THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBALE
CRIMINAL APPEAL No.151 of 2018
(CORAM: Obura, Bamugemereire & Madrama, JJA)

OPOLOT BEN BOSCO :: APPELLANT

VERSUS

UGANDA:: RESPONDENT

[Appeal from the Decision of Henrietta Wolayo J, dated 1st March 2018 in High Court Criminal Session No.196 of 2016 Holden at Kumi)

JUDGMENT OF THE COURT

The appellant, Ben Bosco Opolot was indicted for the offence of Aggravated Defilement contrary to section 129 (3) and (4) (a) of the Penal Code Act. It was alleged that on the 7thday of May 2016, at Kachede-Kachabule village in the Bukedea District, the appellant performed a sexual act on JA a girl aged 6 years.

Background

The background to this appeal is that on the 7th day of May 2016, the victim's mother went to the garden leaving the victim and her 9-year-old sister at home. It is alleged that between 8:00am to 9:00am, the appellant followed and grabbed the victim, took her to a nearby cassava garden, behind the kitchen and performed a sexual act on her. When she returned later in the evening, the victim's mother noticed her daughter walking with difficulty. She rushed the victim to a nearby medical clinic where, upon examination, it was found that she had been violently ravaged and had bruises in the labia area and was bleeding. The following day, Sunday 8th May 2016, the victim and her sister identified the appellant at the trading centre and informed the female relative they were with. He was immediately apprehended. The appellant was tried, convicted and sentenced to 28 years

and 8 months' imprisonment. Dissatisfied, the appellant lodged this appeal against both conviction and sentence.

Grounds of Appeal

1. That the learned trial Judge erred in law and fact when she failed to evaluate the entire evidence on record hence causing a miscarriage of justice.
2. That the learned trial Judge erred in law and fact when she totally ignored the appellant's defence of Alibi which was plausible.
3. That the learned trial Judge erred in law and fact when she convicted the appellant on emotions of the prosecution hence causing a miscarriage of justice to the appellant.
4. Without prejudice to the former, the sentence of 28 years was deemed harsh and excessive given the obtaining circumstances.

Representation

At the hearing of the appeal, Mr. Allan Mooli represented the appellant on state brief while Ms. Immaculate Angutoko, Chief State Attorney represented the respondent.

At the hearing, Mr Allan Mooli applied to file the Notice and Memorandum of appeal out of time. Counsel for the respondent had no objection to the prayers sought. Both counsel filed their written submissions. This court granted the prayer of counsel for the appellant by enlarging the time within which to file and validated the Notice and Memorandum of Appeal under **rules 5 and 43 of the Judicature Court of Appeal Rules and Directions (COA Rules)**. This court has adopted relied on the written submissions by both counsel and other independent authority to arrive at its decision.

Appellant's Submissions

On Ground No. 1, counsel for the appellant submitted that the duty to prove allegations of Aggravated Defilement c/s 129(3 and (4) lies on prosecution throughout. He contended that the accused person does not bear the burden to prove his innocence. Counsel was critical of the trial Judge for failure to evaluate the evidence of participation of the appellant in the commission of the offence. Counsel opined that even though the prosecution led four witnesses to prove its case, the only evidence on record pointing to the participation of the accused person is the unsworn evidence of PW3 Amuge Elly aged 9 years and PW4 Agudi Jackline whose apparent age was assessed by court to be between the age of between 5 and 6 years.

Counsel argued that the evidence the learned Trial Judge based on to come to a conclusion that the prosecution had proved the element of participation beyond reasonable doubt was the evidence of PW3 and PW4, which evidence was uncorroborated and unsworn evidence.

Counsel relied on **Ssenyondo Umar v Uganda CACA No. 267 of 2022** which cited **Patrick Akol v Uganda CACA No. 123 of 1992** with approval. The two cases extensively referred to Lord Goddard in **R v Campbell (1956) 2 ALL.E.R 272** at page 276 rejecting the evidence of children;

> "To sum up, the unsworn evidence of a child must be corroborated by sworn evidence, if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no evidence whether the child's evidence relates to an assault on him or herself or to any other charge, for example where an unsworn child says that he saw the accused person steal an article..."

Counsel further referred to **section 40 (3) of the Trial on Indictments Act,** to the effect that the evidence of a child of tender years needs to be corroborated by some other evidence in order for court to base its conviction on it.

