THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

CONSTITUTIONAL APPEAL NO. 03 OF 2006

(CORAM: ODOKI, C.J, TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE, , JJ.SC; KITUMBA, EGONDA NTENDE AG. JJ.SC).

BETWEEN

ATTORNEY GENERAL:: APPELLANT

AND

SUSAN KIGULA & 417 OTHERS:::::::::::::::::::::::::::::::::: RESPONDENT.

(Appeal, and cross-appeal from decision of the Constitutional Court at Kampala (Okello,Twinomujuni, Mpagi-Behigeine, Byamugisha, Kavuma, JJA) in Constitutional Petition, No. 6 of 2003, dated 10th June 2005 .

JUDGMENT OF THE COURT.

The Respondents/Cross Appellants, (the respondents) filed their Petition in the Constitutional Court under Article 237(3) of the Constitution challenging the Constitutionality of the death penalty under the Constitution of Uganda.

The Respondents were all persons who at different times had been convicted of diverse capital offences under the Penal Code Act and had been sentenced to death as provided for under the laws of Uganda. They contended that the imposition on them of the death sentence was inconsistent with Articles 24 and 44 of the Constitution. To the Respondents the various provisions of the laws of Uganda which prescribe the death sentence are inconsistent with Articles 24 and 44. The Respondents also further petitioned in the alternative as follows:

First, that the various provisions of the laws of Uganda which provide for a mandatory death sentence are unconstitutional because they are inconsistent with Articles 20, 21, 22, 24, 28 and 44(a) of the Constitution. They contended that the provisions contravene the Constitution because they deny the convicted person the right to appeal against sentence, thereby denying them the right of equality before the law and the right to fair hearing as provided for in the Constitution.

Second, that the long delay between the pronouncement by Court of the death sentence and the actual execution, allows for the death row syndrome to set in. Therefore the carrying out of the death sentence after such a long delay constitutes cruel, inhuman and degrading treatment contrary to Articles 24 and 44(a) of the Constitution.

Third, that section 99(1) of the Trial on Indictments Act which provides for hanging as the legal mode of carrying out the death sentence, is cruel, inhuman and degrading contrary to Articles 24 and 44 of the Constitution.

Accordingly they sought various reliefs, orders and declarations.

The Attorney General (the Appellant) opposed the Petition in its entirety, contending that the death penalty was provided for in the Constitution of Uganda and its imposition, whether as a mandatory sentence or as a maximum sentence was Constitutional. Both parties filed affidavits in support of their respective cases.

The Constitutional Court heard the petition and decided as follows:-

1. The imposition of the death penalty does not constitute cruel, inhuman or degrading punishment in terms of articles 24 and 44 of the Constitution, and therefore the various provisions of the laws of Uganda prescribing the death sentence are not inconsistent with or in contravention of Articles 24, and 44 or any provisions of the Constitution

.

2. The various provisions of the laws of Uganda which prescribe a mandatory death sentence are inconsistent with Articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution and, therefore, are unconstitutional.

3. Implementing the carrying out of the death sentence by hanging is constitutional as it operationalizes Article 22(1) of the Constitution. Therefore Section 99(1) of the Trial on Indictments Act is not unconstitutional or inconsistent with Articles 24 and 44(a) of the Constitution

.

4. A delay beyond three years after a death sentence has been confirmed by the highest appellate court is an inordinate delay. Therefore for those condemned prisoners who have been on death row for three years and above after their sentences had been confirmed by the highest appellate court, it would be unconstitutional to carry out the death sentence as it would be inconsistent with Articles 24 and 44(a) of the Constitution.

Consequently, the court made the following orders:

1. For those Petitioners whose appeal process is completed and their sentence of death has been confirmed by the Supreme Court, their redress will be put on halt for two years to enable the Executive to exercise its discretion under Article 121 of the Constitution. They may return to court for redress after the expiration of that period.
2. For the Petitioners whose appeals are still pending before an appellate court:-
   (a) shall be afforded a hearing in mitigation on sentence,
   (b) the court shall exercise its discretion whether or not to confirm the sentence,
   (c) therefore, in respect of those whose sentence of death will be confirmed, the discretion under Article 121 should be exercised within three years.

The Attorney General was not wholly satisfied by the above decision and orders, hence this appeal. The Respondents were also dissatisfied with parts of the decision of the Constitutional Court, hence the cross-appeal.

In this Court the Attorney General filed, 8 grounds of appeal as follows:-

1. ***The Learned Justices of the Constitutional Court erred in law in holding that the various provisions of the law that prescribe mandatory death sentences are inconsistent with article 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution.***

2. ***The Learned Justices of the Constitutional Court erred in law in holding that Section 132 of the Trial on Indictments Act (Cap 23) is inconsistent with article 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution.***

3. ***The Learned Justices of the Constitutional Court erred in law and fact in holding that delay in carrying out the death sentence after it has been confirmed by the highest appellate court is inconsistent with Articles 24 and 44(a) of the Constitution.***

4. ***The Learned Justices of the Constitutional Court erred in law and in fact in holding that a delay in carrying out a death sentence beyond 3 years after the highest court has confirmed the death sentence is inordinate.***

5. ***The Learned Justices of the Constitutional Court erred in law and in fact in ordering that the petitioners whose death sentence has been confirmed by the Supreme Court shall have their redress put on halt for two years to enable the Executive to exercise its discretion under Article 121 of the Constitution.***

6. ***The Learned Justices of the Constitutional Court . erred in law and in fact in ordering that for the petitioners whose appeals are still pending before an appellate court they shall be heard in mitigation on sentence.***

7. ***The Learned Justices of the Constitution Court erred in law in ordering that the appellate courts shall exercise discretion whether or not to confirm the death sentence.***

8. ***The Learned Justices of the Constitutional Court erred in law and in fact in ordering that where the death sentence has been confirmed the discretion under Article 121 of the Constitution should be exercised within three years.***

The appellant seeks orders to allow the appeal, overrule the Judgment of the Constitutional Court and costs of the appeal.

On the other hand, the respondents cross-appealed on the following grounds:-

1. ***"That the Learned Justices of the Constitutional Court erred in law when they held that Articles 24, and 44(a) of the Constitution of the Republic of Uganda 1995 as amended (hereafter referred to as "The Constitution") which prohibit any forms of torture, cruel, inhuman and degrading treatment or punishment were not meant to apply to Article 22(i) of the Constitution.***

2. ***"That the Learned Judges of the Constitutional Court erred in law when they held that the death penalty was not inconsistent with Articles 20, 21, 22(1), 24, 28, 44(a) and 45 of the Constitution".***

3. "That in the Alternative but without prejudice to the above, that the Learned Justices of the Constitutional Court erred in law when they found as a question of fact and law that hanging was a cruel, inhuman and degrading treatment or punishment but held that it was a permissible form of punishment because the death penalty was permitted by the Constitution.

The respondents seek orders and declarations as follows:-

1. Declarations to the effect that:-

   (a) the death penalty, in its nature, and in the manner, process and mode in which it is or can be implemented in Uganda, is a form of torture, cruel, inhuman or degrading treatment or punishment prohibited under Articles 24 and 44(a) of the Constitution;

   (b) the imposition of the death penalty is a violation of the right to life protected under Articles 22(1) 20 and 45 of the Constitution;

   (c) Section 25(1), 25(2), 25(3), 25(4), 118, 123(1), 129(5), 184, 273(2), 301 B(2) and 235(1) of the Penal Code Act (Cap. 120) and Sections 7(1)(a), 7(1)(b), 8, 9(1) and 9(2) of the Anti-Terrorism Act (Act No. 14 of 2002) and any other laws that prescribe a death penalty in Uganda are inconsistent with and in contravention of Articles 20, 21, 22(1),24, 28, 44(a), 44(c) and

45 of the Constitution to the extent that they permit or prescribe the imposition of death sentences;

(d) the carrying out of a sentence of death is inconsistent with Article 20, 21, 22(1), 24, 28, 44(a), 44(c) and 45 of the Constitution;

(e) the method of carrying out a death sentence by hanging is cruel, inhuman and degrading and inconsistent with the provisions of Article 20, 21, 22(1), 24, 44(a), and 45 of the Constitution.

Orders:

(a) that the death sentences imposed on the respondents be set aside;

(b) that the orders of the Constitutional Court granting the cross-appellants' Petition be affirmed and those refusing the cross-appellants' Petition be set aside and substituted with orders prayed for in the Petition in the Constitutional Court.

(c) That the court exercise its jurisdiction to grant such other orders, redress or relief to the respondents / cross appellants, as are appropriate in the circumstances of the case and in the interests of justice;

(d) That the respondents / cross appellants be granted costs of the cross-appeal.

Both parties filed what they termed ***"summary submissions"*** but also made oral submissions in support of their respective cases.

The appellant was represented by Angela Kiryabwire Kanyima, Ag. Commissioner for Civil Litigation, assisted by Margaret Nabakooza, Senior State Attorney and Rashid Kibuuka, State Attorney. The respondents were represented by John Katende together with Prof. Frederick Sempebwa, Soozi Katende, and Sim Katende.

The appellant's counsel argued grounds 1, 2, 6 and 7 together, and then grounds 3, 4, 5 and 8 also together. On the other hand, counsel for the respondents argued that ground 1of the cross appeal should be argued first as it was the main issue of contention, the others being argued in the alternative. In their view, if the court upholds this ground it would be unnecessary to adjudicate on the other grounds. They therefore argued that ground alone, and argued the others also separately.

We agree with counsel for the respondents that the first ground of the cross appeal is the main issue in this case, and that logically it should be argued first. The alternative issues can then be considered after the disposal of that ground.

The first issue for determination arising out of the cross-appeal is whether the death penalty is inconsistent with Articles 20, 21, 22(i), 24, 28, 44(a) and 45 of the Constitution.

The Constitutional Court found that the death penalty was not inconsistent with the above provisions of the Constitution and that Articles 24 and 44 of the Constitution did not apply to article 22(1) of the Constitution. The respondents disagree.

Counsel for the respondents argued that the death penalty by itself is a cruel, inhuman and degrading punishment and therefore violates Article 24 of the Constitution. Counsel relies on the decision of this court in ***SALVATORE ABUKI – Vs- ATTORNEY GENERAL (2001) 1 LRC 63*** in interpreting what amounts to "cruel, inhuman and degrading punishment" Counsel argued that if the case of banishment were found to be such punishment, then death penalty which is much severer must also be judged cruel, inhuman and degrading. Counsel also relies on the Tanzania Case of ***Repiblic–Vs- MBUSHU [1994] 2 LRC 335*** where the death penalty was adjudged to be "cruel, inhuman and degrading." He also relied on the South African case of ***STATE –Vs- MAKWANYANE [1995] 1 LRC 289*** where the court considered provisions in the South African Constitution similar to article 24 of the Uganda Constitution and declared the death sentence to be cruel, inhuman and degrading and therefore unconstitutional in South Africa.

In arguing whether Articles 24 and 44 were meant to apply to article 21(1) of the Constitution, counsel argues that the freedom from cruel, inhuman and degrading punishment, as contained in Article 24, is absolute from which derogation is prohibited by Article 44(a). If the makers of the Constitution had intended that article 24 would not apply to article 22(1) they would have provided so expressly. Since Article 44(a) provides that ***"Notwithstanding anything in this constitution, there shall be no derogation from the***

enjoyment of the freedom from torture, and cruel, inhuman or degrading treatment or punishment," it follows that any provision of the Constitution which provides for a punishment that is cruel, inhuman and degrading, like the death penalty, is inconsistent with Article 44(a) and would be unconstitutional. In counsel's opinion, Article 22(1) was in conflict with Article 24 and the Court. Relying on ***PAUL SEMOGERERE–Vs- ATTORNEY GENERAL (Constitutional Appeal No. 1 of 2002)*** Court can proceed to interpret one article against the other to resolve the conflict. In counsel's view, the conflict is resolved by Article 44(a). Counsel states in his written submission. ***"The purpose and wording of Article 44(a) was to resolve any anomaly in <u>any</u> part of the Constitution and it allows no exceptions or qualifications even those impliedly or expressly envisaged by Article 22(1). The death penalty is therefore not saved by Article 22(1)."*** Counsel urged this Court not to rely on case law from jurisdictions that did not have the equivalent of article 44(a) in their Constitutions. He particularly singled out the Nigerian case of ***KALU –Vs- THE STATE [1998] 13 NWL R54*** which had allowed the death sentence as Constitutional in Nigeria. Counsel contends that the Constitutional Court was wrong to follow that decision.

On the other hand, counsel for the appellant fully supported the decision of the Constitutional Court that articles 24 and 44 were not meant to apply to article 22(1) of the Constitution, and that the death penalty as provided for in article 22(1) was constitutional in Uganda.

In dealing with this matter we wish to start from what appears to be a common position, namely that the right to life is the most fundamental of all

rights. The taking away of such a right is, therefore, a matter of great consequence deserving serious consideration by those who make constitutions as well as those who interpret those constitutions. One must also bear in mind that different Constitutions may provide for different things precisely because each Constitution is dealing with a philosophy and circumstances of a particular country. Nevertheless there are common standards of humanity that all constitutions set out to achieve. In discussing this matter we will make reference to international instruments on the subject.

The death penalty appears to have existed for as long as human beings have been on earth. Sometimes it was arbitrarily imposed and carried out in all sorts of manner as for example burning on the stake, crucifixion, beheading, shooting, etc. During World War II, the crimes committed by the Nazis in Germany whereby millions of people were put to death, clearly shocked the world. This was one of the reasons why the ***UNIVERSAL DELCARATION OF HUMAN RIGHTS*** was adopted and proclaimed by the United Nations General Assembly on 10th December 1948. The preamble to that declaration provides in part;

> ***"Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."……***

> ***Now, therefore, The General Assembly:***
>
> ***Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for those rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."*** (Emphasis added).

