THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 125 OF 2018

(Coram: Elizabeth Musoke, Cheborion Barishaki and Hellen Obura, JJA.)

AUDA HASSAN::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of Hon. Lady Justice Henrietta Wolayo holden at Moroto High Court Criminal Session Case No. 017 of 2015 delivered on27/07/2016)

JUDGMENT OF THE COURT

Introduction

This is an appeal against both conviction and sentence arising from the decision of the High Court (Wolayo J) by which the appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) (4) (c) of the Penal Code Act (PCA) and sentenced to 12 years' imprisonment.

Background to the Appeal

The background facts as ascertained from the court record are that on 2/08/2014, at around 9:00 am the appellant asked the victim Nangiro Rose (PW1) to fetch for him water and deliver to him. When she did, he grabbed her, locked the door and forcefully had sexual intercourse with her. PW1 told her aunt Rose Amese (PW2) about the incident and the appellant was arrested and taken to Campswahili police post from where he was charged with aggravated defilement. He was later tried, convicted and sentenced to 12 years' imprisonment. Being dissatisfied with the decision of the learned trial Judge, the appellant has appealed to this Court on 2 grounds namely;

1. *That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence and apply correct principles of law thereby convicting the appellant basing on evidence full of contradictions and inconsistences thus occasioning a miscarriage of justice.*

2. *That without prejudice to the foregoing, the learned trial Judge erred in law and fact when she passed a sentence of 12 years imprisonment upon the appellant which is manifestly harsh and excessive thereby occasioning a miscarriage of justice.*

Representations

At the hearing of this appeal, Mr. Kambuga Richard represented the appellant on State Brief while Ms. Fatina Nakafeero Chief State Attorney from the Office of the Director Public Prosecutions represented the respondent. Due to the challenge of the Covid 19 pandemic and the Standard Operating Procedures (SOPs) given by the Ministry of Health, the appellant was not physically present in court but he was facilitated to attend the proceedings from prison using zoom technology.

Case for the appellant

On ground 1, counsel submitted that the ingredients of participation of the appellant in the commission of the alleged offence namely; the age of the victim and the appellant being in authority over the victim were not made out and as such it was erroneous for the learned trial Judge to decide otherwise thereby occasioning a miscarriage of justice to the appellant.

Counsel also submitted that there were many conflicting pieces of evidence which should have been resolved in favor of the appellant had the learned trial Judge properly considered them. He argued that during cross examination, the victim had indicated to the school in her application form that she was born on 8/04/1996 which meant that at the time of the incident she was already 18 years of age. Counsel submitted that the learned trial Judge sidestepped this issue to achieve a conviction instead of holding that the victim was a vicious lair who was incapable of being easily believed. In addition, he submitted that the learned trial Judge relied

on the evidence of PW5 who stated that the victim had 28 teeth meaning that she was between 14-16 years at the time of medical examination which observation counsel contended is not correct because scientifically, one can have 28 teeth up to the age of 25 years. Further that, the introduction of a new charge of rape mid-way the trial indicated that the prosecution had realized that the issue of age would not be resolved in their favor.

Regarding the aspect of authority, counsel submitted that the learned trial Judge skirted around until she arrived at the absurd conclusion that the appellant was the victim's teacher despite overwhelming evidence to the contrary.

He further contended that the prosecution case was full of other grave contradictions and inconsistencies which if the learned trial Judge had addressed her mind to, she would have held otherwise. He referred to the contradictions in PW1's testimony regarding who responded first when she made an alarm. Counsel also pointed out the contradictions in PW3's testimony concerning the person the appellant worked under and also the fact that she lied when she told court that a search was conducted at the appellant's house. He cited the cases of ***Candiga Swadick vs Uganda, CACA No. 23 of 2012; Alfred Tajar vs Uganda, EACA Criminal Appeal No. 167 of 1969 (unreported); Sarapio Tinkamalirwe vs Uganda, SCCA No. 27 of 1989*** and ***Twinomugisha Alex & 2 ors vs Uganda SCCA No. 35 of 2002*** to support his submission.

