THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 507 OF 2016

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

KALINAKI MAGANDA MUHAMUDU::APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of Hon. Lady Justice Catherine Bamugemereire at Jinja High Court Criminal Session Case No. 218 of 2012 delivered on 27/11/2014)

JUDGMENT OF THE COURT

Introduction

This is an appeal against the decision of the High Court at Jinja (Bamugemereire, J as she then was) in which the appellant was convicted on 3 counts of aggravated defilement and sentenced to 16 years' imprisonment on the first count and 15 years' imprisonment on each of the 2nd and 3rd counts to run concurrently.

Background Facts

The facts giving rise to this appeal as found by the learned trial Judge are that the appellant was a second husband of Jamilah Kubula (PW1) whose older daughters had complained to her about the appellant's inappropriate sexual behavior towards them and subsequently left the home. PW1 had twins (hereinafter referred to as B.R and N.A) with the appellant and also lived with her other daughter the 1st victim, K.M (PW2) who was aged 13 years. On the fateful night, PW2 needed to go to the latrine at night and she called her mother (PW1) to escort her. However, she was sound asleep and did not hear her calling. It was then that the appellant offered to accompany her to the latrine. When she got out of the latrine, the appellant asked

her to bend over and he placed his penis in her vagina which caused her to feel pain and she made an alarm. The appellant held her mouth and continued to defile her. Following the alleged acts of defilement PW2 lost her self-esteem, she left PW1's home and went to stay with her father Kassim Muyinda. Eventually PW1 convinced her to return and when she did, she fled PW1's home once again following another attempt by the appellant to defile her. PW1 helped her to settle at a one Rajab Ngobi's home. K.M's sisters, B.R and N.A came to visit her there and they revealed to her that the appellant had also defiled them.

These matters were reported to the LC1 Chairperson who arrested the appellant and took him to Jinja Central Police Station. He was charged on three counts of aggravated defilement contrary to section 129 (3) and (4) (c) of the Penal Code Act. The particulars of the offence in Count I as contained in the Charge Sheet were that *the appellant in the month of November 2011 at Namulesa Village in the Jinja District performed sexual acts with KM his step daughter aged approximately 12 years.*

In Count II, the particulars of the offence were that the appellant in the months of January and April 2012 at Namulesa Village in the Jinja District performed sexual acts with RB his biological daughter aged 3 years. In Count III, the particulars of the offence were that *the appellant in the months of January and April 2012 at Namulesa Village in the Jinja District performed sexual acts with A.N his biological daughter aged 3 years*. The appellant was tried and convicted of all the three counts and sentenced as aforementioned. Being dissatisfied with the decision of the trial Court, the appellant has appealed to this Court against both the conviction and sentence on the following grounds.

1. *That the learned trial Judge erred in law and fact when she found that there was a sexual act performed by the appellant on the victim and her two sisters namely; R.B and A.N.*
2. *That the learned trial Judge erred in law and fact when she disbelieved the appellant's defence of alibi.*
3. *That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thus causing a miscarriage of justice to the appellant.*

4. *That the learned trial Judge erred in law and fact when she passed an excessive and harsh sentence against the appellant.*

Representations

At the hearing of this appeal, the appellant were represented by Mr. David Samuel Kyoziira on State Brief whereas Ms. Happiness Ainebyona, Chief State Attorney from the Office of the Director Public Prosecutions represented the respondent. The appellant was not physically present in court, due to the challenge of the Covid-19 pandemic and the Standard Operating Procedures (SOPs) given by the Ministry of Health which among others prohibit crowding in a place. However, he was facilitated to attend the proceedings from prison using video link to Jinja Main Prison.

Appellant's Case

We note that counsel argued all the first 3 grounds of the appeal together without indicating from the onset that he would do so. He had indicated that he was dealing with ground 1 in relation to the 1st victim, KM but he ended up submitting on all the 3 victims and the other 2 grounds on conviction. We will consider grounds 1 and 3 together because they have been intertwined in counsel's arguments.

