THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KABALE

[Coram: M. M. Kibeedi, C. Gashirabake, & O.J. Kihika, JJA]

CRIMINAL APPEAL NO.0124 OF 2022

KAYINAMURA ANDREW.:::APPELLANT

VERSUS

UGANDA.:::RESPONDENT

(Appeal from the Judgment of Hon Justice Moses Kazibwe Kawumi at the High Court of Uganda Holden at Kabale dated the 08th of August 2022 in Criminal Session Case No. 238 of 2019)

JUDGMENT OF THE COURT

Introduction

1] This is an appeal against conviction and sentence.

The Appellant is the biological paternal grandfather of the victim who will hereinafter be referred to as "SK" (or PW1). The Appellant was indicted, convicted for aggravated defilement contrary to section 129 (3) and (4) (c) of the Penal Code Act.

BRIEF FACTS OF THE CASE

2] That on 28th May 2019 PW1 (S.K) was alone at home in Mukingo Village, Chihe parish in Kisoro district. When she had finished taking a bath, she heard a knock at the door. She asked who was knocking and she was informed that it was the Appellant. She responded by opening the door, greeted him and gave him a seat. She went to her room and as she was smearing herself with Vaseline the Appellant entered her room and then forced her into having sexual intercourse with him. Thereafter he warned her not to disclose to anyone lest he would kill her. It was around 9.00am.

3] PW1 further testified that after the incident she noticed blood in her private parts and decided to use a sanitary pad. She then heard a boda boda passing by. She stopped the boda boda and used it to go to the bus park to travel to Kampala. She was crying at the time and did not want her mother to find her at home. She found the bus still empty. She entered the bus until when passengers came and travelled to Kampala. The bus left for Kampala at 6:00pm on the same day. On reaching Kampala the conductor told her that her father had to pick her. Her father picked her and she reached Nansana, her father's place of aboard towards morning.

4] Her father then took her to school – she was a Senior Three boarding student at Pioneer Peace High School. She did not tell anyone of the incident - including her father, the matron and headmaster inspite of the matron noticing and asking her why she was not happy.

5] At trial PW 1 testified that she started feeling pain in her lower abdomen and thought she was starting her periods. On 01/06/2019 when she noticed pus coming out of her private parts she went to the head teacher and asked for a phone to call her father. She did not tell the headmaster or the nurse the reason she wanted to call her father. Though she was crying the nurse refused to give her a phone to call her father. She however told the matron that she had been raped by her grandfather. The headmaster was informed and he asked the nurse to take her to hospital where she was told that she could not be treated unless she first made a report to the police. The headmaster, the father and the nurse took PW1 to Kakonge Police Station.

6] At Kikonge Police Station PW1, PW3, the nurse and the headteacher made statements. The next day PW1 went to Mulago Hospital with her dad **but there was no doctor** and **she was directed** to go to ELE/ANNA Clinic. This was on 02/06/2019. **At trial PW1 testified in examination in chief that**

she did not know where ElleAnna Clinic is located but in cross examination she stated that it is in Nansana.

7] Eventually the Appellant was arrested in Kisoro by police from Kabuli.

8] At trial the Appellant pleaded not guilty and upon full trial he was convicted and sentenced to 20 years' imprisonment. Dissatisfied with the decision, the Appellant appealed to this Court on grounds that:

(1) The learned Trial Judge erred in law and fact when he convicted the Appellant
based on evidence full of contradictions, gaps and discrepancies to reach the wrong conclusion that a sexual act was committed on the victim.

(2) That the learned Trial Judge erred in law and fact when he held that the Appellant
was a person in authority over the person against whom the offence was committed which holding occasioned a miscarriage of Justice.

(3) That the learned Trial Judge erred in law and fact when he failed to evaluate evidence on record and relied on irrelevant assumptions and considerations to place the Appellant at the scene of the crime thus coming to the wrong conclusion that the Appellant committed the crime.

(4) That the learned Trial Judge erred in law and fact when he held that there was no grudge between the Appellant and the victim's father thereby occasioning a miscarriage of justice.

(5) That the learned Trial Judge erred in law and fact when he convicted and sentenced the Appellant to 20 years' imprisonment.