On the issue of sexual intercourse, counsel submitted that the prosecution neither led direct nor scientific evidence to prove it. He argued that PW5 who examined the victim testified that she did not subject the sperm she said she saw to scientific examination to ascertain if it was from the appellant, which created a possibility that some other person could have sexually assaulted the victim and the appellant was just framed. Counsel contended that the appellant was consistent and categorical in his defence when he stated that a fight ensued between him and the victim over allegations of infidelity which explains the injuries the victim sustained.

Regarding ground 2, counsel submitted that the prosecution having failed to prove the ingredients of the age of the victim and whether or not the appellant was a person of authority over the victim, it was unsafe to convict the appellant on charges of aggravated defilement. He prayed court to quash the conviction, set aside the sentence and order immediate release of the appellant. He alternatively submitted that should this Court be inclined to sustain the charges of defilement, the same be taken to be simple defilement, for which sentence the appellant has already served and should thus be set free.

Case for the respondent

Counsel for the respondent opposed the appeal in its entirety and supported the sentence imposed by the learned trial Judge.

Counsel submitted that the court record at pages 6-7 does not indicate any contradictions pointed out by the appellant. She argued that PW1 testified that she filled the admission form in person where she indicated her age and date of birth. Further that PW1 testified under oath that she was 19 years old. Counsel submitted that this testimony read together with the findings on the Police Form 3 which contains the report of medical examination of the victim and found that she was of apparent age of 15 years due to her dentition shows no contradiction at all since the victim was under 18 years at the time this offence took place.

Counsel also submitted that the appellant's opinion about science is not backed by evidence in the entire record of proceedings and therefore acting on it would be acting on speculation. She therefore submitted that the issue of age of the victim was never in contention during the trial and the appellant was rightly convicted.

Regarding the amendment of the charge sheet to introduce an alternative count of rape, counsel referred this Court to sections 50 (2) and section 51 of the Trial on Indictment Act which allows the prosecution to amend an indictment at any stage of the trial and submitted that the argument by the appellant is not only unfortunate but also a misdirection to this Court.

As regards the appellant's authority over the victim, counsel referred this Court to the evidence of PW1 and PW3 and submitted that the appellant was a teacher at the Institute where the victim was a student although not directly under him. She referred to the definition of the word 'authority' in the **Osborne's Concise Law Dictionary** which says it is *"a delegated power, a right invested in a person or body."* Basing on this definition, counsel submitted that the appellant as a teacher in the institute had power over the victim regardless of whether he directly taught her or not and therefore the learned trial Judge rightly so found.

On inconsistencies, counsel submitted that they are minor and do not touch the root of the matter and she prayed that this Court disregards them. She contended that what is relevant and core is the fact that the appellant had authority over the victim by virtue of him being a teacher in the institute and not about who was his supervisor. Counsel relied on the decision in the case of ***Kato John Kyambadde & Anor vs Uganda, SCCA No. 0030/2014*** which referred to the famous case of ***Alfred Tajar vs Uganda, EACA Cr. Appeal No.167/1969*** in which it was held that where there are contradictions in the evidence of a witness, the deciding factor in law is whether they point to deliberate untruthfulness. She prayed that this ground fails.

In regard to ground 2, counsel pointed out to this Court that the appellant's submissions with regard to this ground are very different and far from the wording of his 2nd ground of appeal. Nonetheless, she submitted that the issue of the victim's age was dealt with at page 41 of the court record and the trial court admitted the victim's medical examination report which stated the victim's apparent age to be 15 years based on her dentition. Counsel therefore submitted that the learned trial Judge was right to convict the appellant of the offence of aggravated defilement and that since the maximum penalty for this offence is death, the sentence of 12 years imprisonment is neither harsh nor excessive. She referred to the case of ***Bukenya Joseph vs Uganda, SCCA No.17 of 2019*** where the Supreme Court sentenced the appellant to 20 years imprisonment for aggravated defilement.

