THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE S.G. ENGWAU, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO. 69 OF 2002

OKWANG WILLIAM :::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the judgement of the High Court sitting at Lira (Kania, J.) dated 8/5/2002 in Criminal Session Case No. 157 of 2000]

JUDGEMENT OF THE COURT

Okwang William, hereinafter referred to as the appellant, was convicted of murder contrary to sections 183 and 184 of the Penal Code Act and sentenced to death.

The prosecution case that was accepted by the leaned trial judge is that Bunga Levison, PW3, is the husband of Kutancia Akwee, PW1. Akia Caroline, the deceased, was the daughter of Kutancia Akwee's co-wife by another man who was not her husband. When Akia Caroline's (deceased) mother passed away, PW1 continued to look after her as her own daughter. The appellant had been married by custom to Akia Caroline for 14 years and had eight children. The couple had some misunderstandings and the deceased returned to her parents' home where she lived with her children.

On 9th October 1999 the appellant went with the spear to the deceased's home. The deceased reported him to his brother Okello Benson, PW2, who was together with others. The appellant was taken to the sub-county Headquarters and detained but escaped from the cells. On 11th March 2000 at around 9.00 p.m. the appellant found the deceased at her parents' home and stabbed her in the abdomen with a knife. The deceased made an alarm while saying that it was the appellant who had stabbed her.

PW1 answered the alarm and saw the deceased's intestines protruding out of her stomach. She bandaged the stomach with a piece of cloth. The witness also made an alarm which was answered by Bungo Levison (PW3). PW2 also came to the scene and saw the deceased who was being assisted by her mother, PW1. The deceased continued to tell all the witnesses that it was the appellant who had stabbed her. The deceased was taken to the police and on her way to the hospital she passed away at around 6.30 a.m.

According to the post-mortem report, which was admitted in evidence as exhibit P1, there were external stab wounds on the right upper quadrangle of the abdomen. The abdomen with abdominal contents (intestines) were coming through these wounds. There was a laceration of the gut. The cause of death was severe haemorrhage and shock.

In the charge and caution statement that was recorded from the appellant by D/IP Mark Anyo, PW4, and admitted in evidence as exhibit P4, the appellant admitted that he had stabbed the deceased with a knife. He stated that he had intended to stab the man whom he had found in the deceased's house. He accidentally stabbed her instead.

In his defence the appellant testified on oath. He stated that he had gone to visit his wife but found a man in the house who had spoilt his wife and made her pregnant. A struggle ensued and in the process the appellant picked a knife from the ground intending to stab that man with it. However, he accidentally stabbed the deceased.

The learned trial judge rejected his defence, believed the prosecution case, convicted and sentenced him to death. The appellant being dissatisfied with that judgement has filed his appeal to this Court on the following grounds.

> ***"1 The learned trial judge erred in fact and in law when he found that at the time of the assault there was no new wrongful act or insult to constitute provocation thereby denying the appellant the defence of provocation.***

2. ***The learned judge erred in fact and law when he failed to properly evaluate the evidence before him thereby wrongly convicting the appellant of the offence of murder***

3. ***In the alternative and without prejudice to the foregoing, t*****he appellant prays that he be heard in mitigation on the question of sentence pronounced against him unheard in the lower court."**

He prayed court to quash the conviction of murder and substitute it with manslaughter and set aside the sentence of death. In the alternative he prayed court that the appellant be heard in mitigation of the death sentence that was passed against him by the lower court.

Mr. Ali Gabe Akida, learned counsel for the appellant, argued grounds 1 and 2 jointly and ground 3 separately. We shall handle the appeal in the same manner.

Appellant's counsel's complaint in both grounds is that the learned trial judge did not properly evaluate the evidence of the prosecution and that of the defence. Counsel submitted that if the learned trial judge had done so he would have found that the defence of provocation was available to the appellant. In consequence, thereof, he would have convicted him of manslaughter instead of murder. Counsel contended that before and throughout the trial in the High Court the appellant had maintained that he was provoked by the man he had found with the deceased.

