THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: [Mwondha; Tibatemwa; Mugamba; Buteera; JJ.S.C; Tumwesigye. AG. JJ.S.C]

CRIMINAL APPEAL NO.02 OF 2018

BETWEEN

MWANGA MOSES:::APPELLANT

AND

UGANDA:: RESPONDENT

(An appeal arising from a decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No.66 of 2009 presided over by S.B.K. KAVUMA, A.S. NSHIMYE and R. KASULE, JJA dated the 29th day of June 2011)

JUDGMENT OF COURT

The Background facts

On 23rd January 2002, at about 8pm, people in Kapkoch trading centre in Kapchorwa District heard a lot of gun shots. In the midst of the gunshots, the appellant while armed with a gun entered a shop where Mamari Francis was seated and shot him dead. He then held the hurricane lamp that had been on the counter, opened the counter drawer and removed money. The appellant then pointed his gun at Albert Mangusho (PW3) who was also in the shop. PW3 grabbed the gun by the barrel and struggled with the appellant for it. The appellant over-powered PW3, shot and injured him after which he ran out of the shop.

The appellant then fired some gun shots at a crowd in the trading centre. While he was leaving the trading centre, the appellant bumped into Soyekwo Jimmy (PW5) and stated *"This man has recognised me."* After that statement, the appellant shot and injured PW5 in the stomach. He left the trading centre.

The appellant was arrested a week later in Kapchwora. He was charged, tried and convicted for the offence of murder and was sentenced to death by the High Court. He appealed to the Court of Appeal against both conviction and sentence. The Court of Appeal upheld both the conviction and the sentence of the High Court, hence this appeal.

The grounds of appeal before this Court are stated as follows:-

1. **The learned Justices of Appeal erred in law and in fact when they failed to adequately re-evaluate the evidence on record as regards identification thereby coming to an erroneous decision.**

2. **The learned Justices of Appeal erred in law and in fact when they held that the appellants alibi had been discredited.**

3. **The learned Justices of Appeal erred in law and in fact when they upheld a manifestly harsh, illegal and unjustified death sentence against the appellant.**

Representation

At the hearing of the appeal the appellant was represented by Mr. Emmanuel Muwonge while the respondent was represented by Mr. Wanamama Mics Isaiah, a Senior State Attorney.

Submissions

Submissions of counsel for the appellant

Ground 1

Counsel for the appellant submitted that the Court of Appeal as the first appellate Court failed in its duty to subject the evidence as regards identification to a thorough revaluation before coming to the conclusion that it was sufficient to support the conviction against the appellant.

Counsel submitted that the offence was committed at 8pm at Kapkoch trading centre when there was no electricity light. There was only a hurricane lamp in the shop where the deceased was shot. He argued that there wasn't enough light from the hurricane lamp for the witnesses to sufficiently identify the appellant as the perpetrator of the offence. He added that the Justices of Appeal simply admitted the statement of PW3 that there was sufficient light in the shop from the hurricane lamp and that PW3 had known the appellant from their Primary School days but that the Court never considered whether that light was really sufficient to enable identification of the accused. He relied on **Bogere & Anor vs. Uganda, Supreme Court Criminal Appeal No.2 of 1997** where Court stated:- ***"the judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused."*** to support his contention.

Counsel submitted that although the learned Justices of Appeal found that the circumstances would make it difficult to identify the perpetrator they nevertheless reasoned that there were three witnesses who testified as to the participation of the appellant in the shooting of the deceased. He argued that the Justices thus erred in law when they attached too much weight to the fact that more than one eye witness identified the appellant. He cited and relied on the case of **Bogere** (*supra*) where this Court quoted its decision of **Abdala Nabulere & Anor vs**

Uganda Criminal Appeal No. 9 of 1978 and held that several witnesses testifying as to identification of a party could all be mistaken.

According to counsel, had the learned Justices of Appeal critically evaluated the factors that played a role in the witness's ability to identify the appellant, they would have found that a hurricane lamp light is not enough to enable one identify someone in the night especially in the circumstances in which the witnesses found themselves on the fateful night.

Counsel further submitted that PW3 stated in cross-examination on the night in issue that the assailant wore a cap whose colour he could not identify. Counsel argued that it cannot be reasonably possible that PW3 could not remember the colour of the cap the assailant wore given the length of time that PW3 allegedly saw the accused right from when he entered the shop till when he got out.

