THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT LIRA

CRIMINAL APPEAL NO. 0370 OF 2015

(Coram: Elizabeth Musoke, Hellen Obura, JJA & Remmy Kasule, Ag. JA)

MORO ALEX::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Lira before Nabisinde, J. delivered on the 17th day of November, 2014 in Criminal Session Case No. 0044 of 2014.)

JUDGMENT OF COURT

Introduction

This appeal is against the decision of the High Court (Nabisinde, J) delivered in Criminal Session Case No. 0044 of 2014 in which the appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) and 4 (a) of the Penal Code Act, Cap. 120 and sentenced to 20 years imprisonment.

Background to the Appeal

The facts as accepted by the learned trial Judge are that on 2nd June, 2011 the appellant's wife went to Anyeke Health Center IV and left the 12 year old victim (A.M) at home with the appellant. During the night the appellant went and had sexual intercourse with the victim and threatened to kill her if she revealed the incident to anyone. The following morning, the victim revealed the incident to PW1, Awino Lucy who in turn went to the home of the victim's paternal grandmother (PW2) to report the information she had received. PW2 reported the matter to the Police Station at Oyam and the appellant was arrested and charged with the offence of aggravated defilement. He was tried, convicted and sentenced to 20 years imprisonment.

Being dissatisfied with the decision of the trial Court, the appellant now appeals to this Court on the following grounds:

1. *"That the learned trial Judge erred in law and fact when she failed to properly evaluate the contradictions in the evidence of PW1 & PW2 which were major and pointing to deliberate falsehood and hence came to a wrong conclusion.*
2. *That the learned trial Judge erred in law and fact when she failed to consider the alibi raised by the appellant and hence came to a wrong decision.*
3. *That the learned trial Judge erred in law and in fact when she convicted the appellant on the basis of unsatisfactory circumstantial evidence.*
4. *That the Learned trial Judge erred in law and fact when she passed a sentence which was illegal, harsh and excessive in the circumstances as to amount to a miscarriage of justice."*

Representations

At the hearing of this appeal, Mr. Patrick Adar represented the appellant on State Brief while Mr. Brian Kalinaki Assistant Director Public Prosecutions represented the respondent. The appellant was not physically present in court due to the challenge of Covid 19 pandemic and the Standard Operating Procedures (SOPs) given by the Ministry of Health which prohibit crowding in a place. However, the appellant was facilitated to attend proceedings from prison using technology (zoom). Counsel for both parties filed their respective submissions with permission from this Court which they adopted and shall be considered in this judgement.

The Appellant's submissions

In his written submissions, counsel for the appellant prayed to this Court to extend the time within which to file the notice of appeal under rule 60 of the Judicature (Court of Appeal) Rules on the ground that the respondent will not in any way be prejudiced by the grant of an extension of time.

On ground 1, counsel pointed out that the principles upon which the court can approach contradictions and discrepancies in the evidence of a witness or witnesses were stated in

Alfred Tajar vs Uganda, Criminal Appeal No. 167 of 1969 (EACA) cited with approval in the case of ***Hajji Musa Sebirumbi vs Uganda, SCCA No. 19 of 1989 (unreported)*** in which the court observed that in assessing the evidence of a witness his/her consistency or inconsistency unless satisfactorily explained will usually but not necessarily result in the evidence of the witness being rejected. Minor inconsistencies will not usually have the same effect unless the trial Judge thinks that they point to deliberate untruthfulness.

Counsel submitted that in regard to the injuries, PW1 and PW2's testimonies are not in agreement with the findings of PW3, Tile Kalisto. PW1 testified that when she examined the victim, she found that she had injuries on her private parts. PW2, testified that there were some injuries in the victim's private parts, some were almost healing and had taken around 1 week whereas PW3 testified that he found no injuries on the victim's private parts but there was scarring and reddening at the entrance of the vagina. Counsel also invited this Court to look at PW3's medical report in which he found that there was no injury or inflammation around the private parts, and that the injuries were only on the right thigh and back that were in his opinion 4 days old. Counsel contended that PW3's testimony in Court that there was reddening at the entrance of the vagina was vague and an afterthought which was not included in the medical report. He faulted the learned trial Judge for relying on this contradictory evidence to make a finding that the appellant committed the offence.

Counsel also submitted that there were contradictions regarding the dates when the victim was defiled. He pointed out that the indictment showed that the offence was committed on 2/06/2011 whereas PW2 testified that the victim told her that it happened on 26/05/2011.

In conclusion on this ground, counsel submitted that the learned trial Judge erred when she failed to pay attention to the above inconsistencies which were grave and pointed to untruthfulness on the part of PW1 and PW2.

On ground 2, counsel submitted that the learned trial Judge did not act judiciously when she rejected the appellant's defence of alibi. He cited the case of ***Kizito Enock vs Uganda, CACA No. 224 of 2003***, in which this Court observed that an accused person who puts forward the defence of alibi does not assume any burden of proof. The burden rests upon the prosecution to disprove or destroy the alibi by putting the accused at the scene of crime.

Counsel submitted that the appellant testified that on the material date, he was at Iceme Trading Centre and he called his mother Amolo Dorina (DW2) to corroborate his testimony. However, the learned trial Judge rejected it as hearsay, which counsel contended was unfair since she had accepted the evidence of PW1 and PW2 which was also hearsay. He argued that had the learned trial Judge considered the evidence of PW1 and PW2 as hearsay, he would have rejected the same and found that the appellant was not placed at the scene of crime.

