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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL UGANDA, AT KAMPALA
CRIMINAL APPEAL NO. 16/2007
BONGOMIN SANTO :::::::::::::::::::: APPELLANT

VERSUS

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

CORAM:

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE S. G. ENGWAU, JA

HON. JUSTICE A. TWINOMUJUNI, JA

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Judgment of the Court

The appellant, Bongomin Santo, was indicted for and convicted on nine (9) counts of murder contrary to **sections 188 and 189** of the **Penal Code Act**. He was sentenced to death on count one, while the sentence on the other counts remained suspended. Hence this appeal.

The facts were that on 02-03-1998, the appellant and others still at large, while armed, stormed the home of one Kidega Justin, son of Kolo Valentino, at Paicho Almin-Luwek, at around 10.00 p.m and killed various people to wit Aloyo Margaret, Ajok Rose, Aryema Erojena, Opiro Cosmas, Nyeko Ben, Lawoko Paul, Odokonyero Charles, Obita Peter and Tuke.

It was Kidega Justin who alerted the Civic Defence Team from Gulu, which on arriving at the scene saw dead bodies littered around.

The team ordered the bodies to be immediately buried as the area was insecure. There was no doctor available to carry out the postmortem examinations.

Police investigations disclosed that the appellant, Bongomin Santo had all along been threatening to kill the family of Kolo Valentino because he suspected and accused them of having reported him to the authorities that he was a rebel collaborator, for which he had been remanded at Luzira prison for a long time.

Investigations further revealed that it was the appellant who had led the assailants and was pin pointing out the victims to be killed and that he also participated in the killings.

At the trial he put up a defence of alibi which the learned Judge rejected.

5 He appealed to this court on the following grounds, namely that:

1. **The learned Judge erred in law and fact when he failed to properly evaluate the evidence relating to the three ingredients of the offence; and relied instead on concessions by counsel.**
2. **The learned Judge erred in law and fact when he failed to take into account the**
10 **adverse conditions when evaluating the evidence of identification; and convicted the appellant on unreliable evidence.**
3. **The learned Judge erred in law and fact when he found that the appellant caused the death of the deceased.**
4. **The learned Judge erred in law and fact when he failed to afford the appellant an**
15 **opportunity to mitigate the sentence.**
5. **The learned Judge erred in law and fact in rejecting the appellant's alibi.**

Mr. Mohamed Ally Kajubi appeared for the appellant while Ms. Alice Komuhagi, learned Principal State Attorney (PSA) represented the respondent.

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Mr. Kajubi, learned counsel, argued grounds **1, 2 and 3** together; grounds **4 and 5** were argued separately.

Submitting on grounds **1, 2 and 3** Mr. Kajubi pointed out that the learned Judge relied on
25 unreliable evidence throughout his evaluation of the evidence. Concerning identification of the appellant, the evidence was inconsistent and contradictory. He referred to the evidence of Valentino Kolo (**PW3**) at page **18 lines 319 and 322** where he testified.

“ my wife had injuries on her head, near the eye and the back and chest. She was also burnt.

30 *..... All had injuries on their heads and they were burnt.....”*

He however, did not say what was contradictory, here.

Regarding the evidence of Aol Christine (**PW2**), learned counsel claimed that it was full of inconsistencies and contradictions in the description of peoples injuries.

5 Learned counsel also alluded to the PW2's statement to police which differed from that she gave in court though she explained that she had not yet recovered, from the trauma of the attack at the time she made a statement to police. In counsel's view, her evidence was not consistent and she was not credible.

10 Learned counsel submitted that the circumstances of the attack were not favourable to correct identification. The attack was sudden and fearful. PW2 would not have been able to see and identify the appellant. He therefore concluded that it was mistaken identity because the appellant was always a suspect, citing **Kigundu and others v UCACA 25/2002**.

15 Learned counsel faulted the Judge for relying on the evidence of **PW3** as corroboration - **page 17 line 307**, where the witness testified: *"the accused had threatened to kill his wife for romour mongering that the accused was a rebel collaborator therefore I advised him to take the matter to the LCs or the police"*.

He also relied on the testimony of Julius Obar who stated that before his son Nyero died of a fatal wound on the waist, he had told him that it was the appellant who was the killer.

20 In Mr. Kajubi's view the evidence of all the prosecution witnesses was untruthful as it was based on mere suspicion because of alleged threats. This would not establish beyond reasonable doubt that the appellant committed the crime.

He thus prayed court to allow grounds **1, 2 and 3**.

25 Ms. Alice Kamuhangi learned PSA supported both conviction and sentence. Responding to grounds **1, 2 and 3** she contended that there were neither inconsistencies nor contradictions relied on by the learned Judge.

30 The statements of **PW2** to police and the court did not differ. At the police, **PW2** clearly explained that she had not recovered well from the trauma of the attack. She said that on the

orders of the appellant, the Kadogo had hit her on the head, with a pistol, into unconsciousness as a result of which she had spent 2 months in hospital, and that at the time of trial she had recovered. The alleged inconsistencies concerned the so many injuries to so many injured people. All people had different injuries and it is possible for people to observe such injuries differently, Ms. Komuhangi observed.