Representation

9] The Appellant was represented by Mr. Michael Collins Mugisha. The Respondent was represented by Mr. Semalemba Simon Peter, Assistant DPP.

Ground one

Submissions by counsel for the Appellant

10] Counsel for the Appellant submitted that the evidence of the victim was full of contradictions. He noted that for the victim to testify that on the 28th of May 2019 she saw blood oozing out of her private parts, and then on the 29th of May 2019 she saw puss come out of her private parts and then the evidence of PW4 who testified that the victim was having a foul odour from her private parts on 1st June 2019 were inconsistent with the findings of PW6, a qualified Medical Clinical Officer who examined the victim on 2nd June2019 and found her in a fair health condition. After examination she was released without being given any medication at all. PW6 also found that PW1was sexually active. When she was examined again by PW2 on 08th July, 2019, 42 days after the purported incident she was described as *"physically traumatized as she tells the story she cries" because of the sad memories*. Counsel argued that this was an attempt to validate the evidence of PW1 and PW3 to the effect that PW1 was still traumatized.

11] Counsel submitted that the descriptions given by PW2, PW3 and PW5 were contradicted by PW6 in her report. Counsel argued further that the medical officer PW6 did not make mention of "puss" or "foul odour" or even prescribe treatment for the alleged victim whom a day before was described by PW3 as, "*at Kikonge when I met Sharon, she was crying, stressed and sickly".*

12] Counsel relied on the case of ***Obwalatum Francis Vs Uganda, Supreme Court Criminal Appeal No. 30 of 2015,*** which states the position of the law on contradictions and discrepancies.

13] Counsel further argued that the fact the hymen was found raptured does not mean that **the victim was necessarily defiled by the Appellant at the material time as alleged by PW1.** He argued that the constant demand for medical examinations and the purported need to fill in gaps in the investigations was a demonstrated effort of the investigating officer PW5 getting out of her way to incriminate the Appellant instead of investigating for the truth. Relying on the case of ***Mukasa Evaristo Vs. Uganda, SCCA No. 53 of 199***, where the Supreme Court held that he rapture of the hymen of the victim of defilement was not essential for arriving at a verdict of defilement the trial court should have found that the evidence much as it proved penetration court should have found that PW1 was sexually active and the evidence on record did not necessary prove that the Appellant was responsible.

14] Counsel argued that these contradictions ought to have been noticed by the trial judge while passing the judgment.

15] On ground two, counsel for the Appellant submitted that there was unchallenged evidence that the victim used to stay with her father in Nansana. Counsel continued and noted that the victim was 16 years old in 2019 when the defilement took place, which means that she was seven years old in 2010 when her father brought her to Kampala. Counsel argued therefore that it was not possible that the victim and the Appellant had established a close relationship of authority on the part of the Appellant over

the victim. After all this time the Appellant was no longer a person in authority over PW1 at all.

16] Turning to ground three, Counsel submitted that there was no cogent evidence adduced by the Prosecution to place the Appellant at the scene of crime. The attempt to reconstruct the scene of crime as stated by PW5 on 11th November, 2019 and the sketch map were nothing but a move to put up unproved evidence against the Appellant. Counsel argued that it was an irrelevant assumption and consideration to assume that the testimony of the alleged victim as well as the testimony of Detective Sergeant Hannah Opio (PW5) with her sketch map which she made after a period of ***seven (7) months after the incident*** was sufficient to place the Appellant at the scene of the crime.

17] On ground 4, counsel for the Appellant argued that the trial Judge erred when he found that no grudge fueled the arrest of the Appellant. Counsel submitted that there is undisputed evidence that there was land gifted by the Appellant to PW3 on condition that it was not to be sold. There was evidence adduced that PW3 was using threats against the Appellant to force him to give him land. Counsel argued that PW3 coined evidence of defilement against the Appellant to get the Appellant out of the way, and to enable him to sell the said conditionally gifted land. Counsel observed that indeed when the Appellant was arrested and detained PW3 promptly sold the said land and went back to Kampala. Counsel therefore observed that this was the reason why the Appellant was framed with the defilement case. He noted that based on the overall available evidence it was highly doubtable that the defilement happened as alleged by the victim.

