THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT KAMPALA

CORAM: (ARACH-AMOKO, MWANGUSYA, MUGAMBA, BUTEERA; JJSC; TUMWESIGYE, Ag. JJSC.)

CRIMINAL APPEAL NO 82 OF 2018

BETWEEN

BASHASHA SHARIF:::::::::::::::::::::::: APPELLANT

AND

UGANDA :: RESPONDENT

[Appeal from the decision of the Court of Appeal in Criminal Appeal No. 123 of 2011 (Egonda-Ntende, Obura & Musota, JJA) at Masaka on 8th August, 2018]

JUDGMENT

Bashasha Sharif, the appellant, was indicted in the High Court for murder contrary to sections 188 and 189 of the Penal Code Act. He was tried, convicted and sentenced to death. He appealed to the Court of Appeal against the sentence. That court dismissed the appeal and upheld the death sentence. He now appeals to this court against the decision of the Court of Appeal.

Background

The appellant was a teacher of Islamic religion for Isma Sekajja, the deceased, a boy aged 9 years at the time of his death. The appellant had a love relationship with Nalunga Zam, a sister to the deceased's father. Nalunga Zam who was aged 17 years stayed alone in one of her father's houses in Ddegeya village, Kiseka sub-county, Masaka district. Her father had threatened the appellant with arrest on the ground that he was defiling his daughter, Nalunga Zam.

On 3rd June, 2007, at around 5:00p.m. the deceased was sent by his mother to take money to Nalunga Zam. The deceased arrived at Nalunga's residence but he did not find her there. He instead found there the appellant. Fearing that the deceased would tell his grandfather that he had found the appellant at Nalunga's home, the appellant decided to kill the deceased.

Medical evidence indicated that the deceased was cut into pieces by a sharp instrument. The 3rd to the 6th ribs of the left hand side of the body were cut out and the deceased's heart was extracted. The body parts of the deceased were hidden in different places in the bush where they were later discovered by people after they were led there by the appellant who admitted to have participated in the killing of the deceased.

After being tried and convicted in the High Court (Musoke-Kibuuka, J) the appellant appealed to the Court of Appeal on the ground that the learned trial Judge erred in law when he imposed on him a mandatory death sentence. The Court of Appeal dismissed the appeal.

The appellant now appeals to this court on the following ground:

"The learned Justices of Appeal erred in law when they upheld the death sentence which was illegal."

At the hearing, the appellant was represented by Mr. Moses Okwalinga of the Uganda Law Society Legal Aid Project while the respondent was represented by Mr. Wanamama Mics Isaiah, Senior State Attorney.

Submissions of counsel

Learned counsel for the appellant contended that the death sentence upheld by the learned Justices of Appeal was unlawful because the two courts below failed to apply the second and third stages of the test of the discretionary application of the death penalty. Counsel argued that the first stage is that the death penalty should be imposed in the most exceptional and gravest of cases, the second that court should find that there is no prospect of reform of the convict, and the third stage was that court should be satisfied that the object of punishment would not be achieved by imposition of a lesser sentence.

He cited the cases of **Attorney General vs. Suzan Kigula and 417 others** Constitutional Appeal No. 03 of 2006, **State v. Makwanyane** [1995] (3) SA 391, **Trimmingham V. The Queen** [2009] UKPC 25 and **Bachan Singh V. State of Punjab**, AIR 1980, **Santosh Bariyah v. State of Maharashtra** (2009) (6 SCC 498), **Mbunya Godfrey vs. Uganda**, SC Criminal Appeal No. 4 of 2011, **Kakubi Paul & Anor v. Uganda**, Criminal Appeal No. 126 of 2008, **LDU Kyarikunda Richard vs. Uganda**, CA No. 296 of 2009 and Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 to support his proposition on the 3 stage

test. He argued that the Court of Appeal only considered the first stage of the test and ignored the second and third stages making the sentence illegal.

Counsel also argued that the facts of this case did not constitute "the rarest of the rare" test. He submitted that the Court of Appeal heavily relied on the case of **Mugabe vs. Uganda**, C.A. No. 412 of 2009, the facts of which are distinguishable from the facts of this case.

Lastly, he argued that the sentence of death was not consistent with sentences meted out by the Supreme Court and other courts in similar cases. He referred to the cases of **Byaruhanga Moses vs. Uganda**, C.A.C.A No. 144 of 2010, **Nsabimana Richard v. Uganda**, C.A.C.A. No. 189 of 2013 and **Aharikundira Yusitina vs. Uganda** SCCA No. 27 of 2015 whose circumstances according to counsel were similar to those of the instant case but where the appellants received reduced sentences.

