

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA (COA) AT  
KAMPALA**

**CRIMINAL APPEAL NO. 0180 OF 2009**

**KIGUNDU**

**JOHN:.....APPELLANT**

**VS**

**UGANDA:.....RESPON  
DENT**

**CORAM**

**HON. JUSTICE MR. ELAD Mwangusya, JA**

**HON. LADY. JUSTICE FAITH E. MWONDHA, JA**

**HON. JUSTICE PROFESSOR L.EKIRIKUBINZA TIBATEMWA, JA**

(Arising from the conviction and sentence of the Learned Judge of the High Court of Uganda at Masaka, The Hon Justice Kiggundu Jane F.B in her Judgment dated 31.08.2009, in Criminal Session Case No.0090 Of 2004)

**JUDGMENT OF THE COURT**

The facts of the appeal were that the appellant was tried and convicted of the offence of defilement under **Section 127(1) of the Penal Code Act**. He was sentenced to 12 years imprisonment.

It was alleged that on the 4<sup>th</sup> of September 2003, at a village called Mitima in Sembabule district, at around 9.00 a.m the father of the victim one Mugagga Paul, left the victim Nyangoma and her sister Nakato in the house, for Mitima Trading Center to buy some items. When he returned at about 11. 00 PM, he found his children making noise. He called them from outside and asked what had happened to them. He immediately saw a man running out of the house.

When he entered the house, the victim informed him that Kiggundu had forcefully had sexual intercourse with her. She was crying and blood was oozing from her nose and mouth.

The following day the father of the victim reported the matter to the Defence Secretary of the area, Ntende, who forwarded him to police. The suspect was subsequently arrested.

At the trial which took place in 2009, the victim PW2 testified that the attacker came in and forced her into sex. She later lit a *tadooba*(candle) and was able to recognize that it was Jonh Kiggundu who had attacked her. She also stated that Kiggundu had also physically assaulted her and broke her tooth. The victim confirmed that she knew the accused as she used to see him around their home. He used to graze cattle around the home of the victim and would ask for drinking water. After the assault the victim had lit a *tadooba*(candle)and was able to recognize the accused. The victim was medically examined and found to be 10 years old. She had a ruptured hymen.

The case for the Prosecution was also supported by PW3, a sister to the victim. PW3 testified that after her sister (PW1) had lit the *tadooba*, she (PW3) was able to identify (recognize) the attacker as John Kiggundu. She also testifies to seeing the attacker beating her sister. PW2 testified that she knew the accused before the incident.

The record shows that the defence did not contest the 1<sup>st</sup> two ingredients of the offence of defilement; that the victim was under the age of 18 years and that she was subjected to sexual intercourse but only contested the participation accused. In his defence, the accused denied having entered the house of the victim on the relevant night. He denied having sexually and physically assaulted the victim. He averred that the father of the victim held a grudge against him and had earlier on threatened to do something to him. It was his contention that it was due to the said misunderstanding that the victim's family accused him of defilement.

At the appeal, the appellant was represented by Mr Kafuko Ntuyo of Kafuko and Co Advocates while the State was represented by a Principal State Attorney, Mr. William Byansi.

According to the Memorandum of Appeal filed by Counsel for the Appellant, the appeal was based on two grounds:

1. The learned trial judge erred in convicting the appellant on insufficient evidence of proper identification.

2. The learned trial judge erred in convicting the appellant basing on evidence full of contradictions which were grave.

The appellant prayed that the conviction be quashed and the sentence set aside.

## **Court Resolution**

In dealing with the grounds of appeal we have been guided by the Rules of this Court which enjoin a Court of Appeal of first instance to re-appraise the evidence that was adduced before the trial court and subject it to a fresh scrutiny; make our own findings and draw our own conclusions in order to determine whether the findings of the Trial Court can be supported. (Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions). This duty was restated by the Supreme Court in **Kifamunte Henri vs Uganda, Criminal Appeal No 10 of 1997**.

- **Ground 1:** The learned trial judge erred in convicting the appellant on insufficient evidence of proper identification.

Counsel for the appellant supported this ground with two arguments, one that there was no indication that the two witnesses who identified the accused had known him before the incident and that furthermore the *tadooba* light was not sufficient to enable the two identifying witnesses make proper identification on the attacker without doubt.

