THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CRIMINAL APEAL NO. 022 OF 2014

(Appeal against Sentence of the High Court of Uganda at Entebbe before His Lordship Justice Wilson Masalu Musene dated 15th January, 2013 in Criminal Case No. 351 of 2013)

Drazua Emmanuel ::: Appellant

Versus

Uganda :::Respondent

Coram: **Hon. Mr. Justice Geoffrey Kiryabwire, JA**

Hon. Lady Justice Catherine Bamugemerire, JA

Hon. Mr. Justice Remmy Kasule, Ag JA

Judgment of the Court

This appeal arises from the Judgment of the High Court at Entebbe (Masalu- Musene, J) whereby the appellant was convicted of the murder of his wife a one Amaite Erina contrary to **Sections 188 and 189 of the Penal Code Act** and was sentenced to suffer death.

Dissatisfied with the sentence, the appellant appealed to this Court on the following grounds:

"1. The Learned trial Judge erred in law and in fact when he failed to evaluate evidence on record thereby reaching a wrong conclusion.

2. The Learned trial Judge erred in law and in fact when he denied the appellant the defense of self-defense and/or provocation thereby occasioning a miscarriage of justice.

3. The Learned trial Judge erred in law and in fact on relying on prosecution evidence that was full of contradiction and inconsistencies thereby occasioning a miscarriage of justice.

4. The learned trial Judge erred in law and in fact in failing to adequately consider the appellant's mitigating factors before imposing on him the death sentence deemed harsh and manifestly excessive in the obtaining circumstances."

Background:

The facts, as accepted by the Trial High Court, are that the appellant and the deceased were husband and wife having been in marriage for 9 years and had 3 children. Both worked as prison warders in Uganda Prisons, stationed at Sentema Prison, Wakiso District. The appellant, had previously complained to his prison superiors at Sentema, that he suspected his wife, the deceased, to be having an extra marital affair with another man.

On 13th, August, 2012, after an exchange of harsh words between the two, the appellant, shot at his wife Amaite Erina with a gun at Sentema Prison compound. The bullet missed her. She ran away from the shooting to the prison offices/duty room. The appellant followed her and shot at her 3 times, killing her instantly.

The appellant then fled from the crime scene together with the gun, an SMG AK 47 Number: UG PRI/0250/01087. Later, the appellant called a workmate and directed him and the police to where he had

hidden the gun. The gun together with 4 cartridges was recovered from the prison gardens, 200 meters from the crime scene.

The appellant was arrested at night from a pub in Wakiso district. He was charged and tried for the murder of his wife. He was found guilty, convicted and sentenced to the maximum death sentence.

Legal Representation:

M/S Alaka & Co. Advocates are on record as representing the appellant in this appeal. They however did not avail an advocate to be present in Court on the hearing date of 26th October, 2020. They had however filed in Court written submissions for the appellant.

For the respondent, the learned Assistant Director of Public Prosecutions, Betty Agola was present in Court on the hearing date. She too had filed in Court written submissions for the respondent.

The respective submissions were adopted.

Due to the Covid-19 pandemic and Health Regulations to prevent the spread, the appellant was not physically present in the Court room. He remained confined at the Government Prison, Luzira. However, through zoom video conferencing the appellant fully participated in the Appeal proceedings throughout.

Appellant's Submissions:

Ground 1 and 2:

The appellant's learned Counsel submitted on grounds 1 and 2 together. He faulted the learned trial Judge for not having found

that the appellant had been provoked by the deceased and had acted in self defence when he shot the deceased with a gun.

Counsel contended that had the learned trial Judge properly evaluated the evidence of Pw2, Pw4, Pw5, Dw1 (the appellant) and Dw2 who all claimed to have been eye witnesses to the shooting, he ought to have concluded that the appellant acted in self-defence.

Learned Counsel relied upon **Ojepan Ignatius v Uganda; Supreme Court Criminal Appeal No. 25 of 1995**, for the submission that the law of self defence is based on common sense in that one who is attacked has the option to defend oneself. Counsel also referred to **Palmer v R (1971) ALL ER 1077,** as authority for the proposition that the kind of self defence depends on the particular facts and circumstances of the situation.

In this regard, Counsel argued that the learned trial Judge erred when he did not put due weight to the fact that the marriage between the appellant and his deceased wife had, become a most unhappy one due to the deceased's being unfaithful and that this fact contributed to the appellant being provoked in shooting her to death.