On the alleged performance of sexual act on KM, counsel submitted that the evidence of KM which was adduced in court by the prosecution was not cogent since it was weak and very unreliable. He stated that no explanation was made by KM as to why she took long to report the offence having been defiled in October 2011 but she only informed her mother PW1 in April 2012. Further, that KM seemed to be untruthful because there is no way a girl of her age could be defiled and she does not alarm or immediately report to her mother but keeps quiet and moves on with her normal chores.

Counsel also invited this Court to re-evaluate the evidence on record leading to the arrest of the appellant in April 2012. He contended that the report to police was about assault which

PW1 had reported as a result of domestic violence. He added that the charge of defilement came in as a by the way and as such the possibility of the appellant being framed cannot be ruled out. Counsel referred this Court to the evidence of PW1, P. Exh.7, a plain statement of D/Sgt. Ssalongo Aramazani Katende (PW3) and P. Exhibit. No.11 which clearly indicate that PW2's hymen was not ruptured.

Counsel also contended that the appellant set up the defence of alibi when he testified that in 2011 he was away in Masquid Swahab studying to become an Imam. Counsel argued that the appellant's evidence remained consistent even during cross-examination. He submitted that the evidence to prove this charge against the appellant was not credible and he prayed that the conviction be quashed and the sentence set aside.

In regard to performance of sexual act on B.R and N.A, counsel submitted that the learned trial Judge erred in her finding when she squarely relied on the evidence of PW1 and PW2 and yet the victims did not testify. He argued that the appellant denied committing the sexual act to any of the said victims and that there was no direct evidence to support the charge of aggravated defilement. In addition, counsel submitted that both B.R and N.A did not testify during trial and no statement was ever recorded from them during police investigations which weakened the prosecution case.

Counsel pointed out that the medical reports adduced in court as prosecution Exhibits P.1 and P.3 failed to demonstrate performance of a sexual act or the nature of the sexual act performed on the victims. Counsel contended that the entire evidence that the learned trial Judge relied on to convict the appellant were fabrications against him as a result of hearsay and the domestic violence the family was experiencing.

He submitted that the rule against hearsay is to the effect that an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. He referred to a book titled ***"Hearsay Evidence in Criminal***

Proceedings, G.R Spencer, Vol. 5 – Criminal Law Library, Hart publishing, 2008" at page 1 to support his submissions and he argued that the learned trial Judge should not have relied on that evidence to convict the appellant.

In conclusion, counsel submitted that the learned trial Judge failed to properly evaluate the evidence on record, hence coming to a wrong finding that the appellant committed a sexual act against the victims. He invited this Court to re-appraise the evidence as a whole and arrive at its own conclusion as required by Rule 30(1) of the Judicature (Court of Appeal Rules) Directions.

In regard to ground 4, counsel submitted that the learned trial Judge clearly stated at pages 43 and 44 of the record of proceedings that the appellant is remorseful and a first offender and cried out aloud in court, he is worried and sees no hope for the future. However, she ignored the mitigating factors in favor of the appellant and also called the appellant a pervert which was not backed by any evidence on record.

Counsel prayed that this Court finds the sentence excessive and harsh in the circumstances and sets it aside. On the whole, he invited this Court to allow the appeal and set aside both the conviction and the sentences.

Respondent's Submissions

Counsel submitted that the prosecution proved that a sexual act was performed on the victims when medical evidence was tendered in court and the defence did not contest it. She referred to the evidence of K.M (PW2) on Pages 18-19 which she submitted is corroborated by that of PW1 who confirmed the testimony of PW2 regarding the unusual conduct of the appellant in inserting his fingers in the private parts of B.R and N.A and the sexual act that was performed on PW2 on the night the appellant escorted her to the toilet. Counsel invited this Court to re-evaluate the evidence as a whole and find that prosecution proved that the appellant performed a sexual act on the victim.

In regard to ground 2, counsel submitted that no alibi was raised by the appellant. She referred to the case of ***Mushikoma Watete alias Peter Wakhokha & 3 Ors vs Uganda, SCCA 10/2020***, in which the Supreme Court held that the defence of alibi is set up when an accused person wishing to show that he could not have committed the offence charged, asserts that at the time the offence was committed he was in a different place from the scene of crime. The court further held that for the prosecution to negative it, and more so, for the court to consider it as a defence, the alibi has to be put forward as the answer to the charge. Counsel prayed that this ground fails.

