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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: TUMWESIGYE; KISAAYE; MWANGUSYA; OPIO-AWERI; & MWONDHA, JJ.S.C.]

CRIMINAL APPEAL NO. 15 OF 2014

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BETWEEN

MUMBERE JULIUS:.....] APPELLANT

AND

UGANDA :.....] RESPONDENT

15 [Appeal from the decision of the Court of Appeal at Kampala (Buteera, Bossa, Kiryabwire, JJA) dated 27th June 2014 in Criminal Appeal No. 0154 of 2008]

JUDGMENT OF THE COURT

Introduction.

20 This is a second appeal from the decision of the Court of Appeal which upheld the conviction and sentence of the appellant by the High Court at Gulu for the murder of one, Otto Samuel at Lawiye Oduny village in Kitgum District.

Background.

The deceased Samuel Otto was operating a motorcycle business commonly known as 'boda boda' in Kitgum Town.

25 On 20th January 2005, the appellant, a UPDF soldier, hired the deceased from his boda boda stage at about 10:00 a.m. to transport him from Kitgum Town to Lawiye Village in Madiopei Sub-County, Lamwo District. The distance was about 32 miles. The appellant was dressed in his military fatigue, armed with an SMG rifle and carrying a bag.

30 The deceased had hired out his motorcycle to a self-drive customer, so he approached his colleague, Obwor Jimmy (P.W.5) to lend him his motorcycle to enable him transport the appellant to his destination. Jimmy Obwor (P.W.5) consented and gave the deceased his motorcycle **Reg. No. UDC 900Z** to transport the appellant.

35 On the fateful day, Orach Ambrose (P.W.2) the LC Chairman for Central Village of Madiopei saw motorcycle **Reg. No. UDC 900Z** operated by the deceased and carrying the appellant pass through Madiopei Trading Centre between 11:30am and 12:00 mid-day.

One hour later or thereabouts, having entered a house, Orach Ambrose (P.W.2) had commotion outside and went to investigate. He found that a *boda boda* being ridden by the appellant had knocked down a one Omwony Richard. The appellant was arrested and taken together with the motorcycle to Madiopei Police Post.

5 While the appellant was still at the police post, some people who were travelling from Sudan reported that they had seen a dead body at a place called Lawiye lying on the road. When the police went to the scene, they discovered a body of a male who had been shot dead. It was identified as that of Samuel Otto through an identity card.

10 In the meantime, the appellant had asked for permission from the OC Madiopei police to go to the Trading Centre to have lunch but did not return to the police post.

A search was mounted in the barracks to arrest the appellant without success. The police and the army then mounted a joint operation searching all lodges and hotels in Kitgum town but could not locate the appellant. It was only during security check-point at a road block in the wee hours of 21st January 2005 that the appellant was found aboard the first bus bound for Kampala. He was re-arrested and
15 later charged with the offence of murder of the deceased.

On the 25th January 2005, the appellant made a charge and caution statement before DIP Atube George (P.W.4) in which he admitted to shooting the deceased to death but asserted that it was done in self-defence after a scuffle following a misunderstanding about payment of the transport fare. The appellant, however, repudiated the statement during his trial. The trial judge conducted a trial within a
20 trial and found that the appellant had made the statement voluntarily.

At the trial, the prosecution led evidence of 10 witnesses to prove the ingredients of the offence of murder. The appellant opted to exercise his right under section 73 (2) of the Trial on Indictments Act, to say nothing in his own defence.

25 The trial judge believed the prosecution evidence and convicted the appellant as charged and sentenced him to life imprisonment.

Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal against both conviction and sentence arguing that the trial court did not evaluate the evidence on record and did not take cognizance of the defence of self-defence raised in the charge and caution statement.

30 The appellant also faulted the trial court for imposing a sentence of life imprisonment contending that it was harsh and excessive in the circumstances of the case.

The Court of Appeal after considering the submissions of both counsel and reviewing the evidence on record, found that the trial court had properly evaluated evidence on record and considered the defence of the appellant but did not believe it. On the sentence, the Court of Appeal observed inter-alia that the trial court considered the mitigating factors and did arrive at the correct sentence in the

circumstances of the case and accordingly declined to interfere with the discretion of the trial court. The Court of Appeal dismissed the appeal and upheld the judgment of the trial court.

Dissatisfied with the decision of the Court of Appeal, the appellant appealed to this Court on three grounds as follows:

- 5 **1. The learned Justices of the Court of Appeal erred in law by failing to adequately re-evaluate all material evidence, charge and caution statement, gun, adduced before trial court thereby wrongly upholding the appellant’s conviction of murder.**
- 2. The learned justices of the Court of Appeal erred in law when they wrongly ignored the question of jurisdiction relating to the appellant’s trial, that the appellant should have been**
10 **tried in a military court and not High Court.**
- 3. The learned Justices of the Court of Appeal erred in law by failing to re-evaluate mitigation of sentence thereby dismissing his appeal against sentence.**

The appellant prayed that this Court quashes his conviction and set aside the sentence. In the alternative, the appellant prayed that this Court substitutes the sentence of life with a lesser sentence.

15 The appellant was represented by Mr. Rukundo Henry Seth while the respondent was represented by Mr. Brian Kalinaki, Principal State Attorney, from the Directorate of Public Prosecutions.

Before considering the merits of this appeal, we would like to dispose by way of a preliminary point the admission and application by the two lower Courts of the charge and caution statement made by the appellant on 25th January 2005. The charge and caution statement raises two issues. The first is
20 its admissibility by the trial Court. The second issue which regards the time when it was allegedly recorded, shall be addressed by Court in consideration of ground 1 of this appeal.

Regarding its admissibility, the appellant in the course of his trial denied having made the charge and caution statement. He also denied that the signature on the charge and caution statement was his although his counsel claimed that he was forced to sign a pre-prepared statement the contents of
25 which he did not know. This Court in *Matovu Musa Kassim v. Uganda, Criminal Appeal No. 27 of 2002* reiterated the law governing retracted and repudiated confessions as succinctly stated in *Tuwamoi v. Uganda* that:

30 **“A trial Court should accept any confession which has been retracted or repudiated with caution and must before finding a conviction on such a confession be fully satisfied in all circumstances of that case that the confession is true.”**

In its earlier decision in *Amos Binuge & ors v. Uganda, Criminal Appeal No. 23 of 1989*, this Court held as follows:

“It is trite that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish by evidence, his grounds of objection. This is done through a trial within a trial...The purpose of a trial within a trial is to decide upon the evidence of both sides, whether the confession should be admitted.”

