THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 315 OF 2002

SERUNKUMA ABDU ::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA ::RESPONDENT

(Appeal from the decision in Criminal Session Case No. 99 of 2002 in the High Court of Uganda at Mukono before the Honorable Justice D.K. Wangutusi dated 23rd December 2002)

CORAM:

HON JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON JUSTICE C.K. BYAMUGISHA, JA

JUDGEMENT OF THE COURT

The appellant, Serunkuma Abdu, appeals against conviction. He was indicted before the High Court at Mukono for the offence of defilement contrary to section 12 9(1) of the Penal Code Act. On 23 – 12 – 2002, he was convicted and sentenced to 10 years imprisonment.

The facts were that, on 15-05-99 the victim (PW4) then aged 13 was at her grandmother's (PW3) home, at Wabukira village, Mukono, when at about 8pm she was called by a man who pretended to be giving her maize to eat. The appellant had just been at the shop of PW3's husband to buy cigarettes. He was eating maize. The shop was lit by candle light. Not far off in the kitchen where PW3 was there was another candle light. The appellant offered some maize to PW4 leading her behind the house in a garden where he defiled her. PW4 made an alarm which was responded to by a number of people including PW3 who had a torch. On seeing the people the appellant ran away. PW3 who had a torch had already recognised him. She reported the matter to the LC I and later to Police. PW4 was medically examined and found to have been sexually abused.

The appellant was arrested a month later

He was charged with the offence of defilement. At his trial he set up an alibi contending he did not know where he was at the material time, which the learned Judge rejected and convicted him. Hence this appeal.

The sole ground of appeal reads:

> ***"That the learned trial Judge erred in law and fact in failing to properly evaluate the evidence on record leading to the conviction of the appellant."***

Mr. Sydney Asubo, learned counsel, conceded the age of PW4 to have been below 18 at the time of the offence and the fact of sexual intercourse to having taken place. It is, therefore, only the issue of identification of the appellant that is the subject of this judgement.

Mr. Asubo pointed out that this was a case of a single identifying witness under difficult circumstances.

He first raised the issue of the length of time it took the Police to arrest the appellant when his home was only 600 metres away from the complainant's home. He submitted that the fact that it took them a full month to arrest him renders the identification at the scene doubtful. It must have been an afterthought since there was no evidence that he had run away.

Ms. Jane Akuo Kajuga SSA in reply pointed out that the delay in effecting the arrest of the appellant should not be made an issue as it in no way discredited the substance of the charge. She, however, regretted the fact that it was never exploited at the trial.

The record indicates the evidence/facts surrounding the arrest of the appellant to have been agreed upon by both sides. These read:

"We have agreed on evidence of arrest. Form No. 26085 PC Ekaperu George 31 years of Kangulumira Police Post Kayunga. He recalls that on 16-6-99 I and Detective Constable Okello booked for duty to Wabukira village for the arrest of Sserunkuma Abdu who had allegedly defiled Namono. As we went to the home of accused, the complainant handed to us a boy to take us to Sserunkuma's house. We found him inside the house. We called him. We met… and came out. He led us to the LC I General Secretary. On reaching there we introduced ourselves and told the LC that we had come to arrest Sserunkuma because of defilement. The LC agreed saying he had also heard of ……..(sic) we proceeded back to Kangulumira Police Post and later transferred him to Kayunga Police Post.

Accused Abdu Sserunkuma – signed
State – signed.
Defence – signed.
Judge – signed…….”

The facts of arrest do not reveal any resistance. We, however, agree with Ms. Kajuga that the delay in arresting the appellant did not discredit the substance of the charge. It could have been due to a number of administrative hitches at the Police Station, which is not uncommon. We would reject this aspect of the matter as affecting the charge.

We turn to the issue of identification of the appellant.

Mr. Asubo submitted that PW3 was the sole identifying witness.

She was in the kitchen when she heard somebody crying. One Ronald came to inform her that the appellant was defiling PW4 and that she was the one crying. PW3 was old and could not see properly at night. There was no sufficient lighting. She could not have properly identified the appellant. Learned counsel pointed out that both Ronald and the husband of PW3 who had just sold cigarettes to the appellant were not called as witnesses. It is their evidence which could have provided the material link to the appellant but was missing. In the absence of these two testimonies the evidence of PW3 should not have been relied upon to convict the appellant, learned counsel submitted.

He prayed Court to allow the appeal.

Ms. Jane Akuo Kajuga, learned Senior State Attorney, submitted that the evidence was sufficient to sustain the charge and prayed court to confirm the appellant’s participation in the offence. She argued that although it was dark PW3 had seen the appellant at the shop where there was a candle burning. There was also another candle in the kitchen where she was. This lighting enabled her to see the appellant moving from the shop passed the kitchen where the victim was washing dishes when she found him on top of the victim after hearing her alarm, she properly identified him. She had just seen him at the shop because of the lighting from both candles. When she ran to answer the victim’s alarm she also had a torch which had brand new cells. So she could see properly.

She had known the appellant for two years. He was their porter. When he passed by the kitchen he had a maize cob. That is how she managed to identify him.

Ms. Kajuga submitted that the identification of the appellant by PW3 was free from error.She prayed Court to allow the appeal.

The learned Judge found **"In this case PW3 was in the kitchen whose door faced the shop, which was at that time of 8:00p.m. being manned by her husband. There was a candle in the shop. The reason for the candle was in my opinion to be able to see the things being sold and most important the money in all sorts of denominations. It was therefore bright enough for the purpose because the buying and selling went on. If small things like money coins could be seen, a human being at a distance of 15 metres could certainly be seen much so when he stood in the light. The kitchen door directly faced the shop. There was therefore direct observation. The buyer would have to make his requests. They would be handed to him. He would then pay. The time spent in doing all this was certainly ample time for a person to observe another. It would even be more easier where the person being observed was a common figure in the area. The accused was not only common in the area. He said he had worked for that family for one month. He was therefore familiar to PW3. She could therefore not have mistaken the person she saw. She had seen the person clearly to the extent of seeing him holding and eating a cob of maize.At the same time when she answered the alarm, she had a torch which as she said had new batteries and was bright. She stated that she flashed and the accused jumped off looked at her once and ran. It was a glance but then she could not have been mistaken because the girl had the maize cob she had a few moments seen the accused with. The maize cob does corroborate her testimony that the man she saw at the shop was the same man she found on top of PW4. The maize cob also corroborates the testimony of PW4 when she stated that the man called her and promised her maize so left the plates she was washing and followed him only to be defiled."**

We agree that the learned Judge minutely scrutinised the evidence regarding identification of the appellant, arriving at the correct conclusion.

We can hardly fault him. We thus uphold the conviction and sentence of ten years imprisonment.

The appeal stands dismissed.

Dated at Kampala this 15th day of June 2007.

HON JUSTICE L.E.M.MUKASA-KIKONYOGO
DEPUTY CHIEF JUSTICE

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

HON JUSTICE C.K.BYAMUGISHA
JUSTICE OF APPEAL