On ground 4, counsel submitted that the sentences of 16 years' on count 1 and 15 years' imprisonment on Counts II and III running concurrently is not manifestly excessive and she prayed that this Court upholds the same. She referred to the case of ***Ederema Tomasi vs Uganda, CACA No. 203/2019*** in which this Court set aside a sentence of 25 years and imposed a sentence of 18 years for the offence of aggravated defilement. She also referred to the case of ***Tiboruhanga Emmanuel vs Uganda, CACA No. 655 of 2014*** where this Court stated that the sentences approved by this Court in previous aggravated defilement cases, without additional aggravating factors, range between 11 years to 15 years. Counsel prayed that this Court upholds both the conviction and sentences and dismisses this appeal.

Resolution by Court

The duty of this Court as a first appellate court was re-stated by the Supreme Court in ***Oryem Richard vs Uganda; Criminal Appeal No. 22 of 2014 (SC)*** at page 5 in the following words;

> *"We should point out at this stage that rule 30 (1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate court, to re-appraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it has neither seen nor heard the witnesses. This gives the first appellate court the duty to rehear the case...."*

Mindful of that duty, we now embark to re-appraise both the prosecution and defence evidence on record as we resolve the complaints raised in this appeal. We will be guided by the established position of the law as stated in the authorities cited to us and others we may find necessary as we consider the issues before us.

According to the prosecution evidence on record, Jamila Kubula (PW1) testified that she was married to the appellant. She came into the marriage with her four children including K.M. the 1st victim. She later conceived and gave birth to twin girls. The appellant begun to sexually assault the girl children. He began with H.K who was 18 years old at the time and she ran away from home after being defiled. He then moved on to sexually assault K.M. In 2012 K.M told her that one night, when she wanted to go and pee and she called her to take her out but she (PW1) did not hear because she was deep asleep, the appellant offered to take her and after she was done, he had sexual intercourse with her. He threatened to kill K.M if she informed her. When K.M told PW1 what had happened, she ran away from home and the appellant was always violent when asked about the matter. When she confronted him he ran away but returned after sometime and asked for forgiveness. K.M also returned and was staying with neighbours. The appellant ordered her to return K.M to her father but she refused.

In cross-examination, PW1 stated that K.M came for Christmas in December 2011 but she told her in April 2012 that she was defiled by the appellant in that year 2012.

PW1 further testified that every evening the appellant would take the twins (B.R. and N.A) and pretend to be showering them with parental love but around April 2012, she heard one of them (B.R) crying and she went to see what had happened and she found when B.R had been given bread so that she could stop crying but she continued to cry. When she asked B.R why she was crying, she told her that the appellant had ordered her to squat and he put his finger in her vagina. She (PW1) reported the matter to Mawuta LC1. She went to the garden to dig and when the appellant started assaulting the woman who was keeping K.M,

she tried to stop him and he instead turned on her. He got a hoe and hit her (PW1) on the head with something sharp but she could not tell what it was. She went to Jinja Central Police Station (CPS) and reported a case of assault and recorded a statement. It was her evidence that she reported the case of defilement to the LCs and to the main hospital where the children were examined. She was emphatic that the matter of defilement was never reported to police. In cross examination, PW1 stated that K.M was defiled by the appellant in 2012 but she told her around April, 2012 and it was during that month that things fell apart.

K.M (PW2) testified that on the fateful night, she needed to use the toilet and she called her mother (PW1) but she was deep asleep and did not hear her. The appellant offered to take her and when she had finished, the appellant asked her to bend over and he put his penis into her vagina. When she wanted to make an alarm, the appellant held her mouth. When she returned to the house she started feeling pain and there was a white fluid coming out of her vagina. It was her testimony that that was the first time she experienced sexual intercourse. She told her mother what had happened and due to shame among her peers, she left the home and went to live with her father. After a year, PW1 called her back and she had by then started growing breasts and the appellant asked her if she was growing breasts or stones and he attempted to defile her the second time when her mother had gone to the garden but she went to the home of a one Rajab whom she told what had happened and he informed PW1. PW1 confronted the appellant who slapped her and she kept quiet. K.M said PW1 decided that she would tell the LCs.