Counsel also submitted that the prosecution evidence left doubt as to whether the appellant was properly identified by the victim. He cited the case of ***Roria vs Republic [1967] EA 583; Abdalla Nabulere vs Uganda, SCCA No. 9 of 1978*** for the principles to be applied when the Court is handling evidence of identification. He pointed out that PW1 testified that the victim said that the appellant defiled her at around midnight, a time of the night when correct identification is made difficult. Further that, the failure of the victim to testify in the trial Court in order to give clarification as to how she was able to identify the appellant at night left reasonable doubt regarding the participation of the appellant which should have been resolved in his favor. Counsel invited this Court to find that the alibi set up by the appellant was not disproved by the prosecution and he prayed that ground 2 be allowed.

Regarding ground 3, counsel contended that in convicting the appellant, the learned trial Judge relied on unsatisfactory circumstantial evidence. Counsel submitted that while the learned trial Judge was alive to the law on circumstantial evidence, she misapplied the law to the evidence of the case. He further submitted that the failure of the victim to testify in the

present case was detrimental to the prosecution evidence since no good reason was given by the prosecution for its failure to present her evidence.

Counsel also submitted that there was no corroboration of the victim's evidence as required by law. He relied on the cases of ***Kibale Ishuma vs Uganda, SCCA No. 21 of 1998*** and ***Mugoya vs Uganda, SCCA No. 8 of 1999*** where it was held that in sexual offences, corroboration of the complainant's evidence implicating the accused person is a requirement for convicting the accused. Counsel concluded that the circumstantial evidence relied on in the instant case was of the weakest kind and no inference of guilt could be drawn therefrom.

On ground 4, counsel contended that the sentence imposed by the learned trial Judge was not only illegal but also harsh and excessive in the circumstances. He relied on Article 23 (8) of the Constitution which enjoins the Court to take into account the period spent by the accused person in lawful custody prior to conclusion of his trial. He also relied on regulation 15 (2) of the ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** which is to the effect that the court should deduct the period spent on remand from the sentence it considers appropriate after taking into account all other relevant factors. Counsel relied on the Supreme Court decisions in ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014;*** and ***Abelle Asuman vs Uganda, SCCA No. 66 of 2016*** to support his submissions. He contended that the learned trial Judge did not state the length of time the appellant spent on remand which means that she did not take into account the period the appellant spent on remand as required by law. In the circumstances, counsel urged this Court to find the sentence imposed illegal.

Counsel further contended that the sentence imposed on the appellant was harsh and excessive in the circumstances. He argued that in imposing sentences, there is need for custodial sentences to be for the shortest term commensurate with the seriousness of the offence. He added that the seriousness of the offence committed by the appellant was mitigated by a number of factors which include; the fact that the appellant expressed remorse,

he was a first offender and he had 4 children and 3 orphans under his care. Counsel prayed that this Court reduces the sentence imposed on the appellant.

In conclusion, counsel prayed that this Court quashes the conviction of the appellant or in the alternative, reduces the sentence imposed on him.

The Respondent's reply

Counsel stated that he did not have any objection to the appellant's prayer for extension of time within which to file a notice of appeal. He then submitted on ground 1 that there were no contradictions in the testimonies of PW1 and PW2 regarding the injuries sustained by the victim. He added that their testimonies were corroborated by the evidence of PW3 a Clinical Officer, who stated that he found scarring and reddening at the entrance of the victim's vagina. Further that, PW3, examined the victim on 5th June 2011, 3 days after PW1 had done so on 2nd June 2011, and a day after PW2 had examined the victim on 4th June, 2011 and therefore, this explains the difference in their testimonies regarding the injuries each witness observed.

Counsel submitted that the contradictions, if any, can be explained by the fact that the examinations or observations on the victim were made on different days. He added that they were minor and did not affect the credibility of the witnesses and therefore could be ignored. He relied on the case of ***Alfred Tajar vs Uganda (supra)*** to support his submission. He prayed that ground 1 fails.

On ground 2, counsel submitted that PW1 and PW2 testified that the victim told them that it was the appellant who defiled her. She knew him as her uncle with whom they stayed together and he was the one taking care of her. Counsel argued that with these facts, there was no chance of mistaken identity by the victim who rightly placed the appellant at the scene of crime.

Regarding the victim's failure to testify, counsel submitted that the people the victim reported to testified with precision that she told them that it was the appellant who defiled her. He relied

on the case of ***Badru Mwindu vs Uganda, SCCA No. 15 of 1997*** to support his submission. In that case, the victim was not brought to testify as she had been taken out of the country for treatment and neither was the doctor who examined the victim called to testify. The Supreme Court held that the evidence of the people that the victim reported to was enough to have the accused convicted.

Regarding ground 3, counsel adopted his submissions on ground 2, to cover ground 3.

In response to ground 4, counsel submitted that the maximum sentence for the offence of aggravated defilement is death penalty and in the instant appeal the learned trial Judge was lenient as he imposed a custodial sentence of 20 years imprisonment which is legal. He added that the learned trial Judge considered both the mitigating and aggravating factors and also indicated that she had taken into account the period the appellant had spent on remand before sentencing him. Counsel pointed out that in the case of ***Abelle Asuman vs Uganda (supra)***, which was relied upon by the appellant's counsel, the Supreme Court held that the taking into account the period spent on remand does not have to be done in an arithmetic way and that where a sentencing Court has clearly demonstrated that it has taken it into account to the credit of the convict, the sentence would not be interfered with by the appellate court only because the words used by the sentencing Judge were different. He therefore prayed to this Court not to interfere with the sentence imposed by the trial Court as it was neither illegal nor harsh and excessive.

