

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL**

*[Coram: Egonda-Ntende, Bamugemereire & Mugenyi, JJA]*

**CRIMINAL APPEAL NO. 203 of 2015**

*(Arising from High Court Criminal Session Case No.0084 of 2012 at Fort Portal)*

**BETWEEN**

Kirungi Moses *alias Ekanya*=====Appellant

**AND**

Uganda=====Respondent

*(An appeal against the Judgement of the High Court of Uganda [Okwanga, JJ] at Masindi delivered on 16<sup>th</sup> December 2014)*

**JUDGMENT OF THE COURT**

**Introduction**

- [1] The appellant was indicted of the offence of aggravated defilement contrary to Section 129 (3) & (4) (a), (b), (c) of the Penal Code Act. The particulars of the offence were that the appellant on the 15th day of May 2012 at Kyegobe Village in Kabarole district, performed a sexual act upon KL, a girl aged 8 years. The learned trial judge convicted the appellant and sentenced him to 27 years' imprisonment.
- [2] Dissatisfied with the decision of the trial court, the appellant appealed to this court against both the conviction and sentence on the following amended grounds:

‘(1) The learned trial judge erred in law and fact when he convicted the appellant on poor identification evidence thereby occasioning a miscarriage of justice.

(2) The learned trial judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant.’

### **Submissions of Counsel**

- [3] At the hearing the appellant was represented by Mr Geoffrey Chan Masereka while the respondent was represented by Ms Happiness Ainebyona, Chief State Counsel in the Office of the Director, Public Prosecution. Both counsel filed written submissions which were relied on at the hearing of this appeal.
- [4] The complaint in ground 1 of this appeal is that the learned trial judge erred in concluding that the appellant had been properly identified as the perpetrator. Mr Masereka contended that PW3 stated that she was unable to see the face of the assailant given the fact that there was darkness at the scene of crime. He submitted that the appellant was not properly identified due to the darkness in the house. Counsel for the appellant relied on Abudalla Nabulere v Uganda [1978] UGSC 5 on how evidence of an identifying witness should be handled.
- [5] Mr Masereka, further submitted that it was alleged in the indictment that the incident took place on 15<sup>th</sup> May 2012 and it was the prosecution evidence that the victim was examined on 17<sup>th</sup> May 2012 and found that the hymen was ruptured 5-7 days previously. He contended that the number of days between 15<sup>th</sup> May 2012 and 17<sup>th</sup> May 2012 do not amount to the 5-7 days indicated in the police form 3.
- [6] He submitted that PW3 and PW4 gave contradicting evidence. He stated that it was the testimony of PW4 that he saw the victim coming from school the following day and she was walking with difficulty. While PW3 stated that she did not go to school on the following day. He relied on Baitwabusa Francis v Uganda [2017] UGSC 62 for his submission that the contradictions in the prosecution evidence are grave and go to the root of the case and prayed to this court to reject the prosecution evidence.