18] According to counsel for the Appellant the trial judge should have considered all the facts regarding this issue and found that PW1 was

influenced by her father to frame the Appellant with a view of selling off the land after the Appellant was incarcerated.

19] On Ground five, counsel submitted that the principle of consistency is to the effect that the sentences passed by the trial Court must as much as circumstances may permit, be similar to those passed in previously decided cases having a resemblance of facts as the one in which sentence is being passed; and the appellate court, may if called upon to do so, be justified in interfering with the sentences which contravenes this principle. Counsel cited the case of ***Aharikundira Yusitina Vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015*** and ***Anguyo Siliva Vs. Uganda, CACA No. 0038 /2014*** where the court held that the sentences approved by this court in previous aggravated defilement cases, without additional aggravated factors, range between 11 years to 15 years.

20] Counsel noted that the trial Judge did not consider any aggravating factors other than the fact that the convict did not show any remorse all through the trial and persistently portrayed the victim as a liar threats to the PW1's family further compelled them to shift from the family home and for the victim to be placed under a witness protection program.

21] Counsel submitted that the above assertion by the trial Judge did not amount to aggravating factors warranting a deviation from the well-established principle of uniformity and consistency. The sentence of 20 years' imprisonment was therefore harsh and excessive and should be set aside. Counsel prayed that in the event the conviction is upheld, the sentence be set aside and, considering the Appellant's mitigation factors of being elderly, with a family to care for, and not enjoying good health, a lenient sentence in line with the principle of uniformity and consistency be considered.

Submissions by counsel for the Respondent

22] Counsel for the Respondent jointly argued grounds one and three. Counsel argued that the Appellant in his submissions attacked several witness testimonies in respect to the ingredient of performance of a sexual act as well as the participation of the appellant.

23] Counsel contended that the prosecution adduced cogent and well corroborated evidence of the victim (PW1), the medical evidence of (PW2 & by PW6), and reports made by various prosecution witnesses (PW3, PW4 & PW5) to prove that the victim was sexually assaulted and traumatized as a result of the Appellant's conduct. Counsel invited this Court to exercise its duty as the first appellate court as stated in ***Kifamunte Henry V. Uganda, SCCA No. 10 of 1997*** to re-appraise the evidence in regards to the performance of sexual intercourse upon the victim.

24] Counsel contended that though there were contradictions in PW1's evidence these contradictions did not go to the root of the case. Counsel argued that the conduct of the Appellant had a very traumatizing effect on the victim, this is evident in her conduct of immediately disappearing from the scene of the crime. After the Appellant left, she got her bag, ran to the boda, did not want her mum to find her at home and she was crying, scared that she would ask her what had happened. The victim became withdrawn and so scared to disclose what transpired to any one not even to the matron. She kept on crying even at the point of testifying in court. Counsel relied on the case of ***Ntambala Fred v. Uganda, SCCA No. 34 of 2015*** where the Supreme Court held that *"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".* Counsel further relied on the case of ***Sewanyana Livingstone v. Uganda,***

SCCA No. 19 of 2006 where it was held that what matters is the quality and not quantity of evidence.

25] Counsel argued that the evidence of PW1 was corroborated by PW6 a medical clinical officer who examined the victim on 2/6/2019 and found that her hymen was ruptured, tears around the vaginal muscles, and the probable cause was forceful sexual penetration. PW2 a clinical officer also examined the victim on the 8th of July 2019 and found that there was a tear on her genitals which according to her history was two months old. Counsel relied on the case of ***Bukenya Joseph v. Uganda, CACA No. 222 of 2003*** where this court while relying on Section 155 of the Evidence Act held that such information supplied on the day she was devastated was sufficient to corroborate her evidence. /NOTE THAT ACCORDING TO PW6, PW1 WAS SEXUALLY ACTIVE AS EXAMINED THREE DAYS AFTER THE INCIDENT. THE TEAR ON HER GENITALS AS FOUND BY PW2 WOULD NOT NECESSARILY TIE IN THAT IT MUST ORIGINATE FROM AS ACT OF 42 DAYS BEFORE THE EXAMINATION. PW1 INFORMATION AS SUPPLIED TO PW2 WAS NOT IMMEDIATEY AFTER THE INCIDEMT AS REQUIRED IN THE CASE OF Bukenya cited INFORMATION WAS NOT SUPPLIED ON THE SAME DAY. INSTEAD SHE PURPOSEFULLY RAN AWAY FROM THE SCENE TO KAMPALA!!]