Resolution by the Court

We have carefully studied the court record and considered the submissions of both counsel as well as the law and authorities cited to us plus those not cited but which are relevant to the issues under consideration. We are alive to the duty of this Court as a first appellate court to review the evidence on record and reconsider the materials before the trial Judge, and make up its own mind not disregarding the judgment appealed from but carefully weighing and

considering it. ***See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10.***

As regards ground 1 of the appeal, this Court is required to consider whether there were any contradictions and inconsistencies in the prosecution evidence and if so, whether the learned trial Judge's evaluation of such contradictions occasioned a miscarriage of justice. Counsel for the appellant contended that there were material contradictions in the evidence of PW1 and PW2 on the one hand and that of PW3 on the other hand. Counsel also pointed out that there were contradictions regarding the date when the victim was defiled. Whereas the indictment showed that the offence was committed on 2/06/2011, PW2 testified that the victim told her that she was defiled on 26/05/2011.

We have found it pertinent to first deal with the inconsistencies in the date of defilement as contained in the indictment and the date mentioned in the evidence. The particulars of the offence as stated in the indictment were as follows;

> *"Moro Alex (the appellant) on the* ***2nd day of June 2011****, at Atong Lela-Cell in the Oyam District had unlawful sexual intercourse with A.M (abbreviated herein to conceal the identity of the victim for purposes of protecting her) a girl under the age of 14 years."* [Emphasis added*].*

It therefore follows that the prosecution had to prove that the sexual act was performed on the victim on 2nd June, 2011. The victim was not brought to court to testify. On 21/10/2014 after the conclusion of the evidence of PW3, counsel for the State informed court that they had tried in vain to get the victim A.M but they were informed that she was kept in hiding by her mother who is a sister to the accused (now the appellant). Counsel then closed the prosecution case. The evidence that the prosecution had adduced to prove the case was therefore that of PW1, PW2 and PW3 which we summarize here as follows;

PW1 Awino Lucy testified that on 2/6/2011, she went to a well in Akaoidebe village in Oyam District where she found the victim and another girl. She observed that the victim was not walking properly and when she asked what had happened to her, the victim informed her that

the appellant had had sex with her. The next day 3/6/2011, PW1 went to the appellant's home where she found the victim, DW2, a one Odongo and 2 other people. However, the appellant was not there. The victim informed PW1 in the presence of all those people that the appellant had sex with her while she lay on his bed. She then took the victim aside and examined her. She found injuries on her private parts and the victim told her that the appellant had had sex with her though she did not mention on which date it happened. PW1 then reported the matter to Okello Jimmy, the victim's paternal uncle who in turn took the victim to the LC1 Chairman Okaka William and reported the matter. The case was referred to Police at Anyeke.

PW2, Koli Grace who is the paternal grandmother of the victim testified that on 4/06/2011, PW1 went to her home and told her that the appellant had defiled the victim. She then went to the police station at Oyam to report the incident and the police came and arrested the appellant. While at the police station, the victim told her that the appellant had defiled her on 26/05/2011 around midnight. In cross examination, she stated that she examined the victim's private parts and there were some injuries which were almost healing and they seemed to have taken around 1 week.

PW3, Tile Kalisto testified that on 5/06/2011, he examined the victim and found that she was 12 years old and there was slight penetration on her private parts but the hymen was not ruptured. She had no injuries on the private parts but there was scarring and reddening which was about 4 days old at the entrance of the vagina. (It is noteworthy that the medical examination report prepared by PW3 did not indicate that there was scarring and reddening at the entrance of the victim's vagina). PW 3 also testified that the victim had injuries in the form of scratch marks and abrasions on the thighs, legs, elbows and the back. PW3 also examined the appellant and found him to be of sound mental status and he was also HIV positive.

From the above evidence, both PW1 and PW2 testified that the victim had revealed to them that it was the appellant who defiled her. While PW1 stated that the victim did not tell her the

date when the defilement took place, PW2 said the victim told her that she was defiled by the appellant on 26/5/2011. The evidence of PW2 tended to prove that the alleged offence was committed before the date mentioned in the indictment.

The medical report indicated that when the victim was examined on 5/6/2011 there was slight penetration at the vulva of the victim's vagina and that there were no injuries or inflammation around the private parts. It also indicated that there were some injuries on her thighs which were about 4 days old which means she sustained them on 2/6/2011. The medical examination report does not, however, say when the penetration on the victim's vagina took place and whether the injuries on the thighs were sustained on the same day the sexual act was performed on the victim. We therefore cannot rely on that evidence to draw an inference that the victim was defiled on the day she sustained those injuries.

It is clear from the above pieces of evidence that the prosecution did not establish that the alleged sexual act was committed on 2nd June, 2011 as stated in the indictment. It should also be noted that at the trial the appellant put forward an alibi that on the material date, he was at Iceme Trading Centre having left the scene of crime on 1/6/2011. This is set out in ground 2 of this appeal and shall be considered in detail under that ground. We, however, mention it here for purposes of showing that it was the appellant's case that he was not at the scene of crime on the material date. He called his mother Amolo Dorina (DW2) to corroborate his testimony and she testified, inter-alia; that on 2/6/2011 the appellant told her that he was going to Kona Iceme and he left that day. Further that someone told her that he found the appellant going to his place of work. The learned trial Judge evaluated the evidence and dismissed that of DW2 on the ground that she was not credible as she could not even tell her age. Furthermore, that she only narrated what she was told. The learned trial Judge therefore believed the prosecution evidence which she said connected the appellant to the commission of the crime.