In conclusion, counsel prayed that this Court upholds both the conviction and sentence and dismisses the appeal.

Court's Consideration

As a first appellate court we are enjoined to re-evaluate the evidence on record and come to our own conclusion on the findings of fact and law. ***See; Rule 30(1) of the Judicature (Court of Appeal Rules) Directions; Kifamunte Henry vs Uganda, SCCA No. 10 of 1997 and Bogere Moses vs Uganda, SCCA No. 1 of 1997.***

We have carefully studied the court record and considered the submissions of both counsel and the authorities cited to us. We shall proceed to resolve the grounds of appeal in the order presented by counsel for the appellant.

On ground 1, counsel faulted the learned trial Judge for failing to properly evaluate the evidence and apply correct principles of law thereby convicting the appellant based on evidence full of contradictions and inconsistences thus occasioning a miscarriage of justice. We shall ourselves re-evaluate the evidence on record and arrive at our own conclusion.

PW1 Rose Nangiro testified that on 2/8/2014, she went to the borehole at around 9:00 am to fetch water and the appellant requested her to fetch for him water in a green jerican. When she did, the appellant asked her to carry it to the office of the teachers where they sit and while there, he grabbed her, wrestled her, strangled her neck and then had sexual intercourse with her. She made an alarm and PW3, Akiki Kelvin responded and then afterwards a one Napeyok Emilia also came and she called PW1's aunt Amese Rose (PW2). She told PW2 about the incident and the appellant was taken to Campswahili police post. She was taken to Moroto hospital from where she was examined having sustained injuries on the breast, thighs and private parts.

In cross examination, PW1 testified that her father told her in 2013 that she was born in 1998. She added that she enrolled for bakery at the DON institute in 2014 and she was given a form

which she filled and indicated her age, date of birth and then signed. She further stated that at DON, the appellant was not her teacher but rather he was a teacher at a nursery school at Akaikuri. She also stated that Napeyok is the one who responded to her alarm at around 9:30 am and they both went to call her father with whom they went to the police post. PW1 also stated that PW2 escorted her to hospital with the police and took her for examination.

After PW1's testimony, the prosecution moved court under section 50 of the Trial on Indictments Act to add the offence of rape as an alternative charge which court allowed and PW1 was recalled for cross examination.

In her cross examination on the alternative charge of rape, PW1 testified that the room in which the incident happened had books of teachers, a mattress and a pair of scissors. It was packed with property and there was little space and just chairs. She also described the room as having two doors and that one door led outside and the other led to the room. She added that the appellant first got out the mattress and laid on it. It was spread out at the door and that is where the incident happened. She stated that when she got into the room she placed the jerican further inside the room and that as she put the jerrican down, the appellant was laying on the mattress and while she was on her way out through the outside door, that is when the appellant pulled her inside the room and sexually assaulted her. In re-examination, she clarified that the act took place inside the house after entering the second door but she did not walk into the second room, the appellant pulled her there.

PW2 Amese Rose testified that on 2/8/2014 at 9:00am Napeyok went to her workplace in Campswahili and told her to go and rescue PW1at DON because the appellant had sexually assaulted her. On her way, she met PW1 crying and they both went back to DON where the appellant was. PW2 observed bite marks on PW1's breast and thighs. She narrated to her (PW2) what had happened and PW2 went back to call other people. She returned with Napeyok, PW1 and the old woman (Necho Alice) with whom PW1 lived. They found the appellant outside washing his face and he told them to go home and enter into a discussion.

When they left, they found PW3 Akiki Kelvin on the way with police who came and picked up the appellant and took him to the Police Station. PW1 was taken to the hospital for examination. PW2 also stated that she examined PW1 and she was bleeding in her private parts and also had wounds on the thighs. In cross examination, PW2 testified that the incident happened on Saturday and that the appellant lived in a single room and had no immediate neighbours. She also added that PW1's father was not at home because he had gone to work as a casual labourer and he only got to know about the incident when he returned late in the night but he was not at the police. Further that, PW1 was bleeding from the private parts and the thigh.

