THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 41 2017

WANDUBIRE CLEMENT ..... APPELLANT

AND

UGANDA ..... RESPONDENT

[Appeal from the judgment of the Court of Appeal at Mbale before Hon Justice Elizabeth Musoke, Hon Justice Barishaki Cheborion, Hon Justice Paul Mugamba JJA dated 21st August, 2017 in Criminal Appeal No. 752 of 2014]

(CORAM; KISAAKYE; ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; BUTEERA; JJ.S.C)

JUDGMENT OF COURT.

INTRODUCTION

This is a second Appeal regarding legality of a death sentence.

Background to the Appeal.

The appellant bought land which was subject of a conflict. The conflict was taken to court and court decided in favor of one of the deceased persons. The decree holder had earlier on reported a case of malicious damage to property against the appellant. To effect the court orders, the decree holder came to the appellant's home at 6: 00 am with two police officers to evict and arrest the appellant.

The appellant was asked to get out but he refused. The in-charge was called and he ordered for a forceful entry by breaking of the appellant's house door. Upon entry, the appellant who was armed with a panga cut the police officer, disarmed him and shot him. He proceeded out and shot the other police officer and the decree holder. The appellant who was with his son tried to escape but a

mob pounced on them and killed his son. The police saved the appellant. The appellant was indicted for murder on three counts.

He was convicted of murder on all the three counts on 20th January 2003 by Hon. Justice Maniraguha; J and sentenced to suffer death.

On the 21st September 2009, the Supreme Court in Constitutional Appeal No. 3 of 2006, Attorney General v Susan Kigula & 417others held that death penalty was not mandatory and ordered, among other holdings, that;

"For those respondents whose sentence arose from the mandatory sentence provisions and are still pending before an Appellate Court. Their cases should be remitted to the High Court for them to be heard only on mitigation of sentence and the High Court shall pass such sentence as it deems fit".

Consequently on 15th July 2017, the appellant appeared before Hon. Justice David K. Wangutusi for mitigation and resentencing. By that time the Constitutional (**Sentencing Guideline for Courts of Judicature) (Practice) Directions Legal Notice No. 8 of 2013** had come into operation which the re-sentencing judge applied in sentencing the appellant to death.

The appellant appealed that decision to the Court of Appeal which dismissed the appeal. The appellant is now before this Court with an appeal on the following ground:-

That the learned justices of Appeal erred in law when they upheld an illegal sentence of death which did not take into account the appellant's mitigating factors.

He prayed this court to set aside the sentence of death and replace it with a legal one.

Representation;

The appellant was represented by Ms. Suzan Wakabala whereas the respondent was represented by Mr. Mulindwa Badru, Senior Assistant Director of Public Prosecution.

Both counsel filed written submissions which they adopted entirely at the hearing.

Appellant's case

Counsel for the appellant submitted that although during mitigation, he had pleaded that he was a first offender, the resentencing judge held that that fact did not carry any weight. He argued that this was in contravention with a well laid principle in the case of **Mbunya Godfrey vs Uganda Criminal Appeal No.4 of 2011, Supreme Court** where this court stated that being a first offender was enough to negate the death sentence.

She further contended that it was wrong for the lower courts to ignore the fact that the appellant was of the advanced age of 72 years.

The appellant's counsel also submitted that the death sentence should only be given where court determines that individual reform and rehabilitation consequent to a custodial sentence would be impossible. She submitted that on record was a social inquiry report from his community leadership showing he was a good man with good morals who had never committed any crime before. Further, that there was a letter from the Prison authorities dated 26th June 2014 where he had spent 15 years which shows that he was a disciplined inmate.

Counsel for the appellant prayed to this court to consider the mitigating factors and the circumstances surrounding the execution of the crimes so as to appreciate the level of provocation. Further, that court should consider that his own son was killed by a mob in a scuffle and therefore that amounted to part of the appellant's punishment.

Respondent's case

Counsel for the respondent stated that the *Suzan Kigula case* (supra) did not abolish the death sentence but rather made it discretionary which discretion must be exercised in conformity with paragraph 17 and 18 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No.8/2003.

Counsel for the respondent further argued that the guidelines do not exempt a person of advanced age or a first offender from death penalty. He further contended that even the case of **Mbunya** (supra) which was relied on by the appellant emphasises that the death sentence should be passed in very grave and rare circumstances. Counsel for the respondent concluded that this case is no doubt a rare one and that the manner that the appellant had killed the victims was grave. He prayed court to uphold the death sentence and dismiss the appeal.

Consideration

The appeal is on legality of sentence.

