THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera DCJ, Mulyagonja & Mugenyi, JJA

CRIMINAL APPEAL NO. 113 Of 2018

SSENDI ISAAC Alias MUZEEYI::::::::::::::::::::::::::::::::::::APPELLANT

Versus

UGANDA :: RESPONDENT

(Appeal from the decision of Mutonyi, J dated 3rd July 2018 in Mukono High Court Criminal Session Case No. 273 of 2017)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for the offence of aggravated defilement contrary to sections 129 (3) and 4 (a) of the Penal Code Act. He was convicted and sentenced to a term of 20 years' imprisonment, less the period spent in lawful custody before conviction.

Background

The facts that were accepted by the trial judge were that the victim, NJ was 7 years old on 27th November 2014. At around 6.00 pm, at Gonve Village in Mukono District, NJ's mother sent her to untethered goats that she had tethered that morning close to their home. The appellant found her, undressed her and had sexual intercourse with her. She felt pain and saw blood flowing from her private parts. When she got home, she bathed and changed her clothes quickly. She did not inform her

mother because she was afraid she would be very angry with her and beat her up.

The following day when NJ went to school her teacher noticed that she had difficulty in walking. She asked her why this was so but NJ did not tell her what happened. Shortly after that the teacher received a phone call from NJ's mother who informed her that she had seen bloodstains in NJ's skirts. She suspected that she was sexually abused. The teacher asked NJ's mother to go to the school and take the bloodstained clothes with her. When the mother arrived, the teacher the asked NJ what happened upon which she finally revealed that she was defiled by the appellant.

The mother informed the child's father about the incident who then reported to the authorities and the appellant was arrested. The victim was subjected to a medical examination which established that she was defiled. The appellant was then indicted with the offence of aggravated defilement. He pleaded not guilty but the trial judge found sufficient evidence to convict him and sentenced him to 20 years' imprisonment, less the period spent on remand. He now appeals against both conviction and sentence on the following grounds:

1. The learned trial judge erred in law and fact when she convicted the appellant whose legal representative on State Brief was not vetted prior, to ascertain whether or not he was a qualified Advocate, thereby occasioning a miscarriage of justice.
2. The learned trial judge erred in law and fact when she held that the inconsistencies in the prosecution evidence did not go to the root of the case and convicting the appellant without evaluating the said inconsistencies in her judgement, thereby occasioning a miscarriage of justice.

3. The learned trial judge erred in law and fact when she failed to evaluate the evidence on record regarding blood found on the victim's clothes vis-à-vis the evidence of a police officer that the same was sent to government analytical laboratory for comparison thereby arriving at a wrong decision and convicting the appellant.
4. The learned trial judge erred in law and in fact when she convicted the appellant on a finding that the evidence of the police officer was not useful and that the police mishandled the exhibit and in the absence of evidence of investigation of the case thereby occasioning a miscarriage of justice.
5. The learned trial judge erred in law and in fact when she held that the victim who was a single identifying witness, properly identified the appellant.
6. The learned trial judge erred in law and in fact when she made a finding that the victim's evidence as a single child witness was properly corroborated.
7. The learned trial judge erred in law and fact by expressly showing bias during the trial when she informed the appellant that he defiled the victim before (the case) was finally heard and concluded.
8. The learned trial judge erred in law and fact when she did not consider the appellant's period spent on remand thereby harshly sentencing him to twenty (20) years imprisonment, which is manifestly harsh and excessive.

The appellant prayed that the appeal be allowed and the decision of the trial judge be quashed and the sentence of 20 years' imprisonment be set aside.

The respondent opposed the appeal.

Representation

At the hearing of the appeal on 16th August 2023, the appellant was represented by Mr Edward Kakande on State Brief. The respondent was represented by Ms Rose Tumuheise, Assistant Director of Public Prosecutions. The appellant was in court via video link to the prison where he was incarcerated. The parties filed written submissions as directed by court before the hearing.

Counsel for the appellant addressed ground 1 on its own, grounds 2, 3 and 4 together, grounds 5 and 6 together and grounds 7 and 8 separately. Counsel for the respondent argued ground one on its own. She then argued grounds 2, 3, 4, 5, 6 and 7 together, and ground 8 separately. The submissions of counsel were reviewed before the analysis and determination of the related grounds of appeal.

Analysis and determination

The duty of this court as a first appellate court is stated in rule 30(1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence before the trial court and draw inferences of fact from it. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. **(See Bogere Moses & Another v Uganda; Supreme Court Criminal Appeal No.1 of 1997).**

We observed the principles above in the disposal of this appeal. We considered grounds 3, 4 and 7 which related to the alleged bias of the trial judge first, because bias is a serious issue which goes to the jurisdiction of the court and the right to fair hearing. If established it may result in the impeachment of the whole of the proceedings. We next considered ground 2 separately, grounds 5 and 6 together, and grounds 1 and 8 each on its own.

Grounds 3, 4 and 7

In ground 7, the appellant complained that the trial judge displayed bias when she informed the appellant that he defiled the victim before the matter was heard and finally concluded. Grounds 3 and 4 were related to the allegations of bias because the appellant complained that the trial judge did not evaluate the evidence of blood samples found on the victim's clothes which had been taken for forensic analysis. She instead made a finding that the evidence from the blood samples was not useful because the police mishandled it. It was contended that she was thereby biased and arrived at a wrong decision that occasioned a miscarriage of justice.

Submissions of Counsel

With regard to allegations of bias, counsel for the appellant referred court to the definition of *'bias'* adopted by the court in **Bireete Sarah v Uganda, SCCA No. 0079 of 2011**, from Black's Law Dictionary 6th Edition, where it is stated that *"bias"* is a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. He also relied on the test on identification of bias in a judicial officer drawn from **Localbail (UK) Ltd v Bayfield Properties Ltd & Another, 2000 QB 451,** which was adopted by the court in **Bireete's case.**

Counsel for the appellant then submitted that at page 10 of the record, while delivering her ruling on a *prima facie* case, the trial judge put the appellant on his defence without giving him an opportunity to submit on the *prima facie* case. That this was a clear indication of bias since the trial judge adjourned the case for summing up in the absence of the submissions of counsel for the appellant on the same. He went on to submit that at page 21 of the record the trial judge asked the appellant

a question that clearly indicated that she was biased and wanted to confirm his guilt that, *"In your own understanding do you think children of people who live 10 m away from you can ably identify you?"* Counsel asserted that at that point in the proceedings the trial judge wanted the defence to stop giving its evidence because soon thereafter she asked, *"Counsel any question in re-examination?"* But counsel was still leading the appellant in his defence.

Counsel for the appellant went on to submit that the trial judge also displayed bias when she refused to listen to the appellant on his objection to determining the case without bringing the evidence of blood samples that were submitted to the Government Analytical Laboratory (GAL). That in her judgement, at page 24 of the record, she instead laboured to explain why such evidence would not be produced instead of the prosecution explaining the same. That in addition, the trial judge asked the appellant whether he had children. He also pointed out that she expressed her own opinion that the results of blood tests would not show that there was deep penetrative sex.

Counsel went on to submit that the trial judge, well knowing that the appellant had an Advocate defending him, asked the appellant whether he would submit on his own behalf or whether his advocate would do so. That this left no doubt that the appellant at the time felt intimidated and already convicted by virtue of the trial judge's conduct; it resulted in his statement that he did not want court to pass a sentence or convict him before the blood samples were brought back from the GAL.

