**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

***(CORAM: ODOKI., CJ, TSEKOOKO, MULENGA, KANYEIHAMBA KATUREEBE,JJ.S.C).***

# CRIMINAL APPEAL NO. 10 OF 2006

**BAGATENDA PETER :::::::::::::::::::::::::::::: APPELLANT**

**AND**

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

***[Appeal from the decision of the Court of Appeal of Uganda at Kampala: G.M. Okello,, Mpagi Bahigeine, and Twinomujuni, JJA, dated31st January 2006 in Criminal Appeal No. 155 of 2001].***

## JUDGMENT OF THE COURT.

This is a second appeal by the appellant against his conviction and sentence for murder by the High Court after his first appeal to the Court of Appeal was dismissed.

The facts of the case are that on 19th July, 2000, at around 1 p.m. one Pauline Nasiwa, the deceased, was walking home in the company of her nephew Byabasajja Bazira (PW2) when the appellant emerged from a bush, grabbed her and cut off her head with a panga and ran off with that

head. The appellant was arrested nearly two weeks later in another village to which he had relocated. While in Police custody, he directed the police to the locations where he had hidden the head of the deceased as well as the panga, and both were recovered from those locations. However at his trial he totally denied that he committed the offence and pleaded alibi, namely, that at the time and day of the offence he was not in that village. He stated that he was working at Bayitababiri and staying at the home of one Clotida Nabadda at Kitinda landing site. He was subsequently indicted for the murder of the said Pauline Nasiwa, convicted and sentenced to death. As already indicated, his appeal to the Court of Appeal was dismissed. Hence this appeal.

In this Court the appellant relied on the following three grounds of appeal:-

1. ***"The learned Justices of Court of appeal erred in law and fact in finding that the appellant was not suffering from mental disorder at the time of commission of offence.***

2. ***The learned Justices of the Court of Appeal erred in law when they failed to properly subject the evidence on***

***record to fresh scrutiny and evaluation thereby upholding the appellant's conviction and sentence.***

3. ***That in the alternative but without prejudice to the aforestated the appellant shall in accordance with the principle of fair trial seek to mitigate the mandatory death sentence to custodial sentence."***

Counsel for both sides filed written submissions. In his written submissions, Mr. Alli Gabe the appellant's counsel, dwelt on the 2nd ground and the appellant's defence of alibi and submitted that the prosecution had failed to disprove the alibi by clear cogent evidence. It was his submission that the prosecution evidence was purely circumstantial and that it contained serious inconsistencies and contradictions. He criticized the trial Court for believing that evidence while ignoring the evidence of the appellant with regard to his alibi. He contended that the Court of Appeal had failed in its duty to re-evaluate the evidence as a whole, and was wrong to find that the trial court had properly evaluated the evidence.

Counsel for the appellant contended that the Court of Appeal had failed to properly re-evaluate the evidence as a whole and give due

consideration to the Appellant's defence of alibi. In his view, both the trial Judge and the Court of Appeal had not followed the guidelines set by the Supreme Court in **BOGERE & ANOTHER VS UGANDA**, ***CR. APP. No. 1 OF 1997*** where this court laid the following guidelines as regards what the prosecution has to prove in cases where an accused person raises the defence of alibi:

> **"What amount to putting an accused at the scene of crime? We think the expression must mean proof to the required standard that the accused was at the scene of the crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused was at the scene of crime, and the accused not only denies it, but also adduces evidence showing that the accused was elsewhere at the material time it is incumbent on the court to evaluate both versions judicially and give reason why one and not the other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable."**

Counsel therefore submitted that this court should re-evaluate the evidence as per the guidelines.

On the other hand, Mr. Waninda, Senior State Attorney, for the State, did not agree with the above submissions of counsel for the appellant and fully supported the findings and decisions of the Court of Appeal. He submitted that that court had fully and properly re-evaluated the evidence and applied the law.

The prosecution called PW.2 who was an eye witness to the crime. Although he was a person of tender age and a **voire dire** had to be conducted, the trial judge was impressed by this witness. He testified that he knew the accused and had known him for about 4 years. On the material day, 19th July, 2000, at about 1 pm while in the company of the deceased, he saw the appellant emerge from a bush, got hold of the deceased and declared "I am going to kill you". He saw him cut off the deceased's head. In the main this evidence was not seriously dented in cross examination. The witness seemed to have been truthful, leading the trial judge to record:

> ***"An impressive witness composed and relaxed throughout his evidence."***

The prosecution also adduced other circumstantial evidence which, corroborated the evidence of PW.2 in putting the accused at the scene of crime. It has to be borne in mind that the crime had been committed in broad daylight. This was the evidence of PW.3 and PW.4. PW3, Nasitazia Nabwetere, testified that she had been informed by PW2 about the killing of the deceased who was her niece and how PW2 had informed her that he knew the man who had cut off the deceased's head. She is the one who identified the body of the deceased. She also knew the appellant, and knew that he used to stay with his father. PW4, Henry Misega also testified that he knew the appellant. He testified that as he was running in answer to an alarm raised by neighbours, he saw the appellant emerge from a bush and move in the opposite direction and asked him why he was moving in that direction instead of going to the direction of the alarm. The appellant told him that he was crossing from Kasanyi and was in the bush only to ease himself. He left him to go, but on reaching the scene of the murder, he found a body without a head. He further testified that at the scene one Kasimagwa told him that the appellant had earlier that day chased him (Kasimagwa) while holding a panga. There was also the evidence of PW.6 D/Sgt Patrick Semakula to whom the accused disclosed information leading to the recovery of the severed head of the deceased. The panga which was used to commit the crime was also recovered as a result of information given by the appellant to P.W.7, Steven Kiwuwa who testified that he personally

knew the appellant, and that at the request of the O.C Nakawuka Police Post he talked on phone to the appellant who then directed him to the location where the panga was found.

The trial judge was alive to the accused's defence of alibi and of the legal guidelines applicable to that defence. At page 5 of her judgment, she stated this:

> ***"The last ingredient proof of which is hotly contested by counsel for the accused is participation of the accused in the killing. The defence of the accused is that he was no where near Kasuku village where the offence took place on the date of the offence, the 19th July, 2000. The accused stated that he was then a fisherman at Kitinda Landing site where he got the job of fishing on the 15th July, 2000 the same day he left Kasuku village. Accused's further evidence is that he was arrested on the 6th August 2000 from Bayitababiri in connection with this case. This is defence of alibi. The law is now well settled that an accused who raises alibi as a defence bears no burden to adduce evidence to prove it. The law casts upon the prosecution the burden of disproving the alibi by adducing credible evidence placing the accused at the scene of the***

***crime at the time that the accused claims that he was elsewhere. See Sentale -Vs- Uganda [1968] EA 366."***

In our view the trial judge correctly addressed the defence of alibi and the law. She then proceeded to evaluate the evidence minutely, starting with the evidence of PW2 who witnessed the crime and saw the accused cut off the head of the deceased, to that of PW6 to whom the appellant gave information leading to the recovery of the head of the deceased. The trial judge found, quite rightly in our view, that the appellant would not have known the location where the deceased's head was buried, or where the murder weapon was, unless he had committed the crime himself and hidden them. She found this evidence to be corroborative of the evidence of PW2, and effectively negativing the defence of alibi.

The appellant contended that the Justices of the Court of Appeal had erred in law when they failed to properly subject the evidence on record to fresh scrutiny and evaluation. Having studied the evidence on record ourselves and read the judgment of the trial judge who saw and heard the witnesses in court, we are not persuaded by counsel for the appellant that the Court of Appeal failed in any way in this regard. The learned Justices were right to find that the learned trial judge had properly evaluated all the evidence on record and come to the correct decision. In the circumstances we find no merit in this ground and it therefore fails.

The appellant's counsel in his written submissions seems to have cursorily addressed ground one of the appeal. He submitted that the ***"Appellant appeared to have not been properly represented and guided on the evidence in relation to his mental status at the time it was alleged he killed Pauline Nasiwa."***

The basis for this submission seems to be the horrific nature of the crime. Counsel contends that a sane person could not have committed such a crime and in the manner he did it.

The learned Senior State Attorney, on the other hand, submitted that the defence of insanity had not been raised at the trial, nor had the appellant adduced evidence as to the state of his mental health. He argued further that the burden of proving diminishing responsibility lies on the person raising the defence, and the appellant had failed to do so. The court was therefore correct not to make any finding on the mental faculties of the appellant. He invited this Court to find no merit in this ground.

We agree with the learned Senior State Attorney that, the defence of insanity was never raised by the appellant or anyone else whether at the time of his arrest or at his trial. Had it been raised at the time of his arrest, he would have been subjected to medical/mental examination.

The accused himself did not indicate in any way that he was mentally sick.

The second point at which his mental state would have been brought up was at the trial. The accused chose to make an unsworn statement in court again denying the offence and making allegations of torture by police.

