**THE REPUBLIC OF UGANDA**
**IN THE COURT OF APPEAL OF UGANDA**
**AT KAMPALA**

***CORAM:*** ***HON. LADY JUSTICE A.E.N.MPAGI-BAHIGEINE, JA.***
***HON. LADY JUSTICE C.K.BYAMUGISHA, JA.***
***HON. MR. JUSTICE A.S.NSHIMYE, JA.***

**CRIMINAL APPEAL NO.093/2002**

**BETWEEN**

1. ETUDEBO JAMES
2. LENGU VALERIO
3. DRAMA OPIO PONZIO
4. EDEDRAVU BLASIO::::::::::::::::::::::::::::::::::::::::APPELLANTS

**AND**

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

***[Appeal from the judgment and decision of the High Court of Uganda Arua High Court Circuit (*Kania J) *dated 4th July 2002 in HCCSC No.06/2001]***

**JUDGMENT OF THE COURT**

The appellants herein were indicted for murder contrary to ***sections 188*** and ***189*** of the **Penal Code Act**. It was alleged in the particulars of the indictment that the appellants and others still at large, on the 6th day of February 2001, at Nyago village in Arua District murdered Alidria Albert Orsino.

On being arraigned, the appellants pleaded not guilty and raised alibi as a defense.

After a full trial, the learned judge with the unanimous agreement of the lady and gentleman assessors convicted them as charged and sentenced them to death- hence this appeal.

The memorandum of appeal filed on their behalf by M/S Alaka&Co Advocates has the following grounds:

1. **The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record thereby coming to a wrong conclusion.**

2. **The learned trial judge erred in law and in fact in that he held that P.W. 2 correctly identified the appellants and that the conditions for proper identification were favorable when this was not so for his evidence was conflicting, unreliable and uncorroborated.**
3. **The learned judge erred in law and fact when he failed to resolve the discrepancies and contradictions in the prosecution evidence in favour of the appellants.**
4. **The learned trial judge erred in law when he rejected the appellants' alibi when there was no prosecution evidence to negative it and instead shifted the burden of disproving it onto the appellants.**
5. **The learned trial judge erred in law when he convicted the appellants basing on the weaknesses of the appellants case.**

It was proposed that the appeal be allowed, the conviction quashed and the sentence of death set aside.

The facts that led to the prosecution of the appellants are as follows. During the month of January 2001 a meeting of Nyigo clan was convened.

It was chaired by one Raphalie Ejia and attended by many clan members. Also in attendance was the parish chief of Obica parish, the LC 1 Chairperson, the LC11 Secretary and an Administration Police Sergeant. The purpose of the meeting according to the testimony of Drani Christopher (P.W.2) and Asendu Patrick (P.W.3) was to identify persons who had caused the death of two clan members through poisoning or witchcraft.

The meeting identified the people who included the deceased and they were banished from the clan. They were given one month to relocate to another area. The deceased instead of relocating to another area, filed a complaint with the police that he had been framed.

As a result, 12 people including the appellants were arrested and detained at Oluvu Police Post. When the clan members learnt of their arrest and detention, they went to the police post and demanded their release which was done. Prior to their release, five of the detained people had already escaped.

On 6th February 2001 at about 9 p.m as the deceased and P.W.2 who was his son, were returning home, they were ambushed on the way by a group of people who included the appellants. The deceased was beaten to death.

A postmortem was carried out and a report compiled by Dr A Vuni, the Medical superintendent of Maracca Hospital, was tendered in evidence under the provision of ***section 66*** of the **Trial on Indictments Act.**

The examination revealed various deep cut wounds and the cause of death was failure of vital organs of the body like the heart and brain. There was also heavy loss of blood.

The appellants were arrested and charged.

The prosecution called three witnesses to prove the indictment. Each of the appellants gave an unsworn statement and called no witnesses.

When the appeal came before us, Mr Caleb Alaka who represented all the appellants argued grounds 1, 3, and 5 together and the rest of the grounds separately.

Learned counsel in his submissions, argued that the learned trial judge failed to evaluate the evidence on record; failed to resolve the contradictions and based himself on the weaknesses of the appellants' case

He pointed out that the trial judge in dealing with the evidence of P.W. 2 who was the sole identifying witness did not resolve the contradictions in the names of those who were suspected to have been involved in the commission of the offence.

In reply, Mr Waninda opposed the appeal and dismissed the grounds of appeal. He stated that they lacked merit. He supported the trial judge's evaluation of evidence. He also pointed out that there were no major discrepancies in the prosecution evidence and none were pointed out.

On the identification of the appellants at the scene of crime, he stated that the trial judge followed the relevant guidelines and legal principles regarding one identifying witness.

It now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night such evidence should not ordinarily be acted upon to convict the accused in absence of other evidence to corroborate it.