Learned counsel for the respondent, on the other hand, opposed the appeal and urged court to confirm the death sentence as being lawful and appropriate in the circumstances. The respondent's counsel argued that the appellate court cannot interfere with the exercise of discretion of the trial court unless there was a failure by the trial judge to exercise his or her discretion judicially or where he or she applied a wrong principle in sentencing.

Counsel argued that the Court of Appeal took into consideration all the mitigating and aggravating factors before handing down the death sentence to the appellant. Counsel further argued that this case properly fell within the definition of the rarest of the rare cases

since the appellant gruesomely murdered a 9 year old boy, dismembered his body and hid the body parts in different places in the bush.

Consideration of the appeal by court.

The appellant faults the learned Justices of Appeal for upholding the death sentence passed on him. He describes the sentence as illegal and unjust.

In passing the sentence against the appellant the learned trial judge stated thus:

> **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 [against] 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, therefore, sentences A1 to suffer death in the manner authorised by law.**

The Court of Appeal agreed with counsel for the appellant that the trial judge did not consider the factors in mitigation which were that he was a first offender aged 35 years with 6 children and other dependants, was remorseful and pleaded guilty saving the court's time. Nevertheless, the court added:

> **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.**
>
> **This court in the case of Mugabe vs. Uganda, 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 ...**
>
> **In the circumstances of this case we are satisfied that this is one of a specie of cases where the death penalty is appropriate.**

The death sentence is no longer mandatory following the decision of this court in the case of **Attorney General vs. Suzan Kigula and 417 others** (supra). However, the death sentence is a legal sentence in this country and therefore courts exercising their discretion can pass it.

In the case of **Ssekawooya Blasio vs. Uganda**, SCCA No. 24 of 2014 this court elaborated on the application of the **Suzan Kigula** case thus:

> **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.**

The circumstances in which an appellate court can interfere with the sentence imposed by a lower court are set out in numerous decisions of this court. For example in **Kamya Johnson Wavamunno vs. Uganda,** SCCA No. 16 of 2000, this court stated:

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

See also, in this respect, the cases of **Kyalimpa Edward vs. Uganda**, SCCA No. 10 of 1995, **Kiwalabye Bernard vs. Uganda**, Criminal Appeal No. 143 of 2001, **Karisa Moses vs. Uganda**, No. 23 of 2016 and **Mwanga Moses vs. Uganda** SCCA No. 02 of 2018.

In his submissions, counsel for the appellant argued that the Court of Appeal passed an illegal sentence in exercising its

discretion because it did not consider the two other stages which must be applied in deciding whether or not to pass the death sentence. He asserted that the three stages were enunciated in cases such as **Bachan Singh v. State of Punjab** (supra), **Trimmingham v. The Queen** (supra) and **State vs. Makwanyane** (supra). Counsel also included domestic cases such as **Mbunya Godfrey vs. Uganda** SCCA No. 04 of 2011 and **Kakubi Paul & Anor vs. Uganda**, No. 03 of 2009 but that the Court of Appeal only applied the first one.

Until this court's decision in **Attorney General vs. Suzan Kigula** (supra) the death sentence for murder in the Penal Code Act was mandatory and not discretionary. However, in that case the court ruled that making the death sentence mandatory was unconstitutional. It stated:

> **The death sentence denies a convict under a mandatory death sentence an opportunity to present to court mitigating circumstances and any special facts relating to the offence when it was committed, to distinguish it from other offences in the same category in order to persuade the court in those circumstances that the death penalty is not the appropriate sentence.**

Because of its finality, the death sentence has been and continues to be a controversial sentence. It has its proponents and opponents. Many countries such as the European Union have abolished it altogether. Others have reserved it for the most horrific of murders or other crimes. Others still keep the sentence of death on their statute books as it was in the beginning without any

changes at all. Uganda falls in the last category. The power of making the law or amending it lies with Parliament. Therefore, until Parliament amends the law on the death sentence, the courts will continue enforcing the death sentence while following the case of **Suzan Kigula** in exercising their discretion.

Counsel for the appellant submitted that the Court of Appeal failed to apply what he called the two stages of the test to be followed by court in passing a death sentence. The two stages, according to counsel, that the Court of Appeal failed to apply, were that there should not be any reasonable prospect of reform of the convict and the object of punishment would not be achieved by a lesser sentence. Counsel further argued that although the case of **Suzan Kigula** (supra) recognised that not all murders are committed in the same circumstances, it did not define what the test for the discretionary application of the death penalty should be.

