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PRACTICE GUIDE FOR DEFENSE COUNSEL REPRESENTING INDIVIDUALS FACING THE DEATH PENALTY



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Defense Counsel
Practice Guide
for Individuals facing
death penalty

CHAPTER
01

INTRODUCTION

INTRODUCTION

The purpose of this Best Practice Guide is to offer guidance to defense counsel for the accused person facing a criminal trial of a capital offence involving a death penalty. The best practices are intended to ensure effective legal representation in order to mitigate the potential of imposition of the death penalty. These Guidelines are not in any way intended to vary and or modify defense counsel's responsibilities and obligations under applicable professional code of conduct rules, statutes or common law. They are aspirational or describe "best practices," and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability. However, these best practices may be relevant in judicial appraisal of the constitutional claims regarding the right to counsel in criminal proceedings. As defense counsel you should always read and comply with the rules of professional conduct and other authorities that are binding on you with regard to the quality and standard of legal services to your client.

The Best Practices are intended to enhance the performance of criminal defense counsel in all stages of the criminal trial proceeding to mitigate the adverse effect of an erroneous conviction and sentencing of the accused person to death.

Apart from helping the specific clients, this Best Practice Guide will help defense counsel to try and positively influence improvement in the administration of criminal justice in Uganda. The best practices will help defense counsel identify inadequacies or injustices in the substantive or procedural law and stimulate remedial actions including filing constitutional petitions/references either on his/her own or in corroboration with public interest litigation clinics and organizations like the Uganda Law Society and other civil society organisations.

Because of the unique nature and effect of the death penalty compared to other criminal penalties, defense counsel in a capital case should take extraordinary efforts on behalf of the accused to review and ensure compliance with these best practices throughout the proceedings.

1.1 GENERAL OVERVIEW OF THE RELEVANT LAW

*"No person shall be deprived of life intentionally except in the execution of a sentence 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."*¹

Following the retention of death penalty as an allowed sanction for persons convicted of certain capital offences by the Supreme Court of Uganda in the case of Attorney General Vs. Susan Kigula,² despite the international shift towards abolition of the death penalty, special attention must be paid to the pre-trial and trial process leading to conviction and sentencing of the accused persons. While the Supreme Court in the Susan Kigula case³ confirmed the legality of the death penalty in Uganda, it agreed that indeed in certain aspects the imposition of the death penalty constitutes a cruel, inhuman and degrading punishment though it fell short of declaring it unconstitutional. The application of death penalty is irreversible; and therefore, once errors are made during the administration of the criminal justice, it may result into a conviction and sentencing of an innocent person to death. The

¹ Article 22 ① of the 1995 Constitution of the Republic of Uganda.

² Supreme Court Constitutional Appeal Number 03 of 2006 (unreported).

³ *ibid.*

impact of such a wrongful conviction is irreversible once the conviction and sentence is confirmed by the Supreme Court. It is paramount that advocates representing persons facing capital offences involving death penalty and all key stakeholders adopt internationally recognized fair trial standards to mitigate the obvious dangers of the death penalty.⁴ This is particularly significant given the systemic institutional weaknesses in the administration of justice in many developing countries including Uganda. Among the many challenges negating effective dispensation of criminal justice capital cases in Uganda includes; limited number of judicial officers⁵, shortage of competent investigators, lack of capacity and tools by advocates to offer effective representation to the accused persons, insufficient financial resources and poor lawyering.⁶ These challenges exponentially increase the probability of miscarriage of justice by wrongful conviction and/or sentencing. The institution of a moratorium by the Supreme Court in the Susan Kigula case⁷ on the duration which a person convicted of a capital offence and sentenced to death can stay on death row before the actual execution did not solve any of the challenges posed by the continued existence of the death penalty in Uganda's penal statutes.

The development of this Practice Guide for lawyers in Uganda representing persons facing a death penalty will help to provide additional tools to support quality legal representation and mitigate some of the structural risks in Uganda's criminal justice system. The objective of this Practice Guide is to set out the best practices in defense of individuals facing capital cases. It provides defense counsel with strategic approach in handling these cases and offer possible legal arguments based on a wealth of knowledge from international human rights principles, international treaties and conventions to which Uganda is a party, Constitutional provisions, and relevant jurisprudence of domestic courts and international judicial tribunals. It is hoped that advocates will find it helpful.

1.2 Users' Guide

This Practice Guide entails the lawyers' role in representation of the individuals facing capital cases with the possible imposition of a sanction of a death sentence, right from arrest, through trial until final confirmation by the Supreme Court. The Practice Guide will help advocates to navigate through the entire process right from arrest and detention, pre-trial remand, investigation, pre-trial applications such as habeas corpus, bail applications etc. Plea-bargains and other negotiations, the trial process, sentencing hearing, and appeals. The practice guide does not cover the substantive and procedural laws that govern the adjudication of capital offences in Uganda but rather sets out the best practices for any advocate representing an accused person facing capital offences.

4 *B. Bright, Counsel for the Poor: The Death sentence Not for the Worst Crimes but for the Worst lawyer, 103 YALE L.J., 1835, 1844 (1994).*

5 *Resulting into heavy workload which increases the potential of making errors.*

6 *Randall Coyne & Lyn Entzeroth, Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty & Calling for a Moratorium on Executions, 4 GEOJ. Fighting Poverty 3, 18 (1996).*

7 *Supra (note 2).*

1.3 The Relevant laws.

To appreciate and utilize the best practices set out in this Practice Guide, defense counsel must have a good understanding of the domestic and international legal framework governing the capital offences right from investigation, trial, sentencing and appeals.

a) Domestic Law.

The primary source of domestic law is the 1995 Constitution which is the supreme law of Uganda.⁸ Other sources of applicable criminal law are Acts of Parliament passed in accordance with the Constitution or preserved as part of the existing law under Article 274.⁹ It is important that defense counsel representing a person accused of a capital offence appreciates the provisions of the Constitution relating to the protection and preservation of human rights including the prohibition against torture, inhuman and degrading punishment, the right to fair trial and presumption of innocence until proven guilty. A good understanding of the investigative and a prosecutorial authority under the Police Act,¹⁰ the Uganda Peoples Defense Forces Act¹¹, the Criminal Procedure Code Act,¹² the Magistrates Courts Act¹³, the Trial on Indictment Act,¹⁴ the Evidence Act¹⁵, the Prevention and Prohibition of Torture Act,¹⁶ the Children Act¹⁷ and all the substantive law statutes setting out capital offences with a death penalty sanction and other procedural regulations is a necessity.

b) International Law

Since the imposition of a death penalty constitutes the deprivation of the most sacred right, the right to life which is extensively covered under international law, the best practices highlighted in this Practice Guide are partly based on experiences and standards set in international human rights conventions to which Uganda is a party and other sources of international law. Thus, a reasonable understanding of public international law is very important as it may help defense counsel acting for a person accused of an offence involving a potential imposition of a death penalty to decide whether to use international law to challenge the trial and imposition of death penalty in a particular case. There are four ④ sources of international law as set out in Article 38 ① of the Statute of the International Court of Justice namely: treaties, customary international law, general principles of international law (jus Cogen norms) and judicial decisions and teachings of the most qualified experts. The treaties are the primary source of international law.¹⁸ Treaties may be bilateral or

⁸ Article 2 ① of the Constitution of the Republic of Uganda.

⁹ Article 274 ① of the Constitution provides that, "Subject to the provisions of this Article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring into conformity with this Constitution."

¹⁰ Cap 303, Laws of Uganda, as amended by the Police (Amendment) Act, 2006.

¹¹ Cap 307, Laws of Uganda.

¹² Cap 116 (As Amended), Laws of Uganda.

¹³ Cap 16, Laws of Uganda, as amended by the Magistrates Courts (Amendment) Act, 2007.

¹⁴ Cap 23, Laws of Uganda, as amended by the Trial on Indictment (Amendment) Act, 2008.

¹⁵ Cap 6, Laws of Uganda.

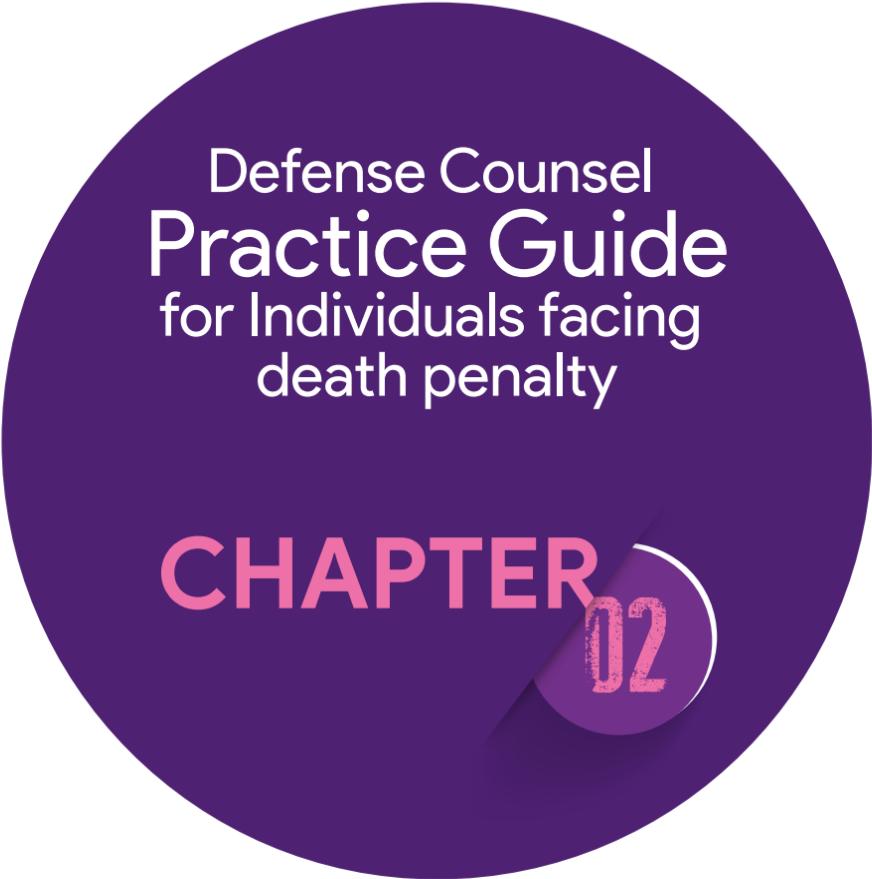
¹⁶ Prevention and Prohibition of Torture Act, 2012.

¹⁷ Cap 59, Laws of Uganda, as amended by the Children (Amendment) Act, 2016

¹⁸ Article 38 ① of the Statute of International Court of Justice.

multilateral. A country is bound by treaties to which it is a party. The most relevant treaties to the conduct of investigations and trial of individuals facing death penalty cases are human rights related treaties. The following are some of the relevant international treaties to which Uganda is a state party:

- The International Covenant on Civil and Political Rights (ICCPR).
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- The Convention on Elimination of Racial Discrimination (CERD).
- The Convention on the rights of a Child (CRC).
- The African Charter on Human and Peoples Rights.