Counsel contended that the learned Justices of Appeal did not attach any weight or consider the appellants evidence that he did not know PW3 before and that they had never been to the same primary school. He added that an assessment of whether the prosecution had through PW3 proved beyond reasonable doubt that he and the appellant had known each other from primary school would not have proved to be true.

It was the appellant's contention that the Justices of Appeal also erred in law and fact when they failed to consider the finding of the assessors that there was panic and fear that could have led to an error in identification.

Counsel submitted that since the Justices of Appeal in their finding did not reach a situation where they ruled out the possibility of a mistaken identity, they therefore failed in their duty to properly re-evaluate the evidence on record.

Ground 2

Counsel for the appellant submitted that the Justices of Appeal erred in law and fact when they held that the appellant's alibi had been discredited.

Counsel argued that the learned Justices of Appeal did not consider the fact that the prosecution made no effort to place the accused at the scene of the crime. He said that the learned Justices instead relied on the stated evidence of PW3, PW4 and PW5 to hold that the alibi crumbled on that account.

He submitted that the appellant stated that he was in Mbale at the time of the offence and that he had been there for one month. He asserted that it is the law that when an accused pleads alibi, it becomes the duty of the prosecution to place him at the scene of the crime.

Counsel submitted that the learned Justices of Appeal did not consider or evaluate the appellant's evidence that he had been in Mbale for one month. He said that the Justices did not evaluate whether the prosecution discharged the burden to discredit this specific evidence from the appellant and that none of the witnesses specifically testified that they had recently seen the appellant in the period just before the fateful day. He added that the prosecution failed to prove beyond reasonable doubt that the appellant was at the scene of the crime and had been there for the last month. He cited **Buhingiro vs. Uganda, Supreme Court Criminal Appeal No.08 of 2014.**

Counsel thus submitted that the learned Justices of Appeal improperly re-evaluated the evidence on record and reached a wrong conclusion that the accused was at the scene of crime at the time of the offence.

Ground 3

It was submitted for the appellant that the learned Justices of Appeal erred in law when they upheld the death sentence against the appellant which was illegal, manifestly excessive and harsh in the circumstances.

Counsel submitted that in upholding the trial learned Judge's sentence, the learned Justices of Appeal relied on the learned trial Judge's reasons for the decision to sentence the appellant to death. He said that the Justices of Appeal did not find the sentence excessive in any way and held that there was no reason therefore to interfere with the trial Judge's decision.

Counsel argued that in **Attorney General vs. Susan Kigula and 417 Ors, Constitutional Appeal No.03 of 2006** this Court held that the mandatory death sentence is illegal. He said that in the **Constitutional (sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013,** it is provided that a Court 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.

According to counsel, the instant case was not one of the rarest of rare cases where a custodial sentence was demonstrably inadequate.

Counsel further submitted that the Justices of Appeal erred in failing to consider that the appellant is a first time offender in his prime age, with a possibility to reform. He said that during his time of remand, the appellant has been involved in multiple rehabilitative activities, had accomplished certificate courses and had held leadership positions.

He prayed that the conviction and sentence against the appellant be set aside.

Submissions of counsel for the respondent

Ground 1

Counsel for the respondent submitted that the learned Justices of Appeal had correctly considered all the factors for correct identification of the appellant to have committed the alleged offence. He said that the Justices of the Court of Appeal had evaluated the evidence and had found that there was a lit hurricane lamp in the shop which provided enough light that enabled PW3 and PW4 to identify the appellant.

Counsel said that the factors of identification were better in the instant case compared to what transpired in **Abdala Nabulere & Anor vs Uganda, (S.C.C.A No. 9 of 1978)** and in **Kifamunte Henry vs. Uganda, (S.C.C.A No.10 of 1997)** because in both cases, the offences were committed at night with only one eye witness while there were two witnesses in the instant case. He added that in the case of **Kifamunte**, the witness used a hand held torch light to identify the accused while the appellant in the instant case was identified with the help of a lit hurricane lamp and the distance between the identifying witnesses and the appellant was short.