He concluded that the trial judge was in a hurry to convict the appellant when she wanted him to make submissions before summing up to the assessors and before the defence could close its case. That this amounted to bias on the part of the trial judge.

We observed that although counsel for the respondent said she would address grounds 7 together with grounds 2, 3, 4, 5 and 6 of the appeal, she said nothing about the allegations of bias attributed to the trial judge. She also ignored or omitted to address the appellant's concerns about the absence of the evidence from blood samples that were drawn from him by the Police.

Resolution of Grounds 3, 4 and 7

The second principle in the Uganda Judicial Code of Conduct is Impartiality. It is stated in the Code that impartiality is the essence of the judicial function and applies not only to the making of a decision but also to the process by which the decision is made; justice must not merely be done but must also be seen to be done. The rules that relate to the principle are stated thereafter, partly as follows:

> **2.1 A Judicial Officer shall perform judicial duties without fear, favour, ill-will, bias, or prejudice.**
>
> **2.2 A Judicial Officer shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the legal profession, the litigants and the public, in the impartiality of the Judicial Officer and of the judiciary.**

The Commentary on the Bangalore Principles of Judicial Conduct[1] defines bias in paragraph 57 thereof, as follows:

> *"Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined*

[1] Judicial Integrity Group and United Nations Office on Drugs and Crime, 2007

towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law."

We carefully perused the record of proceedings that was placed before us. However, we did not find the questions that counsel for the appellant attributed to the trial judge from which he inferred that she was biased against the appellant. Instead, we observed that the trial judge recorded the evidence in the form of bullet points which had only the answers given by witnesses. There were no questions at page 21 as it was alleged by counsel for the appellant. We therefore could not accept the submission that any of the questions alleged to have been put to the appellant showed that the trial judge was biased against him.

With regard to the allegation that the trial judge made comments about the evidence of blood samples in her judgment without the results from GAL, we further examined the record of proceedings. We found that at page 18, Corporal Watongola Asuman, PW5, testified that when the matter was reported at Ntenjeru Police Post, he received two garments stained with suspected blood. That the stains of blood were at the back of the clothes, *"around uterus where one sits from."* (sic). He identified an Exhibit Slip of *"a small cream skirt stained by blood."* He further stated that he delivered the Exhibit Slip and it was marked **PE3**.

When PW5 was cross examined the focus was on the Exhibit Slip. He explained that where there is an Exhibit Book, it is prepared in triplicate and a copy of the slip stays in the Book after it is filed. Another copy is placed on the Police File. The trial judge put questions to PW5. He stated that *"The out part did not have an exhibit Book."* (sic) That the slip was received by Nyakecho but he did not know who took custody of the exhibits.

We observed that the sample that the appellant testified about was of his own blood. At page 21 of the record, he stated in examination in chief, that Police took a sample of blood from him for testing. That he never saw the clothes but they wanted to make a comparison of the blood sample on them with his blood. That he did not see the results but he should not be convicted before the DNA results from Wandegeya (GAL) are received.

In her judgment, at page 32 of the record, the trial judge reviewed the evidence adduced by the prosecution about the blood samples and made observations about it as follows:

> *"The evidence of PW5 Watongola Asuman the Police Officer was not very relevant in as far as identification of the Accused is concerned. Much as the exhibited blood stained clothes were not tendered in court, the sexual act which could have led to the bleeding was not a contentious issue. It was an agreed fact. Court however observed that Police mishandled the exhibits. The chain of exhibits movement was broken completely. Since the sexual act was not contentious court allowed the exhibit slip to be tendered and it was marked PE3. Basically that was the prosecution evidence in brief."*

The appellant's complaint is that the court should have waited for the result of the tests of the sample that was taken to try and match the blood stains found on the victim's skirt with his blood to be returned and adduced before the trial was concluded. This would be by means of matching his DNA to the blood samples on the skirts. However, the skirts did not make it to the Police. Or if they did, the chain of evidence was broken. The evidence from GAL would not have been reliable due to the break in the chain of transfer of the skirts from Ntenjeru to Mukono Police Station, as PW5 admitted.

The trial judge correctly pointed this out in her judgment. The allegations that the trial judge was biased when she did not wait for the evidence of DNA of the appellant *vis-à-vis* the blood stains or fluids that

were found on the victim's skirts was therefore not made out by the facts on the record, and we so find.

It was stated for the appellant that the trial judge did not give an opportunity to his advocate to respond to submissions that there was a case to answer after the prosecution closed its case. It was contended that this too amounted to bias against the appellant.

We observed that the recording of the proceedings at close of the prosecution case seems to have an error. It appears that part of the testimony of PW5 that was given after the ruling of the trial judge that a prima facie case had been established by the prosecution was misplaced. The proceedings at page 19 of the record reflect the error thus:

> **RULING:**
>
> From the prosecution evidence on record, court is of the view that the prosecution established a prima facie case against the accused regarding (sic) him to be put on defence.
>
> Options explained to the accused.
>
> **Signed: Justice Margaret Mutonyi**
>
> **Judge**
>
> **28/3/2018.**
>
> I interrogated the accused, and he denied. The victim identified the accused as the person who defiled her.
>
> No re-examination.
>
> Court: Adjourned to 28/3/2018 for Ruling.
>
> **Signed: Justice Margaret Mutonyi**
>
> **Judge**
>
> **28/3/2018**

It is clear from the record that PW5, the police officer, testified on 27th March 2018 as all the other witnesses for the prosecution did. Court

then adjourned to the 28th of March 2018. It is therefore not possible that the last part of the testimony of PW5 was taken on 28th March 2018. The error above could have been occasioned by the person who typed the record who misplaced parts of PW5's testimony.

Nonetheless, we observed that neither counsel for the respondent nor for the appellant made any submissions at the close of evidence adduced by the prosecution. The trial judge simply arrived at the conclusion that a case had been made out against the appellant from the evidence adduced, which she deemed sufficient to put him on his defence.

We would not say that this amounted to bias on her part since she applied the same standard to both parties. But in order to come to a conclusive finding on this point, we considered section 73 of the Trial on Indictments Act (TIA) which provides as follows:

> **73. Close of case for the prosecution.**
>
> **1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, *the court, if it considers that there is no sufficient evidence that the accused or any one of several accused committed the offence, shall, after hearing the advocates for the prosecution and for the defence, record a finding of not guilty.***
>
> **(2) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, *the court, if it considers that there is sufficient evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each accused person of his or her right*—**
>
> **(a) to give evidence on his or her own behalf;**
>
> **(b) to make an unsworn statement;**

(c) to call witnesses in his or her defence, and shall then ask the accused person, or his or her advocate, if it is intended to exercise any of the rights under paragraphs (a) or (b) and (c) of this subsection and shall record the answer.

The court shall then call on the accused person to enter on his or her defence, except where the accused person does not wish to exercise any of such rights, in which event the advocate for the prosecution may sum up the case for the prosecution.

{Emphasis added}

The provision above shows that there are two options that the court may adopt after the prosecution closes its case. The first option is where the trial judge is of the view that the prosecution has not made out a *prima facie* case for the accused person to be put on his defence. In such a situation, the trial judge calls upon the Advocates for each party to address court in order for him/her to come to a conclusive finding on the matter. In such cases, the Advocate representing the accused person may also move the court to allow him/her to submit that there is no case to answer. Thereafter the prosecution responds, in the ordinary manner, after which the Advocate of the accused person makes a rejoinder. The court then rules on whether there is a case to answer by the accused person or not.