Appellant's Counsel further submitted, relying on the persuasive High Court case of **Uganda vs Dic Ojok [1992-1993] HCB page 54,** that the learned Trial Judge ought to have come to the conclusion that the appellant acted in self defence when he shot the deceased. This is because the elements of self defence covered the appellant namely; the existence of an attack by the deceased on the appellant, the perception by the appellant of being in

imminent danger of death or serious body injury, the appellant believing it to be necessary to use force to repel the attack and the force used to repel the attack being reasonably necessary for that purpose.

Learned Counsel for the appellant invited this Court to re-evaluate and review the evidence adduced at trial, and also consider the case authorities of **George Kanahusasi v Uganda; Supreme Court Criminal Appeal No.15 of 1988, Selemani vs Republic [1963] EA 442, Salim Masala v Republic EACA Criminal Appeal No. 75 of 1977** and **R v Busembezi Wesonga [1948] 15 EACA 65.**

Specifically with regard to provocation, learned appellant's Counsel faulted the learned trial Judge for having erroneously concluded that the appellant was never provoked at all by the conduct of the deceased. The learned Trial Judge, according to appellant's Counsel, arrived at that conclusion because he adopted an isolationist approach in considering the evidence that was before him. The learned Trial Judge ought to have considered all the evidence of provocation cumulatively, that is the conduct, acts and words of the deceased whereby she threatened to kill and/or cause bodily injury to the appellant particularly when the deceased when she was holding a gun addressed the appellant that: *"You are joking with me, you will see what am going to do to you today".* Then later on:

"Emma, you remember what I told you in the morning. This is the time".

The learned trial Judge ought also to have considered the past conduct of the deceased whereby on several occasions, the

appellant had been informed that the deceased, his wife, was having a love affair with one Shafiq, a bodaboda rider in the area, the wife of the said Shafiq, being one of the appellant's informers.

Relying on **LUC THEIR THUAN v R [1996] 2 ALL ER 1033,** the learned appellant's Counsel argued that the learned trial Judge ought to have applied the principle that was pronounced in that case that: **"Particular acts or words which may, if viewed in isolation, be insignificant, may be extremely provocative when viewed cumulatively"** to the facts of the appellant's case and come to the conclusion that the appellant was actually provoked. The High Court in the persuasive case of **High Court Criminal Case No. 71 of 1991 Uganda v Sofia Auma** accepted provocation as a defence. In the case the deceased, a husband, had been constantly violent to his wife, the accused, in their matrimonial home. The husband died by reason of having been served with poisoned food by his very wife, the accused who had been, the victim of the deceased's violence. The Trial High Court Judge found and held in that case that the deceased husband had provoked the accused to act as she did towards her now deceased husband. Likewise in this case of the appellant, the learned Trial Judge ought to have found that the deceased had provoked the appellant to act as he did towards his wife, now the deceased.

Appellant's Counsel further criticized the learned Trial Judge for having failed to resolve the contradiction as to whether or not the deceased had a gun and she used that gun to threaten to shoot the appellant and to find that the evidence of Pw4 and Pw5's had been contradictory in that it claimed that the deceased was in

possession of a gun while inside the prison, while in the same measure it was claimed that the deceased had no gun at the material time. It was also contradictory when Pw2's testimony was to the effect that the accused shot the 3rd and 4th bullets directly at the deceased, while the safety catch of the deceased's gun had not been opened, when the evidence of Pw4 and Pw5, on the other hand, was to the contrary.

In conclusion, Learned Counsel prayed to this Court to find the defence of provocation and self-defence available to the appellant and allow grounds 1 and 2 of the appeal.

Ground 3:

As to ground 3 of the appeal, learned Counsel contested the learned trial Judge's holding that the prosecution witnesses were not contradicted at all and that the fourth ingredient of the offence, that the death of the deceased had been carried out with malice aforethought on the part of the one who carried out the killing, had been proved beyond reasonable doubt.

