THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CORAM: HON MR. JUSTICE G. M. OKELLO, JA

HON LADY JUSTICE A. E MPAGI-BAHIGEINE, JA

HON MR. JUSTICE A. TWINOMUJUNI, JA

HON LADY JUSTICE C. K. BYAMUGISHA, JA HON MR. JUSTICE S. B. K KAVUMA, JA

CONSTITUTIONAL PETITION NO 6 OF 2003

BETWEEN

SUSAN KIGULA & 416 OTHERS:::::::::::::::::::::::: PETITIONERS

AND

THE ATTORNEY GENERAL:::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT OF G. M. OKELLO, JA.

This petition was brought under article 137(3) of the Constitution of the Republic of Uganda challenging the Constitutional validity of the death sentence. The 417 petitioners were, at the time of filing the petition, on death row, having been convicted of offences under the laws of Uganda and

were sentenced to death, the sentence provided for under the laws of Uganda.

Briefly, the petitioners contend that the imposition of the death sentence on them was unconstitutional because it is inconsistent with articles 24 and 44 of the Constitution which prohibit cruel, inhuman or degrading punishment or treatment. According to them, the various provisions of the laws of Uganda which prescribe death penalty are themselves inconsistent with the said articles 24 and 44 of the Constitution. The petitioners contend in the first alternative that the various provisions of the laws of Uganda which provide for mandatory death sentence are inconsistent with articles 20, 21, 22, 24, 28 and 44 of the Constitution. According to them, though the Constitution guarantees protection of the rights and freedoms such as, equal treatment before the law, right to a fair hearing etc, the provisions which provide for mandatory death sentence contravene those Constitutional provisions: a convict who is sentenced under such a mandatory provision is denied the right to appeal against sentence only.

In the second alternative, the petitioners contend that a long delay between the pronouncement of the death sentence and the carrying out of the sentence, allows for a death row syndrome to set in. Carrying out of the death sentence after such a long delay constitutes a cruel, inhuman and degrading treatment prohibited by articles 24 and 44 of the Constitution.

In the third alternative, the petitioners contend that section 99(1) of the Trial on Indictments Act (Cap 23 Laws of Uganda) which provides for hanging as the legal mode of carrying out death sentence, was cruel, inhuman and

degrading as it contravenes articles 24 and 44 of the Constitution. They accordingly sought the following reliefs: -

(a) <u>Declaratory Orders</u>

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

(ii) 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;

(iii) sections 23(1), 23(2), 23(3), 23(4), 124, 129(1) 134(5) 189, 286(2), 319(2) and 243(1) of the Penal Code Act (Cap 120 of Laws of Uganda) and Sections 7(1) (a), 7(l)(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;

(iv) section 99(1) of the Trial on Indictments Act (Cap 23) and the relevant sections of and provisions made under the Prisons Act and referred to therein, are inconsistent with articles 24 and 44(a) of the

Constitution;

(v) that Section 9 of the Magistrates Court (Amendment) Statue (NO 6 of 1990) in so far as it repeals Part XV of the Magistrates Court Act of 1970, is inconsistent with Articles 28 and 44© of the Constitution;

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

(vii) that the time limitation of 30 introduced under Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992, Directions 1996 is in contravention with Article 137 of the Constitution;

(viii) That in the alternative, Sections 23(1), 23(2), 189, 286(2), 319(2) of the Penal Code Act Cap 120 of the Laws of Uganda and Section 7(1)(a), the Anti Terrorism Act (Act No 14 of 2002) and any other laws that prescribe mandatory death sentences are inconsistent with articles 20, 21, 22(1), 24, 28, 44(a), 44(c) and 45 of the Constitution to the extent that they provide for the imposition of a mandatory death sentences;

(ix) that Section 132 of the Trial on Indictments Act to the extent that it restricts the right of appeal against the sentencing component where mandatory death sentences are imposed is inconsistent with articles 20, 21, 22(1), 24, 28, 44(a), 44(c) and 45 of the Constitution

(b) **<u>The following redresses</u>**

(i) that the death sentences imposed on your humble petitioners be set aside;

(ii) that your humble petitioners' cases be remitted to the High Court to investigate and determine appropriate sentences under article 137(4) of the Constitution;

(iii) that your humble petitioners be granted such other reliefs as the court may feel appropriate.

The petition was supported by a number of affidavits sworn by some of the petitioners and a diverse categories of other deponents.

The respondent filed in his answers in which he denied all the allegations contained in the petition. He also supported his answers by some affidavits.

After the pleadings were concluded, counsel for both parties held a scheduling conference before the Registrar of this court on 5/5/2004. At the conference, the parties agreed on some facts and the issues to be determined by this court. Some of the facts they agreed on were: -

(1) that death penalty is a cruel form of punishment or treatment.

(2) that the petitioners who are convicted of offences which carry mandatory death sentences did not have a right to appeal against their sentences.

However, on 11/11/2004 counsel for the respondent in writing notified his learned friends for the petitioners that he intended to renege on the above agreed facts. When we met counsel for both parties in Chambers in the morning of 19/01/2005 before we entered court to start the hearing of this petition, learned counsel for the respondent reiterated their decision to renege on those facts. In their submission, they in fact treated the above two facts as being in issue and needed to be proved by the petitioners.

In their reply, counsel for the petitioners strongly opposed that conduct and urged court not to allow counsel for the respondent to renege on the facts which they had agreed on during the scheduling conference. That would be prejudicial to the petitioners' case and would set a very dangerous precedent to the lower courts.

Scheduling conference is not provided for in the **Modifications To The Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions, 1996.** (Legal Notice No 4 of 1996). It is invoked in the proceedings before this court by virtue of the rule 13 of Legal Notice No 4 of 1996. This rule empowers this court to apply with the necessary modifications, the practice and procedure in accordance with the Civil Procedure Act and the Rules made under the Act relating to the trial of a suit in the High Court. Scheduling Conference is provided for in Order XB of the Civil Procedure Rules as amended by Statutory Instrument No 26 of 1998. The purpose of Scheduling Conference is to save time of the court by sorting out points of agreement and disagreement so as to expedite disposal of cases. Like any other rules of procedures, this is an handmaid of justice. It is not intended to be an obstacle in the path of justice. Counsel for the respondent informed us from the bar that when they admitted those facts during the Scheduling Conference, they had not yet fully studied the case and the relevant authorities. They did not, therefore, appreciate the implications of their admission. When they later studied the case and the relevant authorities more fully, they decided to renege on their admission. That was why they wrote the letter to counsel for the petitioners indicating their intention to renege on their admission.

Article 126(2)(e) of the Constitution of this country enjoins courts to administer substantive justice without undue regard to technicalities. I think that counsel for the respondent gave to counsel for the petitioners reasonable notice of their intention to renege on their admission. This is the spirit of fair play. That notice gave counsel for the petitioners ample time to assemble the necessary evidence to prove the facts whose admission the respondent

wanted to renege on. I am satisfied in the circumstances of this case, that the change of mind by counsel for the respondent on the admission of the facts did not occasion a miscarriage of justice to the petitioners. On the contrary, to insist that the respondent sticks to the admission, would be contrary to the spirit of article 126(2) (e) above.

The issues that were agreed upon by the parties at the Scheduling Conference for determination of the court were as follows

(2) **”(1) whether the death penalty prescribed by various laws of Uganda constitutes inhuman or degrading treatment or punishment, contrary to article 24 of the Constitution. whether the various laws of Uganda that prescribe the death penalty upon conviction are inconsistent with or in contravention of articles 24 and 44(a) or any other provisions of the Constitution;**

(3) **whether the various laws of Uganda that prescribe mandatory sentences of death upon conviction are inconsistent with or in contravention of articles 21, 22, 24, 44 or any other provisions of the Constitution;**

(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 and any other provisions of the Constitution;**

(5) **whether the execution of the petitioners who have been on death row for a long period of time is inconsistent with and in contravention of articles 24 and 44, or any other provisions of the constitution;**

(6) **whether your petitioners are entitled to the remedies prayed**

for. ”

The task which this court is faced with in this petition is, therefore, to interpret the relevant provisions of the Constitution to answer the questions posed above. It is, I think, appropriate at this stage, to point out briefly, the principles of constitutional interpretation that will guide me in the task at hand.

These are: -

(1) It is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions. The widest construction possible, in its context, should be given according to the ordinary meaning of the words used. **(The Republic vs EL manu (1969) EA 357)**

(2) The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other **(Paul K. Ssemogerere and 2 others vs A. G Const. Appeal No 1 of 2002.)**

(3) All provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument **(South Dakota vs North Carolina, 192, US 268 (1940) LED 448.)**

(4) A Constitution and in particular that part of it which protects and entrenches Fundamental Rights and Freedoms are to be given a generous and purposive interpretation to realise the full benefit of the right guaranteed. In determining constitutionality both purpose and effect are relevant **[Attorney General vs Salvatori Abuki, Constitutional Appeal No 1 of 1998]**

(5) Article 126(1) of the Constitution of the Republic of Uganda enjoins courts in this country to exercise judicial power in conformity with law and **with the values, norms and aspirations of the people** (emphasis added.)

It is not surprising that article 126(1) of the Constitution of this country enjoins courts to have regards to the values, norms and aspirations of the people when exercising judicial powers. The reason can be discerned from the preamble of the Constitution. The preamble laments the history of this country that was characterised by political and Constitutional instability. Through their Constitution, the people resolved to break from their past in order to build a better future based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. With the above principles in mind, I shall now proceed to consider the above issues.

Issues Nos 1 and 2

I shall consider these two issues together for convenience. The gist of the petitioners' case in these issues is that death penalty is inconsistent with

articles 24 and 44(a) of the Constitution. They contend that these two articles read together, show that death penalty can not be imposed on any person under the Constitution of this country because it is cruel, inhuman and or degrading. The laws which prescribe death penalty are therefore, they submitted, unconstitutional and should be struck down for being inconsistent with those two articles.

Mr. John W. Katende argued these issues for the petitioners. He contended that the words in article 24 were to be read disjunctively and given their ordinary plain meaning. He cited the judgment of Oder JSC **in Attorney General Vs Salvatori Abuki, Constitutional Appeal No 1 of 1998.** He stated that the disjunctive approach meant that the petitioners would need to prove only one of the mutations stated in article 24 to succeed. Further, that once the court adopted that ordinary plain meaning approach, it would come to an irresistible finding that death penalty is a cruel, inhuman and degrading form of punishment. He pointed out that in the Tanzanian case of **Mbushu and Anor vs Republic (1995)** 1 LRC, 216 and in the South African case of **State vs Makwanyane (1995)** 1 LRC 269, the respective courts have held that death penalty is inherently cruel without any evidence.

In the instant case, however, learned counsel submitted, that the petitioners have adduced affidavits evidence for example, that of Anthony Okwonga (affidavit No 2 Vol 1), Ben Ogwang (affidavit no 3 Vol 1) etc to show that death penalty is inherently a very cruel, inhuman and degrading punishment.

He pointed out that the Supreme Court had found in Abuki's case (supra) that banishment was a cruel, inhuman and degrading punishment. Further, that this

court had also found in **Simon Kyamanywa vs Uganda, Constitutional Reference No 10 of 2000** that Corporal punishment was a cruel, inhuman and degrading punishment. He argued that since banishment and Corporal punishment were found to be cruel, inhuman or degrading form of punishment or treatment, this court should find no difficulty finding that death penalty is a cruel, inhuman and degrading punishment.

Learned counsel contended that death penalty is not only cruel but it is also inhuman. He cited cases to show that deliberate putting to death of a human being, that human being ceases to be a human. His humanity is taken away.

That death penalty is degrading in that it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the State.

In counsel's view, article 22(1) did not save death penalty, nor did it qualify or provide exception to article 24. If the legislature wanted that to be the position, it would have stated so expressly. There is however, he argued, an apparent conflict between articles 22(1) and 24, which this court has jurisdiction to harmonise. Once it is held that death penalty is cruel, inhuman and degrading and that article 24 outlaws such a punishment, then article 22(1) must give way. He pointed out that in the Tanzanian case of **Mbushu** (supra), despite the fact that death penalty was found to be inherently cruel, inhuman and degrading, it was not declared unconstitutional. This was because it was saved by article 30(2) of their Constitution.

He stated that, that scenario was not applicable to Uganda because of article

44(a). Article 44(a) was a Ugandan unique innovation in the 1995 Constitution. It was not present in the 1967 Constitution. The purpose was in view of our chequered history, to protect at any cost, those important and sacred fundamental pillars contained therein. The language of the article is clear. He stated that the Supreme Court had held in **Abuki's case (supra)** that there was 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 he or she was charged or convicted of a serious offence. He referred us to **Zachery Olum vs Attorney General (case No 7)** where this court (Twinomujuni, JA) had held that the language of article 44(a) admits of no other construction. It prohibits any derogation from the enjoyment of the rights set out therein regardless of anything else in the Constitution.

Mr. John W. Katende pointed out that though article 126(1) enjoins courts to exercise judicial power in conformity with law and aspirations of the people, that article does not override article 44. Clear language of the Constitution must prevail over opinion of the people.

On resolving the apparent conflict between articles 22(1) and 24, Mr. Katende contended that the holding in the Nigerian case of **Kalu vs State,** should not be followed because its approach conflicts which the plain ordinary meaning approach adopted by our Supreme Court in **Abuki's case** (supra.) He finally submitted that once it is held that death penalty is a cruel, inhuman and degrading punishment, contrary to article 24, then on the authorities of the Supreme Court and this Constitutional Court cited above, death penalty is outlawed by article 44 and should be declared unconstitutional. The provisions of the various legislations specified in paragraph 1(a) of the petition which prescribe death penalty should also be declared unconstitutional. Mr. Benjamin Wamambe submitted for the respondent on these issues. He contended that death penalty and the various provisions of the laws of Uganda which prescribe death penalty are not unconstitutional. Article 24 must be construed in the context of the Uganda Constitution, applying a dynamic and progressive principle of constitutional interpretation, keeping in mind the historical background of this country and the aspirations of the Ugandan people. He stated that once that approach is adopted, death penalty will not be found to be cruel, inhuman and degrading. He rejected the **"plain ordinary meaning"** approach stated in **Abuki's** case (supra). According to him, both **Abuki's case and Kyamanywa Simon** (supra) were distinguishable from the instant case. In **Abuki and Kyamanywa,** courts were interpreting Statutory provisions against a constitutional provision. In the instant case, the court is faced with the task of interpreting one constitutional provision against another. In **Abuki and Kyamanywa,** banishment and Corporal punishment respectively were not provided for in the Constitution. Death penalty on the other hand, is provided for in article 22(1), which came before article 24. It is his contention that the framers of the

Constitution could not have intended articles 24 and 44 to apply to death penalty. There is a well known rule of interpretation that to take away a right given by a statute, the legislature must do so in clear terms devoid of any ambiguity. He submitted that if the framers of the Constitution had intended to take away, by article 24, the right recognised in article 22(1), they would have done so in clear terms and not by implication. Article 24 was enacted when article 22(1) was still fresh in the minds of the framers

He submitted that death penalty is neither a torture, nor a cruel, inhuman or degrading punishment or treatment within the context of articles 24 and 44. Articles 24 and 44 were intended to address the bad history of this country, which was characterized by torture and arbitrary extra judicial killings. Now under article 22(1), death penalty is limited to specific situation. It follows a conviction in a fair trial by a court of competent jurisdiction in respect of a crime in Uganda, where both the conviction and sentence have been confirmed by the highest appellate court in Uganda. This provision satisfies all the essential requirements for a law derogating from basic rights because it provides

(a) adequate safeguard against arbitrary decision;

(b) effective control against abuse by those in authority when using the law and

(c) complies with the principle of proportionality. The limitation

imposed on the fundamental right to life is no more than reasonably necessary to achieve the legitimate object of the various laws of Uganda, which prescribe death penalty. The laws only net the targeted members of the society. He relied on **Mbushu & Anor vs Republic case No 9 Vol 1 of Petitioners list of Authorities.**

According to Mr. Wamambe, when interpreting article 24, the court should bear in mind article 126(1) which lays emphasis on the norms and aspirations of the people of Uganda. He pointed out that Justice Odoki's Constitutional Commission Report, 1992 and Professor Sempebwa's Constitutional Review Commission Report, 2003 both show that the majority of Ugandans still favour retention of death penalty. Because of this, death penalty is not yet viewed in Uganda as a cruel, inhuman and degrading punishment. He relied on the second limb of the decision in **Mbushu's case** (supra) where the Tanzanian Court of Appeal observed that it was necessary to influence public opinion to abolish death penalty.

He contended that the various provisions of the laws of Uganda, which prescribe death penalty are not inconsistent with articles 24 and 44(a) of the Constitution. They are Constitutional under articles 22(1), 28, 43 and 273 of the Constitution. He rejected the argument that article 44 was a super article. In his view, this article is only super in respect of the rights mentioned therein. The right to life is not included in that article. The reason is that the framers did not view the right to life as non derogable

He stated that the South African case of **State vs Makwanyane & Anor**

(1995) 1 LRC 269 was not relevant to the instant case because under the South African Constitution, the right to life is unqualified. Under the Uganda Constitution, the right to life is qualified. Death penalty is, therefore, validated as an exception to article 24. He also rejected the decision in the Tanzanian case of **Mbushu and Anor** (supra) that death penalty is inherently cruel, inhuman and degrading punishment as not applicable to Uganda because the Tanzanian Constitution does not have the equivalent of our article 22(1).

According to him, the relevant authority is the Nigerian decision in **Kalu vs the State (1998) 13 NIUL R54** because the constitutional provisions it considered are in pari materia with our articles 22(1) and 24 of the Constitution. He also relied on **Bacan Singh vs State of Punjab (1983) (2) SCR 583** where article 21 of the Indian Constitution which is similar to our article 22(1) was considered and the Supreme Court of India held that the right to life under the Indian Constitution was qualified. In those circumstances, the death penalty was constitutionally valid.

He invited us to hold that death penalty under Uganda Constitution does not constitute cruel, inhuman or degrading punishment within the context of article 24 and that the various laws of Uganda that prescribe the death penalty are not inconsistent with and do not contravene articles 24 and 44 or any other provisions of the constitution.

I must emphasise that from the submissions of counsel on both sides on these issues, the point for determination by this court is the constitutionality of death penalty in Uganda and the Constitutionality of the various provisions of

the laws of Uganda which prescribe death penalty. Determination of these questions hinges on the interpretation to be given to article 24. To better appreciate the arguments in this regard, it is necessary to reproduce the text of articles 22(1), 24 and 44 of the Constitution because they relate to the same issue.

They are:-
Article 22(1) provides:

> [66] **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.**

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

44: Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms: -

(a) freedom from torture, cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to fair hearing;

(d) the right to an order of habers corpus. ”

Mr. John Katende urged us to apply the **"ordinary plain meaning"** principle of interpretation when interpreting article 24 because this was decided so by the Supreme Court of this country in **Abuki's case** (supra). In that case, the passage cited was from the judgment of Oder JSC. They were considering article 24 of the Constitution and he said: -" **It seems clear that the words italicised have to be read disjunctively . The treatment or punishment prescribed**

by article 24 of the Constitution are not defined therein. They must, therefore, be given their ordinary and plain meaning. "

Clearly, according to the above passage from the decision of the Supreme Court, which is binding on this court, the words in article 24 are to be read disjunctively and given their ordinary and plain meaning. What did the learned Justice of the Supreme Court mean when he said **"given their ordinary and plain meaning? "**

It was stated in **Jaga vs Donges No 1950 USA 653,** a case cited in Makwanyane's case (supra) thus: -

" The often repeated statement that words and expressions used in a statute must be interpreted according to their *ordinary meaning* is the statement that they must be interpreted in the light of their context. (emphasis added). "

It is clear from the above passage that what the learned Justice of the Supreme Court meant when he said that the words in article 24 be given their

ordinary and plain meaning is that those words must be interpreted in the context of the Constitution in which they are used, but not in an abstract. In this regard, I agree, with respect, to Mr. Wamambe, that article 24 must be construed in the context of the Constitution.

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 our Constitution intended to take away, by article 24, the right they recognised in article 22(1)?

A similar question had earlier been considered in other jurisdictions. Their approach to the question, though only persuasive, may offer us some guidance, more so, when these decisions are from the common law jurisdictions, like us. In **Makwanyane's** case (supra) to which counsel for the petitioners referred us, the Constitutional Court of South Africa found death penalty to be inherently cruel, inhuman or degrading and, therefore, unconstitutional. Under the Constitution of South Africa, the right to life is unqualified.

In **Mbushu's case** (supra), which was also cited to us by counsel for the petitioners, the Court of Appeal of Tanzania, though it found that death penalty is inherently cruel, inhuman or degrading, declined to declare it unconstitutional. Their reason was that it was saved by article 30(2) of their Constitution. The right to life under the Tanzanian Constitution is, therefore, like under our Constitution, qualified. In the **Catholic Commission For Justice And Peace vs Attorney General (1993) 2LRC 279,** the Supreme Court of Zimbabwe held death penalty as well as the mode of carrying it out by hanging to be constitutional. The right to life under the Zimbawean Constitution is also qualified.

The Nigerian case of **Kalu vs the State (1998) 13NWR 531** is of particular interest to me here because the provisions of the Nigerian Constitution considered therein by their Supreme Court are in pari materia with our articles 22(1) and 24 now in question. Section 30(1) of the Nigerian Constitution provides

> **" Every person has a right to life and no one shall be deprived intentionally of his life save in execution of a sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. "**

That provision is in pari materia with our article 22(1) which 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. ”

Section 31(1) of the Nigerian Constitution provides thus: -

" Every individual is entitled to respect for dignity of his person and accordingly: -

(a) no person shall be subjected to torture or to inhuman or degrading treatment. ”

Section 31 (l)(a) of the Nigeria Constitution is in peri materia with our article 24 which provides thus; -

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

It is clear from the above provisions that the right to life under the Nigerian Constitution, like under our own Constitution, is qualified. The Supreme Court of Nigeria had no difficulty finding that death penalty which is expressly recognised in Section 30(1) of their Constitution is constitutional. If the legislature had intended to take away by section 3l(1)(a) the right it recognised in section 30(1) of the Constitution, it would have done so by clear terms and not by implication. The supreme Court of Nigeria followed the Jamaican decisions in **Noel Riley and other vs Attorney General for**

Jamaica and Anor (191983)1 AC 719(PC). Earl Pratt and Anor vs Attorney General for Jamaica and Another (1994)2 ACI(PC).

In those cases, death penalty was held to be constitutional because the right to life under the Jamaican Constitution is qualified.

I endorse the approach adopted in **Kalu's case.** I am, of course, aware of the strong criticism made by Mr. John Katende of the manner that case was handled.
His reasons were that in Kalu:

(1) the judgment was carelessly written.

(2) decided when the judiciary in Nigeria was not independent

(3) it did not apply ordinary and plain meaning principle of interpretation

(4) Nigeria Constitution does not have the equivalent of our article 44 and

(5) it cited and discussed an American case as a Hungarian case.

With respect, I am not persuaded by those reasons. It was not shown how the

manner of writing the judgment affected the ratio decidendi of the case. No iota of evidence was led to show that when the case was decided, the Judiciary in Nigeria was not independent. It is not shown that the decision is wrong in law. The case was decided on the basis that under Nigerian Constitution, the right to life is qualified.

In our case, article 22(1) recognises death penalty as an exception to the enjoyment of the right to life. There is a 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 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 they 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 prescribe death sentence are, therefore, not inconsistent with or in contravention of articles 24 and 44 or any provisions of the Constitution. In the result, I answer issues No 1 and 2 above in the negative.

This now leads me to issue No. 3 which is couched as follows: -

“ Whether the various laws of Uganda that prescribe mandatory

sentences of death upon conviction are inconsistent with or in contravention of articles 21, 22, 24, 44© or any other provisions of the Constitution. ”

1. This issue is argued in alternative to issues Nos 1 and 2 above. Professor Sempebwa who argued this issue for the petitioners contended that if the court found issues No 1 and 2 in the negative, it should find issue No 3 in the affirmative. In his view, the various laws of Uganda which prescribe mandatory sentence are inconsistent with or contravene articles 21, 22(1), 24, 28, 44(c) and 126(1) of the Constitution. His reasons are that: - mandatory sentence gives different treatment to a convict under that section from that given to a convict under a non-mandatory section in contravention of article 21 which guarantees equality before and under the law,

2. it denies a convict under mandatory sentence a fair hearing on sentence in contravention of articles 22(1), 28(1) and 44©,

3. it violates the principle of separation of powers provided in article 126(1).

He pointed out that the right to a fair hearing contained in articles 22(1) and 28(1) and entrenched in article 44© would require that: -

(a) a convict be accorded opportunity to present to court any mitigating circumstances and any special facts relating to the offence when it was committed, to distinguish it from the other offences in the same category in order to persuade the court in those circumstances that death penalty is not the appropriate sentence in his case:

(b) the convict would exercise a right of appeal against sentence only;

(c) the trial court would exercise discretion to determine the appropriate sentence in each case;

(d) the appellate court would also exercise discretion to confirm or not to confirm the sentence.

He submitted that all the above are denied the petitioners convicted under a mandatory sentence. They are not given opportunity to show cause why death sentence is not the appropriate sentence in their individual cases. These denial render the hearing on sentence unfair and unconstitutional as it contravenes articles 22(1), 28(1) and 44©. To emphasise this point, Professor Sempabwa cited the Indian case of **Mithu vs State of Punjab. (1983 Sol Case No 26).**

He further submitted that the trial court is also not given the chance under a mandatory death sentence provision, to exercise its discretion to determine an exact appropriate sentence based on the circumstances of each case and each offender. Even the highest appellate court, in case of those petitioners who have exhausted their right of appeal, did not have the chance to exercise its discretion whether or not to confirm the sentence. It will not also have that chance in the case of those petitioners who are yet to exhaust their right of appeal. In effect, there is no rational decision on sentence under a mandatory sentence provision. He submitted that failure to give the court opportunity to consider the circumstances of each case and offender to determine the appropriate sentence, but merely to impose a sentence on a class of crime

renders the hearing on sentence unfair and the imposition of sentence arbitrary. He cited the case of **Mithu vs State of Punjab (supra) Reyes vs The Queen (2002) 2 AC 235 (Case No 15 vol 2.)**

He stated that the principle of separation of power allocates to the legislature the duty to define offences and prescribe possible sentences for each offence. The determination of the exact appropriate sentence and imposition thereof is the duty of the Judiciary under article 126(1) of our Constitution.
He submitted that a statute which prescribes a mandatory sentence is an intrusion into the realm of the Judiciary and a violation of the principle of separation power. It is thus unconstitutional. To emphasise this point, learned counsel cited a number of decisions from other jurisdictions:

1. **Mithu vs State of Punjab (supra)**

2. **RV Hugh case No (17) vol 2**

3. **Downer Tracey vs Jamaican (case No 15 vol 2**

4. **Robert vs Luciano case No 20 vol 2**

5. **Lockie vs State of Ohio (case No 21 vol 2.**

He stated that the sum effect of these cases is that mandatory sentence of

death constitutes cruel, inhuman and degrading punishment. It does not allow consideration by the court of the circumstances of the offender and of the offence. It denies the convict a fair hearing on sentence, and that such a sentence is not confirmed by the highest appellate court as required by article 22(1). It also intrudes into the realm of the Judiciary. He urged us to declare all those statutory provisions which prescribe mandatory death sentence as unconstitutional.

