged Court to impose only custodial sentence as the convict had easily confessed his recruitment into and participation in the activities of Al Shabaab, and is a young man of 25 years only. Defence Counsel also submitted that the convict was not directly involved in the Kampala bombings; and has through his confessions and extra judicial statements provided valuable information to the Ugandan authorities on terrorist activities. He thus prayed for a lighter sentence focusing on reform as his is a case of a young man who was clearly misled.

The convict himself in his statement to Court asked Ugandans and Court for forgiveness. He was lucky that he was so charged only with conspiracy to commit acts of terrorism. The State could well have charged him with commission of the offences of terrorism under section 7 (2) (d) of the Act in view of the funds he provided and rented a safe place with, for terrorists to operate from, notwithstanding that this money was refunded to him. Similarly, he could have been charged with offences relating to acts of terrorism as set out in section 8 of the Act. In both, he would have been liable to suffer death, in the light of the role he played in securing a place from which the terrorist acts were to be carried out. As it is he was charged with and pleaded guilty

to the lesser offence of conspiracy which attracts a maximum sentence of 7 (seven) years on conviction, as he was.

I have given due consideration to his station in life, education, age and his owning up to his involvement in the activities for which he was charged. I think he was a victim of manipulation in the circumstance of the case. But nevertheless, this Court must send out a clear signal to all that acts of criminality are not worthy enterprises. Terrorism, especially in the manner envisaged to be carried out in the conspiracy for which the convict was nipped in the bud, has the dangerous aspect of occasioning senseless and indiscriminate harm to society. He is a family man and were he to blow himself up as was intended, he would have subjected his family to permanent loss and grief.

I consider that he requires some ample time in jail from which he can reflect on the foolhardiness of the enterprise he had let himself into. I do hope that he will put his time in jail to more constructive use, and when he comes out he will have fully reformed and can be considered a useful member of our society. I therefore sentence him to 5 (five) years in jail. Upon his release from jail, he shall be placed under police supervision for 5 (five) years. He has the right of appeal against sentence.



Alfonse Chigamoy Owiny - Dollo

JUDGE

16 - 09 - 2011