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CHAPTER
02

PROTECTING THE CONSTITUTIONAL
RIGHT TO LEGAL REPRESENTATION:

**WHAT IS THE DUTY OF
THE DEFENCE COUNSEL?**

“Every person charged with an offence shall, 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.”¹⁹

2.1 The Accused’s Constitutional Right to legal Representation

Every person charged with a criminal offence which carries a sentence of death or imprisonment for life is entitled to a lawyer of his/her choice (at his/her expense) or representation at the expense of the state²⁰ (legal representation on state brief). The right to effective legal representation is core to ensuring that the accused person gets a fair trial.²¹

The centrality of the right to effective legal representation in ensuring fair trial was also reinforced by the Human Rights Committee.²² The Human Rights Committee stated that, *“In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.”* The right to a lawyer in capital offences as guaranteed in the Constitution and international instruments means the right to an experienced and competent lawyer.²³

Therefore, defense counsel whether private or on state brief representing an accused person facing a capital case has a duty to provide competent and relevant legal representation. Due to the severity and irrevocability of a death sentence, extraordinary obligations are properly placed on counsel to prepare and try such a case.²⁴

19 Article 28 ③ (e) of the Constitution of the Republic of Uganda.

20 Article 28 ③ (d) and (e) of the Constitution of the Republic of Uganda. This Right is reinforced by the U.N. Basic Principles on the Role of Lawyer, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August to 7 September 19190, U.N. Doc. A/CONF.144/28 Rev. 1 at 118 (1990) which provides that, “Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance.”

21 Under Articles 28 and 44 (c) of the Constitution, a right to a fair hearing is non derogable right. Also see Article 14 (d) International Covenant on Civil and Political Rights; Article 7 ① (c) African Charter on Human and People’s Rights.

22 General Comment No. 32, Amnesty International, Fair Trial Manual p. 46.

23

24 Jill Miller, *The Defense Team in Capital Cases*, 31 Hofstra L. REV. ISS 4 (2003) Article 6.v.

This duty involves a number of core preconditions that counsel should satisfy namely²⁵:

- a) Defense counsel must be independent to be able to exercise professional freedom to zealously pursue justice on behalf of his/her client. This entails putting the client's interest ahead of your personal interest. The Advocate must identify and address potential conflict of interest which may affect his/her independence.²⁶ As Counsel of the accused, you may not represent two or more accused persons in the same matter where doing so may present a risk of conflict of interest, between and among the interests of those clients.²⁷ You must also refrain from representing a new client in a matter involving a former client where doing so may prejudice the former client or both.²⁸
- b) As counsel for an individual facing charges involving a death penalty, you must have the necessary experience and core competencies commensurate with the gravity of the offence.²⁹ It is part of your duties to your client to determine whether you possess the necessary skills and experience to effectively handle the particular case at hand. Where you find that you lack the necessary experience, it is advisable either to decline the instructions or seek additional counsel. At times your competence may be affected by the nature of the caseload that you have. To be able to offer high quality professional representation, you must limit the caseload to a number that allows you to operate optimally.
- c) You must have adequate resources both financial and human to enable you offer competent legal services. This requirement is particularly challenging for the indigent clients who depend on state brief. In Uganda we do not have any legislation setting the standard for the minimum financial resources to be availed by the state to counsel on state brief. Lawyers on state brief are inadequately remunerated and facilitated which affects the quality of the legal services offered to the client. However, the U.N.

²⁵ This is in addition to the duties of Counsel as set out in the professional regulations and statutes such as a duty of confidentiality regarding information relevant to the client's representation which duty continues after the representation ends; a duty of loyalty toward the client; a duty of candor toward the court and others, tempered by the duties of confidentiality and loyalty; a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes; a duty to be well-informed regarding the legal options and developments that can affect a client's interests during a criminal representation; a duty to continually evaluate the impact that each decision or action may have at later stages, including trial, sentencing, and post-conviction review; a duty to be open to possible negotiated dispositions of the matter, including the possible benefits and disadvantages of cooperating with the prosecution; a duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction.

²⁶ Refer to U.N. International Criminal Court Code of Professional Conduct for Counsel (Feb. 2003),

²⁷ See Gary T. Lowenthal, *Why Representing Multiple Defendants is a Bad Idea (Almost Always)*, 3 *Criminal Justice* 7 (1998-1999).

²⁸ See the Advocates (Professional Conduct) Regulations, (Statutory Instrument 267-2), Laws of Uganda.

²⁹ U.N. Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, *supra*.

Basic Principles on the Role of Lawyers provides that, Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.³⁰

2.2 What does the right to legal representation entail?

The right to legal representation is a necessary prerequisite to a right to a fair trial/hearing which is a constitutionally guaranteed non derogable right.³¹ Legal representation entails the responsibility to ensure that all the accused's human rights guaranteed by the Constitution and international law are observed and respected throughout the trial and pre-trial investigations and detention. Therefore mere appointment of a lawyer on state brief does not parse satisfy the state's constitutional obligation to ensure legal representation.³² Both the lawyer and the judicial officer have a duty to ensure that legal representation is effective.³³ Legal representation entails counsel ensuring that the accused's case right from arrest all through the arraignment and hearing is conducted in complete observance of due process.

2.3 Duties of defense Counsel in ensuring that due process is observed.

*"Every counsel has a duty to his client fearlessly, to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case."*³⁴

It is your duty as counsel for the accused to ensure that your client's human rights as guaranteed by the Constitution and international human rights instruments are observed during the course of the criminal proceedings. Observation of these rights is critical to ensure due process and fair hearing. Such rights include the following;

a) Right to be informed of the charges immediately upon arrest and detention in gazetted detention facilities

Your client's right to due process involves adhering to a fair arrest process that complies with the law and respects the accused's rights which include: the right to be detained in facilities authorized by law³⁵; the right to be informed of the charges³⁶; and the right to be produced in court within 48 hours of arrest if not earlier

30 *Supra*. In the case of *Reid vs. Jamaica*, the Human Rights Committee held that, "in cases involving capital punishment, in particular, legal aid should enable counsel to prepare his client's defense in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid." 13, Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987 (1990).

31 Articles 28 and 45 of the 1995 Constitution of the Republic of Uganda.

32 For instance, in the case of *Artico vs. Italy* App. No. 6694/74, 33 ECtHR (May 13, 1980)

33 Article 126 © (a) of the Constitution provides that, "In adjudicating cases of both civil and criminal nature, the courts shall, subject to the law, apply the principles that justice shall be done to all irrespective of their social or economic status." Objective V of the National Objective and Directive Principles of the State Policy provides that, the State shall guarantee and respect institutions which are charged by the State with the responsibility for protecting and promoting human rights by providing them with adequate resources to function effectively.

34 Lord Reid, in *Rondel vs Worsley* (1967)3 ALL E.R 993 at 998.

35 Article 23 © of the Constitution of the Republic of Uganda.

36 Article 9 © of the International Covenant on Civil and Political Rights provides that, "Anyone who is arrested shall be informed, at the time of the arrest of reasons for his arrest and shall be promptly informed of any charges against him."

released.³⁷ It is therefore your responsibility as defense counsel to ensure that your client's rights during arrest and pretrial detention rights are protected. Where your client is not produced in court within 48 hours or is detained in ungazetted places, you may file habeas corpus applications to secure his/her release from the illegal detention.

b) The right to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.³⁸

Your client is entitled to a fair, and public hearing without undue delay by a competent, independent and impartial tribunal established by law.³⁹ As defense counsel, it is your solemn duty to ensure that your client's right to a fair trial is upheld.

What constitutes a fair and public hearing?

According to the Constitution, “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.”⁴⁰ There is no exhaustive definition of what constitutes a fair trial. However, in Uganda's context, a fair trial/hearing can be defined as one that meets the basic rights enshrined in international law and the Constitution of the Republic of Uganda.⁴¹ The minimum guarantees set out in Article 28 of the Constitution and Article 14 of the International Covenant on Civil and Political Rights must be met. The right to a fair hearing cannot be derogated under any circumstances.⁴² Among the basic tenets of a fair hearing includes;

- Equality of arms between prosecution and defense.
- Right to cross examine the prosecution witness and confront the evidence adduced against your clients.
- The right to timely disclosure of relevant evidence and findings in the police file to enable you adequately prepare for the client's case.
- Sufficient time and facilities to prepare the defense.

37 Article 23 ④ of the Constitution of the Republic of Uganda.

38 Article 28 ① of the Constitution.

39 Articles 9 and 14 ① of International Covenant on Civil and Political Rights

40 Article 22 ① of the Constitution of the Republic of Uganda.

41 Article 45 of the Constitution of the Republic of Uganda provides that “The rights, duties, declarations and guarantees relating to the fundamental and other rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned.” Also see the case of Uganda Law Society & Jackson Karugaba vs. Attorney General, Constitutional Petition No. 2 of 2002 pgs. 11-13 where Justice Twinomujuni, JA (as he then was) observed that, “The Constitution of Uganda does not have a concise definition of the phrase “the right to a fair hearing.” It is in fact not safe to purport to give an all-inclusive definition of the phrase because human rights jurists all over the world have written on the subject giving wide ranging and deep analysis of the phrase so much so that it is impossible to give a short definition of it... Article 28 is a package. Each and every one of the above constitutes what the right to a fair hearing means. It was never intended that this would be an exhaustive definition of the right to fair hearing.”

42 Article 44 of the Constitution of the Republic of Uganda.

A judicial officer must treat both parties equally during the course of trial.⁴³ To achieve this, the judicial officer/tribunal must independently and fairly adjudicate the dispute. It would therefore be a violation of your client's right to a fair trial if you as counsel or the client is excluded from any proceedings where the prosecution is in attendance or, where you are given less time to prepare and present your case compared to the time allowed for the prosecution, or where you are denied timely access to the prosecution's intended evidence. You must therefore be on alert to spot all scenarios during the proceedings which may compromise your client's right to a fair trial and raise your objections before the court.

What is the significance of an independent and impartial Court?

The Court/Judicial Officer must be independent and impartial. Impartiality is, a state of mind in which a judicial officer/tribunal is disinterested in the outcome of the case and is open to persuasion by evidence and submission.⁴⁴ Conversely, bias or partiality denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to a particular issue.⁴⁵ Judicial officers must be free from any external improper influence from any source whether government or private and partisan interest.⁴⁶

Judicial independence and impartiality is a critical ingredient of a fair trial. Judicial independence is a shield that secures and protects the fundamental constitutional guarantees for a fair trial. Judicial independence is not a privilege of the individual judicial officer. It is a responsibility imposed on each officer to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence without any external influence or interference.⁴⁷ It ensures that the judicial decisions reached during the trial are based upon the law and the evidence adduced and properly admitted and evaluated in order to do justice between the parties. It ensures that the judicial officer is only bound by the law and his/her conscience "to do right to all manner of people in accordance with the Constitution of the Republic of Uganda as by law established and in accordance with the laws and usages of the Republic of Uganda without fear or favour, affection or ill will."⁴⁸

43 *Lawyers Committee for Human Rights, WHAT IS A FAIR TRIAL? A Basic guide to legal standards and practice*, p.12 March 2000.