For the Respondent, Mr. Wamambe did not agree with the above submissions. He contended that mandatory death sentence is just like any other sentence under the laws of Uganda. The fact that they are mandatory does not make them unconstitutional. They are not inconsistent with articles 21, 22(1), 24, 28, 44© as submitted by counsel for the petitioners.

He pointed out that clause 5 of article 21 is very clear on this point. It provides that nothing shall be taken to be inconsistent with article 21 which is allowed to be done under any provision of this Constitution. Since death penalty is allowed under article 22(1), the various laws of Uganda that prescribe mandatory death penalty upon conviction are not inconsistent with article 21. He also referred us to clause 4(b) and (c) of article 21 which empowers Parliament to make laws that are necessary for providing for things required or authorised to be made under this Constitution, or to provide for any matter acceptable and demonstrably justified in a free and democratic society.

He submitted that mandatory death sentence provision is authorised under article 22(1). Therefore, the various laws of Uganda that prescribe mandatory

death sentence upon conviction are not inconsistent with article 21 or any other provisions of the Constitution.

He contended in the alternative that mandatory death sentence is acceptable and demonstrably justified in Uganda within the context of articles 21(4) (c) and 43 because the majority of Ugandans approve of it. They view it as a fair penalty for heinous crimes. They accept it as a way of demonstrating their disapproval of such crimes. If the majority of Ugandans want violent crimes to be punished by death without any excuse so be it. It is consistent with article 21(4)(c). Therefore, prescribing mandatory death sentence is not inconsistent with article 21.

Fair hearing.

Mr. Wamambe contended that the elements of a fair hearing in Uganda are exhaustively listed in article 28. Once these are complied with, then a fair hearing requirement will have been observed. Our criminal system observe them. Article 28(12) empowers Parliament to define offences and prescribe sentences for them. It does not prohibit Parliament from prescribing mandatory death sentence.

The requirement of confirmation of conviction and sentence under article 22(1) shows that both conviction and sentence are opened to automatic review on appeal. The conviction and sentence are inseparable. It is unfortunate to argue that mandatory sentences deprive courts of their discretion to determine appropriate sentences and that appellate courts merely rubber stamp the decision of the trial courts on sentences. Courts in Uganda

have absolute and unqualified discretion to decide on: -

1. whether or not a case has been proved to the required standard;

2. to take into account all available defences whether raised or not by the accused;

3. to acquit or convict on lesser offence where the evidence so proves and to call upon a person found guilty to show cause why the sentence should not be passed on him or her according to law. (S. 98 of the Trial on Indictments Act Cap 23).

He likened criminal system in Uganda to a pyramid. Many are charged, but few are convicted and sentenced. Still further, very few sentences imposed are confirmed by the highest appellate court. All these, he submitted, are a result of a fair hearing as stated in Olubu's affidavit.

I have already found on issues Nos 1 and 2 above that death penalty is recognised under our Constitution in article 22(1) as an exception to the enjoyment of the right to life and as an exception to article 24. It is permissible 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. The criteria for death sentence to be constitutionally permissible under this Constitution are therefore, that: -

(a) the sentence must be passed in a fair trial.

(b) in respect of offence under the laws of Uganda and

the conviction and sentence have been confirmed by the highest appellate court. The term **"fair trial or hearing"** has not been defined in our Constitution. Mr. Wamambe submitted that the elements of a fair hearing have been exhaustively listed in article 28 of the Constitution and that once those elements are complied with, then for Uganda's purpose, the requirement of a fair hearing will have been observed.

Article 28 provides thus:

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

(2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or National security, as may be necessary in a free and democratic society

(3) every person who is charged with a criminal offence shall: -

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

(b) be informed immediately, in a language that the person

understands of the nature of the offence;

(c) be given adequate time and facilities for the preparation of his or her offence;

(d) be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;

(e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to a legal representation at the expense of the State:

(f) be afforded, without payment by that person, the assistance of an interpreter if that person can not understand the language used at the trial.

(g) be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.

(4) Nothing done under the authority of any law shall be held to be inconsistent with: -

(a) paragraph (a) of clause (3) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts.

(b) paragraph(g) of clause 3 of this article, to the extent that the law imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused are to be paid their expenses out of public funds.

(5) Except with his or her consent, the trial of any persons shall not take place in the absence of that person, unless that person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the person to be removed and the trial to proceed in the absence of that person.

(6) A person tried for any criminal offence, or any person authorised by him or her, shall, after the judgment in respect of that offence, be entitled to a copy of the proceedings upon payment of a fee prescribed by law.

(7) No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.

(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

(9) A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence, shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(10) No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.

(11) Where a person is being tried for a criminal offence, neither that person, nor the spouse of that person shall be compelled to give evidence against that person.

(12) Except for contempt of court, no person shall be convicted of a criminal offence, unless the offence is defined and the penalty for it prescribed by law. ”

It is clear from the above that article 28 has not exhaustively listed the elements of a fair hearing. Notably absent from that list is the right of the convict to be heard in mitigation before sentence is passed on him or her. Conspicuously absent from that article is also the right of the court to make inquiries to inform itself before passing the sentence, to determine the appropriateness of the sentence to pass.

In other jurisdictions, mandatory death sentence has been held to be unconstitutional because

(1) it does not provide a fair hearing because it does not permit the convict to be heard in mitigation before sentence.

(2) it violates the principle of separation of power, as it does not give the court opportunity to exercise its discretion to determine the appropriateness of the sentence to pass. The court passes the sentence because the law compels it to do so.

Mithu vs State of Punjab (supra)is a case in point. In that case, the Constitutionality of section 303 of the Penal Code of India was challenged. It was alleged that the section was inconsistent with article 21 of the Constitution of India which provides: -

> **"No person shall be deprived of his life or personal liberty, except according to fair, just and reasonable procedure established by valid law. ”**

The said section 303 prescribed mandatory death penalty for murder committed by a person serving a life sentence. It was argued for the challenger that section 303 was wholly unreasonable and arbitrary and thereby it violates article 21. The procedure by which section 303 authorises the deprivation of life was unfair, unjust and accordingly, the section was unconstitutional.

Accepting the above argument, the Supreme Court of India observed thus: -

> **“ it is a travesty of justice not only to sentence a person to death, but to tell him that he shall not be heard why he should not be sentenced to death. ”**

The Supreme Court further said: -

> **“ If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels court to impose that sentence. ”**

The Supreme Court struck down the said section 303 of the Indian Penal Code as being unconstitutional for being unfair and unjust because

(1) it did not permit the life-convict to be heard in mitigation before sentence was passed on him

(2) it also did not give the court opportunity to exercise its discretion to determine the appropriateness of the sentence it passed. The court passed the sentence of death because the law compels it to impose it.

(3) denying the court to exercise its judicial discretion to determine the appropriateness of the sentence was an intrusion into the realm of the judiciary and thus, a violation of the principle of separation of

power.

In Soering vs UK (1989) EHRR 439, the Board was asked to consider the constitutionality of mandatory sentence of death for murder by shooting.

The Board was satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction for murder by shooting without affording him opportunity before sentence, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and in appropriate, was to treat the defendant as no human being would be treated. It was unconstitutional.

In Uganda, section 98 of the Trial on Indictments Act provides the procedure to be followed by court after entering a conviction and before sentence. The procedure permits the court to make inquiries before passing sentence to inform itself on the appropriateness of the sentence to pass. The section provides, as far as is relevant, as follows: -

> **" The court, before passing any sentence *other than a sentence of deaths* 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----------. "**
>
> (emphasis added).

That provision makes a distinction between a person convicted under a

mandatory sentence of death provision and those convicted under other provisions. It denies the court the chance to inform itself as to the appropriateness of the death sentence. In other words, a convict of an offence under a mandatory sentence of death provision is told that he or she can not be heard on why in all the circumstances of his or her case, death sentence should not be imposed on him or her. I can think of no possible rationale at all for that distinction yet, a person facing death sentence should be the most deserving to be heard in mitigation.

Mr. Wamambe submitted that in view of article 126, if the majority of the people of Uganda want violent crimes to be punished by death without any excuse so be it. While I agree with Mr. Wamembe that the norms and aspirations of the people must be taken into consideration when interpreting this Constitution, the language and spirit of the Constitution must not thereby be compromised. Article 22(1) permits death sentence in execution of a sentence passed in a fair trial. That is clear. A fair hearing must basically mean hearing both sides. Refusing or denying a convict facing death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. It is neither consistent with the principle of equality before and under the law guaranteed in article 21, nor with the right to a fair hearing guaranteed in articles 22(1), 28 and entrenched in article 44(c).

That procedure which denies the court opportunity to inform itself on any mitigating factors regarding sentence of death, deprives the court the chance to exercise its discretion to determine the appropriateness of the sentence. It compels the court to impose the sentence of death merely because the law directs it to do so. This is an intrusion by the legislature into the realm of the

Judiciary. Our Constitution has spelt out the powers of the three organs of the State; namely, the Executive, the Legislature and the Judiciary. It gives the Judiciary the power to adjudicate. Therefore, for the legislature to define the offence and prescribe the ***only*** sentence which the court must impose on conviction without affording the court opportunity to exercise it discretion to determine the appropriateness of the sentence, is clearly a violation of the principle of separation of power. A similar conclusion was arrived at by the Supreme Court of India in **Mithu vs State of Punjab** (supra).

Article 22(1) requires that both conviction and sentence of death be confirmed by the highest appellate court. Mr. Wamambe submitted that conviction and sentence under a mandatory sentence of death provision are inseparable. Once the conviction is confirmed, the confirmation of sentence follows automatically. With respect, I am not persuaded by that argument. A generous purposive interpretation of article 22(1) does not bring out that meaning. Instead, it conveys the meaning that conviction and sentence be confirmed by the highest appellate court. I am inclined to agree with Professor Sempebwa that this confirmation would require exercise of discretion by the appellate court on whether or not to confirm the sentence. This would be done upon consideration of the circumstances of the offence and of the offender, since the circumstances of murders or aggravated robbery and of their offenders are not exactly the same. Those differences determine the appropriateness of the sentence to be imposed in each case.

As pointed out above, this problem is caused by the procedure provided in section 98. It does not permit the convict under a mandatory sentence of death provision to be heard in mitigation before he or she is sentenced. The court is also not permitted to inform itself on the appropriateness of the sentence to

pass in the case of mandatory death sentence. The sentence is not strictly confirmed within the spirit of article 22(1).

Section 132 (l)(b) of the Trial on Indictments (Cap 23) provides: -

" Subject to this section-

(a) .....;

(b) an accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law....."

The above provision denies a person who is convicted and sentenced under a provision where sentence is fixed by law to appeal against sentence only. Yet article 21(1) of the Constitution guarantees equal protection before and under the law. There is no justifiable reason for denying a convict who is sentenced to a sentence fixed by law to appeal against sentence only, for example, death sentence for murder or aggravated robbery to appeal against sentence only but allow others whose sentences are not fixed by law. This, in my view, is repugnant to the principle of equality before the law and fair trial.

In the result, I find that the various provisions of the laws of Uganda which prescribe mandatory death sentence are unconstitutional. They are inconsistent with articles 21, 22(1), 24, 28, 44(a) 44(c) of the Constitution.

I now turn to issue No 4 which reads thus: -

"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, 44 and any other provisions of the Constitution. ”

Mr. Sim Katende argued this issue for the petitioners. He stated that this issue too was being argued in alternative to issues 1 and 2. He contended that the manner of carrying out death penalty by hanging was inconsistent with the Constitution. The law that prescribes the mode of carrying out death sentence by hanging was inconsistent with articles 24 and 44(a). The method of execution by hanging is cruel, inhuman and degrading and, therefore, inconsistent with articles 24 and 44(a). These two articles, he stated, read together, bar cruel, inhuman and degrading punishment or treatment. He adopted the argument made for the petitioners on issues 1 and 2 about the definition of the terms cruel, inhuman and degrading and approach to their interpretation. That the words in article 24 be read distinctively and given their ordinary plain meaning as was decided in **Abuki's case (supra).** He cited **Republic vs Mbushu & Another (1994) 2LRC 335; Mbushu & Another vs Republic (1995) 1LRC 216; State vs Makwanyane (1995) 1LRC 269; Campell vs Wood (18 F. 3rd 662 - US** th
9 Circuit Court of Appeals) to show that execution by hanging had been held in other jurisdictions to be inherently cruel, inhuman and degrading. No evidence had been adduced to prove the same.

Learned counsel pointed out that in the instant case, the petitioners have adduced several affidavits evidence to show that hanging is cruel, He cited the affidavits of Anthony Okwanga, affidavit No 2 (vol 2); of Ben Ogwang, affidavit No 4 (vol 2) paragraph 7; of Mugerwa Nyansio, affidavit No 6 (vol

2) ; of Edward Mary Mpagi, affidavit No 5 (vol 2); of Tom Balimbya, affidavit No 14 (vol 3); of Vincent Oluka, affidavit No 5 (vol 2) and of David Nsalasata, affidavit No 9 (vol 2) to support the cruelty of death by hanging.

He also cited the affidavits of **Dr. Albert Hunt, affidavit No 5 (vol 10)** and of **Dr. Herold Hilman, affidavit No 4 (vol 10)** to emphasise that execution by hanging is cruel, inhuman and degrading. These last two deponents are medical doctors. Dr. Hillman had been a Director of Unity Laboratory of Applied Neurobiology USA, while Dr. Hunt had practised as a Forensic Pathologist in the UK for forty-five years. Their opinion is that death by hanging is cruel, inhuman and degrading as by that method death was not always instantaneous. It was long, unnecessarily torturous and painful. In the process of execution by hanging, the victim often defecates on himself and his eyes popes out of the sockets. At times, the condemned is decapitated in the process when the machine goes bad.

Learned counsel prayed that in view of the cases cited above and the evidence adduced, court should find that section 99(1) of the Trial on Indictments Act is inconsistent with articles 24 and 44(c) and should, therefore, be declared unconstitutional.

Mr. Chibita submitted for the respondent on this issue. He contended that since death penalty was saved by article 22(1) and is, therefore, constitutional, it was necessary to provide for the mode of implementing it. Section 99(1), therefore, provided the needed mode. It is also constitutional. The legislature must have, in its wisdom, found this method to be the best. He denied that

hanging was done in public as suggested in Anthony Okwonga's affidavit, nor was it opened to other prisoners. He stated that if Okwanga ever witnessed any hanging, it was when he was a prison officer, not when he is now on the death row.

He discarded **Abuki's case** (supra) as well as **Kyamanywa's case** (supra) both as not relevant because they materially differ from the instant case. In both cases, the court was not interpreting one provision of the Constitution against another as it is in the instant case, nor was it interpreting it in light of the Trial on Indictments Act.

He also discarded the decisions from foreign jurisdictions cited to us as being irrelevant. For **Mbushu's case** (supra) he stated that the Tanzanian Constitution does not contain an equivalent of our article 126(1). He discarded the ration decidendi in **Makwanyane's case** because the right to life under the Constitution of South Africa where the case was decided, is different from the one under our own Constitution. In South Africa, the right to life is unqualified, but in Uganda, the right to life is qualified. He prayed that this issue be answered in the negative.

The issue raised here is whether the method of execution by hanging as prescribed by section 99(1) of the Trial on Indictments Act constitutes a cruel, inhuman or degrading punishment and, therefore, violates our Constitution. The starting point is that I have already found on issues 1 and 2 above that death penalty is recognised under article 22(1) of our Constitution as an exception to the right to life. I also found that in a proper interpretation, articles 24 and 44(a) were not intended to apply to death penalty permitted

under article 22(1).
In other jurisdictions, like Nigeria and Jamaica, where the right to life under their Constitutions was, like ours, qualified, hanging as a method of execution was held to be constitutional.

A close study of the Jamaican case of **Earl Pratt and Another vs Attorney General for Jamaica and Another** (supra) shows that sections 14(1) and 17(1) of the Constitution of Jamaica which the court considered in the above case are in pari materia with our articles 22(1) and 24 respectively. That made the right to life under the two Constitutions the same - both qualified.

Our Constitution, however, does not contain the equivalent of section 17(2) of the Jamaican Constitution which provides thus: -

> **"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day. ”**

Lord Griffith, who delivered the judgment of the Privy Council held in the above case that hanging which was a lawful method of execution in Jamaica before Independence was saved by section 17(2). It could not, therefore, be held to be an inhuman mode of punishment for murder.

Notwithstanding the absence in our Constitution of an article equivalent to

section 17(2) of the Jamaican Constitution, the right to life under the Constitutions of both countries is qualified. 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 can not be held to be cruel, inhuman and degrading. Articles 24 and 44(a) do not apply 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).

In the result, issue No 4 would be answered in the negative.

The next to consider is issue No 5 which is couched as follows: -

> **"Whether the execution of the petitioners who have been on death row for a long period of time is inconsistent with articles 24, 44 or any other provisions of the Constitution. "**

Professor Sempebwa who argued this issue on behalf of the petitioners stated that the issue was argued in a further alternative to issues 1 and 2. He contended that the petitioners' long delay on the death row rendered carrying out of the otherwise lawful sentence a cruel, inhuman and degrading punishment. He pointed out that the evidence on record, affidavit of Sam Serwanga vol 4, annexture B, shows that the longest on the death row, Ben Ogwang, at the time of filing this petition on 4/09/2003, had been on there for 20 years since sentencing. The average length on the death row in Uganda is

between 5 and 6 years.

He stated that the aspect of evidence adduced paints grim picture of the conditions in the death row. They are characterised by anguished expectation of death at any time at the hand of the State. That reduces the petitioners into ***"living dead"*** suffering from death row syndrome. They go through very harrowing experience whenever they see their mates separated from them and later they received chits from their separated mates as their will.

Executions are carried out early morning and within the hearing of the other condemned inmates. This adds to the anguish. For these factual situations, Professor Sempebwa relied on the evidence of Ben Ogwang, affidavit No 3 vol 2 and of Mpagi, affidavit No 4 vol 2.

Learned counsel submitted that even if the court were to find that death sentence was recognised under article 22(1) and therefore, lawful, the petitioners still had a right not to be subjected to cruel, inhuman or degrading treatment resulting from death row syndrome. He pointed out that death row phenomenon was recognised worldwide. Even our own Supreme Court had recognised it in Abuki's case (supra). He relied on the case of the **Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General and Others (1993) 2LRC 279)** where the Supreme Court of Zimbabwe agreed that the petitioners' 5 years delay on the death row, in demeaning physical conditions, since the pronouncement of their sentences, went beyond what was constitutionally permissible. The delay caused prolonged mental suffering and was inordinate when compared with the average length of delay in carrying out execution in Zimbabwe. The

Supreme Court accordingly, set aside the petitioners' death sentences and substituted them with a sentence of life imprisonment.

Learned counsel also cited **Earl Pratt and Morgan vs Attorney General of Jamaica and others (case No 27 vol 3) No 210 of 1986 and 225 of 1987.** In that case, the Privy Council stated that for Jamaica where there is only one appeal step, a protracted appeal process beyond two years was tending towards unreasonable delay. If there was inordinate delay in executing the sentence of death, the condemned prisoners, had the right to come to court to examine whether, owing to the delay, the sentence of death should be carried out.

The Privy Council decided that the death sentence of the appellants should not be carried out because they had delayed on the death row for a long time suffering from death row syndrome.

Relying on the above cases, learned counsel urged us to find that those petitioners who have been on the death row for 5 years and above since the pronouncement of their respective sentences of death have waited too long. The long delay coupled with the anguish had rendered the execution of those petitioners a cruel, inhuman and degrading punishment.

Mr. Wamambe did not see anything in articles 24 and 44 (a) of our Constitution which outlaws delay on the death row for a long time. He submitted that no time limit had been prescribed either in the Constitution or

in any statute within which a death sentence has to be executed. The term ***"a very long time"*** was subjective.

According to him, Article 121 sets out an Advisory Committee on Prerogative of Mercy to advise the President on when to grant a pardon etc or to remit part of the sentence imposed. This article also does not prescribe or set a time frame within which to exercise those powers. Had the framers of the Constitution wanted, they would have expressly set the time frame within which a sentence of death should be executed: Courts have no powers to legislate on time limit. The President must be given a chance to exercise his discretion unhinded.

On the anguished expectation of death by the petitioners all the time, Mr. Wamambe submitted that all of us must think about death, not only the petitioners. Just because the petitioners think about death every day should not lead us to think that death is cruel, inhuman or degrading. The death sentence imposed on the petitioners was after a fair trial and it is lawful. The petitioners should be thankful to live a few days longer.

He pointed out that there are a number of affidavits on record which show that those on the death row make peace with their Creators. That is the aspiration of many, the world over. Yet this opportunity is never availed to most victims of murders.

He stated that the **Catholic Commission for Justice and Peace in Zimbabwe** (supra) and **Pratt and Morgan** (supra) were not relevant authorities. They are distinguishable from the instant case on their facts. In

those cases warrants for the petitioners' execution had already been issued, but in the instant case, no such a warrant has been issued yet. The petition is, therefore, premature. He stated that the petitioners should have waited until their warrants for execution were signed to petition. According to him, the affidavit of Anthony Okwonga shows that once death warrant was signed, the condemned prisoner was given one week within which to prepare himself and contact his relatives. Mr. Wamambe submitted that, that one week's, period, would give the condemned prisoner ample time to petition the court.
He invited us to decline to rule on this issue as the Supreme Court of Nigeria did in **Kalu's case** (supra).

The imposing question that arises from the arguments of counsel of both parties is - **Do condemned prisoners have any fundamental rights and freedoms left to be protected before they are executed?** This question was answered in the **Catholic Commission for Justice and Peace in Zimbabwe** (supra) in this way: -

> **" Prisoners did not lose all their constitutional rights upon conviction, only those rights inevitably removed from them by law either expressly or by implication. Accordingly a prisoner who was sentenced to death still enjoyed the protection of section 15(1) of the Constitution of Zimbabwe in respect of his treatment during confinement. "**

I respectfully agree with the above. Section 15(1) of the Zimbabwean

Constitution is in pari materia with our article 24. Condemned prisoners, therefore, did not lose all their constitutional rights and freedoms, except those rights and freedoms that have inevitably been removed from them by law, either expressly or by necessary implication. I have stated earlier in this judgment that death sentence is recognised under article 22(1) of the Constitution of Uganda and, therefore, constitutional. Nevertheless, the condemned prisoners are still entitled to the protection of articles 24 and 44(a) of the Constitution in respect of their treatment while they are in confinement before execution. They are not to be subjected to cruel, inhuman or degrading treatment.

The burden is of course, on the petitioners to prove that their fundamental rights and freedoms have been violated. The principle of interpretation of constitutional provisions relating to fundamental rights and freedoms would apply. Such provisions are interpreted liberally.

It was submitted for the petitioners that the intervening long delay on the death row, coupled with the harsh and difficult conditions in the death row, sets in what is known as ***"death row phenomenon"*** which renders the carrying out of the otherwise lawful sentence of death a cruel, inhuman or degrading punishment prohibited by articles 24 and 44(a). The question raised here is, what is the effect of delay on the death row on the condemned prisoners?

In other jurisdictions, for example, Zimbabwe in the **Catholic Commissioner for Justice and Peace in Zimbabwe** (supra), and in **Jamaica in Earl Pratt and Morgan** (supra), that question was answered that prolonged delay on the death row had adverse effect on the condemned prisoners' physical and

mental state as a result of what is known as ***"death row syndrome."*** Death row syndrome amounts to a cruel, inhuman or degrading treatment. Death row syndrome arise from the harsh conditions and anguish in the death row. It is recognised worldwide. Uganda as a member of the global village can not shut its eyes to the fact of death row phenomenon.

Ben Ogwang, the 3rd petitioner herein, deponed that he had lived in the Condemned Section of Luzira Prison since 1983. He has been transferred to Kirinya prison - Jinja in April 2003. He still remains the longest surviving prisoner on the death row having lived there for 20 years. He deponed of the conditions in the condemned section (death row) of Luzira Prison, as follows: -

> **" The living conditions are extremely depressing. When I was first brought to the condemned section, I and my fellow death row inmates were only allowed 48 (forty eight) minutes a day out of our cells. 24 (twenty four) minutes of this in the morning and the remainder in the evening. This time was normally used for us to empty and clean our chamber pots/buckets. I and my fellow death row inmates spent over 23 (twenty three) hours a day in our cells. In 1991, after Mr. Joseph Etima became Commissioner of Prisons, the period we were allowed out of our cells was increased and inmates in Luzira are now confined for approximately only 16 — 18 (sixteen to eighteen) hours each day in our cells. Inmates in Kirinya Jinja Prison are only allowed 2 (two) hours of exercise each day, l(one) hour in the morning and 1 (one) hour in the evening.**
>
> **The lights in the cells are left on all nights, making it difficult for us**

to sleep properly. This normally leaves us in a permanent state of tiredness, lethargy leading to lack of concentration, insomnia and virtually makes us walking zombies.

The cells are very cold at night. There are no provisions to keep out mosquitoes and I and my fellow death row inmates very often suffer from malaria, from which some die.

I and my fellow death row inmates do not have night clothes. Since in most cases I and my fellow death row inmates only have 1 (one) set of sometimes threadbare and tattered uniform, most of us are forced to sleep naked. This compounds our degradation and humiliation.

When I and my fellow death row inmates lie in our overcrowded cells, there is barely enough room to move around. This makes it easy for contagious diseases like tuberculosis, common cough, colds and other infections in prison to become chronic epidemics.

Sometimes, when prisoners on death row get sick, the hospital staff are reluctant to give us proper medicines and medical attention. The medical staff sometimes tell us that since I and my fellow death row inmates are going to be hanged anyway, they do not need to waste the scarce drugs on us. This increases the depression among prisoners on death row.

The cells in Luzira have no toilet facilities. Because I and my fellow death row inmates spend most of the day inside these cells, our urination and defecation happen in open chamber pots. It is very degrading to human dignity for a human being to be forced to defecate or urinate in the presence of others. This is even more humiliating when one is suffering from diarrhea and has to use the chamber pots frequently.

The resentment of our cellmates when they see us urinating and defecating in the chamber pots, frequently makes our living conditions intolerable, especially if the pots accidentally spill or fill up. There is no toilet paper provided by the prison authorities.

In addition to the indignity of using the chamber pots with others watching, is the additional indignity of having to watch others defecate or urinate in your presence. This is extremely revolting and shocking to ones senses, and difficult to explain to people who do not live with it every day of their lives. Sometimes, this takes place when I and my fellow death row inmates are eating. Then I and my fellow death row inmates have to sleep with an open bucket full of faeces and urine next to us. This is extremely inhuman and degrading treatment. Human beings were not meant to be confined in such circumstances.