Counsel for the appellant cited the case of **Lockhart v. The Queen**, [2011] UKPC 33 in which the Privy Council held that where a death penalty is being considered a consultant psychiatrist report should be presented to court to show whether the convict is not capable of reform before sentencing him or her to death.

He added that in other cases including domestic ones such as **Mbunya Godfrey vs. Uganda** (supra) and **Kakubi Paul vs. Uganda** (supra), cited by counsel for the appellant, it has been held that the death sentence should only be applied in the "rarest of the rare" cases, or "in the worst of the worst" cases, or "in circumstances which establish the gravest of extreme culpability", or "in very grave and rare circumstances".

With the greatest respect, we think that all the above phrases lack precision and cannot be relied upon as "tests" in determining a murder convict's sentence. In our view, they are calculated to limit the applicability of the death sentence which is a lawful sentence in the Statute Books of Uganda. While recognising the gravity and finality of the death sentence, judges must exercise their discretion to pass it where they deem it fit. The power of abolishing the death penalty lies with Parliament and not courts. Therefore, judges need to exercise caution in this regard otherwise they risk being accused of usurping the powers of Parliament. It is our view that, as the law stands today, courts have the judicial discretion to apply the death sentence, as they do when passing sentences in respect of other less severe sentences. What is important is that in passing sentences courts should follow the laid down principles of sentencing. Limiting the exercise of their discretion by case law, both foreign and domestic, can equally be said to be as unconstitutional as making the death sentence mandatory.

Counsel for the appellant contended that the Court of Appeal upheld the injustice of passing the death sentence against the appellant without taking into account the mitigating factors. This submission is not true. On page 19 of the record in its judgment the Court of Appeal states:

> **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 court's 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 warrant this court to interfere with the sentence.

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.

It is, therefore, evident that the Court of Appeal considered the appellant's mitigating factors but still passed the death sentence.

Counsel for the appellant faulted the Court of Appeal for relying on the case of **Mugabe vs. Uganda** (supra) which, according to counsel, was distinguishable. In that case the appellant was alleged to have committed rape and angry about that allegation, he threatened to kill a member of the deceased's family. On the fateful day, the father of the deceased sent the deceased to sell milk at a nearby trading centre. The deceased who was a young boy aged 12 years never returned home. His body was later found in a house in a banana plantation with the stomach cut open and the heart and lungs removed. The private parts had also been cut off. The appellant admitted to have killed the deceased. He was sentenced to death.

We agree that the circumstances of the case of **Mugabe vs. Uganda** closely resemble those in the instant case, and we therefore find

no justification to fault the Court of Appeal for relying on it in sentencing the appellant.

Counsel for the appellant cited a number of cases to show that this court has passed or approved less severe sentences in cases similar to the instant one. He cited the case of **Byaruhanga Moses vs. Uganda** C.A Criminal Appeal No. 144 of 2010, **Nsabimana Richard vs. Uganda**, C.A Crim. Appeal No. 189 of 2013 and **Aharikundira Yusitina vs. Uganda** S.C Crim. Appeal No. 27 of 2015. We do not agree that the circumstances of the cases cited are similar to those of the instant case.

One of the objectives of sentencing is deterrence. The objective of deterrence can affect the severity of the sentence depending on the prevailing circumstances. While sentencing the appellant, the trial judge observed that "***the acts of this nature against children have been on the rise***" and courts should send a clear message that atrocities against children will not be tolerated. The Court of Appeal shared the same view. We find that the two courts below were justified to take this factor into account in sentencing the appellant.

We also agree that the manner in which the appellant killed an innocent child and dismembered his body, hiding different body parts in different places, depicts a depraved person devoid of all humanity. We accordingly find no good reason to interfere with the Court of Appeal's discretion in the sentencing of the appellant.

In the result, we dismiss this appeal.

Dated at Kampala this.....5th.....day of.....December..... 2019

Justice Stella Arach-Amoko
JUSTICE OF THE SUPREME COURT

Justice Eldad Mwangusya
JUSTICE OF THE SUPREME COURT

Justice Paul Mugamba
JUSTICE OF THE SUPREME COURT

Justice Richard Buteera
JUSTICE OF THE SUPREME COURT

Justice Jotham Tumwesigye
AG. JUSTICE OF THE SUPREME COURT