26] Counsel argued that all these go to prove that the victim was sexually assaulted, any discrepancies were explained by the witnesses and do not in any way negate the fact that the victim was sexually assaulted, she was traumatized and scared as a result of the appellant's threat to kill her if she revealed to anyone, she broke down on several occasions.

27] Counsel further argued that if the court found that there were any contradictions, he stated that they were minor, did not go to the root of the case nor point to deliberate untruthfulness of the witness. Counsel cited the case of ***Alfred Tajar vs Uganda (1996) EACA Cr. Appeal No. 167 of 1969*** and ***Kato Kajubi v. Uganda, SCCA No. 20 of 2014.***

28] As regards the alibi, counsel submitted that the evidence of PW1 placed the Appellant at the scene of crime. This was corroborated by the evidence of PW4, a matron and cook at Pioneer High School who received the victim at the school when she reported immediately after the incident. [THE MATRON COULD NOT CORROBORATE EVIDENCE OF THE SCENE OF CRIME. SHE WAS IN KAMPALA AND THE INCIENT HAPPENNED IN KISORO]. PW4 observed that the victim was very quiet and after 02 days she came back to the kitchen crying, when PW4 inquired, the victim reported that the appellant had defiled her.

29] Counsel prayed that this court finds that the appellant's participation was proved to the required standard.

30] Concerning issue two, counsel submitted that the Penal Code does not define *"person in authority"*. In the case of ***Uganda v. Abdalla Nabil Salaam, HCCS NO. 0004 of 2016,*** Justice Stephen Mubiru applying both a mischief and purposive interpretation, for purposes of section 129 (4) (c) of the Penal Code Act, defined a person in authority to mean any person acting in loco parentis (in place of parent or parents) to the victim, or any person responsible for the education, supervision or welfare of the child and persons in a fiduciary relationship, with the child i.e. relations characterized by a one-sided distribution of power inherent in the relationship, in which there is a special confidence reposed in one who in equity and good conscience is

bound to act in good faith about the interests of the child reposing the confidence.

31] Counsel argued that the Appellant is a paternal grandfather to the victim as per the testimony of PW1. This was confirmed by PW3 (the victim's father). Counsel submitted that there exists a fiduciary relationship between the victim and the appellant, the victim trusts and respects the appellant as a grandfather. Counsel invited this court to find that the appellant is a person in authority over the victim in the context of section 129 (4) (c) of the Penal Code Act.

32] On ground four, Counsel contended that there existed no grudge between the victim and the Appellant. Neither was there a grudge between the Appellant and PW3. It was the testimony of PW3 that the Appellant gave him a cow, land, bought him boda bodas twice, helped him whenever he had issues and helped his family when he was arrested twice. The victim's father (PW3) revealed that he had been affected by the incident and recalled how his father (the appellant) was a friend but no longer talked to him after the incident. Counsel argued that this demonstrated that there was no grudge between the Appellant and PW3. Counsel argued that instead, upon commission of the offence it was the appellant who threatened the victim and her father to the extent that the victim had to be placed under witness protection.

33] As regards ground five, counsel submitted that it is settled law that sentencing is the discretion of a trial Judge and an appellate Court will only interfere with a sentence imposed by the trial Court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive given the circumstances of the case as was held in the case of ***Kiwalabye Bernard V. Uganda, SCCA No.***

143 of 2001. See also the case of ***Kyalimpa Edward v. Uganda, SCCA No. 10 of 1995.***

34] Counsel submitted that the offence of aggravated defilement attracts a maxim sentence of death under section 129 (4) of the Penal Code Act. Both parties submitted in allocutus as captured. The trial Judge took into consideration the mitigating factors, aggravating factors, and sentencing guidelines.

35] Counsel conceded that the trial Judge however fell short of arithmetically deducting the period spent on remand as remand under Article 23 (8) Constitution. Counsel cited the case of ***Rwabugande Moses v Uganda SCCA No.***
2014.