She told court that she believes the appellant ejaculated and made some noises which she could not understand. In cross-examination, she stated that the appellant spent over four minutes in the act and that the incident happened in October, 2011.

In regard to sexual assault of B.R and A.N, K.M testified that one day they came to visit her and they played a game called 'Afande' where the child would face the wall and lift the leg and then B.R would place a finger inside her vagina. K.M said when she went home with the twins she told PW1 about it and when PW1 confronted the appellant, he locked the house and beat her up. PW1 then reported the matter to the Local Council (LC) 1 and the appellant was arrested.

No. 23075 D/SGT Ssalongo Aramanzani Katende (PW3) who was the Investigating Officer (I.O) was called simply to tender in the statement he had recorded on 4th May 2012 at CPS Jinja. The defence counsel did not have any objection to that and interestingly he did not even cross-examine the witness on his statement. In his statement, PW3 stated that he took up an investigation in a case of assault occasioning actual bodily harm by the appellant. In her statement, PW1 mentioned the issue of the appellant sexually assaulting their 3-year-old twin daughters. She further alleged that the appellant had also defiled her older daughter K.M whom she came with into the marriage. Inquiries were made and only K.M could volunteer a clear statement. All the three victims were subjected to medical examination and the results revealed that they were HIV negative and all their hymens were intact.

In his defence, the appellant denied the charges of aggravated defilement that were brought against him and he stated that on 12th April, 2012 when he went to Jinja CPS to report an assault case against a one Ayu Ngobi, a one Isaac and a one Ronald, he was arrested. Further, that he had misunderstandings with PW1 and he had spent a long time without getting along with her. On 19th April, 2012, he was informed by Aisha Nanyonzi that PW1 was plotting with Eriasa Luwalana Hamad to kill him. He further stated that in November, 2011, K.M was in Mpumiro Primary School and she commuted to school from her father's home. At the same time, he (appellant) was studying to become an Imam at Masqid Swahab but he returned home. He denied assaulting PW1 or being reported to the LC for any crime. In cross examination, he stated that he started getting misunderstandings with PW1 in 2008 because

of his friends who despised him and it led to PW1 underrating him because of their words. As a result, he stopped having sexual intercourse with PW1 in May 2010.

In his submission, counsel for the appellant argued that no explanation was given by PW2 as to why she took long to report the offence having been defiled in October 2011 but she only informed PW1 in April 2012. Further, that PW2 seemed to be untruthful because there is no way a girl of her age is defiled and she does not alarm or immediately report to her mother but keeps quiet and moves on with her normal chores.

In addressing this submission on the lapse of time of reporting the offence, we shall be guided by the Supreme Court authority of ***Livingstone Sewanyana vs Uganda; Criminal Appeal No. 19 of 2006.*** In that case, the Supreme Court held as follows;

> *"In the judgment of the trial Court the judge gave reasons why it took so long for the appellant's crime to come to light. It is trite law that time does not run against the state in a criminal matter. The complaint by the appellant's counsel about lapse of time is not tenable."*

The above holding makes it clear that there is no limitation period for reporting a crime and prosecuting a suspect. We therefore find no merit in the arguments of counsel for the appellant regarding the delay in reporting the offence.

We must also observe that the appellant is a step father to K.M which implies that he had authority and dominion over her. That relationship usually presents difficulty in reporting sexual offences due to the fear of violence that may ensue in the family as indeed there was in this case according to the evidence of PW1 and PW2. This is in addition to the fear of being exposed to blame, shame and guilt that befall victims of sexual offences. The evidence of PW2 attests to this when she testified that after telling her mother (PW1) about the incident, due to shame among her peers she left her mother's home and went to live with her biological father. We therefore find that the fear of loss of self-esteem explains why the victim kept quiet

about the incident for some time and this Court can neither fault her for so doing nor draw any negative inference from it.