With the above background and objectives in mind, the Assembly proceeded to set out international standards to be achieved by all member states.

Article 3 states: ***"Everyone has the right to life, liberty and security of person."***

Article 5 states: ***"No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment."***

It may be noted that the right to life is provided for separately, and the freedom from torture, cruel, inhuman or degrading punishment is also treated separately. It cannot be argued therefore that by these provisions, the Universal Declaration of Human Rights had thereby abolished the death penalty in the world. Indeed this could not have been so, for even as the Declaration was being proclaimed, death sentences passed by International Tribunals were being carried out against war criminals in Germany and Japan.

The next instrument is the **International Covenant on Civil and Political Rights** which was adopted and opened for signature, ratification and accession by the General Assembly on 16th December 1966, and came into force on 23rd March, 1976.

Article 6(1) thereof states:- "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

This article amplifies Article 2 of the Universal Declaration of Human Rights (supra) by adding on that the right to life must be protected by law and may not be arbitrarily taken away. In our view, the introduction of the word "arbitrarily" is significant because it recognizes that under certain acceptable circumstances a person may be lawfully deprived of his life. This is further acknowledged in Article 6(2) which states:-

> ***"In countries which have not abolished the death penalty, sentence 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 and not contrary to the provisions of the present covenant and to the convention on the Prevention and Punishment of the crime of Genocide. This penalty can only be carried out pursuant to a trial judgment rendered by a competent court."***

This provision recognised the reality that there were still countries that had not yet abolished capital punishment. It also seeks to set out safeguards that

should be followed in the imposition of death sentences. Article 6(4) provides thus:-

> ***"Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the death sentence may be granted in all cases."***

These safeguards are not to be construed as intended to delay or prevent the abolition of capital punishment, but they have to be followed by those countries which, for one reason or other peculiar to their circumstances, have not yet abolished the death penalty.

It is also significant to note that having so comprehensively provided for the death penalty in Article 6, the convention proceeds to provide separate sections for torture, cruel, inhuman or degrading treatment or punishment. Thus Article 7 provides thus:-

> ***"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular no one shall be subjected without his free consent to medical or scientific experimentation."***

It is noteworthy that the above provisions of the Covenant are in pari materia with articles 22(1) and 24 of the Constitution of Uganda.

we do not see nor can we find any conflict between Articles 6 and 7 of this Covenant. This issue was considered by the Human Rights Committee of the United Nations in Ng –Vs- CANADA (COMMUNICATION NO.

469/1991, UNHRC) where the majority of the committee held that because the International Covenant contained provisions that permitted the imposition of capital punishment for the most serious crimes, but subject to certain qualifications, and notwithstanding the view of the committee that the execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the covenant, the extradition of a fugitive to a country which enforces the death sentence in accordance with the requirements of the International Covenant could not be regarded as a breach of the obligations of the extraditing country.

As Twinomujuni, JA, observed, in his judgment, executing a death sentence in Uganda may constitute a cruel punishment, but not in the context of Article 24 because the death penalty has been expressly provided for in Article 22(1). The International Covenant provides that nothing in its provisions should be construed as delaying or preventing the abolition of capital punishment. In Uganda, although the Constitution provides for the death sentence, there is nothing to stop Uganda as a member of the United Nations from introducing legislation to amend the Constitution and abolish the death sentence. Indeed, the Constitutional Review Commission showed by Odoki, JSC (as he then was, and referred to in this judgment (Annexture B) did recommend for a periodic review of the subject.

Internationally, the campaign and efforts to abolish the death penalty as such continue. On December 15 1989, the General Assembly adopted ***SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL* AND *POLITICAL RIGHTS, AIMING AT THE ABOLITION OF THE DEATH PENALTY.***

By this Protocol , each of the States Parties to it undertake to ***"take all necessary measurers to abolish the death penalty within its jurisdiction."***

The United Nations having dealt with the need to abolish the death sentence in the above protocol proceeded to deal with matters of torture, cruel or inhuman punishment separately. Thus the United Nation General Assembly on the December, 1975 adopted the ***DECLARATION ON THE PROTECTION OF ALL PERSONS FROM BEING SUBJECTED*** to ***TORTURE AND OTHER CRUEL,INHUMAN*** or ***DEGRADING TREATMENT*** or ***PUNISHMENT.*** Subsequently on 10th December 1984, the United Nation General Assembly adopted the ***CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN or DEGRADING TREATMENT or PUNISHMENT.*** This Convention came into force on 26th June 1987.

This Convention offers a definition of what constitutes torture, which, in our opinion, leaves no doubt that it does not apply to a lawful death sentence. Article 1 thereof states:-

> ***"For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when***

> ***such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. <u>It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."</u>*** (emphasis added).

The General Assembly on 1st December 2002, adopted the ***OPTIONAL PROTOCOL*** to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, whose objective is ***"to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."***

There are other International Instruments containing similar provisions on the right to life and on freedom from torture, cruel, inhuman on degrading treatment or punishment. The African Charter On Human and Peoples' Rights of 1981 in article 4 provides:-

> ***"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be <u>arbitrarily</u> deprived of this right."*** (emphasis added).

In this charter, again the freedom from cruel, inhuman or degrading treatment is treated separately. Once again, one must note the use of the word "arbiturily".

It may further be stated pointed out that the United Nations Economic and Social Council on 25th May 1984 adopted a Resolution containing the safeguards guaranteeing protection of the rights of those facing the death penalty. Again some of the provisions of the resolution are instructive. Paragraph 1 states as follows: ***"In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crime; it being understood that their scope should not be beyond intentional crimes with lethal or other extremely grave consequences."*** Paragraphs 4, 5, 6, 7, 8, 9, and so thereof are as follows:-

5. ***"Capital Punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts."***

6. ***"Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial,…….***

7. ***"Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory."***

8. ***"Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.***

9. ***"Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceedings relating to pardon or commutation of the sentence.***

10. ***"where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering."***

The above instruments are some of those that lay out the framework governing the imposition of capital punishment. States are urged to strive to achieve the goal of the abolition of capital punishment by guaranteeing an unqualified right to life. But it is also recognised that for various reasons some countries still consider it desirable to have capital punishment on their statute books. The retention of capital punishment by itself is not illegal or unlawful or a violation of international law. It is in that context that we now proceed to discuss the constitutional provisions regarding capital punishment in Uganda.

We take judicial notice of the fact that the debate and subsequent promulgation of the Constitution of Uganda 1995, came after a long period of strife in the country – a period when there had been gross violations of human rights by various organs of the state, particularly the Army and other Security Agencies. This was a period when there were thousands of extra-judicial killings, as well as wanton torture of people. It is for this reason that the preamble to the Constitution states:-

"WE THE PEOPLE OF UGANDA:

"RECALLING our history which has been characterised by political and constitutional instability:

"RECOGNISING our struggles against the forces of tyranny, oppression and exploitation,……."

The Constituent Assembly debated a draft Constitution that was prepared by the Constitutional Review Commission, which had travelled the width and breath of Uganda encompassing people's views on various aspects of the Constitution. One of the subjects on which the Commission specifically sought and received views was the death penalty. In its Report (Annexture B) the Commission had this to say in paragraph 7.106:-

"We have seriously considered arguments of both sides, critically analysed the international attitude to capital punishment, the praiseworthy campaign of Amnesty International for the abolition of the death penalty and consideration of the fact that the death penalty has been abolished in several countries, including a few African countries. We fully understand the need for a change of attitude to capital punishment. We have, however, not found sufficient reasons to justify going against the majority views expressed and analysed."

The Commission then recommended as follows:-

"7.107

(a) ***Capital punishment should be retained in the new Constitution.***

(b) ***Capital punishment should be the maximum sentence for extremely serious crimes, namely***

murder, treason, aggravated robbery, and kidnapping with intent to murder.

(c) ***It should be in the discretion of the Courts of Law to decide whether a conviction on the above crimes should deserve the maximum penalty of death or life imprisonment.***

(d) ***The issue of maintaining the death penalty should be regularly reviewed through national and public debates to discover whether the views of the people on it have changed to abolition or not."***

Clearly, inclusion of the death penalty in the Constitution was therefore not accidental or a mere afterthought. It was carefully deliberated upon.

The concern about torture, cruel and inhuman treatment was considered as a separate subject as there were also reports of people having been subjected to all sorts of torture, cruel and inhuman treatments by various agencies of the state. Uganda is a Member the United Nations. The Framers of the Constitution were aware of the various United Nations Instruments, particularly those to which Uganda is a party. That is why article 287 provided for the continuation of treaties and conventions to which Uganda is a party.

With this background in mind, one should look at all the relevant provisions regarding the death penalty in their totality and how they relate to the International Instruments hereinabove referred to. Furthermore, it is well settled by this Court in ***PAUL SEMOGERERE –Vs- AG. CONSTITUTIONNAL APPEAL NO. 1 OF 2002*** that in interpreting the

Constitution, provisions should not be looked at in isolation. The Constitution should be looked at as a whole with no provision destroying another, but provisions sustaining each other. This has been said to be the rule of harmony or completeness. It has also been settled by this Court that provisions bearing on a particular issue should be considered together to give effect to the purpose of the Constitution.

The death penalty is not only provided for in Article 22(1) of the Constitution but also in several other places. First, article 22(1) provides that:-

> "***No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."***

Clearly this conforms to the international instruments already alluded to above, particularly the International Covenant on Civil and Political Rights to which Uganda is a party. In Uganda, the death sentence can only be carried out in execution of a sentence passed by a competent Court after a fair hearing. Article 28(3)(e) states:-

> ***"Every person who is charged with a criminal offence shall, <u>in the case of any offence which carries a sentence of death</u> or <u>imprisonment for life</u>, be entitled to legal representation at the expense of the state."*** (emphasis added).

This further gives an extra safeguard to a person who is sentenced to death, i.e., legal representation at the expense of the state. It is to be noted here that Article 28 comes after Article 24. So the framers must have known what was provided in Article 24.

Furthermore, Article 121 which deals with the Prerogative of mercy has a special provision regarding the death sentence. Article 121(5) states that;

> ***"Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy."***

Here it is clear that the framers of the Constitution were concerned about an extra safeguard for a person sentenced to death, i.e. that the committee on the Prerogative of Mercy should take into account a report about the case from the judge or judges who presided over the case. The rationale for this is that the judge in his report may reveal whether or not the convicted person showed remorse or contrition during the trial or whether there may be extenuating circumstances upon which mercy may be extended to the convicted person.

In our view these are deliberate provisions in the Constitution which can only point to the view that the framers of the Constitution purposefully provided for the death penalty in the Constitution of Uganda.

Counsel for the Respondents argues that the death penalty is a cruel, inhuman and degrading punishment and it, therefore, is inconsistent with article 24 and 44(a) of the Constitution.

Article 24 of Constitution states thus:-

> ***"No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment."***

This is in *pari materia* with Article 5 of the Universal Declaration of Human Rights. It is also in *pari materia* with Article 7 of the International Covenant on Civil and Political Rights. In the foregoing discussion, have endeavoured to show that the International Instruments have tended to deal with the death penalty separately from the freedom from torture, cruel, inhuman or degrading punishment,. The provisions relating to those two subjects do not conflict with one another. Counsel for the appellant contends that there is a conflict between Articles 22(1) and 24 because Article 44(a) provides for no derogation from the right to freedom from torture, cruel, inhuman or degrading punishment.

Counsel further argues that Article 44 is unique and overrides all other provisions of the Constitution that may provide anything to the contrary, including article 22(1). In his view, had the framers of the 1995 Constitution intended to save punishments that would otherwise offend article 44, they would have re-enacted a provision similar to Article 12(2) of the 1967 Constitution which provided thus:-

> ***"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question authorises the infliction of any punishment that was lawful in Uganda immediately before 9th October, 1962."***

Clearly, Counsel's argument is based on the assumption that the death penalty *per se* amounts to "cruel, inhuman or degrading treatment" which is outlawed by article 44(a). He further argues in his written submission that:

> ***"On the basis of the ABUKI case, each of these words have to be read and interpreted in isolation, not conjunctively, so that any one element if proved must not be allowed to stand."***

So the question that we must answer is whether the framers of the Constitution deliberately intended to exclude article 22(1) from the operation of article 44(a) or whether they inadvertently created confusion and conflict between two important provisions of the Constitution. It is also noteworthy that the Constitution itself did not define the terms ***"torture, cruel inhuman or degrading punishment."*** Courts have tried to define them depending on the context.