44 *Per Hon. Justice Stephen Mubiru in the case of Idrifua Patrick vs. Uganda High Court Criminal Appeal No. 0014 of 2014 (unreported), page 9. Also see Attorney General vs. Gladys Nakibuule Kisekka, Supreme Court Constitutional Appeal No. 2 of 2016 where Prof. Tibatemwa –Ekirikubinza JSC held that "I am aware that judicial independence is now universally recognized as one of the hallmarks of constitutional democracy and rule of law. It is accepted that an independent judiciary is a key to upholding the rule of law in a democratic society. Judicial independence that an individual judge be unconstrained by collegial and institutional pressures when deciding a question of fact or law. The Purpose of judicial independence is the complete liberty of the judicial officer to impartially and independently decide cases that come before the court and no outsider be it government, individual or other judicial officer should interfere with the manner in which an officer makes a decision "*

45 *Ibid.*

46 *Article 128 of the Constitution of the Republic of Uganda. Also see BPIJ, Principle 2: "The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect from any quarter or for any reason."*

47 *Aggrey Bwire vs. Attorney General & Judicial Service Commission, Supreme Court Constitutional Appeal No. 8 of 2010.*

48 *Judicial Oath, Fourth Schedule to the Constitution of the Republic of Uganda. In the case of Meera Investments Ltd vs. Commissioner General, URA, Court of Appeal Civil Appeal No.15 of 2007 (Un*

Given that it is impossible for the law to provide for all possible issue that will emerge in a given case, judicial officers are given discretionary powers to make decisions in the course of the trial that “influence the outcome of the case or the legal recourse of the parties.”⁴⁹

As defense counsel for the accused person, it is paramount that you assess the independence and impartiality of the judicial officer placed in charge of your client’s case at the earliest to avoid a miscarriage of justice. You should ask yourself the following question:

- After an objective assessment of the outward conduct of the particular judge, is the judicial officer exposed to pre-trial biases on the facts of the particular case?
- Is the appointment/constitution of the judicial tribunal suspicious; that is given the history and known antecedents of the individuals constituting the panel, is it tainted with ulterior motives designed to predetermine the outcome of the trial? (This will be particularly important where the trial is conducted through quasi-judicial tribunals like the General Court Martial).⁵⁰
- Does the judicial officer have a personal interest in the matter? This may be due to relationship with the parties or pre-formed ideological opinion that impairs the impartiality in decision making.

Lack of independence and impartiality on the part of a judicial officer presiding over your client’s case is fatal to the proceedings; Justice Stephen Mubiru in the case of **Idrifua Patrick vs. Uganda** observed that,

“A fundamental consideration in any trial will be the independence and impartiality of the court. Article 28 ① of The Constitution of the Republic of Uganda, 1995 guarantees to every accused person, trial by an independent and impartial court or tribunal established by law. Much as this provision has implications for the safeguards for judicial officers against improper pressures it also envisages circumstances which may give rise to both actual bias on their part or, more commonly, well-founded apprehension that this might exist. In this context, this court is cognisant of one cardinal principle, expressed in the words of Lord Hewart, L.C.J, in R. v. Sussex Justices ex p. M’Carthy, [1924] 1 K.B. 256 at p. 259, that: It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

By reason of article 28 ① of The Constitution of the Republic of Uganda, 1995, courts are held to the highest standards of impartiality. Fairness and impartiality must not only subjectively exist but must also be objectively demonstrated

reported), Justice Twinomujuni, JA (As he then was) emphasized that, “The requirement that a judicial officer must be independent, impartial and professional is cardinal principles enshrined in our oath of office and in our Judicial Code of Conduct.”

49 Prof. Tibatemwa-Ekirikubinza, Attorney General vs. Gladys Nakibuule Kiseka (supra).

50 Uganda Law Society & Jackson Karugaba supra, p 17, Twinomujuni JA (as he then was) observed, “In my humble opinion, it is not possible for Uganda Military Courts to be independent and impartial given the current laws under which they are constituted and the military structure within which they operate.”

You must have evidence of the likelihood of bias and lack of independence since judicial officers are presumed to be people of integrity, conscience and intellectual discipline, capable of judging a particular case fairly based on the circumstances.⁵² Once you establish with evidence that the particular judicial officer/tribunal is conflicted or biased and therefore incapable of independently and impartially adjudicating your client's case, it is your duty to mount a challenge for the judicial officer to recuse him/herself. While determining whether the judicial officer/tribunal is likely to be biased or not, "The court does not look at the mind of whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people. Even if he was as impartial as could be, nevertheless if fair minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and if he does sit, his decision cannot stand. Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice ... would or did favour one side unfairly at the expense of the other."⁵³

52 *United States vs. Morgan*, 313 U.S. 409 (1941), at p. 421. Also See *R. vs. S (R.D)* (1997) # S.C.R 484
53 *Professor Isaac Newton Ojok vs. Uganda Supreme Court Criminal Appeal No. 33 of 1991*. Also see *R. v.*

While mounting the recusal challenge against a judicial officer, the proper procedure must be observed.⁵⁴

c) The right to be presumed innocent.

Under both the Constitution and International Covenant on Civil and Political Rights, your client enjoys the presumption of innocence.⁵⁵ According to Article 28 ③ (a) of the Constitution, *“Every person who is charged with an offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.”* The presumption of innocence entails the following:

- **A right to remain silent and not to incriminate oneself before the court or during the hearing, pre-trial proceedings and investigations.**

Therefore the practice of Police and other security agencies arresting and requiring suspects to make statements and or production of documents have been held to be in violation of the accused’s constitutional presumption of innocence guaranteed under Article 28③ (a) of the Constitution.⁵⁶ Thus, unless it is in the best interest of your client, you should object to all attempts by investigators and prosecution to procure your client to incriminate himself.

Camborne Justices ex p. Pearce, [1955] 1 Q.B. 41; *R. v. Gough* [1993] A.C. 646 at 670; *Ex parte Barusley and District Licensed Valuers Association* (1960) 2 Q B D 169; *Musiara Ltd v. Ntimama* [2005] 1 EA 317; *Porter v. Magill* [2002] 1 All ER 465; *Obiga Mario Kania v. Electoral Commission and another*, C. A. Election Petition Appeal No. 4 of 2011; *G.M. Combined (U) Ltd v. A.K. Detergent Ltd and four Others*, S. C. Civil Appeal No. 7 of 1998; *Shell (U) Ltd and Nine others v. Muwema and Mugerwa Advocates and Solicitors and another*, S. C. Civil Appeal No. 02 of 2013

⁵⁴ *Meera Investments Ltd vs The Commissioner General, URA*, supra; pgs 13-14, “In the recent decision of the East African Court of Justice in *Attorney General of the Republic of Kenya vs Prof Anyang’ Nyogo & 10 Others*, Application No.5 of 2007, the court had occasion to discuss the procedure to be followed in such matters. The court stated:-“With regard to an application for a judge to recuse himself from sitting on a Coram, as from sitting as a single judge, the procedure practiced in the East African Partner States, and which this court would encourage litigants before it to follow, is similar to what was succinctly described by the Constitutional Court of South Africa in *The President of the Republic & 2 Others vs. South African Rugby Football Union & 3 Others*, (Case CCT 16/98) (the S.A. Rugby Football union Case). The Court said at para 50 of its judgment: ‘....The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of [the] opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.’ The rationale for and benefit from that procedure is obvious. Apart from anything else, in practical terms it helps the litigant to avoid rushing to court at the risk of maligning the integrity of the judge or judges and of the court as a whole, without having the full facts, as clearly transpired in the instant case.”

⁵⁵ Article 28 ③ (a) of the Constitution of the Republic of Uganda and Article 14 ② of the International Convention on Civil and Political Rights.

⁵⁶ *Olara Otunnu vs. Attorney General Constitutional Petition No. 12 of 2010 (Unreported)* at p. 24.

- **The burden of proof of commission of a crime with which the accused is charged rests on the prosecution.**

The onus is on the prosecution to prove that the accused person committed the alleged offence; and the standard of proof is beyond reasonable doubt.⁵⁷ However, the presumption of innocence does not prohibit a particular legislation imposing a burden of proving a particular fact on the accused.⁵⁸ Neither does the presumption of innocence prohibit the duty to affirmatively establish his/her defense to the charges. The court, investigators and all relevant authorities are duty bound to observe the presumption of innocence by refraining from prejudging the guilt of the accused person throughout the investigation and trial process. Thus cases of the Police and other law enforcement organs of the state parading the suspects in public as criminals is clearly a violation of this constitutional safe guard and must be challenged. Also the presentation of your client before court in handcuffs, shackles and prison uniform unless reasonably justified must be objected to.

d) The right to be informed immediately of the nature of the offence.

Your client is entitled to be informed immediately of the nature of the charges he/she is facing in the language that he/she understands.⁵⁹ This right is intrinsically linked with the right to be afforded an interpreter at the cost of the state in case the accused does not understand the language of court.⁶⁰ Uganda being a multilingual country, this right is very fundamental to achieving a fair trial as important evidence and clues that would help your client are bound to be lost due to language barriers. It is important that you ascertain your client's native language and his/her level of fluency in the English language. The mere fact that your client possesses some level of academic qualification acquired through English language instruction does not automatically mean that he/she fully comprehends the English language and can properly express him/herself. The ideal interpreter must be conversant with both the accused and/or witness's native language and the English language.⁶¹ Where the interpreter is incapable of competently translating the court proceedings for the accused, you should ensure that this is put on record.

As Counsel for the accused where you cannot comprehend the language that your client understands it is important that:

- You get an interpreter who fluently speaks both English and the language your client is most comfortable with. This is intended to lessen the challenges facing your client who is on a capital offence charge. The language barrier makes it extremely difficult for you to fully understand your client's case since the client

⁵⁷ *Nalongo Naziwa Josephine Vs. Uganda, Supreme Court Criminal Appeal No. 35 of 2014*

(Unreported)

⁵⁸ Article 28 ④ (a) of the Constitution of the Republic of Uganda. Also see *Nalongo Naziwa Josephine vs. Uganda, supra*.

⁵⁹ Article 28 ③ (b) of the Constitution of the Republic of Uganda.

⁶⁰ *Ibid*, Article 28 ③ (f)

⁶¹ B.J. Odoki in his book, *A Guide to Criminal Procedure in Uganda*, 2006, at p. 102 observed that, "The need for interpretation arises because whereas the official language of the courts is English (Article 6 of Uganda Constitution) the majority of the population in Uganda do not understand or speak English. Most witnesses and accused persons speak their vernaculars. The vernaculars themselves are as diverse as their tribes. It is not unusual to find an accused person not being able to understand the language used by the witnesses if they belong to different tribes. Also, where witnesses testify in English, the accused person will require the assistance of an interpreter to follow the court proceedings."

cannot properly express him/herself. Neither can he/she understand your professional advice which may lead to adverse consequences.

- Where the Court cannot have an official interpreter, it is important that you seek an adjournment for the court to procure a competent person to translate the proceedings for your client.

e) The right to be given adequate time and facilities for the preparation of his/her defense.

Article 28 ③ (c) of the Constitution provides that “Every person who is charged with a criminal offence shall be given adequate time and facilities for preparation of his or defense.”⁶² This implies that as advocate instructed to represent the accused you must have sufficient time and facilities/resources to effectively defend the accused throughout the pretrial and trial proceedings.

What amounts to Adequate Time?