Counsel submitted that the appellant was not a stranger to PW3 who had known him from their primary school days and knew him also as a driver at Kapkwoch trading center. He added that PW4 had also known the appellant for 10 years and he was his neighbor at Kapkwoch trading center. He stated that PW4 saw the appellant enter the shop lit by the hurricane lamp, fired the bullet and hold the hurricane lamp. Counsel said PW4 testified that the appellant opened the counter, removed some money, put the lamp on the counter and then pointed the gun at the witness. According to PW4, PW4 and the appellant struggled for the gun. Counsel stated that this was all in close proximity which enabled him identify the appellant. According to PW4, the appellant met PW5 who with the help of the

moonlight outside identified the appellant as Mwanga Moses, his clansman. Counsel stated further that PW5 recognized the appellant's voice when he stated that *"this man has recognized me"* and after shooting him in the stomach, he again said *"it has caught him"*.

Counsel invited Court to find that although the incident happened at night, the conditions for identification were good as there was sufficient light from the hurricane lamp and there was moon light. In addition all the witnesses were familiar with the accused who was at a short distance from them at the time of the offence. He prayed that the decision the Court of Appeal be upheld.

Ground 2

In his submission on ground No.2, counsel for the respondent adopted the principle laid down on alibi in the case of **Buhingiro vs Uganda** (*supra*) which quoted **Bogere vs Uganda** (*supra*) where Court held: *"what then amounts to putting an accused person at the scene of the crime? We think that the expression must mean proof to the required standard that the accused was at the scene of the crime. To hold that such proof has been achieved, the Court must base itself upon evaluation of evidence as a whole. Where the prosecution adduces evidence that the accused was at the scene of the crime, and the defence not only denies but also adduces evidence that the accused was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and hold that because of that acceptance per se, the other version is unsustainable."*

Counsel asserted that the Justices of Appeal re-evaluated the evidence and stated that: *"when an accused sets up an alibi in his defence, it is the duty of the prosecution to destroy the alibi by adducing evidence that does not only place the*

accused at the scene of the crime but also proves he participated in the commission of the offence. Where the prosecution does so, as it did in the instant case through the evidence of PW3, PW4 and PW5, the accused's defence of alibi crumbles."

According to counsel, by the above analysis, the learned Justices of Appeal were re-evaluating the whole case for both the defence and the prosecution. He argued that this was their style of re-evaluation as there is no standard style of revaluation. He said that in particular, the appellant was put at the scene of the crime by PW3, PW4 and PW5 and as a result his defence of alibi could not be left standing. He cited the case of **Kifamunte** where the appellant's alibi was found not to have raised any doubt in the prosecution's case.

Counsel prayed that Court finds no merit in ground 2 and the ground would be dismissed.

Ground 3

Counsel for the respondent supported the learned Justices of Appeal in upholding the death sentence imposed on the appellant by the learned trial Judge. He submitted that the sentence is legal, not excessive or harsh in the circumstances of this case.

In response to the appellant's contention that the death sentence is illegal, counsel cited the case of **Attorney General vs. Susan Kigula** in which this Court held that the mandatory death sentence is unconstitutional. He argued that the trial Judge did not give the death sentence as a mandatory sentence but because the appellant had done the unusual act of shooting many times within a short time, killing a person, injuring and scaring other people.

Counsel submitted that the learned trial Judge and the Justices of Appeal when sentencing the appellant considered the **Constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 paragraph 18 (a)** which provide for the death sentence for the "rarest of rare" cases.

As regards the appellant being a first time offender, counsel submitted that this was considered by the lower courts but the appellant's conduct on the fateful day of shooting at the trading centre, inside the shop (killing the deceased and injuring PW3 on the shoulder), and in a short distance shooting PW5 in the stomach, could not allow his being a first offender to help him get a lesser sentence than death in the circumstances of this case. That in the reasoning of the trial Judge and the first appellate Court, such person was to be given such sentence to protect the people the appellant would put in danger if he is to have a chance to be in society again.

Counsel submitted that the learned Justices of Appeal were alive to the principles applied in upholding the death sentence. He prayed that this ground be dismissed and the Court of Appeal decision be upheld.

Rejoinder

Counsel for the appellant submitted that the death sentence imposed by the High Court and upheld by the Court of Appeal is unlawful. He argued that both the trial Court and the Court of Appeal failed to apply the first, second and third stages of the test for the discretionary application of the death penalty. He stated the stages as:-

1. Exceptionality ('rarest of the rare');
2. No reasonable prospect of reform of the convict;
3. The object of punishment would not be achieved by a lesser sentence.