The meals are often inadequate and poorly prepared. Many prisoners' stomach can not cope with them. The timing of meals is

extremely erratic. Sometimes the last meals of the day is served in the morning hours and I and my fellow death row inmates have to cope until the next morning. The quality and quantity of the meals is extremely bad. I and my fellow death row inmates normally have one lump or posho and a few beans a day, sometimes served together, and at other times served separately in an erratic, random order.

Life in the condemned section revolves around talking about our impending fate. The gallows are never far from our minds, and horrific stories around in both the prison community and from the guards about previous executions. This adds to the terror I and my fellow death row inmates are forced to confront on a daily basis.

1 and my fellow death row inmates are under surveillance at all times and I and my fellow death row inmates are subject to impromtu spot checks.

While I have been in the condemned section, very many inmates have died of diseases related to physical and metal anguish, physical hardship, poor feeding, depression and many other causes. Very many death row prisoners have died within the condemned section in such circumstances, before their executions were carried out. A list of some of those inmates who died is hereto attached and marked as annexture 'A'.

The presence of the gallows in the condemned section serves as a constant reminder that I and my fellow death row inmates are in

prison to be executed.

I have been an inmate of the condemned section of Luzira prison for the past 20 (twenty) years and hence, I was present when the 1989, 1991, 1993, 1996 and 1999 executions were respectively carried out. ”

He deponed to the conditions in the condemned prison a week before and immediately after the execution process as follows: -

" When there is going to be an execution, I and my fellow death row inmates suffer a living hell on earth. I can describe the circumstances as best as I can below: -

While I and my fellow death row inmates are on death row, I and my fellow death row inmates are never informed of when an execution is due to take place or who is going to be executed. At all times, I and my fellow death row inmates, therefore, do not know when they are coming for us. This practice of being left in suspense adds to our constant daily fear, mental anguish and torture.

In the past 20 years, every time an execution was going to take place, I and my death row inmates were left guessing and worried. The signs that indicate to us that an execution is going to take place are any unusual activity. For example, if I and my fellow death row

inmates are locked in our cells beyond the usual time, or every time new guards or strange faces emerge, I and my fellow death row inmates immediately break in to a panic thinking that an execution is going to take place. There is no other way I and my fellow death row inmates can know when an execution is going to take place or who is to be executed. So I and my fellow death row inmates live in constant fear to any unusual activity. This means that the slightest thing that is different from our normal routine causes us all to become sick and scared. I and my fellow death row inmates face this for several years. This state of fear is based on the condemned prisoners experience just before each previous executions.

Sometimes, while I and my fellow death row inmates are outside exercising, the guards suddenly call for lock up before the usual time. After I and my fellow death row inmates have been locked up in our cells, the guards come and call out names at random. This is an extremely terrifying event, and a person needs to live it to believe it. At times, I and my fellow death row inmates are all very scared and are praying hard that they do not call our names. If a guard comes and stops outside a condemned prisoner's cell door, the said prisoner usually immediately feels his bowels opening up and ends up soiling himself. In such circumstance, the prisoner is so scared that they have come to arrest him for execution. This experience is like going through death yourself. I have endured this excruciating experience very many times and I still have recurring nightmares about it.

Those who are marked for death and called out of their cells in the above circumstances are literally dragged out of their cells. Many

are taken while they are wailing, kicking and screaming and this adds to our total fear, shock and horror. They are hand cuffed and legs irons are put on their legs. At that time I and my fellow death row inmates see them for the last time and I and my fellow death row inmates know that they are being led to their death. This is very tormenting on our souls as I and my death row inmates watch in horrific specter. They are then led upstairs to the death chambers. I and my fellow death row inmates then hear them crying, wailing and singing hymns. Immediately, a funeral atmosphere engulfs in the entire condemned section. Because these are the only people who I and my fellow death row inmates live with and interact with in our lives for several years, when they are called to their death, it is as though they are going to kill our nearest and dearest relatives and their death inevitably reminds us of our impending fate. While I and my fellow death row inmates are going through the pain and suffering of our colleagues, I and my fellow death row inmates are also contemplating our own death in this cruel, inhuman and degrading fashion and I and my fellow death row inmates feel as though I and my fellow death row inmates are the ones being hanged from the neck until I and my fellow death row inmates die. This is made particularly worse in that while most death occur in sudden and unexpected fashion, I and my fellow death row inmates know that the condemned prisoner is going to be executed and the said prisoner is going to suffer a very painful and deliberately cruel death. This experience reminds the rest of us that our day of execution is not far at hand and can come at anytime. One can not describe adequately the

horror that goes on in our minds at this time.

The execution process normally takes up to 3(three) days and during these days I and my fellow death row inmates are not allowed out of our cells. I and my fellow death row inmates are only allowed out of our cells when all the prisoners due to be executed have actually been executed and certified dead.

During this period of forced confinement, I and my fellow death row inmates can hardly move. I and my fellow death row inmates are forced to live, sleep and eat in the same confined a conditions, with human excrement overflowing, and there is virtually no appetite for food. One can not sleep or even converse with cellmates. There is normally a dead silence and each of us is forced to silently contemplate our impending death and grapple with our upcoming fate privately. This is cruelty beyond description. ”

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 standard 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 reversed. 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.

In Uganda, article 121 of the Constitution sets up an Advisory Committee to advise the President on the exercise of his discretion on prerogative of mercy. The Committee is under the Chairmanship of the Attorney General. That article is operationalised by section 102 of the **Trial on Indictments Act** and section 34 of **the Prisons Act.** They provide procedure to be followed to seek prerogative of mercy. Neither the Constitution, nor those statutory provisions have set up a time frame within which the prerogative of mercy process should be completed. The prerogative of mercy is an executive process that comes after the judicial process is concluded.

The evidence available shows that the average delays on death row among the petitioners who have exhausted their appeal process is between 5 and 6 years. The uncontraverted evidence of Ben Ogwang above shows that from 1989 to 1999, there had been executions in Luzira Prison after every three years. A good numbers of the petitioners had already been on the death row after their sentences had been confirmed by the highest appellate court, but the Advisory Committee did not consider their cases. It is important that; the procedure for seeking pardon or commutation of the sentence should guarantee

transparency and safeguard against delay.

The spirit of our Constitution is that whatever is to be done under it affecting the Fundamental Rights and Freedoms must be done without unreasonable delay. Section 34 (2) of the Interpretation Act (Cap 3) Laws of Uganda, provides that " ***where no time is prescribed or allowed within which anything shall be done, that thing shall he done without unreasonable delay.*** " A delay beyond three years after a condemned prisoner's sentence has been confirmed by the highest appellate court would tend towards unreasonable delay. I, would therefore, agree with Professor Sempebwa that those condemned prisoners who have been on the death row for five years and above after their sentences had been confirmed by the highest appellate court have waited longer than constitutionally permissible.

In the result, I would answer issue No 5 in the affirmative. Consequently, I would allow the petition in part.

Finally, I now turn to issue No 6, namely, **whether the petitioners are entitled to the remedies sought.** The remedies sought are spelled out at the beginning of this judgment. I shall, therefore, not repeat them here.

Clause 4 of Article 137 of the Constitution of Uganda provides as follows: -

> **" Where upon determination of the petition under clause (3) of this article, the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional court**

may: -

(a) grant an order of redress; or

(b) refer the matter to the High Court to investigate and determine the appropriate redress. ”

That provision clearly gives this court wide discretion on the matter of redress in addition to the declarations sought.

In the instant case, having regard to my findings on issues No 1, 2 and 4 above, I would decline to grant the declarations sought in paragraphs 3(a)

(i) , (ii), (iii) and (iv) namely: -

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

(ii) that the imposition of the death penalty is a violation of the right to life protected under articles 22(1) of the constitution,

(iii) that the various provisions of the laws of Uganda that prescribe death penalty are inconsistent with and in contravention of Articles 21, 22(i), 24, 28, 44(a), 44(c) of the Constitution.

(iv) That section 99(1) of the Trial on Indictments Act (Cap 23 of Laws of Uganda) and the relevant sections of and provisions made under the Prisons Act, that prescribe hanging as the legal method of carrying out the death sentences are inconsistent with Articles 24 and 44(a) of the Constitution.

However, in view of my findings on issue Nos 3 and 5 above, the following declarations would be made: -

(a) the various provisions of the laws of Uganda that prescribe ***mandatory*** death sentences are inconsistent with Articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution. The affected provisions are sections 23(1), 23(2), 189, 286(2), 319(2) of the Penal Code Act (Cap 120 of Laws of Uganda) and section 7(l)(a) of the Anti Terrorism Act No 14 of 2002 and any other laws that prescribe ***mandatory*** death sentences.

(b) Section 132 of the Trial on Indictments Act (Cap 23) that restricts the right of appeal against sentence where mandatory sentences are imposed is inconsistent with article 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution.

(c) that inordinate 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. A delay beyond 3 years after the highest appellate court has confirmed the sentence is considered inordinate.

Orders:

(1) For the petitioners whose appeal process is completed and their sentence of death has been confirmed by the Supreme Court, the highest appellate 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) thereafter, in respect of those whose sentence of death will be confirmed, the discretion under article 121 should be exercised within three years,

(d) each party would bear his own costs as this petition was taken as a matter of public interest.

As Twinomujuni and Byamugisha (JJA) both agree, the petition stands allowed in part by a majority of 3 to 2 on the terms stated here above.

Dated at Kampala this 10th Day of June 2005.

O. M. OKELLO
JUSTICE OF APPEALTHE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON MR JUSTICE G. M. OKELLO, JA
HON LADY JUSTICE A. E. N. MPAGI-BAHIGEINE, JA
HON MR JUSTICE A. TWINOMUJUNI, JA
HON LADY JUSTICE C. K. BYAMUGISHA JA HON MR JUSTICE S. B. K. KAVUMA, JA.

CONSTITUTIONAL PETITION NO. 6 OF 2003

BETWEEN

1. SUSAN KIGULA]
2. FRED TINDIGWIHURA]
:::::::::::: PETITIONERS
3. BEN OGWAN AND
4. 416 OTHERS]

AND

ATTORNEY GENERAL RESPONDENT

JUDGEMENT OF A. E. N. MPAGI-BAHIGEINE, JA.

This petition was brought under **article 137** of the 1995 Constitution, of the Republic of Uganda, The Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992; and the Rules of the Constitutional Court (Petitions for Declarations under **article 137** of the Constitution) Directions, 1996.

It is challenging the constitutionality of the death penalty.

The petitioners herein are 417 inmates who were duly convicted and are on death row at the time of the hearing of this petition. They were represented by the firm of M/s Katende, Ssempebwa and Company Advocates with Mr John Katende and Professor Ssempebwa as lead counsel.

Learned State Attorneys, Mr Mike Chibita, Mr Ben Wamember and Mr Sam Serwanga appeared for the respondent Attorney General.

The petition was based on the following grounds, namely:

(a) That **sections 23(1), 23(2), 23(3) 23(4), 124, 129(1), 134(5), 189, 286(2), 319(2)** and **243(1)** of **Penal Code Act (Chapter 120 of the Laws of Uganda)** and sections **71(1) (a), 7(1) (b), 8, 9 (1)** and **9 (2)** of the **Anti Terrorism Act (Act No, 14 of 2002)** to the extent that they permit the imposition of death sentences upon persons on conviction are inconsistent with **Articles 20, 21, 22(1), 24, 28, 44(a), 44(c)** and **45** of the Constitution.

(b) That section **99(1)** of the **Trial on Indictments Act (Cap. 23)** and relevant sections of and provisions made under the **Prisons Act (Chapter 304 of the Laws of Uganda)** and referred to therein, are inconsistent with **Articles 24** and **44 (a)** of the Constitution in respect to the mode, manner and process prescribed for carrying out a sentence of death and in respect of any other manner or mode that may be prescribed for carrying out a sentence of death.

(c) That the actual process, mode and manner of implementation of a sentence of death, from the time of conviction until the actual carrying of the sentence, in accordance with section **99 (1)** of the

Trial on Indictments Act, Cap. 23 are inconsistent with **Articles 20, 21, 22(1), 24, 28, 44(a), 44(c)** and **45** of the Constitution.

(d) That sections **23(1), 23 (2), 23(3) 23(4), 124, 129(1), 134(5), 189, 286(2), 319(2)** and **243(1)** of the **Penal Code Act (Chapter 120 of the Laws of Uganda)** and sections **71(1) (a), 7(1) (b), 8, 9 (1)** and **9**

(2) of the **Anti Terrorism Act (Act No, 14 of 2002)** are inconsistent with **Articles 21, 28** and **44(c)** of the Constitution in so far as in practice, the police and criminal justice system, can lead to the conviction and execution of innocent persons and they do not provide equal protection of the law to disadvantaged people in our society.

(e) That In THE ALTERNATIVE AND WITHOUT PREJUDICE TO THE ABOVE

(i) Sections 23(1), 23(2), 189, 286(2), 319(2) of the **Penal Code Act (Chapter 120 of the Laws of Uganda) and section 7(1)**

(a) of the **Anti Terrorism Act (Act No. 14 of 2002)** to the extent that they prescribe the imposition of **mandatory** death sentences upon persons on conviction are inconsistent with **Articles 20, 21, 22 (1), 24, 28, 44(a), 44(c)** and **45** of the Constitution.

(ii) **Section 132** of the **Trial on Indictments Act, Cap. 23** to the extent that it restricts the right of a person convicted of any offence under **sections 23 (1), 23(2), 189, 286 (2), 319 (2)** of the **Penal Code Act (Chapter 120 of the Laws of Uganda)** and **section 7 (1) (a)** of the **Anti Terrorism Act (Act No. 14 of 2002)** to appeal to a higher court to vary the mandatory sentence imposed is inconsistent with **Articles 20, 21, 22 (1), 24, 28, 44 (a), 44 (c)** and **45** of the Constitution.

The following orders of redress were sought:

i) **That the death sentence imposed on the petitioners be set aside.**

ii) **That the petitioners' cases be remitted to the High Court to investigate and determine appropriate sentences under Article 137 (4) of the Constitution;**

iii) **That the petitioners be grated costs of the petition.**

iv) **That the petitioners be granted such other relief as the Court may feel appropriate.**

A number of affidavits sworn by some of the petitioners were filed in support of the petition, regarding the cruelty and dehumanising nature of the death penalty.

The respondent denied all the allegations in the petition. The answer was

supported by the affidavits of one Deborah Kobusingye, a relative (sister) to one of the victims of a violent crime (murder) regarding the trauma the relatives of the victims suffer and that of Angella Kiryabwire Kanyima, Principal State Attorney and former Commissioner on the Constitutional Review Commission, to the effect that the majority of Ugandans still favour retention of the death penalty.

The gist of the answer to the petition is that the death penalty is still relevant to Uganda's circumstances, considering Uganda's peculiar violent history. The fact that other countries including some European jurisdictions have abolished it is no ground for Uganda declaring it unconstitutional.

At the commencement of the hearing the petition was amended to exclude paragraphs 1 (e), 2 (c) (e) (f) and 3 (b) (iii).

The following issues were by consent framed for determination by the court:

(1) Whether the death penalty prescribed by the various laws of Uganda constitute treatment or punishment contrary to article 24 of the Constitution.

(2) Whether the various laws of Uganda that prescribe the death penalty upon conviction are inconsistent with or are in contravention of articles 24 and 44 or any other provisions of the Constitution.

(3) Whether the various laws of Uganda that prescribe mandatory sentences of death upon conviction are inconsistent with or are in contravention of articles 21, 22, 24 or any other provision of the Constitution.

(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 of contravention of articles 24, 44 and any other provision of the Constitution.

(5) Whether the execution of the petitioners who have been on death row for a long period of time is inconsistent with and in contravention of articles 24, 44 or any other provision of the Constitution.

(6) Whether the petitioners are entitled to the remedies prayed for.

In interpreting the constitution, the court will accord due weight to the particular circumstances in the Country, including the widely — held societal norms, values and aspirations, (article 126 (1). Although public opinion may have some relevance, it is in itself, no substitute for the duty vested in this court to interpret the constitution and to uphold its provisions without fear or favour. The Court will give due regard to international jurisprudence and seek guidance from decisions in other common law jurisdictions.

The court must promote the spirit, purpose and objects of the constitution. The

language of the provisions construed must not be strained by the Judge so as to accord with her/his own subjective moral values, otherwise the spirit of the constitution will be lost. All provisions bearing upon a particular subject are to be considered together and construed as a whole. This is the rule of harmonisation.

Mr. John Katende discussed both issues 1 and 2 together, submitting that the imposition of the death penalty is inconsistent with **articles 24** and **44 (a)** of the Constitution.

He argued that **article 24** prohibits any form of torture, cruel, inhuman or degrading treatment of punishment while **article 44 (a)** forbids any derogation from the enjoyment of the freedom from torture, cruel, inhuman or degrading treatment or punishment. He submitted that reading these two articles together leads to the conclusion that the death penalty cannot be legally imposed because it is a cruel, inhuman and degrading sentence.

Mr Katende asserted that the various laws prescribing the death penalty for instance, the Penal Code Act (Chapter 120 of the Laws of Uganda), the Anti-Terrorism Act (Act No. 14 of 2002), The Trial on Indictments Act (Chapter 23 of the Laws of Uganda, The Prisons Act (Chapter 304 of the Laws of Uganda) all contravene **article 24** by prescribing inter alia a cruel punishment. He prayed that they should be struck down, and cited **Republic v Mbushuu (1994) 2 LRC 335; State v Makwanyane (1995) IRRC 269; Attorney General v Salvatori Abuki (2001) ILRC 63** and **Kyamanywa Simon v Uganda, Constitutional Reference No. 10 of 2000,** in support of his contention.

He submitted that the words in **article 24** should be read disjunctively because it is not necessary for a punishment to be simultaneously a torture, as well as a cruel and degrading sentence in order to offend **article 24.** Once a punishment offends any one of those conditions then it qualifies to be unconstitutional. He pointed out that although the death penalty is envisaged by **article 22 (1),** it is prohibited by **articles 24, 44 (a)** and those prohibitions under **articles 24** and **44 (a)** are absolute. He concluded that the death penalty is cruel per se.

He pointed out that since the 26 affidavits of the petitioners were not challenged by the respondents, the court should believe them and hold that the death penalty is cruel, inhuman and a degrading punishment which contravenes **article 24.** It is not saved by **article 22 (1).** He argued that there is a clear conflict between **articles 22** and **24** which has troubled many jurisdictions for instance Tanzania in Mbushuu's case (supra) where the court of Appeal held that though the death penalty was inherently cruel and degrading, it was authorised by the Constitution and thus did not strike the death penalty down. Similarly other jurisdictions with provisions like **article 22** did the same and refused to strike it down. He asserted that in our case **article 44** is a new and unique provision; it is not found in other constitutions. It has an overriding effect over other provisions. There is a duty to observe it, therefore, as it applies to everybody. This article preserves the right to human dignity as unqualified. Therefore the death penalty cannot be allowed to stand in view of article 44 notwithstanding its apparent authorisation by **article 22.**

Referring to **article 126 (1)** Mr Katende pointed out that though judicial power should be exercised in conformity with the law and with the values,

norms and aspirations of the people, the court is not to base itself on public opinion. **Articles 126 (1)** and **24** are all subject to the overriding effect of **article 44 (a).** He distinguished Mbushuu's case in that there was no equivalent of **article 44 (a),** that is why the offending law was not struck down. Referring to **Kalu v The State (Nigeria) 1998 13 NWLR 531,** Mr Katende argued that the Constitution did not provide an absolute right to life. It had exceptions similar to **article 22** and the court declined to strike down the death penalty. It was held that the word 'cruel' should be given special legal meaning which excludes ordinary natural Dictionary meaning, whereas in Uganda, Oder JSC held in Abuki (supra) that words in **article 24** were to be given their ordinary Dictionary meaning.

Mr. Katende prayed court to harmonize **article 44** which outlaws the inhuman, cruel and the degrading death penalty with **article 22 (1)** which envisages death penalty as a lawful penalty and hold that **article 44** clearly overrides all other provisions. It is the only article in the Constitution which starts with the word "notwithstanding.. . Therefore all laws

prescribing the death penalty should be declared unconstitutional, and be struck down.

The respondent's reply to issues 1 and 2

Mr Benjamin Wamembe, learned State Attorney responding to issues 1 and 2 stated that the proper approach relating to fundamental rights should be dynamic and liberal taking into account people's social norms. He submitted that when these norms are applied to **article 24,** the death penalty does not

constitute a degrading punishment. He argued that the words in **article 24** should not be taken in their natural meaning but should be considered within the context of **article 24. Article 24** comes after **article 22** which validates the death penalty and **article 23** which lists cases when a person can be deprived of personal liberty. He pointed out that article 24 was debated and passed after **articles 22** and **23.** Therefore the framers never intended that the court would take away what had been debated in **articles 22** and **23.** He referred to the rule of constitutional interpretation that to take away a right given by the constitution the legislature should do so in the clearest of terms. If the Constituent Assembly had intended to take away the right it recognized under **article 22 (1)** by **article 24,** it would have done this by clear terms and not by implication as learned counsel for the petitioners had suggested. Mr Wamembe submitted that the combined effect of **articles 22, 23** and **24** was intended to redress our bad history characterised by extra judicial killings and wanton detentions as the Preamble to the Constitution illustrates. He pointed out that **article 24** does not apply to a death penalty passed after a fair trial under the Constitution, by a court of competent jurisdiction. The article was intended to apply to cruel, inhuman and degrading deaths, like what the victims had suffered at the hands of the petitioners, who are cynically arguing that no one should be subjected to cruel, inhuman and degrading deaths. A state governed by law which refuses to use capital punishments ignores the inviolable value of life of the victims of violent crimes, by not giving them full justice. A rightly imposed death penalty gives meaning to article 24. People should feel safe by realising that murderers should also lose their lives against their will, he submitted. The death penalty gives citizens such a sense of dignity and security. A country using capital offence sends a message to the world that it values human life. The death penalty is a penalty of court like

any other sentence. The other sentences also involve pain. If a sentence is not painful, then it is not effective. Suffering is necessary for justice and retribution. Abolition of the death penalty was not the intention of the framers of the Constitution. Any sentence in prison is cruel, inhuman and degrading. A death penalty is thus not always negative, Mr. Wamembe argued.

He prayed court to consider **article 126 (1)** when interpreting **article 24.** The emphasis should be on people from whom judicial power is derived and is to be administered in their names. He submitted that the death penalty is authorised by the Constitution. It cannot therefore be said to be inhuman and degrading. When passing sentence the court exercises a value judgement, having regard to contemporary norms, aspirations and sensitivities of the people as expressed in the Constitution. Having regard to a merging consensus of values in the civilized international community of which Uganda is a part, this Court should uphold the death penalty.

In conclusion, he submitted that the death penalty is not yet inhuman, cruel and degrading because values, norms and aspirations of the majority of Ugandans still approve of it as a just penalty for the most heinous of crimes, leading to loss of life. The people of Uganda accept it as a way of demonstrating their disapproval of serious crimes. He pointed out that this factor is reflected in the two affidavits in support of the answer to the petition. Uganda has not yet reached a stage of reviewing the death penalty as inhuman. It will be a gradual process. He prayed court to answer Issue No. 1 in the negative.

Regarding Issue No. 2, Mr Wamembe acknowledged that it had been partly answered under Issue No. l and pointed out that **article 22 (1)** clearly validates all laws of Uganda prescribing the death penalty on conviction, whether such laws were enacted before or after the 1995 Constitution. Parliament is given power under **article 79** to make laws including defining offences and imposing penalties. Parliament prescribes the death penalties under its mandate. The framers of the 1995 Constitution did not intend **articles 24** and **44** to apply to what was already authorised by **article 22.** He submitted that the death penalty is not a torture, a cruel or degrading punishment under **articles 24, 44.** These two articles were intended toaddress our bad history characterised by wanton killing and torture as clearly brought out by the Preamble to the Constitution, as indicated above.

He pointed out that **article 44** is relevant in relation to derogation of the specific human rights mentioned therein. The right to life is the most fundamental of all human rights and that all other rights mentioned in **article 44** can only be enjoyed by a living person. **Article 22 (1)** is a derogation from the right to life but it is not listed as a non derogable right under **article 44.** Therefore the framers of the 1995 Constitution did not view a derogation from a right to life as cruel, inhuman or degrading punishment, otherwise they would have mentioned it under **article 44.** The death penalty is a derogation of the right to life but the right to life was not listed as non derogable because **article 22 (1)** satisfied all essential requirements for a law derogating from basic rights. It provides adequate safeguards against arbitrary decisions and also provides effective controls against abuse by those in authority when using the law. It also satisfies the principle of proportionality in the sense that

the limitation imposed on fundamental right to life is no more than reasonably necessary to achieve the legitimate object of the various laws of Uganda prescribing the death penalty as a sentence for the targeted members of society. **Article 22 (1)** therefore, satisfies all these requirements as it was under the 1967 Constitution.

He further pointed out that the various laws prescribing the death penalty are under **articles 22 (1), 273, 43** and **28.** These laws are not arbitrary because the penalty is required to be imposed by a competent court after due process of law i. e. after a full trial in which the burden of proof is on the prosecution to prove the case beyond reasonable doubt with an automatic right of appeal to the highest appellate court, the Supreme Court. There are various defences recognized under our laws to mitigate the seriousness of the offences e. g. insanity, intoxication, provocation, self-defence, automatism, etc. which ensure that each case is decided on its peculiar facts and circumstances. This ensures that crimes committed on the spur of the moment are excluded and only the premeditated, deliberately planned ones requiring mensrea are punished. Free legal counsel is accessible under **article 28 (3) (e)** at the cost of the state, for any offence carrying the sentence of death or imprisonment for life. Under **article 121,** there is a provision for seeking a pardon from the President who can substitute a less severe punishment or remit the death penalty. **Articles 28** and Parts **7** and **8** of the Trial On Indictments Act (Chapter 23) sets out elaborate provisions on proceedings at the trial, guaranteeing fair hearing and the right of appeal.

Mr Wamembe asserted that the death penalty therefore passes the

proportionality test because it is in the public interest. It was debated and passed by over 200 Constituent Assembly delegates representing the entire population of Uganda as reflected in the Preamble. It is saved by Article 22. It is not unconstitutional. Issue No. 2 should also be answered in the negative.

My findings on Issue 1 and 2.