It was counsel's averment that the unsworn evidence required to be corroborated by independent evidence and in this case the evidence of PW3 and PW4, which was unsworn and could not corroborate the other. He submitted that the only independent evidence leading to proper identification of the appellant which would have offered independent corroboration would have been evidence of an identification parade. Counsel argued that since the identification parade was not carried out there was no evidence to properly corroborate the eyewitness account of two minors.

Counsel contended that PW3 and PW4 did not know the appellant by name. PW3 testified that she had never seen the appellant but that it was the mother who told her that he was called Ben. Counsel argued that it is questionable why PW3 and PW4 did not tell their mother who the perpetrator was when she asked if they knew him when she found out that one of them had been violently defiled. Counsel averred that an identification parade was the only way the appellant could have been properly identified in order to rule out the possibility of mistaken identity. He cited **Mulindwa Samuel v Uganda SCCA No. 41 0f 2000** where Court pointed out that the objective of an identification parade is to test the ability of a witness to pick out from a group the person the witness has seen at a previous occasion.

Counsel submitted that this court should re-evaluate the evidence in regard to participation of the accused person and find that prosecution did not prove the ingredient of participation beyond reasonable doubt and be pleased to acquit the appellant.

On the second ground, counsel submitted that the appellant raised the defence of an alibi and led his own evidence, that of DW2, Ibrahim Osekeny and of DW3 Peter James Okwii to substantiate his alibi. Counsel submitted that it was wrong for the trial Judge to totally ignore this evidence without providing a basis for her belief.

It was counsel's contention that had the trial Judge given proper scrutiny to the defence of alibi visa vis the evidence led by prosecution to prove participation, she could have found that the defence of alibi was plausible in the circumstances. Counsel prayed that Ground No. 2 of the appeal be upheld by court.

Counsel for the appellant abandoned Ground 3.

On Ground No. 4, counsel submitted that the sentence of 28 years was harsh and excessive in the circumstances. It was counsel's submission that had the learned trial Judge considered the fact that the convict was a first time offender; she would have arrived at a lesser sentence than 28 years.

In conclusion counsel prayed that this court allows the appeal and quashes both conviction and sentence of the convict.

<u>Respondent's Submissions</u>

Counsel for the respondent contended that the first and third grounds offend the provisions of **rule 66(2) of the Court of Appeal Rules** in so far

as they fail to specify exactly the point of law or fact or mixed law and fact or the evidence that the appellant contends were wrongly decided.

Counsel cited **Seremba Dennis v Uganda CACA No. 480 of 2017** and **Ntireganya Joseph v Uganda CACA No. 109 of 2017** where this court struck out similar grounds for offending rule 66 of the COA Rules. Counsel invited this court to apply the same principle and strike out the first and third grounds of appeal.

Without prejudice, counsel for the respondent responded to the appellant's submissions on the first ground of appeal. Counsel cited **Sewanyana Livingstone v Uganda SCCA No. 19 of 2006** where court found that 'what courts look at is the quality of evidence and not quantity.'

It was counsel's contention that the evidence of the appellant's participation was proved beyond reasonable doubt by PW3, PW4 and PW2. Counsel submitted that PW4's evidence was well corroborated by the testimony of PW3 who confirmed that she saw the person who took the victim to the cassava garden and he was called Ben. Counsel averred that there was no need for an identification parade to prove the appellant's participation. His view was that the trial Judge properly evaluated the evidence regarding participation and came to a correct conclusion that it was the appellant who defiled the victim.

In reply to the second ground, counsel for the respondent averred that although the appellant put up a defence of an Alibi was rebutted through evidence which placed the appellant at the scene of crime.

Counsel cited **Jamada Nzabaikukize v Uganda SCCA No. 1 of 1997** for the view that an alibi can be discredited either by prosecution evidence if it

squarely places an accused at the scene of the crime or by prosecution evidence which directly negates or counteracts the accused's testimony that he was in a particular place other than at the scene of the crime. In this particular case the appellant and a defence witness both claimed that at the time the alleged offence took place, he was at Lifeline in Bukedea Town Centre and not at Kachubale where the offence occurred. The two minors here were the only two witnesses to the alleged crime. Their evidence as two minors has to find support from some other independent evident. The evidence of their mother was as follows:

> "JA (names of minor removed) is my daughter, I know accused in the dock, and he is a village mate. On 7.5.16, Ihad gone to weed pine at the swamp in the morning at 8am. On my return, I found JA seated while another child AE was in the kitchen JA. AE is older than JA. JA was bleeding so I took her to the clinic. I asked her what happened but she kept quiet. The older sister AE could not tell me what happened. The nurse directed me to a government facility at Katadi. Accused was arrested because he defiled my daughter. It was at the clinic I was told my girl was defiled."