He submitted that in the case of **Attorney General vs. Susan Kigula and 417 others**, the Supreme Court held that a mandatory sentence of death is unconstitutional and that the imposition of a death sentence is always discretionary. He added that although the Susan Kigula decision recognised that *"not all murders are committed in the same circumstances and not all murders are the same character"*, it did not define what the test for discretionary application of the death penalty should be.

Counsel submitted that international and subsequent domestic case law have given guidance on the discretionary application of the death penalty. The international cases cited were; **State v. Makwanyane [1995] (3) S.A. 391, Trimmingham v. The Queen [2009] UKPC 25, Bachan Singh vs. State of Punjab AIR 1980 SC 898, Santosh Barivar v. State of Maharashtra (2009) (6 SCC 498), Lockhart v. The Queen [2011] UKPC 33,** while the domestic cases cited were; **Mbunya Godfrey vs. Uganda, S.C.C.A No. 04 of 2011, Kakubi Paul and Muramuzi David vs. Uganda, C.A.C.A No.126 of 2008, LDU Kyarikunda Richard vs. Uganda, C.A.C.A No.296 of 2009.**

Counsel argued that in all the above listed cases, there was a need to establish that there is no reasonable prospect of reform and that no lesser sentence will suffice, even if a case falls within 'the rarest of the rare category'.

He submitted that **the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions** also provide guidance on the test for discretionary application of the death penalty. According to Counsel, section 17 of the Guidelines effectively comprises all three parts of the discretionary test: *"the Court 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."*

Counsel submitted on stage one that although the instant case involved a serious offence, it does not constitute the most grave and exceptional murder case. According to counsel, it does not satisfy the definition of the 'rarest of the rare' and therefore should not attract the death penalty.

He argued that other cases involving similar or even greater levels of culpability and harm than the present case have not resulted in the imposition of the death sentence. He referred to **Olupot Justine and another vs. Uganda, C.A.C.A No.155 of 2009**, **Kasaija Daudi vs. Uganda, C.A.C.A No. 128 of 2008, Okecha Mugumba and others vs. Uganda, C.A.C.A No.183 of 2009** and **Kyarikunda Richard vs. Uganda, C.A.C.A No. 296 of 2009.** He emphasised the need for consistency in sentencing.

He submitted that the appellant is aged 35 years, he expressed remorse and was a married man with dependants, two wives and two children. He was the sole breadwinner for his family. He had spent 1 year and 3 months on remand and was a first time offender. He relied on **Uganda vs. Kasuiime Daniel [2009] UGHC 125** and **the Constitution (sentencing Guidelines for Courts of Judicature) (Practice) Directions.**

On stage three and four, counsel submitted that the prosecution bears the burden and standard of proof on these issues: it must prove to the criminal standard, on the basis of expert evidence, that the appellant is incapable of reform and that no lesser sentence would suffice. He added that the prosecution made no submissions concerning reform before the High Court or the Court of Appeal. Neither the High Court nor the Court of Appeal had any evidence presented to them which they could have found such factors proved, contrary to the requirement in the Kakubi case.

According to counsel, imposition of the death sentence without considering the second and third stages of the test was unlawful.

Counsel contended that even if the Court does consider that the facts of the instant case amount to the rarest of rare, the imposition of a death sentence would nevertheless be unlawful in the circumstances where the respondent has failed to adduce any evidence or prove that there is no reasonable prospect of the appellant's reform.

He submitted that the appellant was remorseful and has since matured through his time in prison and therefore capable of reform.

In conclusion, Counsel submitted that the death sentence imposed on the appellant is unlawful and cannot stand.

Consideration of Court

This Court has had occasion to state what its duty is as a second appellate Court in numerous cases including **Kifamunte vs. Uganda, *(supra)*, Bogere Charles vs. Uganda, *(supra)*** and **Ongom John Bosco vs. Uganda Supreme Court Criminal Appeal No.21/2007.**

In the latter case, the Court re-stated what it had held in the previous cases as follows:

> **"A second appellate court is precluded from questioning the concurrent findings of facts by the trial and first appellate courts, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have come to the same conclusion. A second appellate court can only interfere with such finding where there was no evidence to support the finding because this is a question of law."**

We perused the records of proceedings of the High Court and the Court of Appeal as well as the judgments of both Courts. We have also studied the submissions

of counsel for all the parties and the relevant available authorities. We shall now proceed to apply the legal principles stated in the authorities above quoted in resolution of the appeal.