On these two issues I agree with the findings of the rest of the learned members of the panel. I will only make a few comments. The relevant articles state:

> **"22. (1) 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. "**

> **"24. No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment. "**

> **"44. Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—**
>
> **(a) freedom from torture, cruel, inhuman or degrading treatment or punishment;**
>
> **(b) freedom from slavery or servitude;**
>
> **(c) the right to fair hearing;**
>
> **(d) the right to an order of habeas corpus. "**

Chapter 4 of the Constitution which enshrines the fundamental and other human rights including the right to life commences with **article 20** which

commands that these rights are inherent in the human being and must be respected by everyone and all agencies without exception. However, be that as it may, the court is on the other hand faced with the duty to punish a criminal for his forbidden acts while bearing in mind society's reasonable expectation of the court to administer justice and award an appropriate deterrent punishment commensurate or proportionate to the gravity of the offence and in line with the public abhorrence for the heinous crimes like those committed by the petitioners. The upshot of the foregoing is that the right to life is the basis for the enjoyment of all other human rights. However, the right to life is qualified under **article 22 (1)** where a person charged with and found guilty of murder or any other violent crime cannot be said to be arbitrarily deprived of his life if he has gone through due process and the penalty is the sentence of death

I draw support from **Kalu v State (1998) 13 NWR 531** where section 30 (1) of the Nigerian Constitution is similar to **article 22 (1)** of the Uganda 1995 Constitution, and where it was held that although section 30 (1) guarantees and protects the right to life it also permits deprivation of life pursuant to the execution of the sentence of a court of law in a criminal offence. Therefore where a Constitution makes a qualified provision in respect of the right to life, as is case with section 30 (1), the death penalty is permissible and valid. Where however, the constitutional right to life is unqualified, the death penalty is unconstitutional. - **State v Makwanyane & Another (1995) ILRC 269,** where under the South African Constitution, the right to life is unqualified.

As rightly pointed out by Mr Wamembe, **article 24** which prescribes respect for human dignity and protection from inhuman treatment comes after **article 22** making it only logical that inhuman and degrading treatment referred to in **article 24** must be outside the death penalty duly imposed by a competent court, after due process.

I agree that the framers of the 1995 Constitution having so deliberately worded **article 22** could not have in the same vein intended **articles 24** and **44** to apply to **article 22** without saying so expressly. It is trite that a right given by the legislature can only be taken away expressly by the same legislature. Thus where a Constitution makes a qualified provision in respect of the right to life as in the case with **article 22,** the death penalty is clearly permissible and valid. Article 44 does not protect the right to life as non-derogable.

The cases cited by Mr Katende in support of the petition can be commented on as follows **Mbushuu and Another v Republic (1995) 1 LRC 216,** though the Tanzanian Court of Appeal having upheld the trial court's finding that the death penalty was inherently a cruel, degrading and inhuman form of punishment, went on to hold that the Tanzanian Constitution permitted derogation from the prohibition of the "cruel, degrading and inhuman forms of punishment. "

In **State v Makwanyane and Another (1995) 1 LRC 269,** The right to life was unqualified. Capital punishment was thus declared to be unconstitutional.

In **Attorney General v Salvatore Abuki and Another.** The court was discussing the effect of a 10 year banishment order after a prison sentence

under the Witchcraft Act. The context under which **article 44** was being discussed was therefore different. Similarly in **Kyamanywa Simon v Uganda, Constitutional Reference No. 10 of 2000,** the court was discussing corporal punishment which it held to be a torture, cruel and degrading treatment within **article 44 (a).**

I, therefore, do agree with the learned State Attorney that as regards this petition the relevance of **article 44** should be confined to the freedoms and rights stipulated therein. I will be discussing the safeguards for the derogation under **article 22 (1)** when analysing Issue No. 3. It is however, clear that the death penalty as a derogation from the right to life was deliberately left out of **article 44.** It was thus saved by the constitution.

Although some jurisdictions may regard the death penalty as barbaric as contended by the petitioners, it is for the people to influence Parliament to bring about change in the laws. For the moment in a declared democratic society the laws must reflect the wishes of the people. There was abundant evidence from the Constituent Assembly and the Constitutional Review Commission that the majority of Ugandans still favour the retention of the death penalty.

However, be that as it may, the duty of this court is to interpret the constitution. It is not empowered to rewrite it or change its meaning. It is further important to note that the death penalty is still envisaged by International Instruments with similar safeguards as under article 22. **The International Covenant on Civil and Political Rights, article 6 (1) and (2)** provides:

> **"Every human being has the right to life and none shall be**

arbitrarily deprived of his life....

“. ... any one sentenced to death shall have the right to seek pardon or commutation of the sentence. ”

The UN General Assembly Resolution 2857 (XXVI) of 20th December 1971 called for restriction of the number of offences for which capital punishment may be imposed. To date it has not called for its total abolition. However, **Resolution No 1984/50 of 25th May 1994** adopted similar safeguards guaranteeing the protection of the rights of those facing the death penalty. **The European Union Convention for the Protection of Human Rights and Fundamental Freedoms, article2** provides inter, alia, that **“everyone has a right to life and that life can only be taken away in execution of a sentence of a court. ”**

These International Instruments thus recognize the right of states to derogate from the right to life but only"to the extent strictly required by the exigencies of the situation and provided such derogation is not inconsistent with the respective constitutions and international law. Therefore, Uganda is not isolated or alone in retaining the death penalty. It can thus be stated with certainty that the abolition of the death penalty is not a mark or indication of civilisation as remarked by Mr. Katende. In Uganda’s case it is retained as a result of historical circumstances as the Preamble to the constitution proclaims:

“Recalling our history which has been characterised by political and constitutional instability... "

I would thus answer Issue No. 1 and 2 in the negative.

I now turn to Issue No. 3, whether the various laws that prescribe mandatory sentences of death upon conviction are inconsistent with or are in contravention of **articles 21, 22, 24, 44** or any other provisions of the Constitution.

This issue was argued in the alternative depending on the outcome of Issues 1 and 2, in case the court found that the death penalty was not cruel or is saved by Constitution.

Arguing this ground, Professor Sempebwa submitted that if the death penalty was not recognized by **article 22** then the various criminal statutes prescribing mandatory death penalty contravene various provisions of the Constitution. These include the Penal Code Act imposing mandatory death sentences for the following offences: under Section 189 for murder, Section 286 (2) for aggravated robbery and Section 23 (1) for treason. He pointed out that the Trial on Indictments Act, Section 99 (Chapter 23) removes the discretion from court in the case of murder where it is not permitted to inquire into mitigating factors before sentence.

He submitted that the above provisions of law contravene **articles 22 (1), 28, 44 (c)** and **126** conferring judicial power to courts of law. **Article 22** requires a fair trial and the sentence should be subjected to a fair trial to be confirmed by the highest appellate court. In his view this means that the petitioners should be accorded a chance to present to court mitigating circumstances and

the facts relating to the offence as it was committed, to show court that the death penalty is not the correct sentence. Furthermore, a fair trial implies a right of appeal against sentence but this is not so with a mandatory death penalty as other convicts do in other cases under Section 98

(1) of the Trial on Indictments Act. He submitted that this is prejudicial to the petitioners. He cited **Mithu v State of Punjab 1983 SQL Case No. 026** where the death penalty was challenged as violating **article 21** of the Indian Constitution and it was held that "if the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence. It becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence".

He submitted that confirmation of sentence does not mean "rubber stamping, " rather it means that the petitioners should be entitled to be heard by the appellate court on sentence. Confirmation implies a discretion. He prayed court to strike down the mandatory aspect of sentencing which the petitioners are challenging. This right to fair hearing is doubly entrenched by **article 44 (c)** which prohibits any derogation from court. Any statute taking away this right should be struck down as a bad law.

Referring to **article 126,** he argued that prescribing a sentence is a legislative function in a statute while imposing or applying that process is judicial power. In his view a statute imposing a mandatory death penalty is an intrusion in the exercise of judicial power under **article 126** and under the principle of separation of judicial power. It is for the court to decide what sentence, under

their discretionary power, to impose after weighing all circumstances of the commission of the offence. All cases carrying the same penalty are not of similar gravity. There should be a discretion. He relied on **Mithu v Punjab State (1983) SOL Case No. 026 (supra).**

He submitted that a mandatory death penalty does not allow for consideration of personal circumstances of the offender and the offence. This is thus cruel, inhuman and degrading. It violates **article 22 (1)** prescribing a fair trial with no chance of having the sentence confirmed.

It also violates **article 28** as to the right to a fair hearing which is doubly entrenched by **article 44 (c).** He prayed court to declare all the statutory provisions aforementioned imposing mandatory death penalty as unconstitutional.

For the respondent, Learned State Attorney, Benjamin Wamembe submitted that the mandatory death penalty is just like any other mandatory sentence under the laws of Uganda. Being mandatory does not make the death penalty unconstitutional. He pointed out that since the death penalty is allowed under **article 22 (1)** then the various laws of Uganda prescribing mandatory death penalty upon conviction are not inconsistent with **article**

21 of the Constitution. He referred to **article 21 (4)** providing that nothing in **article 21** shall prevent Parliament from enacting laws that are necessary for

(b) making such provisions that are required or authorised to be made under this Constitution or (c) providing for any matter acceptable and demonstrably justified in a free and democratic society. He submitted that a mandatory death

penalty is a provision authorised to be made under **article**

22 (1) and thus the various laws prescribing mandatory death penalty upon conviction are not inconsistent with or in contravention of **article 21** or any other provision of the Constitution.

In the alternative and without prejudice to their submissions, he submitted that the mandatory death penalty is justifiable and demonstrably necessary in Uganda within the context of **article 21 (4) (c)** and **article 43** because the majority of Ugandans approve of the death penalty and in their view it is a just penalty for the most heinous of crime leading to loss of life and they also accept it as a way of demonstrating their disapproval of serious crimes. He asserted that **article 43** allows Parliament to derogate from various human rights and freedoms enshrined in the Constitution to protect lives of Ugandans. This duty is also imposed by **article 12** of the Universal Declaration of Human Rights. Providing a mandatory death penalty falls squarely within **article 21 (1), (2)** and **(3).** In prescribing a mandatory death penalty, the legislature ensures that they do not give different treatment to different persons convicted of the same offence as provided in **article 21 (1)** (2) and (3). Our criminal justice system does not prescribe degrees in murder and other offences as is the case in other jurisdictions, nor do those jurisdictions have the equivalent of **articles 21** and **126.**

Article 79 vests Parliament with exclusive powers to make laws for the good governance of Uganda. Under **article 28 (12)** Parliament under its legislative mandate prescribes and defines offences and penalties. This is not the function of the judiciary. Under the same legislative power, Parliament does not

prohibit imposition of the mandatory death penalty. Thus the various laws prescribing mandatory death penalty are not unconstitutional. Courts have absolute unqualified discretion to decide whether a case has been proved beyond reasonable doubt or not, taking into account all available defences even if they are not raised by the accused. Courts have power to acquit or discharge an accused, or to convict him or her for a minor cognate offence where facts proved reduce the offence or can even convict of an attempt. Courts have power to call upon the accused pleading guilty to say why the sentence should be passed on them according to law under Sections 87, 88, 94 of the Trial on Indictments Act (chapter

23). This is all as a result of fair hearing by which courts are able to determine that the evidence adduced by prosecution is not sufficient to prove the charges beyond reasonable doubt. The implication of **article 22 (1)** is that the conviction and sentence must have been confirmed. This means that the conviction and sentence are open to automatic appeal to have it reviewed by the appellate court. Both the conviction and sentence are not separable otherwise framers of the Constitution should have used appropriate words like 'or' used in **articles** 24,. **25 (1), 44** etc. **Article 22 (1)** uses the word "and". This article is supported by Section 11 Judicature Act (chapter 13) which provides that for purposes of an appeal, the appellate court has all the powers, authority and jurisdiction vested in the court of original jurisdiction. It re-evaluates the evidence afresh and draws own findings and conclusions. Appellate courts are thus not rubber stamps as alleged by the petitioners. Therefore the mandatory death penalty does not deprive the court of its discretion. Thus the various laws prescribing mandatory death penalty are not inconsistent with **article 21, 22, 24, 28** and **44** or any other laws.

He submitted that all the American cases cited by the petitioners were inapplicable in that they hold the death penalty under all circumstances to be cruel, inhuman and degrading punishment under the 8 Amendment, whereas in Uganda it is saved by the constitution. He prayed court to answer Issue No. 3 in the negative.

My findings on issue No. 3.

On this issue, I do respectfully differ from the findings of the majority. It is clear that our criminal justice system provides sufficient safeguards against any arbitrariness and abuse of authority for the proper application of the death penalty as follows. Under the impugned statutes that prescribe the death penalty these capital offences are triable and heard by the High Court. These are offences of exceptional gravity, involving a complexity of issues that render them unsuitable for summary trial. Under **article 139** of the constitution the High Court is vested with unlimited original jurisdiction in all matters including exclusive jurisdiction over capital offences. Most importantly the accused is presumed innocent under **article 28 (3) (a)** of the constitution at the commencement of the hearing and it is incumbent upon the prosecution to prove him guilty beyond any reasonable doubt. The accused is availed access to legal counsel either of his own or if he cannot afford, he is entitled to legal representation at the expense of the State. During the trial, the Trial on Indictments Act, sections 3 and 67, makes provision for two assessors to assist the Judge. These are judges of facts and not of law. If more than one is absent the trial has to start afresh otherwise it is a nullity - **Mohamed and Another v R (1973) EA 197.** Even though the assessors opinion is not binding on the Judge, nonetheless he must give reasons for rejecting it. **Washington S/O Odindo v R (1954) 21 EACA 393.** The assessors' role or knowledge regarding customs, and habits of people is significant, in determining the accused's guilty. Their opinion is likened to the opinion evidence of a person especially skilled in foreign law, science or Art. They strengthen the Administration of Justice. The right of appeal to the Court of Appeal and the Supreme Court is automatic, so that the verdict can be tested to the minutest detail. Should the conviction be upheld, the convict can petition the Advisory Committee on the Presidential Prerogative of mercy

under **article 121 (1)** of the Constitution. The Board advises the President on the exercise of the prerogative of mercy to grant a pardon either free or subject to other conditions. The President is, however, not bound by the Board's advice. Capital offences thus filter through the system to the highest appellate court, so as to eliminate any arbitrariness and abuse of authority in the administration of justice.

Once Parliament is mandated by the Constitution to define and prescribe a penalty under **article 28 (12)** such a penalty as the mandatory death penalty does not become arbitrary by lack of mitigation at the last stage. The Court's duty is to evaluate the constitutionality of the mandatory penalty regardless of Parliamentary opinion though it sets the sentencing policy.

It is thus clear from the above safeguards that where a person is charged and found guilty of a capital offence, the death penalty is only imposed where the circumstances of the offence do warrant it, after exhaustive scrutiny. The court balances the mitigating circumstances by considering all available defenses available to the accused, e. g., insanity, intoxication, depending on the evidence and draws up a just balance between the aggravating and mitigating circumstances which might for instance reduce murder to manslaughter or aggravated robbery to simple robbery or sustain the original capital charge. His right to a fair hearing within the meaning of article 28 is thus complied with.

This therefore supports the contention and reflects the fact that the death penalty is qualitatively different from a sentence of imprisonment and must be

and is subject to certain procedural requirements right from arraignment to conviction and sentence. It is thus not correct or logical to state that

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE G. M. OKELLO, JA
HON. JUSTICE A. E. N. MPAGI-BAHIGEINE, JA
HON. JUSTICE A. TWINOMUJUNI, JA HON. JUSTICE C. K. BYAMUGISHA, JA HON. JUSTICE S. B. KAVUMA, JA

CONSTITUTIONAL PETITION NO. 6 OF 2003

SUSAN KIGULA & 417 OTHERS.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF TWINOMUJUNI, JA

1. INTRODUCTION

This petition has been brought on behalf of 417 prison inmates all of whom have been sentenced to death by the Courts of Judicature in Uganda. It seeks to challenge the constitutionality of the death penalty, to which they have been condemned, after conviction under various provisions of the Penal Code Act. In particular, the petition

makes the following averments: -

(a) That the imposition of the death penalty is inconsistent and contravenes articles 24 and 44(a) of the Constitution of Uganda which prohibit punishment or treatment which is cruel, inhuman and degrading.

(b) That in the alternative but without prejudice to the foregoing: -

(i) A mandatory death sentence which was imposed on 99% of the petitioners is unconstitutional to the extent that it denies them the right to appeal against and to have their sentences confirmed by the Highest appellate court which is contrary to articles 21, 22, 24, 28 and 44 of the Constitution.

(ii) Death by hanging which is the legally prescribed method of implementing the death sentence is inconsistent and contravenes articles 24 and 44(a) of the Constitution.

(iii) The lengthy intervening period between conviction and execution which has been endured by most of the petitioners makes what might have previously and otherwise been a lawful punishment, now exceedingly cruel, degrading and inhuman contrary to articles 24 and 44(a) of the Constitution.

The petitioners are seeking the following declarations:

(a) That the death sentences which were imposed on the petitioners are unconstitutional and should be set aside and replaced with

appropriate sentences.

(b) That all the named provisions of the law which prescribe a death sentence and for the method of hanging should be declared unconstitutional as they contravene articles 24 and 44 (a) of the Constitution.

The petition is supported by numerous affidavits sworn by and on behalf of the 417 petitioners. They consist of affidavits of five petitioners, those sworn by past and present prison officers, various experts in law, medicine, psychiatry, and human rights activists, etc, altogether amounting to thirty — five affidavits. The respondent filed an answer to the petition supported by a number of affidavits of the respondent's employees and some relatives of victims of various crimes. At the trial, there was no much controversy on the affidavits and virtually all of them were admitted in evidence by the consent of both parties reached at a scheduling conference held before the trial. This petition hinges on constitutional interpretation of article 22(1) against articles 24 and 44(a) of the Constitution on one hand and various sections of the Penal Code Act against articles 21, 22, 24, 28 and 44(a) of the Constitution on the other hand.

At the hearing of the petition, the petitioners were represented by the following: -

1) John W. Katende.

2) Prof. Frederick E. Ssempebwa.

Assisted by: -

1) Soogi Katende.
2) Kakembo Katende.
3) Fredrick Sentomero
4) Sim Katende.
5) Christopher Madrama
6) Fred Businge.
7) Jane Akiteng.
8) Nsubuga Ssempebwa.
9) Arthur Ssempebwa.
10) David Sempala.
11) Sandra Kibenge.

The respondent was represented by: -

1) Mike Chibita, Principal State Attorney.
2) Samuel Serwanga, Senior State Attorney.
3) Benjamin Wamambe, State Attorney.
4) Godfrey Atwine, State Attorney.
5) Freda Kabatsi, State Attorney.

2. THE SCOPE OF THE PETITION

(a) There is no dispute that this court has the power to adjudicate on this petition by virtue of article 137(3) of the Constitution.

(b) It was common ground that this court was NOT being called upon to decide whether a death penalty is desirable in Uganda or not. That is accepted to be the preserve of the people of Uganda through their legislature. The main issue is whether the death penalty is a lawful sentence under our Constitution. This is what this court is being called upon to decide.

(c) It was also common ground that the petitioners were not in this court to challenge their convictions. They are only challenging the constitutionality of the death sentence.

(d) The petitioners were anxious to stress that this petition was not brought with a view of setting convicted criminals free. It only seeks to declare a death penalty unconstitutional and to have it replaced with alternative severe but lawful sentences.

(e) The following provisions of the laws of Uganda which provide for a death sentence or prescribe the method of carrying it out are impugned as being inconsistent with or in contravention of various articles of the Constitution.

(i) Murder contrary to section 189 of the Penal Code Act.

(ii) Robbery with Aggravation contrary to section 286(2) of the Penal Code Act.

(iii) Treason contrary to section 23(1) and (2) of the Penal Code Act.

(iv) Terrorism contrary to section 7(1)(a) of the Anti-Terrorism Act, Act No. 14 of 2002.

(v) Kidnapping with intent to murder contrary to sections 243 of the Penal Code Act.

(vi) Rape contrary to section 124 of the Penal Code Act.

(vii) Defilement contrary to section 129 of the Penal Code Act.

(viii) Treason contrary to section 23(3) of the Penal code Act.

(ix) Terrorism contrary to section 7(b) of the Anti-Terrorism Act, No. 14 of 2002.

(x) Aiding and abetting Terrorism contrary to section 8 of the Anti-Terrorism Act, No. 14 of 2002.

(xi) Establishment of Terrorism Institutions contrary to section 9(1) and (2) of the Anti-Terrorism Act, No. 14 of 2002.

(xii) Section 99(1) of the Trial on Indictment Act.

3. THE ISSUES

Consideration and determination of this petition will be limited to the following six issues which were agreed upon by both parties at the beginning of the trial

(1) Whether the death penalty prescribed by various laws of Uganda

constitutes cruel, inhuman or degrading treatment or punishment contrary to article 24 of the Constitution.

(2) Whether the various laws of Uganda that prescribe death upon conviction are inconsistent with or in contravention of articles 24 and 44 or any other provision of the Constitution.

(3) Whether the various laws of Uganda that prescribe mandatory sentences of death upon conviction are inconsistent with or in contravention of articles 21, 22, 24, 28, 44 or any other provision of the Constitution.

(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, 44 any other provision of the Constitution.

(5) Whether execution of the petitioners who have been on death row for a long period of time is inconsistent with and in contravention of articles 24, 44 or any other provision of the Constitution.

(6) Are the petitioners entitled to any remedies?

The main issues are 1 and 2 above. The rest are only in the alternative if the main issues are answered in the negative.

4. GENERAL PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

In Uganda, the principles of Constitutional Interpretation are well settled. They have been expaunded upon by the Supreme Court and the Constitutional Court and at great length in the following cases: -

(i) Tinyefuza vs. Attorney General, Constitutional Petition No. 1 of 1996.

(ii) The Attorney General vs. Tinyefuza, Constitutional Appeal No. l of 1997.

(iii) Abuki vs. Attorney General, Constitutional Case No. 2 of 1997.

(iv) Attorney General vs. Abuki [2001] 1 LRC 63.

(v) P. K. Ssemogerere and Another vs. Attorney General, Constitutional Petition No. 3 of 2000.

And many other decisions of the two Constitutional Courts.

Here I shall only summarise those principles which are relevant for the determination of this particular petition: -

(a) The principles which govern the construction of statutes also apply to the construction of constitutional provisions. The widest

construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters. In certain contexts, a liberal interpretation of the constitutional provisions may be called for.

(b) A constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the court should be dynamic, progressive and liberal or flexible keeping in view ideals of the people, socioeconomic and political-cultural values so as to extend the benefit of the same to the maximum possible.

(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.

(f) Article 126(1) - Judicial power is derived from the people and

shall be exercised by the courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people.

(g) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law which is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency.

(h) Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity.

(i) Decision from foreign jurisdictions with similar constitutions as ours are useful in helping in the interpretation of our Constitution.

(j) The decisions of international Courts and international bodies interpreting the inherent meaning of fundamental rights are relevant to the interpretation of the fundamental rights and freedoms of the individual in our Constitution.

(k) Both purpose and effect are relevant to the determination of constitutional validity of a legislative or constitutional provision.

This summary is not exhaustive but contains the most important principles of constitutional interpretation that must guide this court in the task at hand. **DETERMINATION OF ISSUES**

(A) ISSUES NO 1 AND 2

I find it very convenient to deal with these two issues together because they are interrelated, they are: -

No 1: "**Whether the death penalty prescribed by various laws of Uganda constitutes cruel, inhuman or degrading treatment or punishment contrary to article 24 of the Constitution. "**

No2: **"Whether the various law of Uganda that prescribe death upon conviction are consistent with or in contravention of articles 24 and 44 or any other provision of the Constitution. "**

Mr. John Katende, lead counsel for the petitioners explained that these two issues really posed two questions, namely: -

Does the death penalty prescribed in Uganda Penal laws contravene article 24 of the Constitution?

If so, does our Constitution permit it?

We are being called upon to interpret the validity of a death sentence in light of articles 22(1), 24 and 44(a) of the Constitution.

The three articles provide: -

Article 22: **“PROTECTION OF RIGHT TO LIFE**

(1) 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: **“No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment. ”**

Article 44: **“Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms**

(a) freedom from torture, cruel, inhuman or degrading treatment or punishment; ”

Mr. John Katende, learned counsel for he petitioners submitted that a death penalty was cruel, inhuman and degrading punishment. He submitted that since article 24 of the Constitution did not provide a

definition of those words, the court had to interpret the words in their natural English Dictionary meaning. He referred us to the Supreme Court decision of **Attorney General vs. Abuki (supra)** especially the judgment of Hon. Justice Oder, JSC in which he stated that the words had to be interpreted in accordance with their Dictionary meaning. In the **Abuki case,** the Supreme Court held that banishing a person from his home area for an offence of practicing witchcraft was cruel, inhuman and degrading punishment within the meaning of article 24 of the Constitution. Mr. Katende also relied on the case of **Kyamanywa vs. Attorney General Constitutional Ref. No. 10 of 2000,** in which this court held that corporal punishment was cruel, inhuman and degrading punishment within the meaning of article 24 of the Constitution. In his view, if banishment and corporal punishment could be declared unconstitutional, then the death sentence which is more sordid and barbaric should be declared to contravene article 24 of the Constitution and to be null and void. He relied on two other authorities, one from the Republic of Tanzania and another from the Republic of South Africa. In the Tanzanian cases of **Republic vs. Mbushuu and Another [1994] 2LRC 335** and **Mbushuu and Another vs. Republic [1995] 1 LRC 217,** both the High Court of Tanzania and the Court of Appeal of that country held that a death sentence was inherently cruel, inhuman and degrading punishment. In the case of **State vs. Makwanyane and Another [1995] 1 LRC 279,** The Constitutional Court of the Republic of South Africa also held, after reviewing several common law jurisdiction decisions on the matter, that a death sentence was cruel, inhuman and degrading

punishment. Mr. Katende submitted that since these foreign decisions had been followed with approval by the Supreme Court of Uganda in the case of The **Attorney General vs. Abuki (supra),** then the cases together with the **Kyamanywa case** were binding on us. He invited us to hold that a death sentence in Uganda was inconsistent with article 24 of the Constitution because it is cruel, inhuman and degrading.

On the whether the Constitution of Uganda permitted such a punishment, Mr. Katende invited us to answer the question in the negative. He submitted that on reading article 22(1) of the Constitution, one first gets the impression that a death penalty is permitted by the Constitution. He argued, however, that article 44(a) of the Constitution left no doubt whatsoever that no derogation could be permitted on the provisions of article 24 of the Constitution. He especially invited us to note that article 44 began with words the underlined words as follows: -

> **"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms: -**
>
> **(a) freedom from torture, cruel, inhuman or degrading treatment or punishment.** ''[Emphasis added]

In his view, this meant that the freedom from torture, cruel, inhuman or degrading treatment or punishment was absolute, no matter what anything else in the Constitution, including article

22(1) of the Constitution, provided. He again cited the **Abuki case** (supra) and other decisions of this court in which it was categorically held that the right to freedom from cruel, inhuman and degrading treatment or punishment is absolute. He invited us to hold that the Constitution of Uganda does not permit any cruel, inhuman and degrading punishment or treatment.

Finally on this issue, Mr. Katende invited us not to rely on public opinion when deciding whether a death penalty is cruel, inhuman or degrading punishment. He submitted that up to date, there are no accurate figures as to where the people of Uganda stand with regard to the issue of death sentence. There is no reliable poll that has been taken on the matter. Even the two reports of the Constitutional Review Commissions by Chief Justice Odoki and Professor F. Sempebwa do not present an accurate picture on the matter because the sample of the population which was interviewed on the matter is too small to reflect an accurate picture of what the population wants.