5 The trial judge conducted a trial within a trial to determine the voluntariness of this charge and caution statement. We have reviewed the proceedings of the trial within a trial which appear at pages 48-60 of the record of appeal.

The trial Judge after conducting a trial within a trial accepted it as having been made by the appellant voluntarily and that the signature on the charge and caution statement was for the appellant. Having
10 so found, the trial judge admitted it in evidence as exhibit P1. In his final submissions before the trial Court, counsel for the appellant also relied on it to show that the appellant killed the deceased in self defence.

It is observed that the trial judge having found that the charge and caution statement was voluntarily made by the appellant stated that the reasons for his findings would be incorporated in the main
15 judgment. A perusal of the main judgment however shows the reasons for his findings were not included.

Be that as it may, we are of the view that having admitted it as evidence, it formed part of the record. Thus it was incumbent on the trial judge to evaluate it as any other evidence to see whether it could shed more light on the entire case. In *Tuwamoi v. Uganda [1967] EA 84, 91* it was held as follows:

20 ***“If the Court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing a confession the main consideration at this stage will be, is it true? And if the confession is the only evidence against an accused then the***
25 ***court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with that degree of certainty required in a criminal case. This applies to all confessions whether they have been retracted or repudiated or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession***
30 ***is true.***

The confession in this case is not the only evidence relied on by the prosecution. There was evidence of Obwor Jimmy (P.W.5) who lent the deceased a motorcycle to take the appellant and later identified the motor cycle at the police station as the one the deceased had borrowed from him. Prosecution also relied on the evidence of Orach Ambrose (P.W.2) who saw the appellant riding with the
35 deceased on the motorcycle and later saw him coming back on the motorcycle without the deceased.

This goes a long way in establishing the consistency and truthfulness of the confession in relation to the other evidence adduced by the prosecution.

However, a perusal of the record of appeal shows that the charge and caution statement was selectively applied by the High Court to support the conviction of the appellant and by the Court of Appeal to uphold the conviction.

5 In our view, the two lower courts had a duty to examine the charge and caution statement in relation to any other evidence available to help shed some light on the possible circumstances under which the shooting of the deceased could have occurred, and reach an appropriate finding. It was erroneous for the two Courts to rely on the part of the appellant's charge and caution statement relating to his admission to the act of shooting and ignore and/or disbelieve it in relation to his explanation of the circumstances under which the shooting took place. It is from the part of the statement which none of
10 the two Courts considered that the defences of provocation and self defence are raised.

We shall now revert to consideration of ground 1 of appeal wherein the appellant is faulting the Court of Appeal for failing to adequately re-evaluate all material evidence before the trial court.

Parties Submissions on Ground One

15 In arguing Ground One, learned counsel for the appellant contended that the learned Justices of Appeal failed to properly evaluate the evidence on record and so came to a wrong conclusion that the appellant was guilty of the murder of the deceased. He argued that there was no direct evidence to prove that the appellant shot the deceased with the gun SMG No. 9813, and that the circumstantial evidence against the appellant was not sufficient for that conclusion. In support of his submission, he cited the case of **R vs. Kipkering Arab Koske (1949) 16 EACA 135** where it was held that
20 circumstantial evidence can only sustain a conviction where the inculpatory facts are incompatible with the innocence of the accused.

He argued that there was no ballistic report to show that the forensic analysis of the gun found on the appellant was the gun that was used to shoot the deceased. He also argued that the failure by the prosecution to exhibit the empty cartridge obtained from the scene of crime was fatal to the
25 prosecution case. He further pointed out that the motorcycle **No. UDC 900Z** which was alleged to have been ridden by the appellant after the killing of the deceased was not produced in evidence as an exhibit.

On the issue of the propriety of the charge and caution statement, learned counsel for the appellant argued that whereas the appellant was arrested on 20th January, 2005, the charge and caution
30 statement was recorded on 25th January, 2005, after the breach of the 48 hour rule which, in his view, rendered the statement a nullity, and, therefore, the trial court should not have relied on it and even allowed cross examination of the appellant on it.

He cited the case of **Eldam Enterprises Ltd vs. SGS (U) Ltd**, SCCA No. 5 of 2005, where it was held that evidence which is not challenged in cross examination must be taken as true and **Areet Sam
35 vs. Uganda**, SCCA No. 20 of 2005, where this court refused to admit a confession contained in the

charge and caution statement after finding that the statement was improperly obtained by the police. He argued that the appellant was taken to DIP Atube George to record a charge and caution statement and not a confession.

5 Learned counsel for the respondent, in reply, supported the findings of the Court of Appeal and cited the case of **Kifamunte Henry vs. Uganda**, SCCA 10 of 1997, in which it was held that the role of a first appellate court is to re-evaluate evidence and come to its own conclusion. He contended that the learned Justices of Appeal reviewed the entire evidence as adduced at the trial and came to its own conclusion that there was enough evidence to convict the appellant of the murder of the deceased.

10 Concerning the charge and caution statement, learned counsel for the respondent argued that while it was true that the appellant was kept in police custody for longer than 48 hours contrary to the Constitution and the Police Act, it was explained that this was due to the unavailability of a doctor to fill Police Form 24, and so this unavoidable delay should not be used to vitiate an otherwise properly recorded statement.

15 Counsel for the respondent relied on the case of *Mweru Ali & 2 Ors vs. Uganda, SCCA No. 33 of 2002*, where this court reiterated its earlier position in *Cpl Wasswa and Anor vs. Uganda Criminal Appeal Nos. 48 and 49 of 1999*, and concluded that although delay to record the statement from the appellant should not be condoned, it did not appear that it was deliberately designed to cause the appellant to make an involuntary and untrue statement. Counsel therefore, prayed the court to find that the learned Justices of Appeal properly re-evaluated the evidence, before confirming the
20 appellant's conviction.