There is no standard definition of what constitutes adequate time. This will depend on the circumstances of each case.⁶³ A classical demonstration of violation of this right and the adverse consequences is the case of **Uganda Law Society & Jackson Karugaba vs. Attorney General**.⁶⁴ In this case, the Uganda Law Society challenged the constitutionality of the trial, conviction, sentencing and execution of the accused person by the Field Court Martial. The facts were that on the morning of 22nd March 2002, two soldiers, Cpl James Omedoi and PTE Abdulla Muhammed were arrested for the murder of Rev. Fr. Dedan O’toole an Irish Catholic Priest and two of his companions. They were detained in a military barracks in Kotido. On the afternoon of the 25th March 2002, at exactly 12.50 pm they were indicted before a Field Court Martial presided over by Col. Sula Semakula and eight other soldiers. They were tried, convicted and three hours after their indictment, they were sentenced to death and executed by a firing squad. Justice Twinomujuni JA, held that,

“We have no information as to when (if at all) the accused persons were told of the offence they were going to be indicted on. All we know is that the indictment was read to them in court at 12.50 pm on 25th March 2003. Three hours later, the trial was over and they were dead. It seems to me that they were not accorded any time at all to prepare for their defense. This is contrary even to the provisions of the UPDF Act and the regulations governing trial procedure in military courts. I have no doubt in my mind that the Field Court martial in the Kotido trial grossly contravened article 28 ③ (c) of the Constitution...It is not imaginable, that the accused persons who were not given even a few minutes to reflect on the indictment or the evidence against them, would be able to ask of the state witnesses any intelligent question in cross examination. No wonder then that they totally failed to cross-examine the witnesses.”⁶⁵

⁶² Also see Article 14 of the International Convention on Civil and Political Rights

⁶³ B.J. Odoki Supra, at page 101, “It is not clear what adequate time and facilities for preparation of the defense can be given to the accused. What it amounts to may be to give an accused person a reasonable notice of the offence against him/her as well as when the trial will begin.

⁶⁴ Constitutional Petition No. 2 of 2002

⁶⁵ Supra p.18-19

The right to adequate time to prepare the defence includes the right to have sufficient time with your client.⁶⁶ What is adequate time depends on the complexity of the case, the nature of evidence and the availability of resources. As defense counsel faced with the constraint of time, you have a duty to orally apply to court to adjourn the matter to afford your client sufficient time to prepare his defense. Where your oral application is rejected, it is important that you formally apply to have sufficient time and put on record your grounds indicating the reasonable time required to prepare your client's defense. This may be very helpful on appeal even if not successful at the trial.

Access to Adequate Facilities/ Resources

Article 28 ③ (c) provides that the person accused of a criminal offence be given adequate facilities for the preparation of his defense. The Constitution does not define the nature of these facilities. However, for the person facing a capital offence involving a death penalty, facilities must include adequate resources necessary to present his/her defense. The right to adequate resources is a significant challenge to the indigent persons relying on lawyers on state briefs. The resources provided for lawyers on state brief are insufficient to enable them to effectively carry out research and expert consultations. Effective defense of capital cases may require consulting other professionals like psychologists, ballistic experts, and examining potential witnesses that may exculpate your client or present evidence in mitigation.

f) The right to be present in court in person.

It is the accused's constitutional right to be present in court in person throughout the proceeding.⁶⁷ The physical presence of the accused person in court enables counsel to also have immediate access to the client in an open court to discuss the evidence etc...Thus, your client must be present to fully participate in the proceedings for the trial to be fair. With the enactment of the Judicature (Visual-Audio Link) Rules⁶⁸ there is a potential risk of the courts developing a culture of having the accused person attend the proceedings from detention facilities (most notably Luzira Prison). It is your duty as counsel to resist the inappropriate application of these rules in violation of your client's constitutional right to be present in court during the proceedings. The circumstances under which the Visual-Audial Link hearings may be conducted are wide and may be abused.⁶⁹ The said regulations if applied to cases of a capital nature to dispense with the physical presence of the accused person in court would ultimately affect the ability of the accused to effectively participate in the proceedings. It is your duty to ensure that you vigorously object to the violation of your constitutional right to physically appear before court.

⁶⁶ *The U.N Human Rights Committee in the case of Smith vs. Jamaica, Communication No. 282 /1988, U.N. Doc. CCPR/C/47/D/282/1988.*

⁶⁷ *Article 28 ③ (d) of the Constitution.*

⁶⁸ *Statutory Instrument No. 26, 2016*

⁶⁹ *Supra, Regulation 5 provides that, "A court may hear a case by visual- Audio link in the following circumstances- (a) where a witness lives outside Uganda; (b) where proceedings relate to sexual or violent offences; (c) for security reasons; for the safety of a witness; (e) for infirmity or health reasons; or (f) for any other reason that the court deems necessary and appropriate for a witness to give evidence through the visual-audio link)."*

g) Right to confront, examine witnesses and present evidence before court.

The accused person has the right to “be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.”⁷⁰ To ensure a fair trial, the court processes must afford the accused person the opportunity to cross examine the witnesses brought against him/her.⁷¹ As counsel, it is your duty to ensure that all witness brought against your client and whose evidence is relevant are cross examined. Failure to cross examine may lead court to draw adverse inference against your client. In the case of *Sande Martin vs. Uganda*, the Court of Appeal restated the significance of cross-examining prosecution witness as follows:

“The law is now settled that though the accused has no duty to prove his innocence he/she must by cross-examination challenge the evidence of the prosecution that implicates him/her. All prosecution witnesses must be cross examined. See Section 72 of the Trial on Indictment Act. Failure to cross-examine leads to the inference that the evidence is accepted as being true. As stated by their Lordships of the Supreme Court in James Sawoabiri & Another v Uganda S.C. Criminal Appeal No. 5 of 1990. “An omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue.””

Therefore, although no adverse inference may be drawn from the accused’s silence, failure or neglect to cross-examine the prosecution witness is very fatal to the accused unless such testimony clearly appears to be inherently and patently false. To be able to effectively cross examine the prosecution witness, you must have adequately prepared for the hearing and reviewed all the potential evidence to be tendered in by the witness. You must obtain prior and timely disclosure of the potential evidence to be adduced by the prosecution. You have to ensure adherence to the “**principle of full pre-trial disclosure so as to avert the undesirable practice of prosecution by ambush.**”⁷² You have also to go through such evidence with your client to get his/her insight to enable you effectively prepare for the cross examination.

h) The right to apply to court to be granted bail pending trial.

Your client is constitutionally presumed to be innocent until proven guilty,⁷³ and therefore should not be subject to punishment through pre-trial prison detention unless there are overriding public interest concerns.⁷⁴ Holding your client in prison before trial and conviction subjects him/her to psychological and physical suffering and renders your access to him for advice and consultation more difficult. According to Article 23 © (a)

⁷⁰ Article 28 © (g) of the constitution

⁷¹ Section 72 of the Trial on Indictment Act (cap 23) Laws of Uganda provides that “The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his or her advocate and to re-examination by the advocate for the prosecution.”

⁷² Hon. Lady Justice Monica Mugenyi in the case *Edward Ddumba Muwawu vs. Uganda High Court Criminal Case No. 169 of 2012*.

⁷³ *Supra*, Article 28 93) (a). Also refer to Article 9 © of the International Convention on Civil and Political Rights.

⁷⁴ *Dr. Ismail Kalule vs. Uganda High Court Miscellaneous Application No. 001 of 2018*. Justice Mukiibi noted that, “Courts have been cautioned not to treat refusal of bail as a punishment against the applicant or to deprive one of liberty unreasonably. The Preference has been to allow the accused the full benefit of his Civil Liberties, the gravity of the charges against him /her notwithstanding.”

of the Constitution, “Where a person is arrested in respect of a criminal offence, that person is entitled to apply to the court to be released on bail, and the Court may grant that person bail on such conditions as the court considers reasonable.”⁷⁵ Your client is entitled to apply for bail at any time and the court has discretion whether to grant bail or not and therefore, you should not be constrained by the provisions of section 15 (3) of the Trial on Indictments (Amendment) Act, No.9 of 1998.⁷⁶ The Constitutional Court in the case of *Uganda vs. Dr. Kiiza Besigye* settled the law on grant of bail and held that, “The Applicant should not be unreasonably deprived of his/her freedom and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The refusal to grant bail should not be based on mere allegations. The grounds must be substantiated. Both the High Court and the subordinate courts have discretionary powers to set bail conditions which they deem reasonable, though this must be done with caution.”⁷⁷ In determining whether to grant a bail application court will consider a number of factors including whether the accused/Applicant:

- Will not abscond but will attend court whenever he/she is required.
- Is not and will not be a danger to the public including the alleged victims.
- Will not interfere with the investigations through harassing or endangering the potential witnesses.

To secure your client’s release pending hearing of a capital offence you will need to demonstrate to court that Your Client:

- Has a fixed place of abode with ties to the community.
- Has a family, spouse and/or children within the jurisdiction of the court and leads a settled life.
- Is gainfully employed or carrying on a business.
- Is a person of good character and standing?
- Is not violent person and has no prior criminal record of violence.

In the case your client is below 18 years, the Children Act provides for automatic release on bail unless there is a serious danger to the child.⁷⁸ Where the child is remanded in custody or detained on charges of an offence involving a death penalty, the custodial remand shall not exceed three months.⁷⁹

⁷⁵ Also see Article 23 (b) and (c). Article 23 (c) which is most relevant to capital offences provides that, “In the case of an offence which is triable only by the High Court, the person shall be released on such conditions as the court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.”

⁷⁶ See *Dr. Ismail Kalule vs Uganda High Court Criminal Miscellaneous Application No. 001 of 2018*.

⁷⁷ Constitutional Court Reference No. 20 of 2005. Also see *Attorney General vs Tumushabe* (2008) EA 26 wherein Justice Mulenga JSC held that, “It is clear to me that Clause 6 of Article 23 applies to every person awaiting a trial for a criminal offence without exception. Under paragraph (a) of that clause, every person at any time, upon or after being charged, may apply for release on bail, and the court may at its discretion, grant the application irrespective of the class of criminal offence for which the person is charged.”

⁷⁸ Section 90 (1) provides that, “Where a child appears before a court charged with any offence, the Magistrate or person presiding over the court shall inquire into the case and unless there is a serious danger to the child, release the child on bail – (a) on a court bond on the child’s own recognizance; (b) with sureties, preferably the child’s parents or guardians who shall be bound on a court bond, not cash.”

⁷⁹ Section 91 (3) of the Children Act.

It is also your duty as counsel to ensure that the accused person is released on bail on less onerous conditions. Some bail conditions may render the grant of bail nugatory like requirement that your client pay cash bail beyond the means of your client. In certain instances the court may restrict your client's movement to a given locality. Where the conditions are too restrictive, this may constitute a violation of your client's right to be presumed innocent and not to be punished before he/she is convicted. You owe your client a duty to apply to court to have the excessive restrictions relaxed to enable him/her enjoy the full benefit of the civil liberties to the extent possible.

i) Observance of other independent rights.

Your client has other independent rights which must be protected throughout the criminal justice process. It is your duty as counsel to ensure that these rights are as well protected. These rights include the following:

1. Right to a copy of the proceedings and reasoned judgment. Your client has a right to be given within a reasonable time after delivery of a judgment a copy of the reasoned judgment and a complete record of the proceedings upon payment of the prescribed fees.⁸⁰
2. Freedom from torture, inhuman and degrading treatment.⁸¹ Where your client is subjected to torture and inhuman treatment, it is your duty to formally raise these issues with the relevant authorities such as the Police leadership, the Army, Prison and also petition court for appropriate remedies.
3. The right of access to the next of kin and a lawyer.⁸²
4. Right to information concerning his/her case.
5. The right to be detained in a gazetted and proper detention facility.⁸³
6. If a minor, the right to be detained separate from the adults.
7. The right to reasonable/proper feeding while in detention.
8. Right against retrospective application of penal laws. Your client should not be tried and/or convicted of an offence on account of any act or omission which did not constitute an offence at the time it occurred nor should he/she suffer a severe penalty in degree or description than the maximum penalty that could have been imposed for that offence at the time it was committed.⁸⁴

⁸⁰ Article 28(6) of the Constitution of the Republic of Uganda.