Learned Counsel for appellant referred to the **Supreme Court case of Wasswa Stephen and another v Uganda: Criminal Appeal No. 31 of 1995,** where the Court held that *"even if the defense omitted or failed to point out any contradictions or discrepancies in the prosecution case, it is the duty of the trial Judge to do so where such discrepancies or contradictions exist in the evidence, in that way the trial Judge would be able to express his or her opinion on the weight she attaches on the contradictions and inconsistencies"*, and faulted the learned trial Judge for not having pointed out the contradictions and resolving those contradictions one way or the

other as regards whether or not the deceased had a gun at the time she was killed. Counsel contended that the prosecution evidence was contradictory in material facts when it stated that "as the deceased dropped her gun and entered the gate lodge that is when the accused fired, the 3rd and 4th bullets that killed her". This meant that the deceased was shot when she had no gun. Yet Pw2's testimony was that he (Pw2) witnessed the shooting, and what he saw was that the deceased had been shot while in possession of her gun.

Learned Counsel thus prayed this Court to find the contradictions in the prosecution case as major and allow ground 3 of the appeal.

Ground 4:

Learned counsel for appellant submitted that the learned Trial Judge erred when he failed to adequately consider the mitigating factors before imposing a death sentence which rendered the sentence to be harsh and manifestly excessive. Counsel relied upon **Kiwalabye Bernard Vs Uganda; Supreme Court Criminal Appeal No. 145 of 2001**, and **Livingstone Kakooza v Uganda: Supreme Court Criminal Appeal No. 17 of 1993** where Court set aside sentences by reason of being harsh and excessive, amongst, other considerations.

Appellant's Counsel set out the guiding principle in sentencing that *"the death sentence should only be imposed in the most exceptional cases where there are no reasonable prospects of reformation and the object of punishment would not be achieved by any other sentence"* a principle stated in **South Africa Constitutional Court: State v Makwanyane (1995) 3 SA 391.**

cited with approval in the Ugandan case of **Kakubi Paul & Another v Uganda: Court of Appeal Criminal Appeal No. 126 of 2008.**

Learned Counsel argued that the learned Trial Judge ought to have considered in favour of the appellant that there was blameless as he acted due to loss of control caused by the threats of the deceased to shoot him. He was also of a youthful age at the time of the commission of the offence, had no previous records, was remorseful and had been co-operative with the Police. These factors had not been taken into account by the learned Trial Judge.

Learned appellant's counsel thus prayed this Court to allow ground 4 of the appeal.

All grounds of the appeal being successful, Counsel for the appellant prayed for the whole appeal to be allowed and for this Court to hold that the period of the appellant has spent serving sentence in prison is appropriate sentence and thus order for his release forthwith

Submissions for the Respondent:

Grounds 1 and 2:

Learned Counsel for the respondent opposed the appeal.

As to grounds 1 and 2 of the appeal, Counsel maintained that the learned trial Judge rightly examined the circumstances of the killing and concluded that the defences of self-defense and/or provocation were not available to the appellant. Learned Respondent's Counsel invited this Court to find that the learned Trial Judge had properly evaluated all the evidence and had come

to the conclusion that there was no attack on the appellant by his late deceased wife that put him under reasonable belief that he was under imminent danger of death justifying the use of force to repel such an attack. The testimonies of Pw2, Pw4 and Pw5, which, on reviewing the whole evidence, the learned trial Judge found truthful, as opposed to that of the appellant and Dw2, which the learned trial Judge rejected as not truthful, proved beyond doubt that by the time the appellant fired the last two fatal bullets, the said deceased had already dropped her gun at the gate before entering inside prison.

Counsel referred this Court to **Palmer v R [1971] AC 814**, where it was held that *"there is no option for a verdict of manslaughter where a defendant uses excessive force in self-defense, the defense either succeeds in its entirety or it fails"*, and invited this Court to uphold the holding of the learned trial Judge that the defences of self-defence and/or provocation were not available for the appellant.

Respondent's Counsel, relying on **Nanyonjo Harriet and another v Uganda; Supreme Court Criminal Appeal No. 24 of 2004** and **Supreme Court Criminal Appeal No. 15 of 2009: Nakisige Kyazike v Uganda,** submitted that the conduct of the appellant after shooting his wife, of running away with the killer gun; instead of taking action of saving the deceased's life proved beyond reasonable doubt that he intentionally killed his deceased wife and did so with a motive.

Learned Counsel for the respondent therefore invited this Court to re-evaluate the evidence, and find that the learned trial Judge

rightly rejected the defences of self-defense and provocation. Grounds 1 and 2 of the appeal had therefore to be disallowed.

Ground 3:

On ground 3, Respondent's Counsel reiterated the fact that the learned Trial Judge properly evaluated all the evidence for the prosecution and for the defence and arrived at the proper conclusion that the prosecution witnesses were truthful and consistent in their testimonies inspite of their being subjected to rigorous cross-examination by the appellant's Counsel, and that the defence evidence was not truthful.