Consideration of Ground one

We note from the onset that counsel for the appellant contended that the charge and caution statement was made by the appellant in breach of the 48 hours rule which rendered the statement a nullity.

25 We do not agree with this contention. While a breach of the 48 hours rule should be deprecated, we wish to reiterate our decision in *CPL Wasswa and another Vs. Uganda* (supra) that a delay in recording a charge and caution statement will not result in the nullification of the statement unless the court finds that the delay was designed to force the appellant to make an involuntary statement. In this case, the trial Court conducted a trial within a trial and found that the appellant's statement was made voluntarily and this was confirmed by the Court of Appeal. We find no reason to disagree with the
30 courts below about the manner in which the appellant made the statement.

An appellate court, in our view must establish whether the trial court considered the totality of evidence to determine whether essential elements of a crime have been proved beyond reasonable doubt.

The test applicable was well stated persuasively in the famous South African case of ***DPP VS Oscar Lenoard Carl Pistorious Appeal No. 96 of 2015***.

5 ***“The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.***

10 This court being a second appellate court is not bound to re-evaluate evidence on record unless it is established that the first appellate court did not re-evaluate the evidence. This court reiterated the above position in ***Areet Sam VS Uganda, Criminal Appeal No. 20 of 2005*** as follows:-

15 ***“It is trite law that a second appellate court is not required to re-evaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. Where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved manifestly wrong in findings of fact, the second appellate court is obliged to do so and ensure that justice is properly and truly served”.***

20 The question for consideration, therefore, is whether the Court of Appeal failed in its duty to reappraise the evidence before upholding the decision of the trial court.

It was the contention of counsel for the appellant that there was no direct evidence to prove that the appellant committed the offence and that the circumstantial evidence on which the court relied was not strong enough to support the conviction.

25 A person indicted for the offence of murder can only be properly convicted of the same if all the ingredients of the offence are positively proved beyond reasonable doubt. These ingredients, in summary are: (i) the fact of death of the deceased; (ii) unlawfulness of the homicide; (iii) whether the death was caused with malice aforethought; and (iv) participation of the accused in the unlawful killing of the deceased.

In the present case, it is not in dispute that Otto Samuel is dead or that his killing was unlawful.

30 What is in contention is the participation of the appellant in the killing of the deceased and whether the killing was with malice aforethought.

We shall first focus on the participation of the appellant in the killing. Counsel for the appellant contested the participation of the appellant in the killing of Otto Samuel.

35 In our view, we find that the Court of Appeal considered a chain of events that led it to the conclusion that it is the appellant who killed the deceased.

This evidence included that of Orach Ambrose (PW2), the LC1 Chairperson for Central Village in Madiopei, who saw the deceased riding a motorcycle UDC 900Z with a soldier as a passenger from Kitgum side to Agoro side and who in less than an hour later, saw the appellant riding the same motorcycle at Madiopei Trading Centre, without the deceased; the evidence of Okwonga Richard, (PW1) who was knocked down by the appellant, the knocking of which resulted in the appellant being arrested by PW2 and taken to Madiopei Police Post; the evidence of DC Ekworo Lawrence (PW6) the investigating officer, who visited the scene of crime and found the body of the deceased lying on the road side of Madiopei-Agoro road, and who took it to Kitgum Hospital; and the evidence of DIP Atube (PW4) who stated that he recorded a charge and caution statement (exhibit 4) in which the appellant admitted shooting the deceased.

The Court of Appeal also considered the evidence of PW6 who stated that when the appellant was arrested, he was found with an SMG rifle No. UE 9813, 1999 model, with a magazine containing 8 rounds of ammunition (exhibits P5 and P6); the evidence of Dr. Lenny Paul Loromo (PW8) who performed the post mortem examination on the deceased and who testified that when he examined the deceased, he found that he had been shot and had an entry wound on the right side of the neck and an exit wound on the left side of the chest, and that the deceased died of internal bleeding in the lungs caused by a bullet.

The court also considered the evidence of PW6 that the appellant ran away from the police Post but was apprehended during a night operation on board a Kampala bound bus, and rightly concluded, in our view, that the appellant's conduct was inconsistent with that of an innocent person.

We have already noted that the charge and caution statement became part of the record. In the charge and caution statement, the appellant admitted to having shot the deceased. We shall examine the circumstances of the killing in our evaluation of the defence of self defence later in this judgment.

In the circumstances, we therefore find that the appellant caused the death of the accused.

Learned counsel for the appellant faulted the two courts below for finding the appellant guilty of murder even though the prosecution failed to subject the gun and the ammunition allegedly used by the appellant in the killing of the deceased to ballistic examination, and to produce the motorcycle as an exhibit. In our view, there was already sufficient circumstantial evidence in addition to the admission of the appellant in his charge and caution statement to have shot the deceased, to prove that it was the appellant who killed the deceased. So, failure by the prosecution to subject the gun and the ammunition to ballistic examination could not be fatal to the prosecution case as far the act of killing was concerned.

Having so found, was the appellant's killing of the deceased justifiable? The appellant in his charge and caution statement stated that he killed the deceased in self defence.

In this respect, we wish to look more closely at the defence of self-defence which was raised by the appellant in his charge and caution statement in order to determine whether or not malice aforethought, an essential element of the offence of murder, was established.

The defence of self defence is provided under Section 15 of the Penal Code Act as follows:

5 **“Subject to any express provisions in this Code or any other law in force in Uganda, criminal responsibility—**
 (a) for the use of force in the defence of person and property; and
 (b) in respect of rash, reckless or negligent acts,
 shall be determined according to the principles of English law.”