Mr. Katende submitted that the legal position with regard to the role of public opinion on the issue of the death sentence was that public opinion is irrelevant. According to him, the duty of the court was to decide in accordance with the Constitution and the court should not be reduced to that of an election returning officer. It would set a very dangerous precedent if every time a Constitutional Court had to decide on a constitutional provision it had to canvass

and seek public opinion so that it decides in accordance with it. That would make the role of the Constitution and the Constitutional Court useless and meaningless. Mr. Katended heavily relied on the South African case of **State vs. Makwanyane (supra)** in which the Constitutional Court of South Africa held that public opinion was irrelevant to the issue of the death penalty and in any case, he quoted,

> **"No where was the death penalty ever abolished with the public cheering. "**

He invited us to be bold and to interpret the constitution according to the law and not according to public opinion. In his view, no matter what the people of Uganda thought, a death penalty is inherently cruel, inhuman and degrading punishment. He invited us to so hold.

In reply, Mr. Benjamin Wamambe, the learned State Attorney who argued the two issues on behalf of the respondent, submitted that a death penalty in Uganda was not cruel, inhuman or degrading punishment within the meaning of article 24 and 44(a) of the Constitution. He contended that article 22(1) of the Constitution which provided for the right to life specifically excepted a death sentence from the application of article 24 if it is imposed in the following circumstances: -

(i) In execution of a death sentence.

(ii) Passed in a fair trial by a court of competent jurisdiction.

(iii) In respect of a criminal offence under the laws of Uganda.

(iv) The conviction and sentence have been confirmed by the highest appellate court.

In his view, the question for this court to decide was not whether the death penalty was cruel, inhuman or degrading punishment in the ordinary sense of those words but whether the death penalty is torture, cruel, inhuman or degrading within the meaning of article 24 of the Constitution. He submitted that article 24 was never intended to apply to a death sentence. He contended that articles 22 and 23 are exceptions to article 24. The framers of the Constitution could not have forgotten those provisions when they drafted article 24. If they had intended to take away the right recognized by article 22(1), they would have stated so in very clear terms without ambiguity. In his view, the combined effect of articles 22, 23 and 24 was to redress the bad history of our country which was characaterised by extra judicial killings, unlawful detentions and torture of detained people. Article 24 was intended to apply to torture, cruel, inhuman or degrading treatment or punishment outside the judicial process, like the heinous crimes which were committed by the petitioners.

Addressing his mind to the cases of **Abuki** and **Kyamanywa**

(supra), learned State Attorney submitted that the cases did not apply to this case and were distinguishable. First, the two cases did not concern a death sentence at all. They dealt with banishment and corporal punishment respectively.

Secondly, the constitutional interpretation involved a statute as against the Constitution, whereas in the instant case, the court is interpreting one article of the Constitution against another article of the same Constitution.

Thirdly, in both **Abuki** and **Kyamanywa** the court was dealing with additional punishment. The petitioners had already been sentenced to periods of imprisonment when Abuki was banished and Kyamanywa was ordered to receive additional corporal punishment. In the instant case, we are dealing with a situation where the petitioners have received only one sentence - the death sentence.

Mr. Wamambe also submitted that the South African case of **Makwanyane (supra)** was not applicable to the Ugandan situation because in the South African Constitution, the right to life was absolute whereas in Uganda it is qualified under article 22(1) of the Constitution. Also in South Africa, a death penalty was found to be applied in discriminatory manner and was not applicable to all citizens of that country. It did not satisfy the proportionality test and had to be abolished. In Uganda, a death penalty applies to everyone equally and satisfies the proportionality test.

On the implications of article 44(a) which began with the words **"Notwithstanding anything in this Constitution. "** and whether it meant that the exception to the right to life in article 22(1) of the Constitution was wiped out by the combined effect of articles 24 and 44, the learned State Attorney submitted that article 44(a) only applied to torture, cruel, inhuman and degrading treatment or punishment outside due process of the law. He contended that the right to life in Uganda is not absolute and indeed, if the Constitutional Assembly had intended to make it absolute, it would have made it non-derogable in article 44 as it did in respect of articles 24, 25 and 28 of the Constitution.

On the role of public opinion in the determination of whether a death penalty was cruel, inhuman or degrading treatment or punishment, Mr. Wamambe submitted that in Uganda public opinion was a relevant factor because of our unique article 126 of the Constitution which requires courts to exercise judicial power in the name of the people and in conformity with law and with the values, norms and aspiration of the people. He submitted that the holding in the **Makwanyane case** that public opinion was irrelevant could not apply to Uganda because in South Africa, they did not have the equivalent of our article 126 of the Constitution. Mr. Wamambe invited us to hold that there was no merits in the first and second framed issues of this petition and to dismiss them accordingly.

I now turn to the determination of the merits of questions posed by

the first two issues of this petition, namely: -

- Is a death sentence prescribed by Uganda penal laws cruel, inhuman or degrading treatment or punishment within the meaning of article 24 of the Constitution?

- If so, is it authorized by the Constitution?

I have read all affidavits filed on behalf of both parties to this petition. They portray the death sentence as sordid, barbaric and extremely harrowing experience. I have also carefully studied all the authorities, local and foreign, together with the relevant legislative and constitutional provisions. I have also studied all the International Conventions on the death penalty. I have no hesitation whatsoever in stating categorically that a death sentence is cruel, inhuman and degrading punishment within the meaning attributed to those words in **Attorney General vs. Abuki, Kyamanywa vs. Uganda, Republic vs. Mbushuu, State vs. Makwanyane, (All supra), Kalu vs. The State (1998) 13 NWL R54** and several others cited form USA, the Caribbean countries, India and Bangladesh. However, that is not the issue which falls for determination now. The issues is: **Is the death penalty in Uganda cruel, inhuman or degrading punishment or treatment within the meaning of article 24 of the Constitution of Uganda?**

Article 22(1) of our Constitution provides: -

> **"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. " [Emphasis added]

In short, the right to life is guaranteed **except** where deprivation of life is done in execution of a death sentence passed by the courts in accordance with the Constitution and the laws of Uganda. My simple understanding of this provision is that though the right to life is guaranteed, the right is not absolute because there is one exception where life can be lawfully extinguished. That is when carrying out a death penalty lawfully imposed by courts. The next article of the Constitution is article 23, which grants the right to liberty of the individual. The right to personal liberty is also not absolute as several exceptions are stated in the article.

Next, is article 24. It states

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

This article makes no reference to article 22(1)! Did the framers of the Constitution forget that they had just authorized 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 authorized 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 authorized 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 the derogation purports to take away a fundamental human right or freedom guaranteed under 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.

This holding indirectly answers the second question, namely whether the death sentence is authorised by the Constitution. I have found that article 22(1) authorises a death sentence carried out in execution of a lawful court order. It is an exception to and is not affected by article 24. It is also not affected by article 44(a) of the Constitution which states: -

> **"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms: -**
>
> **(a) freedom from torture, cruel, inhuman or degrading treatment or punishment (article 24),**
>
> **(b) freedom from slavery or servitude (article 25(a)),**
>
> **(c) the right to a fair hearing (article 28),**
>
> **(d) the right to an order of habeas corpus. "**

Article 44(a) only covers those acts which have not been specifically excepted as in article 22(1) of the Constitution. The right to life is not absolute. It is qualified. I agree with counsel for the respondent that if the framers of the Constitution had intended to make it absolute, the right to life would have been one of the items spelt out in article 44 of the Constitution.

In Uganda, the death penalty is so clearly spelt out and authorized by the Constitution that it is not necessary to resort to public

opinion in order to determine whether it is cruel, inhuman or degrading treatment or punishment or whether it is authorised by the Constitution. However, I do not agree that public opinion is an irrelevant factor. It is a very relevant factor because of article 126(1) of the Constitution which states: -

> **"Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people. "**

In the interpretation of this Constitution and indeed any other law, the views of the people, wherever they can be reasonably accurately ascertained, must be taken into account. This is a command which no court can ignore. There is no equivalent provision in the Constitutions of Tanzania or the Republic of South Africa. Their authorities on this matter are not very helpful to Uganda.

(B) ISSUE NO. 3

The issue here is whether various laws of Uganda that prescribe **mandatory death sentences** upon conviction, and bar appeals from these sentences, are inconsistent with or in contravention of articles 20, 21, 22, 24, 28 44 or any other provision of the Constitution.

The following four provisions of our laws provide for mandatory sentences: -

(a) Section 189 of the Penal Code Act (punishment for murder).

(b) Section 286(2) of the Penal Code Act (punishment for Aggravated Robbery).

(c) Section 23(1) and (2) of the Penal Code (punishment for Treason).

(d) Section 7(1)(a) of the Anti Terrorism Act 14 of 2002, (punishment for acts of terrorism leading to the death of a person).

It was submitted by Prof. Sempebwa on behalf of the petitioners that the above mandatory death penalty provisions infringe on the rights of the petitioners guaranteed under the following articles of the Constitution: -

(i) Article 22(1) and 44(c) by denying them the right to a fair trial on the question of sentencing, a non-derogable right;

(ii) Article 22(1) by denying them the right to have their sentences confirmed by the highest appellate court.

(iii) Article 22(1) by infringing on the separation of powers between Judiciary and the Legislature.

(iv) Articles 28 and 44(c) by denying them a right to a fair

hearing on the question of sentence.

(v) Article 24 and 44(a) by providing a mandatory sentence which is cruel, inhuman and degrading in that the individual circumstances of each Petitioner and each case are not taken into account during sentencing, a non derogable right.

(vi) Article 21(1) by denying them of the right to equality before the law.

Articles: 22(1), 28 and 44(c)

On the infringements to the right to a fair hearing and a fair trial, Prof. Sempebwa submitted that no trial for a serious crime attracting a death penalty could be said to be a fair trial when the accused persons is denied the right to be heard on the question of sentence in the trial court and appellate courts up to the highest court. He argued that each individual case has got special circumstances that should be heard by the court after conviction but before sentence. No two offences are committed in exactly the same way or under similar circumstances. In his view, a law which provides that all persons convicted of similar crimes under the law must automatically suffer death, violates the right to a fair trial and a fair hearing guaranteed under articles 22(1), 28 and made no-derogable by article 44(c) of the Constitution. All such provisions of the law which denied an accused person of a right to a fair trial or fair hearing should be declared unconstitutional, and therefore null and void. He relied on the case of **Raves vs. The Queen**

(2002) 2AC 235 and **Mithu vs.**

State of Punjab (1983 SOL Case No. 026).

Article 22(1) Confirmation of Sentence

Prof. Sempebwa argued that in order for a sentence passed under article 22(1) to be lawful, it had to be confirmed by the highest appellate court. According to him, this meant that the court had a discretion to confirm or not to confirm the sentence. Where the death penalty is mandatory, that discretion is removed from the highest appellate court in violation of article 22 of the Constitution. This reduces the highest appellate court into a rubber stamp of sentences pre-ordained by the legislature which is unconstitutional. He cited the case of **Spencer vs. The Queen** and **Hughes vs. The Queen** both cited with approval in **Raves vs. The Queen (supra)** in which it was held that a court must have the discretion to take into account circumstances of an individual offender and offence in determining whether death penalty should be imposed.

Infringement of Article 126: Separation of Powers.

Prof. Sempebwa also argued that the mandatory death sentence offended the basic separation of powers between the legislature and the judiciary. According to counsel, the role of the Legislature was to prescribe sentences but it was the duty of the Judiciary to decide on the appropriate sentence for each individual accused persons within the parameters set by the legislature. When the legislature prescribes a mandatory death sentence on all persons committing a given offence, irrespective of individual mitigating factors, it usurps the role of Judiciary. For this proposition he relied on the case of **Mithu vs. State of Punjab (supra). Violation of Article 24**

Prof. Sempebwa submitted that on the first two issues of this petition, the petitioners had shown that a death penalty was cruel, inhuman and degrading treatment or punishment. He contended that provisions of the law prescribing a death penalty offended article 24 of the Constitution.

In conclusion, Prof. Sempebwa cited numerous decisions of:

- The Privy Council.
- The Supreme Court of United States of America.
- The Supreme Court of India.
- The United Nations Human Rights Committee,

in support of his submissions that mandatory death sentence

violated the constitutional rights of the petitioners guaranteed by our Constitution in articles 21, 22(1), 24, 28 and 44(c). He asked us to declare that all provisions in our law which prescribed a mandatory death penalty were unconstitutional and therefore null and void.

In reply, Mr. Benjamin Wamambe advanced the following arguments on behalf of the respondent: -

(a) Criminal trial procedure in Uganda is conducted subject to article 28 of the Constitution and in accordance with well established rules which emphasise the right to a fair trial. In case of cases which attract a death sentence, the accused are accorded a fair trial in accordance with the Trial on Indictments Act. From the beginning of the trial in the High Court up to the highest appellate court, the courts retain the discretion to evaluate the evidence and to impose a suitable sentence after conviction. It is not true to say that the courts only rubber stamp the mandatory death sentence pre-ordained by the legislature. The courts have the power to confirm or not to confirm any sentence passed by a lower court. Therefore, a mandatory death sentence does not deny an accused person the right to a fair trial as required by article 22(1) of the Constitution or the right to a fair hearing as guaranteed by articles 28 and 44(e) of the Constitution.

(b) A mandatory death penalty does not contravene article 21 of the Constitution. This article guarantees equal treatment before the law. Article 21(5), however, provides that:

”Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution. ”

This means that what is authorised under the constitution cannot be said to contravene article 21 of the Constitution. Since the death penalty is expressly authorised by article 22(1) of the Constitution, it cannot be said to contravene article 21 of the Constitution.

(c) A mandatory death sentence is simply a sentence like any other sentence. It has already been shown by argument when dealing with issues one and two of this petition, that a death sentence is not cruel, inhuman or degrading treatment or punishment within the meaning of article 24 of the Constitution. Therefore, a law prescribing a mandatory death sentence does not contravene article 24 of the Constitution.

(d) Under article 79 of the Constitution, it is the duty of Parliament to make laws for protection of society. It therefore, has the duty to respect public opinion and to translate their wishes into law. Parliament therefore, has the power to pass a law prescribing a mandatory death sentence in response of the wishes of the people. The courts are also enjoined by article 126 of the Constitution to respect the law, the norms, values and aspirations of the people. The courts have a duty to enforce a mandatory death sentence authorised by law.

(e) All the authorities cited in support of this issue are

distinguishable

(i) They are all from countries where a death sentence has been held to be cruel, inhuman or degrading treatment or punishment. This is not the case in Uganda.

(ii) They all state that a mandatory death penalty deprives the accused of the right to present to court his individual mitigating factors before an appropriate sentence is passed on him. However, in Uganda, all those factors are exhaustively gone into before conviction and it would not be necessary to go into them again after conviction.

(iii) They all originate from countries which have LAISSEZ FAIRE culture, especially in Europe and USA whereas in Uganda, we accept our rights and freedoms to be controlled by law and we approve of it.

(iv) The authorities came from countries which do not have the equivalent of our article 126 which requires our courts of law to administer justice in conformity with law and the values, norms and aspirations of the people of Uganda and not of USA, India, South Africa, Namibia or any other country.

(v) In Uganda, all that is required is a strict observance of article 28 of the Constitution. Once that is done, you cannot talk of unfair hearing in criminal proceedings.

Finally, the learned State Attorney invited us to hold that various

laws of Uganda which prescribe mandatory death sentences do not contravene articles 21, 22, 24, 28 and 44(c) of the Constitution and are not inconsistent with those articles or any other article of the Constitution. He asked us to answer issue No. 3 in the negative.

I now turn to the merits of the third issue of this petition. I have held on the 1st and 2nd issues that the death sentence prescribed by article 22(1) of the Constitution is an exception to the prohibitions contained in article 24 and therefore the sentence is not cruel, inhuman or degrading treatment or punishment. I have also held that the death sentence is authorised by the Constitution. It is now time to examine whether the Constitution gives Parliament the power to prescribe a mandatory death sentence or to prescribe a death sentence for any criminal offence as it wishes. Article 22(1) of the Constitution provides

> **"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. "** [Emphasis added]

Under this article, a person can only be deprived of life lawfully

(a) In execution of a sentence passed in **a fair trial** by a court of competent jurisdiction.

(b) In respect of a criminal offence under the laws of Uganda.

(c) The conviction and sentence have been **confirmed** by the **highest appellate court.**

The case for the petitioners is that a mandatory death penalty deprives the person convicted of a capital offence of his inherent right to be heard in mitigation before the sentence is imposed. To refuse to hear an accused person on any aspect of his/her trial affecting his conviction or sentence would be denial of his right to a fair hearing guaranteed under article 28 of the Constitution. Article 22 also requires that any **conviction** and **sentence** passed upon the conviction must be **confirmed** by the highest appellate court. If an accused person is not accorded a fair trial within the meaning of article 28 of the Constitution and the conviction and the sentence passed on him are not confirmed by the highest appellate court, then if the sentence is a death sentence, it will be unconstitutional as contravening article 22(1) of the Constitution.

I think there is no doubt that in Uganda, once a person is convicted of an offence on which the law prescribes a mandatory death sentence, he is not given an opportunity to say anything in mitigation before a death sentence is pronounced against him. Section 98 of the Trial of Indictments Act provides: -

> **"The Court, before passing any sentence other than a sentence of death, may make such inquires as it thinks fit in order to inform itself as to the proper sentence to be**

passes, 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: " [Emphasis added]

I would have thought that if anyone deserved to be heard after conviction, it should be that person on whom a death sentence is about to be pronounced. Yet the above quoted provision of the Trial on Indictments Act gives that opportunity to everyone else convicted of any crime except the one liable to be sentenced to death. From the minute the conviction is pronounced in the High Court up to the confirmation of conviction in the Court of Appeal and the Supreme Court, the sentence remains automatically the same - death. That is the sentence preordained by Parliament.

This is the first time that this type of case has come up in Uganda. However, a mandatory death sentence has been a subject of constitutional battles in courts of law in the countries of the Common Law jurisdiction and in International Human Rights Courts.

In 1983 the case of **Mithu vs. State of Punjab (supra)** posed such a challenge to the Supreme Court of India. Section 303 of the

Indian Penal Code provided: -

> **"Punishment for murder by life convict - whoever, being under a sentence of Imprisonment for life, commits murder, shall be punished with death. ”**

The issue before the court was whether this section infringed Article 21 of the Indian Constitution which provided: -

> **”No person shall be deprived of his life or personal liberty except according to procedure established by law. ”**

It was argued for the petitioner that section 303 was wholly unreasonable and arbitrary and violated article 21 of the Constitution to the extent that it authorised deprivation of life unjustly and unfairly and is therefore unconstitutional. The Supreme Court of India concurred. The court found that: -

> **"If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The <u>blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence. "</u>** [Emphasis added]

Indeed this is what the courts in Uganda are compelled to do. Every so often, like King Herod when he was passing a death

sentence on Jesus, you hear judges confess in court that they have no choice but to arbitrarily pass a death sentence since they have no power to consider whether it is appropriate or not.

The Supreme Court of India asked some pertinent questions in the **Mithu case: -**

> **"Is a law which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that sentence should not be imposed, just and fair?**
>
> **Secondly, is such a law just and fair if, in the very nature of things, it does not require the court to state the reasons why the Supreme penalty of law is called for? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused? ”**

It should be noted that in Uganda, mandatory death sentences are not only imposed on murder convicts but also those convicted of Treason, Terrorism and Aggravated Robbery.

The Supreme Court of India went on to discuss the folly of the mandatory sentence in these terms

> **”…..a provision of law which deprives the court of the**

use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft, ' 'Breach of Trust' or 'Murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hallmarks of justice. The mandatory sentence of death prescribed by section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing

that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead. " [Emphasis added]

The Indian Court concluded: -

"A standardised mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case.....sec. 303 excludes judicial

discretion. The scales of justice are removed from the hands of the judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irresistible is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must be stigmatised as arbitrary and oppressive. Sec. 303 is such a law and it must go the way all-bad laws go. Section 303 of the Indian Penal Code must be struck down as unconstitutional. " [Emphasis added]

Section 303 has got its equivalent in Uganda which I have pointed out earlier in this judgment. The above consideration of Section 303 would equally apply to our equivalent provisions. Can a person tried and sentenced to death under such arbitrary, unfair and unjust laws be said to have received a fair trial within the meaning

of article 22(1) or a fair hearing within the meaning of article 28 of the Constitution?

The decision of the Indian Supreme Court in **Mithu** is not an isolated decision. It was cited with approval in the recent decision of the Privy Council in **Reyes vs. Queen (2002) UK PC II.** In this case, the Privy Council was considering an appeal from the Court of Appeal of Balize in which the defendant Reyes was given a mandatory sentence of death for murder. The Privy Council reviewed most of the cases decided in the Commonwealth and the United States on the subject for mandatory death sentence, including the **Mithu case (supra).** The summary of the issue which lay of determination and the courts conclusion are to be found on page 255 of the report as follows

> **"8. 2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author's case, constitute a violation of articles 6(1), 7 and 26 of the Covenant. The state party has replied that the death sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The committee notes that the mandatory imposition of the death penalty under the laws of the state is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the**

circumstances of the particular offence. The death penalty is mandatory in all cases of 'murder' (intentional acts of violence resulting in the death of a person). The committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the rights of life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right of life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial

review of all aspects of a criminal case. The committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6, paragraph 1, of the Covenant. " [Emphasis added]

I am not persuaded by the argument of the respondent that in Uganda, the right to a fair trial and a fair hearing are always guaranteed when it is clear that in the most serious of crimes, the accused is sentenced to death without affording him/her a simple opportunity to show cause why such an irrevocable penalty should not be imposed on him or her.

To conclude on this matter, these cases are authority for the general proposition that mandatory capital punishment deprives the accused person the most fundamental right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his/her case. It is arbitrary, unfair and unjust.

In the case of Uganda, the laws which authorise such mandatory sentence violate articles 22(1) 28 and 44(c), the non-derogable right to a fair trial and a fair hearing. Such laws cannot be justifiable under article 43 of the Constitution or any other law since article 44(c) of the Constitution is supreme and nonderogable on the right to a fair hearing. The laws must be declared unconstitutional and null and void. This is irrespective of the right of an accused to seek pardon or commutation under article 121 of the Constitution. The Privy Council in **Reyes vs. The Queen (supra)** observed that: -

> **"The existence of a right to seek pardon or commutation as required by article 6, paragraph 4 of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to the appropriate judicial review of all aspects of a criminal case. ”**

If such laws were enacted before the Constitution came into force

in 1995, then they must be modified in accordance with article 273 to be in conformity with the Constitution.

There is also another aspect of this issue as to whether a mandatory death sentence permits the death sentence to be confirmed by the highest appellate court as required by article 22(1) of the Constitution. There is no dispute that the highest appellate court in Uganda is the Supreme Court. It is a very well known fact that when it confirms conviction of a person charged of an offence punishable by a **mandatory death sentence,** its role ends there. It has no opportunity to confirm whether the death sentence is the most appropriate in all the circumstances of the offence and the offender. For that reason, the mandatory death sentence is inconsistent and in contravention of the clear requirement of article 22(1) that a sentence depriving a person of the right to life must be confirmed by the highest appellate court.

It should be obvious from my findings in the first and second issues of this petition, that for a death sentence authorised under article 22(1) to qualify as an exception to the prohibitions in article 24 of the Constitution, it must have been passed in a **fair** trial and **confirmed** by the highest appellate court. I have also held that a mandatory death penalty neither permits a fair trial nor confirmation of the sentence by the highest appellate court. Therefore a **mandatory death sentence** is cruel, inhuman or a degrading treatment or punishment within the meaning of articles 24 and 44(a) of the Constitution. The mandatoriness aspect makes what would have otherwise been a lawful sentence unlawful. It is

not permitted by the Constitution. It is null and void.

Does a mandatory death sentence contravene article 21(1) of the constitution? The article states: -

> **All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. ”**

The petitioners submitted that the death penalty and section 98 of the Trial on Indictments Act (cited supra) contravene article 21 to the extent that whereas all other persons sentenced of a crime are heard on the question of sentence, those sentenced to mandatory death sentence cannot he heard on sentence.

The respondent's defence is that article 21(5) provides: -

> **"Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of the Constitution. "**

The respondent argued that since article 22(1) permits a death sentence, the sentence is lawful even if it is made mandatory. With respect, I do not agree. Article 22(1) only authorises a death sentence passed in a **fair** trial and **confirmed** by the highest appellate court. I have held that a mandatory sentence does not permit the fair trial or the confirmation of the sentence by the

highest appellate court. A mandatory death sentence is not allowed by the Constitution, it offends articles 22, 24, 28 and 44 of the Constitution. Therefore it also offends article 21(1) of the Constitution.

Finally, on the third issue of this petition, Prof. Sempebwa submitted on behalf of the petitioners that a mandatory death sentence offends the basic principles of separation of powers between the legislature and the judiciary. It is the role of the legislature to prescribe sentences but the duty and right of sentencing rests with the judiciary who must decide on an appropriate sentence of each individual accused within parameters set by the legislature. The respondents reply was that under article 79 of the Constitution, Parliament had power to make laws for good governance of Uganda. In exercise of that power it can prescribe mandatory sentences in response to the wishes of the people. The courts had the duty, imposed on them by article 126 of the Constitution, to enforce the mandatory sentences.

This argument raises a very important matter of principle that needs to be settled in the interest of the administration of justice in this country. Whose duty is it to pass an appropriate sentence on a person convicted of crime? Is sentencing an exercise of legislative function or is it an exercise of the judicial function? Does Parliament have the power under the 1995 Constitution to compel judges and justices of the Courts of Judicature to blindly impose mandatory death sentences on citizens of this country who are

rendered statutory mutes shortly before the death sentence is pronounced on them? Does our Constitution provide any guidance on this matter?

In the words of CHANDRACUND, CJ in **Mithu vs. State of Punjab (supra):**

> **"The gravity of offences furnishes the guidelines for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The Legislature cannot make relevant circumstances, irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty to impose a preordained sentence of death. Equity and good conscience are the hallmarks of justice. "** [Emphasis added]

Is Uganda any different from India in this regard? Does the Parliament of Uganda have the power to order courts to blindly hand out death sentences pre-ordained by itself when it never had the opportunity of seeing or hearing the circumstances of each offence and each offender? Where in the Constitution does it derive that power? The respondent has categorically submitted that such power is conferred on the legislature by article 79(1) of the Constitution. That article states: -

> "**Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for peace, order, development and good governance of Uganda. "**

Does this provision, which is subject to the Constitution, authorise Parliament to enact laws which have the effect of taking away a fundamental human right guaranteed in chapter IV of the Constitution. Can Parliament pass a law which derogates on the rights and freedoms guaranteed by articles 22, 24, 28 and 44 of the Constitution?

My answer is definitely No. The power of Parliament to make laws for good governance is subject to the Constitution. It cannot enact a law that takes away from a citizen a right or freedom guaranteed under chapter iv of the Constitution. Yet, that is the effect of section 98 of the Trial of Indictments Act. It deprives the courts of their legitimate jurisdiction to give a fair hearing to a convict on the question of his sentence just as section 303 of the Indian Penal Code does.