Counsel invited this Court to disallow ground 3 of the appeal.

Ground 4:

In respect of ground 4 of the appeal, the learned respondent's Counsel submitted that the offence of murder attracts a maximum sentence of a death upon conviction. Counsel therefore supported the learned trial Judge's decision of passing a maximum sentence of death after the learned trial Judge had considered both the mitigating and aggravating factors.

Relying on **Kyalimpa Edward v Uganda: Supreme Court Criminal Appeal No. 10 of 1995**, learned Respondent's Counsel contended that the appellant had failed to show any grounds upon which an appellate Court should interfere with the sentence of death passed against the appellant.

Learned Counsel therefore prayed this Court to uphold the sentence imposed by the trial Judge and dismiss ground 4 of the appeal.

All the grounds of the appeal having been disallowed, the whole appeal had to be dismissed.

Decision of Court:

As the first appellate court, this Court has to review and re-evaluate and subjected to fresh scrutiny the evidence adduced at trial, draw inferences therefrom and reach our own conclusions, bearing in mind that we did not have, like the trial Court had, the opportunity to hear, see and observe the witnesses testify at trial. Therefore on issues of demeanour of a witness, the observations of the trial Judge have to be accepted by the appellate Court, unless if there is very cogent evidence for so holding otherwise. See: **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions SI 13-10;** and also **Kiwalabye v Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

Bearing in mind the above stated duty, we proceed to resolve the grounds of the appeal.

Grounds 1 and 2:

The appellant asserts in grounds 1 and 2 of the appeal that the learned trial Judge failed to properly evaluate the evidence on record, and by reason thereof denied the appellant the defences of self-defense and provocation, thereby occasioning a miscarriage of justice to the appellant.

We have reviewed the evidence adduced at trial. The crime whereby the appellant killed the deceased who was his wife was carried out during day time on 13th August, 2012 between 3:00pm and 4:00pm at the Uganda Government Prison of Sentema, Busiro County, Wakiso District. Everything that was done could easily be seen. The evidence of the eye witnesses to the crime consisted of that of Pw2, Pw4, Pw5, the appellant as Dw1, and his witness Dw2. Both the appellant and the deceased were serving as prison warders. On 13th August, 2012 the appellant was on duty inside while his wife, the deceased was on duty outside the prison premises setup. There was a main gate whereby one could enter or get out of the prison premises. The evidence of Pw2, Pw4 and Pw5 in agreed that on 13th August, 2012 at about 3:00p.m. The deceased who had a gun on her side was seen and heard from outside the prison talking through a small window to the appellant who was inside the prison premises. Then suddenly the appellant, while holding a gun came outside through the main gate towards where the deceased was. The appellant pointed a gun at the deceased and released a bullet which missed the deceased. The deceased to avoid being shot at ran towards getting inside the prison through the main gate. A second shot again missed the deceased. The deceased dropped the gun she was holding by the gate, outside, and she entered inside. The deceased then entered inside the prison premises through the same main gate. He then released three or four other bullets at the deceased. She fell down in a pool of blood. The appellant then got out of the prison premises holding his gun through the main gate and ran away together with

his gun. The deceased lay dead in a pool of blood inside the prison premises.

On the other hand, the appellant, testified that the deceased confronted him by cocking a gun at him. He was compelled to shoot the first bullet to scare her off. He shot on the wall. The deceased then pressed the trigger of the gun she was holding but no bullet came out. she then followed the appellant inside the prison and during the scuffle, the second bullet accidentally came out and fatally hit the deceased.

The appellant thus claimed that he acted in self defence and after being provoked by the deceased.

The appellant was supported by Dw2 who testified that he saw the deceased pointing a gun at the appellant.

The Law on provocation as a defence to murder is provided by **Section 192 of the Penal Code Act**. A person who unlawfully kills another in circumstances which but for the provisions of the section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool is guilty of manslaughter only.

Section 193 of the Penal Code Act defines the term "provocation" as meaning and including, any wrongful act or insult of such a nature as to be likely when done or offered to an ordinary person to deprive him/her of self-control and to induce him/her to commit an assault of the kind which the person charged committed upon the person by whom the insult is done or offered. A lawful act is not provocation for an assault.