Ground 1

It was the appellant's contention that the Court of Appeal failed in its duty to subject the evidence regarding identification to a thorough revaluation before coming to the conclusion that it was sufficient to support the conviction against the appellant.

In **Criminal Appeal No. 09 of 1978, Abdala Nabulere & Anor vs Uganda,** this Court held that a Judge should examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused to avoid mistaken identity. Court added that when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no other evidence to support identification evidence, provided the Court warns itself of the special need for caution.

In arriving at their decision, it is clear that the Justices of the Court of Appeal were alive to the above principles of identification laid out in **Bogere *(supra).*** The Justices acknowledged that the offence was committed at about 8pm at night which would ordinarily make identification of the appellant difficult. They, however, noted that there was sufficient light from a lit hurricane lamp in the shop which enabled PW3 to identify the appellant whom he had known from their primary school days. PW4 took advantage of the moonlight to identify the appellant who fought him during a struggle for the gun. They were at a short distance from each other. PW4 had known the appellant for 10 years. There was

evidence that PW5 saw the appellant when they met as the latter came running from the direction of the trading centre where the shooting had taken place. PW5 knew the appellant as a neighbour which enabled him to easily identify his voice when he spoke.

From the above analysis, we find that the Court of Appeal Justices properly evaluated the evidence in respect to identification of the appellant.

We find no fault in their finding on ground 1.

Ground 2

It was submitted for the appellant that the Justices of Appeal erred in law and fact when they held that the appellant's alibi had been discredited.

The principle on alibi was laid down in **Criminal Appeal No.02 of 1997, Bogere & Anor vs Uganda,** where this Court held:

> **"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold**

that because of that acceptance per se the other version is unsustainable."

We have looked at both the High Court and the Court of Appeal records and judgments. The trial Judge addressed the issue of the appellant's defence of alibi as follows:

"In the case before Court, it is necessary to determine whether or not the prosecution did negative the alibi of the accused.

In Courts view, the evidence of Mangusho Albert (PW3) which was corroborated by that of Cherwotwo Petero (PW4) put the accused squarely at the scene of the crime at the time the crime was committed. The evidence of those two witnesses was corroborated further by that of Soyekwo Jimmy (PW5) who met and recognised the accused armed with a gun as the accused was running away from the scene of the crime shortly after that witness had heard gunshots in the direction of the scene of crime.

In in view of that evidence on record, court believes that at the time the crime was committed, the accused was not where he alleged he was in his sworn statement. By that same evidence therefore, court finds that the prosecution negative the alibi of the accused, by putting him at the scene of crime at the time the crime was committed (Bogere Moses & Another vs Uganda, S.C. Crim. Appeal No.1 of 1997, 1 SCD (CRIM) 1996-2000 at page 185."

On appeal the Court of Appeal considered the appellant's defence of alibi and held:

"The appellant put up the defence of alibi when he stated that on the material day, he was Mbale. By setting up that defence, the appellant did not assume the burden to prove it. His only duty was to account

for his whereabouts at the time the offence he was charged with was committed. He did not do so. When an accused person sets up an alibi in his defence, it is the duty of the prosecution to destroy the alibi by adducing evidence that does not only place the accused at the scene of crime but also proves he participated in the commission of the offence. When the prosecution does so, as it did in the instant case through the evidence of PW3, PW4 and PW5, the accused persons defence of alibi crumbles. See Alfred Bumbo and others vs Uganda SCCA 28 of 1994 (unreported) and Bogere Moses and Another vs Uganda, SCCA No.1 of 1997. We therefore, find that the appellants' alibi was effectively disapproved by the prosecution."

We find that, in arriving at their decision, the Court of Appeal Justices were alive to the principles on alibi as laid out in the case of **Bogere**. The Justices evaluated the appellant's evidence of alibi alongside the prosecution's evidence from PW3, PW4, and PW5 who placed the appellant at the scene of the crime and we find that they correctly came to the conclusion that the appellants defence of alibi crumbled in view of the testimonies of the prosecution that proved the appellant to have participated in the commission of the offence.

