THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: **HON. C.M. KATO, J.A.**
HON. G.M. OKELLO, J.A.
HON. S.G. ENGWAU, J.A.

CRIMINAL APPEAL NO.40 OF 1999

BETWEEN

TUMUHANGIRE KARAVE AND ANOTHER:::::::::::::::::::::::::::::::::::APPELLANTS

AND

UGANDA :::RESPONDENT

(Appeal from the decision of the High Court
(Rugadya Atwoki, J.) at Mukono dated
16/4/99 in Criminal Case No. 93/98).

JUDGMENT OF THE COURT

The appellants, Haruna Musoke and Karave Tumuhangire, were on 16/4/99 convicted by the High Court of Defilement contrary to section 123 (1) of the Penal Code Act. They were each sentenced to 6 years imprisonment. They now appeal to this court against both the conviction and sentence.

The brief facts of the case are that on 7/6/96 at about 10.000 p.m. at Wabiyinja village in Mukono district, the victim (PW3) was in company of her brother Murumba Fred (PW4) and her sister Nabagala Irene, returning from a wedding party in a nearby home. On the way, the victim branched for a short call when she met the two appellants. She knew them as village mates. They demanded for some money from her for cigarettes. They took from her 10,000/= and dragged her further into the bush. As she resisted, the second appellant slapped her. In the bush, the first appellant defiled her while the second appellant sat on her head. She raised an alarm but it was

not answered as her voice was drowned by the loud disco music that was going on nearby. Murumba Fred who followed her met her on the way sobbing. She told him what had happened. They went to the scene and with the help of a torchlight found her dresses scattered at the place. The appellants ran away but she had identified them with the aid of the moonlight.

The matter was reported to the authorities and the appellants were arrested the following day. Meanwhile, the victim was taken for medical examination at Kayinga Hospital. She was examined by Dr. Edrisa Mukalazi, (PW2), the Medical Superintendent of the Hospital. The appellants were eventually indicted for defiling the victim.

At the trial, they both set up a defence of alibi and called evidence to substantiate their respective defence. The trial judge however, rejected their defence and convicted them.

There are four grounds of appeal namely:

(1) the learned trial judge erred in law in the application of the principles governing the issue of identification though he paid lip service to the principles,

(2) the learned judge further erred in law and fact on the issue of contradictions which were rampant and damaging to the case,

(3) the learned trial judge erred in law in the application of the principles of alibi, and

(4) the alleged confession was in admissible and could not be relied upon.

At the hearing, grounds 1 and 4 were argued together. Grounds 2 and 3 were argued separately. We shall consider them in that order.

On grounds 1 and 4, Mr. Zagyenda, learned counsel for both appellants, complained that the trial judge failed to properly apply the principle governing evidence of identification despite correctly stating the principle. He pointed out that the victim testified that she was able to identify the appellants with the aid of a torchlight taken to the scene by Kedi and by the moonlight. Kedi did not testify. According to counsel, Murumba Fred (PW4) also testified that when they went to the scene, they were able to find the victim’s clothes by the aid of torchlight. Counsel submitted that

if torchlight was necessary for the victim to identify the fleeing appellants and for Murumba to find the victim's clothes, then the moonlight was not bright enough for correct identification.

In his view, the conditions for correct identification were difficult and therefore the trial judge was wrong to have held that the appellants were properly identified by a single identifying witness.

On the other hand, Ms Khisa, the Principle State Attorney, who appeared for the respondent, contended that the trial judge properly applied the principle governing evidence of identification. In her view, the conditions favouring correct identification existed as the victim was known to the appellants before, they being village mates; there was moonlight and the appellants had prior conversation with the victim at close range when they demanded for money from her. Ms. Khisa argued that the incident took one hour which provided the victim ample opportunity to identify the appellants properly. Learned Principle State Attorney submitted that these conditions provided good quality identification.

