THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 62 OF 2018

(Coram: Kisaakye; Arach-Amoko; Mwangusya; Opio-Aweri; Buteera; JJ.SC)

BETWEEN

1. KYABIRE PATRICK
2. ABDU MPIIRA **::::::::::::::::::::::::APPELLANTS**
3. MAGANDA DAVID
4. KABUZE MOSES

AND

UGANDA::RESPONDENT

(Appeal from the decision of the Court of Appeal of Uganda sitting at Jinja (Remmy Kasule, Barishaki Cheborion and Hellen Obura) dated 27th March 2018 in Court of Appeal Criminal Appeal No. 0749 of 2014).

JUDGMENT OF THE COURT

This is a second appeal from the judgment of the Court of Appeal which upheld the death sentence imposed on the appellants by the High Court on four counts of murder.

The facts of the case as found by the courts below are that in the morning of the 19th October, 2000, the body of Paul Kigoli was found by the roadside very near the home of one Eseza Namusobya, a local potent gin seller. The previous evening, late Paul Kigoli had been drinking in the company of Mawulira Fred, Mubezi Moses and Swaga David. When the death of Paul Kagoli

was reported to the local authorities, they arrested Eseza Namusobya together with Mawulira Fred, Mubezi Moses and Swaga David as suspects and for their safety, locked them up in the cells at Gadumire Local Administration Police Post.

Soon thereafter, the appellants and others who were still at large at the time of their trial raided the said Police Post, overpowered the officers on duty and forcefully removed the four suspects from the cells. They then took Eseza Namusobya to her hut, locked her inside, set it ablaze from outside and burnt her to ashes. After that, they hacked each of the other three suspects to death and burnt their bodies as well.

The appellants were arrested as a result of the incident and were each charged with four counts of the offence of murder. They denied the offence and raised the defence of alibi at their trial. The trial judge, Bamwine J, as he then was, convicted them on all the four counts and sentenced each of them to the mandatory death sentence on the 24.06.2002.

As a result of the decision of this Court in **Susan Kigula & 417 Others v Attorney General, Constitutional Appeal No. 3 of 2006 (SC),** the appellants' case was remitted to the High Court for hearing in mitigation of sentence. Wangutusi J who conducted the mitigation maintained the decision of the trial Judge.

The appellants' appeal to the Court of Appeal that the sentence was harsh and excessive was also dismissed by that Court. They appealed to this Court on only one ground that:

5 **The learned Justices of Appeal erred in law in confirming the death sentences notwithstanding the compelling mitigating factors available to the Appellants.**

Representation

Mr Henry Kunya continued to represent the appellants on State brief. The respondent was represented by Assistant Director of Public Prosecution, Michael Ojok. They relied on the submissions filed in court and gave brief highlights during the hearing of the appeal.

Submissions

Counsel for the appellants opened his submission by referring to the celebrated case of **Kiwalabye v Uganda, Criminal Appeal No 143 of 2001 (CA)** which has settled the principle of law that an appellate Court is not to interfere with the sentence imposed by the trial court which has exercised its discretion on sentence, unless the court, in exercise of its discretion ignored to consider an important matter or circumstances which ought to be considered when passing sentence.

He submitted that in upholding the death sentences imposed on the appellants, the Court of Appeal failed to re-evaluate the entire evidence on record and most importantly, the compelling mitigating factors put forward by the appellants. It therefore erred.

According to counsel, the Court of Appeal did not consider the fact that it was a case of mob justice where several residents had invaded the police facility, overpowered the officers on duty, removed the deceased persons from custody and killed them one

by one. Several people were arrested and according to the Charge Sheet, 37 of them were charged with murder of the deceased persons. In cases such as the instant one, counsel argued, there is a possible margin of error that ought to be borne in mind while sentencing those found culpable to ensure that the appellants do not become sacrificial lambs for the actions of an unruly, aggressive and highly charged crowd. He submitted that it is now settled that in terms of sheer criminality, a mob cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood.(See: **Kamya Abdulla & 4 Others v Uganda (Supreme Court Criminal Appeal No. 24 of 2015).**

Secondly, counsel submitted that the Court of Appeal did not consider that the appellants were first time offenders who ordinarily should not be sentenced to suffer the maximum sentence that is death, notwithstanding the calamitous nature of the said offence. This is because it is now settled law that the fact that one is a first time offender should be taken into account before passing the ultimate sentence (See: **Susan Kigula (supra).**

Thirdly, counsel submitted that the Court of Appeal did not also consider the mitigating factor that the appellants were of youthful age at the time of conviction since they were 35, 29, 32, and 25 years old respectively, hence were capable of reforming and being re-integrated in the society after serving their prison sentences.