When court referred counsel to the evidence on record which indicated that both PW2 (the victim) and PW 3 testified that the

accused was known to them before the assault, Counsel dropped this argument and limited his submission to the argument that the light was not sufficient for proper identification of the offender and prayed that any arising doubt be resolved in favour of the appellant.

In resolving this issue, we note that it is trite law that where conditions favouring correct identification are difficult, court must test with the greatest care the evidence of witnesses giving testimony that a particular person was involved in a crime. The identification must be free from the possibility of mistake. It is only then that court can make a finding that the prosecution has proved beyond reasonable doubt that it was the individual charged with the offence who participated in the crime.

### **Resolution of Ground 1**

We have given due consideration to the argument of the appellant's Counsel that a *tadooba* constitutes insufficient lighting and is an obstacle to proper identification. The prosecution case was based on the testimony of two witnesses; PW2 and PW3. Court recognizes that the presence of a plurality of witnesses does not in itself make the need for caution less essential in cases where a conviction is based solely on visual identification evidence. Even in cases where more than one witness gives testimony which places an accused at the scene of crime, the possibility that more than one witness can all be mistaken exists. What is critical is the quality of the identification. In **Abdalla Nabulere & 2 Others v Uganda, Criminal appeal No. 9 of 1978** this court stated that if the quality of the identification is not good, a number of witnesses

will not cure the danger of mistaken identity and hence the requirement to look for 'other evidence'. Court went on to state that:

Where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correct identification or identifications. The reason for the special caution is that there is a possibility ... that even a number of such witnesses can all be mistaken. *The judge should then examine closely the circumstances in which the identification came to be made, particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced, but the poorer the quality the greater the danger,*" (our emphasis)

In the present appeal, the record of the trial court indicates that at the time PW2 lit the *tadooba* her attacker was in the same room with her, the room in which the assault had taken place. PW3 was also in the same room.

It is also on record that the accused person was well known to the two identifying witnesses. This fact was not only part of their

testimony but was also in the testimony of the accused person when he stated that he knew PW2 (the victim) and PW3 as daughters of his neighbour and that the family of the victim knew him and wanted to implicate him in the crime as a result of an existing grudge.

Furthermore PW2 testified that her attacker spent a considerable period at the scene of crime. Although we did not believe the recorded testimony of the victim that the sexual assault lasted 2 hours, we opine that what appears like an exaggeration was not a deliberate falsehood but a result of the age of the victim at that time of the ordeal.

We therefore hold that a multiplicity of factors surrounding the identification, support the Trial Judge's finding that the accused was properly identified as the person who sexually assaulted the victim. The relevant factors/circumstances are that the witnesses and the attacker were in the same room at the time the *tadooba* was lit; the accused spent a considerable period at the scene of the crime after the defilement; he was well known to the witnesses prior to the commission of offence; he was identified by more than one witness. Furthermore when the father of the victim asked her who had assaulted her, she spontaneously mentioned the accused as her attacker. All these factors made the quality of the identification evidence good.

We agree with the Trial Judge that the evidence of identification was free from the possibility of error and that the prosecution

succeeded in proving beyond reasonable doubt that the accused was at the scene of the crime. The record shows that the learned trial judge correctly appreciated that this was a case of identification by recognition and directed herself on the need to closely examine the circumstances under which the identification was made. We have no reason to doubt the findings of the Trial Judge that PW2 and PW3 were truthful witnesses.

We thus dismiss this ground of appeal.

- **Ground 2:** The learned trial judge erred in convicting the appellant basing on evidence full of contradictions which were grave.
  - a) Counsel for the appellant argued that the first contradiction in the prosecution case was in regard to the dates of the alleged incident. He pointed out that whereas the indictment and PW2 gave 4<sup>th</sup> of September 2003 as the relevant date, her sister who is PW3 gave the date as 4<sup>th</sup> of February 2003. Counsel argued that since the trial Judge did not comment on whether that contradiction was major or minor, this Court should go ahead and make a finding on the matter.