⁸¹ See Articles 24 and 44 of the Constitution of the Republic of Uganda, Article 10 (1) of the International Convention on the Civil and Political Rights. Also see the Prevention and Prohibition of Torture Act, 2012.

⁸² The Constitution Article 23 (5) a)

⁸³ For the accused person below 18 years, Section 91 of the Children's Act provides that where a child is not released on bail, the Court may remand/commit him or her in "custody in a remand home" and where there is no remand home within the area, "shall make an order as to the detention in a suitable place of custody" that is fit to provide good care for the child and where the child "shall not associate with any adult detainee."

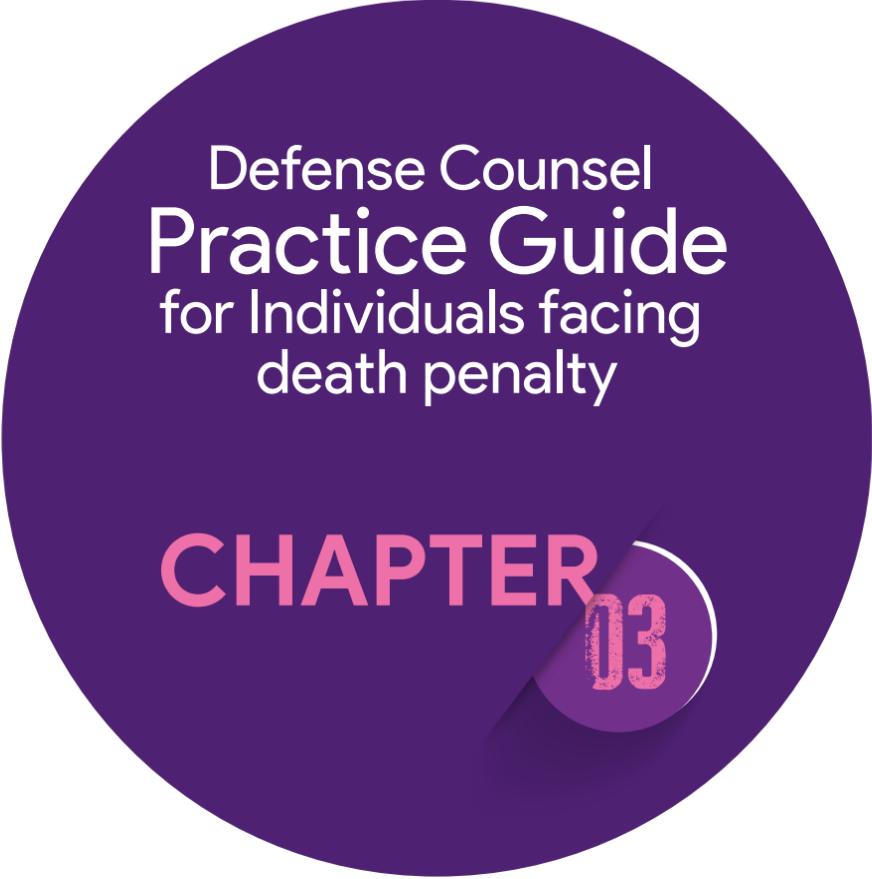
⁸⁴ Article 28 (7) and (8) of the constitution of the Republic of Uganda.

9. Right against double jeopardy. Your client should not be subject to trial of an offence for which he/she has been previously tried and convicted or acquitted or for an offence which he/she could have been convicted at the trial for that offence except in the course of appeal or review by the superior court.⁸⁵
10. The right to access the necessary medical care while in custody.⁸⁶
11. Right against trial and conviction of an offence unless such offence is defined and the penalty prescribed by written law.⁸⁷

2.4 What should defence Counsel do to secure the Client's rights?

The totality of your client's rights is important and must be respected. Whereas you may have no control over the environment in which your client is detained, it is important that you formally and constantly raise the conditions of your client's detention with the relevant authorities. There is no doubt that Uganda's criminal justice system is facing several changes like overcrowded and dilapidated jails, grossly insufficient budgets which ultimately may affect your client's mental and physical wellbeing. However, where the civil rights of your client are being violated by the prison's officials, police or other inmates through deliberate active abuse or omission, you are duty bound to take all necessary legal steps to stop the abuse. Where the client's prosecution and trial are being conducted in a manner that cannot guarantee his/her right to a fair trial, it is your responsibility to document and challenge the unfair practices including filing petition and motions. Refer to Chapter 3.2 below for some of the applications/motions that you may consider.

85 *Article 28 ⑨ of the Constitution.*
86 *Ibid Article 23 ⑤ (c)*
87 *Article 28 (12) of the Constitution.*



Defense Counsel
Practice Guide
for Individuals facing
death penalty

CHAPTER
03

**INVESTIGATION, AND PRE-TRIAL
AND/ OR TRIAL APPLICATIONS.**

3.1 INVESTIGATION

“Given the possibility that ultimate penalty, death will be imposed, it is crucial that every fact and allegation be investigated, and every possible issue be researched, raised and litigated.”⁸⁸

As counsel for an accused person facing trial for a capital offence, whether privately retained or on state brief or offering service as a legal aid service provider, it is one of your core obligations to ascertain the facts surrounding the commission of the alleged crime and your client’s background.⁸⁹ The purpose of your investigation is to achieve the following objectives:

- To discover weaknesses in the prosecution case that will enable defense Counsel present a successful defense or introduce reasonable doubt of the client’s guilt at the trial.
- Gather relevant evidence to show mitigating circumstances to help your client avoid a death penalty. Evidence of character and circumstances of your client will be very vital in mitigating your client’s exposure to death penalty. Factors such as impaired judgment, psychological and developmental impairment or retardation, drug addiction among others must be ascertained at the earliest.
- To determine whether your client is ineligible for sentencing to death.

3.1.1 How can I conduct the investigations? And what am I looking for?

a) Interviewing your Client.

As soon as you are instructed/retained as a defense counsel, you must immediately work to establish an effective relationship of trust and confidence with your client as this relationship is critical to your investigation and effective representation.⁹⁰ This relationship is important to ensure that the client is able to trust you and open up. Your client is a vital source of clues and information regarding his/her involvement in the alleged crime. Your client is a critical part of your defense. It is his life at stake. He/ she has several “critical decisions to make in the process including whether to plead guilty or testify.”⁹¹ In your initial contact/meeting with a client, you should start the process of establishing an effective attorney-client working relationship that fosters effective communication.

How to build an effective attorney-client relationship.

- To build an effective attorney-client relationship you will need to ensure that you:
- Consistently communicate with the client on all major issues pertaining his/

88 Jill Miller, *The Defense Team in Capital Cases*, (supra)

89 Jill Miller, *Supra*

90 Brandly A. Maclean, *Effective Capital Defense Representation and the Difficult Client*, 76 *Tennessee Law Review* 661, 674 (2009), (“in a capital case, where the client’s life is on trial, there are additional reasons why a close and trusting lawyer-client relationship is critical”).

91 Jill Miller, *The Defense Team* (supra).

her case in a language that the client is comfortable with. You may need to get a competent interpreter if you do not speak his/her language.

- Assure the client of confidentiality. You have to demonstrate to the client that whatever information he/she shares with you is not to be shared with any person except with the client's explicit consent.
- Inquire about the client's ultimate objectives for your legal representation. Is it acquittal or mitigating the potential risks of a conviction like avoiding a death sentence and extremely long imprisonment?
- Discuss the pieces of evidence as known to you from time to time and seek clarification/information from the client as to the facts and other potential sources of evidence.
- Inform your client the estimated length and course of the court proceedings.
- Highlight the potential sources of critical information and evidence.
- Ask the client about his/her wishes to secure release before trial and offer sufficient advice on the steps necessary to attain his/her release.
- Discuss with him/her the available legal options such as application for disclosures, commencement of trial, and potential plea bargain negotiations with the prosecution. Analyse for the client the potential outcomes and alternatives, and if convicted, possible punishments.

b) Interview family members and close friends/acquaintances.

Family members, friends, acquaintances, workmates, teachers, religious leaders, employers, physicians, therapists and business associates are vital sources of information about the accused's antecedents. Interview the family members and close relatives about the family history and the client's childhood. This may reveal important information about your client such as fetal alcohol syndrome, childhood abuse resulting in permanent brain damage or psychological imbalance.

c) Interview prison staff

If your client remains in pre-trial detention facilities, the prison staff will be sources of vital information about his character. They may attest to his good behavior in prison, the education or training that he/she pursued. Such evidence may convince the judicial officer that your client has reformed and therefore mitigate the exposure to death penalty.

d) Review relevant documentary records.

A review of your client's records may reveal vital information about him that may sway the direction of the case. Academic records may reveal a learning disability/mental retardation; medical records may reveal incidents of traumatic injury or drug abuse or mental illness; photos, awards and certificate from school and community voluntary service may reflect a good character about your client

relevant in mitigation etc.... It is important to seek access and review documents concerning your client to help you develop a theory of the client's case and defense strategy.

e) Review of scientific evidence.

On many occasions, the conviction of the accused for capital offences is premised on scientific evidence such as DNA, ballistic reports, audio & visual recordings, telephone call print outs, finger/footprints, soil tests and postmortem reports. This kind of evidence calls for greater reliance on expert witnesses. As defense counsel, whenever the prosecution case is dependent on forensic evidence, you should investigate the nature of that evidence, how it was collected, preserved and analysed. Such evidence is prone to contamination and fabrication resulting in conviction and miscarriage of justice. You have to investigate the qualification of the experts, the nature of their training and the state of technology used to analyse/test the forensic evidence. In homicide cases, pay special attention to details in the post-mortem report. Study the alleged cause of death, location and nature of the alleged wounds, or the type and nature of the alleged poison. These will provide useful details needed to challenge the prosecution witnesses in cross examination. If resources permit, you should consider retaining an expert witness to help with the investigation and analysis of the prosecution evidence or your client's state of mind at the time of the alleged commission of the offence. As you work with the retained expert be mindful of the attorney-client privilege.

f) Identify and investigate potential prosecution witnesses.