As counsel for the respondents submitted, the right to life is the most fundamental of all rights. It is therefore curious that the framers of the Constitution did not have it included within article 44(a) as one of those rights that are non-derogable under any circumstances. Or could it be that they regarded the right to life to be so fundamental and chose to deal with it

separately and provide for exceptions to it in a self-contained provision which was supposed to stand alone to the exclusion of article 44(a)?. We have already pointed out that the death penalty is referred to in several provisions of the Constitution. In our view, the framers of the Constitution did not regard the death penalty as qualifying for the classification of ***"cruel, unusual, inhuman or degrading treatment or punishment"*** for purposes of the Constitution, as long as it was passed by a competent court, in a fair trial and confirmed by the highest court as provided for in article 22(1). ***PAUL SIEGHART*** in his article published in ***THE INTERMATIONAL LAW OF HUMAN RIGHTS (1983)*** P.130, and cited by the Court of Appeal in the Tanzanian case of ***MBUSHUU & ANOTHER –Vs- REPUBLIC (1995) 1 LRC*** at page 232, seems to support the view that provisions about torture, cruel or inhuman punishment are intended to apply to the process of living. He writes as follows:-

> ***"As human rights can only attach to living human beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would have any value or utility without it. But the international instruments do not in fact accord it any formal primacy: on the contrary …….contain qualifications rendering the right less than absolute, and allowing human life to be deliberately terminated in certain specific cases……The right to life thus stands in marked contrast to some of the other rights protected by the same instruments; for example, the freedom from torture and other ill-treatment …….and the freedom from slavery and servitude ……are both absolute, and subject to no exception of any kind. <u>It may therefore be said</u>***

> ***<u>that international human rights law assigns a higher value to the quality of living as a process, than to the existence of life as a state ……..the law tends to regard acute or prolonged suffering</u> (at all events in cases where it is inflicted by others, and so it is potentially avoidable) <u>as a greater evil than death</u>, which is ultimately unavoidable for everyone."*** (emphasis added)

The phrase ***"cruel, unusual, inhuman or degrading punishment"*** has its history in the English Bill of Rights of 1688. According to ***DEATH PENALTY CASES,*** Second Edition, page 2, the English Bill was a response to the cruelty of King James II. In a revolt against him which he savagely suppressed, hundreds of captured rebels were taken before special courts (the ***"Bloody Assizes"***) convicted and then brutally executed by such methods as hanging, being cut down before death, being disembowelled, beheaded, or being hacked to pieces. It is also said that even in Europe at that time there was ***"use of the rack, drawing and quartering and burning alive."*** The authors continue;

> ***"When the United States Constitution was adopted in 1789, some of these barbaric punishment still were used abroad, and the framers of the Constitution apparently were determined to prohibit their imposition in America. However, branding, whipping, and the cropping of ears were commonly used in the United States before and after the adoption of the Eighth Amendment, until, by 1850, they were virtually abolished by the state legislatures.***

It is clear that the Cruel and Unusual Punishments clause was NOT intended to abolish capital punishment. Some proof of this is provided by other language in the Constitution; the Fifth Amendment in particular implies that the death penalty was Constitutionally acceptable. It was intended (in part) to forbid the infliction of more pain than was necessary to extinguish life. Therefore, the focus of the few death penalty cases before the Supreme Court in the 19th Century was not whether a death sentence could be imposed, but how it was to be carried out."

The Supreme Court of the United States has interpreted the 8th Amendment and struck down sentences found to be ***"excessive"*** in the circumstances of a particular case. In ***TR0P –Vs- DULLES, 356 U.S 86, (1958)*** the majority were of the opinion that the 8th Amendment must draw its meaning from ***"the evolving standards of decency that mark the progress of a maturing society,"***, and therefore held that it was cruel and unusual punishment to take away the citizenship of a wartime deserter. This was not even a death penalty case. The problem has been how to determine and measure what is to be ***"contemporary standards of decency."***

The Supreme Court considered the 8th Amendment in the case of ***FURMAN -Vs- GEORGIA, 408U.S. 238 (1972)*** which has also been cited in this court by counsel for respondents. For the first time, the U.S Supreme Court, by majority, declared that the death penalty was a cruel and unusual punishment. However, barely four years later, the same court, again by majority in ***GREGG –Vs- GEORGIA, 428 U.S. 153 (1976)*** rejected the

decision in ***FURMAN*** that the death penalty is *per se* cruel and unusual and went on to uphold a Georgian law that permitted capital punishment but provided for certain trial procedures and appeals designed to prevent the penalty being imposed arbitrarily. In his opinion which was joined in by Justice Powell and Stevens, Justice Stewart stated thus:

> ***"We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendment of the Constitution…….. The Petitioners in the capital cases before the court today renew the "standards of decency" argument, but developments during the four years since FURMAN have under cut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th Century, over the morality and utility of capital punishment, it is now evident that a larger proportion of American society continues to regard it as an appropriate and necessary criminal sanction.***
>
> ***The most marked indication of society's endorsement of the death penalty for murder is the legislative response to FURMAN. The legislatures of at least 35 states have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to***

address the concerns expressed by the court in FURMAN primarily:

(i) ***by specifying the factors to be followed in deciding when to impose a capital sentence, or***

(ii) ***by making the death penalty mandatory for specified crimes. But all of the post – FURMAN statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people……."***

The above cases illustrate the debate that has raged, and continues to rage, in the United States regarding aspects of the death sentence, and what constitutes "evolving standards of decency." We cannot say that those states in the United States of America, or indeed anywhere else in the world who retain the death penalty, have not evolved standards of decency. Each situation must be examined on its own merits and in its context.

In Uganda, we have already alluded to the concerns of the framers of the Constitution at the time when these provisions were enacted. Although counsel for the respondents has sought to rely on the omission of the equivalent of article 12(2) of the 1967 Constitution from the 1995 Constitution, he did not advert to the fact that the preamble to the 1967 Constitution did not include the equivalent of the following recital in the 1995 Constitution:

> ***"RECALLING our history which has been characterised by political and Constitutional instability;***
>
> ***"RECOGNISING our struggles against the forces of tyranny, oppression and exploitation."***

Secondly, the Court cannot fail to recollect that the debate and passing of the 1995 Constitution was proceeded by two important Commissions of inquiry. The first was the Commission of inquiry into the violations of Human Rights in Uganda, headed by Oder, JSC, (RIP). The second was the Constitutional Review Commission headed by Odoki JSC, (as he then was)(supra).

The first Commission established that there had been gross violation of human rights including numerous extra-judicial killings, or many cases where people simply disappeared. Indeed, even during the rule of Idi Amin, there was a Judicial Commission set up to look into "missing persons." Its report listed many people as "missing, presumed dead". The Oder Commission reported numerous instances of torture , where people were burned with molten plastic materials, shocked with electricity, buried alive, hacked to death, put in boots of cars etc. This Commission made certain recommendations some of which were later to be considered by the Odoki Commission and included in the draft Constitution that was presented to the Constituent Assembly in 1993.

Therefore in debating it, the framers of the Constitution had in mind the recent history of Uganda, characterised by gross abuses of human rights. This explains the promulgation of the Constitution with a full Bill of Rights but including clear exceptions where those were found necessary, and modelled on International Instruments.

Article 22(1) is clearly meant to deal with and do away with extra judicial killings by the state. The article recognises the sanctity of human life but

recognises also that under certain circumstances acceptable in the country, that right might be taken away. The framers also were aware that the Constitutional Commission had specifically sought and analysed views from the public in Uganda about the retention of the death penalty.

The framers of the Constitution were also aware of the numerous instances of torture and other cruel punishments that had characterised our recent history. They seem to have come out on these two aspects of out history and dealt with them by providing that life is sacrosanct and may only be taken away after due process up to the highest court, and after the President has had opportunity to exercise the prerogative of mercy. On the other hand,, there must not be torture or cruel, inhuman or degrading punishment under any circumstances.

In our view there is no conflict between article 22(1) and 44(a). Article 44(a) was not meant to apply to article 22(1) as long as the sentence of death was passed by a competent court after a fair trial and it had been confirmed by the highest appellate Court. Such a sentence could not be torture, cruel or degrading punishment in the context of Article 24. Had the framers intended to provide for the non-derogable right to life, they would have so provided expressly. But in light of the history and background they had at the time, it is clear to us that the effect and purpose of the two provisions was to treat the right to life with qualification but with the necessary safeguards, while totally outlawing all other forms of torture, cruel and degrading punishments as had been found to have taken place in Uganda. Many of the instances of extra judicial killing and torture were found to have been meted out to

perceived political opponents. It is instructive that article 43 on general derogation specifically states that "public interest" shall not permit political persecution or detention without trial.

We therefore agree with the Constitutional Court on this ground that the imposition of the death penalty in article 22(1) is not inconsistent with articles 20, 24, 28, 44(a) and 45 of the Constitution. Grounds 1and 2 of the cross appeal must fail.

We wish to add that the right to life is so important that the abolition of the death penalty requires specific progressive measures by the State to eventually expressly effect such abolition. This has been done by many countries all over the world who have specifically provided for no death penalty in their Constitutions, or who have acceded to the Optional Protocol on the Abolition of the Death Penalty. Some Constitutions have not qualified the right to life and it has been easy for the courts to rule that the death sentence is unconstitutional as happened in South Africa with the ***MAKWANYANE*** case (supra) upon which the respondents have put so much reliance.

In our view, the ***Makwanyane*** case, so well and ably reasoned, is a good authority for the abolition of the death sentence in its entirety, where the Constitution itself has not dealt with it. Indeed, ***CHASKALSON P***, in his comprehensive judgment, after reviewing the background to the promulgation of the South African Constitution, stated as follows at page 289.

> ***"The death sentence was, in terms, neither sanctioned or excluded, and it was left to the Constitutional Court to decide whether the provisions of the pre-Constitutional law making the death penalty a competent sentence for murder and other crimes are consistent with chap.3 of the Constitution. If they are, the death sentence remains a competent sentence for murder in cases in which those provisions are applicable, unless and until Parliament otherwise decides; if they are not, it is our duty to say so, and to declare such provisions to be unconstitutional."***

Later, at page 309, the learned President further states with regard to the right to life:

> ***"<u>The unqualified right to life</u> vested in every person by section 9 of our Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of Section 11(2) of our Constitution. In this respect our Constitution differs materially from the Constitutions of the United States and India. It also differs materially from the European Convention and the International Covenant."*** (emphasis added).

The distinguished Judge reviewed many cases, and indeed found that some judges in those jurisdictions had argued for the unconstitunality of the death penalty notwithstanding provisions permitting it, but he reaches his conclusion in the context of the South African Constitution when he states:

> ***"I am satisfied that in the context of our constitution the death penalty is indeed a cruel, inhuman and degrading punishment,"***

SACHS, J, in his concurring judgment also agrees that Section 9 of the South African Constitution guarantees an unqualified right to life. He states, at page 389:-

> ***"This Court is unlikely to get another case which is emotionally and philosophically more elusive, and textually more direct. Section 9 states: "every person shall have the right to life." These unqualified and unadorned words are binding on the state ……and, on the face of it, outlaw capital punishment. Section 33 does allow limitations on fundamental rights; yet, in my view, executing someone is not limiting that person's life, but extinguishing it."*** (emphasis added).

It appears to us clear enough that the situation and the Constitution in South Africa are materially different from those obtaining in Uganda. The Constitution of Uganda does not include the right to life under the general provision dealing with derogation under article 43 and 44 of the Constitution. In Tanzania, the Court of Appeal in the MBUSHUU (supra) saved the death penalty under the general provisions on derogation from fundamental Human Rights. But in Uganda the Constitution specifically provides for it under a substantive article of the Constitution, i.e. article 22(1). The subject of the death penalty was not left for the Constitutional Court to fill in gaps as in the case of South Africa. The Courts cannot now

take on the role of the Legislature to abrogate a substantive provision of the Constitution by a process of interpreting one provision against another. In our view, this is the work of the Legislature who should indeed further study the issue of the death penalty with a view to introducing appropriate amendments to the Constitution.

The next issue for determination concerns the provisions, in various laws, for the imposition of the mandatory death sentence for certain offences in those laws. The Commissioner for Civil Litigation who represented the appellant , combined grounds 1, 2, 6, and 7 of the appeal.

She, argues that the various laws of Uganda which prescribe the mandatory death sentence are not inconsistent with nor do they contradict article 21, 22(1), 24, 28, 44(a) and 126(1) of the Constitution. To her, the mandatory death sentence is like any other mandatory sentence under the laws of Uganda, and being mandatory does not make it unconstitutional. She relies on article 22(1) which provides for the death penalty, and on article 21(4) which provides that nothing shall prevent Parliament from enacting laws necessary for making provisions that are required to be made under the Constitution. To the learned Commissioner, the death penalty and the laws that provide for it are made under article 21. Therefore, she contended, prescribing for a death penalty upon conviction is not inconsistent with article 21 nor does it contravene any provision of the Constitution.

She further contends that the mandatory sentence is justifiable and demonstrably necessary in Uganda within the context of article 21(4) and 43 as it reflects the views of the people of Uganda. Since under article 43

Parliament is allowed to derogate from the various rights and freedoms, prescribing for the mandatory death penalty is within its mandate. The mandatory sentence ensures that different people who have committed a similar offence do not get different sentences. She invoked article 21(1), 21(2) and 21(3) to fortify her argument. She further contended that the criminal justice system in Uganda did not provide for various degrees of an offence as in some other jurisdictions, and there are no equivalents of our articles 21 and 126. She supported the dissenting judgment of Mpagi-Bahigeine, J.A in that regard.

Counsel further argued that since the court has a discretion to determine the appropriateness of the sentence even before conviction, the mandatory sentence does not deprive the court of its discretion.

On the other hand, Prof. Sempebwa, who argued the case for the respondents on this point, supported the decision of the Constitutional Court that the mandatory death sentence was unconstitutional.. He submitted that the provisions of the Penal Code which provides for the mandatory death sentence for murder and aggravated robbery, were inconsistent with the Constitution notwithstanding that there may have been a fair trial before conviction. But, to him, fair trial as envisaged in article 22(1) included conviction and sentencing. Pleading mitigation was part of fair trial in all other non-mandatory sentences. The fact that mitigation was not expressly mentioned as a right in the Constitution does not deprive it of its essence as a right because the rights in the Constitution are not exhaustive. Mitigation is an element of fair trial. He relied the case of ***MITHU –Vs- STATE OF***

PUNJAB 1983 SOL CASE NO. 026, and ***REYES –Vs- QUEEN, [2002] UK.PC 11.***

Counsel further argued that the second element in article 22(1) relates to confirmation of sentence. The conviction and sentence of death must, before its execution, be confirmed by the highest appellate court, in this case the Supreme Court. In counsel's view to confirm implies a discretion whether to confirm or not. A sentence which has been fixed by law to be passed upon conviction, deprives the court of that sentencing discretion. Therefore the mandatory sentence becomes inconsistent with the Constitution and therefore unconstitutional. Even in jurisdictions like the United States which prescribe for various degrees of murder, for example, the mandatory sentences have been adjudged to be unconstitutional. He cited the case of ***WOODSON –Vs- NORTH CAROLINA*** (1976) 426 US 280. Furthermore, he argued, mandatory death sentences were cruel and inhuman because they do not differenciate between offenders, thereby offending Article 24. Murder may be committed under different circumstances. He further cited the Malawian case of ***KAFANTANYENI & OTHERS –Vs- ATTORNEY GENERAL, Constitutional Case No. 12 of 2005 (Malawi)*** in support**.** Finally, counsel submitted that sentencing is a matter of law and part of the administration of justice which under article 126 is a preserve of the Judiciary. Parliament should only prescribe the maximum sentence and leave the courts to administer justice by sentencing offenders according to the gravity and circumstances of the case. He prayed court to confirm the judgment of the Constitutional Court on this issue.