In counsel's view, the police had the duty to investigate the existence of the man who was with the deceased, because the appellant had mentioned it at the earliest opportunity. Counsel further argued that the appellant loved his wife and went there to visit her and the children. Counsel criticised the judge for holding that the mere finding of the deceased with a man who had made her pregnant was not provocation to the appellant. Counsel contented that the appellant was provoked and the judge was wrong to hold that the appellant had time to cool off.

In reply, Mr. Fred Waninde, learned Senior State Attorney, supported the judgement of the trial court. He submitted that the judge properly addressed his mind on the law and applied it to the facts. He argued, further, that the appellant had all along been preparing to kill the deceased and that is why the evidence of PW4 was unchallenged.

From submissions of both counsel the issue for determination in grounds 1 and 2 is whether the trial judge correctly dealt with the defence of provocation from the evidence on record. We find that the judge correctly stated the law on provocation as follows:

> "***Provocation is defined in section 188 of the Penal Code Act as follows:***
>
> ***188 (1) the term "provocation" means and includes except as hereinafter stated any wrongful act or insult of such a nature as to be likely-***
>
> ***(a) when done or offered to an ordinary person***
>
> ***(b) when done or offered in the presence of an ordinary person to another person***
>
> ***(i) who is under his immediate care, or***
>
> ***(ii) to whom he stands in a conjugal, felial or fraternal or in the relation of master and servant. To deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***
>
> ***2. When such act or insult is done or offered by one person***
>
> ***(a) to another or***
> ***(b) to the presence of another to a person***
>
> ***(I) who is under the immediate care of that other; or***
> ***(ii) to whom that other stands in any such relation as***
> ***aforesaid, the former is said to give to that provocation for/an assault***
>
> ***3. A lawful act is not provocation to any person for assault***
>
> ***4. An act which a person does in consequence or incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not a provocation to that other person for an assault.***
>
> ***5. An arrest which is unlawful is not necessarily provocation***

for an
Assault but it may be evidence of provocation to a person who knows of the illegality."

To constitute provocation in the legal sense the wrongful act or insult must be of such a nature as to be capable of depriving an ordinary person of his power of self-control and to induce him to commit the assault to the person who did or offered the act or insult. The wrongful act or insult may be done directly to the person who commits the assault or in his presence to any of the persons who stand to him in the relation in section 188 (1) (b) (I) and (ii) above.

For the defence of provocation to succeed the assault must be done in heat of passion before the accused has had time to cool down. See <u>Ikuku alias maina Nyaga vs Republic [1965] EA 496.</u>

The law in this regard was summarised by the Supreme Court in <u>Sowedi Oasire vs Uganda Supreme Court Cr. Appeal \No. 28 of 1989</u> where their Lordships held that for a charge of murder to be reduced to manslaughter on a plea of provocation –

(a) The death must be ceased in the heat of passion before there is time for the passion to cool down.

(b) The provocation must be sudden.

The standard for judging of the act or insult on which the plea Is advanced is capable of causing provocation in the legal sense is that of an ordinary man."

It is our duty as the first appellate court to re-appraise the evidence and come to our own conclusion. See **Rule 30 (1) (a) of the Judicature (Court of Appeal) Rules.** We have, of course, to bear in mind that we did not have the opportunity to see and hear the witnesses as they testified. See **Selle and Another vs. Associated Motor Boat Co. [1968] EA 123, Pandya vs. R. [1957] EA 336, Ruwala vs R [1957] EA 570, and Kifamunte Henry vs Uganda Criminal Appeal No. 10 of 1997 (Supreme Court).**

The learned trial judge considered the defence of provocation and held that it was not available to the appellant. He found that there was no immediate action, which provoked the appellant. The trial judge considered the fact that the appellant had in his charge and caution statement stated that on the fateful day he had found a man committing adultery with the deceased. During the trial the appellant testified on oath

that he had found the two sitting together inside the house. The judge concluded and, rightly so in our view, that the appellant had abandoned the first set of facts as contained in the charge and caution statement. His defence was that he found the deceased sitting in her house with a man whom he knew had made her pregnant. The change of statements indicates to us that the appellant was telling lies to court. Soon after the incident had happened and when the events must have been fresh in his mind, he told a different story from what he testified in court on oath.