Counsel for the appellant also submitted that the report to police was about assault which PW1 had made as a result of domestic violence. He added that the charge of defilement came in as a by the way and as such the possibility of the appellant being framed cannot be ruled out.

We accept counsel for the appellant's submission that the police report was in regard to assault occasioning actual bodily harm. However, we also note that the Investigating Officer in his statement mentioned that during investigation PW1 informed him that the appellant was sexually abusing their 3-year-old twin daughters namely, B.R and N.A and her other daughter K.M. We note some contradictions in the evidence of PW1 and PW2 in regard to reporting the offence of aggravated defilement and the circumstances that led to the arrest of the appellant. On the one hand, PW1 testified that the appellant was arrested because he assaulted her when she tried to stop him from assaulting the woman who was keeping K.M and she reported a case of assault and recorded a statement at Jinja Central Police Station (CPS) which led to the arrest of the appellant. She made it clear that she only reported the case of defilement to the LCs and to the main hospital where the children were examined. She was emphatic that the case of defilement was never reported to police.

On the other hand, it was the evidence of PW2 that PW1 confronted the appellant regarding his sexual assault of her children and the appellant locked the door and beat her up. As a result, PW1 reported the matter to the LC and the appellant was arrested.

We take it that the contradictions in the evidence of PW1 and PW2 on what transpired was due to the lapse of time between when the incident took place and the testimony in court and the age of PW2 who was said to be 12 years when the incident took place in 2011 or 2012

and they testified in court two years later in 2014. Be that as it may, we still find a problem with the issue of reporting the offence of aggravated defilement against the appellant to police. While the I.O states that PW1 mentioned it to him in her statement, PW1 never alluded to this but instead was quite emphatic that the case of defilement was never reported to police. The court relied on the statement of the I.O which was not even subjected to cross-examination to test its veracity and ignored what PW1 said. This is a matter that should have been inquired into more at the trial to find out how the appellant came to be arrested in regard to the offence of aggravated defilement.

The appellant's testimony is to the effect that he was arrested when he had gone to CPS Jinja to report a case of assault on him and indeed PW1 confirmed in her evidence that she knew the appellant had reported a case of assault against Rajab. We find a glaring gap in the evidence on the report of the offence of aggravated defilement to police and a blurred picture of the exact circumstances that led to the appellant's arrest which leaves some doubt in our minds and lends credence to counsel for the appellant's submission that the charge of defilement came in as a by the way. We must however observe that we would have no problem with the offence of aggravated defilement being discovered in the process of investigating the reported offence of assault if there were no circumstances that create doubt in our minds about the appellant's participation in the offence. That doubt, pursuant to the established position of the law, must be resolved in favour of the appellant. But before we do that, we shall consider the other issues raised by counsel for the appellant as relate to appellant's conviction on Count I in regard to the alleged defilement of K.M.

On the issue of the hymen being intact, one of the ingredients for establishing the offence of aggravated defilement is proof that the victim was subjected to a sexual act. The definition of a sexual act under section 129 (7) of the PCA is penetration of a vagina, however slight by the sexual organ of another or unlawful use of any object or organ on another person's sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence

and any other cogent evidence, ***See: Bassita Hussein vs Uganda, SCCA No. 35 of 1999; Remegious Kiwanuka vs Uganda, SCCA No. 41 of 1995 (unreported)*** and ***Muze Imana vs Uganda, CACA No. 85 of 1999***. In ***Adamu Mubiru vs Uganda; CACA No. 47 of 1997*** (unreported), the Court held that however slight the penetration may be, it will suffice to sustain a conviction for the offence of defilement.

Furthermore, it is not required that the hymen should be ruptured or that there should be the omission of the male seed for sexual intercourse to be considered to have taken place. ***See: Halsbury's Laws of England 4th Edition Vol. 11 page 653.***

In the instant case, the medical examination report of the victims revealed that all their hymens were intact. It should be noted that this medical examination was done on 4/5/2012, over 6 months after the alleged sexual assault of K.M based on her own evidence that she was defiled in October 2011 and perhaps anything between 1 month to about 4 months as per the evidence of PW1 who said she was defiled in 2012 without specifying the month but that K.M reported the incident to her in April 2012. For the twins who were said to have been defiled around April 2012 it would be about 1 month or less after their alleged sexual assault.