In considering the constitutionality of the mandatory death sentence, we think it is important to consider certain provisions of the Constitution. Article 20 states that fundamental rights and freedoms are inherent and not granted by the State, and directs all organs and agencies of Government and all persons to respect, uphold and promote those rights and freedoms. Article 21(1) states as follows:-

> ***All persons are equal before and under the law in all spheres of political, economic, social and cultural life and <u>in every other respect</u> <u>and shall enjoy equal protection of the law</u>."*** (emphasis added).

Article 28 guarantees the right to fair hearing. In particular the following deserve note: Article 28(1) states:

> ***"In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law"***

Article 28(3)(e) states: ***"Every person who is charged with a criminal offence shall -***

> **(e)** ***In the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the state;"***

In our view, these provisions, bring out a number of important factors. First the rights of each individual are inherent. Secondly, all persons are equal before and under the law. Thirdly, a person is entitled to a fair, speedy and

public hearing before an independent and impartial tribunal. Fourthly, in a case that carries a death sentence, the state must provide legal representation to the accused person. This can only be because the framers of the Constitution deemed that an offence carrying a death penalty is so heavy and so important that all help and latitude must be given to the accused person for that person to have a fair trial.

A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a maximum sentence. The court will truly have exercised its function as an impartial tribunal in trying and sentencing a person. But the Court is denied the exercise of this function where the sentence has already been pre-ordained by the Legislature, as in capital cases. In our view, this compromises the principle of fair trial.

Then there is the other aspect of the right of equality before and under the law. Two provisions stand out: Section 94 of the Trial on Indictments Act provides thus:-

> ***"If the accused person is found guilty or pleads guilty, the judge shall ask him or her whether he or she has anything to say why sentence should not be passed upon him or her according to law, but the omission so to ask him or her shall have no effect on the validity of the proceedings."***

It would appear that the reason why the accused person is given this right is so that he may present some mitigating factors, even at this late stage, which may affect the sentence to be passed on him or her.

Then there is section 98 which allows the court to make inquiry before passing sentence, in all cases except when the sentence to be passed is of death. The Section states thus:-

> ***"The Court, before passing any sentence <u>other than a sentence of death</u>, may make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed, and may inquire into the character and antecedents of the accused person either at the request of the prosecution or the accused person and may take into consideration in assessing the proper sentence to be passed such character and antecedents including any other offences committed by the accused person whether or not he or she has been convicted of those offences: except that:-***
>
> **(a)** ***the accused person shall be given an opportunity to confirm, deny or explain any statement made about him or her and in any case of doubt the court shall in the absence of legal proof of the statement ignore the statement.***
>
> **(b)** ***No offence of which the accused person has not been convicted shall be taken into consideration in assessing proper sentence unless the accused person specifically argues that the offence shall be taken into consideration and a note of that request shall have been recorded in the proceedings;…."***

We find this provision troubling. First it provides in essence that a person accused of stealing a chicken may not only be heard in mitigation, but may actually request the court to inquire into his character and antecedents for purposes of assessing appropriate sentence for him, while on the other hand, a person accused of murder and whose very life is at stake, may not do likewise. We think this is inconsistent with the principle of equality before and under the law. 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 person 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.

We also find this provision curious in light of article 121(5) of the Constitution which states:-

> ***Where a person is sentenced to death for an offence, written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy."***

The question that arises from this is: If the judge will have been prevented by Section 98 of the TID from carrying out an inquiry when the accused person is still before him, on what basis will he write the report required of him under article 121(5) of the Constitution? It is reasonable to deduce that in fact by virtue of article 121(5) the judge is obliged to conduct an inquiry

and that section 98 of the TID is inconsistent with that article of the Constitution.

In our view if there is one situation where the framers of the Constitution expected an inquiry, it is the one involving a death penalty. The report of the Judge is considered so important that it forms a basis for advising the President on the exercise of the prerogative of mercy. Why should it not have informed the Judge in passing sentence in the first place.

Furthermore, the administration of justice is a function of the Judiciary under article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice. By fixing a mandatory death penalty Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution.

We do not agree with learned counsel for the Attorney General that because Parliament has the powers to pass laws for the good governance of Uganda, it can pass such laws as those providing for a mandatory death sentence. In any case, the Laws passed by Parliament must be consistent with the Constitution as provided for in article 2(2) of the Constitution.

Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution. We also agree with Prof. Sempebwa, for the respondents, that

the power given to the court under article 22(1) does not stop at confirmation of conviction. The Court has power to confirm both conviction and sentence. This implies a power NOT to confirm, implying that court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution.

We are of the view that the learned Justices of the Constitutional Court properly addressed this matter and came to the right conclusion. We therefore agree with the Constitutional Court that all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency. Such mandatory sentence can only be regarded as a maximum sentence. In the result, grounds 1. 2, 6 and 7 of the appeal must fail.

We now turn to the issue of delay in execution of the sentence of death. Counsel for the appellant argued grounds 3, 4, 5 and 8 together. She contended that articles 24 and 44(a) of the Constitution, or any other provision thereof, do not set a time limit within which the sentence of death must be carried out after the judicial process. She argued that article 121 of the Constitution confers on the President the prerogative of mercy without setting out the time frame within which he is to exercise that mercy. Therefore any delay in execution of the sentence of death is not unconstitutional. She cited ***MICHAEL De FREITAS –Vs- GEORGE RAMOUTAR BENNY & OTHERS (1976) A.C. 239*** in support of the argument that delay is not unconstitutional . She further argued that it would be unconstitutional to impose time limits within which an execution should

be carried out, or within which the President must exercise the Prerogative of Mercy. To her any delay allows the convicted person to live longer in hope of a reprieve, and that executions should not be rushed.

On the other hand, Counsel for the respondents argued that staying on death row for a long time causes the suffering of the "death row syndrome" which itself amounts to a cruel and inhuman or degrading treatment or punishment. He submitted that all the respondents had been on death row for a long time, and that in Uganda the average length of stay on death row was 10 years. He clarified that by arguing that long delay was unconstitutional, the respondents were not seeking early execution, but were contending that having been kept on death row for a long time, to execute them would amount to a cruel, inhuman punishment contrary to articles 24 and 44(a) of the Constitution. He submitted that the case of ***RILEY*** cited by the appellant had been over-ruled by ***PRAT*** and ***MORGAN –Vs- ATTORNEY GENERAL OF JAMAICA [1994] 2 A.C. 36***. Counsel sought to rely on the case of ***CATHOLIC COMMISSION FOR JUSTICE AND PEACE IN ZIMBABWE –Vs- ATTORNEY GENERAL & OTHERS (1993) 2 LRC 279*** which decided that a long delay on death row causes the death row syndrome which is cruel and inhuman. The case of ***DE. FREITAS, cited*** by the appellant had also been over-ruled by ***NEVILLE LEWIS –Vs- ATTORNEY GENERAL OF JAMAICA and ANOTHER [2001] 2 A.C 50*** which held, inter alia, that to execute a person who had been on death row for over six years after conviction would amount to inhuman treatment.

Counsel therefore supported the findings and decision of the Constitutional Court on these issues and prayed for the dismissal of these grounds of appeal.

These grounds raise one fundamental question: where a death sentence has been passed lawfully, can there be supervening events which can render the carrying out of such death sentence on the condemned prisoners to constitute inhuman and degrading treatment contrary to article 24 of the Constitution The Constitutional Court held that to execute a condemned person after three years on death row from the time when the last appellate court confirmed the sentence is cruel and inhuman and therefore a violation of article 24 of the Constitution.

Perhaps we should start with establishing the legal status of a person who has been sentenced to death and the sentence has been confirmed. A condemned person does not lose all his other rights as a human being. He is still entitled to his dignity within the confines of the law until his sentence is carried out strictly in accordance with the law. There are many authorities to that effect cited in the judgment of the Constitutional Court. Some key features seem to underline what is regarded as the death row syndrome. These are, first, the element of delay between when the prisoner is sentenced to death and when the execution actually takes place. There is the natural fear of death that the prisoner has to live with constantly for a long time.

The second element that has been considered by courts in other jurisdiction, is that of prison conditions under which the prisoner is kept pending execution. In the Catholic Commission case, (supra) the Supreme Court of

Zimbabwe set aside the death sentences because the appellants had been on death row for 5 years, in "demeaning conditions." It was held that the prolonged delay in those condition caused prolonged mental suffering which amounted to cruel and inhuman treatment, and that a period of more than 2 years tended to be inordinate delay.

The Constitutional Court, in our view, correctly addressed the issue and correctly analysed the evidence. Okello, JA, who wrote the lead judgment, after reviewing the evidence stated thus:-

> ***The above evidence has not been controverted. It portrays a very grim picture of the conditions in the condemned section of Luzira Prison. They are demeaning physical conditions. Such conditions coupled with the treatment meted out to the condemned prisoners during their confinement, as depicted by the above evidence, are not acceptable by Ugandan standards and also by the civilised international communities. Inordinate delays in such conditions indeed constitute cruel, inhuman or degrading treatment prohibited by articles 24 and 44(a) of the Constitution of Uganda."***
>
> ***"To determine whether there has been an inordinate delay., the period when the condemned prisoner has spent on the death row, in my view, should start from when his/her sentence has been confirmed by the highest appellate Court. Appeal process for a prisoner convicted of a capital offence is mandatory. In Uganda, there is a two steps appeal system. An appellant has no control over the time the appeal process***

should take. While the appeal process is on, a condemned prisoner has hope of his conviction and sentence being revised. It is the time taken between the confirmation of his/her sentence and execution, when the condemned prisoner has virtually lost all hopes of surviving execution, that should determine whether or not there has been an inordinate delay."

We fully agree. However one must remember the concerns of the condemned persons that they do not seek a quick execution when they argue against inordinate delay. Indeed, it would be a contradiction in terms for one to argue against the death penalty while at the same time arguing that it must be carried out with speed.

According to various international instruments already cited in this judgment, a person who has been sentenced to death must be given as much latitude as possible to exhaust not only the court appellate processes but even all appeals for clemency before the sentence of death is carried out. For example in the ***SAFEGUARDS GUARANTEEING OF THE PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY,*** a Resolution 1984/50 of 25th May 1984 of the United Nations Economic and Social Council, paragraphs 7 and 8 thereof state as follows:-

7. ***"Anyone sentenced to death shall have the right to seek pardon or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment."***

8. ***"Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence."***

We believe these provisions are part of the evolving standards of common decency, namely that society should not wish to put a person to death expeditiously. The rationale for this must be because the death sentence is final. It extinguishes life. It should therefore not be carried out in a hurry. There have been reported too many instances where persons who have spent many years on death row are finally found to have been wrongly convicted and been released or had their sentences commuted. Had such persons been executed so as to avoid their suffering of the death row syndrome, it would have been gross miscarriage of justice, far worse than death row syndrome. In our view it calls for a balance so that while a person exercises his rights under the law to exhaust all avenues under the law before he is executed, he at the same time is not unduly kept in prison serving a sentence that he was not sentenced to. We must also add that persons sentenced to death need not be held in demeaning conditions as has been testified to. The government and all those who inspect prisons must ensure that the conditions under which all prisoners are kept strictly conforms to the law and to international standards.

The Constitution provides for the prerogative of mercy exercised by the President under Article 121. This is based on the English model where the Sovereign could exercise mercy over a person convicted by the courts. Many countries have adopted this system, including the United States whose Constitution has, in some respects, influenced the Constitution of Uganda.

The Supreme Court of the United States has expounded on the matter of executive clemency in the case of ***HERRERA –Vs- COLLINS, 506 U.S. 390 (1993).*** In his judgment cited in ***DEATH PENALTY CASES, LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT,*** at page 301, Chief Justice Rehnquist states thus:-

> ***"Our Constitution adopts the British model and gives to the President the "Power to grant Reprieves and Pardons for offences against the United States"…… In UNITED STATES –Vs- WILSON…… Chief Justice Marshall expounded on the President's pardon power:***
>
> ***"As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.***
>
> ***"A pardon is an act of grace, proceeding from the power entrusted with the execution of all laws, which exempts the individual, on whom it is bestowed from punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part***

> ***of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."***

The learned Chief Justice observes that although the Constitution vests in the President a pardon power, it did not require the states to enact a clemency mechanism. He continued thus:-

> ***"Executive clemency has provided the "fail safe" in our criminal justice system ……. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence."***

Our Constitution provides for more or less the same position as the American one on the matter of Prerogative of mercy. Learned Counsel for the Attorney General argued that since the Constitution itself does not provide for a time limit within which to exercise the prerogative of mercy, it

is not up to the courts to impose such time limits as this would tantamount to interference with executive privilege.