The Constitution itself does not direct courts to pass blind sentences on convicted persons. The courts mandate to exercise judicial power are contained in article 126 of the Constitution. It states: -

> "**Judicial power is derived from the people and shall be exercised by the courts established under this**

Constitution in the name of the people and in accordance with the law and with the values, norms and the aspirations of the people. "

The first requirement of this article is that the exercise of judicial power must be in conformity with the Law. Is a "law" which provides for arbitrary, discriminating, unfair and unjust treatment of citizens a law within the meaning of this article? Can a "law" which derogates on the rights of citizen's guaranteed under article 22, 24, 28 and 44 be called a law within the meaning of article 126 of the Constitution? A law must always be right, just, fair, not arbitrary, fanciful or oppressive. If a law is not all these, it is no law at all and our courts are not called upon to exercise judicial power in conformity with such a **"law".**

It should be clear from the above discussion that sentencing is a judicial function and not a legislative function. The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the Constitution. Most of the laws which prescribe a mandatory death sentence were enacted before the promulgation of the 1995 Constitution. They are now inconsistent with it and to the extent of the inconsistency, they are null and void. If the 1967 Constitution did not define judicial power and led the legislature not to trust the judges' sense of responsibility to pass death sentences in deserving cases, the 1995 Constitution in article 126 prescribes the only limits to the exercise of judicial power and the legislature must now learn to trust that judges have

enough sense of responsibility to bear in mind article 126 when considering whether to impose a death sentence or not. In other common law jurisdictions, judges do impose the death sentence in deserving cases even when it is not specifically made mandatory, as long as the legislature indicates that it is desirable. The legislature should be free to legislate but the judiciary should also be left free to adjudicate.

I wish to conclude by saying that Parliament has no power to enact a law which is arbitrary, unfair, unjust, fanciful or oppressive. The provisions of sections 189, 286(2) and 23(1) and (2) of the Penal Code Act, section 7(1)(a) of the Anti-Terrorism Act and section 98 of the Trial on Indictments Act are unjust, unfair, arbitrary and contrary to articles 21, 22, 24, 28, 44 and 126 of the Constitution. I would answer issue No. 3 of this petition in the affirmative.

(C) ISSUE NO. 4

The issue is: -

Whether section 99 of the Trial on Indictments Act, which prescribes hanging as a legal method of implementing the death penalty, is inconsistent with and in contravention of articles 24, 44 and any other article of the Constitution. I have just held in issue No. 3 that the various Uganda laws which prescribe a mandatory death sentence and section 98 of the Trial on Indictments Act (TIA) contravene articles 21, 22, 24 and 44 of the Constitution. This is

because in the imposition and execution of such sentence, article 22(1) of the Constitution is not complied with. I also held that a death sentence (as opposed to a mandatory death sentence) imposed strictly in accordance with article 22(1) is an exception to article 24 and 44(a) of the Constitution and is therefore permitted by our Constitution. What then is the status of section 99 Trial on Indictments Act when applied to this latter category? Is the method of hanging prescribed by section 99 Trial on Indictments Act unconstitutional when applied to convicts sentenced to death strictly in accordance with article 22(1) of the Constitution? Does it constitute cruel, inhuman, or degrading treatment or punishment within the meaning of articles 24 and 44 of the Constitution? This is the question at stake in this issue.

I will paraphrase this issue in a different way. The Constitution of Uganda authorises a death penalty as long as it is carried out in execution of a sentence imposed in a fair trial by a court of competent jurisdiction in respect of criminal offence under the laws of Uganda and the conviction and the sentence have been confirmed by the highest appellate court. Suppose Uganda laws were streamlined, as they should, and mandatory death sentences were removed and the Supreme Court regained its rightful jurisdiction to confirm death sentences, would carrying out of the sentence by hanging as in section 99 be unconstitutional because of the way it is carried out in Uganda?

Section 99 provides: -

"99(1) Sentence of death shall be carried out by hanging in accordance with the provisions of the Prisons Act.

(2) When a person is sentenced to death, the sentence shall direct that he or she shall suffer death in the manner authorised by law. " [Emphasis mine]

The learned counsel for the petitioners who argued this ground submitted that a death sentence, even if it was found to be constitutional in Uganda, offends article 24 and 44(a) of the Constitution by virtue of the hanging method of implementation of the sentence. Counsel read affidavit evidence of Anthony Okwanga, a former prisons officer now on death row, Ben Ogwang, who has attended several executions by hanging at Luzira Prisons, and the expert evidence of Dr. Hunt and Dr. Hillman. Some of the affidavits contain graphic descriptions of barbaric, horrific and bizarre scenes that take place immediately before, during and after execution by hanging in Uganda and elsewhere. Counsel invited us to interpret the words **"torture, cruel, inhuman"** and to give them their ordinary English language meaning which was attributed to them in famous authorities such as: -

- **Abuki vs. Uganda (supra)**
- **Uganda vs. Abuki (supra)**

- **Republic vs. Mbushuu (supra)**
- **Mbushuu vs. Republic (supra)**
- **State vs. Makwanyane (supra).**

Learned counsel cited these cases and several others in support of his submission that death sentence by hanging turns an otherwise lawful sentence into an unconstitutional one because the method used is cruel, inhuman and degrading within the meaning of articles 24 and 44(a) of the Constitution. His prayer was that section 99 of Trial on Indictments Act which prescribes the method should be declared null and void for being inconsistent with and contravening article 24 and 44(a) of the Constitution.

Mr. Mike Chibita, the learned Principle State Attorney who argued this ground on behalf of the respondent did not agree. His argument in reply was short but precise. He submitted that the respondent had proved that the Constitution of Uganda saved the death sentence in article 22(1). Therefore, if the death penalty is permitted by the Constitution as it has been and continues to be, it was incumbent upon the legislators to prescribe a method of carrying it out. They prescribed hanging. If they had not, it would have been upon the Prisons authorities to originate a method of their choice, firing squad, poisoning, lethal injection, and electric chair e.t.c. There are diverse methods used in various jurisdictions. The hanging method was not arrived at randomly. A lot of research must have been carried out first before it was prescribed. It has

been in use in Uganda since 1938. It has worked well and no major problems have been reported regarding its execution here.

Learned counsel submitted further that in Uganda, hanging is carried out in private, it is not open to the general public or the prisoners. Okwanga who witnessed it did so as a Prisons staff member before he became a prison inmate. There is nothing degrading about it because unauthorized people do not witness it. Punishments by their very nature inflict a degree of pain and are intrinsically painful and unpleasant.

On the interpretation of the words **"cruel, inhuman or degrading"** Mr. Chibita invited us not to give them their ordinary English interpretation as was done in cases like **Abuki** and **Kyamanywa** (supra). Those cases were distinguishable because they were not dealing with a death sentence. The words should only be given a meaning that is justified by the context in which they were used in articles 22(1) and 24 looked at together. The natural interpretation from that context is that a death sentence authorized by the Constitution in article 22(1) can lawfully be carried out by any method prescribed by Parliament. The fact that the method inflicts pain and suffering does not render it cruel, inhuman and degrading treatment or punishment within the meaning of article 24 of the Constitution. It is a logical and a natural consequence of the death penalty.

Learned counsel also invited us to ignore cases decided outside

Uganda on this issue because those countries did not have the equivalent of article 22(1), 24 and 126 of the Constitution. By article 126, the courts of law in Uganda are enjoined to exercise judicial power according to law and the values, norms and aspiration of the people. Since the people of Uganda do not regard the death penalty as cruel, inhuman or degrading, then any method prescribed by Parliament to carry it out cannot be said to be cruel, inhuman or degrading within the meaning of articles 24 and 44(a) of our Constitution. He invited us to determine this issue in the negative.

I must now determine whether death by hanging is authorized by the Constitution of Uganda. We must remember here that the issue is not whether inflicting a death sentence by hanging is a good thing or not. The issue is not whether hanging is a desirable or an appropriate sentence in Uganda at this point in time. The only issue is whether it is authorized by our Constitution or not. If the answer is that it is authorized, then so be it. It is not the duty of this court to stop it. Those who find it offensive must go to the people or their elected representatives and convince them to drop that method of carrying out a death sentence. If the answer is that it is not authorized by our Constitution, then, it must stop at once.

I have held in this judgment that a death sentence in Uganda is lawful and Constitutional ONLY if it is carried out in a manner which is consistent with article 22(1) of the Constitution. Any death sentence which is passed in a manner not consistent with article 22(1) is unlawful and unconstitutional. In this part of this

judgment, reference to a **death sentence"** only refers to such a sentence passed strictly in accordance with article 22(1) of the Constitution. The term **"death sentence"** in this section does not include a mandatory death sentence which I held under issue No. 3 above to be unlawful and unconstitutional.

I have already quoted the provisions of section 99 of the Trial on Indictment Act earlier in this judgment. It authorizes execution of the death sentence by hanging. The constitutionality of hanging authorized by section 99 of the Trial on Indictment Act has not been challenged in our courts of law. It has, however, been a subject of challenges in United States of America, South Africa and other common law jurisdictions. In the United States Supreme Court case of **Campbell vs. Wood (1994) 18F 3a 662** the court described hanging in the following terms

> ***"Hanging is savage and barbaric method of terminating human life..... Hanging is a crude rough and wanton procedure, the purpose of which is to tear apart the spine. It is needlessly violent and intrusive, deliberately degrading and dehumanising, it causes grievous fear beyond that of death itself and the attendant consequences are often humiliating and disgusting. In a number of cases, one of these consequences is decapitation. "***[Emphasis added]

Further on the court stated

> ***"There is absolutely no doubt that every hanging involves a risk that the prisoner will not die immediately, but will instead struggle or asphyxiate to death. This process, which may take several minutes, is extremely painful. Not only does the prisoner experience the pain felt by any strangulation victim, but he does so while dangling at the end of a rope, after a severe trauma has been inflicted on his neck and spine. Although such a slow and painful death will occur in only a comparatively small percentage of cases, every single hanging involves a significant risk that it will occur..... This***

conclusion is not surprising, because every jurisdiction that has ever used hanging as a method of execution has understood that the risk of painful and torturous death exists. "[Emphasis added]

The court then concluded: -

> ***"Hanging is a violent mutilative barbaric procedure that has been resoundingly rejected..... Even aside from the risks of decapitation and lingering painful death, hanging is simply inconsistent with 'the dignity of man' which is the basic concept underlying the English amendment.....***
>
> ***Hanging is without the slightest doubt, 'cruel and unusual' - in layman's terms and in the constitutional sense. "*** [Emphasis added]

Though these quotes are from the minority decision of the United States Supreme Court, they were cited with approval in **State vs. Makwanyane** (supra) unanimous decision of the Constitutional Court of the Republic of South Africa. In the Tanzanian case of **Mbushuu** (supra) hanging was described as follows: -

> ***".... the process of hanging is particularly gruesome. One leading doctor described the process as 'slow, dirty, horrible, brutal, uncivilised and unspeakably barbaric'. The prisoner is dropped through a trap door eight to eight and a half feet with a rope around his neck. The intention is to break his neck so that he dies quickly. The length of the drop is determined on the basis of such factors as body weight and muscularity or fatness of the prisoner's neck. If the hangman gets it wrong and the prisoner is dropped too far, the prisoner's head can be decapitated or his face can be torn away. If the drop is too short, then the neck will not be broken but instead the prisoner will die of strangulation. There are many documented cases of botched hanging in various countries including Tanzania. There are a few cases in which hanging have been messed up and the prison guards have had to pull on the prisoner's legs to speed up his death or use a hammer to hit his head. The shock to system causes the prisoner to lose control over his bowels and he will***

soil himself. "[Emphasis added]

There is no doubt that the strongest language available in the English vocabulary is used in the above decisions to describe the effect of hanging on the victim and the observers. However, this alone cannot mean that in Uganda, hanging is cruel, inhuman or degrading treatment or punishment within the meaning of article 24 of the Constitution. For example, if this sort of punishment is in clear terms authorized by our constitution, then it means that the people of Uganda do not view it as being cruel, inhuman or degrading. It would mean that they regard it as a suitable punishment in certain cases authorized within the meaning of article 22(1) of the Constitution.

Hanging has been in the use in Uganda since 1938. It is a very well known sentence as the treatment one gets for very serious offences, especially as a sentence for murder. In Runyankole/Rukiga language it is called **Akabaaho** and in Luganda, **Akalabba.** The Luo people call it **Dec** meaning putting a rope around the neck and then pulling it. These words describe a situation where one stands on a piece of wood hosted on top of a pit with a rope tied around the neck. When the piece of wood is removed, the person falls in the pit and is strangled to death by the rope.

When the people of Uganda were consulted in the constitutional making process for the 1995 Constitution and the 2005 amendments to it, the majority of those consulted demanded that a

death sentence stays. They knew very well that it would be carried out by hanging. This country has never known any other method. When the Constituent Assembly enacted article 22(1) authorizing a death sentence, they were very much aware that it would be carried out by hanging because section 99 of Trial on Indictment Act was already in place. In authorizing a death sentence in article 22(1), and remaining silent on the method of carrying it out, they knew that unless section 99 of Trial on Indictment Act was repealed, hanging would be the method to execute the death sentence. It is therefore, inconceivable that shortly after the enaction of article 22(1) authorizing both the death sentence and hanging, the Assembly would have enacted article 24 outlawing hanging without specifically stating so.

It should also be noted that the case of **Campbell vs. Wood** (supra) represents a minority decision at the time of the decision and has very little persuasive value on this court beyond the useful description of the hanging method. The decision in **Makwanyane** is also distinguishable because the right to life is absolute under the Constitution of South Africa. The decision in **Mbushuu** is also distinguishable because the death sentence was not authorized by the Constitution of Tanzania itself but by an Act of Parliament. In Uganda the death penalty is expressly authorized by the Constitution clearly in the knowledge that it would be carried out by hanging. Long before articles 22(1) and 24 were enacted, the practice of hanging criminals in serious crimes had been in practice for almost 60 years. The Uganda cases of **Abuki vs. Uganda and Kyamanywa vs. Uganda** are not useful in this regard. They were

neither on the subject of death sentence nor hanging. They also concerned interpretation of Acts of Parliament against the Constitution, unlike the instant case which concerns interpretation of provisions of the Constitution against other provisions of the same Constitution.

Finally, I have stated in this judgment, that unlike in South Africa where people's opinion may not be a relevant considerations in constitutional interpretation, in Uganda, the people's views are very relevant because of article 126 of our Constitution. Whether you call hanging cruel, inhuman, degrading, sadistic, barbaric, primitive, out moded e. t. c, 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 authorized 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 the 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. I would answer this issue in the negative.

(D) ISSUE NO. 5

This is whether Execution of Petitioners who has been on death row for a long period of time is inconsistent with and in contravention of articles 24, 44 or any other provision of the Constitution. Professor Sempebwa, the learned counsel who argued this issue on behalf of the petitioners submitted that should the Constitutional Court be inclined to find that the Death Penalty is a lawful form of punishment, then the length intervening between conviction and execution that has been endured by the majority of the petitioners on death row makes what might otherwise be a lawful punishment, cruel, degrading and inhuman, and consequently unconstitutional to implement.

Counsel was anxious to point out that the petitioners were not seeking for a quick execution, but merely pointing out that to carry out the execution now would amount to cruel, inhuman and degrading form of treatment. For the rationale of this issue, he cited the case of **Catholic Commission for Justice and Peace of Zimbabwe vs. Attorney General (1993) 2LRC 277** which

was cited with approval in **R vs. Mbushuu** (supra) where the court in Tanzania stated

"When a prisoner who has been on death row for several years

approaches the courts for relief <u>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 a living heir is such as to render it particularly inhuman to execute him at that stage. [99] [Emphasis added]

He submitted that because of what has come to be known as the **"Death Row Phenomenon"** which sets in from the day an accused is sentenced to death up to the day he is executed, delay in executing the death penalty makes the sentence cruel, inhuman and degrading treatment or punishment within the meaning of articles 24 and 44(a) of the Constitution. In support of his arguments, learned counsel cited the following authorities: -

(i) <u>Catholic Commission for Justice and Peace in Zimbabwe vs. Attorney General and others (supra).</u>

(ii) <u>Attorney General vs. Abuki (supra).</u>

(iii) <u>R vs. Mbushuu (supra)</u>

(iv) <u>Mbushuu vs. R (supra)</u>

(v) <u>Platt and Morgan vs. Attorney General of Jamaica [1994] 2AC 36.</u>

(vi) <u>Sovereign vs. UK (1989) EHRR 439.</u>

He invited us to answer this issue in the affirmative.

The respondent's arguments in reply can be summarized as follows: -

(i) There is nothing in articles 24, 44(a) or any other provision of the Constitution that implies or sets a time limit within which a death penalty must be carried out after due process in the courts is completed. If the framers of the Constitution wanted to set a time limit, they would have done so unambiguously. It is not the function of the courts to do so and the courts should not do so now.

(ii) Under article 121 of the Constitution, the President has the power to exercise the Prerogative of mercy in which he can grant pardon, respite, substitution or remission of any sentence or punishment imposed on any person. The exercise of this discretion cannot and should not be fettered by time limits.

(iii) The petitioners were very ungrateful people. They should greet each day they are allowed to stay alive with glee and thankfulness. The more they stay on death row, the more chances they have of being pardoned. One Abudallah Nasuru, who was recently pardoned by the President after almost twenty years on death row was cited as an example. It was

pointed out, partly in jest, that the man has recently married a brand new wife! The State was however, prepared to put the long suffering of the petitioners to the end, if that is what they really want.

(iv) Given that the majority of the petitioners have committed murder, the alleged cruelty suffered by them while waiting for execution cannot be compared to the cruelty they inflicted on their victims and their relatives who continue to suffer.

(v) All the cases relied upon by the petitioners on this issue are not applicable to this case. First, In the **Catholic Commission for Justice and Peace and Platt and Morgan,** the petitions were originated after a real threat of execution. The petitioners death warrants in both cases had already been signed. In this case there is no such threat. The President has not signed any warrant for execution of anyone. The petitioners still have a chance to be pardoned. The Presidents hands should not be tied by time limits. Second, in both cases, their respective countries had set very high standards whereby executions were always carried out speedily within a short time, but in Uganda, executions take a very long time to occur. Third, In **Platt and Morgan** the State was found to have failed to perform some obligations hence contributing to the delay. In Uganda the State has been diligent throughout. Finally, counsel for the respondent invited us to find that long delay on death row was not only prohibited but was actually justified under our Constitution. In his view, this issue should

be answered in the negative.

I now turn to the determination of the merits of issue No. 5. I will endeavor to answer the following questions:

(a) What is the meaning of Death Row Phenomenon?

(b) Does it exist in Uganda?

(c) Is it capable of turning an otherwise lawful death sentence into cruel, inhuman, degrading treatment or punishment within the meaning of article 24 of the Constitution?

I must state a gain that this issue has not been a subject of adjudication in our courts in Uganda. There are, therefore, no local precedents on the matter. However, it has been a subject of adjudication in the United Kingdom, the United States of America, Jamaica, Zimbabwe, South Africa, Tanzania and India, to mention but a few countries. For the purpose of this judgment I shall mainly refer to the cases from Zimbabwe and Tanzania both of which are much nearer home, with similar legal systems like ours and where prison conditions prevailing there are remarkably similar to our own.

The meaning of death row phenomenon:

The issue at hand was extensively discussed in the Supreme Court of Zimbabwe in **Catholic Commission for Justice and**

Peace in Zimbabwe vs. The Attorney General and Others (supra). The brief facts of that case appear on page 284 of the report as follows: -

> ***"The applicant, the Catholic Commission for Justice and Peace in Zimbabwe, was a human rights organisation. In March 1993 it was reported in a national newspaper that four men, all of whom had previously been convicted of murder and sentenced to death, were soon to be hanged. At this time the four condemned prisoners had already spent between four and six years in the condemned section of Harare Central Prison i. e. on death row. The applicant immediately sought and obtained from the Supreme Court a provisional order interdicting the Attorney General, the sheriff of Zimbabwe and the Director of Prisons, the respondents, from carrying out the death sentences. The matter was referred to the Supreme Court to determine whether the delay in carrying out the death sentences breached section 15(1) of the Constitution of Zimbabwe and if so, whether the sentences should be permanently stayed. "***

It should be noted that section 15(1) of the Constitution of Zimbabwe is similar to article 24 of our Constitution. The Supreme Court investigated the physical condition endured daily by the four condemned persons and found the following: -

> ***"Since the passing of sentence of death upon them, the four prisoners have been incarcerated in the condemned section of***

Harare Central Prison. Pursuant to section 110 of the Prisons Act (Cap 21) a condemned prisoner is confined in a cell separately, under constant supervision both by day and night. The cell is approximately three and a half meters long by two meters wide. By holding his arms outstretched a person is able to touch the opposite walls. There is a single window very high up from which only the sky is visible. The door of the cell has a small aperture through which prison officers are able to view the inmate. An electric light burns in each cell and is never extinguished. It supplies the sole source of illumination. There is no inbuilt toilet, the prisoner being obliged to utilise a chamber pot. A thin mattress is provided as well as two sets of clothing - the one to be worn inside the cell, the other when outside - in order to facilitate routine security checks and searches.

The cell is opened every morning at 0600 hours. The condemned prisoner is allowed out in a group for washing of the chamber pot and bathing. He is returned for breakfast. Lunch is served in the cell at

1. *00 hours and supper at 14 hours. The food is of poor quality. Ten cigarettes a day are provided. The condemned prisoner is allowed two periods of exercise time of thirty minutes each in one of two exercise yards, between 0900 and 1100 hours and 13000 and 1500 hours, in a group of about ten other condemned prisoners. No apparatus to exercise is supplied and the playing of games is forbidden. Communication with other condemned prisoners is permitted but not with any other grade of prisoner. In all he is confined in a cell for a minimum period of twenty-one hours and forty minutes per day during which he has no contact at all with any other prisoner. He is given a bible and other religious books but no other reading material.*

At 1500 hours the condemned prisoner is required to leave all clothing outside his cell. Thereupon he is incarcerated, naked until the following morning. The cell is very cold in the winter months.

Visitations from family members of about ten minutes' duration, in the presence of prison officers, are permitted

periodically. ”

The court also investigated the mental conditions, the anguish the condemned persons had to endure while waiting for execution. They were deponed to by a condemned prisoner called Admire Mthombeki as follows

> ***“Because you spend so much time in your cell alone, you endlessly brood over your fate and it becomes very difficult, and for some people impossible, to cope with it all. The treatment meted out to you by the warders is very harsh. They continuously hassling you and chasing you up. If you make any complaint about anything to do with the conditions, you run the risk of receiving a beating. One of the warders blows a whistle. Other warders come running and without further ado they start beating you with their baton sticks. The warders are also continuously reminding you of the hanging which awaits you. They continually taunt and torment you about it. For instance, they would ask you why you are bothering to read when you are going to hang. They would also say that you are now fat enough to hang.***
>
> ***The gallows themselves are situated within the condemned section itself. Whilst I was there, people were hanged in 1987 and 1988. Although apparently five people can be hanged at the same time, the hangings used to take place in stages. This means that for the rest of us the agony was prolonged.***

In 1987 a total of eleven people were hanged. However, the process went on for about two weeks. Two people were hanged one day. The next day nobody was hanged. The following day another two people were hanged and so it went on. During this period, the warders rattled our doors at 4. 00 am which is the time they remove people from their cells for hanging. The effect was, of course, that I woke up suddenly terrified that I was about to be hanged. This was just another way in which they tormented us. When a person was to be taken out for hanging the warders came into his cell in a group. They leg-ironed him and handcuffed him. Often, the person to be hanged resisted and the warders then used electric prodders to subdue him. I saw this through the peep-hole in my cell. The screaming of those about to be hanged from the time they are removed from their cells at 4. 00 am up to the time they were hanged at about 9. 00 am. We also heard the sounds of the gallows themselves.....

The warders often told us detailed and lurid stories about the hangings themselves which they had witnessed. The aim of this was to torture us. For instance, after one lot of hangings, they told us that the machine did not work properly. As a result one of those to be hanged called Chitongo did not die. Instead, he somehow managed to get hold of the hangman and would not let go. We were told that the warders eventually had to get a hammer and then they hammered him to death. On another occasion one of the warders showed one condemned man called Vundla a newspaper showing that he was about to be

executed. We were not allowed access to any newspapers. The warder therefore deliberately showed this condemned person the newspaper to torture him. As a result, Vundla managed to climb up to the window at the top of his small cell and from there he dived on to the floor and killed himself.

Many people could not cope with all this and become mentally disturbed. The warders treated these kind of people even worse than us. For instance, if a mentally disturbed prisoner soiled his cell the warders refused for days to have it cleaned up. [99]

The Supreme Court of Zimbabwe discussed the Judicial and academic acceptance of the death row phenomenon. It reviewed various decisions from other jurisdictions and writings of jurists, penologists and psychiatrists and accepted the physical and mental conditions expressed in the above extracts and in the following extracts from the same case as the true meaning of the death row phenomenon: -

(a) ***"When a prisoner sentence by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.... As to the precise time when his execution shall take place,*** [99]

(b) ***"Punishments are cruel when they involve... a lingering death... something more than the mere extinguishment of life. "***

(c) ***"It may validly be argued, so it seems to me, that death is as lingering if a person spends several years in a death cell awaiting execution, as if the mode of execution takes an unacceptably long time to kill him. The pain of mental lingering can be as intense as the agony of physical lingering. "***

(d) ***"Death row is barren and uninviting. The death row inmate must contend with a segregated environment marked by immobility, reduced stimulation, and the prospect of harassment by staff. There is also the risk that visits from loved ones will become increasingly rare, for the man who is 'civilly dead' is often abandoned by the living. The condemned prisoner's ordeal is usually a lonely one and must be met largely through his own resources. The uncertainties of his case - pending appeals, unanswered bids for problems. A continuing and pressing concerns whether one will join the substantial minority who obtain a reprieve and will be counted among the to- be-dead. Uncertainty may make the dilemma of the death row inmate more complicated than simply choosing between maintaining hope or surrendering to despair. The condemned can afford neither alternative, but must nurture both a desire to live and an acceptance of imminent death. As revealed in the suffering of terminally ill patients, this is an extremely difficult task, one in which resources afforded by family or those within the institutional context may prove critical to the person's adjustment. The death row inmate must achieve equilibrium with few coping supports. In the process, he must somehow maintain his dignity***

and integrity. ”

(e) ***“Some death row inmates, attuned to the bitter irony of their predicament, characterize their existence as a living death and themselves as the living dead. They are speaking symbolically, of course, but their imagery is an appropriate description of the human experience in a world where life is so obviously ruled by death. It takes into account the condemned prisoners' massive deprivation of personal autonomy and command over resources critical to psychological survival; tomblike setting, marked by indifference to basic human needs and desires; and their enforced isolation from the living, with the resulting emotional emptiness and death. ”***

These extracts depict the internationally accepted meaning of Death Row Phenomenon.

<u>Does it Exist in Uganda?</u>

I have read about the physical conditions existing in our prisons from the affidavits of former inmates: Edward Mary Mpagi and Tom Balimbya and current inmates: Ben Ogwang, Susan Kigula, Andrew Walusimbi and Prisons officials: Tom Ochan and Moses Kakungulu Wagabaza.