Counsel for the appellant invited this court to find that the appellant's alibi was destroyed by prosecution evidence that placed him at the scene of crime. We have carefully examined what might have been eye-witness evidence of PW3 AE, a 9year old who gave unsworn evidence and here is an excerpt:

PW3: AE, I am nine years old I study at Akuri primary school, P3 (read Primary Three). I go to church. My parents are Ikiriya Jesca. I don't have a father.

Court: I have examined the girl I find she is too young to understand the importance of taking the oath. **She will give evidence not on oath.**

> "**PW3 (sic Recounts the events)**: We were boiling cassava, somebody came and chased us and my sister fell. He took my sister JA to the cassava garden. I did not follow them. JA retumed she was bleeding from the buttocks. I saw the person who took JA to the cassava garden. He is called Ben. I had seen him before, he passes by the road near our home. He is the accused person. He took JA during day time. When JA retumed I did not see Ben. My mother had gone to the garden. I did not tell my mother it was Ben who took JA to the garden. I didn't tell mother, I saw Ben the second time at the centre, I was with my aunt Gilde Phoebe. I told my aunt it was Ben, Ben was arrested."

Upon close scrutiny of the manner in which the above evidence of the minor was procured by the court and her testimony above we form the view that the evidence against appellant was complicated by not adopting proper procedures for taking of a ***voi dire*** and the subsequent testimony of the child of tender years. The Trial Judge ought to have carefully considered the manner in which a ***voi dire*** is taken. The nature of particulars taken from the child and questions asked by the court as recorded above do not amount to a ***voi dire***. In order for a ***voi dire*** test to stand it ought to comply with whether the child has an understanding of the obligation to speak the truth on the witness stand; has capacity to distinguish right from wrong and the reliability to prove that at the material time, she had conceived an accurate impression of the occurrence concerning which she stands to testify and has a memory sufficient to retain an independent recollection of the

occurrence and the capacity to express in words tsuch memory of the occurrence when asked simple questions. Sadly, gathering from the above transcription of events in the trial Judge's notes, there was no demonstration of the three condition required under section 40(3) of the TIA. It states as follows:

Section 40

"(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."

It is our finding that there was no proper taking of the evidence of a child of tender years. The procedural error, in our view, goes to the root of a fair hearing and erodes the rights of the appellant by requiring him to answer to charges regarding evidence which was improperly procured. Aggravated defilement is a capital offence attracting a sentence of death in the rarest of the rare cases. Evidence surrounding it must be cogent enough to place the person accused on his defence and make a conviction from it safe.

The above evidence must go hand in hand with testimony or other proof that places an offender at the scene of crime. In this case the appellant pleaded an alibi. It is neither the duty of the appellant to place himself at the scene of the crime nor is it his duty to rebut the alibi. Indeed, in this

case he provided an alibi that at all times material to this case he was busy ferrying sand at Lifeline School in Bukedea. To prove this, he called a witness to support his alibi. The prosecution on the other hand stuttered in bringing evidence that could pin the appellant and squarely place him at the scene of the crime. Failure to procure the evidence of the two minors in a manner acceptable under the law left the prosecution with no other evidence to pin the appellant.

In Sekitoleko v Uganda 1967 EA 531, it was held that; "An accused person does not have to prove an alibi once he raises it. Further, in Bogere Moses v Uganda SCCA No. 1 of 1997, court held that;

> "Where prosecution has adduced evidence showing that the accused was at the scene of crime and the defence not only denies it but adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judiciously and give reasons why one and not the other version is accepted."

There was no evidence led to disprove the alibi of the appellant that he was ferrying sand to Lifeline School as a casual labourer in Bukedea. Instead the prosecution only managed to make inferences of his presence at the scene of crime.