As submitted by counsel for the appellant in this appeal, the learned trial Judge did not direct her mind to the controversies surrounding the date on which the victim was allegedly defiled. In this appeal, the question that we need to answer is whether a conviction can be sustained where an indictment alleges that a sexual act was performed on the victim on 2nd June, 2011 and the evidence adduced for the prosecution shows that the sexual act was performed earlier.

Our answer would be no because evidence adduced in a criminal trial must prove the offence as contained in the indictment beyond reasonable doubt. Any disconnect or contradiction between the indictment and the evidence adduced on material facts, in our view, would create reasonable doubt as to whether the offence was actually committed as alleged. It is a cardinal principle of law that any doubt as to the guilt of an accused person entitles him/her to an acquittal. In the celebrated decision of the House of Lords in ***Woolmington v DPP*** [1935] UKHL 1, Viscount Sankey stating the judgment for a unanimous Court, made his famous "Golden thread" speech:

> *"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

In the instant appeal, the failure by the prosecution to adduce evidence to prove that the appellant defiled the victim on 2/6/2011 creates reasonable doubt in our minds which we resolve in favour of the appellant. We believe that if the learned trial Judge had properly directed her mind to the indictment and the above pieces of evidence adduced to prove the offence, she would have also had some reasonable doubt and thereby acquitted the

appellant. On this aspect of ground 1 alone this appeal would succeed and we would be inclined to quash the appellant's conviction and set aside the sentence.

Be that as it may, we will still proceed to consider the other arguments on ground 1 and the other grounds of the appeal. It was contended for the appellant that there were material contradictions in the evidence of PW1 and PW2 on the one hand and that of PW3 on the other hand regarding the injuries sustained by the victim.

In evaluating the evidence to prove that a sexual act was performed on the victim, the learned trial Judge found as follows at page 5 of her judgment;

> *"For this ingredient, the court can rely on evidence of a person to whom the victim narrated her ordeal immediately after the incident and who did a physical examination of her private parts plus medical evidence. This was provided by PW1, PW2 and PW3. PW1 took steps to examine the victim and so did PW2 immediately she learnt of the incident. Their findings were corroborated by PW3 a qualified medical personnel who found signs of sexual intercourse having been performed on the victim (P. Exhibit1). PW3's findings indicated that the injuries he saw were caused by sexual penetration. The evidence of all the prosecution witnesses corroborates each other on the fact of sexual penetration."*

First of all, with all due respect to the learned trial Judge, no finding was made by PW3 that the injuries he saw on the victim were caused by sexual penetration. Secondly, we note from the above finding that the learned trial Judge made no mention of the inconsistencies and contradictions in the witnesses' evidence. We shall therefore, evaluate the contradictory evidence of the prosecution to determine whether or not they are major and go to the root of the case.

The law regarding inconsistencies and contradictions was stated in the case of ***Oketch David vs Uganda, SCCA No. 24/2001*** in which the Supreme Court observed that a contradiction or inconsistency in the prosecution case which is major and goes to the root of the case should

be resolved in favor of the accused, but where it is minor and was not a deliberate lie intended to deceive the court, it should be ignored. ***(Also see; Alfred Tajar vs Uganda (supra))***

Regarding the injuries sustained by the victim, we note from the evidence of PW1, PW2 and PW3 that there were some inconsistencies as contended by counsel for the appellant. It was PW1's testimony that when she examined the victim on 3/6/2011 she saw injuries on her private parts. PW2, stated that when she examined the victim's private parts on 4/6/2011 she also saw some injuries which were almost healing and they seemed to have taken around 1 week old. In his medical examination report (Exhibit PEX No. 1), PW3 stated that he found no injuries on the victim's private parts but that instead the victim sustained injuries on the thigh. However, in his evidence on oath, he stated that there was scarring and reddening on the victim's private parts which was about 4 days old. It is therefore true that there were some inconsistencies in the evidence of PW1 and PW2 who claimed to have found injuries on the victim's private parts on the one hand and that of PW3 whose medical report indicated that there were no injuries on the victim's private parts.

In sexual offences, the ingredients to be proved by the prosecution are that; the victim was below 14 years of age; a sexual act was performed on the victim; and it is the accused who performed the sexual act on the victim. In this appeal the victim's age is not contested. What is contested are the fact that sexual act has been performed on the victim and the appellant's participation. Whether or not a sexual act has been performed on a victim is proved by determining whether there is penetration however slight. In ***Adamu Mubiru vs Uganda; CACA No. 47 of 1997*** (unreported), the Court held that however slight the penetration may be, it will suffice to sustain a conviction for the offence of defilement.

In the instant appeal, it can be deduced from the evidence of PW1 and PW2 that their purpose of checking the victim's private parts was to confirm whether the victim had been defiled and injuries on her private to a lay person would be proof of the same. Indeed they said they found

injuries and we believe this motivated PW1 to inform PW2 who reported the offence to the police.

As for PW3 who is a medical personnel and well versed with what is required to prove defilement, his purpose of examining the victim was to prove that there was penetration of the victim's vagina. However, we must observe that if indeed there were some injuries on the victim's private parts, PW3 who examined the victim only a day after PW1 and 2 days after PW2 had done so would have seen those injuries and included it in his report. We accept counsel for the appellant's contention that the oral evidence of PW3 that there was scarring and reddening at the entrance of the victim's vagina was an afterthought since he had not included it in his report. If indeed PW3 had observed any injuries or even the scarring and reddening at the entrance of the victim's vagina which he testified about on oath, he would have included it in his medical report. It is curious to note that PW3 examined the victim on 5/6/2011 and testified in court on 21/10/2014, which was after a period of about 3 years and 4 months and yet he could remember to talk of the scarring and reddening as though he had carried out the examination in the recent past.