The second option applies where the trial judge is, after hearing all of the evidence adduced by the prosecution, of the opinion that there is a *prima facie* case for the accused person to be put on his defence. In that event, the court reads our or explains the options that the accused has under the law to defend themselves. It is apparent from clause (2) of section 73 of the TIA that the trial judge is not under any obligation at this point of the proceedings to call upon any of the Advocates to offer submissions on whether there is a case to answer made out against the accused person or not. In the instant case, the trial judge considered the evidence adduced by the prosecution and came to the finding that

a *prima facie* case was established against the appellant. She thus correctly put the appellant on his defence, under section 73 (2) TIA, and explained the options as to how he could defend himself.

Therefore, we are unable to find that the trial judge was biased against the appellant when she did not call upon his Advocate to address the court before he was put on his defence. The trial judge only applied the necessary provision of the law in the particular circumstances and properly put the appellant to his defence.

We therefore find that grounds 3, 4 and 7 of the appeal were without merit and they must fail.

Ground 2

In this ground the appellant complained about inconsistencies and contradictions in the evidence against him which the trial judge found not to have gone to the root of the case and so convicted him without evaluating them. He contended that this occasioned a miscarriage of justice.

Submissions of Counsel

Counsel for the appellant submitted that there was an inconsistency about the manner in which it was established that the appellant was the man who defiled the victim. The 1st argument was that it was the victim's teacher, PW2, who explained to her how blood went onto her clothes. That this led to the fabrication of evidence against the appellant by PW2. He asserted that this also confirmed the contention that PW2 had a grudge against the appellant. Counsel went on to submit that the use of the name "Muzeeyi" was only by PW2 and not the victim who identified her assailant as *grandpa* or *Ssebo*. He asserted that this inconsistency was major and added that it was aggravated by the

victim's mother who testified that *"a tall man who wears a hat and sells vegetables"* is the person who defiled the victim. That the mother did not use the name "Muzeeyi" used by the teacher. Counsel went on to submit that it was strange that PW3, the victim did not recognise any blood on her skirts. That this left the only evidence of blood on the record to be that which came from PW4 who suffered a nosebleed, as PW2 testified.

Counsel went on to submit that the victim testified that she had knickers on at the time she was defiled but none of the prosecution witnesses spoke about them. That PW4 was able to talk about the accused's underpants that purportedly had bloodstains but she forgot to say anything about her daughter's knickers. He submitted that this left a lot to be desired in the evidence adduced by the prosecution, hence the significance of the absence of results from the blood samples as a major inconsistency that goes to the root of the case. Counsel further submitted that it was not surprising that PW5 testified that he delivered a small cream skirt stained with blood with an Exhibit Slip **PE3**. However, the officer did not clarify the said inconsistency and contradiction in respect of how such an exhibit ended up on the record of the court. He went on to submit that it was strange that PW5 received 2 pieces of cloth, one brown and the other checked black and white belonging to the victim, but he failed to exhibit them but delivered and exhibited an unknown cream skirt that did not belong to the victim.

Counsel went on to submit that the fear that PW3 had of her mother also left a lot to be desired in the prosecution case. He asserted that PW4 told a lie when she stated that the teacher, PW2, interviewed the victim while she (PW4) was seated in the teacher's office. And at the same time that the teacher called the victim and took her behind the classroom and interviewed her there. He asserted that this was a major

contradiction and inconsistency in her evidence. He went on to point out that PW2 stated that the victim's mother cried and then had a nosebleed on being informed that it was the appellant that defiled her child. However, PW4 stated that she screamed when she recognised who the assailant was. He asserted that there was a big difference between crying and bleeding and screaming, and the trial court failed to evaluate this leading to a major inconsistency that goes to the root of the case.

Counsel went on to submit that PW3 testified that the appellant asked her to lie down and remove her knickers which she did. However, this contradicted her testimony in cross examination where she stated that the appellant removed her clothes while she was standing. He asserted that this was a major contradiction that the court ignored.

He further submitted that the victim's mother, PW4, contradicted her evidence in chief because in chief she stated that she told the victim to go and have a bath. But in cross examination she stated that the victim took a bath on her own and she did not direct her to do so. He asserted that such a contradiction and inconsistency in her evidence shows that she was not a truthful witness. That the inconsistency should not be taken lightly as the trial judge did because it led to a miscarriage of justice. He referred to the decision in **Obwalatum Francis v Uganda, SCCA No. 30 of 2015**, where the Supreme Court laid down the principles observed by courts in arriving at their findings in cases where there are inconsistencies and contradictions in the evidence.

In reply, counsel for the respondent submitted that there were no discrepancies in the evidence adduced by the prosecution, and if there were any they were so minor that they did not go to the root of the case. That at page 30 of the record the judge observed that there were some contradictions in the manner in which the victim revealed information

to the teacher. She further observed that the witnesses testified in the case where the offence occurred in 2014. That this was 4 years after the incident and such contradictions could be explained away by the lapse of time. She prayed that this ground be dismissed.

Resolution of Ground 2

The principles that are observed by the courts in resolving inconsistencies and contradictions in evidence have been long settled. They were re-stated by the Supreme Court in **Wephukulu Nyuguli v Uganda, Criminal Appeal No. 21 of 2001** as follows:

> *"It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses, should be ignored and that major ones which go to the root of the case, should be resolved in favour of the accused* ***(See Alfred Tajar v Uganda, Cr. Appeal No. 167 of 1969 EACA)*** *(unreported). But each case must be decided on its facts."*

The alleged inconsistencies in the evidence adduced by the prosecution in this case were between the testimonies of the victim's teacher Susan Nanvuma (PW2), the victim (PW3) and her mother Zawedde Winnie (PW4). The evidence that was central to establishing the appellant's guilt is that of the victim. Since it was short and concise, we reproduced it below, verbatim, to guide the reappraisal of the rest of the evidence.

The victim testified on oath after court conducted a *vior dire*. At page 14-15 of the record her testimony was recorded thus:

> *"I am 10 years old, resident of Gonve village. I know the accused person. I saw him. He was a neighbour renting near where we stayed. He used to sell avocado, and other vegetables. I remember what happened between me and him. He defiled me. I had gone to untie goats in the evening, he just asked me to lie down, removed my nicker, (sic) and he also removed his trouser, he put me down and then defiled me. After defiling me, blood started flowing from me. I went back home and quickly removed the skirt I was wearing and bathed quickly, (I)removed the skirt*

and did not tell my mother. I thought my mother would beat me. After removing the cloth, I remained there. It was in the evening and was becoming dark but I could see. He defiled me behind the pit latrine of Mama Ese (Eseza). The accused did not say anything to me. I tried to scream but he covered my mouth. I felt pain and I was taken to hospital. I knew him very well by his facial appearance. Some children called him grandpa others called him Ssebo."

Court put some question to the victim. She responded that her assailant lived in the 3rd room from theirs. That she was not feeling too much pain but she was not walking normally. Further, that someone looking at her would easily notice that she was not walking as she usually did. In cross examination, she explained that teacher Nanvuma (PW2) was her friend. That she was afraid to tell the teacher because she thought she would tell her mother who would beat her. But she maintained that the appellant was the person who removed her clothes, slowly. That he did not use violence to undress her. That the place at which she was defiled was not far; but it was bushy, not clear. That no one witnessed the incident. She also clarified that no one told her to tell this story to court.