We agree with the Court of Appeal that the matter of insanity seems to be raised only as an one word. The essence of the defence of insanity is that the accused person did not know what he was doing, or if he did, he did not know that it was wrong. This is the gist of the McNaughton Rules which have been adopted and applied in the courts of Uganda – ***See R-Vs- MAGATA S/o KACHEHAKANA [1957] EA 330.*** It is also important to bear in mind the provisions of sections, 10,11, and 194 of the Penal Code with regard to (i) the presumption of sanity, (ii) the defence of insanity and (iii) findings of diminished responsibility in murder cases.

The conclusion as to the state of mind of the accused person may be discerned from the evidence on record, be it from the prosecution side or the statement made by the accused person to the police, as was done in the **Magata** case *(supra).*

In this particular case, there does not seem to be evidence on record upon which a conclusion of insanity could be reached. The Court of Appeal considered this matter and found that the behaviour of the appellant after the commission of the offence was not consistent with the behaviour of a person who would be suffering from insanity. The Court of Appeal dealt with the matter thus;

> ***"The learned Judge minutely examined all evidence on record. The Court would normally consider other possible defence based on the evidence on record and not otherwise. There was nothing on record to remotely suggest that the appellant might have been labouring under diminished responsibility. As rightly pointed out by learned counsel, Mr. Kaamuli, the appellant's family (father) never mentioned anything about his son's mental instability when being interviewed about the panga and his whereabouts. Neither did Byabasaijja who had known him for four years previously. Most importantly, his escape and relocation to another village where he was arrested is a strong pointer towards his conscious guilt. It is trite that the conduct of the accused subsequent to the commission of the offence is relevant towards establishing his guilt or otherwise. A mad man would not have made any move. He would rather***

***have remained at the scene of crime, unaware of what he had done."***

In his written submissions, the learned Senior State Attorney also submitted that the appellant was not, and could not have been, suffering from diminished responsibility, given his conduct after the commission of the crime. He supported the findings and decision of the Court of Appeal. He further argued that raising the defence of diminished responsibility would be inconsistent with his defence of total denial of the commission of the offence. In his view, the appellant would in effect now be saying that he committed the offence but was suffering from diminished responsibility at the time.

We agree with the Court of Appeal that on the evidence on record, there was no basis for the Court to consider the defence of insanity. It was never raised at the trial and no evidence supports it. In **SOHAN SINGA s/o LAKHA SINGA VS R [1958] EA 28**, the defence of insanity was raised at the opening of the trial and an order was made for the accused to be remanded in custody pending medical examination. But at the subsequent trial, the defence of insanity was not pursued and the defence declined to call the psychiatrist who had examined the accused. After his conviction, the appellant and his counsel applied for leave to call evidence of another psychiatrist who had examined the appellant after

the trial on the ground that there had been no sufficient inquiry whether the appellant was of unsound mind and incapable of making his defence.

The Court of Appeal for East Africa rejected that application on the ground, inter alia, that since the question of the Appellant's fitness to plead had not been pursued at the trial, the trial judge could not be faulted for assuming that the question of the appellant's fitness to plead was no longer an issue.

That Court stated at p. 30:

> ***"The duty to prove fitness to plead affirmatively as laid down by this Court in Kaplotwa's case only arises if an accused person's fitness to plead is in issue, that is if 'the Court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence'."***

As earlier observed, in this case the matter of the Appellant's insanity was never raised at all. The trial Judge could therefore, not have misdirected herself on a matter not in issue. Furthermore, the Appellant's Counsel both in the Court of Appeal and in this Court did

not seek to make application to adduce fresh evidence as to the mental status of the Appellant. They raised it as a ground of appeal.
The Court of Appeal was quite right to observe:

> ***"Raising this defence now is tantamount to raising new matter on appeal for which Mr. Matovu would have moved the Court properly if at all there was that need."***

We therefore, agree that there is no merit in this ground and it accordingly fails.

In the result we do not find any merit in this appeal which is hereby dismissed. We uphold the appellant's conviction for murder. However with regard to sentence, because of the decision of the Constitutional Court in Constitutional Court Petition No. 6 of 2003 ***(SUSAN KIGULA & 417 OTHERS -Vs- ATTORNEY GENERAL)*** from which an appeal is pending in this court, we exercise our discretion and postpone confirmation of sentence in this case under Article 22(1) of the Constitution, until determination of the pending Constitutional Appeal to this court.

DELIVERED at Mengo this 16th day of October 2007

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**B.J. ODOKI**
**CHIEF JUSTICE**

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**J.W.N. TSEKOOKO**
**JUSTICE OF THE SUPREME COURT**

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**J.A. MULENGA**
**JUSTICE OF THE SUPREME COURT**

**…….**
**G.W. KANYEIHAMBA**
**JUSTICE OF THE SUPREME COURT**

**…….**
**BART M. KATUREEBE**
**JUSTICE OF THE SUPREME COURT**