I have also read about the mental state of the prisoner on death row

from the affidavits of Moses Kakungulu Wagabaze, David Nsalasatta, Medical Officers Dr. Magret Mungherera and Robert Okuyait. It is neither possible nor desirable to reproduce them in this judgment for lack of space. I can, however, definitely say that the physical and mental conditions endured by death row inmates in Uganda are much more horrible and harsher than those endured by death row inmates in Zimbabwe as described a while ago in this judgment. The evidence on the Uganda conditions is neither rebutted nor contested by the respondent. I have no doubt in my mind whatsoever that Death Row Phenomenon exists and is very much well and alive in Uganda Prisons.

Does its Existence Violate article 24 of the Constitution?

Article 24 of the Constitution of Uganda states: -

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

Section 15(1) of the Zimbabwe Constitution states: -

> ***"No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment. "***

Commenting on the construction of the Zimbabwe provision in the case of **Ncube vs. State [1988] LRC 442 at 460,** Gubbay CJ (as he then was) stated:

> **"I express the view that section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic motions of dignity, humanity and decency. It guarantees that punishment or treatment of the individual be exercised within the ambit of civilised standards. Any punishment or treatment incompatible with the evolving standards of decency that mark the progress of maturing society, or which involve the infliction of unnecessary suffering, is repulsive. "**

In this petition, 417 petitioners are complaining that since they were sentenced to death, they have been subjected to death row phenomenon for so long that it would be cruel, inhuman and degrading to subject them to execution after so much suffering. There is evidence that they have been on death row for between 4 to 20 years at the time of filing this petition. The average period of waiting is reckoned to be about 10 years. Have they ceased to have the protection accorded by article 24 of the Constitution? It was stated in the **Catholic Commission for Justice and Peace of Zimbabwe (supra)** that: -

> ***"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 possess. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inevitably 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(1) of the Constitution in respect of his treatment while under confinement. "***

In **Riley vs. Attorney General of Jamaica [1982] 3 All ER**

469 at 479 the court stated

> ***"It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading. The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical***
>
> ***integrity and health of the individual are vividly described in the evidence of the effect of the delay in the circumstances of these five cases. "***

Finally, the conclusion of all the authorities reviewed in the **Catholic Commission** case can be summarised by the holding in

Indian case of Trivenben vs. State of Gujerat 1992 LRC 425

as follows: -

> ***"It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture.... As between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there was every reason for him to hope for acquittal. That hope is extinguished after the final verdict is finally set against the accused. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to court requesting it to examine whether, it is just and fair to allow the sentence of death to be executed. "***

The respondent has contended that this form of pain and suffering is

inevitable because it occurs when the President is still considering what to do with convicts in accordance with article 121 of the Constitution. I agree that from the time the petitioners' cases are finalized in the Supreme Court, reasonable time is required for the exercise of Prerogative of mercy. After the Supreme Court, compliance with article 121 is the only action remaining before the sentence decreed by the courts is carried out. Reasonable time must be that time necessary to carry out that procedure. The evidence on the record shows that some prisoners stay on death row for as many years as 20 years! Very many of them stay on death row for between 7 years and 20 years. Does the exercise of Prerogative of mercy require so much time? The Attorney General argued that the people of Uganda demand that the death sentence must be carried out. Is it lawful for anyone to unreasonably delay the execution of the sentence against the will of the people? Our law requires that the President must consent to all execution for the death sentence. Does he have the discretion to withhold such consent indefinitely? I think not. He can only withhold his consent for as long as is reasonably necessary to give him the information to enable him take a decision under article 121 of the Constitution. When he withholds the consent beyond that time, the death sentence begins to become cruel, inhuman and degrading within the meaning of article 24 of the Constitution. Once that happens, then execution of the death sentence becomes unconstitutional within the meaning of article 44(a) of the Constitution. The question then is: What is reasonable time in those circumstances?

Before I return to the question, let me first deal with two other concerns

of the respondent. The first was that foreign authorities, including **Catholic Commission for Justice and Peace** and **Mbushuu,** are irrelevant to the instant situation in Uganda because their laws and Constitutions contain different provisions from those in our Constitution. The above analysis of the **Catholic case** have clearly shown that the relevant laws and provisions of the Constitution of Zimbabwe are very similar to their equivalents in
Uganda. The second was that those countries did not have the equivalent of article 126 of our Constitution which enjoins the judiciary to exercise judicial power in conformity with the law, norms, values and aspirations of the people. It is true that those other countries do not have a similar provision but any judicial officer need no reminders that the power he exercises is on behalf of the people.

In Uganda, the existence of article 126 means that the wishes of the people must be granted. We have been told that the people of Uganda want the death sentence, and I agree. Anyone who unreasonably delays the execution of the death sentence passed in accordance with article 22(1) contravenes the Constitution. It is for this reason that I would hold that anyone, even the one exercising functions under article 121 of the Constitution, who unreasonably delays execution of the death sentence lawfully imposed under the Constitution contravenes the Constitution.

Now, I turn to the question: How long is reasonable time? According to the cases which were cited to us by both sides, it was held that prolonging execution of the death sentence for periods between two to

five years makes the punishment when it finally comes, cruel, inhuman and degrading treatment or punishment. See: -

- **Catholic Commission for Justice and Peace of Zimbabwe's. The Attorney General.**
- **Platt and Morgan vs. The Attorney General of Jamaica.**
- **Soering vs. United Kingdom (supra).**

All these courts have held that the period starts to run from the date when the accused is first sentenced to death because that is when the Death Row Phenomenon sets in. I do not agree with the courts in that aspect. In Uganda, the right of an accused to have his death sentence confirmed by the Supreme Court is guaranteed. The period the accused stays on death row after the sentence has been passed is lawful and cannot be blamed on the state or the accused. Here a case takes about 3 years to go through the appeal process. In my judgment, a period of three years from the day the Supreme Court disposes of the appeal should be reasonable time within which to complete whatever is necessary to do under article 121 of the Constitution. It would be unconstitutional and in contravention of article 24 and 44(a) to carry out the death sentence on a prisoner who has been subjected to the Death Row Phenomenon for more than three years from the date his appeal was disposed of in the Supreme Court of Uganda. I would answer this issue in the affirmative.

(E) ISSUE NO. 6

This is whether the petitioners are entitled to remedies prayed for in the petition.

The Background

The criminal justice system in Uganda, especially where capital punishment is concerned, is now in an acute crisis. We have in our prisons more than 400 death row inmates. Many of them have been waiting for execution for more than 10 years, a good number of them for more than 15 years. There are a few who have already spent 20 years waiting for the punishment which the law and the courts pronounced on them -death. Looking at the statistics of death row inmates supplied by the petitioners and attached to Mr. Samuel Serwanga Ssengendo's affidavit, it is safe to state that the majority of them have had the appeal process completed in the highest court of the land and what separates them from death is the legal requirement that every execution must be accompanied with a death warrant personally signed by the President of this Republic. We did not receive any direct evidence from the petitioners or the respondent as to why the warrants take so long to process. All we know is that under article 121 of the Constitution, the President is given power to pardon, commute, substitute, or grant remission to any person convicted of an offence. An unfortunate situation has now developed whereby the sentencing process in capital offences has been totally removed from the hands of the courts and has been transferred into the hands of one office of the President. It is no longer a judicial

process but it has entirely become an executive and legislative function. The Constitution does not give the President time limit within which to exercise this function. Given the numerous constitutional functions of his office, it is difficult to imagine that dealing with criminals on death row would be any of his priorities.

For as long as these people are still alive, they have the protection of the Constitution and the Constitution demands that justice should be done to all speedily in order to be meaningful. Justice delayed is justice denied. There is great need to reform the criminal justice system so that in capital offences, justice is done speedily for the convict, the victims and society as a whole.

Outdated Laws

The problem of delayed justice has been aggravated by the following factors which arise because of outdated laws: -

(a) The laws impose mandatory death penalties. This means that the sentencing court and the appellate courts do not inquire in the individual circumstances of the offence and the offender. This means that at the time the Supreme Court disposes of the appeal, there is no piece of information on the record that could assist the President to make a decision under article 121 of the Constitution.

(b) When the condemned person petitions the President for mercy, the Attorney General, who chairs the Committee on the

Prerogative of Mercy calls for the court file. The Trial Judge is then called upon to write a report five years after the trial whose main features he no longer remembers except the dry facts on the file. The trial judge could be dead, retired, transferred or infirm. Delay is inevitable. All these would not have been necessary if the trial judge had the liberty to inquire into the circumstances at the time of passing the sentence of death. Right now, the information is not necessary because he has to impose a mandatory sentence pre-ordained by the legislature.

(c) Meanwhile, even those who have not petitioned for pardon or commutation have to wait indefinitely for the warrant of the President to have their sentences executed. Those who have petitioned will have to wait for a busy Attorney General and a busy head of State to process their petitions which could take years.

(d) All the laws which prescribe a mandatory death sentence and the provisions of sections 98, and 102 of the Trial on Indictments Act and any other similar laws are not in conformity with articles 22(1), 24, 28 and 44(a) of the constitution. The Uganda Law Reform Commission and the Legislature should deal with them in accordance with article 273 of the Constitution.

REMEDIES

(a) I have held on issues 1, 2 and 4 that: -

(i) The death penalty in Uganda is authorized by article 22(1) of the Constitution.

(ii) It is an exception to actions prohibited under article 24 of the Constitution.

(iii) The hanging method prescribed for carrying the death penalty out is lawful.

(b)I have held on issues 3 and 5 as follows: -

(i) A mandatory death sentence is inconsistent with and contravenes articles 21, 22(1), 24, 28 and 44(a) and (c) of the Constitution.

(ii) Delay in executing a death sentence contravenes and is inconsistent with articles 24 and 44(a) of the Constitution.

Following these holdings I would make the following declarations

(i) I would declare that the death penalty and the hanging method of carrying it out are not cruel, inhuman, degrading treatment or punishment within the meaning of article 24 and 44 (a) of the Constitution.

(ii) The various laws of Uganda which prescribe for a **mandatory death sentence** are inconsistent with and contravene articles 21, 22(1), 24, 28, 44 of the Constitution and are null and void.

(iii) Delay in carrying out a death sentence for three or more

years from the date the case was disposed of in the Supreme Court turns an otherwise lawful death sentence unconstitutional for being in contravention of articles 24 and 44(a) of the Constitution.

REDRESS

Under article 137(3) and (4) of the Constitution, this court has the discretion to grant any redress that it considers appropriate

in the circumstances of each case. See: The Supreme Court judgment in the **Attorney General vs. Paul K. Ssemogerere and Zachary Olum, Constitutional Appeal No. 3 of 2004.** In the exercise of this discretion, the court must keep in mind the provisions of article 126(1) of the Constitution which enjoins this court to exercise judicial power

> **"in the name of the people and in conformity with law and with the values, norms and aspiration of the people. "**

In addition, the peculiar conditions of Uganda must be taken into account. In the instant case, I consider the following matters: -

(i) Unlike in the cases of **Catholic Commission for Justice and Peace, the Makawayane, Platt and Morgan** and others cited above where the courts were dealing with a handful or one death row inmate, here we are dealing with more than 400 of them.

(ii) A death sentence in Uganda is constitutional and widely accepted.

(iii) The unlawfulness of the mandatory death sentence and the delays in executing the lawful death sentences has been caused by out of date laws enacted before 1995 Constitution but which have never been brought in conformity with it.

(iv) The usurpation of the judicial discretion of sentencing by the Executive and Legislative Organs of State, in the innocent but mistaken belief that the people demanded it. Yet the people through the Constitution clearly subjected the exercise of judicial power only to the extent which article 126 of the Constitution stipulates.

With all these factors in mind, I would make the following orders: -

(1) For all petitioners whose cases have been disposed of by the Supreme Court at the date of this judgment, **redress is** postponed for a period of two years from the same date to enable the President to exercise his Prerogative of Mercy under article 121 of the constitution. The petitioners will be at liberty at the expiry of the **two years** to return to this court for an order of redress in accordance with this judgment.

(2) For the petitioners whose cases have not yet reached or been disposed of by the Supreme court, at the date of this judgment, the petitioners shall not be subjected to a

mandatory death sentence and shall be entitled to be heard on the question of sentence before the death sentence or any other appropriate sentence is pronounced on them. This means that at whatever stage in the appellate courts the cases are, the petitioners shall be entitled to be heard in mitigation of sentence and the appellate courts will exercise their discretion to confirm both conviction and sentence. Thereafter, the exercise of the prerogation of mercy under article 121 should be completed within THREE years from the date the conviction and sentence are confirmed by the Supreme

Court. It will be unconstitutional to execute them after that period.

(k) CONCLUSION

In this judgment, I have held, among other things, that it is unconstitutional for Parliament to direct courts by a law to pass mandatory pre-ordained sentences determined by itself. While it has all the powers under the Constitution to prescribe any sentences, it is the duty of the judiciary to impose an appropriate sentence after due process. Mandatory sentences deny an accused the right to be heard on the question of sentence, which amounts to denial of a fair trial. That contravenes article 22(1), 28 and 44(c). Sentencing is a judicial function. It is not a legislative function. It is also not an executive function. The

exercise of the Prerogative of Mercy should only be done after the judicial process on both conviction and sentencing have been finalized.

In that regard, I hold the view that section 47(6) of the Prisons Act (cap 304 Laws of Uganda), should be brought into conformity with the Constitution. It states: -

> **"For the purpose of calculating remission of a sentence, imprisonment for life shall be deemed to be twenty years imprisonment. "**

To my understanding, this provision has the effect of fettering the discretion of courts to pass a sentence of imprisonment which is greater than 20 years! Suppose, during sentencing, the court does not use the term **"life imprisonment"** and for example simply imposes a sentence of 50 years, does this provision confer the discretion on the Prisons authorities to deem 20 years imprisonment as the maximum sentence imposed? Is this not another attempt by the legislature to pre-determined sentences without hearing the parties in order to determine an appropriate sentence? If a **"life imprisonment"** sentence is pronounced, why can't the convict serve imprisonment for life?

I do appreciate that there will be cases where a person sentenced to serve imprisonment for life deserves remission for good behavior while in prison or indeed for any other just cause. Couldn't such a case be taken care of under article 121(1) of the Constitution where the President has the power to grant remissions of sentences to deserving prisoners?

In my opinion, if the Supreme Court confirms a sentence of Life Imprisonment, it will only do so in conformity with article 126 of the Constitution. It will only do so to give effect to the peoples wish that the convict is an undesirable character in society and should be removed and kept away forever.

It would be unconstitutional for Parliament to authorise Prisons authorities to alter the sentence in the guise of calculating remission. Such a person is not entitled to any remission at all. If, however, the Prisons Authorities think such a person is entitled to remission, they should make a representation to the President to exercise his constitutional powers under article 121 of the Constitution. Other than the President and in accordance with the constitution, nobody should be allowed to alter the order of the Supreme Court passed in accordance with the Constitution of Uganda.

In the circumstances, where the courts must fully comply with articles 22(1), 28 and 44(c), life imprisonment is a realistic alternative to a death penalty and it can only be a viable alternative if it means imprisonment for life, and not a mere twenty years as it is currently understood to mean.

Finally, this judgment does not advocate for the abolition of a death sentence at all. That was not an issue in this petition. The only issue was whether it is constitutional or not. The answer is, YES, it is allowed by the Constitution. However, in all cases, it should ONLY be imposed after

due compliance with article 22(1) of the Constitution. After the court has heard from the prosecution and the accused what they wish to say on the issue of **conviction** and **sentence** and both conviction and sentence have been confirmed by the highest **court in the land,** there is no reason why the sentence should not be executed unless it is commuted by the President **within three years after the confirmation by the Supreme Court.**

I would dismiss issues No. l and 2 and 4 of this petition. I would allow the petition on issues No. 3 and 5. Issue No. 6 is partially successful as indicated. I would make no orders as to costs.

Dated at Kampala this. 10th day of June 2005.

Hon. Justice Amos Twinomujuni

JUSTICE OF APPEALTHE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CORAM: ***G. M. OKELLO, JA. A. E. N. MPAGI-BAHIGEINE, JA. A. TW1NOMUJUNI, JA. C. K. BYAMUGISHA, JA. S. B. K. KAVUMA, JA.***

CONSTITUTIONAL PETITION NO. 6/03

BETWEEN

1. SUSAN KIGULA
2. FRED TINDIGWIHURA
3. BEN OGWANG &
4. 414 OTHERS:: PETITIONERS

AND

ATTORNEY GENERAL:::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGEMENT OF BYAMUGISHA, JA

I had the benefit of reading in draft the lead judgement prepared by Okello, JA and I agree with the reasons he has given in partly allowing the petition. However, I have my own remarks to make on the issues raised by the petitioners.

This petition was filed by 417 petitioners under the provisions of **article 137(3)** of the Constitution challenging the constitutionality of the death

penalty/sentences that were imposed on each one of them under our criminal justice system. At the time of filing the petition on the 3rd September'03 all the petitioners were incarcerated in the condemned section of Upper Prison Luzira, the Women Prison in the same place and at Jinja main prison, Kirinya.

In the petition, they allege that they are affected and have an interest in the following matters that they consider to be inconsistent with the Constitution:

1. That sections **23(1), 23(2), 23(3), 23(4), 124, 129(1), 134(5), 189, 186(2), 319(2)** and **241(1)** of the Penal Code Act and sections **7(l)(a), 7(l)(b), 8, 9(1)** and **9(2)** of the Anti- Terrorism Act to the extent that they permit the imposition of death sentences upon persons on conviction are inconsistent with **Articles**

   20, 21, 22(1), 24, 28, 44(a), 44(c) and **45** of the Constitution.

2. That **section 99(1)** of the Trial on Indictments Act and the relevant sections of and the provisions made under the Prisons Act are inconsistent with **Articles 24** and **44(a)** of the Constitution in respect to the mode, manner and process prescribed for carrying out a sentence of death and in respect of any other manner or mode that may be prescribed for carrying out a sentence of death.

3. That the actual process, mode and manner of implementation of a sentence of death, from the time of conviction until the actual carrying out the sentence, in accordance with **section 99(1)** of the Trial on Indictments Act are inconsistent with **Articles 20, 21, 22(1), 24, 28, 44(a)** and **45** of the

Constitution.

4. That sections **23(1), 23(2), 23(3), 23(4), 124, 129(1), 134(5), 189, 286(2), 319(2)** and **243(1)** of the Penal Code Act and **sections 7(l)(a), 7(l)(b), 8, 9(1) and 9(2)** of the Anti Terrorism Act are inconsistent with **Articles 21, 28** and **44(c)** of the Constitution in so far as in practice, the police and the criminal justice system can lead to the conviction and execution of innocent persons and they do not provide equal protection of the law to the disadvantaged people in our society.

5. That in the alternative but without prejudice to the above avernments

i) sections **23(1), 23(2) 189, 286(2), 319(2)** of the Penal Code Act and section 7(1)(a) of the Anti Terrorism Act to the extent that they prescribe the imposition of mandatory death sentences upon persons on conviction are inconsistent with **Articles 20, 21, 22(1) 24, 28, 44(c**)and **45** of the Constitution

ii) section 132 of the Trial on Indictments Act to the extent that it restricts the right of a person convicted of an offence under **sections 23(2) 189, 286(2) 319(2)** of the Penal Code Act and **section 7(1)(a)** of the Anti Terrorism Act to appeal to a higher court to vary the mandatory sentences imposed is inconsistent with **Articles 20, 21, 22(1), 24, 28, 44(a) 44(c)** and **45** of the Constitution.

The petitioners sought the following orders of redress:

i) that the death sentences imposed on the petitioners be set aside;

ii) that the cases be remitted to the High Court to investigate and determine appropriate sentences under article 137(4) of the Constitution;

iii) costs,

iv) other reliefs that the court may find appropriate.

The petition was supported by many affidavits sworn by some of the petitioners themselves, human rights activists, current and former prison warders and Dr Margaret Mungherera, President of Uganda Medical Association, whose is also a Consultant Psychiatrist with the Ministry of Health.

The respondent in the answer to the petition, denied that the various provisions of the law cited by the petitioners providing for the imposition of the death penalty were inconsistent with the articles in the Constitution. It was the respondent's case that the death penalty is authorised by the Constitution and therefore the impugned provisions of the Penal Code Act and the Anti Terrorism Act, the Trial on Indictments Act cannot be challenged as being unconstitutional.

The answer to the petition was supported by a number of affidavits.

At a scheduling conference held before the Registrar of this Court, the following matters were agreed upon:

1. that all the petitioners are under a sentence of death.

2. that 410 of the total of 417 were sentenced to death upon conviction for offences such as murder and aggravated robbery for which the sentence of death is mandatory.

3. that 5 petitioners out of a total of the remaining 7 were sentenced to death on conviction for the offence of treason for which the death sentence is also mandatory.

4. that only 2 petitioners out of all the petitioners were sentenced to death under the provisions of the law which provide for a discretionary death sentence.

5. That the death sentence in respect to the petitioners is by law executed by hanging the convict by the rope until he/she dies.

6. That the petitioners convicted of offences which carry mandatory death sentences had a right of appeal against their convictions but did not have a right of appeal against their sentences.

There was a dispute at the trial as to whether the parties had agreed that the death penalty was a cruel form of punishment and the only issue to determine was whether it was authorised by the Constitution. Mr Katende, lead counsel, submitted before us that once parties have agreed on certain facts they are bound by those facts. On the other hand the respondent submitted that they informed the

petitioners' counsel well in advance that the respondent does not accept that the death penalty is a cruel form of punishment. The purpose of a scheduling conference as I understand it, is one of the many tools employed to speed up a trial. The parties are supposed to agree on facts that are not in dispute according to the pleadings filed by them. There is nothing in the rules and Mr Katende did not cite any, that can stop a party from changing a position or a stand taken earlier if such stand is against the interest of the case being put across. With respect, Mr Katende's complaint is neither founded in law or any practice of the court.

The following were agreed as issues for determination:

1. **Whether the death penalty prescribed by the various laws of Uganda constitutes inhuman or degrading treatment or punishment contrary to article 24 of the Constitution?**

2. **Whether the various laws of Uganda that prescribe the death penalty upon conviction are inconsistent with or contravention of Articles 24 and 44 or any other provisions of the Constitution?**

3. **Whether the various laws of Uganda that prescribe mandatory sentences of death upon conviction are inconsistent with or in contravention of articles 21, 22, 24, 44 or any other provisions of the Constitution?**

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, 44 and any other provisions of the Constitution?**

5. **Whether the execution of petitioners who have been on death row for a long period of time is inconsistent with and in contravention of articles 24 44 or any other provision of the Constitution?**

6. **Whether the petitioners are entitled to the remedies prayed for?**

When the matter came before us, Mr Katende together with Professor Sempebwa assisted by Soogi Katende, Kakembo Katende, Fredrick Sentomero, Sim Katende, Christopher Madrama, Fred Businge, Jane Akiteng, Nsubuga Sempebwa, Arthur Sempebwa, David Sempala, and Sandra Kibenge represented the petitioners while Mike Chibita Principal State Attorney, Sam Serwanga Senior State Attorney, Benjamin Wamambe State Attorney and Freda Kabatsi State Attorney represented the respondent.

In submitting on the first issue Mr Katende began by reminding us about the principles that have been enunciated in many authorities of the Supreme Court and this Court.

The first principle is that fundamental rights and freedoms as guaranteed under the Constitution have to be given a broad and purposeful interpretation in order to give meaning to the rights that were enshrined.

The second principle is that this court is unreservedly vested with unlimited and unfettered jurisdiction to determine any question as to the interpretation of any provision of the Constitution.

The third principle relevant to constitutional interpretation is that purpose and effect are relevant in the determination of the constitutional validity of any legislation. He referred to a passage in the judgment of Oder in

the case of **Attorney- General V Salvatori Abuki &Another**

[2001] 1LRC 63. In this appeal, the Supreme Court was considering the

constitutionality of section 7 of the Witchcraft Act. The learned judge

relied on a Canadian case of ***R v Big M Drug Mart Ltd [1986] LRC***

(Const)332, At page 87 he said:

"The principle is that in determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality if either an unconstitutional purpose or unconstitutional effect is animated by an object the legislation intends to achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively in the sense of the legislation's object and ultimate impact, are clearly linked if not indivisble. Intended and actual effects have been looked to for guidance in assessing the legislation's object and thus validity".

The fourth principle is that the Constitution must be read as an integrated whole, and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, completeness and exhaustiveness.

He cited the following authorities namely:

(i) Tinyefuza v Attorney General, Constitutional Petition No. 1/97.

(ii) Attorney General v Tinyefuza, Constitutional Petition Appeal No. 1/97.

(iii) Ssemogerere &Another v Attorney General, Constitutional Petition No. 3/2000.

On the first issue, counsel argued submitted that it is seeking to establish whether or not the death penalty is a cruel, inhuman or degrading form of punishment contrary to **Article 24** of the Constitution that provides as follows

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

Learned counsel submitted that the phrase in the article have been judicially considered in a number of authorities within and outside Uganda. The cited the following authorities namely **Mbushu &Another v The Republic [1995] 1LRC 216; State v Makwanyane [1995] 1 LRC**

269 and **Attorney- General v Abuki** and **Kyamanya v Uganda Constitutional Reference No. 10/2000.** In the Abuki decision he relied on the judgement of Oder JSC in which the learned judge stated that the prohibition in the article are absolute and the words in the article must be read disjunctively. Counsel argued that the case set down the legal standards to be followed. He stated that what is required is to establish a violation of article 24 is a finding that the particular legislation or practice authorized or regulated by the state organ falls within one or other of seven permutations of the article and no justification is permitted. The permutations are

(i) Torture;

(ii) cruel treatment;

(iii) cruel punishment;

(iv) inhuman treatment;

(v) inhuman punishment;

(vi) degrading punishment;

(vii) degrading treatment.

On the death penalty as a form of punishment, counsel contended that many jurisdictions have held that the penalty is inherently a cruel, degrading and inhuman form of punishment. In doing so, the courts did not rely on any evidence adduced. This approach was adopted in Tanzania and the Republic of South Africa in the Mbushu(supra) and Makwanyane(supra) cases respectively. Counsel argued that the standards set out in the above cases were followed by the Supreme Court of Uganda in the Abuki case. He invited us to follow those decisions in determining the first issue.