We therefore find no fault in the Court of Appeal's finding on ground 2.

Ground 3

It was the appellant's contention on ground 3 that the death sentence imposed on the appellant was illegal, manifestly excessive and harsh in the circumstances. According to counsel for the appellant, the instant case was not one of the rarest of rare cases where a custodial sentence was demonstrably inadequate.

It was argued for the appellant that the learned Justices of Appeal erred in failing to consider that the appellant is a first time offender in his prime age, with a

possibility to reform. It was further stated that during his time of remand, the appellant had been involved in multiple rehabilitative activities and had done certificate courses besides holding leadership positions.

It is well settled law that the appellate Court is not to interfere with a sentence imposed by the trial Court which has exercised its discretion on sentence unless the sentence is illegal or where the appellate Court is satisfied that in the exercise of its discretion the trial Court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence or the sentence was manifestly excessive or so low as to amount to an injustice. See: **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

The **Constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, Paragragh 17** provides for imposition of the death sentence in exceptional circumstances in the "rarest of the rare" cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate.

The learned trial Judge when sentencing put the appellant's case in the category of the "rarest of rare" cases. The trial Judge took into account all the mitigating factors before him alongside the severity of the offence and found that, even if the convict was a first time offender, his conduct was tantamount to genocide. That Court considered the appellant to have been on a shooting spree on the day in issue. Court considered that the appellant shot first in the trading centre, then inside the shop killing one person and injuring another. Court noted that the appellant shot again when on the road and injured a third person. According to the trial Judge, a combination of his conduct and the severity of the offence justified the maximum sentence of death.

In arriving at their decision, the Court of Appeal Justices considered the trial Judge's holding on imposing the death sentence and held as below:

"Clearly the learned trial Judge elaborately gave his reasons, for sentencing the appellant to death. We find no cause to fault him on the exercise of his discretion in sentencing the appellant as he did. The judge considered all the mitigating factors that were presented before him. He, also, carefully considered the aggravating factors that were presented by the case he presided over. He did not infringe any legal principle. The reasons he gave for the sentence are neither wrong nor untenable. The sentence he imposed on the appellant is lawful and is not excessive in our view."

In **Constitutional Appeal No.03 of 2006, Attorney General vs. Susan Kigula and 417 others**, this Court held that a mandatory death sentence was inconsistent with the Constitution. The Court did not rule that a death sentence was unconstitutional. It ruled that the sentence was one which Court could impose in exercise of its discretion.

In the instant case, the trial Judge had exercised his discretion and sentenced the appellant to death. The sentence was challenged at the Court of Appeal. The Court of Appeal considered the trial Judge's decision and held as quoted above.

This Court considered the circumstances under which an appellate Court may interfere with a sentence imposed by a lower Court in **Criminal Appeal No.25 of 2014, Rwabugande Moses vs. Uganda**. The Court considered previous decisions and held:

"In Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No.10 of 1995, the principles upon which an appellate court should interfere with a sentence were considered. The Supreme Court referred to R vs. Haviland (1983) 5 Cr. App. R(s) 109 and held that:

An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. MOHAMEDALI JAMAL (1948) 15 E.A.C.A 126. (Emphasis ours)

We are also guided by another decision of this court, Kamya Johnson Wavamuno vs. Uganda Criminal Appeal No.16 of 2000 in which it was stated:

It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently. (Emphasis Ours)

In Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001 it was held:

The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence."

The record of both the learned trial Court and the Court of Appeal reveals that in arriving at the death sentence both the mitigating factors and the aggravating factors were considered by both Courts.

In his rejoinder, counsel for the appellant faults the trial Judge and the Court of Appeal Justices on new issues that were not raised at the trial or at the hearing of the appeal. According to counsel, the learned trial Judge and the learned Justices of the Court of Appeal failed to apply the first, second and third stages of the test for the discretionary application of the death penalty used by Courts in other jurisdictions. According to counsel the three stages are: 1). Exceptionality ('rarest of the rare'); 2). No reasonable prospect of reform of the convict; 3). The object of punishment would not be achieved by a lesser sentence.