Concerning the appellant's identity, Ms. Komuhangi stated that he had been specifically identified by Aol Christine (PW2) who knew the appellant very well as they were neighbours living about 400 metres apart. As the rebels approached, they were talking. PW2 knew the appellant's voice which she identified. The appellant asked for Kidega who was **PW2's** spouse. The appellant was commanding others what to do. PW2 saw and watched the appellant though she had been ordered to lie down, she had lost all hope of living she could risk raising up her head to see. All the six homes in the homestead had been set on fire there was thus sufficient light. She could thus see the appellant and even described the clothes he was putting on. PW2 could see that the rebels numbered seven plus the appellant. They had five guns, one panga and one axe. The others were clad in uniforms while the appellant donned green jeans and a green t-shirt. The attack lasted 2 hours while PW2 took 30 minutes observing what was going on. The appellant was 7 metres away from her.

Ms. Komuhangi asserted that PW2 was a truthful witness since she candidly said the appellant was only commanding and did not carry out the actual killing – though she could easily have said so. No grudge existed between the family of PW2 and that of the appellant. The appellant was their friend. They were living well except for the mere rumours flying around that he was a rebel collaborator.

Ms. Komuhangi distinguished the case of **Kiggundu** (supra) relied on by Mr. Kajubi in that the attack in **Kiggundu's** case had lasted only 15 minutes thus there was clearly insufficient time for identification whereas in the instant case the attack lasted almost 2 hours and all the surrounding houses were ablaze thus furnishing enough light. Furthermore the appellant disappeared after the attack, raising considerable doubt about his innocence.

The learned Judge observed:

“The accused himself admits that on one occasion the rebels sent him to buy goods for them and indeed he did buy goods for them.

Besides PW3 Valentino Kolo told court that the accused had warned that Valentino’s wife Enzama Aryemo had been spreading romours that he was a rebel collaborator and that he would use his means and knew what to do. Aryemo was one of the people killed. Next is the evidence of PW4 Julius Obaro who told the court that Nyero Ben who was his brother’s son told him before he died that Bongomin the accused had killed him for nothing. All these put together would lead to the inference that the accused went with the assailants and was rightly identified at the scene”.

The appellant’s participation is the only ingredient of murder that is disputed here. This turns on the factors of the available light around, length of the time to identify and observe, the distance from the appellant and familiarity with him - See Nabulele and others v Uganda (1979) HCB 79.

PW2 said she was five metres from the appellant; she described his clothing on the night of the incident; she stated that several homes were burnt (creating additional light) and that she knew the accused very well as they were good neighbours even in the words of the appellant himself. **PW2** stated the incident lasted for about two hours before she was hit on the head into unconsciousness. Though she was lying face down she routinely picked her head up to see the rebels. In her own words, she had lost hope of living.

We are inclined to believe that **PW2** was not confused or lying. She gave a precise description of the appellant, his green jeans and t-shirt, as contrasted by the uniforms worn by the other rebels. She described the ways in which other five relatives were killed down to the number of hits and cuts to different parts of their bodies as well as which body parts were injured. Her co-wife Aloyo was killed by cutting her with a panga and beating her. Odokonyero was killed by cutting his head. The appellant ordered that no one should be left alive. Aryemo was cut on the back, waist and head.

The only flaw in **PW2’s** testimony was that her statement to the police contrasted with her evidence in court and this was merely in respect of the number of cuts made on certain

victims. Moreover **PW2** admitted to being afraid and shaken on the night of the attack. Still it would be imprudent to dismiss the testimonies of murder witnesses on such grounds. Should murder witnesses always be sober and fully composed or not even cry (as the defence argued that because she had tears in her eyes, therefore she could not observe any thing)?

5 This would be unrealistic.

PW2's story was too candid to permit of any doubt. The learned Judge correctly found corroboration in the evidence of **PW4** who testified that his son Nyero told him (**PW4**) that it was the appellant who dealt him the fatal wound to his waist.

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Lastly, **PW3** spoke of the alleged threats by the appellant on his deceased wife. The learned Judge thus correctly evaluated the evidence. We cannot fault him. Grounds **1, 2** and **3** stand dismissed.

15 Concerning ground **No.4**, the appellant was sentenced to death on 26-03-2007. It seems irrelevant to allow an appeal for mitigation of a sentence in such a case as this one.

20 However, since this court is vested with all the powers of the trial court, we conceive this to be an outrageously sadistic case deserving the very maximum sentence. We cannot fathom any extenuating circumstance which would prompt an individual to violently kill nine human beings under such circumstances. We thus see no reason to mitigate this sentence.

In view of our findings on grounds **1, 2, 3 and 4** ground **5** concerning alibi became superfluous.

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We agree with the learned Judge that once there is evidence that places the accused at the scene of the crime at the time the offence was committed then the defence of alibi will not stand. We thus find this appeal devoid of any merit and dismiss it forthwith.

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Dated at Kampala this 17th day of August 2009

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

HON. JUSTICE S. G. ENGWAU

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JUSTICE OF APPEAL

HON. JUSTICE A. TWINOMUJUNI

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JUSTICE OF APPEAL