While preparing for the case, it is important that you scrutinize the potential prosecution witnesses, their history/backgrounds and whether they have/had any relationship with your client or the prosecution. This will help you ascertain whether they witnessed the crime, properly observed the incident and their state of mind, were they under the influence of some intoxicants, do they have preconceived motive to incriminate your client? Are they acting under duress and undue influence of the police or prosecution? Were they potential co-accused and therefore with a potential motive to fabricate evidence against your client so as to escape their criminal liability?

g) Circumstances of your client's arrest

You have to investigate circumstances under which your client was arrested and whether he was forced to make any incriminating statements in contravention of the Constitution. Your client is not under duty to make any statement to police or any other investigating authority.⁹² Any statement made by the accused must be voluntary and in full compliance with the constitutional provisions and international law. When evidence procured through illegalities involving serious violation of the accused's human rights, form the foundation of the prosecution, this negates the constitutional guarantee of a fair trial under Article 28① of the Constitution. You may

⁹² *Olara Otunu Vs. Attorney General (supra)*. also see Article 221 of the Constitution imposes a positive duty in mandatory terms on the security organs to observe and respect human rights in the execution of their duties. It provides that, "It shall be the duty of the Uganda Peoples' Defense Forces and any other armed force established in Uganda, the Uganda Prisons Service, all intelligence services and the National Security Council to observe and respect human rights and freedoms in the performance of their functions."

seek to have your client discharged where the totality of the conduct of the state from the point of arrest to arraignment constitutes a gross violation of fair trial before an independent and impartial tribunal so as to render a just determination of the case impossible.⁹³ The question how incriminating evidence was procured is particularly significant in capital cases because, *“reliability has a stronger meaning in capital cases than it does in the ordinary criminal case, requiring that the death sentence be imposed in accordance with procedures, standards, and actual practices designed to assure that death will not be imposed capriciously or disproportionately.”*⁹⁴

Therefore, where evidence was procured through torture and coercion, it is tainted and as counsel you must be prepared to challenge its admissibility and/or reliability. In **Uganda vs. Pte Turyamureba Amon & Anor**⁹⁵, Justice T.W. Kwesiga, while dismissing the reliability of the accused person’s confession held that, “In my view, the detention of 8 months before being produced in court was illegal and unlawful detention. The torture under the military who handed the accused persons to the police for charging cannot be ignored. Torture marks were visible after healing while the accused persons were in military detention to corroborate the torture they underwent. Presenting of Melon (deceased) the wife of A1 Turyamureba who was in very bad health conditions before he signed was meant to break him down to do anything to release his wife and therefore could not have signed voluntarily. In my view, nothing procured through any form of torture of the accused person to incriminate the accused person has any value of evidence. It is irrelevant that the torture was done by the army and not the police. Both are state security agencies or institutions that participated in the arrest, interrogation, detention and charging of the accused persons.”⁹⁶

Torture and exertion of duress on the accused to procure incriminating evidence may manifest in different forms. This may include physical abuse, threat to family members, sleep deprivation or denial of food and/or medical treatment causing the accused to fear for his life and others. Once you detect that your client was subjected to any form of torture, you may need to get him/her medically examined for evidence of torture. You must ensure that all evidence procured under circumstances of torture is challenged.

h) Possible defences available to your client.

It is your responsibility as defense counsel to investigate whether there are possible defences available to your client. In the case of **Strickland vs. Washington**⁹⁷ the U.S Supreme Court held that in a capital case, the defense counsel has a duty to

⁹³ *Dr. Kiiza Besigye and Others vs. Attorney General, Constitutional Petition No. 7 of 2007* where the Constitutional Court stayed /discharged the accused persons who were facing charges of treason and unlawful possession of firearms before the High Court and the Court martial. Court held that it could not sanction any continued prosecution of the petitioners, where during the proceedings their human rights were deliberately and systematically grossly violated by the state security agencies including the Police, Prisons and the Army to such an extent that no fair trial would be achieved and any subsequent trial would be an abuse of the Court process.

⁹⁴ Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983).

⁹⁵ High Court Criminal Case No. 297 of 2006

⁹⁶ *supra*

⁹⁷ 446, U.S. 668 (1984).

make a reasonable investigation into potential defences or to make a reasonable determination that such investigations are not necessary.

You should investigate defenses to criminal liability such as insanity, diminished responsibility due to intoxication, self-defence etc. ensure that you get witnesses or medical evidence that can satisfy court that your client is entitled to the benefit of the defense he is putting forward.

i) Criminal history of the client.

It is part of your responsibility as defense counsel to humanize your client and present evidence explaining his behaviour or circumstances. You have to investigate the life history of your client and ascertain whether there is any criminal record against your client. Where you find that the accused has a criminal record, you should prepare how to respond to them when brought up by the prosecution to deny your client mitigation of the potential death penalty. You should investigate and present evidence related to the accused's mental condition; social and economic situation; good characters and others that may enlist compassion for your client from the judicial officer.⁹⁸

j) Eligibility for the death penalty.

Under both domestic and international law, certain categories of accused persons may not be eligible for imposition of a death penalty. It therefore your duty as defense counsel to investigate whether your client is within this category. Such examples include minors⁹⁹, pregnant women and the nursing mothers¹⁰⁰, the elderly and persons suffering from mental disability although not sufficient to mount a successful defence of insanity.¹⁰¹

⁹⁸ Jill Miller, *Supra*, argues that, "The history must be multi-generational in nature assessing the effect of hereditary and the intergenerational transmission of patterns of behaviors and must be broad in scope and involves investigations that goes beyond the individual, family school and neighborhoods to include social economic, political, cultural and environment influence on the client's life." Also see Jill Miller, *Expanding the spheres of mitigation Evidence, CAPITAL REPORT* (Nat'l Legal Aid and Defenders Ass'n) Sept/Oct 1995. Russel Steller, *Mitigation Evidence in Death penalty Cases: THE CHAMPION* Jan/Feb 1999. Available at [http://www.nacdl.org/public.nsf/Champion Articles/99/Jan04/open](http://www.nacdl.org/public.nsf/Champion%20Articles/99/Jan04/open) Document.

⁹⁹ Children's Act

¹⁰⁰ International Covenant on Civil and Political Rights Article 6, Article 30(e) of the 1990 African Charter on the Rights and Welfare of the Child requires states to prohibit the passing of a death sentence on 'mothers of infants and young children', Article 4@ (j) of the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa forbids the execution of 'nursing women'

¹⁰¹ *Pitman v The State in Trinidad & Tobago*, 'affirmed the long-held principle that the State may not execute or condemn to death any person with significant mental impairment or mental illness, and the need to obtain medical evidence to determine such impairment/illness'

3.2 PRE-TRIAL AND/OR TRIAL APPLICATIONS.

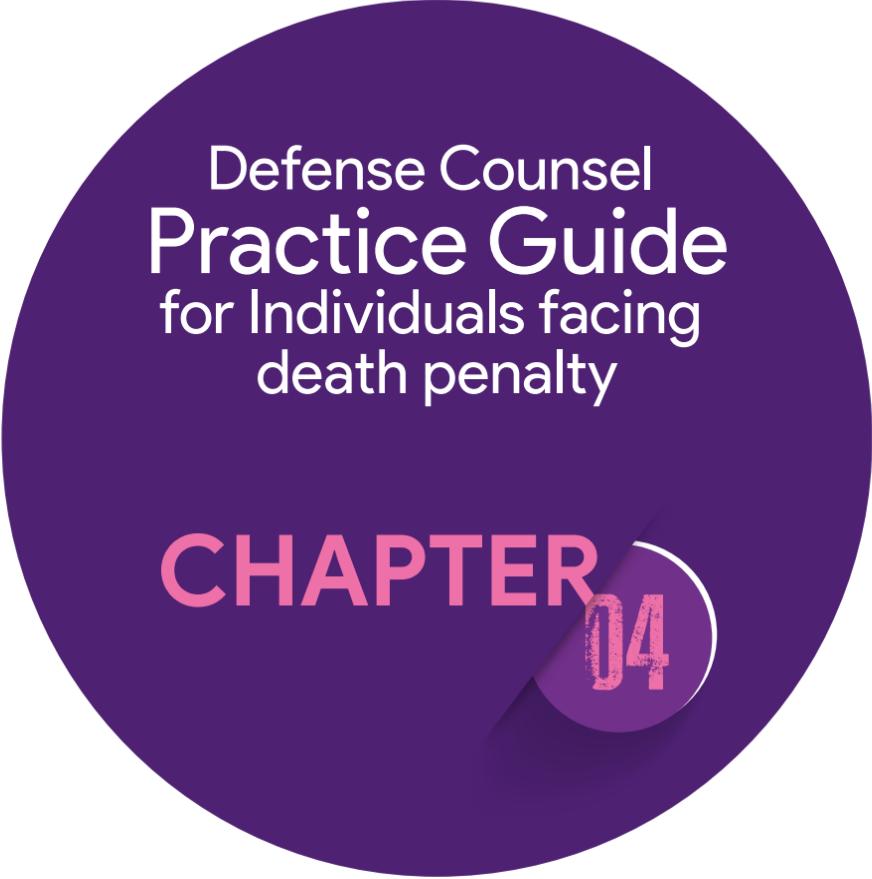
Pretrial applications are filed before the commencement of the trial and are intended to secure some remedies to which the accused person is entitled either by law or established practice. During the course of your investigations and preparation for a capital case trial, you may be required to make a number of applications and motions before the appropriate courts. However, some of the applications may be appropriately taken out during the course of the trial. You may consider the following pretrial applications:

- Habeas corpus applications where the accused is detained in ungazetted detention centers and is not produced within 48 hours as commanded by the constitution.
- Bail application for pretrial release. See Chapter 2.3.8 above.
- Application for timely and sufficient disclosure and discovery where the prosecution is procrastinating or is unwilling to comply with the standard disclosures. The disclosures may include all copies of police statements made by potential prosecution witnesses and exhibits that the prosecution intends to rely on and other relevant evidence for aggravating and mitigating factors.¹⁰²
- Application for reasonable access to your client where the circumstances of the accused's detention does not permit you the required access to facilitate effective representation.
- Constitutional references to the Constitutional Court challenging either the constitutionality of the substantive criminal legislation or your client's prosecution and trial where the prosecution and trial are marred by gross and systematic violation of the constitutionally guaranteed human rights particularly the right to a fair trial.¹⁰³
- Challenging the imposition of a death penalty to your client.
- Recusal of judicial officer for bias or conflict of interest and change of venue.
- Exclusion of illegally procured evidence like coerced confessions and hearsay evidence.¹⁰⁴
- Prevention of double jeopardy trials.
- Fixing the case for hearing to ensure your client's right to a speedy trial.
- Challenging the jurisdiction of special courts like the Court Martial over your client or the offence in question.
- You will have to take an informed and strategic decision whether to file such applications.

¹⁰² The Constitutional Court held in the case of *Soon Yeon Kong Kim vs Attorney General Constitutional Reference No. 6 of 2007* that affording the accused person adequate "facilities" under article 28 ① and ③ of the Constitution means resources, conveniences or means which make it easier to achieve or favorable condition of doing something and that, "the right to a fair hearing contains in it the right to pretrial disclosure of material statements and exhibits....that courts cannot approve of a trial by ambush. The right to fair hearing envisages equality between the contestants in litigation."

¹⁰³ See *Dr. Kiiza Besigye & Others vs Attorney General Supra*.

¹⁰⁴ Article 28 ③ (a) of the Constitution and Article 14 ③ (g) of the International covenant on Civil and Political Rights and Article 55 ① (a) of the Statute of the International Criminal Court guarantees your client's right to remain silent and free from self-incrimination.



Defense Counsel
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CHAPTER
04

**TRIAL STRATEGY, NEGOTIATIONS
AND SENTENCING**

“It is axiomatic that lawyers who will be seeking mercy at the penalty phase of a trial must be wary of the portrait of their client that they paint during the guilt/innocence phase. Frequently, there is tension between the strategic goals in the two phases: The most promising guilt phase defense—for example, alibi—can present the most problematic penalty phase situation if it fails. Having found that the defendant was lying about his alibi at the guilt phase, why a juror should believe, or even care about, his tales of child abuse at the sentence.”¹⁰⁵

4.1 INTRODUCTION.

In this chapter will provide a brief summary of basic considerations while developing a defense trial strategy. Criminal trials involve two major phases, the guilty phase (trial) and the penalty phase (sentencing) which in the case of capital offences involving a potential death penalty requires that defense Counsel, should develop a strategy “for the guilt phase that takes into account a possible penalty phase, since it is likely that a court will proceed with the penalty phase immediately after a finding of guilt...”¹⁰⁶

Therefore, as you plan and prepare for the hearing at the guilty phase, you will have to simultaneously prepare your sentencing strategy including which witnesses to call.¹⁰⁷

Upon review of the facts and evidence both independently gathered and disclosed by the prosecution, you will need to develop a theory of your client’s case that will see you through the critical phases of trial and sentencing. Although these two phases are technically separate, “they are inextricably entwined.”¹⁰⁸ As part of the strategy, upon review of the totality of the evidence, you may need to explore the possibility of a plea bargain with the prosecution.¹⁰⁹

¹⁰⁵ James M. Doyle, *The Lawyers’ Art: “Representation” in Capital Case*, 8 *Yale J.L. & Human*, 417, 423 (1996).