For the above reasons, we find that the inconsistencies regarding the injuries on the victim's private parts as contained in the evidence of PW1 and PW2 against that of PW3 were major and cast doubt on the evidence of PW1 and PW2, thus going to the root of the case. Therefore, it should not have been ignored since they affect the material aspect of the evidence. This finding is informed by the purpose of PW1 and PW2 examining the victim which, in our minds, was to prove that a sexual act had been performed on her and as such, their findings that there were some injuries on the victim's private parts was a material evidence which the learned trial Judge considered to corroborate the medical evidence and thereby concluded that a sexual act had been performed on the victim. We respectfully, fault the learned trial Judge for ignoring these major contradictions.

For this reason, this aspect of ground 1 of the appeal must also succeed and on the whole ground 1 of the appeal is allowed.

On ground 2 of this appeal, the appellant contends that his alibi was wrongly rejected by the learned trial Judge. In all criminal cases, the burden of proof lies on the prosecution to prove each of the elements of the offence of which the accused is charged beyond reasonable doubt. This burden remains the same even where the appellant sets up the defence of alibi. In ***Sekitoleko vs Uganda, [1967] 1 EA 531***, it was held that:

> *"...if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving the defence; and that the burden of proving his guilt remains throughout on the prosecution..."*

In the instant case we note that the appellant denied defiling the victim and he put forward a defence of alibi. He stated that on the material day, he was at Iceme Trading Centre away from the scene of crime at Atong-Lela village. It was his evidence that he left his home where the scene of crime was on 1/6/2011 to construct a certain woman's house and he stayed there for 3 days. DW2 testified that the appellant left for Kona Iceme on 2/6/2011. As already stated earlier, the learned trial Judge summarily rejected the evidence of DW2 on the grounds that she was not credible as she could not even tell her age and that she only narrated what she was told. It was unfortunate that the learned trial Judge used the failure of DW2 to tell her age to conclude that she was not a credible witness. It is also interesting to note that PW1, PW2 and PW3 all testified about what the victim told them but the learned trial Judge dismissed the evidence of DW2 as being hearsay and yet she found those of PW1 and PW2 admissible and she believed them.

We must point out that the learned trial Judge did not evaluate the appellant's own evidence before believing the prosecution evidence. All she did was to mention what the appellant stated in his defence and what DW2 stated. After summarily rejecting the evidence of DW2 for the reasons stated above, she did not say anything about the appellant's own evidence of

alibi. The learned trial Judge later merely mentioned that she had carefully heard all the evidence in respect of the ingredient of participation of the appellant in the offence and that the law casts upon the prosecution the burden of adducing credible evidence placing the accused at the scene of the crime at the time. She pointed out that in this case, the ingredient on participation of the appellant clearly rested on circumstantial evidence and collateral matters especially as the victim was not in court to testify. She then stated that the position of the law is that the court may convict the accused if absolutely satisfied that he committed the offence even if the victim is not called to court or in a position to testify.

The learned trial Judge proceeded to discuss the law on circumstantial evidence citing a number of cases and made a finding as follows:

> *"Having cautioned myself on the position of the law above, it is clear that all evidence of the prosecution witnesses connects the accused to the commission of this crime. DW1 the accused person is clearly implicated by PW1 and PW2 who were the first people to talk to the victim immediately after learning of the commission of the offence. There is also ample evidence to prove that the victim AM lived in the same compound with the accused, just a few meters away, she was at the scene of crime at the material time the offence was committed. That is at the home of the accused person. While the accused in his alibi stated that he went away on the 1st June 2011, the victim told PW2 her grandmother that he defiled her on 26th. The fact that she informed PW1 and PW2 who her assailant was immediately and never pointed at anyone else coupled with the fact that she never left that home in that period cannot be ignored. The fact that she had been sexually molested was proved by PW1 and PW2 and PW3. The injuries discovered in her private parts were between 4 days to 1 week old by the time she was examined. It is also not in dispute that the victim knew the accused very well before the incidence and she had lived in his home as a niece and she named him immediately after the incident to PW1 and PW2."*

The learned trial Judge also discussed the law on identification evidence and after stating that she had cautioned herself and the assessors that in sexual offences the evidence of the victim is the best evidence on the issue of penetration and even identification, she concluded that she was satisfied that both PW1 and PW2 had no reason to frame the appellant. She believed

that both of them were telling the truth and concluded that the prosecution had proved the ingredient of the appellant's participation beyond reasonable doubt.

It is clear from the record that the learned trial Judge did not comply with the principle on how to deal with the evidence where an accused puts forward a defence of alibi. In ***Bogere Moses and anor vs Uganda, SCCA No. 1 of 1997 (unreported)***, the Supreme Court observed that an alibi is deemed to have been disproved in the presence of evidence placing the accused at the scene of crime. As to what amounts to placing the accused at the scene of crime, the Court held as follows:

> *"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of 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 person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially giving reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable.*" [Emphasis added].

We respectfully find that the learned trial Judge misdirected herself when she failed to evaluate both versions of the evidence judicially and to give reasons why she accepted the version of the prosecution and not that of the defence. This misdirection in our view was prejudicial to the appellant and as such occasioned a failure of justice. For that reason, ground 2 of the appeal must also succeed.

Regarding ground 3, counsel for the appellant faulted the learned trial Judge for convicting the appellant based on unsatisfactory circumstantial evidence. He contended that while the

learned trial Judge was alive to the law on circumstantial evidence, she misapplied the law to the evidence of the case.

As we have earlier noted, the evidence adduced by the prosecution was what the victim told PW1 and PW2 and the victim herself was not brought to court to testify. This therefore implies that the appellant's conviction was based on circumstantial evidence which was corroborated by the medical evidence by PW3.

The law on circumstantial evidence was clearly set out by the East African Court of Appeal in ***Simon Musoke vs R, [1957] EA 715,*** where it held that;-

> *"In a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

The instances where courts have accepted reports made by victims of sexual offences to a 3rd party as admissible in evidence are numerous. One of such instances is where testimonies by 3rd parties are in corroboration of the victim's evidence that she was defiled. In the Supreme Court case of ***Livingstone Sewanyana vs Uganda, Criminal Appeal No. 19 of 2006***, the victim was the biological daughter of the appellant. Her mother had got married to another man before the victim was born. She was born in January 1980 and she lived with her grandmother until she was 7 years old when she went to live with her father the appellant in that case. In 1993 she was aged 13 years and her father started sexually molesting her. He routinely defiled her until 1994 when the victim conceived and her father took her for an abortion. She confided in her two friends at school about what was going on between her and her father. He had threatened her with death if she ever let anyone know about it. The two friends, without the victim's knowledge, told the senior teacher called Ireta Mary Rose, PW3 in that case. The teacher talked to the victim's father and advised him to let the victim stay with her biological mother for the sake of her academic performance but he refused that

advice and continued with his incestuous activity with the victim. The victim conceived again in 1998 and 2000 but on each occasion her father arranged for her abortion.

There were other intervening factors which led the victim's father and the victim to appear before PW4, Pastor Fred Watente to settle the dispute between them. The following day the victim went back to the Pastor alone and shared with him all her experiences. The Pastor advised her to report the matter to Police and she obliged. The father was arrested and indicted for the offence of defilement and incest. He was prosecuted, convicted and sentenced to 18 years imprisonment on count 1 and 19½ years imprisonment on count 2.

On appeal, this Court dismissed his appeal and on a 2nd appeal, the Supreme Court found that such a victim's report was sufficient evidence that corroborated commission of the sexual offence. It stated thus;

> *"We accept the submissions of the learned Senior Principal State Attorney that the reports which PW1 made to her teacher Ireta Mary Rose, PW3, and Fred Wantente, PW4,* ***corroborated her evidence that the appellant routinely had sexually abused her****...*
>
> *That not-withstanding we are of the considered view that even if such corroboration was not there, as the Court of Appeal held, it is the quality and not the quantity of evidence that matters and the learned trial judge was aware of that..."*

The facts in the instant appeal are distinguishable from those in ***Livingstone Sewanyana vs Uganda (supra)*** in so far as the victim in the above case testified in court and both PW3 and PW4 to whom she made the report gave evidence in corroboration of her testimony whereas in the instant case, much as the victim is alleged to have made a report to PW1 and PW2, she did not testify in court to confirm it and therefore PW1 and PW2's evidence was not in corroboration of her testimony.

The other instance where courts have also accepted reports made by victims to 3rd parties in the absence of the victim's evidence is when the accusation is made contemporaneously with

the offence and therefore, is part of *res gestae* and thus making it an exception to the hearsay rule as was held in ***Omuroni vs Uganda [2002] 2 EA 531.***

We have found it imperative to reproduce the facts and decision in ***Omuroni vs Uganda (supra)*** in details so as to compare and contrast them with the facts of the instant case which are already set out in the background to this appeal even as we use the principle applied in that case for purposes of distinguishing it from the present one.

The appellant in that case, Omuroni Francis, and one Mohamed Okwir (PW1) were lake fishermen. They both lived at Kampala landing site, Swagire Village on the shores of Lake Kyoga where both were engaged in commercial fishing. Okwir had a daughter called Ecakuna Maliamu (the victim) who was living with him on 4 July 1995 having come, from the village where she ordinarily stayed with her mother, to collect fish to take home. On that day, Okwir left the victim at his residence and went to the lake together with the appellant for fishing. After fishing, Okwir went to a home of one Omuroni (not related to the appellant) where he drunk local brew called malwa till late. He returned home at night at about 10:00pm. On reaching home, he called out the name of the victim, ordering her to open for him to enter. She "did not answer quickly". Instead Okwir heard some movements inside the house. He then became suspicious and called a neighbour, Teddy Achom. He thereafter forced the door open. He entered the house, while continuing to call the daughter. She responded saying that the appellant "came and had sexual intercourse with her".

Okwir got his torch and shone it whereupon he sighted the appellant lying on the floor. Okwir challenged the appellant to respond to what the victim had reported. Instead of answering, the appellant simply got up and fled from the house. Okwir pursued the appellant, arrested him and took him back to the house. He subsequently took him, with the victim, to Augustine Etapu (PW3) LC1 chairman of Swagire, to whom he made a complaint. Etapu thought it was too late to go into the matter and he detained the appellant and the victim at his home in separate rooms till the next morning. In the morning of 5 July 1995, Teddy Ochom, (PW2), a

retired medical nurse and a Soroti Municipality councilor, examined the victim and observed sperms and blood stains around her vagina. She also observed that the victim "could not open or close her legs saying it was painful".

Subsequently, on 7 July 1995, the victim was examined by Dr Opio who observed that the victim was aged about 10 years and that her hymen had been ruptured in less than a week prior to the examination. He also noticed inflammation of her private parts. The doctor attributed the rapture and the inflammation to forced sexual intercourse involving penetration of the vagina. The appellant was taken to the police and was eventually charged with and prosecuted for defilement of the victim.

In his sworn evidence in defence at the trial, the appellant denied the offence but he agreed that he carried on fishing business with Okwir living at Kampala landing site, in Swagire Village. He claimed that he and Okwir lived in one and the same room. He further claimed that he had given Okwir a loan of KShs 60 000 which the latter failed to repay and when the Appellant demanded for it, Okwir planted this case on him. He asserted that the victim was a grown up girl, and was not a daughter of Okwir, but a step daughter, being a daughter of Okwir's woman friend. He claimed that on the evening of 4 July 1995, he was with Okwir at a drinking place. He admitted being arrested that very evening on allegation that he defiled the victim.

At the trial, only the evidence of PW1, the father of the victim and PW2, a retired medical nurse who had examined the victim a day after the alleged act was taken. The victim was not brought to testify nor was the doctor who had subsequently examined the victim after PW2 and prepared a medical report. Nevertheless, the trial court convicted the appellant and sentenced him to imprisonment for ten years. The appellant's appeal to the Court of Appeal was dismissed. A further appeal to the Supreme Court was based on two grounds namely, that the Court of Appeal erred in upholding a conviction on insufficient and false evidence, and that the Court of Appeal erred when it failed to draw adverse inference from failure by the

prosecution to produce in court the victim, the doctor who examined her and her mother, to testify.

The Supreme Court in dismissing the appeal held as follows;

> *"The evidence was circumstantial as the victim who would have given direct evidence as the only eye witness, did not testify, but nonetheless constituted sufficient proof of the offence of which the Appellant was convicted, as it was amply corroborated by independent evidence.*
>
> *Although the victim did not testify, PW1's evidence that the victim accused the Appellant of having had sexual intercourse with her, was admissible as the accusation was made contemporaneously with the offence and therefore, was part of res gestae and is an exception to the hearsay rule."*

This Supreme Court found that the circumstantial evidence the trial Court relied on consisted of four components, namely;

1. *Okwir's evidence that on arrival at his house, the scene of the crime, he called out the victim to open, but, though he could hear movements inside, there was no response until he forced the door open and found the appellant inside lying on the floor.*
2. *Okwir's evidence that when he entered, the victim accused the appellant of having had sexual intercourse with her. It was observed by the Supreme Court that although the victim did not testify, this piece of evidence was admissible as the accusation was made contemporaneously with the offence and therefore, was part of res gestae and is an exception to the hearsay rule.*
3. *The evidence of Teddy Ochom who examined the victim in the morning after the incident and concluded from what she observed that the girl had been defiled and the medical report in Exhibit PI in which Dr Opio who examined the girl three days after the incident, found on her injuries which led him to the opinion that she had had forced sexual intercourse within the week prior to the examination.*
4. *A combination of evidence from Okwir and Augustino Etapu PW3, coupled with some from the appellant. Okwir testified that when he asked the appellant to respond to the victim's accusation that he had defiled her, the appellant kept quiet, and immediately took to his heels. In his evidence at the trial the appellant glossed over the incident at Okwir's residence. While he admitted that during the material night, he was present at Okwir's residence, and was arrested on allegation that he had defiled Ecakuna, he explained the said presence on a claim that he shared the residence with Okwir,*

but made no comment about the victim's accusation, and his reaction to it, as testified by Okwir. The trial court disbelieved the claim that he shared residence with Okwir, rightly in our view, having regard to the evidence of Etapu the LC1 chairman, that the two were neighbours but lived in separate residences.

The Supreme Court concluded that it was satisfied that the above four components of the circumstantial evidence proved beyond reasonable doubt that the appellant in that case defiled the victim, and that the courts below did not err in so holding.

The circumstantial evidence in the case of ***Omuroni vs Uganda (supra)*** was so compelling as compared to the present case. The appellant was found at the scene of crime by the victim's father, PW1 and he fled the scene. He was pursued by PW1, arrested and taken to PW3 immediately. PW2, a neighbor who was called by PW1 on the night of the incident examined the victim in the morning and observed that she had been defiled. The evidence of PW2 and PW3 and the medical report were independent cogent which corroborated the evidence of PW1.

Unlike in the case of ***Omuroni vs Uganda (supra)***, where the accusation by the victim to the father was made contemporaneously with the offence and there were other components of circumstantial evidence that confirmed it, the alleged accusation by the victim in the instant case was not supported by any other circumstantial evidence.

We have also considered the decision in ***Badru Mwindu vs Uganda (supra)*** which the respondent's counsel relied on to support his argument that even if the victim and the doctor who examines her do not testify the evidence of the people to whom the victim reports that she was defiled and names the perpetuator is sufficient to sustain a conviction. In that case, the victim was defiled by the appellant who was a boda boda man hired by her mother to take her and her sister to their respective schools in the morning. Although the appellant was not expected to collect the victim and her sister from school, he went to the office of the mother of the victim later that morning and offered to collect them and he was allowed to do so. The

appellant then went first went to the victim's school, picked her, took her to his home and defiled her. He then went to her sister's school, collected her and took the two girls home.

The appellant was later arrested, tried, convicted and sentenced to 12 years imprisonment. At the trial, neither the victim nor the doctor who examined her testified in court. The appellant appealed to this Court but his appeal was unsuccessful. He filed a second appeal to the Supreme Court on a single ground that; "The lower court erred in law and in fact in confirming the conviction of the appellant on insufficient evidence". Pursuant to the requirement of the law that a 2nd appeal should be grounded on law, the ground of appeal was later amended to challenge only points of law.

The Supreme Court while dismissing the appellant's appeal held;

> *"We found no merit in any of the submissions made for the appellant. Both the High Court and the first appellate court dealt with all the issues raised before us, except the issue of matching semen which was made without any authority to support the evidential nature of such an examination. In dealing with the other issues, the Court of Appeal said:*
>
> *"It is clear to us from the record that the prosecution case rested entirely on circumstantial evidence. The victim did not testify as she was out of the country with her father for treatment following that attack on her. The point raised in this Appeal is that in the absence of the victim's evidence, there was no evidence which connects the appellant with the commission of the offence. This raises the question whether the circumstantial evidence relied on was enough to support the trial Judge's conclusion.*
>
> *The court is of course, bound to re-examine exhaustively all the evidence on record in order to determine the question whether the evidence is enough to sustain a conviction. See Okeno v R (1972) E.A. 32 at pase 36.*
>
> *In our view, the circumstantial evidence amply justified the trial Judge's conclusion that the appellant was the person who defiled the victim.* The circumstantial evidence was;
>
> 1. that the appellant was hired and he took the victim and her sister to school.
> 2. that though he was not supposed to collect the victim from school, the appellant later approached the mother of the victim and offered to pick the victim from school. He was allowed to do so.
> 3. that the appellant collected the victim from school at 12.00 noon. He himself admitted that in his sworn evidence in his defence.

4. that the appellant brought the victim home when she was in a distress disposition - she was actually crying.
5. that the victim immediately complained to the house-girl (PW 4) who received her from the appellant against the appellant, that the boda-boda man had ",sat on her".
6. that when the house-girl confronted him as to what had happened to the child, the appellant replied merely that the victim was only stubborn and that he had found her even crying in school.
7. that the house-girl (PW 4) soon confirmed the victim's complaint of pain in her lower abdomen when she discovered that the victim's knickers were blood stained.
8. that the house-girl (PW 4) later identified the appellant in court as the boda- boda man against whom the victim had complained.
9. that the appellant later in his sworn evidence in his defence gave different explanation regarding the cause of the distressed disposition of the victim. He explained that the victim was crying because she had slipped from the carrier of the bicycle though that he had grabbed her legs and prevented her from falling down."

The Supreme Court then concluded thus;

"We have no doubt in our minds that the first appellate court on a re-evaluation of the evidence was satisfied that the offence had been proved beyond reasonable doubt. Not a single item of the evidence so evaluated has been faulted before us.

We observe that there are two pieces of evidence which the trial court relied on but were not mentioned by the Court of Appeal. First there was the evidence of James Zikusoka (PW 2) to the effect that on examination of Gill on the day of the attack, he found spermatozoa and puss cells in her vagina. The second piece of evidence is that of Gill's mother, Winfred Isabirye (PW 4), to the effect that on the day of the assault Gill violently resisted examination of her private parts by a doctor Mpata because of pain. It is unfortunate that this doctor was not called to testify but Winfred's evidence regarding the examination which she witnessed was not in any way discredited. Both these pieces of evidence further support the case against the appellant not only that the girl was defiled but also, in view of the fact that at the material time she was in his care, that it was he who defiled her. In our view there was more than ample evidence to justify the conviction."

It is clear from the above decision ***in Badru Mwindu vs Uganda (supra)*** that just like in the case of ***Omuroni vs Uganda (supra)***, the Supreme Court upheld the appellant's conviction based on the evidence of witnesses to whom the victim had accused the appellant of defiling her and other ample circumstantial evidence that the prosecution adduced at the trial, notwithstanding the fact that in both cases, the respective victims and the doctors who examined them had not testified.

We also note that the evidence of report made to the witnesses in all the above cited cases of ***Livingstone Sewanyana vs Uganda (supra), Omuroni vs Uganda (supra)*** and ***Badru Mwindu vs Uganda (supra)*** were admitted and relied upon. There are many other authorities where a report made by victims of defilement have been held to fall under the exceptions to the general rule on hearsay evidence and admissible. This is because defilement cases are unique in the sense that the victims are sometimes persons who are not able to testify by reason of age or mental disability. If the strict rule on hearsay evidence was to be applied, then credible witnesses to whom the victims accuse the perpetrators would be locked out and the heinous crimes committed on such unfortunate victims would go unpunished.

Applying the principle in the above cases to the instant appeal, the evidence of PW1 and PW2 on the report the victim made to them would be admissible and could be relied upon if it is corroborated by ample circumstantial evidence that implicates the appellant in the commission of the offence. The evidence of PW3 together with the medical report he made only confirm that sexual act was performed on the victim but not participation of the appellant. We have not found any other circumstantial evidence on record that pointed to the guilt of the appellant.

In the circumstances, we find that the evidence adduced by the prosecution could not sustain a conviction. We are therefore unable to agree with the learned trial Judge's conclusion that the prosecution had proved the ingredient of the appellant's participation beyond reasonable doubt.

This ground therefore succeeds.

Having answered grounds 1, 2 and 3 in the affirmative, we find no reason to resolve the last ground as these grounds dispose of the appeal.

In the premises, we quash the appellant's conviction and set aside his sentence. We accordingly, order for the immediate release of the appellant from prison unless he is being held on other lawful charges.

We so order.

Dated at **Lira**.....18th.....day of .....May.....2021

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Elizabeth Musoke

JUSTICE OF APPEAL

.....

Hellen Obura

JUSTICE OF APPEAL

.....

Remmy Kasule

Ag. JUSTICE OF APPEAL