10 In *Selemani VS Republic [1963] EA 442* the then Court of Appeal for Eastern Africa stated the law on self defence as follows:-

15 ***“If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case, there is no duty to retreat, though no doubt questions of opportunity of avoidance or disengagement would be relevant to the question of reasonable necessity for the killing.” (emphasis added).***

20 In the instant case, the charge and caution statement of the appellant brings out elements of provocation and self-defence both of which negate malice aforethought. In the said statement the appellant stated as follows;-

25 ***“I wish to state that it is true that I murdered the deceased on that day. I did not murder him intentionally. What happened was that I hired the deceased (motorcyclist boda boda) rider from Kitgum Town to take me to Agoro and coming back at shs. 40,000/= (forty thousand). On reaching Agoro I did not get the man I went for. I asked the rider to take me to a detach of SPLA (Sudanese people liberation Army) and get a man there who had my money. He accepted.***

30 ***On mid way he stopped and got off the motorcycle to urinate. On coming back he told me that I was to add more 15,000/= (fifteen thousand). I told him that at that time I had no money but requested him that we go to where I told him that was where we are going to get money. He told me that he was not proceeding ahead.***

35 ***I told him that we come back he refused. I then asked him ‘my brother what is the matter now’. He replied me that ‘do you know that we the boda boda riders are veterans and been fighting before you were born?’ I told him that I did not know that. There and then he caught me by the collar of my shirt (army uniform). He slapped me. I had my gun put across my back. He pushed me down. He came down to me caught the sling of the gun. I got up and we started struggling over the gun. The gun was loaded with bullet in the chamber. As we struggled, one bullet was fired by him. That bullet missed narrowly. Seeing that this man if he overpowered me would kill me. So I kicked him and he fell down. I then shot him direct***
40 ***four bullets and he died there and then.”***

Apart from the charge and caution statement, the two Courts below considered the conduct of the appellant after the alleged shooting incident to reject the appellant's defence of self-defence. According to the Courts below, the appellant's failure to report the matter to the Police or any other authority, his use of the motorcycle as if it was his and his escape from Police and attempt to run
5 away to Kampala disproved his defence.

While we agree that the conduct of the appellant is an important factor in determining his guilt or innocence, the charge and caution statement remains as the only evidence as to what exactly happened at the scene. The perfunctory manner in which the Police handled the investigations at the scene does very little to help Court establish whether the deceased's killing was with malice
10 aforethought as claimed by the Prosecution or in self-defence as claimed by the appellant.

The appellant claimed that he shot at the deceased four times but the Doctor who performed the post mortem found only one bullet wound. Even if it was to be presumed that the appellant did not hit the target with all the four bullets, the four rounds of ammunition and/or all the empty cartridges' should have been recovered. So in absence of any independent evidence as to what happened at the scene we
15 still rely on the charge and caution statement as to what could have happened.

We find no justification for relying on the part of the statement that relates to the act of shooting and rejecting the part that relates to the circumstances leading to the shooting which according to the appellant was a result of a scuffle. Both Courts below failed to consider the part of the statement which was in favour of the appellant and it is our duty as a second appellate Court to scrutinize it in
20 order to determine the nature of the offence committed by the appellant and whether there was any defence available to him.

According to the appellant, the deceased attacked him first. He held him by the collar of his shirt and pushed him down. Before the shooting there was a struggle for the gun and according to P.W.8 (the doctor) both the appellant and deceased had injuries and the fact that the deceased assaulted the
25 appellant first also raises provocation as a defence.

This Court in its recent decision of *Obote William v. Uganda, Criminal Appeal No. 12 of 2014* elaborated on the defence of provocation as follows:

“The law on provocation as a defence to murder is found in Section 189 of the Penal Code Act. The Section states that when a person who kills another in circumstances which but for the provision of the section, would constitute murder, does an act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, is guilty of manslaughter only. The term “provocation” is defined in section 190 as meaning and including, for purposes of cases such as the present, any wrongful act or insult of such a nature as to be likely when done or offered to an ordinary person to deprive him of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the insult is done or offered. A lawful act is not provocation for an assault. This Court has interpreted the two sections as meaning that before a charge of murder can be
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reduced to manslaughter on the ground of provocation the following conditions must be satisfied;

1. *the death must have been caused in the heat of passion before there is time to cool;*
2. *the provocation must be sudden;*
- 5 3. *the provocation must have been caused by a wrongful act or .insult.*
4. *The wrongful act or insult must be of such nature as would be likely to deprive an ordinary person of the class to which the accused belongs of the power of self control. It is obvious from this that any individual idiosyncrasy, such as for instance that the accused is a person who is more readily provoked to passion than an ordinary person, is of no avail; and*
- 10 5. *Finally, the provocation must be such as to induce the person (by whom) provoked to assault the person by whom the act or insult was done or offered.*

15 *This last provision in our opinion means (provided, of course, that all the other conditions referred to are present) that if the provocation is such as to be likely to induce an assault of any kind, the accused should be found guilty of manslaughter and not murder irrespective of whether the assault was carried out with a deadly weapon, such as was done in the present case, or by other means calculated to kill. (See Sowedí Ndosire versus Uganda, Supreme Court Criminal Appeal No. 28 of 1989) (unreported)”*

In the present case, and as the appellant stated, the deceased grabbed him by the shirt collar and slapped him. A struggle ensued there and then, which culminated in the fatal shooting of the
20 deceased. In our view, the defence of provocation was available to the appellant.

From charge and caution statement, the appellant overpowered the deceased and shot him when he was on the ground.

With regard to the appellant’s setting up of the defence of self-defence in the charge and caution statement, the onus of proof was on the prosecution to destroy it by adducing evidence. In the case of
25 *Oloo s/o Gai v. R [1960] EA 86*, the then Court of Appeal for Eastern Africa cited with approval a decision of the Privy Council in *Chan Kau v. R (2) (1955) 2 W.L.R. 192* which stated the law as follows:-

30 *“In cases where the evidence discloses a possible defence of self-defence, the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any defence apart from that of insanity”.*

This Court in *Gabriel Byabagambi vs Uganda (Supreme Court Criminal Appeal No. 16 of 2002)*, held that both defences of provocation and self-defence can be available to the accused at the same time and that where both self-defence and provocation exist, the inference of malice aforethought is
35 rebutted. In *Byabagambi* (supra) it was held as follows:

“There is authority for the proposition that in certain circumstances, both the defences of provocation and of self-defence can be available to an accused at the same time. In Hau s/o Akonaay v R., (1954) 21 E.A.C.A. 276, the accused quarreled with X. The quarrel was

followed by a fight in which X. was killed. The accused was armed only with a stick. X was armed with a stick and a spear. The accused got in the first blow.