36] Counsel prayed that this court exercises its powers under section 11 of the Judicature Act and sentence the Appellant to an appropriate sentence. Counsel submitted that the circumstances of the case justify a sentence of 20 years' imprisonment.

37] Counsel cited the cases in similar circumstances. In the case of ***Ntare Augustine v. Uganda, Criminal Appeal No. 053 of 2011,*** the appellant was convicted for aggravated defilement of a victim 11 years old by a trial Judge who did not exceed the permissible sentencing range. In the case of ***Magoro Hussein v. Uganda, Criminal Appeal No. 0261 & 0305 of 2016,*** the appellant was sentenced to 20 years' imprisonment for aggravated defilement of a 05-year-old victim. In the case of ***Seruyange Yuda Tadeo v. Uganda, Criminal Appeal No. 080 of 2010*** in which the Appellant was sentenced to 33 years' imprisonment for defiling a 09-year-old, this court found a sentence of 27 years' imprisonment appropriate.

38] Counsel invited this Court not to interfere with the discretion of the learned trial Judge as no illegality was occasioned and all material factors were duly considered in imposing the sentence.

Submissions in rejoinder

39] Counsel invited this court to re-appraise the evidence in the testimonies of PW1, PW2, Pw3, PW4, PW5, and PW6 and come to its own independent conclusion as to the discrepancies and contradictions as espoused in the evidence of the said witnesses in respect of the performance of a sexual act on the alleged victim as well as to the alleged participation of the Appellant. Counsel reiterated the earlier submissions and stated that the contradictions went to the root of the matter. Counsel argued that the victim (PW1) could not have seen blood oozing out of her private parts on 28th May 2010 and saw puss coming from her private parts on 1st June 2019 but when examined on 2nd June 2019 the medical officer PW6 found her in a fair and healthy state.

40] As regards alibi, counsel submitted that DW3's evidence corroborated the Appellant's evidence that they were together and at their shop all the time, that is from 7 a.m. to 8 p.m. Counsel argued that the Appellant's alibi could only be destroyed if Prosecution adduced contrary cogent evidence, as was held in the case of the case of ***Alfred Bumbo Vs. Uganda, SC Criminal Appeal 28 of 1994.***

41] In response to ground two, counsel maintained the submission that the ingredient of a person in authority in a case of defilement can only stand when the ingredient of a sexual act and or sexual intercourse has been proved which was not the case in the instant appeal and also there was in

actual fact no fiduciary relationship between PW1 and the Appellant at the time of the alleged commission of the offence.

42] On ground four, counsel reiterated that there is sufficient evidence adduced that there existed a grudge between the Appellant and the alleged victim's father (PW3). Counsel noted that he was alive to the fact that in criminal trials a grudge could not be sustained where the Trial Judge made a finding that the prosecution had proved the ingredients of sexual intercourse beyond reasonable doubt as was discussed in the case of ***Kiggundu John Vs. Uganda, Criminal Appeal No. 0180 2009.*** This is however factually a distinguishable case as there had been no defilement and in the view of counsel cogent evidence to show a grudge harboured by PW3 against the Appellant.

43] On ground five counsel stated that the court should find merit in this ground.

Consideration of Court

44] We must state from the outset that certain aspects of the adduced evidence show a level of controversy in handling this matter especially during the investigation process and these must be pointed out.

45] The evidence on record indicates that PW1, her father, the head teacher and the school nurse made statements at Kikonge Police Station. A day after, PW1 was taken to Mulago Hospital by her dad. On that particular day there was no doctor at Mulago hospital or so she was informed. Through the evidence on record there is no proof at all that PW1 and PW3 went to Mulago. There is no written reference from Mulago hospital to any other clinic – be it to the mentioned Sure House on Bombo Road or to Ella Anna clinic. PW6 who examined PW1 at Elle Anna Clinic states that PW1was not referred from Mulago hospital. **PW6 does not state who exactly referred**

PW1 to Ella Anna clinic for examination. It is very probable that PW3 took PW1 to Ella Anna as a convenient place he could get results favorable for his scheme to frame the Appellant.

