THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 177 OF 2010

Coram: Cheborion Barishaki, Stephen Musota, Percy Night Tuhaise, JJA

Mutema Tegike Muzamiru Ronald.....Appellant

V

Uganda.....Respondent

(Appeal arising from the judgment of His Lordship Hon. Justice Mwangusya Eldad at High Court of Uganda at Iganga, Criminal Session Case No. 305 of 2007 delivered on 16th August 2010)

JUDGMENT OF COURT

The appellant, Mutema Tegike Muzamiru alias Ronald, was indicted for murder contrary to sections 188 and 189 of the Penal Code Act. He was convicted and sentenced to death, the maximum punishment provided for murder. The appellant was aggrieved by the sentence, and, with leave of Court granted under section 132(b) of the Trial on Indictments Act, he appealed against the sentence only on one ground, that is:-

1. *That the learned trial judge erred in law and fact when he failed to take into account essential mitigating factors and thus passed a sentence that is manifestly harsh.*

Background

The appellant and his wife, one Nabwire, were having a fight over the paternity of their daughter Mutunda Doreen, a 2½ year old child (deceased). Christopher Basoga, an uncle to the appellant, and his wife Logose Deborah, who lived nearby, intervened in the fight, which gave an

opportunity to Nabwire to escape leaving behind the child, Mutunda Doreen. The appellant looked for Nabwire in vain. He told his uncle to go and sleep since the fighting had ended. An hour later, Basoga and Logose heard the child (deceased) crying. They went to the appellant's home again and found the appellant slapping and boxing the child. They took the child away from the appellant. Basoga reported the matter to the Local Council Chairman. Basoga went back to the appellant's home and asked for money to take the child to hospital. The appellant refused to give him the money. The child died as Basoga and his wife took her to a health centre. The medical report revealed that the deceased had multiple injuries on her body. The cause of death was asphyxia due to suffocation and strangulation.

Representation

Mr. Jacob Osillo represented the appellant. Ms. Josephine Namatovu, Assistant Director of Public Prosecutions, represented the respondent. The appellant was in Court at the hearing of this appeal.

Submissions for the Appellant

The appellant's counsel submitted that the sentence of death on the appellant upon him being convicted of murder was manifestly harsh; and that the circumstances of this case did not warrant the maximum sentence. He argued that the law requires a trial court to take serious consideration of the mitigating factors. He referred this Court to page 42 of the record. He submitted that in the instant case, the mitigating factors were highlighted, among which, were the factors of the appellant being a first offender, being of youthful age, and needing to be given an opportunity to reform and serve the country as a reformed person. Counsel submitted that none of the said mitigating factors were considered by the trial Judge when sentencing the appellant.

The appellant's counsel also submitted that Article 23(8) of the Constitution enjoins court to take into account the period of remand before conviction. He contended that in the instant case, the appellant

had spent 3½ years on remand, but this was not considered by the trial Judge when sentencing the appellant.

Counsel referred this Court to page 43 of the record where the trial judge clearly said that the appellant did not deserve any mercy before handing over a death sentence. He submitted that he disagreed with the trial Judge's position because every convict deserves to be accorded a degree of mercy by the court, particularly if he raises issues that mitigate such sentence.

Counsel submitted that this was not the worst kind of murder case to warrant a maximum penalty, and that therefore, the appellant deserved to be accorded a degree of mercy or lenience. He cited a number of authorities including **Ogwal Alberto V Uganda, Court of Appeal Criminal Appeal No. 46 of 2010**; and **Okello Alfred & Others V Uganda, Court of Appeal Criminal Appeal No. 28 of 2016** to support his arguments.

The appellant's counsel further argued that the death in the instant case occurred as a result of a scuffle between the appellant and his wife. He contended that this was also the case in the cited **Ogwal** case where there was a fight between that convict and his wife when the unfortunate incident of death happened. He prayed this Court to treat the instant case in the same way as the cited cases of **Ogwal Albert** and **Okello Alfred**, and to apply the same standard by sentencing the appellant to 20 years imprisonment, which was considered as fair in the cited cases.

The appellant's counsel concluded that, given the circumstances of the instant case, there is no justification for subjecting the appellant to the maximum sentence which was manifestly harsh, though the court had discretion to hand down the said sentence. He prayed that this Court allows the appeal, quash the death sentence, and reduce or replace it with a less sentence of about 20 years.

Submissions for the Respondent

Ms. Josephine Namatovu submitted for the respondent that the only justifiable sentence, given the facts of the instant case, was the maximum sentence of death, which is a legal sentence properly provided for under section 189 of the Penal Code Act.

Regarding the trial Court's failure to consider the period spent on remand, she argued that Article 23(8) of the Constitution only requires courts to consider such factor in respect of a custodial sentence, which was not the case in the instant case where a death penalty rather than a custodial sentence had been meted out.

The respondent's counsel further submitted that the trial judge was justified to sentence the appellant to the maximum sentence of death because of the circumstances of the case, first, because the victim was a child of 2½ years, and second, the child was the appellant's own biological child.

Counsel submitted that the case of **Ogwal Alberto** cited by the appellant's counsel was not similar to the instant case in as far as the ages of the two children were concerned, and the circumstances under which they were killed. She reiterated that given the peculiar circumstances of the instant case, the trial judge was justified to hand him the maximum sentence because the appellant does not deserve any lenience whatsoever. She prayed that the death sentence be maintained by this Court.