¹⁰⁶ Molly Treadway Johnson, Laura L. Hooper; *Resource Guide for Managing Capital Case*, Federal Judicial Centre, p 3 (2004): <http://www.fjc/sites/default/files/2015>.

¹⁰⁷ Jill Miller *Supra*, “lawyers in a death penalty case must prepare for both trials and must develop an overall strategy that takes the penalty phase into account even in the guilty phase.”

¹⁰⁸ Molly Treadway Johnson, Laura L. Hooper, *Supra*

¹⁰⁹ Regulation of Judicature Plea Bargain) Rules, 2016 defines ‘Plea Bargain’ as, “The process between an accused person and the prosecution, in which the accused person agrees to plead guilty in exchange for an agreement by the prosecutor to drop one or more charges, reduce charge to a less serious offence, or recommend a particular sentence subject to approval by the court.”

4.2 DEVELOPING A THEORY OF THE DEFENSE CASE.

*“Just as a defense attorney’s compelling narrative of injustice can produce a favourable result for a particular capital defendant, defense attorneys’ compelling narrative of the series of injustices perpetrated by the modern system of capital punishment may lead to a continuing decline in the use of the death penalty, and eventually to its outright abolition.”*¹¹⁰

The importance of the theory of the case is to ensure that between the two versions of events; one provided by the prosecution and the other by the defense, the defense case appears consistent and credible. The theory of the case may also help your investigation and decision making whether to advise your client to take up a plea bargain negotiation with the prosecution. The theory of the case for example in a murder trial may be, that your client acted in self-defense, mistaken identity (alibi) or that he/she committed the offence under diminished responsibility. Whichever theory you adopt, you must present evidence and explanation supporting the theory.

- The theory must comprehensively knit together all important facts of the case into a single seamless narrative easily understandable by an average person.¹¹¹ The theory must constantly remind the court and the prosecutor from the start throughout the trial, cases involving a potential imposition of a death penalty should be tried differently from non-death cases.¹¹²
- To sway the court, your theory must be consistent throughout the trial and sentencing phases. You must critically review all the relevant facts and evidence before adopting a defense strategy. The evidence you lead at the guilty phase should ideally support your submission in mitigation at the sentencing phase.¹¹³
- The theory must be consistent and concise capable of being repeated throughout the trial to ensure that the Judge is constantly aware of the accused’s theory of the case.

A proper theory of the case should guide your decisions with regard to the following key decisions in the defense of a capital case:

4.2.2 Determining the kind and number of witnesses.

The number and kind of witnesses to summon on behalf of the accused person should be determined by the facts that you need to place before court to justify your theory of the case. Highlighting the weaknesses in the prosecution case may not suffice to help your client avoid a conviction or a death sentence. In consultation with your client, you should call such number and kind of witnesses that will provide evidence to back up your submission at the guilty phase and at the sentencing

¹¹⁰ Professor Welsh S. White, *Litigating in the Shadow of Death, Defense Attorney in Capital Cases*, University of Michigan Press (2006) p 208.

¹¹¹ Molly Treadway Johnson, Laura L. Hooper, *Supra*, 44 “During the guilt phase, a defense attorney does not want to make an argument that will be inconsistent with what he or she will argue at the penalty phase. For example, denying guilt outright in the guilt phase might be a strategic mistake if during the penalty phase the defendant wants to argue that certain factors (e.g., a deprived childhood, a mental illness) led him or her to commit the crime.”

¹¹² Dennis N. Balske, *New Strategy for Defense of Capital Cases*, Akron Law Review, July 2015

¹¹³

phase. These may include fact witnesses, character witnesses and where possible expert witnesses if scientific/forensic evidence like DNA, postmortem reports, ballistic report and toxicology and fingerprint evidence is involved.

4.2.3 Identifying the evidence and exhibits to use.

Whenever there is an opportunity to present physical evidence, depending on the nature of the case and your theory, the tangible evidence usually has a more enduring effect on the judicial mind. Evidence of the nature of the scene of crime, the nature of the wounds through photographs or the type of weapon may be used to demonstrate that indeed it is more likely than not that your client is not the guilty party. Through investigation and with your client's cooperation, you may need to present favourable forensic evidence like DNA Evidence and fingerprints to contradict the prosecution evidence. Also, physical evidence in mitigation like photographs, awards and trophies may be presented to cast your client in good light.

4.2.4 Whether your client should take a stand

The accused person has a right to remain silent or may give unsworn evidence or give evidence under oath. One of the critical strategic decisions for the defense Counsel is whether to put the client on the stand. If your client possesses the potential to convince the court, taking the stand to testify about his innocence or about his/her affirmative defenses like self-defense will be a compelling tool. However, you should be aware of the downside of your client being torn apart in cross examination and then disrupt your strategy and theory of the case. You should help your client make an informed determination whether to testify whether on oath or not, based on the strategy of the case and the value of his/her testimony.

4.2.5 Cross examination of prosecution witnesses

Although the accused person has a right to confront the evidence of the prosecution through cross examination¹¹⁴, the defense counsel should make a strategic decision whether to cross examine a particular witness or not. You should constantly ask yourself whether the particular witness's testimony has hurt your client in any way. If the answer to that question is a no, you should decline cross examination except where cross examination is a strategic interest to enlist useful testimony left out by the prosecution.¹¹⁵ However, you should be careful not to fall in a prosecution trap because, "a skillful adversary often takes his witnesses over innocuous direct examination in order to set a trap for the overly ambitious cross examiner."¹¹⁶ While undertaking cross examination, defence counsel should:

- Direct cross examination to the weakness in the witness's examination in chief. The weak points must be exploited to the fullest extent possible. The weakness may be due to inconsistencies, witnesses' relationship to the prosecution or the victim, educational background and skills in the case of expert witnesses

¹¹⁴ Article 28 © of the Constitution

¹¹⁵ George J. Cotsirilos, *Meeting the Prosecution's Case: Tactics and Strategies of Cross Examination*, 62 J. Crim. L. Criminology & Police Sci.142 (1971), "The only exception occurs where

¹¹⁶ *Ibid*

or the tools and level of technology used to analyze scientific evidence. To effectively highlight all the weakness for cross examination, defense counsel should prepare thoroughly and review all the facts and the law relevant to the case and evidence.

- Not allow the witness to retell the story by posing questions targeting specific parts of the evidence in chief.
- Control the scope of cross examination following the clue from the court so as not to unnecessarily irritate the court with irrelevant cross examination. You should remember that it is the damage caused to the prosecution's case and not the time spent on cross examination that counts.
- Ask simple questions capable of being understood by any person of ordinary intelligence.
- Quietly and tactfully move on to another question if the witness's response is harmful to your client's case.
- Not ask any question in cross examination when you don't know the answer you want to enlist from a witness.
- Attack the credibility of a witness with great care

To ensure effective cross examination you need to ask yourself the following non exhaustive questions to help you prepare:

- What type of witnesses are you cross examining? For an accomplice or addict informer you may need to frame your cross examination around motive to show explicit and implicit promises from the prosecution. If it is an expert witness for instance ballistic experts, handwriting experts, pathologist or toxicologist, you may need to talk to another expert to help you prepare for the cross examination.
- Is the witness's evidence in contrast with his/her previous statement on the subject?
- Did the circumstances of the commission of the offence allow the witness to observe the incident he is testifying about?
- Can you enlist favourable evidence to undermine the prosecution case?
- Can the cross examination trap the witness to retract or discredit his testimony?
- What is the witness's criminal record?
- Does the witness possess the expertise and skills he/she claims to have to enable him/her to testify on the subject under consideration?
- Is it possible to create inconsistencies and contradiction in his/her testimony or the testimony of previous witnesses?

4.2.6 Direct Examination of Defense Witnesses

Once the prosecution closes its case, you get the opportunity to present direct evidence in favor of your client's case. You should only call witnesses and ask questions that will enlist evidence that further your defense strategy. You should have a plan for each witness to guide him/her to offer evidence by walking the court through the facts which he/she has direct knowledge of. The witnesses must testify to matters that they observed, experienced, witnessed or studied. Before you put each witness on the stand, you should consider whether:

- The witness is necessary to prove or disprove a particular relevant aspect of the case.
- The testimony of the witness contributes in any way to the theory of the defense case.
- The witness is relevant in introducing some useful exhibits.
- The witness' testimony will bolster or discredit your client's case or the credibility of other evidence.
- The witness can withstand the intense cross examination of the prosecution.

4.3 SUBMISSION.

a) Opening address

The opening address at the start of the hearing is a great opportunity for you as defense counsel to properly articulate the theory of your client's case to the court to help the court follow the evidence as the trial progresses. Your opening address should be based on fact precisely knitted to tell a compelling and believable account of your client's defense. The opening sentence should summarize your theory of the case before you proceed to give a brief narrative of the facts that inform court of your client's innocence or diminished culpability. The summary you give at the opening should take into account the two phases of the trial, the guilty phase and the sentencing phase in a complementary manner.¹¹⁷

b) Closing submission at the guilty phase.

The closing submission is the last chance for defense counsel to present to court a comprehensive summary of your client's case, the law applicable to the case, tactfully explaining to court what the evidence means and how it fits squarely into your entire theory of the case. Your submission should be based on evaluation of the evidence and the law and should appeal to reason not emotion. You should avoid abusive language or introducing your personal belief as to the truth or falsity of the evidence or as to the guilt and innocence of the accused person or make arguments on the basis of matters outside the record.

4.4 PLEA BARGAIN- ONE WAY OF TAKING THE DEATH PENALTY OFF THE TABLE.

In Uganda plea bargain is now part of the criminal justice system allowing the accused to exercise his right to plead guilty either in exchange for a recommendation for a lesser sentence or to a minor cognate offence, a lesser offence, for a drop of some charges /counts or to cooperate as a witness for the prosecution in exchange for reduced charges or a reduced sentence or both.¹¹⁸ Plea bargain can be initiated at any stage of the criminal proceedings before the court passes the sentence.¹¹⁹ Upon a thorough evaluation of the evidence either before, during or after the trial but before sentencing, a capital defense counsel is under duty to explore whether it is in the best interest of his/her client to enter into a plea bargain and advise the client accordingly. The decision to plead guilty is for the client to make voluntarily, free from any form of coercion or undue influence.¹²⁰ Before you advise your client to plead guilty, you must have appreciated the prosecution's evidence and ascertained the weaknesses of your client's defense.¹²¹ Therefore your role as counsel is to advise the client and also facilitate the process of plea bargain. It is your responsibility to explain to the client in detail the nature of the charges and the strength and weakness of the evidence produced by the prosecution and the defense including the benefit of the plea bargain. Once the terms of the plea bargain have been agreed, defense counsel is under duty to explain the terms to the accused. According to Regulation 10 of the Judicature (Plea Bargain) Rules, "*A plea bargain agreement shall, before being signed by the accused, be explained to the accused person by his or her advocate or justice of peace in the language that the accused understands and if the accused person has negotiated with the prosecution through an interpreter, the interpreter shall certify to the effect that the interpretation was accurately done during the negotiation and execution in respect of the contents of the agreement.*"

You should explain to the accused person the following constitutional rights that he/she may be waiving by pleading guilty;

- a) If he/she is not yet convicted, the presumption of innocence which entails the right not to plead guilty and to persist with that plea if he/she already pleaded.
- b) The right to a trial by the court to determine his guilt or innocence.
- c) If the trial is not yet concluded, the right to confront the alleged prosecution evidence through cross examination and presentation of evidence.
- d) If already convicted, the right of appeal against the conviction and/or sentence
- e) The right to present mitigating circumstances to the court.