The Supreme Court in **Sowedi Ndosire versus Uganda, Supreme Court Criminal Appeal No. 28 of 1989** has held that provocation applies when;

"(a)the death must have been caused in the heat of passion before there is time to cool;

(b)the provocation must be sudden;

(c) the provocation must have been caused by a wrongful act or insult.

(d)The wrongful act or insult must be of such nature as would be likely to deprive an ordinary person, of the class to which the accused belongs, of the power of self-control. It is obvious from this that any individual idiosyncrasy, such as for instance that the accused is a person who is more readily provoked to passion than an ordinary person, is of no avail; and

(e) *Finally, the provocation must be such as to induce the person (by whom) provoked to assault the person by whom the act or insult was done or offered. This last provision in our opinion means (provided, of course, that all the other conditions referred to are present) that if the provocation is such as to be likely to induce an assault of any kind, the accused should be found guilty of manslaughter and not murder irrespective of whether the assault was carried out with a deadly weapon, such as was done in the present case, or by other means calculated to kill".*

As to self-defense, the principles of English law apply. See: **Section 15 of the Penal Code Act**. The onus is on the prosecution to establish that the killing was not done in self-

defense. See: **Palmer V Reginam [1971] 1 ALL ER 1077 at p. 1088 para e-g** the Privy Council held that:

"If there has been no attack then clearly there would have been no need for defense. If there has been an attack so that defense is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defense of self-defense, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defense. But their Lordships consider in agreement with the approach in De Freitas v. R that if the prosecution have shown that what was done was not done in self-defense then that issue is eliminated from the case."

In the instant case, on reviewing all the evidence we are satisfied and uphold the conclusion of the learned Trial Judge that it was the appellant who pointed the gun at the deceased, and shot at her with the first bullet, which missed her. It was not necessary for the appellant to follow the deceased and fire at her more bullets even when she had already fallen down. Further, the running away immediately after the incident and calling Pw3 to find out if the deceased, who was his wife and

the mother of his 3 children, had died, without in anyway doing anything to save the life of the deceased, was an indication that the appellant had a clear intention of killing the deceased.

We are also in agreement with the learned trial Judge's rejection of the appellant's assertion that the shooting occurred around the shoulder which was not a fatal part of the deceased's body, and therefore this proved that he, the appellant, never intended to kill the deceased. We find as correct the reasoning and conclusion of the learned Trial Judge that: ***"shooting using a gun on any part of the body is very dangerous, particularly the upper part of the body which was targeted by the accused, why didn't the accused aim at the legs/lower part of the body".*** The postmortem examination established that the deceased was shot around the breast. The injuries on the deceased were consistent with the prosecution evidence that the appellant took aim at the deceased and deliberately shot at her.

In conclusion, the appellant cannot be protected by the defences of provocation and self-defence. We find no merit in grounds 1 and 2 of the appeal. The same stand disallowed.

Ground 3:

As to ground 3 of the appeal, what has to be resolved is whether there were any material contradictions and/or inconsistencies in the evidence adduced, whether the learned trial Judge properly considered the same what weight was attached to anyone of them

and what effect did they or any of them have on the credibility of the evidence adduced.

In **Hajji Musa Sebirumbi vs Uganda; Supreme Court Criminal Appeal No. 10 of 1989**, the Supreme Court expounded that:"*The principles upon which a trial Judge should approach contradictions and discrepancies in the evidence of a witness or witnesses are now well settled in this country.....in assessing the evidence of a witness his consistency or inconsistency; unless satisfactorily explained, will usually, but not necessarily, result in the evidence of a witness being rejected; minor inconsistencies will not usually have the same effect unless the trial Judge thinks that they point to deliberate untruthfulness, moreover, it is open to a trial Judge to find that a witness has been substantially truthful, even though he lied in some particular respect.*

The principles apply to contradictions and discrepancies in the evidence of a single or more witnesses supporting the same case".

The testimonies of the prosecution eye witnesses, Pw2, Pw4 and Pw5 all agreed as to what transpired between the deceased and the appellant on 13th August, 2012 at 3:00-3:30pm at Sentema Prison. Though the deceased held a gun on the side way of her body, she never fired and never pointed that gun at the appellant. There were no bullets in the chambers of her gun and its safety catch had not been opened. The deceased had even dropped his gun this gun outside the prison gate as she ran for safety to enter inside the prison premises after the appellant had shot at her twice but both bullets had missed her, it is when she was inside the prison, after

dropping her gun outside that the appellant followed her inside with his gun and shot her at close range with three or four bullets.