Counsel also submitted that it is also settled law that the death sentence should be passed in very grave and rare circumstances

because of its finality. (See: **Mbunya Godfrey v Uganda, Supreme Court Criminal Appeal No. 04 of 2011).**

Counsel further submitted that it is also settled law that no two crimes are identical. However, courts should try as much as possible to have consistency. (See: **Mbunya Godfrey v Uganda (supra)).**

Lastly, the learned counsel submitted that on account of the principle of **stare decisis**- the **doctrine of precedent**, a court must follow earlier judicial decisions when the same points arise in litigation.

Consequently, Counsel invited Court to find that the Court of Appeal erred in law in confirming the death sentences on the appellants without considering the compelling mitigating factors above. He prayed that the appeal be allowed, the sentences be set aside and replaced with custodial sentences in the range of 20 to 25 years.

The reply by the respondent's counsel was brief. He supported the decision of the Court of Appeal and contended that they had not erred at all since they had considered all the relevant factors before arriving at their decision that the death sentence be upheld.

Regarding the case of **Kamya Abdulla (supra),** counsel submitted that it was distinguishable. He submitted further that this Court had emphasised in the case of **Turyahabwe & 12 Others v Uganda, Supreme Court Criminal Appeal No. 50 of 2015,** that the manner in which the appellant had committed such a heinous crime would render the fact that they were first time offenders of little relevance.

He therefore prayed that the appeal be dismissed and the sentences be upheld by this Court.

Consideration of the appeal by Court

We have carefully read the record of proceedings, the submissions by both counsel and the authorities cited.

The complaint before this Court by the appellants is that the Court of Appeal erred in confirming the death sentences imposed on them by the High Court despite compelling mitigating factors that were available before them. In his submissions, learned Counsel for the appellants enumerated them as mob justice, first time offenders, youthful age, the gravity of the offence, and consistency with sentences in previous similar cases. Based on the authority of **Kiwalabye v Uganda, Criminal Appeal No 143 of 2001 (CA),** counsel prayed that this Court should therefore interfere with the sentences and replace them with custodial sentences.

The respondent's counsel supported the decision of the Court of Appeal. The issue before this court is therefore:

a) Whether the Court of Appeal ignored the above mentioned factors in confirming the death sentences of the appellants as alleged.
b) If so, whether this Court should re-consider them and therefore interfere with the appellant' sentences.

We must state from the outset that this is a second appeal and the duty of the 2nd appellate Court is to determine whether the first appellate court properly re-evaluated the evidence before coming to its conclusion. The second appellate court should not interfere

with the decision of the trial court except in the clearest of cases where the first appellate court has not satisfactorily re-evaluated the evidence. (See**: Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No.10 of 1997.)**

We must also re-state the settled principle that this Court as an appellate court will only interfere with the sentence imposed by the trial court if it is evident that the court acted on a wrong principle or overlooked some material factor, or if the sentence is too low or manifestly excessive in the circumstances of the case. (See: **Livingstone Kakooza v Uganda, Supreme Court Criminal Appeal No.17 of 1993.**)

According to the record of proceedings, during mitigation, counsel for the state submitted that the appellants had committed a heinous crime where they had killed the deceased persons in a ghastly manner. That the appellants became judges and executioners in this matter. They violently removed the deceased persons from the police cells, proceeded to torture them with sticks and stones and then burnt them to vestiges. That the appellants were properly identified as the culprits who had participated in this heinous crime with the common intention of killing the deceased persons. That the deceased were tortured and killed under the watchful eyes of the community since it was broad daylight. This was very traumatising on the community especially for one of their mothers who fainted when she saw the appellants actually burning her son to death. Counsel prayed that the death sentence should be maintained since the appellants had taken the law into their own hands.

