THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: B Cheborion, JA, C. Gashirabake, JA, O. Kihika, JA.)

CRIMINAL APPEAL NO. 0556 OF 2014

(Arising from Criminal Session No. HCT-00-CR-CS-170/2013)

BETWEEN

OBOTH OTHIENO YOFESI .....APPELLANT

AND

UGANDA..... RESPONDENT

(Appeal from the Judgment of the High Court of Uganda Holden at Moroto, by Henry I Kawesa, J. delivered on 11th June 2014)

JUDGMENT OF COURT

Introduction

1.] The appellant was charged with one count of aggravated defilement contrary to sections 129 (3) and (4) of the Penal Code Act.

2.] The facts are that in the month of February 2012 the victim AH, was going to her sister's home in Ngeta "B" Lyolwa, Tororo district, she stopped near a grinding mill as she waited for the sister. The appellant approached the victim and offered to take her to the sister. The appellant walked with the victim up to a swamp called Poyawo and then forcefully performed a sexual act on the victim who was then aged 11 years. The victim ran to PW3 and PW4's home for assistance and narrated her ordeal. Meanwhile, the victim was bleeding from her private parts and they gave her food and a bed since it was at night. The victim described the appellant and he was arrested prosecuted, convicted, and sentenced to 20 years' imprisonment.

3.] The appellant being aggrieved with the decision of the High Court lodged an appeal in this Court. The appeal is premised on three grounds set out in the Memorandum of Appeal as follows;

1. *The learned trial Judge erred in law and fact when he convicted the appellant on the unreliable evidence of a single identifying witness.*
2. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on the Court record.*
3. *The learned trial Judge erred when he sentenced the appellant to an illegal sentence without taking into account the pre-trial remand period.*

Representation

4.] At the hearing of the appeal, the appellant was represented by Mr. Eddie Nangulu. The respondent was represented by Ms. Caroline Marion Acio, Chief State Attorney.

Ground one

The learned trial Judge erred in law and fact when he convicted the appellant on the unreliable evidence of a single identifying witness.

Submissions for the appellant

5.] According to counsel for the appellant, the other ingredients of the offence of aggravated defilement are not in dispute, what is in dispute is the participation of the appellant. It was submitted that the appellant can only be convicted on the strength of the prosecution case and not the weakness of his defence. (See, **Sekitoleko vs. Uganda, SCCA No.33 of 2014**)

6.] It was submitted that the trial Judge convicted the appellants purely upon a single identifying witness while reviewing the evidence of the single

identifying witness, the trial Judge referred to **Abdullah Nabulere vs. Uganda, 1979 HCB 17, Abudalla Bin Wendo & Another vs. R, (1953) 20, EACA 166 and Wasajja vs. Uganda, [1975] E. A 181,** which counsel for the appellant cited in his submissions.

7.] In his view, counsel for the appellant, argued that the evidence was not sufficient to implicate the appellant of aggravated defilement. The circumstances were not favorable for proper identification, in that the victim was not familiar with the appellant. He submitted that the victim was not able to identify her assailant. That according to the record of proceedings, the victim stated that she identified the appellant after he had been shown to her.

8.] Counsel further argued that according to the evidence of PW2, when they asked the victim to identify the appellant from a crowd that was at his compound, she said there were none of them. This was corroborated by the evidence of PW3 who testified that when the victim was asked to identify the appellant out of the crowd, she said he was not among them yet, he was there. He further submitted that PW5 went against the rules of the identification parade. Counsel cited **Sgt. Baluku Samuel & anor vs. Uganda SCCA 21 OF 2014,** which laid down the procedure of conducting an identification parade, which the police allegedly faulted.

9.] The appellant denied having defiled the victim. It was submitted that the prosecution failed to discharge its burden of proof to the required standard of proof and having so failed, counsel insisted that the learned trial Judge erred in law and fact when he convicted the appellant without sufficient evidence on the Court record.

Submissions for the respondent.

10.] The respondent submitted that the trial Judge correctly evaluated the evidence on record, applied the law relating to a single identifying witness, and arrived at a correct/proper decision. Counsel submitted that counsel for the appellant failed to apply the law to the facts. Counsel cited **Abdulla Bin Wendo & Anor vs. R (1953)20 EACA 166 and Abdalla Nabulere & Anor vs. Uganda [1970] HCB 77.**

11.] It was argued that the conditions were favourable for proper identification. Counsel cited the victim's testimony testifying that;

> *" .... I know the accused. I was going to my sister's place. I stopped at the grinding mill waiting for my sister. It was 6:00 pm..... he came and told me he knew my sister's place and he could take me there. Accused moved with me up to the swamp at Payawo then he started struggling with me. He boxed my neck and threatened to stab me with a knife..... We struggled for a long, he overpowered me and raped me. He had sexual intercourse with me..... I told the Police that I knew the accused. The accused was brought, he was the very person having the very clothes he put on. I described him as a man with dark skin, with a red hut, an operator of a grinding mill. He was the one operating."*

12.] It was submitted that from the victim's testimony, all the conditions that favour positive identification existed. The victim met the appellant at 6:00 p.m. when there was still sufficient light for proper identification, the two interacted from a very close range and for a very long time. The conditions enabled the victim to identify the appellant both by appearance and dress code.

13.] Additionally, it was submitted that there was corroborative evidence to pin the appellant. Counsel cited **Rwalinda John vs. Uganda, SCCA, No. 03**

of 2015, which defined corroboration as independent evidence, counsel submitted that PW4's testimony corroborated the evidence of the victim. PW4 testified and stated that;

> *"I know the accused we were operating the grinding mill. We saw a child who came, accused gave her to sit. The accused told the child where you are going. They talked. the child said, am lost I failed to get on the road to my home and my sister told me to wait at Mailo 10. That she would get her there. Accused told her to sit, at about 6:00 pm when we closed the mill. I stopped /closed. I left them there and I went and I closed the mill. I left them there and I went to my place called Centre Pole. This was at 6:00."*

14.] This evidence corroborates the victim's testimony regarding meeting the appellant at the grinding mill. This also confirms that the appellant and the victim met at the grinding mill at around 6:00 p.m. It was submitted that the evidence of PW3 and PW6 offered corroborative evidence as well.

15.] On the issue of the identification parade, counsel for the respondent submitted that it was not necessary since the appellant was clearly identified by the victim. Counsel submitted that the case of **Samuel and another vs. Uganda, (*Supra*)**cited by counsel for the appellant was not applicable in the circumstances.

Consideration of Court

1.] According to **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** and **Selle & another v Associated Motor Boat Co. Ltd.& others, (1968) E. A 123,** This Appellate Court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to

fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity to see and hear the witnesses firsthand. This duty was stated in **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**. It was held that a first appellate Court has the duty to review the evidence of the case and reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on the manner and demeanor of the appellate, the Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanor, which may show whether a statement is credible or not which may warrant a court differing from the Judge even on a question of fact turning on the credibility of the witness which the appellate Court has not seen. **See Pandya vs. R. (1957) E.A. 336.**

16.] As we re-evaluate the evidence on record we bear in mind the burden of proof and standard of proof required in all Criminal cases. The burden of proof is on the prosecution to prove all the ingredients of the offence. The burden never shifts except in some exceptional cases set down by law. **(See: Woolmington versus DPP [1935] AC 322.)** This is provided for in the Constitution under Article 28(3) which provides that an accused person is presumed innocent until proven guilty or otherwise pleads guilty. It is not for the accused to prove his innocence; he only needs to call evidence that may raise doubt about his guilt in the mind of the court. Any doubt in the prosecution case has to be resolved in favour of the accused person (See, **Obwalatum Francis vs. Uganda, Supreme Court Criminal Appeal No.**

030 of 2015). The prosecution must prove all the ingredients of the offence. See **Sekitoleko vs. Uganda [1967] E.A 531**.

17.] **Section 101 (2) of the Evidence Act** provides that;

"When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

18.] Additionally, **Section 103 of the Evidence Act** that;

"The burden of proof as to any particular fact lies on that person who wishes the Court to believe its existence unless it is provided by law that the proof of that fact lies on any particular person."

19.] The prosecution evidence should be of such standard as to leave no other logical explanation to be derived apart from the fact that the accused committed the offence. It was further held that the standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent **(See: Miller versus Minister of Pensions [1947] 2 ALL E.R. 372)**

20.] Both counsel for the appellant and the respondent rightly stated the law relating to single identifying witnesses. As rightly stated, the Court can convict on such evidence after warning itself and the assessors of the special need for caution before convicting based on the reliance on the correctness of the identification. The reason for the special need for caution is that there is a possibility that the witness might be mistaken. **(See: Christopher Bagonza versus Uganda, Crim. Appeal No. 25 of 1997** and **Abdala Nabulere & Another versus Uganda, Crim. Appeal No. 9 of 1978).** In **John Katuramu versus Uganda, Criminal Appeal No. 2 of 1998** it was held that;

"The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should warn itself of the danger of the possibility of mistaken identity in such cases. This is particularly important where there are factors that present

difficulties for identification at the material time. The court must in every such case examine the testimony of the single witness with the greatest care and where possible look for corroborating or other supportive evidence. If after warning itself and scrutinizing the evidence the court finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity."

21.] The test of correct identification was explicitly outlined in **Abdala Nabulere & another versus Uganda,** 1979 HCB 77, as follows;

"The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting, and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced, the poorer the quality the greater the danger."

22.] In order to prove the participation of the appellant the prosecution led evidence of different witnesses. PW1 testified that on the 11th of February 2012, when she was going to her sister, Acheing Baker, she stopped at the grinding mill. While there, the appellant came and asked her what she was doing around. She explained herself and the appellant promised to take her to the sister's place because he knew the place. This fact was corroborated by PW4, who testified that on that day he was operating the mill, he saw a young girl who came to the grinding mill. He said the appellant gave the girl a chair to sit on. PW4, further testified that when it clocked 6 p.m., he shut down the grinding mill and left the appellant with the victim. This evidence passes the test of proper identification. It was 6 p.m. still broad daylight, they had ample time to talk at close range. The space looked safe space for the girl not to worry about any threat of danger. This free environment enabled her to identify the appellant.

23.] Furthermore, the description of the place and the appellant was more authentic so as to put the appellant at the scene of the crime. There was only one grinding mill at mile 10. The grinding mill had two men, but the appellant was described as "*tall a bit, darkish, he had a stripped /checked cloth ..... with a red cap.*" He perfectly fit the said description since the victim had the opportunity to see both of them and knew that her assailant was taller than PW4. This was corroborated by PW5, who testified that when they went to the grinding mill, there were only two men, one short and the other tall. The tall happened to be the appellant. The red cap and sweater were recovered from the grinding mill where the appellant works.

24.] Considering the evidence as a whole there was no mistaken identity. The appellant and the victim had time to interact before the incident happened. They walked 500 meters to the swamp. The victim trusted the appellant would take her to her sister and all this time was enough to have proper identification. Additionally, there was corroboration from PW4, PW5 and PW6. The prosecution evidence was consistent throughout the hearing. The failure to conduct a parade was not fatal because an identification parade is not necessary where the conditions favoring good identification exist like in this case.

25.] We agree with the trial Judge that the conspiracy theory could not stand considering the evidence on record. The appellant had not worked at the grinding mill for a long time for him to allege that there was a bad working relationship between him, PW4, and the boss as well. The corroborative evidence was too strong to disregard the appellant's guilt. It leaves no doubt in our minds that the appellant was the assailant in this case. There was therefore proper identification by the victim.

26.] This ground fails.

Ground 2

The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on the Court record.

27.] This ground was abandoned.

Ground 3

The learned trial Judge erred when he sentenced the appellant to an illegal sentence without taking into account the pre-trial remand period.

Submissions for the appellant

28.] It was submitted that according to Article 23(8) of the Constitution while sentencing the trial Judge must take into consideration the time spent on remand. Counsel cited **Attorney General vs. Suzan Kigula & others Constitutional Petition Appeal No. 3 of 2006** and **Abaasa Johnson and Anor vs. Uganda, Supreme Court Criminal Appeal No. 54 of 2016**, in the latter case the Supreme Court held that the omission to consider the pretrial remand is fatal to the extent it renders the sentence illegal.

29.] It was submitted that during the sentencing, it was highlighted that the appellant had been on remand since 2012 but the trial Judge did not take this into consideration. This was contrary to principle 15 of the sentencing guidelines. It was further argued that according to the case of **Kakeeto Joseph vs. Uganda CACA No. 370 of 2019**, it is a requirement for the Court to arithmetically deduct the time spent on remand. It is not enough for the trial Judge to acknowledge the time spent on remand.

Submissions for the respondent

30.] Counsel for the respondent conceded as far as the learned trial Judge did not take into consideration the period the appellant spent on remand as dictated by Article 23 (8) of the Constitution of the Republic of Uganda, 1995.

31.] It was also submitted that the sentencing regime then only required the trial Judge to take into consideration the period spent on remand and no arithmetic deduction was required as stated in **Rwabugande Moses VS. Uganda, Criminal Appeal No.25 of 2014.**

32.] Counsel prayed that this Court exercises its power vested in it by section 11 of the Judicature Act to enhance the sentence to 30 years.

Consideration of Court

33.] The Supreme Court has laid down the principles upon which an appellate Court should interfere with the sentencing discretion of the trial Court, in **Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995,** the Court relied on **R vs. Haviland (1983) 5 Cr. App. R(s) 109** and held that:

> *"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. MOHAMEDALI JAMAL (1948) 15 E.A.C.A 126."*

34.] In **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001** it was held:

> *"The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence."*

35.] While sentencing the trial Judge held that;

> *"The Offence is grave and rampant. The accused is the first offender. Need for deterrence, rehabilitation of convict, and reform of convict. Given mitigation Court sentences him to 2O years of imprisonment to achieve the above effect.*
> *I so order."*

36.] From the above quotation, it is evident that the trial Judge did not consider the mandatory requirement under Article 23(8) of the Constitution. It is a mandatory requirement that the Court while sentencing must comply with Article 23(8) of the Constitution. Failure to adhere to this provision renders the sentence illegal. We therefore declare that the sentence of 20 years is illegal.

37.] Having found that the sentence of 20 years is illegal this appellate Court can interfere with the discretion exercised by the trial Court since it appears that while assessing the sentence the Judge did not consider Article 23(8) of the Constitution. (see **R VS. Mohamed Jamal, 1949 15 EACA)**. We therefore set aside the sentence. We invoke the powers of this Court in section 11 of the Judicature Act which provides that;

> *"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority, and*

jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."

38.] On aggravating factors, we noted that the offence of aggravated defilement carries a maximum penalty of death. Such cases are rampant. the victim was too young and was seriously injured by the assailant. She sought guidance from the appellant who instead injured her. However, in mitigation, the appellant is a first-time offender, has been on remand for 2 years, and has a family of young children.

39.] In **Byera Denis vs. Uganda, Court of Appeal Criminal Appeal No. 99 of 2012,** this Court substituted a sentence of 30 years' imprisonment with one of 20 years' imprisonment it considered appropriate in a case of aggravated defilement.

40.] In **Anguyo vs. Uganda, Court of Appeal Criminal Appeal No. 030 of 2014**, where Court found the sentence of 25 years appropriate for the offence of aggravated defilement.

41.] Taking into consideration the sentencing range cited above, and the aggravating and mitigation factors, we are convinced that for the ends of justice to be achieved, a sentence of 20 years is appropriate in the circumstances of this case. We deduct the 2 years spent in lawful custody. The appellant will therefore serve 18 years' imprisonment from the date of conviction which is 11/ 06 /2014.

42.] This ground succeeds

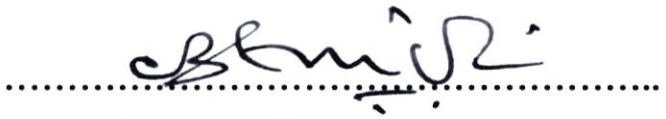
43.] Consequently, the appeal partially succeeds.

We so Order

Dated at Kampala this 18th **day of** November **2023**

CHEBORION BARISHAKI

JUSTICE OF APPEAL



CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

OSCAR JOHN KIHIKA

JUSTICE OF APPEAL