**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**AT GULU**

**CRIMINAL APPEAL N0. 52/2006**

**Coram: Hon Justice L.E. Mukasa-Kikonyogo, DCJ**
**Hon Justice S.B.K Kavuma, JA**
**Hon Justice A.S. Nshimye, JA**

**ONZIMA MARTIN::::::::::::::::::::::::::::::APPELLANT**

**VERSUS**

**UGANDA::::::::::::::::::::::::::::::::::::::::RESPONDENT**

***Appeal from the conviction and sentence of the High Court of Uganda at Arua Mr. Justice Augustus Kania dated the 1st day of December 2006 in criminal case N0. 0001 of 2006.***

**JUDGMENT OF THE COURT.**

The appellant appealed against both conviction and sentence. He was indicted for murder of his wife c/s 188 and 189, of the Penal Code Act, and convicted by the High Court sitting at Arua and sentenced to death.

The following were the brief facts of the case before the High Court.

On 9th October 2002 at Ofude village, Arua District, the appellant left his wife **OZELE GRACE** (the deceased) at home and went to Ewota for a local dance called "Ndara". On coming back, he found the deceased standing naked with unidentified man near the appellant's home. The unidentified man ran away leaving behind the deceased who was very drunk.

The appellant suspected his wife to have been having sexual intercourse and started beating her. The post mortem report revealed a cut wound on the lower lip with loss of

two upper incisor teeth, fractured ulna and severe internal injuries with internal haemorrhage.

The defence of the appellant was that when he came back, he found someone who had fallen in a ditch. That person turned out to be his wife who could not walk. With some help, he took her at home hoping to wait for day break to get transport to take her for treatment. He noticed blood in her mouth. Unfortunately in the morning, she was dead. The appellant was arrested and taken to CPS Arua and charged with the murder of his wife.

The trial judge accepted the evidence of the prosecution and rejected the defence of the appellant, hence the appeal to this court.

There were two grounds of appeal.

Learned counsel Mr. Olonya Martin for the appellant on state brief, abandoned ground one and concentrated on ground two namely:-

> ***"The learned trial judge did not properly evaluate the evidence hence he came to a wrong decision of convicting the appellant of murder"***

Counsel submitted that it was trite law that, the judge had to consider defences raised by the appellant and even those not raised, but available to him on a charge of murder. He complained that although there was evidence from PW.6 (Ali Geoffrey) that the appellant had told him

> ***"That the death was the result of a fight he had with his wife. And that he beat his wife because he caught her with a man. I accompanied him to his house and found indeed the wife had died"***

Which revealed a defence of provocation, the learned trial judge erred in not considering it when he was evaluating the evidence. Had he done so, he would have come to a different conclusion, Counsel concluded.

Counsel further referred us to page 12 of the judgment in which the trial judge accepted the evidence of P.W.6, but did not use the same evidence during evaluation to consider provocation.

***"He further gave evidence that the accused told him that he had fought with his wife because he had caught the latter with a man. P.W. 6 Ali Geoffrey was not cross-examined in this point leading to the reference that this confession by the accused was to the truth".***

He prayed that the appeal of his client be allowed and the conviction of murder be quashed and sentence be set aside.

**In reply** learned counsel for the respondent Khisa Betty a Senior Principal State Attorney, conceded that, the learned trial judge omitted to consider the defence of provocation which was available to the appellant. She left it to us to decide.

This Court, as a 1st appellate Court has a duty to rehear and revaluate the evidence afresh and come to its own conclusion. **Pandya V R (1957) EA 338, Okeno V R (1972) EA 12, Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal N0. 10/1997**. We are in agreement with both counsel that the evidence of P.W. 6 disclosed a defence of provocation.

Provocation is defined in section 193 of the Penal Code Act (cap) 120 as follows:

"***Provocation means and includes, except as stated in subsections (3) to (5), any wrongful act or insult of such a nature as to be likely:***

***(a) When done or offered to an ordinary person; or***

***(b) When done or offered in the presence of an ordinary person to another person***

***(i) who is under his or her immediate care; or***

(ii) ***To whom he or she stands in a conjugal, parental filial or fraternal relation or in the relation of master and servant, to deprive him or her of the power of self control and to induce him or her to commit an assault of the kind which the person charged committed upon by the person by whom the act or insult is done or offered***".

Then section 192 of the same Penal Code Act, spells out what happens on "killing on provocation".

> ***" when a person who unlawfully kills another under circumstances which, but for this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocations as defined in section 193, and before there is time for his or her passion to cool, <u>he or she commits manslaughter only</u>.***

We find un contraverted evidence on record (evidence of P.W.6) that the appellant found his wife naked with unidentified man, who ran away on seeing the appellant. Very few men would not react and keep peace on finding a naked wife with another man. To make it worse, the man ran away which aggravated suspicion or guilt. If the learned trial judge had considered this evidence, he would have inevitably have come to the conclusion that there was provocation on the part of the appellant. Therefore the unlawful killing of his wife fell within the scope of section 192 of the Penal Code Act quoted above. There is therefore merit in ground two of the appeal which succeeds.

In the result, we allow the appeal, quash the conviction of murder and set aside the death sentence.

We substitute a conviction of manslaughter c/s 187 of the Penal Code Act.

On sentence, learned counsel for the State asked us to impose a severe sentence of 25 years. She submitted that judging from the post-mortem report, the appellant overreacted when he assaulted his wife to death.

In reply learned counsel for the appellant submitted in mitigation, that his client was sorry for the death of his wife. He informed us that there are 3 children who need guidance and care of the appellant. He also

has an old mother to look after. He suggested a period of 15 years inclusive of the period he has been in custody.

After considering submission of both counsel on sentence, we have considered the period he has been in custody since 9th October 2002 which is approximately 7 years and 8 months. He is sentenced to 12 years imprisonment.

**Dated at Gulu this 10th day of June 2010**.

**L.E.M MUKASA KIKONYOGO**
**DEPUTY CHIEF JUSTICE**

**S.B.K KAVUMA**
**JUSTICE OF APPEAL**

**A.S. NSHIMYE**
**JUSTICE OF APPEAL**