46] According to the testimony of PW1 was directed *(she doesn't say by who)* to go to Elle Anna Clinic in Nansana where she was examined by a nurse and told to take the form she was given back to police at Kikonge Police Station.

47] At Kikonge police station PW1 and PW3 were given a file to take to Kisoro Police. The Police in Kisoro wanted to take PW1 to Kisoro Government Hospital – presumably for further medical examination. PW3 refused because according to him the appellant had a friend at Kisoro Government Hospital. [How does a complainant refuse a victim to be examined at a particular medical facility and prefers his own]. PW3 decided to bring PW1 back to Kampala and took her to CID Headquarters, Kibuli who took her to another hospital – Nsambya Police Station Healthy Centre IV.

48] PW3 testified that the file in Kisoro regarding that case had been closed. According to PW3 the Appellant had bribed an officer at the Kisoro hospital to generate a false report. There is no tangible evidence adduced to prove the bribery. [No one in particular is mentioned as having been bribed.]

49] This evidence in our evaluation clearly shows that PW3 preferred matters of her daughter's case handled by specific people within or around Kampala and Nansana.

50] We have carefully considered all the materials in the appeal including the record, the submissions of counsel for either side and the law and authorities cited. As this is a first appeal, we reiterate the duty of this Court while handling such an appeal. Under Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10, this Court has a duty to reappraise the evidence and make inferences of fact. In the case of ***Kifamunte Henry Vs.***

Uganda, Supreme Court Criminal Appeal No. 10 of 1997, it was held that a first Appellate Court must review the evidence of the case and reconsider the material before the trial Judge and then make up its own mind not disregarding the Judgment appealed but carefully weighing and considering it. We shall proceed to consider the grounds of appeal.

51] We shall resolve grounds 1 and 3 together.

52] The Appellant has distinctly argued that there are glaring contradictions in the evidence of PW1 and the other prosecution witness and indeed that the appellant has a solid alibi since the evidence on record does not place the Appellant at the scene of crime.

53] The evidence on record shows that the victim was a sexually active person. It was the testimony of PW1 that she was sexually violated by the Appellant, that she saw blood coming out of her private parts, and later pus was oozing out of her private parts. That she was alone and did not make a complaint to anyone. There is however no sufficient evidence that proves that the sexual violation was committed by the appellant.

54] The record on PW1 testimony is that she was assaulted by her grandfather and that she knew him very well. It is of course true that at 16 years she knew her grandfather and she could not fail to identify him positively. What is however also very possible is that at that age she could also be easily manipulated to give false testimony against her grandfather with influence from her father who was the parent solely in her charge and fully responsible for her especially in Nansana where she was living.

55] At trial, PW1 testified that the sexual act was committed on her at around 9am and that at 11am she jumped on a boda boda, bypassed a police station (Kisoro Police Station) and went to the bus park in Kisoro town while crying. She further testified that she knew the functions of police. There is

all possibility that the boda boda rider would have suspected something unusual about a girl running away from her home crying and asking to be taken to the bus park. He would certainly have asked about the cause of her crying. At the bus park PW1 entered an empty bus where she sat up to 6 00pm and then proceeded to Kampala. All this time no one noticed her isolation and asking her what could have happened. This appears impossible to comprehend as truthful. Indeed at trial she testified that when the bus reached Kampala the bus conductor insisted that she must be collected by her father. This implies that the bus conductor knew her and would have earlier been attracted by the apparent distress of the victim.

56] At trial she further testified that when she felt pain in her lower abdomen, after a violent sexual act, she thought that she had started her monthly periods. That she was only able to report the violation on her only when she saw pus had started coming from her private parts. She did not tell her mother about the incident. She left her home in Kisoro two hours after the alleged incident. She was not oblivious that the mother she feared would find out. Even immediately after reaching Kampala very far away from Kisoro and well out of reach from her grandfather who she alleges that she feared would kill her she could not even inform her father. She did not even immediately inform the matron who had noticed and inquired about her distress. She only confided in the school matron later who informed the nurse and the headmaster. When her father was informed he tried to beat her up wondering why she had not told him before. According to her if she had told her father he would have immediately gone to Kisoro, confronted the grandfather and then the grandfather who was in Kisoro would have killed her though she was already in Kampala. At her age of 16 years she would have known that she was safe enough to confide in her father about the

incident. She chose not to tell him. This in our view is not a truthful witness and her testimony ought to have been disregarded by the trial judge.