There is sympathy for that view. However, one should look at the Constitution as a whole to determine the purpose and effect of the various provisions. The right to fair hearing provided for in Article 28 envisages a fair, speedy and public trial. The right to liberty in Article 23 envisages that one's liberty may be compromised in execution of a court order. In our view, these provisions mean that a person who has had a speedy trial should only have his liberty compromised in execution of a sentence of court without delay. The person would thereby serve his due sentence and regain his liberty. In the case of a sentence of death it would mean that after the trial, the processes provided for under Article 121 should be put in motion as quickly as possible so that the person knows his fate, i.e., whether he is pardoned, given a respite or remission or whether the sentence is to be carried out. It could not have been envisaged by the Constitution makers that article 121 could be used to keep persons on death row for an indefinite period. This in effect makes them serve a long period of imprisonment which they were not sentenced to in the first place. Evidence was given of persons who have spent as long as 18 or 20 years on death row without decisions by the Executive as to their fate. This could not have been envisaged by the Constitution.

Although the Constitution does not provide for a time limit within which the President may exercise the prerogative of mercy, one has to take, by analogy, the provisions of the Interpretation Act. Section 34(2) thereof provides thus:

> ***"Where no time is prescribed or allowed within which anything shall be done, that thing shall be done without unreasonable delay and as often as due occasion arises."*** (emphasis added).

Article 121 sets up a permanent body called the Advisory Committee on the Prerogative of Mercy which is chaired by the Attorney General. We see no reason why this committee, charged with advising the President, should not process the cases of all persons sentenced to death as a matter of priority and without unreasonable delay and advise the President accordingly. Likewise, once advised, we see no reason why the President may not make his decision without unreasonable delay. One has to bear in mind that a person's life and liberty is at stake here. In our view, the President must not delay to take a decision whether to pardon, grant a respite, substitute a lesser sentence or remit the whole or part of the sentence. The law envisages that even the President will act without unreasonable delay. To hold otherwise, would mean that the President could withhold his decision indefinitely or for many years, and the person would remain on death row at the pleasure of the President. In our view this would be contrary to the spirit of the Constitution.

The Constitutional Court held that a period of more than three years from the time when the death sentence was confirmed by the highest court would constitute inordinate delay. We agree. As soon as the highest court has confirmed sentence, the Advisory committee on the Prerogative of Mercy and the Prisons authorities should commence to process the applications of condemned persons so that the President is advised without unreasonable delay. In that way, a person sentenced to death would spend considerably

less time on death row without knowing conclusively his fate. The appeal process itself will in all probability have taken several years. If the President decides that the death sentence be carried out, so be it.

In the circumstances, We agree with the Constitutional court that to hold a person beyond three years after the confirmation of sentence is unreasonable.

Although it has been suggested as in the ***Makwanyane*** case (supra) that the period of delay should be counted from when the sentence of death is first pronounced, we have taken the view, as the Constitutional court did, that the period of trial and appeal, i.e. the judicial process should be counted out. From the time a person is charged with a capital offence carrying a mandatory death sentence as has been the case, that person knows that he may be convicted. His anxiety and worry about the death sentence would start from there. One may even add that he knew or should have known the consequences when he committed the offence. But he knows that he is entitled to put his defence before a court and the prosecution has the burden of proving the case beyond a reasonable doubt. He therefore has a real chance of getting acquitted or being found guilty of a lesser offence like manslaughter, if the offence charged was murder, and get a lesser sentence. Even after conviction and sentence of death has been imposed, in Uganda, the convicted person has a constitutional right to appeal to a higher court and legally argue against his conviction even at the expense of the state in terms of legal representation. He has a constitutional right to appeal to the highest court which has to confirm his conviction and sentence before that sentence can be carried out. It is after the last highest court has confirmed both

conviction and sentence that the person now realistically faces the death penalty, as he is now at the mercy of the President. We are of the view that it is this stage which should count for the purposes of the argument about the delay in execution of the death sentence. The delay must be in respect of the execution of a death sentence that has been confirmed by the highest appellate court as provided by article 22(i) of the Constitution. Before that, the sentence cannot be carried out.

We have already said in this judgment that the right to life is so fundamental that there should be no rush to extinguish it. The accused person must be given all reasonable time to prepare his defence, or appeal as the case may be. There may be inherent delays in the process of trial and appeal, but the person still has his right to life and has hope of succeeding legally in the courts. For that reason it is only reasonable that the period to be regarded as delay in execution of the sentence must only start when the sentence of death is executable i.e. after it has been confirmed by the highest court.

What is the effect of an unreasonable delay on an otherwise constitutional death sentence. This, in our view, was adequately answered by the High Court in the ***MBUSHU*** case where court stated thus:

> ***"When a prisoner who has been on death row for several years approaches the courts for relief, he is not seeking to be put to death expeditiously, but rather, he is saying that the long period he has spent on death row, coupled with the agony and anguish of death row endured for several years, plus the horrible conditions under which he is***

> ***kept, is such as to render his execution at that particular time cruel and inhuman as to offend the constitutional prohibition against cruel and inhuman punishments……<u>he would not be challenging the legality or appropriateness of the original sentence of death. He would be accepting the validity of that original sentence but merely arguing that the juxtaposition of the intervening delay, and prolonged anguish of death row, which has been appropriately described as the "living hell" is such as to render it particularly inhuman to execute him at that stage."</u>*** (emphasis added).

This passage was quoted with approval by Twinomujuni, JA. We agree with it. We observe that the Constitutional Court exhaustively considered the subject of inordinate delay in carrying out a death sentence, and we fully concur with the court in that respect. We would agree that a delay carrying out sentence beyond three years from the date when the sentence of death was confirmed by the highest court constitutes unreasonable delay.

At the end of a period of three years after the highest appellate court confirmed the sentence, and if the President shall not have exercised his prerogative one way or the other, the death sentence shall be deemed to be commuted to life imprisonment without remission. In the result, grounds 3, 4, 5 and 8 of the appeal must fail.

The next issue for determination is the constitutionality of hanging as a method of carrying out the death sentence which is contained in ground 3 of the cross appeal. Mr. Sim Katende argued this issue on behalf of the Respondents. He criticized the Constitutional Court for holding that hanging was constitutional because the death penalty was allowed by article 22 of the Constitution. Counsel argued that if the reasoning of the Constitutional Court were to be upheld it would mean that any method of execution would be constitutionally acceptable. He submitted that hanging is provided for by section 99 of the Trial on Indictments Act. It is not provided for in the Constitution itself. Therefore, he argued it can be challenged if it is inconsistent with or in contravention of any provision of the Constitution. In this respect he submitted that hanging had been stated to the a cruel, inhuman and degrading punishment in the ***MBUSHU and MAKWANYANE*** cases. The evidence of experts and other witnesses particularly the affidavit of Antony Okwanga and Ben Ogwang had shown that hanging was cruel, inhuman and degrading in the manner it was carried out, the way it affected other prisoners and the way it affected even the executioners themselves. This was inconsistent with and in contravention of article 24 and 44(a) of the Constitution. He relied on the ABUKI case for the proposition that in interpreting the Constitution purpose and effect must be looked at, and that there can be no derogation whatsoever from the freedom from torture, cruel, inhuman or degrading punishment. He also cited ***THE CATHOLIC COMMISSION*** case where ***GUBBY, CJ.,*** observed as follows:-

> ***"It cannot be doubted that prison walls do not keep out fundamental rights and protections. Prisoners are not, by mere reason of a conviction, denuded of all the rights they***

otherwise process. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inveritably removed from them by law, expressly or by implication. Thus, a prisoner who has been sentenced to death does not forfeit the protection afforded by Section 15(i) of the Constitution in respect of his treatment while under confinement."

Counsel conceded that every punishment involves pain, but submitted that the degree of pain in hanging was excessive. He further relied on ABUKI for the proposition that rights and freedoms guaranteed by the constitution are to be interpreted having regard to evolving standards of common decency. Hanging violated those standards and should therefore be held to be unconstitutional.

This issue no doubt raises some difficulty. This difficulty arises from the fact, as already found, that the Constitution itself permits the death penalty, even though some other jurisdictions have decided that the death penalty itself violates those standards of common decency and have outlawed it. Those who have outlawed it are no longer concerned with the manner of carrying out the death sentence. In the **MBUSHUU** case (supra) the High Court considered the totality of the death penalty, i.e., the sentence itself **and** the manner of carrying it out, in coming to the conclusion that the death penalty was a cruel punishment. If the Constitution permits the death penalty, the difficulty must be to identify that method of carrying it out that will extinguish the life of the condemned person without causing excessive pain and suffering.

In the instant case, counsel for the appellants have argued the issue of hanging in the alternative. Their argument is that even if it is found that the death penalty is provided for in the Constitution, then the manner of carrying it out by hanging is unconstitutional as it constitutes a cruel and degrading punishment.

As indicated above, counsel relied on the Abuki case. In our, view, the Abuki case must be put in its proper context. In that case the Penal Code provided for the offence of practising witchcraft, and for the sentence of imprisonment and/or banishment as punishment upon conviction for that offence. The court ordered that the accused serve a period of 10 years of banishment from his home after serving the term of imprisonment. It is that punishment that was found to be cruel, inhuman and degrading and therefore unconstitutional.

In this case, the punishment prescribed for capital offences is death. In this judgment we have said that provided the conditions stated in article 22(1) of the Constitution are fulfilled, the death penalty is constitutional. Therefore what remains to be determined is the <u>manner</u> of carrying out the constitutionally permitted punishment.

The UN resolution on safeguards guaranteeing the rights of those facing the death penalty (supra) state in paragraph 9 thereof:-

> ***" Where capital punishment occurs, it shall be carried out so as to inflict the <u>minimum possible suffering</u>."*** (emphasis added).

What is recognised is that suffering must necessarily be part of the death process, but that it must be minimized. In our view one would need to make a comparative scientific study of the various methods of carrying out the death sentence to determine which one imposes less suffering than the others.

As the Constitutional Court observed, hanging has been used in Uganda to carry out death sentences since 1938. The framers of the Constitution were aware of the method used when they provided for the death sentence. It is not in dispute that fear, anguish, etc must accompany a sentence of death by hanging. But then which method of carrying out a death sentence does not invoke these natural instincts in a normal human being?.

Counsel for the Respondents argued in their written submissions that:- "***Most jurisdictions which still retain the death penalty, including the USA and China which carry out the most executions in the world to-day, have moved away from hanging to the more humane lethal injection."*** They urged the court to ***"compel the Legislature to prescribe a more humane method of execution."***

While we appreciate the argument of learned counsel, there is no evidence on record to show that in fact the lethal injection method is any more humane than hanging, that it produces no pain, nor that it does not produce any mishaps as may happen during hanging. There is no evidence to show that the persons who do the injection are any less traumatised than those that carry out the hanging. There are also many countries that still use hanging. We do not know whether lethal injection causes any less anguish, fear or

pain. Nonetheless, since the law requires that execution be done in a manner authorised by law, it must have been envisaged that the legislature would continue to study scientifically the available methods of execution and adopt and provide for one which conforms to the "***evolving standards"*** of decency. We would indeed urge our legislature to do just that. But for now we are inclined to the view that the pain and suffering experienced during the hanging process is inherent in the punishment of the death penalty which has been provided for in the constitution. We would therefore not say it is unconstitutional in the context of article 24 of the Constitution. We have considered the affidavit evidence of Dr. Harold Hillman and Dr. Albert. C. Hunt in support of the respondents. Although both dispute the notion that hanging causes instantaneous death, they agree that death occurs within a fairly short time i.e. "over several minutes." Dr. Hunt refers to a scientific article published by Drs. Ryle James and Nasmight Jmith (Exhibit (AHI) which also casts doubt on the notion that hanging causes instant death. But that article concludes as follows:-

> ***"However, hanging, even without cord damage usually causes death rapidly either by compression of the carotid arteries***, ***reflex cardiac arrest due to carotid sinus stimulation , various obstruction or airway obstruction. "Dancing" on the end of the rope may, in many cases be decerebrate twitching or "fitting" rather than struggling and whilst death may not be instantaneous, unconsciousness is probably usually rapid."***

In our view, the issue is not whether the method of execution causes instant death, but whether it causes minimum possible pain and suffering. If there is a proved method that causes instant death, it would certainly be preferable.

But in these circumstances, a method that causes death within minutes would, in our view, meet the standard of not causing excessive pain and suffering.

Before we leave this subject, we wish to urge that the Legislature should re-open debate on the desirability of the death penalty in our Constitution, particularly in light of findings that for many years no death sentences have been executed yet the individuals concerned continue to be incarcerated on death row without knowing whether they were pardoned, had their sentences remitted, or are to be executed. The failure, refusal or neglect by the Executive to decide on those death sentences would seem to indicate a desire to do away with the death penalty.

In the result, by unanimous decision we dismiss the appeal, and by majority decision we dismiss the cross appeal.
We confirm the declarations made by the Constitutional Court and, we would modify the orders made by that court as follows:-

1. For those respondents whose sentences were already confirmed by the highest Court, their petitions for mercy under article 121 of the Constitution must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the Executive, the death sentence shall be deemed commuted to imprisonment for life without remission.

2. For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law.
3. Each party shall bear its own costs.

DATED at Mengo this 21st day of January 2008.

…….
B. Odoki
Chief Justice

…….
J.W.N. Tsekooko
Justice of the Supreme Court

…….
J.N. Mulenga
Justice of the Supreme Court

…….
G.W. Kanyeihamba
Justice of the Supreme Court

…….
Bart M. Katureebe
Justice of The Supreme Court

…….
C. Kitumba
Ag. Justice of the Supreme Court

IN THE SUPREME COURT OF UGANDA

AT MENGO

[CORAM: Odoki, CJ; Tsekooko, J.S.C., Mulenga, J.S.C., Kanyeihamba, J.S.C., Katureebe, J.S.C., Kitumba, Ag. J.S.C., Egonda-Ntende, Ag. J.S.C.,]

CONSTITUTIONAL APPEAL NO. 03 OF 2006

BETWEEN

ATTORNEY GENERAL……APPELLANT

AND

SUSAN KIGULA & 416
OTHERS…….RESPONDENTS

(An appeal and Cross Appeal from the decision of the Constitutional Court at Kampala Okello, Mpagi-Bahigeine, Twinomujuni, Byamugisha, Kavuma, JJA in Constitutional Petition No. 6 of 2003 dated 10th June 2005.)