The appellant's case is that the lower courts did not take into consideration the mitigating factors that the appellant was a first

offender and was of the advance age of 72 years that were advanced by the appellant, hence reaching an illegal sentence.

The sentence in question is the death sentence. It is provided for in section 189 of the Penal Code Act Cap12 as amended which is to the effect that any person found guilty of murder shall be sentenced to death. The position has since changed after Supreme Court pronouncements in the case of **Suzan Kigula & 417 Ors** (supra) wherein the court set aside the mandatory death sentence and allowed such persons found guilty to mitigate their sentence. In that case, this Court observed as follows;

"**Not all murders are committed in the same circumstances and not all murders are necessarily of the same character. One may be a first offender and the murder may have been committed in the circumstances that the accused deeply regrets and very remorseful. We see no reason why these factors should not be put before the court before it passes the ultimate sentence.**"

The position in **Suzan kigula** (supra) was further fortified by the **Constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013. Guide line 17** states that;

"**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.**"

This position was further explained by this court in the case of **Aharikundira Yusitiina vs Uganda Criminal Appeal No. 27 of 2015** where court held as follows;

"...it is trite that a person convicted of capital offence in this country cannot be sentenced to suffer death as a matter of course without the court considering mitigating factors and other presentencing requirements. This is because death sentence is no longer mandatory in this country; See Suzan Kigula & Ors vs Ag (supra). According to the above case, death sentence should be visited on a convict in the rarest of the rare cases.

It is also important to bear in mind that a death sentence being the heaviest in the land should be carefully examined at different levels including appellate levels to ensure its propriety. The above obligation is more compelling to this court, since it is the court of last resort. The Supreme Court should not merely rubber stamp sentences passed by the trial courts and court of Appeal....."

Against that background, we shall consider the arguments by counsel.

It was counsel's contention that the courts failed to consider the mitigating factors advanced by the appellant, hence reaching an illegal sentence. He argued in particular that court did not consider that the appellant was a first offender and was of advanced age.

At this point, we shall reproduce the lower courts' judgments on the matter. The High court observed as follows;

"It is true the convict was a first offender and a man of advanced age. It is also true that the death penalty can only be justified in very

exceptional cases or in the rarest of the rare. *Exceptional cases have been discussed in Trimingham v The Queen (2009) UKPC 25. In this case, the offence is said to be exceptional when it is different from other murder cases not agreeable with ordinary civilized behavior. Merely taking a life is not of itself exceptional. This has been emphasized in Bachan v State of Punjab (1980) 2 SCC478 in which the Court found; "The extreme penalty can be inflicted only in gravest cases of extreme culpability.....life imprisonment is the rule and the death sentence an exception.....A real and abiding concern for the dignity of human life postulates resistance to taking life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclose."*

Article 6 of the International Covenant of Civil and Political Rights acknowledges the existence of death penalty but provides that it is only meted out in most serious crimes.

It provides;

"In countries which have not abolished the death penalty, sentences of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime"

Indeed Direction 17 the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions Legal Notice 8 of 2013 provides;

"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 for the appellant submitted that because the murder was not premeditated, it did not fall amongst the rarest of the rare. Having listened to both parties, this Court can agree with the courts below that the act of killing 3 people at ago using a panga and a gun was brutal, disgusting, gruesome and cold blooded.

On the issue of premeditation people who had gone to arrest the convict arrived at his home at 6:00am. They pleaded with him for 2 hours but he refused to surrender to the authorities. They called the LC Chairperson of the area who was well known to him but he refused to open the door. They in turn called the OC Police who forced the door open. The appellant was armed with a panga and stool which he proceeded to hit the first victim on the head, cut off his left hand, disarmed him and shot the helpless police officer.

Being armed with lethal weapons could not have been accidental but in preparation to kill whoever came by. Having killed the Police Officer and being armed as he was, he should have stopped at that but he continued, shooting two other people and would have proceeded to the fourth if the gun had not jammed.

The evidence of PW2 was to the effect that when the police officers called the appellant out of the house, he refused to get out. Later, his daughter and some young children sneaked through the window and went out of the house. It was at that moment that the police forced open the door of the house and immediately the appellant cut the hand of the police officer holding gun with a panga and

when the gun fell, he picked it and shot the officer dead, plus another officer and a one Musungu, the decree holder. We believe that all along the appellant was planning to commit the crime and that was why he let his children get out of the house to safety. We find that there was premeditation of the crime by the appellant.

He must have planned his actions within the several hours that he remained locked up in his house. The premeditation clearly draws this case into the bracket of exceptional cases and or the rarest of the rare.