The unfortunate incident was said to have occurred on a Saturday while Jesca Ikiriya, mother to the two infants was away weeding pine in a swamp. On return she was concerned to see her daughter walking in an awkward manner and quickly took her to a medical clinic where a nurse examined her and proved that the child had been defiled. When asked who did this heinous act, the two children did not reveal to their mother who did it. The

following day the two young girls confided in their aunt, in whom they felt more comfortable to confide. They had not divulge to their mother who the assailant was in spite of her taking JA through the initial examination. The reason for not disclosing the assailant to their mother at the earliest opportunity was not disclosed, either due to indequate investigation competencies, lack of parenting skills by the poor mother, hence failure to communicate with young children, extreme deprivation or other related reasons. The failure led to a weak prosecution case. Lack of cogent evidence is no fault of the appellant. He cannot be found guilty where evidence is glaringly lacking. The ineptness of the respondent should not be visited upon him. We therefore find that the identification of the appellant was not adequate and provided a gap in the prosecution evidence which they could not fill. An accused can only be convicted on the strength of the prosecution case. Any doubt raised must be resolved in favour of the appellant: see Sekitoleko v Uganda [1967] EA 531. See Euchu Michael v Uganda Supreme Court Criminal Appeal No. 54 of 2000 where it was held as follows:

> "It is trite that in arriving at its decision in a criminal trial, the court must consider the evidence as a whole. See Okethi Okale vs Republic (1965) E.A. 555. It is a gross misdirection, for a trial court, to decide that an accused person is guilty after considering the prosecution case alone, without considering the defence, and thereby, expressly or by inference, to hold that the defence is consequently rejected. Such approach is tantamount to shifting the burden of proof in so far as the defence is looked at merely to consider if it disproves or casts doubt on the prosecution case. It is a cardinal principle, however, that, save for a few exceptions which are not relevant here,

the burden of proof in a criminal trial never shifts from the prosecution. That burden entails adducing evidence which not only supports the prosecution case, but also disproves the defence case. For that reason the court has to take the defence into consideration, before it can determine that the prosecution has discharged the burden to prove its case and disprove the defence case, beyond reasonable doubt."

We have carefully re-viewed the record of the lower court and found that the trial Judge was more inclined to accept the evidence of the prosecution with its flaws and did not give careful consideration to the defence of the appellant and his alibi which had been supported by his two witnesses. Indeed, had the trial Judge carefully analysed the prosecution evidence together with the defence of alibi she would have come to the conclusion that the prosecution failed place the appellant at the scene of the crime.

The evidence on the record was not sufficient to sustain the offence of Aggravated Defilement contrary to section 129 (3) and (4) for lack of proper identification. In the end this matter turns on identification. See **Okeno v (1972) E.A.32 at p36**. In **Walakira Abas, SGT. Kizito Joseph and Muwakanira John v Uganda SCCA 25 of 2002** the supreme court had this to say:

"considering all the foregoing matters, we are unable to uphold the concurrent decision of the two courts below, that the participation in the robbery by the 2nd and 3rd appellants was proved beyond reasonable doubt. We think the evidence raises reasonable doubt on their identity, which doubt must be resolved in their favour".

In Moses Bogere and Another v Uganda (Supreme Court Criminal Appeal No. 1 1997 the approach to be taken by a trial Court in dealing with evidence of identification by eye witnesses in a criminal case was laid down by the Supreme Court as follows:

> "This Court has in many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eyewitnesses in Criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of mistaken identity. The Court should proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction unless it is satisfied that mistaken identity is ruled out. In so doing the Court must consider the evidence as a whole, namely, the evidence if any of the factors favouring correct identification together with those rendering it difficult. It is trite Law that no piece of evidence should be weighed except in relation to all the rest of the evidence.

Had the trial Judge applied her mind to the fact and the law she would have concluded that the evidence was not adequate to pin the appellant with the offence of Aggravated Defilement contrary to section 129 (3) and (4) of the Penal Code Act. The conviction cannot stand. The appellant is therefore declared not guilty.

Counsel for the appellant abandoned Ground No. 3 of the appeal. We therefore strike it out. Upon finding that there was no proof of the offence of Aggravated Defilement contrary to section 129 (3) and (4) and that the defence of alibi succeeds, we hereby quash the conviction. Having found the

appellant not guilty, we did not find reason to deal with issues of sentencing in Ground No. 4 of the appeal since this ground has now been overtaken by events. The sentence of 28years imprisonment also is set aside.

In the result, this appeal succeeds.

The appellant is acquitted and forthwith set at liberty unless held on other charges.

Dated at Kampala this.....7th.....Day of .....Feb.....2023.

Hon. Lady Justice Hellen Obura
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal

Hon. Mr. Justice Christopher Madrama
Justice of Appeal