Judgment of Egonda-Ntende, Ag. J.S.C.

I have had the benefit of reading the majority judgment in draft. I agree that the death penalty is constitutionally permitted but regretfully do not agree that Articles 24 and 44 of the Constitution do not apply to Article 22(1). For that reason I shall in the judgment below deal with grounds No.1 and No.3 of the Cross Appeal. However, I agree with the majority judgment that this

appeal and the cross appeal (save for grounds no.1 and no.3) should fail for the reasons set forth in the majority judgment.

Ground No. 1 of the Cross Appeal

Ground No.1 of the Cross Appeal states,

> '1. That the learned justices of the Constitutional Court erred in law when they held that Articles 24 and 44(a) of the Constitution of the Republic of Uganda 1995 as amended (hereinafter referred to as "the Constitution" which prohibit any forms of torture, cruel, inhuman and degrading treatment or punishment were not meant to apply to Article 22(1) of the Constitution.'

Connected to this ground is ground no.3 of the Cross Appeal which is stated as follows,

> '3. That in the alternative but without prejudice to the above, that the learned justices of the Constitutional Court erred in law when they found as a question of fact and law that hanging was a cruel, inhuman and degrading treatment or punishment but held that it was a permissible form of punishment because the death penalty was permitted by the Constitution.'

In the court below the issue that was decided and gives rise to the above grounds in the cross appeal was framed in the following manner:

> '4.Whether Section 99(1) of the Trial on Indictments Act which prescribes hanging as the legal method of implementing the death penalty is inconsistent with and in contravention of articles 24 and 44 or any other provisions of the Constitution?'

This issue was argued in the court below in the alternative to the first 2 issues that dealt with whether the death penalty was constitutionally permissible. The findings and holding of the Constitutional Court on those

two issues are therefore of some interest to the findings and holding of the Court on its issue no.4. I will set out below what the majority of Constitutional Court held and the reasons there for in respect to whether or not Articles 24 and 44 (a) of the Constitution applied to Article 22(1) of the Constitution.

Okello, J.A., (as he then was) stated,

> 'Article 22(1) recognises death penalty in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court in Uganda. This is an exception to the enjoyment of the right to life. To that extent, death penalty is constitutional. Article 24 outlaws any form of torture, cruel, inhuman or degrading treatment or punishment. The imposing question to answer is whether the framers of the Constitution intended to take away, by article 24, the right they recognised in article 22(1)?'

The learned Justice of Appeal discussed some comparative jurisprudence and then continued to state,

> 'In our case, article 22(1) recognises death penalty as an exception to the enjoyment of the right to life. There is well known rule of interpretation that to take away a right given by common law or statute, the legislature should do that in clear terms devoid of any ambiguity. It is important to note that the right to life is not included in article 44 on the list of the non derogable rights. Accordingly articles 24 and 44 could not have been intended to apply to the death penalty permitted in article 22(1). When articles 24 and 44 were being enacted, article 22 was still fresh in the mind of the framers. If they (framers of our constitution) had wanted to take away, by article 24, the rights recognised in article 22(1), they would have done so in clear terms, not by implication. Imposition of death penalty therefore, constitutes no cruel, inhuman or degrading punishment. The various provisions of the laws of Uganda which prescribes death sentence are, therefore, not inconsistent

with or in contravention of articles 24 and 44 or any provisions of the Constitution.'

In deciding issue no.4 he held as follows:

'Execution by hanging may be cruel, but I have found that articles 24 and 44(a) were not intended to apply to death sentence permitted in article 22(1). Therefore, implementing or carrying out death penalty by hanging cannot be held to be cruel, inhuman and degrading. Articles 24 and 44 (a) do not apply to it. Punishment by its nature must inflict some pain and unpleasantness, physically or mentally to achieve its objective. Section 99(1) of the Trial on Indictments Act is therefore, constitutional as it operationalises article 22(1). It is not inconsistent with articles 24 and 44(a).'

Twinomujuni, J.A., reasoned as follows before he answered issue no.1 in the negative.

'This article [24] makes no reference to article 22(1)! Did the framers of the Constitution forget that they had just authorised a death sentence in article 22(1)? Is a death sentence something they could have forgotten so easily and so quickly? Personally, I think not. The framers of the Constitution could not have in one breath authorised a death sentence and in another outlawed it. They must have meant that all forms of torture, cruel, inhuman or degrading treatment or punishment are prohibited except as authorised in article 22(1) of the Constitution. We must remember that unlike in Abuki and Kyamanywa cases where the court was interpreting a statute against a provision of the Constitution, in this petition we are dealing with the interpretation of article 22(1) against article 24 both provisions of the Constitution. Where a Constitution creates derogation in clear language to a right or freedom guaranteed under the Constitution, then derogation will stand despite the provisions of Article 43 and 44 of the Constitution. The only exception is where derogation purports to take away a fundamental right or freedom guaranteed Chapter IV of this Constitution. In the instant case, article 22(1) provides for derogation to the right to life. The derogation is an exception to acts of torture, or cruel, inhuman or degrading treatment or punishment under Article 24 of the Constitution. The language used is very clear and unambiguous. Therefore, it is clear to me that a death sentence in Uganda cannot be one of the acts prohibited under article 24 of the constitution. It is an exception to the article. I would

hold that it is not cruel, inhuman or degrading treatment or punishment within the meaning of article 24 of the Constitution. I would answer the first issue in the negative.'

With regard to hanging the learned Justice of Appeal stated,

'Whether you call hanging cruel, inhuman, degrading, sadistic, barbaric, primitive, outmoded, etc, as long as the people of Uganda still think that it is the only suitable treatment or punishment to carry out a death sentence, their values norms and aspirations must be respected by the courts. I also think that it is trite that every sentence must involve pain and suffering if it is to achieve its purpose as a punishment. A death sentence is not merely designed to remove from this earth, blissfully and peacefully, those people who have committed heinous crimes like murder, genocide and crimes against humanity e.t.c. It is intended to punish them here on earth before they go. It is not a one way ticket to Sugar Candy Mountains of George Orwell's ANIMAL FARM. Once it is accepted that the death sentence is authorised by the Constitution, it is an exception to article 24 and all Parliament has to do is to provide a balanced method of carrying it out, between blissful and peaceful methods of dispatch, like the lethal injection and more barbaric methods like stoning or public beheading. In that context, hanging is a modest method of carrying out the death sentence and therefore, section 99 of Trial on Indictment Act does not offend Articles 24 and 44(a) of the Constitution.'

Byamugisha, J.A., agreed with the judgment of Okello, J.A., and added,

'The framers of the Constitution were aware of the provisions of articles 24 and 44 when they enacted article 22. In my view, they would not have permitted a death sentence in one article and prohibited it in another. This means that the right to life is a derogation of a fundamental human right which provides an exception to acts of torture, cruel, inhuman and degrading form of punishment prohibited by article 24 (supra). It is therefore my considered opinion that the death penalty is not a cruel, inhuman and degrading treatment or punishment within the meaning of the article. Consequently, I would answer the first issue in the negative.
The second issue is almost related to the first one. Having held that the Constitution authorises the death sentence that is carried out in execution of a court order, it goes without

> saying that it is not affected by article 24. The various laws of Uganda that prescribe the death sentence upon conviction are therefore not inconsistent with or in contravention of articles 24 and 44(a) of the Constitution. They are also not affected by article 44(a). I would answer the second issue in the negative.'

Mr. Sim Katende, learned counsel who argued this aspect of the cross-appeal submitted, in effect summarising the written submissions filed in the appeal/cross appeal that the Constitutional Court erred when it held that since the death penalty was constitutionally permissible, the method of carrying out that sentence could not be challenged. The Constitution does not provide for the manner of carrying out of the death penalty. He submitted that the hanging as method of carrying out the death penalty is provided for in the Trial on Indictments Act which was subject to constitutional review. He argued that hanging was unconstitutionally cruel. Firstly that there are unchallenged judicial decisions to that effect, citing R v Mbushuu, [1994] 2 LRC 335, a decision of the Court of Appeal of Tanzania, and State v Makwanyane and Another, [1995] 1 LRC 269, of the Constitutional Court of South Africa.

Secondly Mr. Katende submitted that there was on record the unchallenged evidence of Dr. Hillman and Dr. Hunt that hanging was cruel and inhuman. Thirdly there was the evidence of Antony Okwonga, a former prisons officer, Vincent Oluka, and Ben Ogwang which was unchallenged that

proved that hanging as practised in Uganda was a cruel, inhuman and degrading punishment. He referred to the cases of Attorney General v Abuki [2001] 1 LRC 63, the Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Others, [1993] 2 LRC 279, in support of the cross appeal.

Ms Angela Kiryabwire Kanyima, learned counsel for the Appellant, the Attorney General, opposed the cross appeal. She submitted that the death penalty allowed under Article 22(1) of the Constitution does not constitute torture, cruel or inhuman or degrading treatment within the meaning of Article 24 and 44 of the Constitution as those articles did not apply to a sentence of death passed by a competent court.

With regard to hanging, she submitted that the death penalty is saved by law, and therefore Section 99(1) of the Trial on Indictments Act, merely puts into effect the Constitution and is not therefore unconstitutional. It cannot amount to torture, cruel, inhuman or degrading treatment. Secondly that hanging as a form of carrying out the death penalty is acceptable to the people of Uganda. The Trial on Indictment Act is a reflection of the people's will as it was made by their Parliament.

It may be useful at this stage to bring into view the provisions of the Constitution that touch on the question at hand. Article 22(1) of the Constitution, whose title is 'Protection of right to life' states,

> 'No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.'

Article 24 has a heading, 'Respect for human dignity and protection from inhuman treatment.' It reads,

> 'No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.'

Article 44 is entitled,

> 'Prohibition of derogation from particular human rights and freedoms'.

It states,

> 'Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms---
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
> (b)freedom from slavery or servitude;
> (c) the right to a fair hearing;
> (d) the right to an order of habeas corpus.'

It is clear, in my view, that the Constitution does authorise the death penalty under Article 22(1) of the Constitution. A literal reading of Article 22(1) leaves one with no other possible meaning.

What I do not find justified is the view that Articles 24 and 44(a) do not apply to Article 22(1). Or expressed in different words that article 22(1) is an exception to Articles 24 and 44(a).

As was noted by Twinomujuni, J.A., in his judgment, some of the accepted principles in interpreting a Constitution include the following:

> '(c) The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.
> (d) The words of the written Constitution prevail over all unwritten conventions, precedents and practices.
> (e) No one provision of the Constitution is to be segregated from the others and be considered alone, but all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.'

In Ssemogerere and Anor v Attorney General Constitutional Appeal No.1 of 2002 this court had opportunity to consider this rule in interpretation of the Constitution. Chief Justice Odoki put it in the following words,

> 'The second question is harmonisation. The Constitutional Court was in error to hold that it did not have jurisdiction to construe one provision against another in the Constitution. It is not a question of construing one provision as against another but of giving effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to the others. Failure to do so will lead to an apparent conflict with the Constitution.'

Oder, J.S.C., stated,

> 'Another important principle governing interpretation and enforcement of the Constitution, which is applicable to the

> instant case, is that all the provisions of the Constitution touching on an issue are considered all together. The Constitution must be looked at as a whole.'

Mulenga, J.S.C., discussing the same rule, stated,

> 'To my mind, the clause does not thereby preclude the court from interpreting or construing two or more provisions of the Constitution brought before it, which may appear to be in conflict. In my opinion, the court has, not only the jurisdiction, but also the responsibility to construe such provisions, with a view to harmonise them, where possible, through interpretation. It is a cardinal rule in constitutional interpretation, that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complimenting, and not contradicting one another. The Constitution must be read as an integrated and cohesive whole.'

Applying the above rule to the task at hand, Articles 22(1) if read together with Articles 24 and 44 would, in my view, mean that whereas the death penalty is authorised by the Constitution the same Constitution does ordain that it must not be carried out in a manner that is in violation of Articles 24 and 44. Death penalty is authorised but must be in compliance with Articles 24 and 44(a) as these provisions render cruel, inhuman and degrading treatment or punishment unconstitutional. This, in my view, is the only way to read all those provisions together, in harmony, without segregating one provision from the other, or any one particular provision destroying the other.

All these three articles relate to the subject of punishment or treatment of offenders. They must be read together. Article 22(1) makes the death penalty

lawful as an exception to the right to life. Article 24 outlaws cruel, inhuman, degrading treatment or punishment. Article 44 makes Article 24 non derogable. The death penalty authorised in article 22(1) must conform to criteria for punishment set out in Article 24. It is not that framers in writing Article 24 had forgotten what they had just written in Article 22(1). No, the framers were aware and required that all the provisions be read together, and not one against the other. I am unable to find any justification for the view that the constituent assembly intended that Articles 24 and 44 would not apply to Article 22(1). If that had been their intention, given the precedent available in the Constitution (1967) preceding the one that they were enacting, they would have stated so clearly.