Appellant's submissions in rejoinder

The appellant's counsel agreed with the respondent's counsel's submissions that the sentence passed against the appellant was not a custodial sentence, but he reiterated that the death sentence ought to be reserved for the very worst scenarios of murder.

Resolution of the appeal

This is a first appeal. This court, as a first appellate court, has a duty to re-evaluate the evidence and come to its own conclusion as required under

rule 30 (1) of the Judicature (Court of Appeal Rules) Directions 2005. However, this Court will be mindful of the fact that, unlike the trial court, it had no opportunity to observe the demeanour of witnesses as they testified. See **Pandya V R. [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No. 10/1997**; **Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997**.

The instant appeal is against sentence only. The criteria for interference with sentence by an appellate Court, as stated by the Supreme Court in **Kiwalabye Bernard V Uganda, Supreme Court Criminal Appeal No 143 of 2001**, was set out as follows:-

> *"The Appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence is wrong in principle."*

We have addressed our minds to the adduced evidence, the submissions of both counsel, and the law applicable to the circumstances of this case. We agree with the submissions from both sides that the death penalty is not a custodial sentence. So, the question of court taking into account the period spent on remand, as required under Article 23(8) of the Constitution of Uganda, does not arise in the circumstances of the instant case where the death penalty that was handed over to the appellant was not a custodial sentence.

Regarding the death penalty, the governing principle is that the death sentence, being the maximum penalty, should be reserved for offences committed under circumstances falling within the category of *"the rarest of the rare"* cases. This means that the death sentence ought to be reserved for the very worst or the most horrific scenarios of murder.

In **Suzan Kigula and Others V AG Constitutional Appeal No. 3/2006**, the court observed that:-

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

In **Aharikunda Yustina V Uganda, Supreme Court Criminal Appeal No. 27/2017**, the Supreme Court, while setting aside a death sentence imposed by the High Court and upheld by the Court of Appeal, stated as follows:-

> *"The holdings of the trial court...do not reflect consideration of any of the mitigating factors but rather only the aggravating factors. The appellant mitigated her sentence before the trial Judge however when giving his decision, the learned Judge did not weigh the mitigating factors against the aggravating factors. These included the fact that the convict was a first offender, of advanced age and had children who needed her attention as the surviving spouse...The same trend prevailed in the Court of Appeal when it failed its duty to re-evaluate the mitigating factors."*

In **Mbuya Godfrey V Uganda, Supreme Court Criminal Appeal No. 04/2011**, where the appellant murdered his wife in cold blood, the Supreme Court, while disagreeing with the decisions of the two courts below, emphasized that the death sentence should be passed *"in very grave and rare circumstances."*

Therefore, this Court has to determine whether the facts of the instant case fall within the category of the worst scenarios, or very grave and rare circumstances, to attract a death sentence.

The record of appeal shows on pages 42 and 43 that the trial Judge stated the reasons why he arrived at the sentence, that is, that:-

> *"The convict killed his own child in the most merciless manner and this (sic) one of the numerous cases where parents who are supposed to raise their children turn out to be their worst tormentors and like in this case their killers. The killing of the deceased in the manner that she was, deserves no mercy and none will be shown by this court. The maximum sentence provided for the offence of murder is death penalty and that is what this court will impose."*

The appellant's counsel cited the authority of **Ogwal Alberto V Uganda, Court of Appeal Criminal Appeal No. 46 of 2010**. In that case, this Court observed and considered mitigating factors, namely that the convict, who had also murdered his own son, was a first offender, and substituted the sentence of life imprisonment issued by the trial court with the sentenced of 20 years imprisonment. The cited **Ogwal Alberto** case is however distinguishable from the instant case because in that case, the killing of the victim, who was aged 10 years, was upon provocation. The father and mother were fighting and their child came in to separate his parents from fighting, during which moment he got killed by his father.

In the instant case, the evidence of PW4 and PW5 is that the mother of the child had already left and the fight had stopped when the 2½ year old child was killed by the appellant. At 2½ years, the child was defenceless and did not deserve such brutal treatment from her own father.

The circumstances of this case as revealed by the record of appeal on page 12, is that, after the appellant assaulted the child to unconsciousness, PW4 the appellant's uncle, asked the appellant for money to take the child to hospital, but the appellant refused. The uncle went to the Local Council to report the incident, but the appellant remained seated on the veranda. The evidence of PW4 and PW5 also shows that even before that, the wife of the appellant's uncle asked to

take the child away and the appellant refused. The evidence of PW4 and PW5 who were at the scene is to the effect that the child was unconscious when the appellant handed her over to PW4 and PW5.

We have duly addressed our minds to the appellant's counsel's submissions in mitigation. We agree, basing on the record, that the convict was a first offender with no previous record. He was in his youthful age when he committed the offence. However, based on the evidence on record as highlighted above, we have no doubt in our minds that the circumstances under which the appellant killed his infant child were cruel, unprovoked, horrific and cold blooded, which makes this case to fall within the category of the rarest of the rare, or the very worst scenarios of murder, or very grave and rare circumstances.

The appellant does not deserve any lenience, and his criminal conduct should attract the maximum death penalty. It is in that light that we find that the trial judge was justified in passing the maximum sentence of death against the appellant.

We therefore find no merit in this appeal which is hereby dismissed. We uphold the maximum sentence of death given by the trial Judge against the appellant.

Dated at Jinja this ...30th...day of ...Sept....2019

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Hon. Justice Cheborion Barishaki

Justice of Appeal

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Hon. Justice Stephen Musota

Justice of Appeal

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Hon. Justice Percy Night Tuhaise

Justice of Appeal