Counsel for the appellant submitted that the testimony of PW2, Nanvuma contradicted that of the victim because she stated that the victim told her that the person who defiled her was called "Muzeeyi," not *grandpa or Ssebo,* and rightly so. The testimony of PW2, at page 13 of the record, shows that the victim informed her that it was Muzeeyi that defiled her. That when she asked which Muzeeyi, the victim explained that it was the Muzeeyi who lived near their home and that she knew him because he used to sell vegetables. PW2 further testified that when she told PW4 that it was Muzeeyi who defiled the child, PW4 confirmed that the man lived in a house next to them. However, PW4 stated that PW2 referred to the assailant as *'the tall man who wears a hat with vegetables and a neighbour to PW4.'*

We see no major contradictions in the descriptions of the appellant by the three witnesses because they each stated that they knew him before the incident. Each had their own description of the appellant from their own perspective. To the children he was *grandpa* or *Ssebo*. To the teacher he was *Muzeeyi*. To PW4, he was *"a neighbour and fellow tenant."* But there were two aspects that were consistent in all the three testimonies. The person that the victim reported to have defiled her was their neighbour and he sold vegetables.

With regard to the appellant's advocate's contention that the blood stains on the victim's skirts was from her mother's nosebleed (PW4) and not form the injuries of the victim, he referred us to the testimony of PW2. He contended that she stated that when she told PW4 that it was Muzeeyi who defiled her daughter, she broke down and cried which resulted in a nosebleed. We carefully appraised the evidence about the nosebleed in the testimony of PW2 and found that it came after she interviewed the victim. This was also after PW4 showed her the blood stained skirts. The relevant part of PW2's testimony in that regard, at page 12-13 of the record, was as follows:

> *"I know ... (NJ) who is a pupil right from baby class. I used to see him moving around the village selling vegetables and fruits. It was 27/11/2014 when I received the victim at school. She was walking but uncomfortable. I called her and tried to ask what happened to her. She kept quiet. I let her go. After some minutes, the parent called. She told me she suggested (sic) something had happened to her because as she was washing clothes, she saw blood in her clothes. I told her to come to school with the bloodstained clothes. When I checked I saw the blood stains in the skirts. One was brown and one was checked. Both clothes had blood stains behind around the panty part. I tried to ask the girl when the matter (sic) was there. She could not say anything. I told the mother to get one (sic) and I remained with the girl. When I asked her again she gave me a name Muzeeyi. After explaining to her how the blood got on her clothes, she explained that a man got her and pulled out his penis and put it inside her. She had gone to untie the goat behind Anne Esajaa's (sic) toilet. When she mentioned Muzeeyi, I asked her who is*

this Muzeeyi. She told me, the Muzeeyi who stays near their home and that she knew him because he sells vegetables. I called the mother back and asked her about the man and she said he stays next to them. After telling her about the man she started crying them (sic) and then and nosebleed. I advised her to report the case to police. She requested me to go with her."

From the testimony above, it is not possible that the bloodstains that PW2 saw on the victim's skirts were the result of PW4's nosebleed. It is clear that the blood was on the skirts when PW4 showed them to PW2; the blood stains on the skirts were actually what raised PW4's suspicions and led her to make the telephone call to PW2. There was therefore no contradiction between the testimony of PW2 and PW4 in that regard.

Counsel for the appellant also doubted that the victim was so afraid of her mother that she could not reveal to her that she was defiled when she went to untether the goats. However, PW4 explained to PW2 why the child may have been afraid. She said that she directed her daughter to go and untether the goats at around 6.00 pm in the evening but she took some time before coming back home. And that when she did, PW4 asked her why she had taken such a long time. She blamed the child for taking long because she came back when it was approaching 7.00 pm. That she spent almost an hour yet it would normally take about 10 minutes to bring in the goats if they had not tied themselves up badly. That she told the child to bathe. She also stated that the child appeared to have a problem but she did not take a keen interest in it; she said she did not bother. That child bathed and changed her clothes, and they had supper and went to bed.

In PW2's opinion, the actions that the victim took were because she thought the mother would beat her up if she found out that she was defiled. She testified that the manner in which her mother demanded

for an explanation may have forced the victim to keep quiet and not reveal what happened. PW2 explained that the child did not feel free with the mother because she was a *bit tough on her*. That the manner in which she questioned her was tough and so she did not get anything out of her. That she too, PW2, failed to get any information out of her when she first interviewed her. It appears to us that the victim naïvely blamed herself for what happened to her while she was out getting the goats. We see no inconsistency in the evidence because the testimony of PW2 and PW4 was consistent and not contradictory to the testimony of the victim herself.

Counsel for the appellant also contended that there was a contradiction about whether PW4 told the victim to bathe or whether she did so on her own. This goes to the evidence that after she was defiled she took a bath to hide the fact of the defilement. We observed that the victim (PW3) clearly stated that when she was defiled she saw blood flowing out of her private parts. But when she got home she quickly removed the skirt that she was wearing, bathed quickly and changed the skirt. But she did, again naively, not tell her mother because she thought her mother would beat her up, yet she left the evidence of the blood stains in the skirt. The mother on the other hand in her examination in chief stated that she directed the victim to take a bath. But when she was cross examined, she stated that the victim bathed of her own choice; she did not direct her to do so. In re-examination, she asserted that her children bathe every day.

We therefore do not think that this was an important contradiction in the evidence given the testimony of the victim herself that she bled after she was defiled and that she took off the offending skirt. This is because whether she bathed on the instructions of her mother or her own need to do so, she bled and the blood went onto two of her skirts. It is this

fact that raised the mother's suspicions and led to her investigations with the help of PW2.

Counsel for the appellant complained about the fact that though PW4 testified that the appellant's under pants had blood on them, she *'forgot'* to testify about the victim's knickers though she was wearing them before the alleged defilement. While it is true that PW4 stated that the victim's clothes were left at the Police Station, and further that it was found that the appellant's under pants had blood stains, the victim's knickers were not in evidence at all. PW2 did not state that she saw the victim's knickers. Neither did the victim herself say anything about them, save that the assailant removed them before he defiled her. The fate of the knickers is not known but the skirts had blood stains which both PW2 and PW4, as well as PW5 saw. Therefore, whether the knickers were in evidence or not does not make a difference given the clarity of the victim's evidence that she bled after she was defiled, which was corroborated by the mother who found blood stains on two of her skirts.

Finally, counsel for the appellant asserted that there was a contradiction in the testimony of the victim as to whether her clothes were removed when she was standing up or lying down. However, the sequence of events is clear in the testimony of the victim. She clearly stated that the appellant asked her to lie down, removed her knickers and also removed his trousers and then defiled her. In cross examination she confirmed that it was the appellant who slowly removed her clothes, and that he did not use violence when he did so. In our opinion, whether she was standing, sitting or lying down when her knickers were removed made no difference at all because the material evidence was that the knickers were removed before she was defiled.

We found no contradiction in the victim's testimony about how her clothes were removed and the fact of of the sexual act. She was consistent in her examination in chief and cross examination. Indeed, counsel for the prosecution did not have to re-examine her to resolve any contradictions. The trial judge therefore correctly found that though there were inconsistencies in the evidence adduced by the prosecution they were not grave, and we agree with her finding.