PW3 Akiki Kelvin testified that he knows the appellant as a staff member and that on 2/8/2014 at about 10:00am while he was going to work, he met him, PW1 and four women at the mission grave yard and the women stopped him. They told him that PW1 had been raped at the main office of Early Childhood Development (ECD). Before he could respond, the appellant asked the women for negotiations, so PW3 rushed to the police post in Campswahili where he picked up policemen who came and arrested the appellant. He added that PW1 showed him a bite mark on the breast and thigh and the teeth marks were visible and that she also had a scratch on the lower abdomen. PW3 also stated that he did not go to the hospital with PW1. In cross examination, PW3 emphasized that he did not visit the hospital with PW1 and that he was present when the room was searched but they did not find a pant. He also stated that all the rooms at DON were offices and planes. Further, that the bite marks and scratches on PW1 were fresh when he saw them but they were not bleeding. PW3 also stated that the appellant was a student as well but he was made a teacher though he never taught PW1.

PW4 AIP Rose Azicia testified that on 4/8/2014 she was allocated a rape case where the appellant was the suspect. She recorded PW1's statement in which she narrated that while she was at the borehole, the appellant came with a green jerrican and asked her to carry it to

him. As soon as she put it down, he grabbed her and pulled her inside his house where he threw her on a mattress and sexually assaulted her. PW4 stated that PW1 had scratches and bite marks on her body. She then proceeded to the crime scene at the institute from where she drew a sketch map. However, she did not enter the house because it was locked.

PW5, Esia Ekwalingat Ongole testified that she examined PW1 on 2/8/2014 and found that she had a bite on the left breast and nail scratches on the abdomen. She also observed that PW1 had a flow of sperm and there was penetration, a sign of sex. PW1 informed her that she was 15 years old. In cross examination, PW5 stated that before she counted PW1's teeth, PW1 had told her that she was 15 years old and she indicated that PW1 was 15 years old. She also added that she conducted the examination in the morning hours and she did not see blood but a flow of sperm, a white substance. She stated that she neither took the specimen for further examination nor confirmed the identity of the sperm. PW5 also testified that she can view a sperm within 48 hours after it first entered the sexual organ and that she did not examine the appellant. Further that, when PW1 came in for examination, she was not wearing a pant. In re-examination, she stated that the sperm she saw could have been there for 6 hours.

In his defence, the appellant denied sexually assaulting PW1 but said he was in courtship with her. He stated that on that day, at around 7:30am a fight erupted between him and PW1 in the compound of C&D because she suspected that he was seeing another girl. He stated that earlier PW1 had gone to fetch water and when she returned she held his shirt and his testicles. He then held her tightly and bit her breast and kicked her. The students of Kabong who were there came to her rescue. As he was about to leave around mid-day, he met PW1 and her grandmother at the gate and he told her that she was in courtship with PW1. As they went for negotiations, PW3 arrived on a motorcycle and he insisted that they go to the police which they did. PW5 also stated that PW1 used to come to the office after school. In cross examination, he stated that there is no mattress in the office. He added that PW1's

grandmother wanted them to negotiate but he did not know whether the discussion was about the fight or the courtship. He also stated that on that day, he was defending himself.

We have looked at the trial Judge's findings in her judgment at pages 27-32 and we note that she dealt with each ingredient of the offence of aggravated defilement and found as follows.

In regard to proof of age, she found that an examination of DE1, which is the victim's application letter to the institute showed that it is an admission form to a vocational institute and not a birth certificate. She also agreed with the assessors that the date of birth was given as 3/2/1996 for the victim to gain admission to the institute and not as proof of date of birth. She also added that having seen the victim when she took the stand and in light of the medical assessment of PW5 and the evidence of the victim that she was 19 years when she testified, the learned trial Judge concluded that she was below 18 years on 2/8/2014 when the offence was committed.

On whether the appellant was a person in authority, the learned trial Judge found that although the appellant did not directly teach the victim, the fact that he was a member of the teaching staff having been retained after his training, means that he was in constructive authority over her as a student at the institute.