We would have no problem with the fact that the hymen was intact as indicated in the medical report if the pieces of evidence on record supported the allegations that K.M was indeed defiled. However, we curiously note that PW2 testified that on the fateful night, the appellant asked her to bend over and he put his penis into her vagina whereupon he performed the sexual act for over four minutes until he ejaculated and when she returned to the house she started feeling pain and there was some white fluid coming from her vagina. Much as the law says penetration however slight by the sexual organ amounts to sexual act and there need not be rapture of the hymen, the description of the sexual act allegedly performed on PW2 who was only 12 years old and moreover in a bending position would, in our view, result in complete penetration that would leave her with extensive injury. It is therefore quite surprising that the doctor found her hymen intact and did not observe any scarring around the vagina!

This further strengthens the doubt in our minds about the alleged defilement of the victim in Count I.

We must also observe that some of the potential key witnesses who could have given evidence to strengthen the prosecution case like the LCs to whom the case was reported, the officer who recorded the victim's statement and that of PW1, the woman who is said to have kept PW2 and who the appellant is alleged to have fought with before he turned on PW1 as well as a one Rajab to whom PW2 said she ran and reported when the appellant attempted to defile her the 2nd time were not called to testify. No reason was given as to why such key witnesses were not produced in court. Of course, we are very much aware of the settled position of the law that no particular number of witnesses are required to prove an offence but that does not negate the requirement to produce key witnesses whose evidence would be necessary to prove a case beyond reasonable doubt.

All the aforementioned factors leave us with reasonable doubt about the alleged defilement of K.M which we now resolve in favour of the appellant and find that the evidence adduced by prosecution to prove the offence of aggravated defilement of K.M did not meet the required standard of proof beyond reasonable doubt. Had the learned trial Judge properly addressed her mind to the evidence she relied on to convict the appellant she would have made the same finding. The aspect of ground 1 (a) of the appeal that relate to K.M therefore succeeds.

We now turn to consider ground 1 (b) and (c) that relate to defilement of B.R and N.A. Counsel for the appellant submitted that the learned trial Judge erred in law and fact when she relied on the evidence of PW1 and PW2 to find that the appellant performed a sexual act on B.R and N.A and yet the victims did not testify due to their tender age and the learned trial Judge noted that they were not able to express themselves. She then indicated that the matter would be heard in camera for them but we did not find any record which indicates that this was done. As it were no voir dire was conducted to assess whether B.R and N.A were possessed of

sufficient intelligence to justify reception of their evidence and if they understood the duty of speaking the truth pursuant to section 40 (3) of the Trial on Indictment Act.

We are alive to the fact that in cases of defilement, the court can still convict an accused person in the absence of the victim's evidence. In ***Badru Mwindu vs Uganda, SCCA No. 15 of 1997*** and ***Omuroni vs Uganda [2002] 2 EA 531*** the Supreme Court upheld the appellant's conviction in the absence of the victim's evidence. In ***Badru Mwindu vs Uganda*** (supra), the victim did not testify since she was out of the country with her father for treatment following the sexual assault on her which implied that the prosecution evidence against the appellant was purely circumstantial.

The facts in the case of ***Badru Mwindu vs Uganda*** (supra) were briefly that the parents of two girls below the age of 18 years gave them to the appellant, a boda-boda rider to transport them to their respective schools which he did. The appellant also asked and was allowed by the girls' mother to bring them home from school. The appellant picked one of the girls from her school, took her to his home, from where he defiled her. He then returned to pick the second girl from her school and took both girls home. The Supreme Court accepted the prosecution evidence that on reaching home, the girl who was defiled informed her parents about the defilement by the appellant. The Supreme Court held that there was ample evidence of a circumstantial nature to justify the decisions of the two lower courts. The Supreme Court cited with approval, a passage from the decision of the Court of Appeal and found that the offence against the appellant had been proved beyond reasonable doubt.