¹¹⁸ Regulation 6 of the Judicature (Plea Bargain) Rules, 2016.

¹¹⁹ Ibid, regulation 5.

¹²⁰ Article 28 © of the Constitution. Also see Jill Miller, *The Defense Team in Capital Cases*, supra p 18.

¹²¹ Regulation 7 of the Judicature (Plea Bargain) Rules, requires that, "The Prosecution shall, in the interest of justice, disclose to the accused all relevant information, documents or other matters obtained during the investigations to enable the accused make an informed decision with regard to plea bargain."

On the other side of the isle, you should explain to the client the benefit of pleading guilty in case the prosecution evidence pinning him/her is overwhelming without appearing to be coercive. Explain to the accused the possibility of the prosecution seeking and court sentencing him/her to death. You should explain to the accused the nature and weight of the aggravating evidence/factors that the prosecution intends to produce.

4.5 ROLE OF DEFENCE COUNSEL DURING THE SENTENCING PHASE

“[D]eath is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind ... [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment... requires consideration of the character and record of the individual offender and the circumstances of the particular offense This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long ... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”¹²²

Sentencing is the final phase of the criminal trial process at which the appropriate penalty should be passed by the trial court. This is a critical phase in the capital cases and courts are duty bound to consider all evidence in mitigation. According to the Supreme court, “before a convict can be sentenced, the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the constitution, statutes, practice directions together with general principles of sentencing as guided by case law...it is trite that a person convicted of a capital offence in this country cannot be sentenced to death as a matter of course without the court considering mitigating factors and other pre-sentencing requirements. This is because a death sentence is no longer mandatory in this country.”¹²³

Mitigation hearing is a daunting task for defense counsel because, “the defense in a capital offence conveys a broad presentation of the defendant’s character, a demonstration of capacity for life, while the prosecution seeks only to emphasize the horror, of his act, the presentations are asymmetrical. The prosecution concentrates on one brief, vivid incident; the defense views an entire life.”¹²⁴

¹²² Woodson v. North Carolina 428 U.S. 280, 304-05 (1976).

¹²³ Aharikundira vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015. Also see Susan Kigula vs Attorney General Supreme Court Constitutional Appeal No. No. 03 and Guide Line 19 of the Sentencing Guideline which enjoins court to consider the aggravating and mitigating factors in determining the sentence in cases where death penalty is a prescribed maximum sentence for an offence.

¹²⁴ James M. Doyle, The lawyer’s Art: “Representation” in Capital Cases, 8 YALE J.L & Human. 417, 425 (1996)

4.5.1 Mitigation hearing. “The proven crime is already an aggravated crime.”¹²⁵

By the time the accused is convicted at the conclusion of the guilty phase in a fair trial before an independent and impartial court, the prosecution has already presented a compelling account of the accused’s death. It is therefore extremely important that as defense Counsel you effectively prepare for sentencing phase from day one of your instruction to help you overcome the dehumanizing arguments of the state at this phase. It is your duty as defense counsel to investigate and present all mitigating evidence in the course of the entire trial. As Goodpaster put it, “*Counsel’s obligation to discover and appropriately present all potentially beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial: it should shape relationship with the client, prosecutor, court personnel and the jurors.*”¹²⁶

As defense counsel for an accused facing the death penalty, you should discover and present some of the following mitigating evidence:

a) Personal social history of the accused person.

Presenting certain elements of the accused’s social history such as physical or sexual abuse, childhood neglect, childhood exposure to criminal and violent environment, extreme poverty, religious, racial, gender and tribal discrimination, learning disability as evidence of cognitive disability, history of and substance abuse among others may enlist sympathy from the court to impose a lighter sentence.¹²⁷

b) Circumstance of the offence.

Death penalty should only be imposed for worst crimes committed under very aggravating circumstances.¹²⁸ Counsel for the accused person may argue at the sentence that:

- The death sentence should only be imposed where it is explicitly demonstrated beyond reasonable doubt that the ultimate intention of the accused is to kill the victim which resulted into the loss of life.¹²⁹ Thus imposition of death penalty for accidental or unpremeditated murder like death during a fight or commission of other felonies like theft is inappropriate.
- Your Client played a minor role in the crime or he/she was provoked which diminished his/her culpability.
- The accused honestly believed that he/she was acting in self-defense even though the belief was unfounded and flawed.

¹²⁵ Jesse Cheng, *Mitigating from Day One: Effective Defense Advocates Do Not Prioritize liberty over life in Death Penalty Cases*

¹²⁶ Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty cases*, 58 N.Y.U. L. REV. 299, 230 (1983).

¹²⁷ Kevin M. Doyle, *Lethal Crapshoot: The Fatal Unreliability of the Penalty Phase*, 11 U. PA.J. L & SOC. CHANGE 275, 290 (2008) where he argues that “life history mitigation is one of the cogent and common mitigation in capital litigation”

¹²⁸ Article 6 ② o the International Covenant on Civil and Political Rights

¹²⁹ Report of the Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions 65, U.N. Doc. A/HRC/4/20/2007/18 (Jan.29, 2007).

- The accused lost self-control through intoxication, provocation emotional distress, sudden and overbearing temptation etc...

c) The age of the accused.

The extremely youthful age of the accused presenting challenges of being impressionable and easily influenced, and extreme old age are some of the mitigating factors. Young persons should generally be subjected to reformatory treatment than punishment.¹³⁰ The same principle applies to extremely old persons.

d) Evidence of good moral standing.

Evidence of the accused's good social conduct and responsibility may sway the court not to impose a death penalty. Defense counsel should present evidence of character such as remorsefulness after the crime, stable marriage with children, community involvement, being a first offender with no previous criminal record, and participation in rehabilitation programs.

e) The accused's mental state at the time of commission of the offence.

Although the mental state of the accused may not meet the legal threshold of insanity, it may be valuable to encourage court to exercise compassion. Conditions such as low intelligence, post-traumatic stress disorder, bipolar disorder, mental retardation should be investigated, and evidence of psychiatric evaluation presented to court. These factors are helpful in explaining the accused's involvement in the commission of the crime.

f) Counter the state's alleged aggravating circumstances.

The prosecution's aggravating circumstances should be confronted with legal arguments and contradictory evidence. Prosecution's evidence of previous convictions and arrests by police should be suppressed. Your client has a constitutional right of presumption of innocence established under article 28 ③ (a) of the Constitution of the Republic of Uganda where every person charged with a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.¹³¹

¹³⁰ Section 104A ① of the Children Act provides that, "A death sentence shall not be pronounced on or recorded against a person convicted of an offence punishable by death, if it appears to court that at the time when the offence was committed the convicted person was below the age of 18 years."

¹³¹ *Inensko Adams vs. Uganda High Court Criminal Appeal No. 004 of 2017.*

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CHAPTER
05

**APPEALS AND OTHER POST
SENTENCING REMEDIES**

5.1 THE ACCUSED'S RIGHT OF APPEAL

A person convicted and sentenced to death penalty has a constitutional right to appeal against both the conviction and the sentence up to the highest appellate court.¹³² The Right of appeal is a fundamental human right in capital cases, it is therefore important that your client is availed another chance to challenge the legality of the conviction and sentence. The appeal process is intended to enable the appellate courts to remedy any mistakes of the lower courts to avoid a miscarriage of justice. Whether you conducted the trial as counsel for the accused or you have been instructed to appeal, you have a duty to ensure that your client is availed the facilities to exercise his/her unfettered right of appeal.

5.2 EXPLAIN THE RIGHT OF APPEAL TO THE CLIENT.

Although it is an established practice of the courts to explain to the convicted person his/her right of appeal immediately after sentencing, defense counsel has a duty to meet and explain to the client in detail what it entails. You should explain to the client the practical step that you will take to pursue the appeal and the possibility of release pending determination of the appeal.

5.3 UNDERTAKE THE PRACTICAL STEPS TO PURSUE THE APPEAL

Defense Counsel is responsible for taking practical steps to pursue the client's appeal by among others;

- Obtaining a copy of the reasoned judgment and a complete record of proceedings in a timely manner. Access to a copy of the judgment and record of proceedings is an integral part of the right to fair hearing.
- Filing a notice of appeal within the prescribed time. If the time prescribed lapsed, file appropriate motion for extension of the time within which to appeal. This application will be granted as a matter of course given the constitutional prohibition of execution of any person until he/she has exhausted the right of appeal.¹³³
- If you are instructed as new Counsel to appeal, ensure that you get a copy of the client's file from the previous counsel.
- Determining whether there is critical evidence that was not availed to the trial court. Explore means and possibility of introducing such evidence on appeal. Generally, the appellate court will allow additional evidence to be adduced on appeal where, it is, "shown that the evidence could not have been obtained with reasonable diligence for use at the trial, secondly, the evidence must be such that if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."¹³⁴

¹³² Article 22 ① of the Constitution

¹³³ Article 22 ① of the constitution

¹³⁴ *Denning LJ in Ladd vs Mashall (1954) 1 WLR 1489, 1491. Also see Attorney General vs. P.K.*

- Comprehensively reviewing the judgment and record of proceedings and formulate appropriate grounds of appeal. In reviewing the judgment and the record, evaluate whether, there was a mistaken witness identification, testimony of unreliable informants and co accused, false or forced confession, apparent judicial bias, fault/tainted forensic evidence, or the trial process was unfair and contravened your client's fundamental human rights.

5.4 Explore your client's right to Clemency.

In Uganda, the president has the discretion to exercise a prerogative of mercy on the advice of the Advisory committee to:

- a) Grant any person convicted of an offence a pardon either free or subject to lawful conditions;
- b) Grant to a person a respite, either indefinite or for a specified period from execution of a punishment imposed on him or her for an offence.
- c) Substitute a less severe form of punishment for a punishment imposed on a person for an offence;
- d) Remit the whole or part of the punishment imposed on a person.¹³⁵

Where your client is facing a death penalty, you should consider seeking a presidential pardon in accordance with the Constitution. Your petition for clemency may include factors like humanitarian reasons such as serious sickness, rehabilitation and remorsefulness, reconciliation with the victim's family, new evidence establishing your client's innocence, behavior of the accused since commission of the offence and other sympathetic considerations.

Ssemogerere Supreme Court Constitutional Application No. 2 of 2004 and Naveed Ahmed vs Uganda Court of Appeal Criminal Appeal No. 129 of 2015. In the case of Solomon vs the State, Privy Council, (1998) 2 LR 50, 54-5, the Privy Council admitted new evidence on appeal which showed that the accused who had been convicted of murder was suffering from a depressive illness at the time of commission of the offence, though no investigation was done at the trial and no medical evidence was adduced.

¹³⁵ Article 121 of the constitution.



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