THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE G.M. OKELLO, JA

HON. MR. JUSTICE S.G. ENGWAU, JA

HON. MR. JUSTICE A. TWINOMUJUNI, JA

CRIMINAL APPEAL NO.130 OF 1999

KYALIMPA RICHARD ……APPELLANT

VERSUS

UGANDA …….....RESPONDENT

(Appeal against the decision of

the High Court of Uganda at Mubende (Bamwine, J)

in Cr. Session Case No.574/1999 dated 3-11-1999)

JUDGMENT OF THE COURT:

This is an appeal against conviction and sentence for the offence of defilement contrary to section 123(1) of the Penal Code Act.

The facts of the case are that the victim (PW2) and the appellant are half brother and sister born of the same mother but different fathers. On 26th December 1998, they lived in the same village of Nkanaga in Mubende District. On that day the victim, who was then aged 14 years old, was at home with her mother when the appellant came there and called her outside the house. Her mother was then resting. It was around 5 p.m. When the victim showed some reluctance the appellant lifted her from the house, took her to the nearby bush and defiled her. She cried out and in so doing woke up her mother who ran from the house to where they were. When she arrived, the appellant got off his victim and ran away. He was later arrested and charged with the offence of defilement. At his trial, he pleaded alibi which was not accepted. He was convicted and sentenced to 13 years imprisonment, hence this appeal.

The Memorandum of Appeal has three grounds of appeal as follows: -

1. The learned trail judge erred both in law and fact to state that the appellant was properly identified as the person who defiled the complainant.
2. The learned trial judge erred both in law and fact, when he failed to consider the contradictions in **the prosecution evidence so as to determine their effect on the prosecution case.**
3. The learned trial judge was wrong when he rejected the appellant's alibi.

Mr. Cranimer Tayebwa, learned counsel for the appellant, submitted on the 1st ground of the appeal that the trial judge erred when he held that the appellant was properly identified. In his view, the conditions of lighting were rather poor and the victim (PW2) was an imbecile and incapable of carrying out correct identification. In those circumstances, her evidence should be taken with care. He also argued that the evidence of her mother (PW3) was equally suspect as conditions of lighting did not favour correct identification.

In reply, Mr. Byabakama Mugenyi, the learned Deputy DPP, who represented the respondent, submitted that the appellant was very well known to the victim and her mother who were his sister and mother respectively. The appellant lifted her and defiled her. Her mother heard her cry out: **"Kyalimpa why are you killing me".** When she ran to the scene, she saw her own son defiling his sister. He then got off and ran away.

Both counsel appeared to be under the impression that the conditions of lighting at the time of the offence were not testified to by the prosecution witnesses. However, the victim stated that it was during daytime. She clearly described how the appellant was dressed and exactly what he did. Her mother was very positive in her identification of the appellant. She stated under cross-examination: -
"He did it to her around 8 p.m. Identifying him was not a problem. I know him well. I even called him by name. I found him playing sex with her. He just jumped off and stood in a distance."

The learned trial judge found both these witnesses credible and believed them. He also found that though PW2 was an invalid (a polio victim) she was not so mentally deranged as to fail to

recognise her brother and what he did to her. The appellant tried to plead alibi saying that he was not at home on the material day but under cross-examination, he admitted that on 26/12/98 he returned home early and spent the day at home which is near that of his mother.

We have carefully scrutinised all the available evidence on record on the issue of identification. We agree with the trial judge that the offence was committed in such circumstances that identification of the appellant could not have presented any problems. Both PW2 and PW3 knew the appellant very well. He came into very close contact with both of them. They narrated their ordeal firmly and convincingly to the trial judge and in contrast, the appellant tried to set up an alibi that could not hold. The trial judge was therefore right to hold that the appellant was positively identified. This ground of appeal fails.

The second ground of appeal was that the trial judge failed to consider is material contradictions in the prosecution case. The only contradiction that Mr. Tayebwa was able to point out was that whereas the indictment alleged that the offence was committed on 26/12/98, the mother of the victim said it was on 20/12/98. However, Mr. Tayebwa appears to have abandoned this ground when it was pointed out to him that the mother of the victim stated in cross-examination that the offence took place around Christmas festivities. Mr. Tayebwa was unable to substantiate the second ground of appeal and it therefore fails.

The third ground of appeal was that the trial judge erred to reject the appellant’s alibi. I have already alluded to this defence which the appellant tried to put up and the circumstances in which the trial judge rejected it. Though the appellant half-heartedly tried to raise it, he admitted under cross-examination that on 26-12-98, at least most of that day, he had returned to his home and was certainly there at the material time of the defilement. The trial judge considered the defence but found it wanting and rejected it. In our view, he rightly rejected it as the appellant failed to sustain it. We do not mean here that he failed to prove it. He had no duty to do so. However, he first tried to raise it and then abandoned it under cross-examination. It was therefore no longer a valid defence of alibi. This ground too must fail.

We have subjected the whole record of proceedings in this trial with a view to arriving at our own conclusion. We are satisfied that the learned trial judge diligently handled the facts and the

law properly and arrived at a correct conclusion. We see no reason to interfere or disturb his findings or conclusions. The appellant was correctly convicted.

Before we take leave of this case, we wish to comment on the sentence that was imposed on the appellant. In passing the sentence, the learned trial judge stated: -

> **For the terrible offence he committed, and the manner in which he committed the same, the best this court can do towards extending leniency to him is to reduce the sentence from death <u>to imprisonment of thirteen (13) years, the period spent on remand since 19/4/99 inclusive.”</u>** [Emphasis supplied]

We were unable to tell with certainty exactly what sentence the learned trial judge had imposed. Both learned counsel who appeared before us thought that it was 13 years imprisonment. It is also possible to construe the underlined words to mean that the period the appellant spent on remand is to be deducted from the sentence of 13 years.

It has now become very frequent for trial courts to pass a sentence in vague 5 terms that it is not possible to tell exactly what sentence has been passed.
Common forms are: -
- You are sentenced to 10 years imprisonment, period on remand inclusive.
- Sentenced to 15 years Period on remand to be taken into account.
- You will serve 18 years in prison minus period spent on remand e.t.c.

In all these examples, it appears as if the trial court leaves the task of determining the exact sentence on someone else. It seems that this confusion occurs in an attempt to comply with Article 23(8) of the Constitution which states: -

> **“Where a person is convicted and sentenced to a term of imprisonment for an offence any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.”**

We have stated before, and we feel we must state so again, that this provision does not require a trial court to mathematically add or deduct the period spent on remand from the proposed

sentence. It only requires the trial court to TAKE INTO ACCOUNT the period lawfully spent in custody. The court is under duty to pass an ascertainable and final sentence after it has taken the remand period into account.

It would be an abdication of its duty if it left the sentence to be worked out by the Criminal Registries or prison authorities as seems to be happening now.

In the instant case, after taking into account the period the appellant spent on remand, we direct that he will serve a sentence of 13 years imprisonment from the date he was sentenced by the trial court.

In the result, we find no merits in this appeal which we dismiss accordingly.

We also direct that a copy of this judgment be sent to the Hon. the Principal Judge for wide circulation to the trial judges.

Dated at Kampala this 8th day of May 2003.

Hon. Justice G.M. Okello
JUSTICE OF APPEAL.

Hon. Justice S.G. Engwau
JUSTICE OF APPEAL.

Hon. Justice A.Twinomujuni
JUSTICE OF APPEAL.