We perused the trial Court record and that of the Court of Appeal and found that the above mentioned issues were not raised before the trial Judge and the Court of Appeal Justices. They were only raised in his rejoinder in this Court.

Rule 70 (1) (a) of the **Supreme Court Rules** prohibits raising of a new ground or argument on appeal save with leave of the Court. The Rule provides:

> **"70. Arguments at hearing.**
>
> **(1) At the hearing of an appeal—**
>
> **(a) the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 63 of these Rules;"**

In **Supreme Court Criminal Appeal No.35 of 2014, Nalongo Naziwa Josephine vs. Uganda,** Court held:

'The law is that the grounds being framed on a memorandum of appeal should emanate from the decision and proceedings of the lower Court. This point was underscored in Ms Fang Min v Belex Tours and Travel Limited SCCA No. 06 of 2013 where the Supreme Court held thus:

"... on appeal, matters that were not raised and decided on in the trial court cannot be brought up as fresh matters. The Court would be wrong to base its decision on such matters that were not raised as issues and determined by the trial Court."

More particularly so, in a second appeal such as the instant one, an appellant is not at liberty to raise matters that were not raised and considered by the trial court and the first appellate court.'

This Court further restated the above position in **Criminal Appeal No.39 of 2016, Bogere Assimwe Moses vs. Uganda** and held:

'This Court has had occasion to consider the issue of a ground of appeal being raised before this Court when the issue had not been raised before the *Court of Appeal in Criminal Appeal No.35 of 2002, Twinomugisha Alex Alias Twine Patrick Kwezi & John Sanyu Katuramu vs. Uganda.* This Court held as follows:

"With respect, we think that this ground is not maintainable, because it was not raised before the Court of Appeal and considered by the Justices of Appeal. Therefore, it is erroneous to criticise the learned Justices of Appeal as having erred when the complaint was not raised before them for consideration"

The Court of Appeal Justices may be faulted on matters they handled and not what was never before them.'

Similarly, in the instant case, the trial Court and the Court of Appeal did not get a chance to look at the new arguments raised in this ground of appeal. The learned Justices would not be faulted on matters that were never before them but only on matters that they handled.

In the circumstances, we would not fault the lower Court's Justices on an issue that was not raised before them for consideration.

In any case, the international authorities relied on by counsel for the appellant to support his contention in his rejoinder, can merely serve as persuasive. We find that the trial Judge and the Court of Appeal Justices relied on relevant and binding authorities of this Court while sentencing the appellant. The issue here is whether or not the sentence imposed by the two lower Courts is illegal. The sentence would not be illegal merely because the trial Judge and the Court of Appeal Justices did not rely on a persuasive foreign authority. We find that the sentence imposed was legal.

Counsel for the appellant also argued that the death sentence imposed on the appellant is harsh and excessive.

We would not consider issues of the sentence being harsh or excessive since that goes to severity of sentence as the appellant has no right of appeal on severity of sentence. In **Criminal Appeal No.66 of 2016, Abelle Asuman vs. Uganda** this Court held:

> ***"The sentence being harsh and excessive are matters that raise the severity of the sentence. This Court held in Criminal Appeal No.34 of 2014, Okello Geoffrey vs. Uganda as follows:***
>
> ***"....Section 5(3) of the Judicature Act does not allow an appellant to appeal to this Court on severity of sentence. It only allows him or her to appeal against sentence only on a matter of law."***

Accordingly we shall not consider issues of the sentence being harsh or excessive since that goes to severity of sentence. The appellant has no right of appeal on severity of sentence."

We find no fault in the sentencing process nor the sentence imposed by the High Court as confirmed by the Court of Appeal.

We therefore find no reason to interfere with the lower Court's concurrent decision on sentence as it was done in accordance with the law and due consideration of the circumstances of the case.

In the result, the appeal is hereby dismissed. The decision of the Ccurt of Appeal is upheld.

Dated at Kampala this day 21st of October 2019

.....
FAITH MWONDHA
JUSTICE OF THE SUPREME COURT

.....
PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT

.....
PAUL MUGAMBA
JUSTICE OF THE SUPREME COURT

.....

RICHARD BUTEERA
JUSTICE OF THE SUPREME COURT

.....

JOTHAM TUMWESIGYE
AG. JUSTICE OF THE SUPREME COURT