5 *The Eastern Africa Court of Appeal held that it is immaterial in such cases which party offers the provocation or commits the first assault and that in the case there existed elements both of self-defence and provocation, and that the inference of malice aforethought was rebutted by the circumstances, it mattering little whether the acts be regarded as done in excess of self defence or under the stress of provocation(emphasis supplied).”*

10 It was also held that while normally a successful defence of self-defence would lead to acquittal of the accused, where the force used by the accused was excessive but not so excessive as to remove the defence of self-defence from the appellant the offence proved was manslaughter and not murder. Again in *Byabagambi*, this Court observed as follows:

15 *“Normally a successful defence of self-defence in homicide cases would lead to acquittal of an accused. However because of the two injuries inflicted on the deceased as revealed in this case by the post mortem report, we think that the force used by the appellant was excessive but not so excessive as to remove the defence of self-defence from the appellant.*

We, therefore, hold that both the trial judge and the Court of Appeal erred when they held that neither defence was available to the appellant. Self-defence was established. The two grounds of appeal must, therefore, succeed.

20 *For the foregoing reasons, the appeal is allowed. We quash the conviction of murder. We substitute a conviction of manslaughter C/s 185 of the Penal Code Act.*

We therefore, find that from the evidence as to what happened at the scene both defences of provocation and self-defence are available to the appellant. However, after overpowering the deceased, he did not have to shoot at him four times when he was down. We find that the force the appellant used at that point was disproportionate to the mischief he was trying to avoid.

25 We wish to also briefly make some observations on the ingredient of malice aforethought. The elements of malice aforethought are well set out under section 191 of the Penal Code Act as follows:

“Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—

- 30 (a) *an intention to cause the death of any person, whether such person is the person actually killed or not; or*
(b) *knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.”*

35 We also wish to note that this Court in *Nandudu Grace & Another v. Uganda, Criminal Appeal No.4 of 2009* reiterated the ratio in the earlier decision of this Court in *Francis Coke v. Uganda [1992-93] HCB 43* that the existence of malice aforethought is not a question of opinion but one of fact to be determined from the available evidence.

We also hasten to add that in determining whether the prosecution has proved malice aforethought, the Court has to examine the circumstances surrounding each case. These circumstances include: (i) the nature of the wounds inflicted; (ii) the part of the body injured; (iii) the type of weapon used; (iv) the conduct of the accused person immediately before and after the injuries causing death were
5 inflicted; and, (v) the manner in which the weapon was used-whether repeatedly or not.

A review of both the trial Court and the Court of Appeal Judgments show that their findings on constructive malice aforethought were wanting in many ways. In our view, there were gaps in the prosecution evidence which could not stand under close scrutiny.

For instance, the trial judge, at pages 114-115 of the record of appeal, based his findings on
10 constructive malice aforethought on: (i) the fact that the appellant killed the deceased with a gun and that the use of such a lethal weapon clearly inferred malice aforethought, (ii) the appellant shot the deceased in the neck, a very vulnerable part of the body, (iii) the appellant in his charge and caution statement stated that he shot the deceased direct from close range thus showing that he clearly intended to kill him, and (iv) the conduct of the appellant after shooting the deceased which included
15 riding the deceased's motorcycle and 'enjoying himself' and consequently involving himself in an accident.

We have also reviewed the Court of Appeal Judgment on the issue of malice aforethought. This is how it handled it this issue.

***“On the issue of malice aforethought, this is apparent from the way the offence was committed and the conduct of the appellant after the commission of the offence. The evidence on record shows that the bullet fired by the appellant entered on the right side of the neck of the deceased and exited on the left side of the chest suggesting the bullet took a downward path. This was a lethal shot which ended the life of the victim instantly. After the appellant had shot the victim, he converted the deceased's motorcycle for his own use after the incident. In so doing, he
20 knocked down one, Richard Omony whereupon he was apprehended by PW2. When he was taken to Madiope Police Station, he deliberately omitted to report the murder until he was released. It is only after police investigation revealing that he was a suspect in the murder case of the deceased that he was rearrested aboard a bus to Kampala. This conduct is inconsistent with that of an innocent man. The ingredient of malice aforethought is drawn in that
25 evidence.”***
30

We have already analyzed the charge and caution statement which we have already found to have the element of provocation and partial self defence. In the circumstances, the two defences had the effect of negating the ingredient of malice aforethought.

Be that as it may, the conduct of the appellant after the death of the deceased cannot be the primary
35 evidence to establish malice aforethought. Rather it can be used to corroborate other pre-commission or on the scene evidence about how the killing was committed, which is not available in this case, because there were no eye witnesses to the killing.

Thus contrary to the findings of the Trial Judge and the Court of Appeal, the conduct of the appellant before and after the deceased's death does not necessarily support a finding of his guilt and conviction for murder.

5 On failure by the prosecution to produce the motorcycle as an exhibit, it is our view that the motorcycle was not the object used in the commission of the offence. Rather it was the gun SMG rifle No. UE 9813 which was produced as Exhibit No. 5. Therefore, in our view, it was not necessary for the prosecution to produce the motorcycle as an exhibit to prove its case.

10 For clarity, we wish to observe that exhibits in criminal trial fall into two broad categories. The first category are those exhibits which are not recoverable because they are either hidden or destroyed. In this case what is required of the prosecution is to adduce evidence giving a description of the items which was the case in the case of *Mutesasira Musoke vs Uganda (Supreme Court Criminal Appeal No. 17 of 2009)*. In this case, the weapons used in the case of Aggravated Robbery were not recovered but Court held that the description of the weapons and the injuries found on the victims were sufficient proof that objects described by the witnesses as pangas or knives had been used.

15 The second category are those exhibits which were recovered but the prosecution chose not to tender it as an exhibit. For example, in this case the motorcycle which was allegedly used by the deceased and the appellant before deceased was killed. We note that motorcycle was adequately described by its Registration Number but most importantly, we do not think that its physical production was relevant in light of the evidence available to Court concerning the circumstances under which the appellant carried the deceased on the motorcycle and how he returned riding it. In both categories the overriding principle is whether the non-production of an exhibit was fatal to the prosecution case and
20 in the instant case we think it was not.