It is pertinent to note that none of the prosecution witnesses and especially the doctor who performed the post-mortem examination on the body of the deceased testified that she was pregnant. We are of the considered opinion that even if the deceased had actually been pregnant and the appellant found her in the company of her lover that would not amount to legal provocation. Knowledge of an adulterous affair of one's spouse has been held not to amount to provocation when one is charged with murder. See **Yafesi Nabende and Others vs R. (1948) 15 EACA 71.** In that case the appellant was charged with murder of his wife's lover. It was established in evidence that he had prior knowledge of their adulterous association. He was privy to the plot to catch them together. The Court of Appeal for Eastern Africa held that the defence of provocation by sudden knowledge was not available to the appellant.

In his judgement the learned trial judge considered the issue of provocation and stated thus: -

> *"**The issue to decide is whether the knowledge that somebody had made one's wife pregnant is capable of throwing such a person into a sudden passion as to momentarily deprive him of self control. The issue to consider with the above issue is whether that previous knowledge afforded a sufficient cooling period between the time of such knowledge and the assault.***
>
> ***Knowledge of a previous adultery ordinarily would disentitle a husband from pleading provocation without any other intervening insult or unlawful act. The plea of provocation would therefore, not be available to an accused who assaults a paramour of his wife many weeks after***

hearing that he had committed adultery with his wife. However, knowledge by a husband that his wife and her paramour had committed adultery makes the plea of provocation available to the husband if he finds his wife and her paramour in the act of adultery. <u>See Yakoyadi Lakora s/o Omeri v R [1960] EA 323.</u>

In the instant case the accused claimed that the person he found in the house with his wife had made his wife pregnant. It was also his evidence that he found the two conversing. Even if it is true that the accused came to know that the man he found in the house with his wife has made her pregnant. I find he had ample time for his passion to cool down from the time he knew of the pregnancy and when he assaulted the deceased. At the time of assault there was no new wrongful act or insult which constituted provocation in the legal sense. For the above reason the defence of provocation is not available to the accused."

The learned trial judge correctly stated the law and properly applied it to the evidence before him. We cannot fault him. The argument by the appellant's counsel that the police should have investigated and found out the truth of the appellant's story that he found the deceased and her lover inside the house because the appellant told the police at the earliest opportunity is not tenable. Counsel's argument, with due respect, would apply in a case where the accused raises a defence of alibi and not provocation.

Additionally, there was other evidence on record, which showed that the appellant had a prior intention to kill the deceased and was not provoked when he stabbed the deceased. Three prosecution witnesses namely, Akwee Kutancio, PW1, Okello Benson, PW2, and Bungo Levison, PW3, testified that during the night of 11/3/2000, the appellant went to the deceased's house and stabbed her in the abdomen. The deceased told all of them that it was the appellant who had stabbed her with a knife. The three witnesses also testified that the relationship between the appellant and the deceased was not good. On the 9/10/1999 the appellant unsuccessfully attempted to spear the deceased. The deceased reported that incident. PW2 found the appellant

with the spear and together with others took him to Erute sub-county headquarters. However, he escaped from there.

Grounds 1 and 2 fail for lack of merit.

On the alternative ground appellant's counsel did not say much apart from praying this court to evaluate the evidence and sentence the appellant to 10 years imprisonment. Mr. Waninde did not agree.

The death sentence was passed against the appellant on 8/5/2002. This was before Constitutional Court pronounced itself on the mandatory death sentence. Following the Supreme Court decision in **Philip Zahura vs. Uganda Criminal Appeal No.16 of 2004 w**e have taken into account all the mitigating factors. We have found no mitigating factors deserving reduction of the sentence. We are of the considered view that this was a brutal murder. The appellant had even previously attempted to murder the deceased. The ground on mitigation of sentence that was imposed on the appellant also fails.

In the result the whole appeal against conviction and sentence is dismissed.

Dated at Kampala this 21st day of May 2007.

L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE

S.G. Engwau
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL