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

CORAM: ***HON. LADY JUSTICE A.E.N.MPAGI-BAHIGEINE, JA.***
HON. LADY JUSTICE C.N.B. KITUMBA, JA.
HON. LADY JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO.279/02

OWERE JOSEPH::APPELLANT

AND

UGANDA::RESPONDENT

[*Appeal from the judgment of the High Court of Uganda sitting at Tororo (*Rugadya-Atwoki J*) dated 8th April 2002 in Criminal Session Case No. 143/01*]

JUDGMENT OF THE COURT

Owere Joseph, the appellant, has filed the instant appeal against his conviction and sentence. He was charged with the offence of defilement contrary to ***section 129(1)*** of the Penal Code Act. It was alleged in the particulars of the indictment that on the 11th November 2000 at Sere 'A' village in Tororo District, the appellant had unlawful sexual intercourse with Nyadoi Grace, a girl under the age of 18 years.
On his arraignment he pleaded not guilty. The prosecution called a total of witnesses in their attempt to prove the indictment. The appellant gave testimony on oath and called his wife to testify on his behalf.

The case for the prosecution as accepted by the trial court is that the complainant and her siblings were left at home by their parents. On the day in question the complainant woke up at about midnight and found the appellant on top of her having sexual intercourse with her.

She tried to raise an alarm but the appellant prevented her by threatening to cut her with a *panga.* The sister of the complainant, Florence Kigeni (P.W.4), lit a match but it was immediately put out by the appellant. Apparently, the appellant stayed in the house until dawn.

When the mother of the complainant, Eunice Nyachwo (P.W.2) returned, she found her sick, with great pain and unable to walk. She examined her and found sperms in her private parts, blood and an apparent rupture.

She reported the matter to the area Local Council 1 Chairperson who gave her a letter to take to Paya Police Post. She got no assistance. She reported the matter to Tororo Police Station. The appellant was arrested and charged.

The complainant was examined at Tororo Hospital and a medical report compiled by Dr Lawrence Opio of the same hospital was tendered in evidence as exhibit P.1 under the provisions of ***section 66*** of the ***Trial on Indictments Act.***

In his defence the appellant stated that he was framed because there was a grudge between him and the mother of the complainant over a debt of shs 30,000/= she owed him. He called his wife, Siprosa Nyafamba (D.W.2) to support his story of the debt.

The trial judge with the unanimous advice from the assessors rejected the defence and convicted him as charged.

His appeal to this Court is based on one ground namely:-

"The learned trial judge erred in law and in fact when he failed to evaluate the evidence on record thereby arriving at an erroneous decision."

His prayer was that the appeal be allowed and the sentence be set aside.

Mr Ambrose Tishekwa, learned counsel for the appellant, submitted that the offence was committed at night and it was dark. There was no light whatsoever except the match which was lit and blown out by the assailant. Counsel stated that factors favoring correct identification were absent and that therefore the two children who were with the victim could not give credible evidence regarding identification. He pointed out that the trial judge should have evaluated the evidence to iron out the possibility of error.

He contended that the evidence of the victim needed corroboration. He pointed out that there was no independent evidence save medical evidence which did not implicate the appellant.

On identification, counsel cited to us the case of Abdallah ***Bin Wendo &another v R (1953) 20 EACA 166*** for the legal proposition that although a fact can be proved by the testimony of a single witness, this does not lessen the need to test with the greatest care the evidence of such witness especially when conditions for correct identification are difficult. In such circumstances "other evidence is needed pointing to the guilt of the appellant, counsel argued.

Another authority cited by counsel was ***Hitler Ojasi v Uganda SCCA No.1/86***. At page 6 of the judgment the court said:

"These were then said to be unfavorable factors. The attack took place at night; the witnesses were taken by surprise; they were frightened and feared for their lives; and there occurred a flurry of activities. The witnesses were being taken out of their houses and two were assaulted i.e Joyce raped and Gabriel hit with a butt. They would not therefore be in a calm frame of mind to recognize the appellant".

Finally learned counsel submitted that it is the duty of this court as the first appellate court to re- hear the case and come to an independent decision.

Mr Vicent Okwanga, Principal State Attorney, in responding to the above submissions supported the conviction and sentence. He supported the trial judge's evaluation of evidence on record and for reaching the correct decision. He pointed out that the two eye witnesses correctly identified the appellant. On conditions prevailing at the time, the learned Principal State Attorney asserted that they favored correct identification. The conditions existing at the time according to him were the following:

1. The appellant was not a stranger to the witnesses.
2. The witnesses were in close proximity.
3. They exchanged words with the appellant.
4. There were different sources of light- the match which was lit before being put out by the appellant was sufficient for the witnesses to see the *panga.*
5. After the act the appellant sat in the door way and remained there till dawn and there is always natural light at dawn.

On corroboration, Mr Okwanga submitted that it is not a legal requirement but a matter of practice. Once a trial judge warns himself and the assessors and is satisfied that the two witnesses are telling the truth, a conviction can be based on their evidence. He pointed out

that there was corroboration of the victim's evidence because she told her parents immediately they returned home and she was distressed. Her distressed condition provides consistency

On the case of ***Hitler Ojasi*** cited by Mr Tishekwa, Mr Okwanga submitted that it is distinguishable from the instant appeal because there was no flurry of activities mentioned in this appeal.

He asserted that the prosecution adduced enough evidence to put the appellant at the scene of crime.

He invited us to dismiss the appeal.

The legal principles which guide an appellate court when it is considering an appeal of this nature are reflected in a number of legislations. The legislations in question are ***Rule 30(1)*** of the ***Judicature (Court of Appeal Rules (Directions) S.I. 13-10*** and ***section 34(1)*** of the ***Criminal Procedure Code (Cap 116).*** The said section provides as follows:

"The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the grounds of a wrong decision on any question of law if such decision has in fact caused a miscarriage of justice, and in any other case shall dismiss the appeal.

Provided that the Court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred."

The duty of the first appellate court was re- stated in the case of ***Okeno v Republic [1972] EA 32.*** At page 36 the court said:

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*<u>**Pandya v R [1957] EA 336)**</u> ***and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions <u>**(Shantilal Ruwalo v R [1957] EA 570)**</u>***. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was***

some evidence to support the lower court's findings and conclusions; it must make findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has the advantage of hearing and seeing the witnesses, see **Peters v Sunday Post [1958] EA 424".**

The above passage was quoted with approval by the Supreme Court in the case of ***Kifamunte Henry v Uganda SSCA No.10/97*** (unreported)

With the above legal proposition in mind, we shall proceed to consider the evidence adduced by the prosecution to prove the charge against the appellant.
The prosecution's depended on visual identification of the appellants by the two identifying witnesses although one of them was a child of tender years. The Supreme Court in the case of ***Bogere Moses &another v Uganda SCCA No. 1/97*** (unreported) gave guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. At page 11 of the judgment the Court said:

"The starting point is that the court ought to satisfy itself from the evidence whether conditions under which the identification is claimed to have been were or were not difficult, and to warn itself of the possibility of mistaken identity. The court then should proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence as a whole, namely the evidence of any factors favoring correct identification together with those rendering it difficult".

Turning to the facts of this appeal, it is common ground that the offence took place at night. The appellant entered the house by cutting the nail which the occupants had used to fasten the door. The two identifying witnesses together with their brother were fast asleep. The complainant woke up to find the appellant on top of her having sexual intercourse with her. The room was dark. These factors rendered identification difficult.
There were factors which favored correct identification, the appellant and the identifying witnesses knew each other very well. They were village mates. The appellant stayed with the witnesses for a considerable length of time and they at least talked to each other when the

appellant was warning them not to tell anybody about what had happened. The only source of light was a match which was lit by Florence Kigeni (P.W.4). This was blown out by the appellant but it enabled the two witnesses to see the *panga* which the appellant had.

The testimony of the identifying witnesses was not challenged in cross-examination by counsel who represented the appellant in the lower court.

The appellant did not account for his activities on the night in question. Contrary to what the learned trial judge stated in his judgment, the appellant did not raise the defence of alibi. The defence of alibi is raised when an accused person alleges that he was in another place at the time when the offence with which he is charged was committed.

In the instant appeal the appellant and his witness testified about the debt of a pig that the mother of the complainant allegedly owed them. The witness was not cross-examined about the debt. The defence of a debt was in our view an afterthought.

We are satisfied on the evidence available that the learned trial judge evaluated the evidence properly and reached the right decision by finding the appellant guilty as charged.

Consequently his appeal to this court fails.

We uphold the appellant's conviction. As for the sentence, counsel did not address us on the sentence and we shall not interfere with it.

Dated at Kampala this 7th day of July 2007.

A.E.N.Mpagi- Bahigeine

Justice of Appeal

C.N .B Kitumba

Justice of Appeal

C.K.Byamugisha

Justice of Appeal