In responding to the above submissions Mr Wambembe, began by restating the rules of constitutional interpretation as they were recently summarised by Twinomujuni JA in **Constitutional Petition No. 3/2000- Paul Ssemogerere & Another v Attorney-General** who relied on the decision of the Supreme Court in the case of **Attorney-General v Tinyefuza** (supra) and **Smith Dakota v North Carolina, 192 US 268(1940).**

He pointed out that the proper approach to the interpretation of the fundamental rights and freedoms provisions is one that is dynamic, progressive, liberal and flexible, keeping in mind the views of the people and their socio-economic political and cultural values. He also stated that no article of the Constitution should be treated in isolation but must be read together. On the first issue, he submitted that **Article** 24(supra) was never intended by the framers of the

Constitution, to apply to the death penalty. The reason for saying so was because the article was debated and passed after **Articles 22** and **23.** The former article validates the death penalty while the latter provided for instances where a person can be deprived of personal liberty and what happens when that is done. He claimed that the combined effect of the above articles was intended to redress the bad history of our Country that was characterised by extra judicial killings, unlawful detentions and torture of detained persons. He claimed that the article was intended to apply to torture, cruel, inhuman or degrading treatment or punishment outside the judicial process, like the heinous crimes committed by the petitioners. He argued that it is hypocritical for the petitioners to argue that every human being has a right to life and shall not be subjected to torture, cruel inhuman and degrading treatment or punishment, when they totally ignored those very rights to their victims. The learned State Attorney commented on the cases cited by Mr Katende such as Abuki(supra) which dealt with the banishment under the Witchcraft Act and was not concerned with the death penalty. On **Mwakanyane(supra) he** stated that it was not applicable to Uganda because under the Constitution of South Africa, the right to life was absolute whereas here it is qualified under **Article 22(1).**

The learned State Attorney cited to us the case of **Kalu v the State (1998) 13 NILUL R54** a decision from Nigeria. The case was interpreting section 31(1) of the Nigerian Constitution which is similar to our articles 22(1) and 24. Another case that he cited was **Bacan Singh v State** of **Punjab(1983)(2) SCR** which was

interpreting article 21 of the Indian Constitution which is also similar to article 22(1) of our Constitution. Mr Wamembe contended that in those two decisions, the death penalty was held to valid. He invited us to follow those decisions and hold that the death penalty is not cruel inhuman and degrading form of punishment within the context of the Constitution.

What we are being asked to do in the first issue is to interpret articles of the Constitution against each other. The rule of harmonisation would, therefore, be applicable. The provision of **Article 24** have already been reproduced. The other articles are 22(1) that protects the right to life; 23 that protects the right to personal liberty and 44 which prohibits derogation from certain human rights and freedoms. One of such rights that are not supposed to be derogated from are torture, cruel, inhuman or degrading treatment or punishment.

Article 22(1) of the Constitution provides as follows: -

"No person shall be derived of life intentionally except in execution of a sentence passed in 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".

What the article states is to guarantee the right to life except where its deprivation is done under a sentence of death passed by a court of competent jurisdiction for an offence under the laws of Uganda. The above article clearly shows that the right to life is not absolute. There are instances in which the due process of law will deny a person his or her right to life or its protection. International

instruments and conventions still recognise the death penalty after due process of law. Such instruments include but are not limited to the **European Human Rights Convention, International Covenant on Civil and Political Rights 1966, the African Charter** and **American Convention on Human Rights.**

I wish to comment briefly on the authorities cited to us by Mr Katende and which he urged us to follow. The case of **Mbushu(supra).** The facts in that case were that the appellants were convicted of murder and sentenced to life imprisonment. They appealed to the court of appeal against their convictions. The state cross-appealed against the sentence on a constitutional point. On appeal, the court dismissed the cross-appeal, quashed the conviction and declared the death penalty constitutional having been saved by article 30(2) of the Constitution. The court of appeal agreed with the trial judge that capital punishment, including execution by hanging, was inherently cruel, inhuman and degrading punishment and infringes the right to dignity.

The case **Makwanyane** was based on the interpretation of section 9 of the South Africa constitution which guaranteed every person the right to life. The constitution court held that the right to life was absolute and therefore the death penalty was a cruel, inhuman and degrading form of punishment that was prohibited by section 11 of the constitution.

The case of Abuki(supra) this Court and the Supreme Court were interpreting the provisions of a statute against the provisions of the Constitution.

In the matter before us, a number of affidavits sworn in support of the petition describe in graft details the experience and effect a death sentence has on the person who is convicted. I have no doubt in my mind that a death sentence is a horrid form of punishment. The question that has to be answered is whether the death penalty is a cruel inhuman and degrading form of punishment within the meaning of article 24(supra)? **Article 22(1)** of the Constitution states as follows:

"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".

This article guarantees the right to life except where the deprivation is done under an execution of a death sentence passed in a trial conducted in accordance with the provisions of **Article 28** of the Constitution by a competent court. This article sets out the tenets of a fair trial although the words "fair trial" is not defined under the Constitution. To that extent I agree with the submissions of the learned State Attorney that the right to life is not absolute and it can be taken away after due process. I have also found the decision in **Kalu** case persuasive despite the criticisms levelled against it by Mr Katende. It was interpreting articles similar to our articles 22(1) and 24. The framers of the Constitution were aware of the provisions of articles 24 and later 44 when they enacted **article 22.**

In my view, they could 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, 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 court order, it goes without saying that it is not affected by article 24. The various laws of Uganda that were cited in the petition 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.
Third issue complained that the various laws that prescribed mandatory death sentences upon conviction were inconsistent with articles 21, 22, 24, and 44 of the Constitution. I shall set out the legislation in question.

1. The Penal Code Act

(a) section 23(1) (2) - treason

(b) section 189 -murder

(c) section 286(2)- aggravated robbery

2. The Anti- Terrorism Act 14/02

Section 7(1)(a)

Professor Sempebwa who submitted on this issue on behalf of the petitioners contended that the above provisions that provide mandatory death penalties infringe on the rights of the petitioners guaranteed under the Constitution. He cited the following articles as being infringed namely: -

(a) **Articles 22(1) 28** and **44(c)** the right to a fair trial on the question of sentencing is a non-derogable right.

(b) **Article 22(1)** the right to have their sentences confirmed by the highest appellate court.

(c) **Article 21(1)** that guarantee equality before the law.

(d) **Articles 24** and **44(a)** by providing a mandatory death sentence which is cruel, inhuman and degrading without taking into consideration the circumstances of each individual convict.

Professor Sempebwa argued that any trial for a serious attracting a death penalty could not be said to be fair in terms of the above articles when the accused person

is denied the right to be heard on sentence first in the trial court and later in the last appellate court. He contended that offences are not committed under similar circumstances and as such, a law that provides an automatic sentence on conviction for persons convicted of such offences violates the right to a fair hearing which is a non-derogable right.

On confirmation of sentence by the highest appellate court under **article 22(1)** learned counsel argued that in order for a sentence to be lawful, it had to be confirmed and in order for confirmation to take place, the highest appellate court must exercise discretion whether to confirm such a sentence. He contended that the highest appellate court has no discretion as far as the mandatory death penalty is concerned and all that it does is to rubber stamp a sentence that is pre-determined by the legislature. He cited two decisions for that proposition namely **Spencer v The Queen** and **Hughes v The Queen** that were cited with approval in **Rayes v The Queen (2002) 2 AC 235.**
the doctrine of separation of powers. He contended that the role of the legislature was to prescribe sentences and to leave the judiciary to determine the appropriate sentences within the parameters set by the legislature. He relied on the case of **Mathu v State of Punjab(1983)SOL Case No. 026** for that proposition.

He invited us to declare the impugned sections above unconstitutional and therefore null and void.

In reply, Mr Wamambe, stated that the criminal justice system in Uganda has elaborate procedures that ensure a fair trial as envisaged under **Article 28.** He pointed out that in cases which attract a death sentence, an accused person is accorded a fair trial in accordance with the provisions of the **Trial on Indictments Act** He contended that all the courts retain their discretion to evaluate evidence and to impose any sentence after conviction and on appeal. It was his contention that a mandatory death sentence does not deny an accused person the right to a fair hearing as guaranteed by the Constitution.

It was also his case that a mandatory death penalty does not contravene article 21 of the Constitution which guarantees equality before the law because of sub-article 5 thereof which states that: -

"Nothing shall be taken to be inconsistent with this article which is allowed to be done under the provisions of this Constitution

According to Mr Wamembe once an act is authorised by the Constitution, it cannot be said to contravene article 21. Since the death penalty is authorised by the Constitution, it cannot be said to contravene article 21.

On the legislative powers of Parliament, he submitted that **Article 79** of the Constitution empowers it to make laws for protection of society and it has a duty to respect the wishes of the people and their aspirations. He contended that

Parliament has the power to pass any law prescribing a mandatory death sentence to reflect society's abhorrence of certain behaviour or conduct.

On the authorities cited by Professor Sempebwa, he stated that they were distinguishable because they originate from jurisdictions where the death sentence has been held to be cruel, inhuman or degrading treatment or punishment. He invited us to determine the third issue in the negative.

The complaint in this issue as I understand it is that a mandatory death sentence leaves the accused person and the courts with no option. In the case of the accused he has no right to be heard in mitigation of sentence. On the part of the court it has no discretion in the sentencing process up to the highest appellate court.
In order to determine whether a mandatory death sentence offends the various articles of the Constitution, regard must be had to the provisions of **article 28** that Mr Wamambe relied upon as providing tenets of a fair trial. The article states as follows:

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

(2) ***Nothing in clause(l) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.***

(3) ***Every person who is charged with a criminal offence shall: -***

(a) ***be presumed to be innocent until proved guilty or until that person has pleaded guilty;***

(b) ***be informed immediately, in a language that person understands of the nature of the offence;***

(c) ***be given adequate time and facilities for the preparation of his or her defence;***

(d) ***be permitted to appear before the court in person or, at that person's expense, by a lawyer of his or her choice;***

(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;***

(f) ***be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;***

(g) ***be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before court.***

(4) ***Nothing done under the authority of any law shall be held to be inconsistent with: -***

(a) ***paragraph(a) of clause(3) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts.***

(b) ***Paragraph(g) of clause 3 of this article, to the extent that the law imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused are to be paid their expenses out of public funds.***

(5) ***Except with his or her consent, the trial of any person shall not take place in the absence of that person, unless that person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the person to be removed and the trial to proceed in the absence of that person.***

(6) ***A person tried for any criminal offence, or any person authorised by him or her, shall, after the judgement in respect of that offence, be entitled to a copy of the proceedings upon payment of a fee prescribed by law.***

(7) ***No person shall be charged with or be convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.***

(8) ***No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.***

(9) ***A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence, shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.***

(10) ***No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.***

(11) ***Where a person is being tried for a criminal offence, neither that person, nor the spouse of that person shall be compelled to give evidence against that person.***

(12) Except for contempt of court, no person shall be convicted of a criminal offence, unless the offence is defined and the penalty for it prescribed by law".

The provisions of this article are silent about the sentencing process.

Therefore during the sentencing process, the courts are guided by the relevant legislation as to the sentence to be imposed and the mitigating factors. **Section 98** of the **Trial on Indictments Act** sets out the procedure to be followed by High Court after conviction before imposing any sentence. The section provides in part as follows:-

"The court, before passing any sentence other than a sentence of death, 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 "

The provision of the section are clear. A distinction is made between an accused person who is convicted of an offence carrying a mandatory

death sentence and that one who is not. An accused person is not allowed to say anything in mitigation of sentence and the court is not allowed to inform itself about the sentence it should impose. This process is repeated until the appellate process is completed.

The issue to be resolved is whether a mandatory death sentence that is imposed by the legislature offends the doctrine of the separation and whether it offends the tenets of a fair trial. It necessary at this stage to consider authorities from other jurisdictions that judicially considered this matter. Professor Sempebwa cited the **Mithu** case from the State of Punjab in India, a Commonwealth Country. In this case the constitutionality of section 303 of the Penal Code of India was challenged for prescribing a mandatory death sentence for murder. The issue that was framed for determination was whether the section contravened Article 21 of the Constitution of India. It was argued for the petitioners that the section was unjust, unfair, arbitrary and therefore unconstitutional for authorising the deprivation of life. In accepting this argument, the Supreme Court of India said: -

"It is a travesty of justice not only to sentence a person to death, but to tell him that he shall not be heard why he should not be sentenced to death. "

Later the Court in the same judgement said: -

"If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels court to impose that sentence. "

Another case relevant to the issue at hand is the recent decision of the Privy

Council in **Reyes** (supra). The case was filed to test the

constitutionality of section 102 of the Belize Criminal Code that imposed a mandatory death sentence on conviction for murder. The relevant provisions of the Belize Constitution is worded in *pari materia* with Uganda's Constitution- **Articles 20, 22, 24** and 28(supra). The Privy Council had the following to say on mandatory death sentence:-

"The mandatory death penalty as applied, robs those against whom sentence is passed of any opportunity to have the court consider mitigating circumstances even as an irrevocable punishment is meted out to them. The dignity of human life is reduced by a law that compels a court to impose death by hanging indiscriminately upon all convicted of murder, granting to none an opportunity to have individual circumstances of his case considered by the court that is to pronounce the sentence. It has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide, then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case.

The court went to state that: -

"In a crime of this kind, there may well be matters relating to both the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed to seek to persuade the court that in all circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human should be treated and thus deny his basic humanity, the core of the right which section 7 exists to protect. "

Section 7 of the Belize constitution is *pari materia* with Article 24 of our Constitution.

Turning to the issue now before us, I think it is clear from the authorities that were cited by counsel for the petitioners that a mandatory death sentence deprives both

the person and the court an opportunity of considering mitigating factors. On the accused's part he or she denied a chance to persuade the trial court as to the sentence to be imposed. The court is also denied an opportunity to consider any factors in favour of the accused before passing any sentence. One of the factors that the court is required to take into consideration before passing sentence under **article 23(8)** of the Constitution is the period an accused person has spent on remand. The court is required before passing a sentence to state the reasons for such a sentence.

The purpose of stating reasons for the sentence to be imposed and for the court to inform itself of the sentence it should pass is to enable the accused not only to feel that the circumstances under which the offence was committed are relevant but it also enables the appellate court to determine whether the trial court exercised its discretion properly. However, as we all know, in imposing a mandatory death sentence the court has no discretion in the matter. In fact the court does not pass a sentence as popularly understood, it imposes a sentence that was predetermined by the legislature in total disregard of the facts and circumstances of each case. Matters are compounded by the provisions of **section 132(l)(b)** of the **Trial on Indictments Act** which provides as follows: -

"Subject to this section-

(a) .....;

(b) *an accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law".*

This provision does not permit an accused person who is convicted and sentenced under a statute whose sentence is fixed by law to appeal against sentence only. It contravenes article 21(1) of the Constitution that guarantees equal protection before and under the law.

I am aware that Parliament has the power to pass a legislation prescribing sentences for certain crimes and in some of them setting a minimum sentence that a court can impose. This of course curtails the discretion of the court in the sentencing process. However, a mandatory death sentence makes the circumstances under which the offence was committed irrelevant and has the effect of depriving the courts their legitimate jurisdiction in determining the appropriate sentence. The provisions of the Constitution providing for equality before the law, fair trial, and those against cruel, inhuman and degrading treatment or punishment were intended to guard against situations that the petitioners are complaining about.

The superimposition of the mandatory death penalty on the courts is old fashioned and backward in this age. Needless to say is the fact that offences like treason that attract the mandatory death sentence were a result of the ancient belief that the King is next to God and therefore to plan his death would be equivalent to wanting

ones creator dead. This belief in my view has lost root in society and as such the mandatory death sentence is not tenable in modem society. There is of course another aspect to the mandatory death sentence. The Constitution reiterates in **article 128(1)** that courts " ***in the exercise of judicial power shall be independent and shall not be subject to the control or direction of any person or authority".*** It can therefore be said that strict adherence to the principle of independence of the judiciary presupposes that courts are not to be guided by legislative provisions since such provisions deprive the courts independence in the exercise of their judicial power.

I therefore consider it cruel and degrading to tell an accused person that he or she has no right of being heard about the sentence to be imposed. It is not Parliament that tries criminal cases where a mandatory death penalty is imposed. In all fairness, the legislature should not determine for the court what sentence it should impose. This issue was well founded and it would be answered in the affirmative. The fourth issue concerned hanging. This issue was presented in the alternative. The law governing the mode of carrying out the death sentence is **section 99** of the **Trial on Indictments Act.** The section states as follows

"(1) Sentence of death shall be carried out by hanging in accordance with the provisions of the Prisons Act".

Mr Sim Katende argued this issue on behalf of the petitioners. In his submission, he stated that the mode of carrying out the death penalty by hanging contravenes articles 24 and 44(a) of the Constitution. He contended that the two articles when read together prohibit cruel, inhuman and degrading punishment or treatment. He invited us to give the words in the two articles their plain and ordinary meaning. He cited the following authorities to show that other jurisdictions have held that hanging is inherently cruel, inhuman and degrading.

(1) Abuki(supra)

(2) Republic vMbushu&Another (1994) 2LRC 335

(3) Mbushu&Another(supra)

(4) State v Mwakanyane(supra) and

(5) Campbell v Wood (18 F. 3rd 662 US 9th Circuit Court of Appeals.

Learned counsel pointed out that in the above cases the courts were able to hold without any evidence that hanging was cruel, degrading and inhuman, while in the instant petition, several affidavits evidence have been adduced to demonstrate that hanging was cruel. The affidavits of the following deponents were singled out: -

Anthony Okwanga- petitioner.

Ben Ogwang- the third petitioner.

Mugerwa Nyansio- petitioner.

Edward Mary Mpagi- former death row inmate.

Tom Balimbya- former death row inmate.

Vincent Oluka- officer in- charge of condemned section at Luzira Prison. David Nsalasata-Assistant Commissioner of Prisons.

Dr Albert Hunt and Dr Herold Hillman both medical doctors of long standing and experience.

Mr Katende submitted that the law which prescribes the mode of carrying out the death penalty by hanging was inconsistent with **articles 24** and 44(a)(supra). He invited us to find on the evidence on record that the provisions of section 99(supra) are inconsistent with and contravenes the articles he cited and declare it unconstitutional.

Mr Mike Chibita in submitting on behalf of the respondent defended the mode of execution by hanging. He stated that the death penalty is saved by the Constitution and therefore the legislators had to prescribe the method of carrying it out. He argued that the practice has been around since 1938 and it has not had any major problem necessitating its substitution. He contended that punishments by their

very nature have a degree of pain inflicted and are intrinsically painful and unpleasant. Commenting on **Abuki's** case, counsel stated that it is distinguishable from the matter before us because the Supreme Court was not considering the death penalty or the provisions of the Trial on Indictments Act. On the case of **Mbushu(supra),** he stated that it is irrelevant because the constitution of Tanzania does not contain the equivalent of our **Article 126(1).** On the case of **Mwakanyane(supra),** he stated that it is distinguishable because the right to life in South Africa is absolute.

Mr Chibita dismissed the affidavits of the petitioners because they are not objective since they cannot praise the rope that is waiting for them. He also dismissed the affidavits of the two doctors. On Dr Hillman, counsel pointed out that the contents of his affidavit show that he has become a professional deponent with a mission, a crusader against the death penalty. On the affidavit of Dr Hunt, he argued that that the deponent's knowledge was based on the British experience of the 19 century. There is no evidence of any mishaps in hanging in Uganda.
I have already found that the death penalty is constitutional. Therefore, it goes without saying that the mode of carrying it out cannot be said to be unconstitutional. Moreover the complaint being raised by the petitioners is based on the fact that they are opposed to the death sentence and as such any method of carrying out the said sentence would be considered cruel, degrading and inhuman. The Constitution having legalised the death penalty, it cannot be said that section

99(1) of the **T. I. A** contravenes **Articles 24** and **44(a)** of the Constitution.

The 4th issue would be answered in the negative.

Issue No. 5 concerned delay in carrying out the death sentence and whether the delay contravenes **article 24** of the Constitution. This issue was argued in the alternative. It was submitted on behalf of the petitioners by Professor Sempebwa that in complaining about the delay, the petitioners are neither seeking quick execution nor are they regretting the delay. Their complaint is that to carry out the executions now, would amount to cruel, degrading and inhuman form of punishment. Learned counsel submitted that being on death row for long periods of time amounts to cruel, inhuman and degrading form of punishment. He contended that the petitioners who have been on death row for a long period of time are legally entitled to a constitutional exemption from the implementation of the death penalty against them by reason of the exceeding cruelty they have already endured on death row. He cited to us authorities from other jurisdictions that have dealt with the subject namely: -

Catholic Commission for Justice and Peace in Zimbabwe v

Attorney-General &Others [1993] 2 LRC 279

Pratt and Morgan v Attorney-General Jamaica [1994] AC 36. Soering v

United Kingdom(1989) 11 E. H. R. R. 439.

Sher Singh&othersv The state of Punjab (1985) 2 S. C. R. 582 and Mbushu(supra).

I shall comment briefly on some of the authorities.

The facts in the Catholic Commission case are that the government of Zimbabwe announced the execution of two prisoners who had been sentenced to death. They had been incarcerated for a period of about five years. The petitioner filed a constitutional petition challenging the execution on the ground that owing to the long period of incarceration, from the time of passing the sentence, the suffering the prisoners have endured under the "death row phenomenon", it would be cruel to carry out the death sentence. The court agreed with the petitioner on the premise that the delay of 5 years on death row from the date of conviction in demeaning physical conditions went beyond what was permissible under the constitution. It commuted the death sentences.

Earl Pratt and Morgan is a case from Jamaica. It was held that a period beyond five years from the time of conviction to execution would be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment. It was observed that where there is one step in the appeal process, a protracted

appeal beyond two years was unreasonable. The Privy Council held that the sentence should not be carried out because of the delay.

Professor Sempebwa relied on the affidavit of Mr Serwanga and the annextures attached thereto. These annextures show that the number of years that the convicts have been on the death row. In particular, the affidavit of Ben Ogwang who has been on death row for over twenty years to date. He invited us to commute death sentences of all the petitioners who have been on death row for more than five years to life imprisonment.

Mr. Wamembe in replying to the above submissions stated that there is nothing in articles 24 and 44(a) of the Constitution that outlaws delay in carrying out the death sentence. It was his contention that when faced with death, any additional day should be looked at with glee and thankfulness. He contended that it would be wrong for this court to impose a time frame on how long one can lawfully stay on death row. Commenting on the Advisory Committee on the Prerogative of Mercy, he submitted that the Constitution does give it a time frame within which to advise the President and the President is not given a time frame within which to exercise his discretion under the article.

Mr Wamambe also submitted that the authorities that were cited by counsel for the petitioners were inapplicable in the instant petition because no death warrants have been signed for the execution of any of the petitioners. Both the cases of

Prat&Morgan and **Catholic Commission For Justice and** Peace(supra), he submitted the only issue for determination was long stay before execution and the cases were filed after the execution warrants had been signed. The average delay was 17 months and the longest delay was 39 months. In the case of Pratt &Morgan it was found that the state had failed to perform some of its obligations thus contributing to the delay.

He concluded by saying that the majority of Ugandans have expressed the desire to keep the death penalty in place. They did so through the Odoki Constitutional Review Commission and more recently through the Constitutional Review Commission. He invited us to disallow the issue.

From the submissions that have been made by both counsel, the authorities cited and the evidence adduced, it is apparent that the petitioners are saying that because of the delay in carrying out the death, it would be cruel, inhuman or degrading to carry out an otherwise lawful sentence imposed by law. It is also clear from the authorities from other jurisdictions that prolonged stay on death row has adverse effect on the prisoners both physically and mentally. That was what has become known as the death row syndrome or phenomena.

In the instant petition, the Constitution grants every accused person who is sentenced to death an automatic right of appeal. The sentence must be confirmed

by the highest appellate court in the land. The appeal process might take a period of three years on average. After the appeal process is completed the condemned prisoner has a right to apply to the Committee on the Prerogative of Mercy which advises the President on the exercise of his powers under Article 121 of the Constitution. **Section 102** of the **Trial on Indictments Act** and **Section 34** of the **Prisons Act** provide the procedure to be followed when a prisoner desires to seek pardon from the President. Both sections are worded in such a manner that it is difficult to tell when the process of seeking pardon ought to begin. Obviously it ought to commence soon after the judicial process is complete. The affidavit of Ben Ogwang who is the longest serving prisoner on death row did not state whether he has ever applied to the Committee for the President to exercise his prerogative of mercy. He stated in his affidavit that there has been executions after every three years. There is no evidence or study that has been done to determine how long it takes to carry out executions so as to show the death row syndrome which the petitioners are complaining about.

However, any delay to carry out the death sentence after it had been confirmed by the highest appellate court in the land is inexcusable. The sentence ought to be carried out within a reasonable time. What constitutes a reasonable time is a question of fact. A person who is sentenced to death does not lose the protection of the law against cruel, inhuman or degrading treatment. Therefore, a delay of more than three years to carry out the sentence after the same has been confirmed by the highest appellate court would amount to unreasonable delay. If the death sentence

is to retain its meaning, then it has to be carried out within a reasonable time at best within three years after the highest appellate court had confirmed the sentence. Any period beyond that would in my view constitute inordinate delay and therefore unacceptable. Having said that, I do not think that this court is in a position to commute the death sentences to life imprisonment. Such a course of action would be arbitrary because the circumstances of each prisoner must be considered on merit. There is no scientific data on which such a decision can be made. The fifth issue would be answered in the affirmative.

Lastly I would like to consider the remedies prayed for in the petition. In view of my findings on the first, second and fourth issues, I would decline to grant the declarations sought thereunder and hold that various laws of Uganda mentioned are not inconsistent with the articles in the Constitution. As for the third issue, the various provisions of the laws of Uganda that prescribe mandatory death sentences are inconsistent with articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution. This declaration also applies to issue no. 5

Section 132 of the Trial on Indictments Act is inconsistent with articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution for restricting the right of appeal against sentence where a death sentence is imposed.

Delay to carry out the death after it had been confirmed by the highest appellate court, beyond three years would be unreasonable and therefore inconsistent with articles 24 and 44(a) of the Constitution.

As for the remedies that were sought i. e setting aside the death sentences imposed on the petitioners and remitting the case to the High Court to investigate and determine appropriate sentence under **article 137(4)** of the Constitution. The article empowers this court to grant redress in addition to the declarations. ***The redress of setting aside the sentences of*** death was sought in ***the event of our finding that the death penalty*** is unconstitutional. In view of my findings on issues one and two, I would decline to set aside the sentences imposed on each of the petitioners. Each party to bear its own costs.

Dated at Kampala this 10th day of June 2005.

Justice of the Constitutional CourtTHE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE G. M. OKELLO, JA.
HON. LADY JUSTICE A. E. N. MPAGI-BAHIGEINE, JA.
HON. MR. JUSTICE A. TWINOMUJUNI, JA.
HON. LADY JUSTICE C. K. BYAMUGISHA, JA. HON. MR. JUSTICE STEVEN B. K. KAVUMA, JA.

CONSTITUTIONAL PETITION NO, 6 OF 2003

BETWEEN

SUZAN KIGULA & 416 OTHERS.....PETITIONERS

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF STEVEN B. K. KAVUMA, JA.

I have read in draft the lead judgment of Hon. Mr. Justice G. M. Okello, JA, those of Hon. Lady Justice A. E. N. Mpagi-Bahigeine, JA, Hon. Mr. Justice A. Twinomujuni, JA and Hon. Lady Justice C. K. Byamugisha, JA.

I agree with Hon. Lady Justice A. E. N. Mpagi-Bahigeine, JA that this petition should fail in toto and 1 order so.

I would decline to grant the declarations and reliefs sought.

Each party to bear its own costs.

Dated at Kampala this 10th day of June 2005.

Steven B. K. KAVUMA
JUSTICE OF APPEAL