We have already cited the case of *Byabagambi* where this Court held that normally a successful defence of self-defence would lead to acquittal of the accused. However, where the force used by the
25 appellant was excessive but not so excessive as to remove the defence of self-defence from the appellant the offence proved was manslaughter and not murder.

Similarly in *R v. Shaushi s/o Miya [1951] 18 EACA 198, 200* the then East African Court of Appeal held as follows:

30 ***“The essence of the crime of murder is malice aforethought, and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat to attack which is near enough and serious enough to cause loss of control then the inference of malice is rebutted and the offence will be manslaughter.”***

In light of the above two authorities, we quash the appellant's conviction of murder and we substitute it with a conviction for manslaughter c/s 187 of the Penal Code Act.

35 Ground 2 of Appeal

This ground was framed as follows:

“The learned Justices of the Court of Appeal erred in law when they wrongly ignored the question of jurisdiction relating to the appellant’s trial, that the appellant should have been tried in a military court and not the High Court.”

5 Relying on sections 194 and 197 of the Uganda Peoples’ Defence Forces (UPDF) Act, counsel for the appellant submitted that the appellant being a soldier was a person subject to military law whether under the Division Court Martial or the General Court Martial. In counsel’s view, the Court with jurisdiction to try the appellant was a military court and not the High Court.

10 Counsel prayed that this Court nullifies the Judgment of the High Court and order a retrial of the appellant in a military court.

On the other hand, counsel for the respondent acknowledged that the appellant was a subject of military law under section 119(a) of the UPDF Act. Despite the acknowledgment, counsel for the respondent submitted that the UPDF Act did not oust the jurisdiction of the High Court to try criminal cases relating to soldiers as accused persons.

15 Relying on Article 139 of the Constitution and section 14(1) of the Judicature Act, counsel for the respondent submitted that the two provisions clearly gave the High Court unlimited jurisdiction to try any offence committed by a person even if such person is a subject of military law.

20 Counsel further argued that section 204 of the UPDF Act compliments the above two provisions. Counsel concluded by submitting that all the above provisions give the High Court inherent power to try the offence the appellant was indicted for and that as such, no miscarriage of justice was suffered by the appellant.

Consideration of Ground 2

Article 139(1) of the Constitution provides for the jurisdiction of the High Court as follows:

25 ***“The High Court shall subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.”***

Section 14(1) re-emphasizes this jurisdiction in the following terms:

30 ***“The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.”***

35 A clear reading of the above provisions shows that this unlimited jurisdiction is subject to the other provisions of the Constitution. Parliament enacted the UPDF Act where in it conferred jurisdiction of persons subject to military law to Division Court Martial and the General Court Martial. This is evident in sections 194 and 197(2) of the UPDF Act. It would therefore follow that the appellant as a soldier and therefore as a person subject to military law ought to have been tried by either a Division Court Martial or a General Court Martial.

However, section 204 of the UPDF act recognizes the jurisdiction of civil courts as follows:

“Nothing in this Act shall affect the jurisdiction of any civil Court to try a person for an offence triable by that Court.”

5 Thus from the above provisions of section 204 of the UPDF Act, it is evidently clear that the High Court rightly exercised its jurisdiction to try the appellant for murder despite him being a person subject to military law.

Ground 2 therefore fails.

Ground 3 of appeal which was on sentence was framed as follows:

10 ***“The learned Justices of the Court of Appeal erred in law by failing to re-evaluate mitigation of sentence thereby wrongly dismissing the appellant’s appeal against sentence.”***

Our resolution on ground 1 makes the resolution of ground 3 academic. However, we note that we have substituted the appellant’s conviction for murder with manslaughter.

Section 7 of the Judicature Act vests this Court with powers of the Court of original jurisdiction while hearing an appeal as follows:

15 ***“For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated.”***

The effect of this provision is that this Court is placed in the same position as the High Court which had jurisdiction to hear the matter. Section 2 (1) of the Trial on Indictments Act provides for
20 sentencing powers of the High Court as follows:

“(1) The High Court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.”

The appellant had been sentenced imprisonment for life for the offence of murder. The maximum
25 sentence for the offence of manslaughter for which he has now been convicted is imprisonment for life.

Paragraph 27(2) of the ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions) 2013*** enjoins a sentencing Court in the offence of manslaughter to consider the aggravating or mitigating factors in paragraphs 28 and 29 of these Guidelines and to determine the appropriate sentence in accordance with the sentencing range.

30 The starting point in determining an appropriate sentence for manslaughter is 15 years.

Bearing the above mentioned provisions in mind, we shall now proceed to consider the aggravating and mitigating factors in the present appeal, before determining the appropriate sentence.

During allocutus at the High Court, counsel for the DPP had stated that there was loss of life. On the other hand, counsel for the appellant submitted in mitigation that the appellant had no prior criminal record; was a first offender; that was a young man (aged 24 years), had been on remand, had a family with 3 children, was supporting his elderly parents, had been affected by rebel insurgency.

5 The appellant himself stated that all his parents were dead (contrary to the contention of his counsel), was beaten upon arrest and was urinating blood, has been on remand, his aunt died of ebola and that his wife who was going for burial was involved in an accident and lost her legs.

We have already alluded to paragraph 27 of the *Sentencing Guidelines* which gives guidance on factors that aggravate or mitigate a sentence of manslaughter. In this case, the relevant aggravating factors are: (a) degree of injury or harm; (b) the part of the victim's body where harm or injury was occasioned; (c) use and nature of the weapon. On the other hand, the relevant mitigating factors are: (a) lack of intention to cause death; (b) some element of self-defence.

We note that the deceased died of a gunshot to the neck. We however note that: (a) the appellant was legally in possession of the gun at the time the scuffle ensued, (b) the gunshot that killed the deceased was as a result of the scuffle between the deceased and the appellant, (c) there is no evidence on record to show that appellant had intended to cause death, and (d) that the appellant was provoked by the deceased.

Given the circumstances of this case and the aggravating and mitigating factors we have pointed out, we do not consider the maximum sentence of imprisonment for life as appropriate.

20 Article 23 (8) of the Constitution requires Court to take into account the period spent by a convict in lawful custody in imposing the term of imprisonment. In line with our recent decision of *Rwabugande Moses v. Uganda, Criminal Appeal No. 25 of 2014 (SC)*, we are required to deduct this period from the sentence imposed.