Ground two of the appeal therefore also fails.

Grounds 5 and 6

The two grounds were to the effect that because she was a single identifying witness, the victim did not properly identify her assailant due to the alleged absence of sufficient light to do so. Further that because she was a child, her testimony as a single identifying witness legally required corroboration.

Submissions of Counsel

With regard to grounds 5 and 6 counsel for the appellant submitted that when the victim was cross examined she stated that there was no other person in the bushy place where she was defiled. That this was consistent with her testimony in chief where she stated that it was evening and it was becoming dark, but she could see. That the state did not show that the victim could clearly see at the time she was defiled. That this was supported by the testimony of her mother who stated that she returned home when it was approaching 7.00 pm. That she also explained that she spent almost an hour away when she went to untether the goats. Counsel asserted that this confirms that the victim did not properly identify her assailant. He added that though an identification parade was conducted the report was never produced in

evidence; neither did the officer who conducted it testify. He further opined that the victim's identification evidence was never corroborated, as is required by law.

Counsel went on to submit that though the victim stated that she knew the appellant very well by his facial appearance, she did not state the aspects of his appearance that led to his identification. She only identified him by what the children called him, *grandpa or Ssebo*. That therefore though the victim knew the person who allegedly defiled her she failed to describe him in court. That the other witnesses PW2 and PW4 identified him as Muzeeyi, a distinctive name which indicated that the two witnesses were testifying about a different person from the one identified by the victim.

Counsel further contended that the trial judge came to the conclusion that at the time the victim was defiled it was not yet dark, yet the victim stated that it was dark. That it then becomes clear that the judge failed to properly evaluate the evidence about identification of the appellant. That in addition, she did not caution herself on convicting the appellant on the evidence of a single identifying witness. He explained that court did not take into consideration the principles that courts rely upon to determine whether identification by a single eye witness was proper, as they were stated in **Bogere Moses & Another v Uganda, SCCA No. 01 of 1997**. He prayed that court answers grounds 5 and 6 in the affirmative since the appellant was not properly identified, considering all the circumstances surrounding the unfortunate incident.

In reply, counsel for the respondent submitted that the parties tendered the agreed facts in court under section 66 of the Trial on Indictments Act, as it is shown on page 12 of the record of proceedings. That it was agreed that the prosecution proved that the victim was 7 years old and

therefore below the age of 14, as well as the fact that the sexual act took place. That the only element disputed was and still is the participation of the appellant. And to prove its case the prosecution adduced the evidence of PW3 the victim, PW2 the teacher and PW4 her mother.

She went on to submit that the victim testified that she was 10 years old at the time of her testimony which meant that she was 7 years old at the time of the incident in 2015. She also stated that she knew the appellant very well because he was their neighbour who rented a house near them. Further that he used to sell avocado and other vegetables. Counsel asserted that this shows that the victim was possessed with sufficient intelligence to know her assailant.

She further submitted that PW3 testified that on the date in issue she went to untether goats in the evening. That it was then that she met the appellant who laid her down, removed her knickers and his trouser and had sexual intercourse with her. That this evidence shows that the victim knew the person who defiled her. That she insisted that it was he and therefore there was no mistaken identity. She went on to submit that the testimony of the victim was corroborated by the evidence of her mother, PW4 who testified that on the 26th November 2014 the victim returned from school and she told her to untethered the goats. That the goats were tethered in a nearby bush behind the house and she gave instructions to the victim at about 6.00 pm in the evening. That this evidence showed that the incident took place in broad daylight, under favourable conditions for identification.

Counsel went on to submit that the appellant testified that he had no grudge against the victim's mother. That therefore there was no reason for the victim to frame the appellant. That the trial judge rightly found

that the victim correctly identified her assailant. She prayed that the conviction be upheld and the sentence confirmed.

Resolution of Grounds 5 and 6

Two related questions fall for the determination of the court under these two grounds of appeal: i) whether the victim correctly identified her assailant, and ii) whether there was need for corroboration of her evidence to support the conviction.

Identification

The former Court of Appeal in **Abdalla Nabulere v Uganda**, **Criminal Appeal No. 09 of 1978; [1978] UGCA 14**, relied on the decision in **Abdalla Bin Wendo & Another v R (1953) 20 EACA 166,** cited with approval in **Roria v. R. (1967) EA 583,** and stated that the testimony of a single witness regarding identification must be tested with the greatest care. That the need for caution is even greater when it is known that the conditions favouring a correct identification were difficult. Further, that where the conditions are difficult, what is needed before convicting is 'other evidence pointing to guilt.' Finally, that subject to certain well known exceptions, it is lawful to convict on the identification evidence of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone. The court then came up with criteria to guide evaluation of identification evidence in the following often quoted paragraph of its judgment:

> *"Where the case against an 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 correctness of the identification or identifications. ... The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under*

observation, 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."

The trial judge's findings on the evaluation of evidence of identification were at page 33 of the record where she observed and found as follows:

"She knew the accused very well being a neighbour whose room was just 10 metres away.

She ably described him as Muzeeyi, a neighbour who sells vegetables. It was at 6.00 pm which in Uganda is still day time. It was not yet dark

The child properly identified her assailant as the conditions were conducive for proper identification. ...

In my humble opinion, the mother, and the teacher's evidence corroborates well with the victim's evidence. She identified the assailant who happens to be the accused."

We note that the trial judge did not show that she tested the evidence on identification by a single witness with the greatest care, as it is required in such cases. She therefore erred when she stated that the victim identified her assailant as "Muzeeyi." Though her identification of her assailant was consistent with the person the teacher knew as Muzeeyi, in her testimony the victim stated that the assailant was known as *grandpa or Ssebo*. However, this was not prejudicial to the appellant because all three witnesses who testified about his identify also referred to him as the neighbour at the victim's home who sold vegetables.

As to whether there was sufficient light, the victim did not state the time at which she was defiled but she indicated that it was *"in the evening and becoming dark but I could see."* However, the mother stated that it was between 6.00 pm and 7.00 pm, because the child whom she sent out to untether the goats at about 6.00 pm returned home at about 7.00 pm. As to whether there was still light for her to see her assailant, it is

known that the time between 6.00 pm and 7.00 pm in most parts of Uganda is twilight. This is the time between day and night when there is light outside, but the sun is below the horizon. There is still sufficient light for one to identify a person near them.

It is trite law that the best witness to identify the assailant in sexual offences is the victim. In this case, the assailant was well known to the victim. He was the neighbour who the children called grandpa or *Ssebo* and he sold vegetables in the neighbourhood. He could not have defiled her unless he was in close proximity for him to perform the sexual act with her. The period of time that the assailant took to remove her clothes slowly, lay her down and defile her was sufficient for her to identify him, though the victim did not state how long she was in his presence. She also stated that during that period of time she was able to identify him by his facial features.

Counsel for the appellant contended that the victim did not describe her assailant according to the facial features she identified him by. However, we are of the view that it is these facial features that she was familiar with by sight that enabled her to state that the assailant was their neighbour who lived in a room/house near where her family stayed and sold avocado and other vegetables. It is also highly improbable that a seven-year-old child could after a period of more than 3 years state the distinctive facial features of her assailant, unless they were clearly distinctive or different from the normal.

