

5 **THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT MBALE**

(Coram: B Cheborion, JA, C. Gashirabake, JA, O. Kihika, JA.)

**CRIMINAL APPEAL NO. 0556 OF 2014**

*(Arising from Criminal Session No. HCT-00-CR-CS-170/2013)*

10 BETWEEN

**OBOTH OTHIENO YOFESI .....APPELLANT**

AND

**UGANDA..... RESPONDENT**

15 *(Appeal from the Judgment of the High Court of Uganda Holden at Moroto, by Henry I Kawesa, J. delivered on 11<sup>th</sup> June 2014)*

**JUDGMENT OF COURT**

**Introduction**

1.] The appellant was charged with one count of aggravated defilement contrary  
20 to sections 129 (3) and (4) of the Penal Code Act.

2.] The facts are that in the month of February 2012 the victim AH, was going  
to her sister’s home in Ngeta “B” Lyolwa, Tororo district, she stopped near a  
grinding mill as she waited for the sister. The appellant approached the victim  
and offered to take her to the sister. The appellant walked with the victim up  
25 to a swamp called Poyawo and then forcefully performed a sexual act on the  
victim who was then aged 11 years. The victim ran to PW3 and PW4’s home  
for assistance and narrated her ordeal. Meanwhile, the victim was bleeding  
from her private parts and they gave her food and a bed since it was at night.  
The victim described the appellant and he was arrested prosecuted, convicted,  
30 and sentenced to 20 years’ imprisonment.

5 3.] The appellant being aggrieved with the decision of the High Court lodged an appeal in this Court. The appeal is premised on three grounds set out in the Memorandum of Appeal as follows;

- 10 1. *The learned trial Judge erred in law and fact when he convicted the appellant on the unreliable evidence of a single identifying witness.*
2. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on the Court record.*
- 15 3. *The learned trial Judge erred when he sentenced the appellant to an illegal sentence without taking into account the pre-trial remand period.*

### **Representation**

4.] At the hearing of the appeal, the appellant was represented by Mr. Eddie Nangulu. The respondent was represented by Ms. Caroline Marion Acio, Chief State Attorney.

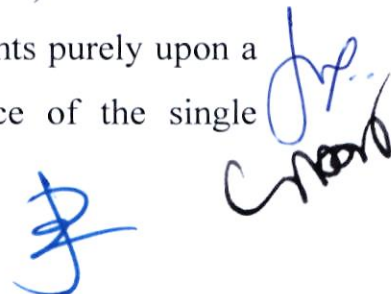
### **Ground one**

**The learned trial Judge erred in law and fact when he convicted the appellant on the unreliable evidence of a single identifying witness.**

### **Submissions for the appellant**

5.] According to counsel for the appellant, the other ingredients of the offence of aggravated defilement are not in dispute, what is in dispute is the participation of the appellant. It was submitted that the appellant can only be convicted on the strength of the prosecution case and not the weakness of his defence. (See, **Sekitoleko vs. Uganda, SCCA No.33 of 2014**)

6.] It was submitted that the trial Judge convicted the appellants purely upon a single identifying witness while reviewing the evidence of the single



5 identifying witness, the trial Judge referred to **Abdullah Nabulere vs. Uganda, 1979 HCB 17, Abudalla Bin Wendo & Another vs. R, (1953) 20, EACA 166 and Wasajja vs. Uganda, [1975] E. A 181**, which counsel for the appellant cited in his submissions.

7.] In his view, counsel for the appellant, argued that the evidence was not  
10 sufficient to implicate the appellant of aggravated defilement. The circumstances were not favorable for proper identification, in that the victim was not familiar with the appellant. He submitted that the victim was not able to identify her assailant. That according to the record of proceedings, the victim stated that she identified the appellant after he had been shown to her.

8.] Counsel further argued that according to the evidence of PW2, when they  
15 asked the victim to identify the appellant from a crowd that was at his compound, she said there were none of them. This was corroborated by the evidence of PW3 who testified that when the victim was asked to identify the appellant out of the crowd, she said he was not among them yet, he was there.  
20 He further submitted that PW5 went against the rules of the identification parade. Counsel cited **Sgt. Baluku Samuel & anor vs. Uganda SCCA 21 OF 2014**, which laid down the procedure of conducting an identification parade, which the police allegedly faulted.

9.] The appellant denied having defiled the victim. It was submitted that the  
25 prosecution failed to discharge its burden of proof to the required standard of proof and having so failed, counsel insisted that the learned trial Judge erred in law and fact when he convicted the appellant without sufficient evidence on the Court record.