Thus taking into account the aggravating and mitigating factors we have highlighted above and the period of 3 years and 10 months which the appellant spent on remand, we hereby sentence the appellant to 10 years and two months imprisonment with effect from the date of conviction by the High Court, which was 21st November 2008.

We so order.

Dated at Kampala this...9thday of...April.....2018

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Hon. Justice Dr. Esther Kisaakye, JSC

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Hon. Justice Eldad Mwangusya, JSC

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Hon. Justice Opio-Aweri, JSC

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REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

15 **(CORAM: TUMWESIGYE; KISA AKYE; MWANGUSYA; OPIO-AWERI; MWONDHA. JJ.S.C.)**

CRIMINAL APPEAL NO: 15 OF 2014

20

BETWEEN

MUMBERE JULIUS ::::::::::::::::::::::::::::::: APPELLANT

AND

25

UGANDA ::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Buteera, Bossa and Kiryabwire, JJ.A) dated 27th June 2014]

30

JUDGMENT OF TUMWESIGYE AND MWONDHA, JJ.S.C

We have read the draft judgment representing the decision of the majority members of the court in
35 this appeal and we respectfully find ourselves unable to agree that the conviction of the appellant
should be reduced from murder to manslaughter. It is our view that there is sufficient evidence on

record to sustain a conviction of murder against the appellant, and we find no justifiable reason to interfere with the concurrent finding of the High Court and the Court of Appeal.

The background facts to this appeal have been set out in the majority judgment and we will only give a brief summary of the circumstances that led to the death of the deceased.

5 On 20th January, 2005, the appellant, a UPDF soldier, dressed in military uniform and armed with a gun SMG rifle No. 9813 hired the deceased who operated a motorcycle transport business commonly known as “boda boda”, to take him from Kitgum town to a place called Lawiye some 32 miles away.

The deceased and the appellant passed through a town called Madiope riding together on the same motorcycle but an hour later the appellant was seen in the same town riding the motorcycle alone. He
10 knocked down a boy called Omwony Richard and for that reason he was arrested and taken to Madiope Police Post where he was detained.

While he was still being detained it was reported that a person’s body was seen lying on the road. The police went to the scene and found the body of the deceased identified by the deceased’s identity card. In the meanwhile the appellant had escaped from the Police Post by telling the Police a lie that
15 he was going to have lunch and would come back which he never did. A joint search for him was conducted by both the police and the army during the day but he could not be traced. The search continued during the night and at around 2:00a.m. he was found in a bus heading to Kampala and re-arrested.

In his charge and caution statement recorded by DIP Atube George at Kitgum Police Station the
20 appellant stated that he killed the deceased in self-defence. He retracted this statement at his trial. The majority judgment agrees that there is sufficient evidence to show that the appellant killed the deceased. However, it criticizes the courts below as follows:

“Both courts below failed to consider the part of the statement which was in favour of the appellant and it is our duty as a second appellate court to scrutinize it in order to determine the nature of the offence committed by the appellant and whether there was any defence available to him.”

5 The part in the appellant’s charge and caution statement which is being referred to is part where the appellant states as follows:

*“ I asked the rider to take me to a detach of SPLA and get a man there who had the money.....mid way he stopped and got off the motorcycle... I requested him to go where I told him...he told me he was not proceeding...I then asked him ‘my brother what is the matter now’ he replied me that ‘do you
10 know that we boda boda riders are veterans and been fighting before you were born?’ There and then he caught me by the collar of my shirt. He slapped me. I had my gun put across my back. He pushed me down. He came down to me caught the sling of the gun. I got up and we started struggling over the gun. The gun was loaded with bullets in the chamber. As we struggled, one bullet was fired by him. That bullet missed [me] narrowly. Seeing that this man if he overpowered me would kill me. So I
15 kicked him and he fell down. I then shot him direct four bullets and he died there and then.”*

The Court of Appeal gave careful consideration of the appellant’s statement that he killed the deceased in self-defence and dismissed it. See pp.29 and 30 of the record. On page 30 the court stated:

**“....we do not agree with the counsel for the appellant that the trial judge did not
20 properly evaluate the evidence. However, we shall still examine whether the defence of self-defence is available to the appellant... However, it is important for us to state that the trial judge did not rely on the evidence of PW6 alone. The trial judge also pointed to the contradiction between the appellant’s charge and caution statement and the post mortem report...”**

The learned trial judge, more thoroughly in our view, evaluated the appellant's claim of self-defence and dismissed it as untrue. He stated:

5 **“In the view of court, largely what the accused stated in his charge and caution statement is not true. PW6 who visited the scene of crime just a few hours after the death of the deceased and also removed the body from the scene was able to observe only the motorcycle tyres prints on the ground. He specifically saw no signs of struggle. It was a dry season and the ground was clear. The scene was an all weather murrum road. Signs of struggle would have been clearly visible. PW8 found that the deceased was shot only by one bullet through the right side of his neck. It exited from the left side of the ribs. Where were the four bullets the accused claims to have pumped into the deceased?**

10 **If the accused shot the deceased under circumstance he described in exhibit 4, then why did he not report the incident at the nearest Police post which was at Madiope? He did not do so even during the period he stayed with the OC and PW6 at Madiope Police Post after PW2 had taken him there after the accident. Why did he take the deceased's motorcycle and start riding it at his own pleasure which resulted into the accident in which PW1 was injured?**

15 **And lastly, why did the accused sneak away from the Police at Madiope and disappear if he had such prominent and eloquent a defence? It is quite clear that the accused shot Otto not because of danger to him but because he either wanted to steal his motorcycle or for some other unknown reason.**

20 **But even if court were to believe that there was a struggle between the deceased and the accused, the accused was armed with a rifle, AK47, the deceased was not armed with anything. How could the deceased have posed a serious attack that could place the accused in immediate peril and necessitating instant action (shooting) to avert danger?**

In light of the brief analysis set out above, court finds that the defence of self-defence is clearly not available to the accused person. What he stated in his statement to the police but never repeated in court were mere lies fabricated to deceive the police.”