That then leaves the alleged identification parade whose results counsel for the appellant complained were never adduced in court. We carefully perused the record of appeal. The only identification at the Police Station was mentioned by PW4, at page 17 of the record, when she stated that when the appellant was arrested, the victim identified him

at the Police Station as the man who defiled her. PW5, Watongola Asuman, the policeman who partially carried out the investigation, said nothing about an identification parade. We therefore did not accept the submissions of counsel for the appellant that a report ought to have been produced in court because clearly, there was no identification parade carried out for the victim to identify her assailant.

Corroboration

The rule about corroboration of the evidence adduced by a child in court flows from section 40 (1) of the TIA, which states the general rule that every witness in a criminal cause or matter before the High Court shall be examined upon oath, and the court shall have full power and authority to administer the usual oath. Sub-section (1) of section 40 of the TIA goes on to provide for an exception to this rule as follows:

> **(3) Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; *but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.***
>
> *{Emphasis added}*

The victim in this case was 10 years old when she testified though the incident took place when she was aged seven. A *vior dire* was conducted by the trial judge and she established that she was possessed of sufficient intelligence to justify the reception of her evidence, because she understood the importance of telling the truth. The proceedings relating to the *vior dire* were at page 14 of the record of appeal. The

victim thereafter took the oath and was cross examined by counsel for the appellant, as it is shown at page 15 of the record of appeal. The requirements for corroboration in section 40 (3) of the TIA therefore did not apply to her testimony.

We also found that there was no need for corroboration of her testimony because it withstood cross examination and was consistent with the testimony of PW2 and PW4 about the sequence of events, both before and after the incident.

As to whether corroboration was required due to the fact that it was a sexual offence, it is pertinent to point out that corroboration of the evidence of victims in sexual offences was an unwritten rule of evidence or practice. It is no longer required by the courts. The Supreme Court in **Ntambala Fred v Uganda, Criminal Appeal No. 34 of 2015; [2018] UGSC 83,** reiterated the need to discard of the requirement of corroboration when it stated that even in sexual offences, a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. That what matters, even in such cases, is the quality, not the quantity of evidence. In the supporting opinion on that particular point, Tibatwmwa Ekirikubinza, JSC, further explained and emphasised that:

> *"In Basoga Patrick vs. Uganda, Criminal Appeal No. 42 of 2002, the Court of Appeal held that the requirement for corroboration of evidence in sexual offences is discriminatory against women and is therefore unconstitutional. The court cited with approval the finding in the Kenya case of Mukungu vs. R (2003) 2 EA that: "the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls."*

It was further emphasised that the evidence of a victim in a sexual offence must be treated and evaluated in the same manner as the

evidence of a victim of any other offence. That as it is in other cases, the test to be applied to such evidence is that it must be cogent.

The defilement of girls, or children, and indeed most sexual offences takes place in private places in the absence of eye witnesses, except the victim. The fact that the victim is a child does not mean that there is always need for corroboration of the event, especially where his/her evidence is cogent. We note that the trial judge relied on the testimonies of PW2 and PW4 as evidence to corroborate the testimony of the victim. We find that she made no error when she did so, because in their absence the assault upon the victim would have gone unnoticed. The evidence of the two witnesses therefore established the basis upon which the victim testified in court and such evidence is of great value to the court because section 156 of the Evidence Act provides as follows:

> **156. Former statements of witness may be proved to corroborate later testimony as to same fact.**
>
> **In order to corroborate the testimony of a witness, any former statement made by the witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.**

We therefore find that though corroboration was not required by law in this case, it was necessary to establish the case and availed by the prosecution. The trial judge therefore made no error when she convicted the appellant of the offence of aggravated defilement on the basis of the evidence of the victim though she was only a child.

Grounds 5 and 6 therefore also fail.

Ground 1

In this ground of appeal, the appellant complained that the trial judge erred when she convicted the appellant yet he was represented by a

legal representative on State Brief who was not vetted to establish whether or not he was a qualified Advocate. That when she did so, the trial judge occasioned a miscarriage of justice.

Submissions of Counsel

Counsel for the appellant submitted that Article 28 (3) (e) of the Constitution provides that an accused person is entitled to legal representation either private or on State Brief, if charged with an offence carrying a sentence of death or imprisonment for life. He relied on the Judicature (Legal Representation at the expense of the State) Rules of 2022, to define *"legal representation."* He then submitted that the appellant was assigned a lawyer called Turwomwe Emmanuel as a State Appointed Advocate but it was found that the said Advocate does not appear on the Roll of Advocates and bears no Practising Certificate. In support of this assertion he provided a copy of a letter from the Chief Registrar dated 29th August 2018, which was attached to his submissions.

Counsel went on to submit that the many errors in the representation of the appellant before the lower court, which he pointed out in the submissions, were attributed to the ineptitude of this State Appointed Advocate. He then asserted that due to the fictitious, overrepresentation at the hands of the Advocate appointed by the State, the appellant innocently suffers imprisonment for years, occasioning a miscarriage of justice that can never be atoned for a person of advanced age at the time of his arrest. He prayed that this ground be decided in the affirmative.

In reply counsel for the respondent submitted that these allegations were brought before court from the bar. That they were not found anywhere on the record of proceedings and they were not supported by

evidence from the Law Council to confirm that the Advocate was never on the Roll. She concluded that this ground should fail because the appellant was properly represented in the trial court by counsel appointed by the State.

Resolution of Ground 1

It is indeed the correct position of the law that the Constitution of the Republic of Uganda in Article 28 (3) (e) provides that every person that is charged with a criminal offence which carries a sentence of death or imprisonment for life is entitled to legal representation at the expense of the state. The appellant was therefore assigned an Advocate to represent him in the lower court on State Brief.

However, we observed that counsel for the appellant opined that this was done under the Judicature (Legal Representation at the expense of the State) Rules of 2022. This could not have been so because those Regulations came into force in 2022, long after the appellant was tried, convicted and sentenced in July 2018. It was therefore erroneous of counsel to apply Regulations that had not yet come into force in his submissions.

Nonetheless, it is evident from the record that the appellant did not complain about the Advocate that was assigned to his case by the Registrar in the trial court. The complaint therefore comes to us as an appellate court for the first time without any evidence on the record about it, except the letter dated 29th August 2018, from the Chief Registrar addressed to M/s F. Aogon & Co. Advocates. In the letter, the Chief Registrar states that *"**Turyomwe Emmanuel** is not on the Roll of Advocates."* The heading in the letter referred to **Turyomwe Emmanuel** also known as **Turyomwe Emma**.

We carefully perused the record of proceedings throughout the trial of the appellant in the lower court which took place on two days: 27th and 28th March 2018. We established that the Advocate who represented the appellant on State Brief was recorded by the trial judge as **Turwomwe Emma** and not **Turyomwe Emma**, as it was stated in the letter from the Chief Registrar presented to this court. The two names are clearly different from each other.

The submissions on record in the lower court were signed for Bumpenje & Co. Advocates of Carol House, Plot 40 Bombo Road in Kampala, but the Advocate who signed them was not named. This called for further investigations of the matter by this court in order to establish whether indeed a person who is not on the Roll of Advocates in Uganda represented the appellant holding the brief for the State. This was done because it is the duty of the trial court to appoint Advocates to represent accused persons indicted for capital offences. It would cause disrepute to the court in the eyes of litigants if the court appointed a person who is not licensed to practice to represent a person on trial for an offence whose maximum sentence is death.