The record indicates that the appellants' counsel had pleaded for a lenient sentence. In mitigation, Counsel had put forward the following factors:

1. The appellants had been on death row for 12 years and had suffered the death row syndrome;
2. The appellants had been on remand for one and a half years;
3. The appellants had no record of previous conviction;
4. Mawulire was of advanced age of 72 years with failing health;
5. Kyabuza was of the youthful age of 26 years and could have been influenced by the group in participating in the crime without knowing the consequences;
6. All the appellants had family responsibilities and their families had disintegrated since their incarceration;
7. The appellants had undertaken religious courses and had acquired skills in making handcrafts while in custody;
8. This was mob justice where they are not sure of the roles played by each of the appellants.

The record further indicates that in sentencing the appellants, the learned mitigation judge took into account the aggravating and mitigating factors listed above and concluded that:

"...counsel for the appellants had really brought out mitigating factors which, if there were no aggravating circumstances, would justify a custodial sentence."

The learned mitigation judge then concluded that:

"The aggravating factors I have listed above surpassed whatever mitigating factors that have been submitted to such the extent that even the death row syndrome put forward by counsel for the appellants could not pull this case out of the rarest of the rare cases."

Consequently, the learned judge maintained the death sentence on each of them.

The appellants' appeal to the Court of Appeal was based on the ground that:

> "***The sentence of death after mitigation was harsh and excessive in the circumstances."***

As indicated earlier in this judgment, the same arguments were repeated before the Court of Appeal by counsel for the appellants and the respondent.

We find that the Court of Appeal, in determining the appeal, was alive to the settled principle stated in **Livingstone Kakooza v Uganda (supra).** The Court then went on to determine whether or not the appellants' case falls in the category of the rarest of the rare cases as held by the mitigating judge. In their judgment, the Court of Appeal sets out in elaborate details the facts of that case, the evidence adduced by both parties especially regarding the mitigating and aggravating factors. The Court of Appeal then proceeded to carefully evaluate the evidence. For emphasis, this is what the Court of Appeal held:

> "***This Court, as a first appellate Court, has reviewed all the facts of this case, particularly with regard to the***

mitigating and aggravating factors. We have carried out an objective assessment of the facts and we too are satisfied that the manner of commission, the motive, the magnitude of the crime as well as its anti-social and abhorrent nature coupled with the personalities of the victims of the crime , places this case in the category of the rarest of the rare cases."

We agree with the finding of the Court of Appeal. The case of **Kamya Abdalla v Uganda (supra)** relied on by the appellants' counsel is distinguishable. In this case, the learned trial judge relied on the evidence of six eye witnesses, namely PW2, PW3, PW4, PW5, PW6, PW7 and found that the appellants were properly identified as having participated in the killings with a common intention in that:

"It was evidence of people who saw it all. The accused persons were known to the witnesses prior to the time of the offence. The killings were carried out in broad daylight, around 10 am. The witnesses were in very close proximity with the assailants and accused persons were under observation for over an hour."

This evidence was not challenged before the mitigating judge or the Court of Appeal. It therefore rules out the question of margin of error alluded to by this Court in **Abdalla Kamya's** case **(supra)**.

Regarding the issue of consistency, learned counsel for the appellants has rightly submitted that no crimes are identical. Courts must determine each case on the basis of its peculiar facts. We are also alive to the requirement that courts should try as

much as possible to have some consistency in sentences in the interest of justice. However, we are in total agreement with the Court of Appeal that the gravity of the offence in the instant appeal justifies the imposition of the maximum sentence on the appellants.

For the foregoing reasons, we do not consider this an appropriate case where this Court should interfere with the sentence by the Court of Appeal. We accordingly dismiss the appeal and uphold the death sentence on each of the appellants.

Dated at Kampala this...8th.....day of .....May.....2020

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Hon. Justice Dr. Kisaakye

JUSTICE OF THE SUPREME COURT

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Hon. Justice Arach-Amoko

JUSTICE OF THE SUPREME COURT

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Hon. Justice Mwangusya

JUSTICE OF THE SUPREME COURT

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Hon. Justice Opio-Aweri

JUSTICE OF THE SUPREME COURT

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Hon. Justice Buteera

JUSTICE OF THE SUPREME COURT

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