The trial judge dealt with the point in his judgment thus:

> "In the instant case, the victim, Kasalina had known Al for 3 years and A2 for 2 years prior to the alleged incident. They were all from the same village. Their homes were not far from each other. The accused in their testimonies each admitted knowing Kasalina. She was a village mate. Kasalina testified that there was moonlight that night when she went for a short call. PW4 Murumba Fred also testified that there was moonlight. Kasalina crossed the road to the path where she met the two accused. She stopped and they talked. They asked her for money for cigarettes. This all must have taken time. Al and AZ then held her hands and pulled her a distance of about 70 meters. She stated that at first they held her hands gently: presumably because these were people well known to each other. But when they continued pulling her towards the bush, she resisted and A2 slapped her. She was violently disrobed and her clothes were scattered in the ensuing struggle. All this time, Kasalina was very close to her assailants. She was eventually put down. A2 held her hands and sat on her head while A2 lay on top of her and defiled her. Kasalina said Al defiled her three times; and that this whole episode lasted about one

hour. That period was long enough for her to identify her attackers clearly so very close to her as they were. I am convinced that there was simply no possibility of a wrong or mistaken identification."

We cannot fault the trial judge in the manner he dealt with the issue of identification. He closely examined the circumstances in which the identification was stated to have been made and ruled out any possibility of mistaken identity. We agree with that. That was a strict application of the principle governing evidence of a single identifying witness laid down in *Abudala Nabulere Vs Uganda [1979] HCB 77.*

Mr. Zagyenda submitted that if torchlight was needed for the victim to identify her fleeing assailants or for PW4 to find the victim's clothes at the scene, then the moonlight did not provide sufficient light for correct identification. We do not agree with this argument because the victim testified that she identified the appellants when she first met them at the roadside, as there was moonlight.

Her evidence in this regard went as follows:

"Even before Kedi came, I had recognised them when I first met them at the roadside. There was moonlight."

The trial judge in fact did not rely on the torchlight as the source of light which aided the victim to identify her assailants. He stated in his judgment that:

> "Mr. Serwanga attacked Kasalina's testimony when she stated that she was further aided in identifying her attackers by the torches which her rescuers flashed at the fleeing assailants. I did not put reliance on this of the evidence because there was already enough factors in evidence which in my opinion, enabled Kasalina to make an error-free identification of her assailants even in the absence of the torches."

In our view, the learned trial judge properly applied the principles governing evidence of identification. Grounds 1 and 4 therefore fail.

On ground 2, Mr. Zagyenda complained that the trial judge did not consider grave contradictions which were rampant in the prosecution evidence. He pointed out as grave contradictions the following:

Firstly, that while the victim and Murumba Fred testified that Kedi went to the scene with a torch, the trial judge found that there were torches. We find, with respect, that this is not a contradiction in the prosecution evidence.

Secondly, that on the question whether it was Kedi or Murumba Fred who arrived at the scene first, the victim testified that it was Kedi who arrived at the scene first, while Murumba stated that he arrived together with Kedi. We do not find this to be a grave contradiction as it does not go to the root of the case. It was never the prosecution's case that the rescuer who arrived at the scene first identified the assailant.

Thirdly, counsel pointed out that on the question of bruises on the victim, the doctor who examined her claimed to have found bruises on her, yet the victim herself was silent on that point. In our view, that is not a contradiction. The fact that the victim was silent on the question of injuries on her did not make it a contradiction. In the whole, we find that none of the alleged contradictions were contradictions at all. We find no merit in this ground. It fails.

On ground 3, Mr. Zagyenda complained that the trial judge failed to apply the principles governing the defence of alibi. He argued that if he did so, the trial judge would not have found that the appellants' alibi had been destroyed when the evidence he relied on could not destroy the alibi as the conditions favouring correct identification did not exist.

On the other hand Ms Khisa contended that once the trial judge believed the evidence of identification by the victim, then the alibi was destroyed.

As we have shown when dealing with grounds 1 and 4 above, the trial judge correctly dealt with the issue of identification. He found that conditions favouring correct identification existed and believed the victim's evidence. Existence of conditions favouring correct identification accounts

for the quality of identification. Once the evidence of identification is believed by the trial judge, then the alibi is destroyed as the evidence of identification places the appellants squarely at the scene of crime. We find no merit in this ground. It therefore fails.

In the result, we dismiss the appeal.

Dated at Kampala this 20th day of December 2000.

C.M. KATO,
JUSTICE OF APPEAL

G.M. OKELLO,
JUSTICE OF APPEAL

S.G. ENGWAU,
JUSTICE OF APPEAL