The Deputy Registrar of this Court was therefore tasked to make an inquiry about the person who represented the appellant and she made the inquiry. The Chief Registrar responded to the inquiry by letter to the Deputy Registrar dated 1st September 2023. It was stated in the letter that records show that there is no Advocate on the Roll by the names of **Emma Turwomwe**, **Emma Turyomwe**, **Emmannuel Turyomwe** or **Emmanuel Turwomwe**.

However, the submissions were filed by a law firm known as Bumpenje & Co, Advocates. It was established by letter from the Law Council dated 19th September 2023 that the firm was registered in 2018 and one of

the partners at the time was Christopher Bumpenjje. If Turwomwe Emma was in court on behalf of that firm, the partners should be taken to task for allowing him to pass off as an Advocate when he was not enrolled.

It also appears to us that all along, M/s F. Aogon & Company Advocates and/or the appellant were aware that Mr Turwomwe was not on the Roll of Advocates but they did not complain or let the court know about it. With that information under their belts, M/s Aogon & Company Advocates took on the representation of the appellant in this appeal, we believe with the intention of using it to impeach the proceedings in the lower court. This can be deduced from the sequence of events from the date of the appellant's conviction to the time that they lodged his Memorandum of Appeal stating the complaint about Mr Turwomwe's conduct as the very first ground of appeal.

We observed from the record that M/s F. Aogon & Co. drafted and signed the Notice of Appeal on 24th July 2018. They then, on the 27th August 2018, sought to confirm from the Chief Registrar whether Mr Turwomwe was on the Roll of Advocates. Once they confirmed that he was not from the letter of the Chief Registrar dated 29th August 2018, M/s F. Aogon & Co Advocates lodged the Notice of Appeal in this and the lower court on 31st August 2018. They then proceeded to lodge the Memorandum of Appeal in court on 31st November 2018, stating the first ground of appeal that the trial judge erred when she convicted the appellant who was represented by a person who was not a qualified Advocate.

Counsel for the appellant now contends that the omission to hire an Advocate who is on the Roll or the error of the court in appointing Mr Tutwomwe as the person to represent the appellant led to the denial of

the appellant's rights under Article 28 (3) (e) of the Constitution. Further that the rights under Article 28 (3) (e) are non derogable and where the prisoner is not represented, the whole of the proceedings are invalid. He referred to the decision of this court in **Arinaitwe Richard v Uganda, Court of Appeal Criminal Appeal No. 595 of 2014; [2019] UGCA 236,** to support his submissions. He contended that for those reasons, this court should allow the appeal because the representation of the appellant by a person who is not an Advocate in this case occasioned a miscarriage of justice.

We considered the decision in **Arinaitwe Richard** (supra). We observed that the court indeed made a general observation, where the appellant decided to represent himself in the lower court, discharged the Advocate that he had previously hired and refused to be represented by an Advocate on State Brief. At page 8 of its judgment the court stated that Article 28 (2) is couched in mandatory terms and the failure of the court to ensure that an accused person is represented by legal counsel under the above provision would invalidate the whole trial. However, the court in that case found that the appellant waived his right to legal representation at some point during the trial when he chose to represent himself. Court also found that he was within his rights to do so; he made an informed choice when he chose to represent himself and refused an Advocate appointed by the state or a lawyer on private brief.

The case of **Arinaitwe** (supra) can therefore be distinguished from the instant case in which a person who was appointed by the court represented the appellant to the end. It is inferred from the facts in this case that the State paid for legal representation and indeed the court appointed a person thought to be a lawyer, who passed off as an Advocate from the recognised firm of Bumpenje & Co Advocates, when he was not an Advocate.

We do accept the submission that it was the duty of the Court to ensure that the person that was retained to represent the appellant was licensed to practice. The court made an error when it appointed one who was not. But given the conduct of counsel for the appellant in this appeal when he took on instructions, we note that section 16 of the Advocates Act provides that Advocates shall be officers of court in the following terms:

> **16. Advocates to be officers of the court.**
>
> **Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the High Court and shall be subject to the jurisdiction of the High Court and, subject to this Act, to the jurisdiction of the Disciplinary Committee.**

Rule 17 of the Advocates (Professional Conduct) Regulations, SI 267-2, goes on to emphasise the duty of an Advocate to the court as follows:

> **17. Duty of an advocate to advise the court on matters within his or her special knowledge.**
>
> **(1) An advocate conducting a case or matter shall not allow a court to be misled by remaining silent about a matter within his or her knowledge which a reasonable person would realise, if made known to the court, would affect its proceedings, decision or judgment.**

It is also our opinion that the provision above does not only apply to matters that the Advocate is engaged to conduct before the court; it applies to any matter before the court in which an Advocate has special knowledge of the fact that the court is being misled, even as a by-stander. The fact that a person representing a party is not on the Roll of Advocates is no doubt one of the matters that may be in the special knowledge of an Advocate. By withholding their knowledge of the fact that Mr Turwomwe was not on the Roll of Advocates, only to verify it and then immediately thereafter take on the prosecution of the appellant's appeal in this court, the Advocates in M/s F. Aogon & Co.

appear to have flouted the tenets in rule 17 of the Advocates (Professional Conduct) Regulations.

The duty of this court while disposing of criminal appeals is set out in section 132 (1) (d) of the TIA, which provides that on an appeal to this court from the decision of the High Court, this court may confirm, vary or reverse the conviction and sentence. Counsel for the appellant urged this court to reverse both the conviction and sentence and set the appellant free. However, section 139 of the TIA goes on to clarify as follows:

> **139. Reversability or alteration of finding, sentence or order by reason of error, etc.**
>
> **(1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment *or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice*.**
>
> **(2) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, *the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.***
>
> *{Emphasis added}*

We are of the view that the failure to ensure that Mr Turwomwe was on the Roll of Advocates was an error, omission or irregularity in the proceedings. It did not however mean that the state did not discharge its obligation to comply with the provisions of Article 28 (3) (e) of the Constitution. Mr Turwomwe misrepresented to the court that he was an Advocate and he or Bumpenje & Co Advocates were paid for representing the prisoner at his trial. Mr Turwomwe was clearly a fraudster who obtained money from the state though the court when he was not an Advocate. However, the question must still be answered

whether representation by Mr Turwomwe in practical terms occasioned a miscarriage of justice within the meaning of section 139 (1) of the TIA.

Black's Law dictionary, 9th Edition by Garner, defines a *"miscarriage of justice"* as,

> *"A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite lack of evidence on an essential element of the crime. – Also termed failure of justice."*

We have considered all the grievances that the appellant's counsel pointed out to us within the proceedings that resulted in the conviction of the appellant, both with regard to the procedure followed by the court and the evidence adduced by the prosecution. We have found no merit in any of them and each has been resolved against the appellant. We therefore cannot say in this case that because the person that was paid by the state to represent the appellant was not on the Roll of Advocates, the court in a gross and unfair manner convicted the appellant without sufficient evidence.

As to whether the fact that Mr Turwomwe was not an Advocate could have been brought to the attention of the trial court, we have already observed that it seems this fact was within the knowledge of the appellant's Advocates during the proceedings before the lower court. They however opted to keep quiet and bring it up as a ground of appeal in this court to facilitate the impeachment of the whole of the proceedings against their client. We do not think that they acted in good faith or as true officers of this court should.