Similarly, in ***Omuroni vs Uganda*** (supra), the victim did not testify and the trial court relied on the evidence two people. The first witness was the victim's father (PW1) who had found the appellant in his house with the victim on the fateful night though he (appellant) escaped and fled but he managed to chase and arrest him. The second witness was a retired nurse (PW2) who had examined the victim a day after the alleged act. Neither the victim nor the

doctor who had subsequently examined the victim and prepared a medical report testified. The trial court convicted the appellant on the basis of the evidence of the two witnesses and the medical report and sentenced him to 10 years' imprisonment. The appellant unsuccessfully appealed to this Court after which he appealed to the Supreme Court on two grounds namely, that the Court of Appeal erred in upholding a conviction on insufficient and false evidence, and that the Court of Appeal erred when it failed to draw adverse inference from failure by the prosecution to produce in court the victim, the doctor who examined her and her mother, to testify.

The Supreme Court in dismissing the appeal held as follows;

> *"The evidence was circumstantial as the victim who would have given direct evidence as the only eye witness, did not testify, but nonetheless constituted sufficient proof of the offence of which the Appellant was convicted, as it was amply corroborated by independent evidence.*
>
> *Although the victim did not testify, PW1's evidence that the victim accused the Appellant of having had sexual intercourse with her, was admissible as the accusation was made contemporaneously with the offence and therefore, was part of res gestae and is an exception to the hearsay rule."*

In **Moro Alex vs Uganda**, **Criminal Appeal No. 0370 Of 2015,** this Court had the opportunity to discuss the principles that underpinned the Supreme Court decision in the above 2 cases of **Badru *Mwindu vs Uganda*** (supra) and ***Omuroni vs Uganda*** (supra) as well as the decision in ***Livingstone Sewanyana vs Uganda (supra)*** and it observed as follows;

> *"It is clear from the above decision **in Badru Mwindu vs Uganda (supra)** that just like in the case of **Omuroni vs Uganda (supra)**, the Supreme Court upheld the appellant's conviction based on the evidence of witnesses to whom the victim had accused the appellant of defiling her and other ample circumstantial evidence that the prosecution adduced at the trial, notwithstanding the fact that in both cases, the respective victims and the doctors who examined them had not testified.*
>
> *We also note that the evidence of report made to the witnesses in all the above cited cases of **Livingstone Sewanyana vs Uganda (supra), Omuroni vs Uganda (supra)** and **Badru Mwindu vs Uganda (supra)** were admitted and relied upon. There are many other authorities where a report*

made by victims of defilement have been held to fall under the exceptions to the general rule on hearsay evidence and admissible. This is because defilement cases are unique in the sense that the victims are sometimes persons who are not able to testify by reason of age or mental disability. If the strict rule on hearsay evidence was to be applied, then credible witnesses to whom the victims accuse the perpetrators would be locked out and the heinous crimes committed on such unfortunate victims would go unpunished."

What comes out very clearly from the decisions of the Supreme Court in **Badru *Mwindu vs Uganda*** (supra) and ***Omuroni vs Uganda*** (supra) is that the report made by a victim of defilement to a 3rd party can be admitted and relied on even in the absence of the victim's evidence provided the report was made contemporaneously with the offence and therefore, was part of res gestae and if the evidence is amply corroborated by independent evidence.

Applying those principles to the facts and evidence in the instant case, even in the absence of the evidence of B.R and N.A, the evidence of a report made by them to a 3rd party about their having been defiled by the appellant would be admissible and can be relied on to find a conviction if there was ample independent evidence to corroborate the same. We note that the learned trial Judge relied on the evidence of PW1 who testified that every evening the appellant would take B.R. and N.A and pretend to be showering them with parental love but around April 2012, she heard B.R crying and she went to see what had happened. She found when B.R had been given bread so that she could stop crying but she continued to cry. When she asked B.R why she was crying, she told her that the appellant had ordered her to squat and he put his finger in her vagina. PW1 said it was only B.R who revealed what had happened whereupon she reported the matter to Mawuta LC1.