By way of defence, the evidence of the appellant Dw1 and that of his witness, Dw2 was to the effect that the deceased used the gun she had to threaten the appellant by pointing the same at him and even pressing its trigger, though no bullets ever came out of it. Therefore the appellant acting in self-defence shot dead the deceased.

We have re-evaluated the whole evidence. The only inconsistency in the prosecution evidence of Pw2, Pw4 and Pw5 was that according to Pw2 the first bullet shot by the appellant towards the deceased hit a wall of the prison gate, while according to Pw4, this bullet hit the ground because Pw4 saw a lot of dust being raised. This inconsistency was inconsequential and very minor, and did render the prosecution evidence to be unreliable in any way. It was very possible for the given bullet or its fragments to hit the wall of the prison gate and then the ground.

On the other hand, however, the evidence of the appellant Dw1, and that of his witness, Dw2, was grossly contradictory in material particulars. The evidence of the appellant was that the deceased had a gun and threatened to shoot him with that gun and that at one time, the appellant he saw the deceased holding a bullet in the chamber of her gun. The deceased pressed a trigger, but no bullet came out of her gun.

Dw2 however testified that he saw the deceased holding and cocking a gun and in a few minutes heard gunshots. He informed the appellant of what he had seen the deceased do. The appellant

then came out and took off very fast after another bullet was shot by the deceased. Dw2 then testified ***"I heard one round when the deceased was accusing the accused, accused asked her to leave him alone".***

However under cross-examination Dw2 contradicted himself by stating ***"I did not see the deceased shoot at any time".***

Dw1 and Dw2 also contradicted themselves when Dw1 (appellant) asserted that on 13th August, 2012 at about 4:00 p.m. the deceased addressed prisoners telling them that they go and tell him (the appellant) to come out of the prison premises to where she, (the deceased) was and that he did not come out as the deceased had threatened to shoot him. However Dw2 who claimed to have been present at that material time testified that the deceased never addressed any prisoners at any time before she was shot dead on that day.

The above contradictions coupled with the claim of the appellant that he found his deceased wife naked and in bed in the house of the bodaboda rider Shafiq with whom she was alleged to have had a love relationship, but the appellant never reported this incident to the police or to his superiors in prisons rendered the defence evidence to be very suspect.

As to the two police statements made by Pw2, the learned Trial Judge properly considered the circumstances surrounding the making of the two statements and rightly admitted them as evidence.

The contents of the two police statements made by Pw2 were admissible evidence since they all concerned the same subject matter of the appellant killing his wife, the deceased. The two statements were made by Pw2 within a short period one after the other on 13th August, 2012 and 15th August, 2012. We are unable, on the evidence that was available before the learned Trial Judge, to draw any conclusion that Pw2 made the second police statement for the sole purpose of implicating the appellant into this crime,

We are satisfied with the analysis of the evidence by the learned trial Judge as to the contradictions and inconsistencies that were identified in the evidence adduced before the Court. The learned Trial Judge properly dealt with them and arrived at the proper conclusions.

We find no merit ground 3 of the appeal.

Ground 4:

The appellant's Counsel submitted as to ground 4, that the mitigating factors were not considered by the learned Trial Judge. On the other hand, the respondent's Counsel contend that both the mitigating and aggravating factors were considered and that the learned Trial Judge properly sentenced the appellant.

The learned Trial Judge stated as to sentence of the appellant that:

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"The aggravating factors in this case was that the convict meticulously planned the murder the whole day, first by keeping the gun with him at the counter when he was supposed to keep it in the

armory. The convict further went on to confuse and mislead his boss by claiming or purporting that he was going to kill himself. Then he went on to put the deceased at gun point and executed her or ruthlessly shot her 4 times, the last 2 bullets sending her to her creator. That was done in a matter typical of firing squads under the past regime of Idi Amin, a regime of murder and terror.

The Courts will not therefore sit back and allow perpetrators of such uncivilized and barbaric acts to go unpunished or walk away with a lenient sentence. A harsh penalty is in the circumstances called for".

We note that, the learned trial Judge did not make any reference to what was presented by the appellant as mitigating factors.

The Supreme Court in **Magala Ramathan vs Uganda: SCCA No. 01 of 2014**, held that:

"A Judicial officer is accountable to explain the reasons for exercising the discretion in a particular way. Our justice system requires that an accused person be given an opportunity to say something in mitigation of the sentence. It follows that in arriving at a sentence, a judicial officer is obliged to balance the mitigating against the aggravating factors. However, after identifying the mitigating and aggravating factors, a Judge may come to the conclusion that in the circumstances of the particular case, the aggravating factors outweigh what would have been mitigating factors".