On the ingredient of performance of a sexual act, the learned trial Judge took note of the fact that the evidence of a mattress emerged when the victim was recalled to testify after the alternative count of rape was preferred. She also noted that the reference to the scene as an office is reference to the teachers' quarters, residence of the accused as described by AIP Azicia in her sketch map. She also took note of the defence suggestion that the existence of sperm was meaningless given that they could have been deposited there much earlier than the time of the alleged sexual encounter with the appellant. In the result, she found that there was convincing evidence that the appellant performed a sexual act with the victim on 2/8/2014 at about 9:00am at the teachers' quarters.

Regarding the appellant's participation, she took into account he appellant's defence which she rejected. She found that his admission goes further to reinforce the prosecution's case that the appellant performed a sexual act with the victim on 2/8/2014. In conclusion, the learned trial Judge convicted the appellant of the offence of aggravated defilement.

We have ourselves re-evaluated the evidence on record as summarized above. Counsel for the appellant submitted that there was plenty of contradictory evidence which should have been resolved in favor of the appellant.

The law on contradictions and inconsistencies was stated in the case of ***Oketch David vs Uganda, SCCA No. 24 of 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.

Upon our perusal of the record, we agree with counsel for the appellant's contention that there are contradictions and inconsistencies in the prosecution case. We note from the court record that the learned trial Judge made some assumptions regarding some of the inconsistencies in the prosecution evidence. We shall therefore highlight these contradictions and inconsistencies and determine whether or not they go to the root of this case.

We note from the court record that PW1 testified that her father told her in 2013 that she was born in 1998 yet when she enrolled at the institute she filled in her date of birth on both the registration and application form as 1996. In addition, we have looked at the forms and found that PW1 gave 2 conflicting dates of birth. On the application form, she filled her date of birth as 3/2/1996 whereas on the registration form she filled her date of birth as 8/4/1996. Further still, when PW1 was called to testify on 19/7/2016 she informed court that she was 19 years old which means that on 2/8/2014 when the incident allegedly happened she was 17 years old which is different from the 15 years she told PW5. In our considered view, we construe

the inconsistencies regarding the age of PW1 as deliberate untruthfulness intended to deceive court and the learned trial Judge and the assessors should have taken note of this and treated her evidence with caution.

In dealing with the age of PW1, the learned trial Judge in agreement with the assessors made an assumption that PW1 could have given her date of birth as 3/2/1996 in order to get an admission into the institute. In our considered view, this assumption is unfounded since PW1 herself never explained in her evidence why she gave different birth dates when she filled the forms. It is not the duty of court to make assumptions to explain contradictions and inconsistencies in the evidence of witnesses. We respectfully disagree with the learned trial Judge on this approach which misdirected her to come to a wrong conclusion that the victim was 15 years at the time the offence was committed. Had the learned trial Judge properly addressed her mind to these inconsistencies, she would have found the contradiction on the age of the victim to be so grave as to go to the root of the case since it cast doubt on the age of the victim which is one of the key ingredients to be proved in a defilement case. It is also noteworthy that the complaint that was reported to police according to the evidence of PW4, was rape. Even at the hospital the complaint was about rape as indicated in police form 3A (Exh. PE4). The idea of aggravated defilement came in later but when at the trial the prosecution realized that it might not be sustainable upon listening to the evidence of PW1, an alternative charge of rape was introduced.

In our view, the evidence of the victim's age appeared to have been manipulated to fit into the age bracket for defilement. All the inconsistencies and contradictions in the age given by PW1 in the forms she filled when applying for admission, the report she gave to the enrolled midwife who examined her and her testimony on oath should have been resolved in favor of the appellant as was held by the Supreme Court in ***Oketch David vs Uganda*** *(supra).*

Secondly, PW1 testified that the appellant requested her to carry the water for him where teachers sit and that the incident happened in the office of the teachers. Similarly, PW3 stated

that when he met the appellant with PW1 and the four women at the mission's grave yard, he was told that PW1 had been raped at the main office of ECD. However, PW1 stated in her cross examination on the alternative count of rape that the room in which the incident happened had books of teachers, a mattress and a pair of scissors. It was packed with property and there was little space and just chairs. She also described the room as having two doors and that one door led outside and the other led to the room.