57] As regards ground one, contradictions has been defined in the Nigerian case of ***David Ojeabuo v Federal Republic of Nigeria {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; &Abiru JA.***

"Now, contradiction means a lack of agreement between two related facts. The evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of or contains a little more than what the other piece of evidence says or contains." Emphasis mine.

58] For contradictions in evidence of a witness to be fatal, it must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a conviction. See the case of ***Obwalatum Francis Vs Uganda, Supreme Court Criminal Appeal No. 30 of 2015.***

59] In applying the above test, the trial Judge should have read the evidence tendered holistically including the defense evidence. It is indeed not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case leading to the rejection of evidence. When such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court an accused is entitled to benefit from it. In the case of ***Twehangane Alfred v Uganda, Criminal Appeal No. 139 of 2001,*** the Court stated: -

"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

60] Applying the test of the law on contradictions and inconsistencies in the prosecution evidence to these facts, PW2 who examined the victim 42 days after the incident, to be exact 08th July 2019, observed that the victim was alert but crying because of the bad memories. Through his examination PW2 found tears. It was the observation by PW2 that according to history and information given by PW1 the tears appeared to be two months old. However this contradicts evidence of PW6 who examined PW1 on 2/06/2019 (just three days after the purported incident) who at trial testified that:

"She was in a fair general condition. Mentally ok, she was well orientated when I talked to her. The genitals-hymen was ruptured, tears around the vaginal muscles. The probable cause was forceful sexual penetration. I could not tell the exact date but since there were fresh tears, it was recent."

PW6 continues:

"I did not give the patient treatment, no infections, no discharge."

62] This testimony clearly contradicts the testimony of PW1 who only within the past two days had stomach pains, was discharging blood and just the day before this test she had pus coming from her private parts. This added to the

testimony of PW4 who at trial testified that on 01/06/2019 "s*he had a foul adour but she did not tell me that pus was oozing out of her vagina. I thought she had candida."*The school nurse was never called as a witness.

63] PW1 testified that she was defiled by her grandfather, this seemed to be confirmed by the evidence of PW2, a medical personnel who reported that there was penetration and tears which were around two months old according to the history. This also seemed to be confirmed by the evidence of PW6 who examined the victim on the 2nd June 2019. It was stated by PW6 that there was penetration and there were fresh tears. The presence or absence of pus out of the victim's vagina is not one of the ways to establish that there was penetration. However, there were visible contradictions in the factual situation manifestly presenting doubt on the truthfulness of the victim's condition.

64] From the evidence on record that there was penetration and this was fundamental. The presence or absence of pus is just a discrepancy that does not go to the root of the matter. In the case of ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), the Court stated that however slight the penetration may be, it will suffice to sustain a conviction for the offence of defilement. In the case of ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995, the Supreme Court of Uganda*** stated as under :

> *"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's evidence and corroborated by medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration.*

Whatever evidence the prosecution may wish to adduce to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

65] We are satisfied that the evidence of the Victim (PW1) and her father (PW2) when weighed against that of the first medical officer (PW6) who first examined the victim leaves doubt in the truthfulness in the victim's testimony. It was not sufficient that there was penetration because the victim was confirmed to be sexually active. The trial Judge erred in failing to evaluate the evidence to discern this contradiction.

66] These inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore the Appellant must be entitled to benefit from them.

67] As regards ground 3, on proof of participation of the Appellant, the evidence was founded on a single identifying witness. We therefore warn ourselves as guided by the case of ***Roria vs. Republic [1967] E.A. 583***, which was followed by the case of ***Bogere Moses & Anor. vs. Uganda S.C. Crim. Appeal No. 1 of 1997***; the Courts warned themselves of the danger of a single identifying witness and urged the Court to always satisfy itself that in all the circumstances of the case, it was safe to act on such evidence.