The problem of cases which depend on identification only, like the instant appeal, has been a subject of judicial consideration in a number of authorities. In the case of ***Roria v Republic [1967] EA 583*** at page 584 the Court of Appeal for East Africa said:

***"A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardener LC said in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act……'There may be a case in which the identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten-if there are as many as ten- it is in a question of identity'***
***That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such evidence of identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."***

The conditions which are considered favourable for correct identification without any possibility of error have been laid down in a number of authorities such as ***Abdalla Bin Wendo v R (1953) 20 EACA 166, Abdalla Nabulere &others v Uganda [1979] HCB 77, Moses Kasana v Uganda [1992-83] HCB 47*** and ***Moses Bogere &another v Uganda – Criminal Appeal No.1/97(SC) (***unreported)

The following were the conditions that were set out:

***(i)*** Whether the accused was known to the identifying witness at the time of the offence.

***(ii)*** The length of time the witness took to identify the accused.

***(iii)*** The distance from which the witness identified the accused.

***(iv)*** The source of light that was available at the material time.

We shall now examine the evidence of the identifying witness and determine for ourselves whether the identification was free from error.

The evidence of PW2 on identification was that he knew the attackers before since they were village mates. The conditions prevailing at the time was a bright moonlight.

The attack was sudden and lasted about four minutes. He was frightened.

In cross-examination he stated that although he was frightened he was able to identify the attackers. He further stated that the attackers were many but he was able to identify the four appellants and others that were not arrested.

The conditions prevailing at the time of the attack were mixed. On one hand, the witness knew the attackers and there was bright moonlight. On the other, the attack was sudden and it lasted about four minutes which was a short time indeed.

In these circumstances it is necessary to look for 'other' evidence direct or circumstantial which goes to support the correctness of identification and to ensure that the witness was not mistaken.

Other evidence may consist of a prior threat to the deceased, naming of the assailants to those who answered the alarm and a fabricated alibi etc.

The appellants denied the offence and they all stated that they heard the mother of the deceased crying about the death of her son. They did not go to see and console her instead

they went to Arua Police Station apparently to report the death of her son. Yet they all stated that he was their brother.

The death of the deceased occurred at the time when he had been banished by his clansmen who included the appellants. Instead of leaving the village as he had been ordered he reported the matter to police and his clansmen were arrested. On their being arrested almost the whole clan went to the police to protest and every one was released. The death of the deceased occurred the very evening of their release. It can therefore be said that there was anger towards the deceased not only for disobeying the 'decree' and' sentence' of the clan banishing him from the village but also his reporting the matter to police and causing the arrest and detention of his clansmen. A threat to his life was therefore real.

There are other pieces of evidence which tend to support the correct identification of the appellants as the people who committed the offence.

No 23021 D/Sgt Mwebaze Paddy (PW1) visited the scene of crime and was the investigating officer. He testified that the suspects who numbered about ten reported themselves to the police. This evidence is supported by that of Asendu Patrick (PW3), the sub-county chief, Rhino Camp. He testified that when he learnt about the death of the deceased he went to Arua Police Station to report the matter. At the station the witness met about ten people from Oluvu Obica Parish. They told him that they had killed the deceased. It is the first appellant who spoke to him. The others did not disassociate themselves from his statement. The first appellant's report to PW3 is admissible in evidence since he was not a police officer under ***section 23*** of the **Evidence Act.**

This witness was not cross-examined by counsel who represented the appellants.

We are of the opinion that the conduct of the appellants and their failure to challenge incriminating evidence against them is incompatible with their innocence.

The learned judge evaluated the evidence before him properly and came to the right conclusion by finding the appellants guilty as charged.

We have found no major contradictions in the prosecution evidence which could be said to have caused any miscarriage of justice.

Their appeal to this court fails.

As for the sentence, counsel for the appellant submitted that the appellants have been in custody since 2001, they are village mates and therefore they deserve a lenient sentence.

The prosecution opposed the reduction of the sentence that was imposed. The learned Principal State Attorney submitted that the injuries inflicted on the deceased and the conduct of the appellant does not warrant any reduction of the sentence.

***Section 11*** of the **Judicature Act** gives this Court all the powers, authority and jurisdiction vested in the court of first instance from which the appeal originally emanated.

This means as we understand it, that this court is clothed with similar powers as the court of first instance. We feel that in order to save time and expenses that will be incurred by sending the file back to the High Court to record mitigating factors and impose the appropriate sentence, this court can pass the appropriate sentence under the provisions of the above section.

Consequently we have considered the mitigating factors and the circumstances under which this offence was committed; the sentence of death imposed by the trial judge is upheld.

**Dated this 23rd day of March 2009.**

**A.E.N.Mpagi-Bahigeine**
**Justice of Appeal**

**C.K.Byamugisha**
**Justice of Appeal**

**A.S.Nshimye**
**Justice of Appeal**