Furthermore, Direction 18 (b) (1) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions Legal Notice 8 of 2013 provides that amongst cases that fall within the rarest of the rare are those where the victim was a law Enforcement Officer or a Public Officer killed during the performance of his or her functions. The re-sentencing judge while sentencing the instant appellant observed as follows:-

"Two of the people the convict killed were police officers, one of whom was the in charge of the area's police post. These together with the complainant who was likely to give evidence against him, completed the picture of the rarest of the rare cases. Having done so, the issue of having stayed on remand for long and being a person of good conduct in prison, in my view takes the back seat. Fighting authority, leading to the death of those authorized to execute authority , completely reinforces the need for the death penalty in this case and justifies the maintenance of the death penalty as had been imposed earlier..."

The Court of Appeal held as follows;

"The appellant during a killing spree extinguished the lives of two police men and one civilian, the complainant. Direction 18 (a) and (b) of the Sentencing Guidelines relates to the rarest of the rare cases and states that they are present interalia where;

a. The court is satisfied that the commission of the offence was planned or meticulously premeditated and executed;

b. The victim was ;

i. A law enforcement officer or a public officer killed during the performance of his or her functions ; or

ii. A person who has given or was likely to give material evidence in court proceedings.....

Given the above, we are satisfied that the sentencing court properly found this case qualifies as the rarest of the rare where the aggravating factors far outweigh any perceived factors in mitigation. As we find no reason to fault the penalty passed by the High Court, we uphold the death sentence."

It is very important to note that the Suzan Kigula locus classicus did not abolish the death sentence. It simply renounced the compulsoriness of a death sentence upon being found guilty without a chance of mitigation. Therefore the death sentence is still a legal sentence and may be handed down even after mitigation, if the judge comes to the conclusion that the aggravating factors outweigh the mitigating factors.

The re-sentencing judge from his observations above took note of all the mitigating factors that were raised by the appellant and

highlighted the overwhelming aggravating factors which included premeditation and killing a law enforcement officer thereby concluding that the death sentence was appropriate in the circumstances. The Court of Appeal reiterated the same and also found that the aggravating factors outweighed the mitigating factors. We agree with the findings of the Trial Court and confirmed by the Court of Appeal that the death sentence was appropriate in the circumstances of this case.

It is a well established principle from the law and authorities above cited that a death sentence may be meted out only in murders that are the "Rarest of the Rare".

The rarest of the rare cases are well provided for under **Guideline 18** of the sentencing guidelines, which provide as follows;

"The rarest of the rare cases include cases where;

(a) <u>The court is satisfied that the commission of the offence was planned or meticulously premeditated and executed ;</u>

(b) <u>The victim was;</u>

i. <u>A law enforcement officer or a public officer killed during the performance of his or her functions</u> ,or;

ii. A person who has given or likely to give material evidence in court proceedings.

(c) .....

(d) .....

(e) .....

(f) ......"

Further, it is not in contention that amongst the victims of the crime were two law enforcement officers who were killed during the performance of their duties. Courts of law have a duty to society to show the law enforcement community that they are supported against those who attack them. Society depends on police officers for protection therefore we should protect them in return from all the vulnerability and crisis they encounter during the course of their duties.

In our opinion, the appellant in the instant case had a land conflict which was taken to court. He lost in court and therefore was aware that there was a decree about to be executed against him. Therefore his acts were not spontaneous as argued by counsel for the appellant. Although the appellant was a first offender, and a person of advanced age, the circumstances under which he murdered the victims justify the death sentence as maintained by the lower courts. The circumstances of this case fall squarely within the ambits of the rarest of the rare cases.

We also note that the contention that the social inquiry report of the appellant show that he was a good man with morals and a letter from Prisons indicating that the appellant was a disciplined inmate are not issues for mitigation but relevant for the purposes of mitigation. They may be factored in for the purposes of remission and prerogative of mercy.

In the result, we find no merits in this appeal. We find that the learned Justices of the Appeal did not error when they confirmed the death sentence imposed on the appellant. The death sentence imposed on the appellant is hereby confirmed.

The appeal is accordingly dismissed.

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

HON. JUSTICE KISAAKYE;

JUSTICE OF THE SUPREME COURT

HON. JUSTICE ARACH-AMOKO;
JUSTICE OF THE SUPREME COURT

HON. JUSTICE MWANGUSYA;
JUSTICE OF THE SUPREME COURT

HON. JUSTICE OPIO-AWERI;
JUSTICE OF THE SUPREME COURT

HON. JUSTICE BUTEERA;
JUSTICE OF THE SUPREME COURT