68] In the case of ***Abdallah Nabulere vs. Uganda , Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77;*** the Court stressed the need to exercise care, in cases involving either single or multiple identification witnesses; and added that in either situation the Judge must warn himself and the assessors of the need to exercise of caution, because the witness or witnesses may appear convincing but could be mistaken. The Lordships then laid down guidelines to be followed while assessing such evidence. The Court stated that:

"The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, 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 mistaken identity is reduced but the poorer the quality the greater the danger.....

When the quality is good, for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

69] According to the record PW1 in her testimony PW1 stated that on the fateful day after taking a bath, she had a knock at the door. When she inquired who it was, it was the Appellant. She opened the door for him. It was around 9:00 a.m. She testified that while she was in her room the Appellant came and forcefully had sexual intercourse with her. The burden to prove the commission of the offence for which the Appellant is charged lies on the prosecution which must not only prove that there was a sexual act committed on the victim but that it must also have been committed by the Appellant. Proof that there was penetration and tears on the private parts where it cannot be proved that it was not done by the Appellant will not suffice.

70] At trial, the Appellant testified that he had last seen PW1 in 2010. In 2019 when he heard that Police from Mityana was looking for him he voluntarily surrendered himself to Police in Kisoro. He surrendered to be medically examined at Kisoro Government Hospital.

71] At the trial, the Appellant raised a very strong alibi. On 28/05/2019 – the alleged date of the defilement incident - the Appellant testified that he was at his shop with his wife. He went to the shop at 7 00 am with his wife and spent the whole day at the shop.

72] This is reaffirmed by the wife of the Appellant who testified that on 28/05/2019 she was with her husband at their shop up to 8 00pm. This patent part of the evidence was not properly evaluated by the trial judge. He instead relied on the evidence of a single – witness – the victim - and found, erroneously, that since the victim knew the Appellant very well her evidence must not be contradicted. The Appellant gave evidence that he was being framed by his son, the father of PW1 because of an old grudge and his evidence was that his own son wanted him out of the way so he could sell part of a disputed piece of land the Appellant did not want him to sell.

73] There is ample evidence that by the time of the alleged commission of the offence there was a complete breakdown of relationship between the Appellant and his son's family. That the victim and his children had not been in Kisoro for a long time and they had not been communicating.

74] The defense of alibi raised by the Appellant necessitated the prosecution to adduce cogent evidence to put the appellant at the scene of crime. The evidence of PW1 and the subsequent reconstruction of the scene by PW5 (D/Sgt Apio Hanah) seemed to attempt to place the appellant at the scene of crime.

75] The guidelines as to what amounts to putting the accused at the scene of crime were set by the Supreme Court of Uganda in the case of ***Bogere and Anor (Supreme Court Criminal Appeal No 1 of 1997)*** where it was held as follows:

"What then amounts to putting an accused at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the Court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused was at the scene of crime, and the defense not only denies it but also adduces that he was elsewhere at the material time it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version accepted. It is misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable."

76] In light of the evidence on record, we are not persuaded that the trial judge did exercise adequate caution in relying only on the evidence of a single witness – PW1. The evidence of the Prosecution did NOT place the Appellant at the scene of crime. The aggregate evidence shows that the Appellant was somewhere else at the time the alleged defilement happened. The Appellant gave a strong alibi that he was at his shop far from the scene of crime. His evidence was well corroborated by his wife. This alibi, coupled with the contradictions in the evidence of PW1 and other prosecution witnesses, having found doubt in the evidence as to whether there was a sexual act performed by the Appellant on the victim and having found that the Prosecution failed to place the Appellant at the scene of crime, the two grounds are resolved in favor of the Appellant. It, therefore follows, that resolving the other grounds can only be an academic adventure.

77] In the result the Appellant's appeal is allowed. His conviction on the count of aggravated defilement is quashed and is to be released from custody unless he is being held on other lawful charges.

Decision of court:

1. This Appellant's appeal is allowed.

2. The Appellant's conviction on the count of aggravated defilement and sentence are hereby quashed.

3. The appellant should immediately be released unless held on other lawful grounds.

We so Order

Dated, signed, and delivered at Kampala this 26th day of April 2024.

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MUZAMIRU MUTANGULA KIBEEDI
JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA
JUSTICE OF APPEAL