We note that apart from PW2 stating that one day R.B and N.A came to visit her and they played a game called 'Afande' where N.A would face the wall and lift her leg and then B.R would place a finger inside her vagina and that when she went home with them she told PW1 about it and when PW1 confronted the appellant, he locked the house and beat her up, she

did not link those acts to the appellant. Neither did she state in her evidence that B.R and N.A told her that the appellant defiled them.

The learned trial Judge in her finding and conclusion she did state that she believed the evidence of PW1 and PW2 regarding sexual acts the appellant performed under Counts No.2 and No.3 since the children were too young to speak for themselves. However, in her own summary of the evidence of PW2 she did not indicate that PW2 testified about the defilement of B.R and N.A. Therefore, her finding is in error as it is not supported by the evidence of PW2. This means the only evidence on record to prove the alleged defilement of B.R and N.A is that of PW1.

It is noteworthy that that the specific incident of around April 2012 that PW1 testified about concerned only B.R whom she said she had heard crying and when she went to see what had happened and asked her why she was crying, she told her that the appellant had ordered her to squat and he put his finger in her vagina. It was that incident PW1 said she reported to the LC1 Mawuta. The medical evidence as we did find earlier, showed that the hymen of both victims were intact and no bruises or scars were recorded to have been seen on their private parts.

Clearly, no evidence was adduced to support the alleged defilement of N.A and for that reason we find that the prosecution had failed to prove the alleged offence in Count III beyond reasonable doubt. It therefore follows that the conviction has no basis and as such it cannot be sustained. We would accordingly quash the appellant's conviction on Count III and set aside the sentence.

As regards the alleged defilement of B.R, the only evidence adduced to prove the offence was that of PW1 as summarized above. The learned trial Judge found that B.R and N.A were not able to express themselves and therefore could not testify since they were only 3 years

old when the offence was committed. We are aware that failure by the victim to testify is in itself not fatal to the prosecution case as long as there is other cogent evidence pointing irresistibly to the accused as the perpetrator. (***See: Patrick Akol vs Uganda, SCCA No. 23 of 1992, Badru Mwindu vs Uganda*** (supra), and ***Omuroni vs Uganda*** (supra)).

Following the principles in those decisions, the report made by B.R to PW1 would only be admissible and could be relied on even in the absence of the victim's evidence if the report was made contemporaneously with the offence and therefore, was part of res gestae and if the evidence is amply corroborated by independent evidence. The evidence of PW1 shows that around April 2012 when the appellant took the twins to play with them as he would normally do in the evening, she got attracted by the crying of B.R. When she went to check, she found B.R in a distressful state as she cried uncontrollably and when she asked her what had happened she informed her of what the appellant had done to her. The report was therefore made contemporaneously with the offence and therefore, was part of res gestae.

The next question would then be whether the evidence of PW1 is amply corroborated by any independent evidence. We did mention earlier that the only evidence that was adduced to prove the offence on Counts II & III was that of PW1 and it is based on the report of B.R to her. We had earlier found that the case of defilement of all the three victims was never reported to police and there is a glaring gap on how the appellant was arrested and subsequently charged with the offence of defilement. We did say this lends credence to counsel for the appellant's submission that the charge of defilement came in as a by the way. We hold the same view in regard to the alleged defilement of B.R, especially in view of the surrounding circumstances and the fact that there is no independent evidence on record that amply corroborate that of PW1. Consequently, the evidence on record leaves us with some doubt as to the guilt of the appellant which we can only resolve in his favour.

We therefore find that the alleged defilement of B.R was also not proved beyond reasonable doubt. Had the learned trial Judge properly evaluated the evidence on record, she would have found as we did and acquitted the appellant. Consequent upon our above finding, we are unable to uphold the appellant's conviction on Count II and we accordingly quash it and set aside the sentence.

In the result grounds 1 and 3 of the appeal succeed and on those grounds alone we find this appeal has merit and therefore allow it without considering the remaining grounds. We order that the appellant be set free forthwith, unless held on any other lawful charges.

We so order

Dated at **Jinja** this 16th day of May 2023

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Elizabeth Musoke

JUSTICE OF APPEAL

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Cheborion Barishaki

JUSTICE OF APPEAL

.....

Hellen Obura

JUSTICE OF APPEAL