The approach I have taken of reading all the relevant provisions together in harmony finds persuasive support from a decision of the European Court of Human Rights in Soering v United Kingdom Application No. 14038/88 delivered on 7th July 1989. The US government sought to extradite, Mr. Soering, a German National, living in the United Kingdom for the murder of 2 people in Virginia, US. The Secretary of State, after the necessary proceedings in the courts in UK, issued an extradition warrant. Mr. Soering brought an application before European Court for Human Rights seeking a declaration that United Kingdom was in breach of its treaty obligations

under Article 3 of the European Convention of Human Rights in light of the fact that should he be extradited to the US, tried, and convicted he was likely to be sentenced to a death penalty, which would violate his charter rights, inter alia, Article 3 that forbids torture, inhuman and or degrading treatment or punishment to any person. It was the argument for Mr. Soering that if convicted and sentenced to death, it was likely that he would spend a long period of time on death row without being executed, inflicting pain and suffering to him, known as the death row phenomenon.

Article 3 of the European Convention states,

> 'No one shall be subjected to torture, or to inhuman or degrading treatment or punishment.'

The European Court held that under Article 2 (1) of the Convention capital punishment was permitted. Article 2(1) states,

> 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in execution of a sentence of a court following his conviction of a crime for which the death penalty is provided by law.'

It then went on to say,

> '103. The Convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of article 2 (see, mutatis mutandis, the Klass and others judgment of 6 September 1978, Series A no. 28, p. 31, § 68). On this basis Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 §1…..
> ……

104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3….'

The Court went on to observe and hold,

'111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services….. However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration. Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.'

Article 2(1) of the European Convention on Human Rights is in *pari materia* with Article 22(1) of our Constitution. So is Article 3 with Article 24 of our Constitution. The approach by the European Court to read the said provisions in harmony is in line with the established approach to constitutional interpretation here in Uganda. Reading the provisions together is essential in order to grasp the full meaning of the provisions bearing upon the same subject.

The reasoning of the European Court is very persuasive. The European Convention on Human Rights is the forerunner of the bill of rights found in many independence constitutions, and post independence constitutions. The jurisprudence of the European Court is therefore quite persuasive.

Further authority for this approach is found in the decision of the Human Rights Committee in Chitat Ng v Canada, Communication No. 469 of 1991 delivered on 7th January 1994. This decision is quoted by the majority in support of the proposition that there is no conflict between Articles 22(1) and Articles 24 and 44(a) of our Constitution.

In that case the applicant, a British Citizen, who had been living in Canada, had been extradited to the United States for trial on several counts of murder. He brought an action under against Canada that his extradition to the United States would result in breach of his rights under Articles 6 and 7 of the

International Covenant on Civil and Political Rights as he would face the death penalty, and be subject to not only the death row phenomenon but also the mode of execution (gas asphyxiation) which was cruel, inhuman and degrading treatment or punishment.

Articles 6 and 7 of the International Covenant on Civil and Political rights are in pari materia with Articles 21(1) and 24 of our Constitution as noted by the majority judgment.

The Committee decided that Mr. Ng was not a victim of the violation by Canada of Article 6 of the Covenant but found that he was a victim of Canada's violation of Article 7. It went on to say,

> '16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of Article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In the instant case, it is contended that execution by gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of Article 7 of the Covenant. **The Committee begins by noting that whereas Article 6, paragraph 2, allows the imposition of the death penalty under certain limited circumstances, any method of execution provided by law must be designed in such a way as to avoid conflict with Article 7.** 16.2 The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant; on the other hand, Article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. **Nonetheless, the Committee reaffirms, as it did in Its General Comment 20[44] on Article 7 of the Covenant (CCPR/21/Add.3, paragraph 6) that, when imposing capital punishment, the execution of**

the sentence "… must carried out in such a way as to cause the least possible physical and mental suffering'.

It is clear that the Committee treated Articles 6 and 7 of the International Covenant as not in conflict as noted by the majority judgment. It is also very clear that the Committee read and interpreted both articles in harmony, without separating them, or ignoring one provision in preference to the other, an aspect of the decision ignored by the majority judgment. The approach of the Committee is very persuasive as it is clearly consistent with our rule of harmony in constitutional interpretation as espoused by this Court in Paul Ssemogerere v Attorney General, Constitutional Appeal No.1 of 2002. It is worthwhile noting that Uganda acceded to the International Covenant on Civil and Political rights on 21st September 1995 and to the First Optional Protocol on 14th February 1996. At the very least the decisions of the Human Rights Committee are therefore very persuasive in our jurisdiction. We ignore the same at peril of infringing our obligations under that treaty and international law. We ought to interpret our law so as not to be in conflict with the international obligations that Uganda assumed when it acceded to the International Covenant on Civil and Political Rights.

What the Constitutional Court has done is in effect to write back into law, with regard to the death penalty, Article 12(2) of the 1967 Constitution which was specifically omitted in the 1995 Constitution. Article 12 reads,

> ‘(1) No person shall be subjected to torture or to inhuman or degrading punishment or other like treatment.
> **(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question authorises the infliction of any punishment that was lawful in Uganda immediately before 9 October 1962.’**
> (Emphasis is mine.)

Article 24 of the 1995 Constitution does not include the exception that was provided in Article 12(2) of the 1967 constitution and the omission of that provision was deliberate. As noted by Mulenga, J.S.C., in Abuki v Attorney General,

> ‘The prohibition of such treatment and punishment is absolute. **It is instructive, in my opinion, to recall that the 1967 Constitution of Uganda in art.12, similarly provided for the protection from inhuman treatment but with a qualification in clause (2) which provided: [sets out article 12(2) of the 1967 constitution] When the current constitution was framed and promulgated on 8 October 1995, that provision was deliberately omitted. That alone, in my view, should leave no doubt in anyone’s mind about the intention of the framers of the Constitution to make the prohibition absolute.** Therefore while the Privy Council’s decision in Riley may have been strong persuasive authority in Uganda prior to the 1995 Constitution, it is today irrelevant and inapplicable. With effect from 8 October 1995, validity of any punishment prescribed by existing law ceased to depend on its existence prior to Uganda’s independence. The validity depends on conformity with the Constitution.’
> (Emphasis is mine.)

It is reasonable to infer that the omission in the 1995 Constitution of an equivalent provision to Article 12(2) of the 1967 constitution and Article 21(2) of the 1962 Constitution was intended to make prohibition in Article 24 absolute as noted by Mulenga, J.S.C., in Attorney General v Abuki. Not

only was there no specific derogation against article 24 as was previously the case prior to the 1995 Constitution but the Constitution under Article 44 protects Article 24 from derogation. The wording of Article 44 is instructive. It starts with the words, **'Notwithstanding anything in this Constitution, ..**' The framers were aware of what they had enacted in Article 22(1). The framers decided, notwithstanding that the death penalty was constitutionally permissible, to subject it to Article 24 without derogation.

I am strengthened in that view in light of the nature of the legislative or constitutional history of the proviso or rider in all our earlier constitutions. Its omission can only be significant. Constitutional history of the provision may, as in this instance, provide strong inference as to why a particular interpretation may be preferable to the other. The omission of that rider coupled with the non derogation clause in Article 44, points, in my view, to only one conclusion. That the framers of the Constitution raised the threshold of Article 24 to apply to all existing punishments, rather than exclude all existing punishments or any punishment stipulated in the law at the time of enacting of the 1995 Constitution.

The Constitutional Court declined to follow Abuki v Attorney General, distinguishing it on the ground that in the Abuki decision what the court was considering was an Act of Parliament as against the Constitution, while in

the case before it, the court was considering one provision of the constitution against another provision of the Constitution. In my view this is not strictly correct with regard to the consideration of whether hanging as provided for in the Trial on Indictments Act was a cruel, inhuman or degrading treatment or punishment. Hanging, as a method of execution of a death penalty is not provided for by the Constitution. It is provided for by an Act of Parliament. It is the provisions of that Act that were challenged (in the alternative). Attorney General v Abuki is therefore applicable.

The Constitutional Court is bound by the decisions of the Supreme Court, sitting as an appellate court in constitutional matters. And so is the Supreme Court itself bound by its earlier decisions, though it may depart from them, if it appears right to do so. Article 132(4) states,

> '4. The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.'

Mulenga, J.S.C., stated in Attorney General v Abuki,

> 'This prohibition is directed, without exception, to everyone capable of causing or effecting derogation from observance, respect and / or enforcement of the freedoms and rights specified in the article. It applies not only to the law makers but also to those who interpret, apply, or enforce the law. A subjective view that some of the penalties, still on our statute books, which are inflicted daily by the courts of law, are cruel or inhuman may be understandable. However, that cannot be a basis for the contention that the courts of law are

> excepted from the clear prohibitions under Articles 24 and 44 of the Constitution. If any existing law prescribes a penalty which is inconsistent with article 24, or any other provisions of the Constitution, it is liable to be interpreted in accordance with article 273, which provides in clause (i)
>
> > 'Subject to the provisions of this article, the operation of existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.'

Kanyeihamba, J.S.C., stated in part, in the same case of Attorney General v Abuki,

> 'Article 24 is doubly entrenched by article 44 to the extent that it is unalterable. In other words, there are no conceivable circumstances or grave facts by which the rights protected in article 44 can ever be altered to the disadvantage of anyone even if that person has been charged of a serious offence. Parliament may not pass any law whose provisions derogate from article 44. Courts cannot pass any sentence that derogates from the same article.' Further on he states, 'In my opinion, even an Act passed unanimously by Parliament and any judgment of any court, whatever its position in the hierarchy of the courts' system, which derogates from Articles 24 and 44 is unconstitutional, and therefore, null and void.' (Emphasis is mine.)

Attorney General v Abuki clearly establishes the reach of Articles 24 and 44 of the Constitution. The said provisions apply to all punishments and or treatment meted out by a state actor inclusive of the courts. The protection against torture, cruel or degrading treatment and punishment is absolute. What the Constitutional Court had to determine was whether hanging passes constitutional muster with regard to the provisions of Article 24 and 44 of the Constitution. The Court took the view that hanging was definitely cruel

but concluded that it was not subject to the provisions of Article 24 and 44 of the Constitution. This was, with due respect, an error.

For the reasons set out above I would find that the Constitutional Court erred in law when it held that Article 24 and 44 of the Constitution did not apply to Article 22(1) of the Constitution of Uganda. I would hold that Articles 22(1), 24 and 44 must be read together, in so far as they relate to sentencing and punishment to provide a harmonious interpretation that does not do violence to the meaning of any one provision. Capital penalty is clearly authorised by Article 22(1) but to give effect to Articles 24 and 44 such capital penalty as may be authorised by law must not infringe Article 24 and 44 of the Constitution. Parliament is free to enact laws that provide for the execution of the death penalty but such laws are subject to Articles 24 and 44 (a) of the Constitution of Uganda.

It is suggested in the majority opinion that international human rights instrument treat the right to life including the derogation in respect of capital punishment separately from the provision against torture, inhuman and degrading treatment or punishment. And that therefore one provision is not intended to affect the other. In my view this approach is inconsistent with the rule of harmony in constitutional interpretation. And authority to the contrary is abound. I will refer to only 2 decisions in relation to the

European Convention on Human Rights and the International Covenant on Civil and Political Rights.

As demonstrated by Soering v UK (supra) and Chitat Ng v Canada (supra) this cannot be true with regard to European Convention of Human Rights and the International Covenant on Civil and Political Rights. The approach to interpretation is that all the provisions be read together in harmony, rather than one against the other, in order to elicit the true intent of the framers of Convention.

The Constitutional Court held, and the majority now affirm, that Articles 24 and 44(a) do not apply to the death penalty authorised under Article 22(1) of our Constitution. That imposition and or execution (i.e. mode of carrying out) of the death penalty cannot be questioned under Article 24 of the same Constitution. The Constitutional Court held, and the majority of this Court now affirm, that delay in the execution of the death penalty in Uganda creates ‘death row phenomenon’ that amounts to ‘cruel, inhuman and degrading treatment or punishment’ under Article 24 of the Constitution.

It is odd, in my view, that delay in executing the death penalty can amount to cruel, inhuman, and degrading treatment’ under Article 24 while at the same time the same provision cannot be used to determine whether the mode of

implementing the death penalty meets the threshold provided by Article 24 of the Constitution. I am unable to find any justification for this approach. As pointed out in Soering v UK (supra) there are several factors, including the one accepted and the one rejected by the Constitutional Court, that are available to determine whether the death penalty may infringe the equivalent of our Article 24 of the Constitution. The Court put it in the following words,

> '104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3….'

It is somewhat incongruous that one factor or circumstance surrounding the death penalty was found to be a violation of Article 24 while another factor or circumstances related to the death penalty could not even be examined to determine whether or not it may trigger Article 24 into operation.

I would allow Ground No.1 of the Cross Appeal.

Ground No. 3 of the Cross Appeal

I now turn to ground no.3 of the cross appeal. It states,

> '3. That in the alternative but without prejudice to the above, that the learned justices of the Constitutional Court erred in

> law when they found as a question of fact and law that hanging was a cruel, inhuman and degrading treatment or punishment but held that it was a permissible form of punishment because the death penalty was permitted by the Constitution.'

In considering this ground the words of Oder, J.S.C., in Attorney General v Abuki are instructive. He stated in part,

> 'Article 24 of the Ugandan Constitution provides; 'No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment.' It seems clear that the words emphasised have to be read disinjuctively. Thus read, the article seeks to protect the citizens from seven different conditions: (i) torture; (ii) cruel treatment; (iii) cruel punishment; (vi) inhuman treatment; (v) inhuman treatment (vi) inhuman punishment; (vi) degrading treatment and (vii) degrading punishment. Under Article 44 the protection from the seven conditions is absolute.'