In her analysis, the learned trial Judge made another assumption that reference to the scene as an office was reference to the teacher's quarters being the residence of the appellant as described by PW4. With all due respect, we disagree with this assumption because in her sketch map, PW4 was specific on which ones were the teachers' quarters when she labelled them 1,2,3,4 and 5. The crime scene was marked *"SS"* and from our observation, it covers a wide area of the campus and could not have been the appellant's residence as stated by the learned trial Judge. Further still, PW1 was very clear when she stated that she took the jerrican to the teachers' offices where the teachers sit not to the teachers' quarters. PW3 who said he was a project manager at DON Vocational Center where the appellant worked testified that none of the six teachers, including the appellant, who taught at ECD was a resident at DON. He said that all rooms were offices and planes. It therefore means that the learned trial Judge made a wrong assumption that the office was the appellant's residence.

Be that as it may, we are alive to the fact that the issue whether the victim was defiled or raped in an office or at a residence is not material in determining whether the offence was committed. As such this contradiction could be ignored as it does not go to the root of the prosecution case.

We have also taken note of the other contradictions and inconsistencies on court record which were not addressed by the learned trial Judge but in our view, when considered together cast doubt on the truthfulness of PW1 which then necessitated her evidence to be treated with a lot of caution.

PW1 testified during examination in chief that it was Akiiki (PW3) who came when she made an alarm during the rape. However, in cross examination, she said that it was Napeyok who answered her alarm and he found them inside the house.

Further still, PW1 testified that PW3 escorted her to the hospital and also took her to the doctor for examination. However, in both examination in chief and cross examination, PW3 denied going to the hospital with PW1. We therefore find this to be a deliberate lie on the part of either PW1 or PW3.

PW1 testified in cross examination that when the incident happened, Napeyok came and then went to call her father and by the time he arrived, the appellant had been taken to police, so they hurried with her father and went to the police station. However, PW2 stated in cross examination that PW1's father was not at home, he had gone to work as a casual laborer and he got to know about the incident on his return late in the night. She also added that at the police station, PW1's father was not there. We find the evidence of PW1 on this matter either an outright lie to court or it was PW2 who lied to court.

PW4 testified that she recorded PW1's statement and that she told her that the appellant asked her to carry the jerrican of water to him. As soon as she put it down, he grabbed her and pulled her inside his house where he threw her on a mattress. However, when PW1 was recalled to testify in regard to the alternative count of rape, she testified in cross examination that the appellant got out the mattress first and lay on it as she took the jerrican inside. She added that the room had 2 doors, the inside door and the outside door and that as she was on her way through the outside door, the appellant pulled her inside the room and assaulted her.

First of all, according to PW1's testimony, it is not clear at what point she was defiled. Whether it was at the point of putting down the jerrican or at the point of leaving the house. Secondly, from her evidence, it seems that the crime scene had 2 rooms because in re-examination,

she said that she did not walk into the second room and all through her cross examination she kept referring to 2 doors and an inside room. However, PW2 stated in her cross examination that the appellant stayed in one room. Thirdly, it is during cross examination on the alternative count of rape that PW1 mentioned the presence of a mattress in the room and the learned trial Judge took note of that fact. It should be noted that PW1 herself testified that the incident took place in the teacher's office where teachers sit and it had little space. Similarly, PW3 testified that the four women he found by the grave yard told him that PW1 had been raped at the main office of ECD. PW3 also testified during cross examination that all the rooms were offices and 'planes'. It is therefore doubtful that there was a mattress in the teachers' main office.