He submitted that that to the appellant, this contradiction was major and showed that the two witnesses were not consistent and were not saying the truth about an incident which took place where both witnesses testified to have been present. He invited court to find the contradiction as major and resolve it in favor of the appellant, allow the appeal, quash the conviction and set aside the sentence.



## **Resolution of Ground 2(a)**

We noted that the court record indicated that the victim had been medically examined on the 5<sup>th</sup> of September 2003. The medical report was admitted in court under Section 30 of the Evidence Act and showed that the victim had been involved in sexual intercourse. It further indicated that the victim had inflammation around her private parts which were consistent with force having been used. Based on this medical report the Trial Judge made a finding that the testimony of the victim in regard to the ingredient of sexual intercourse had been corroborated by the medical evidence presented. Having noted that the evidence of sexual intercourse had not been disputed by the defence, the trial Judge made a finding that the prosecution had proved the ingredient of sexual intercourse beyond reasonable doubt. We also agree with the submission of Counsel for the State that the contradiction between PW2 and PW3 was clarified by their father PW4, who said the incidence took place on 4<sup>th</sup> September and that he took the victim for medical examination the next day (5<sup>th</sup> September) and this is what is reflected on the medical report.

We thus find that the contradiction between PW2 (the victim) and PW 3 in regard to the relevant date was resolved by the medical evidence. Since the medical report referred to a September date as did the testimony of the victim, we opine that the mentioning of a wrong date by PW3 was minor and did not go to root of the prosecution case.

b) Counsel for the appellant also submitted that another contradiction in the prosecution evidence was the fact that

whereas PW2 (the victim) testified that she was sleeping on the same bed with her sister when she was defiled, PW3 testified that they were sleeping on separate beds, which were however separated by a small distance.

Counsel submitted that the trial Judge should have made a finding on whether this was a major or minor contradiction but she did not. Similar to his submission in regard to the contradictions relating to the date of the offence, it was the argument of Counsel that this contradiction was major and was evidence that the two witnesses were not consistent, they were not saying the truth about an incident which took place where both alleged to have been present at the same time. He invited the court to find that this contradiction was major and to resolve it in favor of the appellant.

On the other hand, Counsel for the State argued that the explanation by PW3 that the beds were very close to each other, leaving just a very small gap in the middle sufficient to explain that contradiction. He submitted that whether the witnesses were sleeping on one or two beds does not go down to the root of the issue as to whether defilement took place or not.

### **Resolution of Ground 2 (b)**

Court takes note of the fact that the offence occurred in 2003 but the trial was in 2009. We also note that the PW2 and PW3 were aged only ten years at the time of the offence. Nevertheless the Trial Judge who had the opportunity to observe the witnesses made

a finding that PW2 was a truthful witness. Considering the lapse of time (6 years between the commission of the crime and the trial) and the way humans remember events differently as well as the age of the two witnesses at the time of the offence, we opine that the contradictions are explainable.

In conclusion we find that any contradiction in the evidence of the two witnesses (PW2 and PW3) were not major, nor did they undermine evidence of proof of essential ingredients of the crime of defilement. As pointed out by this court in the case of **Twehangane Alfred vs Uganda, Criminal Appeal No. 139 of 2001**, with regard to contradictions in the Prosecution's case, the law as set out in numerous authorities is that the Court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness.

In the instant case we are of the opinion that the inconsistencies and contradictions in regard to whether PW2 and PW3 were sleeping on the same bed or on two separate beds were not intended to deceive court but were due to lapse of time and the age of the witnesses at the time of commission of offence.

In conclusion we are not convinced that any of the two arguments on which Counsel based Ground 2 of the Appeal constitute major contradictions in the Prosecution evidence. We thus dismiss this ground of appeal as we did Ground 1 of the Appeal.

## **Conclusion**

Having dismissed the two grounds of Appeal, the appeal against conviction and sentence is dismissed.

Dated at Kampala this 27<sup>th</sup> ..... day of ...February..... 2014.

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**HON. JUSTICE MR. ELDAD MWANGUSYA, JA**

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**HON. LADY. JUSTICE FAITH E. MWONDHA, JA**

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**HON. JUSTICE PROFESSOR L.EKIRIKUBINZA TIBATEMWA, JA**