He continued to consider the meaning of what is protected under Article 24. He stated,

> 'The treatment or punishment prescribed by Article 24 of the Constitution is not defined therein. According to the Concise Oxford Dictionary they have the following meaning: Torture—'the infliction of severe bodily pain, especially as a punishment or a means of persuasion; severe physical or mental suffering; force out of natural position or state; deform; pervert.' Cruel—'causing pain or suffering, especially deliberately; pervert.' Inhuman—'brutal, unfeeling, barbarous, not of a human type; inhumanly.' Degrading—'humiliating; causing loss of self-respect' Treatment—'a process or manner of behaving towards or dealing with a person; customary way of dealing with a person.' Punishment—'the act of punishing; the condition of being punished; the loss or suffering inflicted; severe treatment or suffering.'
> 'As I have already said, the prohibitions under Article 24 are absolute. The state's obligations are therefore absolute and unqualified. All that is therefore required to establish a

> violation by a state organ falls within one or other of the seven permutations of Article 24 set out above. No question of justification can ever arise.'

European Convention of Human Rights jurisprudence on Article 3 is helpful in throwing light on what may constitute cruel, inhuman and degrading treatment or punishment, given that the wording of Article 3 of the Convention and our Article 24 is virtually the same save for the inclusion of the word 'cruel' in our Article 24 which is not present in Article 3 of the Convention.

In Ireland v United Kingdom Application No. 531 of 1971 the European Court stated in paragraph 162,

> '… ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is in the nature of things relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'

In Seoring v United Kingdom (Supra) the Court stated in paragraph 100,

> '… Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering" and also "degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"…….
> In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment……
> In this connection, account is to be taken not only of the physical pain experienced but also, where there is a

> considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.'

Regard may be given to the jurisprudence of the Human Rights Committee on provisions that are in *pari materia* with Article 24 of the Constitution. Article 7 of the International Covenant on Civil and Political Rights (to which Uganda acceded as noted above) is in pari materia with Article 24 of the Constitution. I refer to the decision in Chitat Ng v Canada (supra) where the Committee stated,

> '16.3 In the instant case, the author has provided **detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes. The State party had the opportunity to refute these allegations on the facts; it has failed to do so.** Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, "it would be interfering to an unwarranted degree with the internal laws and practices of United States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation". 16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of "least possible physical and mental suffering", and constitutes cruel and inhuman treatment, in violation of Article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of Article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.
> 16.5 The Committee need not pronounce itself on the

> compatibility, with Article 7, of methods of execution other than that which is at issue in this case.'

The question to be decided is whether hanging as practised in this jurisdiction infringes Article 24 of the Constitution. The Constitutional Court found that hanging is indeed cruel. The evidence produced in that court to support this conclusion was as compelling as it was chilling. Dr. Harold Hillman of the United Kingdom and Dr. Albert Hunt from Scotland swore affidavits in this matter that detail medical explanation of the process of hanging. It is clear that in the majority of cases and or studies that they have come acros**s,** death is not instantaneous. In Dr. Hillman's opinion death by hanging was humiliating because (i) the person is masked; (ii) The person's wrists and ankles are bound to restrain him; (iii) The person cannot react to pain, distress and feeling of asphyxia, by the usual physiological responses of crying out or moving violently (although he sometimes twitches late in execution, usually attributed to the effect of lack of oxygen on the spinal cord); and (iv) The person hanged often sweats, drools, the eyes bulge and he micturates and defecates.

Mr. Okwanga in his affidavit stated in part,

> '8 From my experience, this is the procedure that takes place when the prisoners were to be executed:
> (a) When the President of the Republic signs the death warrants, the executions are supposed to be carried out within 1 (one) week. (b) The warrants are then handed over

to the Commissioner of Prisons who hands them over to the Officer in Charge, Luzira Upper Prison, who then liaises with the Officer in Charge, Condemned Section.
(c) No notice is given to the Prisoners as to whether there was going to be an execution.
(d) The officer in charge then starts the repair of the execution machine, the cleaning of the gallows, the restriction of the prisoners' movements, the making of coffins in the prison carpentry workshop and the making of lists of which particular cells the prisoners are resident.
(e) The warders selected to take part in the execution as well as the Executioner are normally brought from outside the condemned section of Luzira. This is because the prison warders who are stationed in the condemned section are normally close to the inmates and would not feel comfortable helping in the execution of the prisoners. These different prison warders are paid a special allowance to participate in the executions.
(f) When the initial preparations are complete, the condemned prisoners selected to be executed are taken from their cells. This is usually done very early in the morning. The prison warders go from cell to cell, calling out names of prisoners and forcefully ordering them out of the cells. All the prisoners are terrified, as they suspect that this removal from their cells is about execution but do not know for sure whether this to be an execution.
(g)The selected prisoners are handcuffed and leg-irons are put on their legs. They say their last goodbyes to their fellow condemned prisoners. Some prisoners are taken kicking and screaming. Many of them soil themselves in the process.
(h) The Prisoners are taken to the Officer in Charge's office. The Prisoners are then arrested before execution. The Officer in Charge announces to the each individual prisoner the crime he was convicted of, as well as the date and time of his execution, which is normally 3 (three) days thereafter. At that stage, most of the prisoners collapse, soil themselves, cry and wail and start praying to the Lord.
(i) The prisoners are then taken to the death chamber/gallows in Section E of the prison and locked up in individual cells.
(j) The prisoners' heights and weights are recorded. The recording of the heights and weights is part of a formula to measure how far the prisoners would drop when the lever of the execution table is released. The formula is supposed to help the condemned prisoners to drop without their heads being plucked off. It also helps in measuring coffins.

(k) After recording the weights and heights, the prisoners are then given 3 (three) days period before their executions. This 3 (three) day period is to enable the prison authorities to get in touch with the prisoners relatives and for the prisoners to make their wills and make peace with God.
(l) In the meantime, preparations for the execution continue. Coffins are made in the courtyard of the upper prison directly next to Section A of the condemned section. The prisoners in Section A can hear the sounds of the coffins being made, and this puts them on notice that an execution is imminent. This increases the terror, horror, and apprehension of the rest of the prisoners in the condemned section.
(m) Prisoners in Luzira Prison who are not in the condemned section are deployed to make the hoods and clothing that the soon-to-be-executed prisoners are to wear. This is done in the tailoring section of the prison, and this process ensures that all the inmates of Luzira prison know that an execution is imminent. The number of hoods and clothes made also informs the other prisoners of the number of prisoners due to be executed. This adds to the general unease, fear, alarm and dread in the prison.
(n) For the 3 (three) days, while the prisoners await their respective executions a dark cloud of death descends upon and engulfs the whole prison. Everyone is tense especially the prisoners slated to be executed, the warders and everyone connected to Luzira prison.
(o) During the 3 (three) days wait, some of the prisoners confess that they are guilty but that they are now ready to meet their Maker as they had become born again. Others insist that they are innocent but that they had found peace in God and forgiveness for the people that had falsely or maliciously caused all this misery upon their lives. At this time, the priests and imams are present, giving the prisoners solace and comfort in this most trying of times.
(p) During these 3(three) days, the lights in the cells are left on all day and night and the prisoners are under 24 (twenty four) hour surveillance. The prison warders ensure that there are no instruments that can assist such prisoners to commit suicide during those 3 (three) days.
(q) During those 3 (three) days, a prison warder reminds each prisoner hour after hour of the crime he was convicted of, the sentence imposed upon him and the number of hours remaining to the carrying out of the death sentence by hanging.

(r) During those 3 (three) days, the prisoners normally write notes/chits/letters to their fellow condemned prisoners who are not scheduled to be executed that day. These notes/chits/letters normally serve as their last Wills and Testaments. The prisoners are normally pitifully poor and all they have to will are items like flasks, bedroom slippers, soap and their threadbare clothes. These are usually willed to their death row colleagues. These notes/chits/letters are given to the prison warders who pass them on to the intended recipients.

(s) During those 3 (three) days, the prisoners usually keep singing hymns, to comfort themselves. The words of the hymns are normally changed by the prisoners to be executed, so as to keep the rest of the condemned prisoners informed of their fates.

(t) During those 3 (three) days, the prisoners are also given a last chance to be visited by their friends and relatives, but hardly any prisoners receive family visits. This is because many prisoners are poor peasants whose families cannot afford the fare to Kampala, or the prisoners have spent such long periods in prison that their families have forgotten or abandoned them.

(u) During these 3 (three) days, the prisoner's skins normally appear faded, wan and washed-out. Their faces appear ashy, pale and white.

(v) On the day of execution, in the middle of the night the prisoners are herded to the Pinion room and the Officer-In-Charge reads the execution order for their respective executions. The shaken prisoners at this time usually turn whitish with popped out eyes. Some start wailing afresh while others sing hymns and accept Jesus Christ as their personal Saviour.

(w) The prisoners to be executed are taken to the dressing room and dressed in an unusual overall-like outfit and are covered from head to toe without any openings for the hand or feet. They are also hand and leg cuffed to avoid incidences of violence. Black hoods are passed over the prisoner's heads. Weights are placed in the overalls of the smaller and lighter prisoners to make them heavier.

(x) The execution chamber is capable of hanging 3 (three) prisoners at a time. The prisoners can be led singly or in threes, supported by warders.

(y) With black hoods over their heads, the prisoners cannot see or tell how they are going to be executed, or who is present to witness their executions.

(z) At that time, the priests and imams normally read to the prisoners their last rites, and bless them. Most of the prisoners are usually still wailing, bawling and lamenting. Some of them admit their guilt and ask for forgiveness, but many others maintain that they are innocent until the very end.

(aa) From the time the prisoners are led to the dressing room and hence to the gallows themselves, their colleagues in the death chamber are, through hymns, recounting the proceedings to the rest of the prisoners in the condemned section below. Graphic details are given out through these songs, telling the other condemned prisoners of who is being taken for dressing, or for execution and what is being done to him at every moment.

(bb) At the execution chambers, the prisoners' legs are tied-up and the noose pushed over their heads to their necks. At the back of the prisoners' heads the noose is tightened, cutting off their breathing.

(cc) The metal loop is normally on the right hand side of the prisoners' necks so that when they drop the loop would be directly under their cheeks and it would quickly break the cervical bone and kill them instantly.

(dd) The prisoners are then put atop a table, 3 (three) at a time. The table is one that opens at the bottom when a certain gear-like lever is pressed. The aim is to place the noose around the prisoner's head, press the lever so that the table opens and let the prisoner hang from the neck until he is dead.

(ee) When all is set, the executioner releases a gear-like lever of and the table opens into two, each side gets stuck against the rubber under the table leaving the space of the two joined tables open and the 3 (three) prisoners drop down.

(ff) There is an extremely loud thud when the two sides of the table get stuck against the rubber, and an even bigger one when the prisoners hit a table in the basement room directly below the gallows.

(gg) After the bodies drop, the Officer- In- Charge, and the priest go down to the ground and enter the basement where the bodies are hanging to ensure that the prisoners have been executed. The prison doctor is normally already in the basement.

(hh) The Doctor examines the corpses to confirm that the prisoners are dead before the corpses are placed in poorly made ceiling board coffins ready for burial in shallow un-marked mass graves.

> **(ii) In case the prisoners are not certifiably dead, they are then killed by hitting them at the back of the head with a hammer or a crow-bar.**
> (jj) This process is repeated until all the prisoners due to be executed that day are executed.
> (kk) The shallow mass grave is situated next to the Women's prison, Luzira and the prisoners' families have no access to the corpse. They are not even told where the grave is situated.
> (ll) The corpses are deposited into the mass graves and sprayed with acid to help them decompose faster. Subsequently, cabbages and other vegetables are grown over the mass graves to feed the remaining prisoners.
> **9. I have on several occasions witnessed the heads of prisoners being plucked off during executions. This occurred mainly in old inmates who were aged above 60 years old. Witnessing human heads being plucked off is a very shocking and harrowing experience indeed as both the skin and cervical break off leading to blood gushing out like pressure pipe water When the heads are plucked off, blood spills all over the place and even onto the prison warders assisting in the execution'**

The evidence put forth by the respondents on this issue was not challenged by the appellants in the Court below. Neither was it contradicted. The appellants did not adduce any evidence to put in doubt what Mr. Okwanga sets out in his affidavit as to what occurs in this country during execution of the death penalty.

I accept the evidence of the respondents that hanging as a method of execution as it is carried out in this country, is a process that is cruel, inhuman and degrading treatment and punishment. In situations where the head is plucked off this is like killing an insect or a bird. It is inhuman to decapitate persons in the name of punishment. To subject those who do not

die instantly to death by bludgeoning is likewise not only cruel, it is inhuman and degrading as well. This is akin to the times when the order for death by hanging included quartering and disembowelling! This is definitely beyond the pain, suffering or humiliation that should be associated with the death penalty.

In the last three days before hanging a prisoner is continually reminded every hour for 24 hours by a prison warder that he is to die by hanging and the remaining number of hours before the hanging is to occur. This consistent and round the clock reminder of the violence that is to be visited upon him must surely cause the same amount of mental suffering as that experienced under the death row phenomenon. It is entirely unnecessary but no doubt imposes extreme mental suffering.

The evidence adduced by the parties clearly shows that hanging as practised in Uganda fails to meet the test of 'the least possible physical and mental suffering' that has been set by the Human Rights Committee under the International Covenant on Civil and Political Rights.

I would agree with the respondents that hanging as a method of execution as it is carried out in Uganda is a cruel, inhuman and degrading treatment and punishment.

In my view it is the duty of Parliament to legislate the manner in which the death penalty should be carried out. In doing so, Parliament is obliged to take into account the dictates of the Constitution, including ensuring that the method it establishes is not a cruel, inhuman and degrading treatment and or punishment. It is not for this Court at this stage to suggest what method should be acceptable as no evidence has been adduced for consideration by this Court. That point is moot. There is no evidence before this Court with regard to other methods of implementation of the death penalty for this Court to say at this stage that method X or Y or Z is, or, is not, cruel, inhuman or degrading treatment and punishment.

I would allow Ground No. 3 of the Cross Appeal.

Signed, dated and delivered at Mengo this 21st day of January 2009

FMS Egonda-Ntende
Ag. Justice of the Supreme Court