Our re-evaluation of the evidence of PW1 gives us the impression that she was not very consistent in her evidence because at some point she kept changing her position. For example, while in her evidence in chief she said during the rape she made an alarm until Akiiki came, in cross examination she said Akiiki came to know about the incident when he met Napeyok Emelia on the road. Similarly, while at the beginning of her testimony she stated that Napeyok called her Aunt and later in cross examination she said Napeyok answered her alarm and still in re-examination she stated that Napeyok came last when she was being examined.

The other contradiction that we have noted is that PW5 stated that she did not see blood but a flow of sperm, a white substance from PW1's vagina and yet PW2 testified that PW1 was bleeding from her vagina. The difference between the colour of blood and that of sperm is so clear that one cannot be mistaken for the other. So one of the two witnesses must have told court a lie. In our view, this is a contradiction the learned trial Judge should not have ignored.

We also find it imperative to add that not every white substance in a woman's vagina is sperm. It should be noted that PW5 testified that she neither took the specimen for further examination nor confirmed the identity of the sperm. We therefore find that the learned trial

Judge should not have relied on PW5's observation to conclude that PW1 was sexually assaulted.

With all the contradictions and inconsistencies we have pointed out above, coupled with the observations we have made in our analysis, we are not entirely convinced that the appellant sexually assaulted PW1. Infact, we have found a lot of inconsistencies in PW1's own testimony and glaring lies which casts doubt in our mind regarding what she told court and the other prosecution witnesses whose corroborative evidence, as we have also found contradicts her evidence. We do not doubt the fact that PW1 was bitten on the breast and had some scratches on her body. However, we need to point out that while the witnesses stated that she had scratches on her thigh and abdomen, the pictogram for her examination at page 44 of the record indicates that the scratches were on the right side of the lower back and on the lower part of her left thigh slightly above the knee. We find this evidence consistent with either forceful sex or just merely an assault. However, in the instant case, the contradictions in the evidence adduced to prove defilement or rape makes us more inclined to believe that the injury was as a result of an assault causing bodily injury as opposed to sexual assault. Indeed the appellant in his defence testified about a fight that ensued between him and PW1 during which he bit the victim's breast and kicked her. In our view, this is consistent with the evidence of her injuries of tooth bite on the left breast and scratches on her body. The Prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the accused, it should be resolved in favor of the accused person. ***See: Woolmington vs DPP [1935] AC 462.*** In this case, we have strong doubt which we accordingly resolve in favor of the appellant. In the result, we quash the appellant's conviction for the offence of aggravated defilement and set aside his sentence.

However, as mentioned earlier, we find that the offence of assault causing actual bodily harm contrary to section 236 of the PCA is proved. "Harm" is defined under section 1 (g) of the PCA as **bodily hurt**, disease or disorder whether permanent or temporary.

Had the learned trial Judge properly addressed her mind to the evidence before court, she would have found the appellant guilty of assault causing actual bodily harm instead of aggravated defilement. We therefore find the evidence adduced proved the offence of assault causing bodily harm which we convict the appellant of.

The offence of assault causing actual bodily harm is a misdemeanor that attracts imprisonment for five years under section 236 of the PCA. Having taken into account the period of two years the appellant had spent on remand, we sentence him to 3 years imprisonment. We note that the appellant has been in prison for a period of 7 years 3 months and 16 days. We therefore find that he has already served the sentence and even exceeded it. In the premises, we order for his immediate release from custody unless he is being held on other lawful grounds.

In the result, we find that ground 1 disposes of the appeal and automatically resolves the 2nd ground on sentence as well.

We so order.

Dated at **Jinja** this 22nd day of Dec 2021

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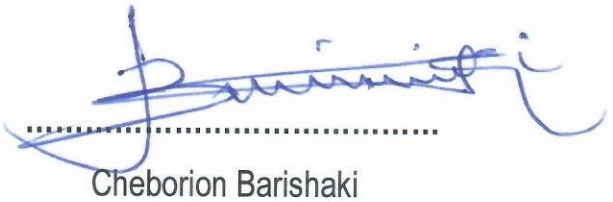
Elizabeth Musoke

JUSTICE OF APPEAL



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