It is pertinent to note that much as Article 28 (3) (e) of the Constitution emphasises the prisoner's right to legal representation as a mandatory requirement in a criminal trial where the maximum sentence is death or life imprisonment, Article 126 (2) (a) provides that justice shall be

done to all irrespective of their social or economic stature. The rights that are pitted against each other in this case are those of an innocent 10-year-old girl who was sexually abused by a person fit to be her grandfather and those of the appellant an old man who was 60 years old at the time the offence was committed, who abused her rights. This court was called upon to balance the two sets of rights and come to a just decision.

Finally, Article 126 (2) (e) of the Constitution enjoins courts to administer substantive justice without undue regard to technicalities. The appellant was represented by a person who was not on the Roll of Advocates but by a firm with competent Advocates who filed submissions on his behalf. He has had a second go at his defence, with an Advocate on the Roll, before this court which has the duty to rehear the case by reappraising all of the evidence before the trial court and coming to its own findings on the basis of that evidence and the law.

It would be a travesty of justice if this court let the appellant off, given the body of evidence before us, for the sole reason that though there was evidence enough on the record to convict him, a fraudster took advantage of the trial court when he purported to represent him. We are of the strong opinion that the better option would be to have Mr Emmanuel Turwomwe arrested and subjected to the course of justice by prosecuting him for the appropriate offence. Ground 1 of the appeal therefore fails and it is dismissed.

Ground 8

The appellant's complaint in this ground of appeal was that the trial judge did not consider the period that he spent on remand and therefore, she sentenced him to a harsh and excessive sentence of 20 years' imprisonment.

Submissions of Counsel

Counsel for the appellant submitted that while sentencing the appellant the trial judge clearly indicated that he spent 4 years and 7 months on remand. That she in fact sentenced the appellant to 20 years' imprisonment, less the period spent on remand. That however the sentence was harsh and excessive because she failed to consider the same while signing the warrant of commitment for a sentence of imprisonment, under section 106 of the Trial on Indictments Act.

Counsel went on to submit that the decision to sentence the appellant was very clear but because it was not reflected in Form 80, the Commitment Warrant, it was confusing. That Form 80 should have reflected 15 years and 5 months, not 20 years. That this was very harsh because it shows that the judge did not consider the time spent on remand as mentioned in her sentence.

Counsel went on to submit that the trial judge was persuaded by the submissions in mitigation but wrongly found the appellant unremorseful because he said he did not commit the offence, and this defeats the right to appeal. That the reason one appeals is because they are dissatisfied but it does not mean they are not remorseful. He prayed that the conviction be quashed, the sentence set aside and the appellant be acquitted.

In reply counsel for the appellant submitted that the judge was clear that the appellant was to spend 20 years less the time spent on remand which was 4 years and 7 months. That a sentence of 20 years' imprisonment was not harsh and excessive and the court should not interfere with the said sentence, instead it should be confirmed. She went on to submit that the Commitment Warrant was very clear

because it was to the effect that the appellant was to serve 20 years' imprisonment, including the time spent on remand.

Counsel then concluded that should this court find that the sentence was ambiguous, it should invoke its powers under section 11 of the Judicature Act and deduct the 4 years and 7 months from the 20 years, bringing the sentence to 15 years and 5 months imprisonment. She prayed that the sentence be confirmed because it was neither illegal nor harsh and excessive.

Resolution of Ground 8

The principle that this court will only interfere with a sentence imposed by the trial court unless it is illegal or founded on wrong principles of law has long been settled. The court will also interfere with the sentence where the trial court has not considered a material factor that ought to have been considered, or where the sentence is harsh and manifestly excessive in the circumstances. [See **Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported), Bashir Ssali v Uganda [2005] UGSC 21 and Livingstone Kakooza v Uganda [1994] UGSC 17**.] We took cognizance of these principles in disposing of this ground of appeal.

The appellant was convicted on 3rd July 2018 but sentenced on 18th July 2018. The part of the sentencing ruling that he complained about was at page 23 of the record of appeal and as follows:

> *"In view of his unrepentant heart and considering the gravity of the offence, coupled with the fact that he has spent about 4 years and 7 months on perpetual remand, I sentence him to 20 years' imprisonment less period spent on remand."*

The period of remand was not shown to have been considered in the commitment warrant which stated that the appellant was *"sentenced to*

serve 20 (twenty) years imprisonment, period spent on remand inclusive." There is therefore an apparent disparity between the sentence as pronounced by the trial judge and that which was recorded in the Commitment Warrant.

The Supreme Court in **Rwabugande Moses v Uganda, Criminal Appeal No 25 of 2014; [2017] UGSC 8,** where judgment was handed down on 3rd March 2017, made the following observations about the implications of Article 23 (8) of the Constitution:

> *"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.*
>
> *We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous."*

In this case, the trial judge did take the period spent on remand into account arithmetically when she stated that the sentence of 20 years would be less the period of 4 years and 7 months spent on remand. However, she did not specifically state the sentence imposed, so the sentence defied proper interpretation by the person who prepared the Commitment Warrant for the trial judge's signature.

A sentence of imprisonment for a period of time should be specific, ascertainable, clear and unambiguous. {See **Kibaruma John v Uganda, Criminal Appeal No.225 of 2010; [2016] UGCA 52}.** The sentence must be definite and clearly ascertainable. (See **Umar Sebidde v Uganda [2012] UGSC 84).** It should also be unreservedly pronounced by the trial judge in order to remove any doubt or ambiguity about the punishment that the convict has to serve. It is for that reason that

section 106 of the TIA provides for a warrant in case of a sentence of imprisonment in the following terms:

> **106. Warrant in case of sentence of imprisonment.**
>
> **(1) A warrant under the hand of the judge by whom any person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Uganda, shall be issued by the judge, and shall be full authority to the officer in charge of that prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.**
>
> **(2) Subject to the express provisions of this or any other law to the contrary, *every sentence shall be deemed to commence from and to include the whole of the day of the date on which it was pronounced.***
>
> *[Emphasis added]*

Clause (2) of section 106 of the TIA is specific. The person implementing the sentence should be able to tell exactly when the sentence commences and when it should end, both from the sentencing ruling and the Commitment Warrant. Sentencing judicial officers should therefore avoid expressions in the sentences imposed such as *"20 years' imprisonment, period of remand inclusive"* or *"20 years' imprisonment, less the period spent on remand"* and similar statements. This is because when judges describe the sentence imposed in that manner, they leave room for error in the computation thereof, especially where the period spent on remand has not been specifically stated in the sentence. This may prejudice convicts in the execution of sentences against them.

In this case therefore we find that the sentence imposed by the trial judge was ambiguous and we set it aside. We invoke the powers of this court under section 11 of the Judicature Act and hereby sentence the appellant to a sentence that is clear and unambiguous.

We have considered the aggravating and the mitigating factors that are evident on the record. We have also considered the fact that the

appellant was of the advanced age of 64 years when he entered upon his defence on 28th March 2018. He must now be 71 years old. We are of the opinion that the sentence of 20 years' imprisonment that was imposed upon him would have been sufficient to serve the interests of justice in the case, but we now deduct the period of 4 years and 7 months that he spent in lawful custody before he was convicted and sentence him to serve a term of 15 years and 5 months' imprisonment. The sentence shall commence on 18th July 2018, the day on which he was first sentenced.

Dated at Kampala this 26th Day of September 2023.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Monica K Mugenyi
JUSTICE OF APPEAL