THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J, TSEKOOKO, KAROKORA, KANYEIHAMBA, KATO, J.J.S.C.)

CRIMINAL APPEAL NO.39 OF 2001

BETWEEN

KATO ABASI :::::::::::::::::::::::::::::::::::: APPELLANT

AND

UGANDA ::RESPONDENT

(Appeal from the Judgment of the Court of Appeal (Okello, Mpagi - Bahigeine, Twinomujuni, J.J.A, dated, 18th May, 2001, in Criminal appeal No. 39 of 2001)

REASONS FOR THE JUDGMENT OF THE COURT

This was a second appeal. The appellant was convicted by the High Court for defilement contrary to section 123 (1) of the Penal Code Act. He was sentenced to 15 years imprisonment.

The Court of Appeal dismissed his appeal and confirmed sentence after taking into consideration the period he had spent in prison on remand. His appeal to this court was based on two grounds, namely:

1. The learned trial Judge erred when she held that the appellant is the person who committed the offence which holding was also confirmed by the Court of Appeal.

2. Alternatively, but without prejudice to the first ground, the sentence of 15 years imposed on the appellant was excessive in the circumstances.

The appellant was represented by Mr. Noha Ssekabojja and the respondent by Mr. Erubu Michael, Principal State Attorney. In light of the provisions of section 6 (3) of the Judicature Statute. Mr. Ssekabojja sought leave of court to have the Memorandum of Appeal amended so that the appeal would be confined to conviction and identification of the appellant at the time the defilement occurred. As Counsel for the respondent had no objection, court granted the application to amend.

The brief facts of the case may be summarised as follows:

The appellant and the parents of the victim were neighbours and lived at Nangwa village in Nyimbwa sub-county, the District of Luwero. In the evening of 6th November, 1998, at about 7.30 p.m., the appellant went to the home of the parents of the victim, Nakiseka Sumaya, PW1, in the company of her sister, Nakabonge Cissy, PW2, and other children. He invited the victim to accompany him on the pretext that he was going to buy her bread. She accompanied him. After buying her bread, he took her to a building, which was under construction, and defiled her. Thereafter, the appellant told the victim to go home but after warning her not to reveal to anyone what had happened to her in the uncompleted building. However, when the victim returned home she revealed to her sister, Nakabonge, PW2, what had happened. She told her that she had been defiled by the appellant. Nakabonge noticed that there was a blood stain on the dress worn by the victim. Nakabonge informed her mother, Veronica Namirembe, PW3, who reported the matter to the authorities.

The appellant was arrested for defilement that very night. The following day, the victim was taken to Nakaseke hospital where she was examined by Dr David Mubezi. The doctor found that the victim was aged about six years and had bruises inflicted on her vaginal canal, her hymen had recently been raptured and she had contracted a vaginal disease. Her vaginal area was inflamed.

Subsequently, the appellant was indicted for defilement. At his trial, he pleaded an alibi in his defence. He stated that at the material time he was at his home. He also denied that he knew the victim. He stated that the accusation against him had been motivated by a grudge which existed between himself and the mother of the victim. According to him the grudge had arisen because the appellant had refused to sell a plot of land to the mother of the victim. In support of this claim, the appellant called two witnesses, namely Issa Wagaba, DW1, and Badru Mayambala,

DW2, who both testified that indeed that grudge existed between the two because of the refusal by the appellant to sell his plot of land to the mother of the victim.

The trial Judge rejected the appellant's defence and convicted him. His conviction and sentence were confirmed by the Court of Appeal. He appealed to this court. We heard the appeal on 2nd, December, 2002, and dismissed it without hearing Counsel for the respondent because both the submissions on behalf of the appellant and the record of proceedings indicated to us that there was no merit in the appeal. We intimated then that we would give reasons for our decision on a date to be notified to the parties. We now give those reasons.

Mr. Ssekabojja, Counsel for the appellant, contended that the appellant had not been properly identified. He submitted that at the time of the offence, the victim was only six years old and at that tender age, she could not possibly have properly identified her attacker, especially as it was already dark and the appellant denied knowing her.

Secondly, Counsel contended that the appellants' alibi and his testimony of the grudge had not been properly evaluated by the trial court and the Court of Appeal. Counsel invited this court to reconsider these two issues.

In her well reasoned judgment, the trial Judge said:

> *"As to whether the accused was responsible for the abuse, the court carefully scrutinised the evidence in view of the fact that the matter was highly contentious since the defence denied the allegation. The evidence implicating the accused was through identification. PW1, though of tender age, was subjected to a 'voiredire' and found to be possessed of sufficient intelligence to testify and to distinguish lies from the truth. As rightly argued by the learned State Attorney, she courageously identified the accused in the dock as the man who had defiled* her. *The Court did not doubt her testimony in any way. Her testimony was corroborated by the evidence of PW2 who saw and heard the accused call her. Although PW2's knowledge of the accused was contested by defence Counsel that PW2 only knew the accused as Abua. I did not find this as materially defective because according to the charge sheet the accused was named as Katto Abasi alias Abuwa. PW2 knew the accused as he used to live on the same village and usually visited with (s.c.) them.*

On the material day, it was about 7.30 p.m. and PW2 was proximate to the accused that she was able to recognise him as well as hear him speak to PW1. Both PW1 and PW2 were consistent and their evidence corroborative. PW.3 also recounted the story corroboratively raising no doubt in my mind. I therefore agree that the conditions for identifying the accused were favourable and the evidence of PW1 was sufficiently corroborated as already observed."

The record of proceedings show quite clearly that the learned trial Judge considered and resolved both the claim of the grudge by the appellant between himself and the mother of the victim and his defence of alibi. The trial Judge was satisfied that the appellant's defence had not in any way affected or rebutted the prosecution's evidence. She found that the two witnesses called to testify on behalf of the appellant were unimpressive and contradicted each other. The assessors in the case were not impressed by the evidence of the defence. They both recommended that the appellant be convicted.

In the Court of Appeal, the learned Justices of Appeal fully, and in our view, correctly, explained the law governing evidence of identification and properly reevaluated all the evidence. The Court of Appeal relied on the case of Abudala Nabulere V Uganda, (1979) HCB 77, in emphasizing the law, that a trial Judge must warn himself or herself and the assessors to ensure that identification was free from mistake before convicting the accused. They also agreed that 7.30 p.m. in Uganda is generally early enough for there to be still some light.

In this particular case, there was also moonlight. The learned Justices of Appeal reevaluated the evidence and came to the conclusion that they were satisfied that the two witnesses positively identified the appellant whom they knew before the incident and as a result confirmed the findings of the learned trial Judge. After hearing the submissions of Counsel for the appellant, we were not persuaded that either the trial Judge or the Court of Appeal made any error as contended by counsel. It was for these reasons that we dismissed the appeal.

Dated at Mengo this 5th day of March 2003.

B.J. ODOKI

CHIEF JUSTICE

J.W. N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A.N.H. KAROKORA

JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

C.M. KATO

JUSTICE OF THE SUPREME COURT