The learned trial Judge while sentencing the appellant was under an obligation to state that the sentence was arrived at with both

the mitigating and aggravating factors having been considered by Court. The learned Trial Judge with respect hardly considered any mitigating factors that had been forward in favour of the appellant. The learned Judge only remarked that:

".....the Court is at cross roads because of the mitigating factors raised by Mr. Bwire for convict in mitigation. The issue of children has been raised but the children belong to both convict and the deceased. At such a tender age, they even needed the motherly love and care more than ever before".

We therefore find, with respect, that the learned trial Judge erred in law in considering only the aggravating factors, to the exclusion of the mitigating factors when he passed sentence against the appellant.

This court has power to interfere with the sentence imposed by a trial court where the sentence is either illegal or founded upon a wrong principle of law, or when the sentence is passed when the trial court had not considered material factors in the case or imposed a sentence which is harsh and manifestly excessive or too low in the circumstances of the case so as to amount to a miscarriage of Justice. **See: Bashir Ssali v Uganda: Supreme Court Criminal Appeal No. 40 of 2003.**

Article 23(8) of the Constitution required the learned Trial Judge to take into consideration while sentencing the period the appellant had spent in lawful custody. Again, with respect to the learned Trial Judge, this was not addressed at all.

We accordingly set aside the sentence of death passed upon the appellant by reason of its illegality having been passed contrary to **Article 23(8) of the Constitution** and also without consideration by the learned sentencing Judge of the mitigating factors, which rendered the said sentence to be illegal and also harsh and/or manifestly excessive in the circumstances.

Pursuant to **Section 11 of the Judicature Act,** this Court now proceeds to sentence the Appellant. The principle of uniformity and consistency in sentencing as was held in **Mbunya Godfrey v Uganda; Supreme Court Criminal Appeal No. 4 of 2011** has to be complied with. Having had the benefit of considering the mitigating and aggravating factors as well as a number of Court decisions having some similarity with the case under consideration, we find that on the mitigation side, the appellant was aged 30 years at the time of conviction, as such he was still young, and capable of reforming into a better citizen. He was a first offender, a family person with 3 children to support. He also readily admitted to the killing of his wife, though he falsely claimed it was due to provocation and he acted in self-defence.

On the aggravating side, the appellant killed the mother of his 3 children thus rendering them to grow without their mother's love and affection. The appellant, a trained prison officer used excessive force on the deceased his wife, the killing having been premeditated. The appellant illegally used a gun to end the life of the deceased, his wife.

In **Akbar Hussein Godi vs Uganda: Supreme Court Criminal Appeal No. 03 of 2013,** the appellant, then a member of

Parliament, was convicted of murder and sentenced to 25 years imprisonment, which sentence was confirmed by both the Court of Appeal and the Supreme Court.

In **Rwabugande Moses vs Uganda: Supreme Court Criminal Appeal No. 25 of 2014**, the Supreme Court reduced a sentence of 35 years imprisonment imposed by the trial Court and confirmed by this Court of Appeal to 21 years imprisonment for murder. The appellant hit his victim with a herdsman's stick twice on the head. He sustained bodily injuries which led to his death.

The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, have death as the maximum sentence for murder, with a starting point at 35 years imprisonment.

Having considered the aggravating factors and mitigating factors, the past Court precedents as to sentences in Court cases where convictions of the offences of murder have been secured, and having been guided by the Sentencing Guidelines, we sentence the appellant to 25 years imprisonment.

The appellant spent 1 year and 5 months on remand from 13th August, 2012 when he was arrested to 15th January, 2014 when he was convicted of murder by the High Court. This period is deducted from the sentence of 25 years imprisonment. Accordingly the appellant is to serve a sentence of imprisonment of 23 years and 7 months as from the date of conviction of 15th January, 2014.

We dismiss the appeal as to conviction, but allow the appeal as to sentence on the terms set out above in this Judgment.

We so order.

Dated at Kampala this ....4th.... **day** of ....Feb.... **2021.**

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Geoffrey Kiryabwire
Justice of Appeal

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Catherine Bamugemerire
Justice of Appeal

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Remmy Kasule
Ag. Justice of Appeal