We entirely agree with the position of the two courts that the appellant, for reasons which were
5 clearly articulated by the learned trial judge, did not kill the deceased in self-defence. We also agree that the question whether or not a person acted in self-defence is a question of fact.

This court has stated in several decisions that a second appellate court should not interfere with the concurrent findings of fact of the courts below. It should only interfere if it is satisfied that the two courts applied wrong principles of the law. See for example, the case of **Kakooza Godfrey vs.**
10 **Uganda**, SCCA No. 03 of 2008.

The question is whether in this case the two courts below in dismissing the appellant’s claim of self-defence applied wrong principles of the law. Our respectful view is that they did not.

The Ugandan law on self-defence is still based on English law. Section 15 of the Penal Code Act states:

15 **“Subject to any express provisions in this Code or any other law in force in Uganda, criminal responsibility-**

(a) for the use of force in defence of a person and property; and

(b) in respect of rash, reckless or negligent acts,

shall be determined according to the Principles of English law.”

20

“A defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property... It must be reasonable.” (**Beckford V. The Queen** [1988] AC 130). Under English

law it is the jury to determine what is reasonable force after weighing all the circumstances of the case. In Uganda it is the court to determine the issue.

Perhaps the leading authority on self-defence is to be found in the case of **Palmer v. The Queen** [1971] AC 814. We will quote what the Privy Council stated in its judgment extensively because we
5 think it brings out clearly the principles that govern the defence of self-defence.

**The defence of self-defence is one which can be and will be readily understood by any jury. It is a straight forward conception. It involves no abstruse legal thought. ...Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may
10 do but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion
15 to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off
20 an old score or may be pure aggression. There may no longer be any link with a necessity of defence... If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its
25 raising possible, will only fail if the prosecution show beyond doubt that what the**

accused did was not by way of self-defence... If the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. (Our Emphasis) In a homicide case the circumstances may be such that it will become an issue whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury.

10 Under English law which we apply by virtue of section 15 of the Penal Code Act, where an accused is charged with murder, use of excessive force in self-defence does not change the conviction from murder to manslaughter. In the case of R v. Clegg, [1995] All ER 334, the defendant who was a soldier on patrol duty was convicted of the murder of the passenger and attempted murder of the driver of a stolen car. He pleaded he had fired at the car in self-defence and that of a fellow soldier he was on patrol duty with. The court upheld his conviction of murder and rejected the suggestion that he should have been convicted of manslaughter saying that under English law a plea of self-defence cannot reduce a culpable homicide from murder to manslaughter.

Therefore, as the court stated in that case, the defence of self-defence either succeeds or fails and there is no half-way house. We are of the view, therefore, that the case of Byabagambi vs. Uganda, SCCA No. 16 of 2002, where it was stated that “we think that the force by the appellant was excessive but not so excessive as to remove the defence of self-defence from the appellant” does not correctly represent the law on self-defence. The same applies to cases such as R v. Biggin 14 Cr. App. Rep. 87, R v. Howe (1958) 32 Australian Law Journal Reports, 212 and Robi v. R [1959] E.A. 660 (C.A) which were cited in the case of Manzi Mengi v. R [1964] E.A. 289. to say that “if the force used is excessive, but if the other elements of self-defence are present, there may be a

conviction of manslaughter” and which may have influenced the court’s decision in **Byabagambi vs. Uganda.**

If the accused raises self-defence as his or her defence, he or she has no duty to prove it. The duty remains on the prosecution. It is the prosecution to prove by evidence that the accused did not kill the
5 deceased in self-defence. In the case of **Ollo S/O Gai v. R** [1960] EA 86 the court held:

**In cases of where the evidence discloses a possible defence of self-defence, the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any defence apart from that of
10 insanity.**

We think that in the instant case the prosecution adduced sufficient evidence to establish that the appellant did not kill the deceased in self-defence. The trial court never placed the burden on the appellant to prove it.

The appellant did not raise the defence of provocation in his charge and caution statement. However,
15 he stated that the deceased caught him by the collar of his shirt, slapped him and pushed him down all of which would raise a claim by the appellant that he acted under provocation to shoot the deceased.

However, having dismissed the appellant’s charge and caution statement as largely untrue, and having considered the facts and circumstances before and after the shooting of the deceased, the two courts below rightly found it unnecessary to consider provocation as a possible defence. As was
20 stated in **Palmer v. Regina** (supra) “it is not every fanciful hypothesis that need to be presented for their [jury’s] consideration”.

In cases of homicide where the defence of self-defence fails, the prosecution still has a duty to prove that the accused killed the deceased with malice aforethought. Malice aforethought is not always

proved by direct evidence. Most often it is by inference from the circumstances under which the deceased was killed. In **Tubere S/O Ocan vs. Rex**, (1945) IEACA 63 the court set out circumstances which the trial court should consider in deciding whether there was malice aforethought in the killing of a person. These are: the type of weapon used, the nature of injury or injuries inflicted, the part of
5 the body affected and the conduct of the attacker before and after the attack.

In the instant case, the two courts below applied this test to conclude that the appellant killed the deceased with malice aforethought. We respectfully agree with them. The weapon used was a gun, an SMG rifle. According to the medical evidence the post mortem report indicated an entry wound on the right side of the neck, clots of blood on the mouth, bruises on the left side of the ribs, chest arms
10 and left lower limb. The cause of death was internal bleeding in the lungs. This indicates that the appellant shot the deceased on a very vulnerable part of his body.

In conclusion, it is our view, that the learned Justices of Appeal properly re-evaluated the evidence on record before agreeing with the learned trial judge that the appellant killed the deceased with malice aforethought. We have no doubt that the appellant was properly convicted of the offence of murder
15 contrary to sections 188 and 189 of the Penal Code Act.

We agree with the resolution by the majority members of the court of ground 2 of appeal.

In view of the majority decision on ground one that the appellant was only guilty of manslaughter we find it unnecessary to consider ground three on sentence.

5

Dated at Kampala this...9thday of.....April.....2018

Hon. Justice Jotham Tumwesigye

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JUSTICE OF THE SUPREME COURT

Hon. Justice Faith Mwendha

JUSTICE OF THE SUPREME COURT

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