

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 21 OF 2003
KATENDE AHAMADAH.....APPELLANT
VERSUS
UGANDA.....RESPONDENT

CORAM:

THE HONOURABLE MR. JUSTICE S B K KAVUMA, Ag. DCJ

THE HONOURABLE MR. JUSTICE ELDADA MWANGUSYA, JA

THE HONOURABLE LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

JUDGMENT

Introduction:

The appellant was indicted and tried for aggravated defilement by the High Court at Mukono (**Wangutsi J.**) contrary to **section 121 of the Penal Code Act** in count 1 and with incest contrary to **section 149(1)** of the same **Act** in count 2. He was convicted on January 27, 2003 on both counts and sentenced to 15 years' imprisonment on each count. The two sentences were to run concurrently. He was dissatisfied with the conviction and sentence and filed this appeal against both.

Background facts:

The facts of the case as established at trial were that the appellant is the natural father of three children, one son and two daughters. He lived with them and a wife at Bulongo village in Mukono District. The daughters were Zaina Nakitende and Nalweyiso Ajalah. The son's name was Katende.

On June 20, 1999, the appellant was at home with all the three children. The appellant told his children to go and pick coffee. While in the coffee garden, he asked Zaina Nakitende (PW5), aged 13 years at the time of the events, to accompany him to cut palm tree leaves. The appellant and Zaina Nakitende left the others behind and went to cut palm tree leaves. On the way back, and about a quarter of a kilometer from where the others were picking coffee, the appellant demanded sex from her. He threatened her with a panga and out of fear, she gave in. He then had sexual intercourse with her. All this occurred during day time. On the same day, Zaina informed Nalweyiso and together they reported the matter to the Local Council 1 leadership. The Treasurer LC1 Mr. Clement Musoke (PW3) took them to the Police. The victim was distressed. The two girls also informed their aunt, Betty Nakibuule (PW2), who was a sister to the appellant of the incident.

The appellant denied having sex with his daughter and stated that on June 20, 1999, he had gone to attend a funeral at Kazinga. He also stated that he was framed by his sister (PW2) because she had a land dispute with him.

He also alleged a grudge between him and his sister PW2 arising from a disputed piece of land. He proffered an alibi on the day he is alleged to have defiled his daughter, stating that he was keeping vigil at a funeral in Kazinga.

Grounds of appeal

The grounds of appeal were as follows:

- 1. The learned Trial Judge erred in law when he rejected the Appellants defense of alibi without evidence to disprove it.**
- 2. The learned Trial Judge erred in law when he failed to properly evaluate the evidence on record which resulted in his making wrong conclusions to the detriment of the appellant.**

- 3. The learned Trial Judge erred in law when he sentenced the Appellant in count 2 of incest to 15 years' imprisonment which sentence is not provided for by the law.**
- 4. The learned Trial Judge erred in law when he sentenced the Appellant to 15 years' imprisonment on count 1 of defilement which was excessive in the circumstances.**

At the hearing, Mr. Brian Kalinaki Senior State Attorney represented the Respondent, while Mr. Kafuko Ntuyo represented the appellant. Counsel for the appellant, Mr. Kafuko Ntuyo argued grounds 1 and 2 only and abandoned grounds 3 and 4.

Resolution of the grounds of appeal

The first ground of appeal was based on the alibi. Counsel for the appellant submitted that the learned trial Judge erred in law when he rejected the appellant's defense of alibi which the prosecution had failed to disprove. The appellant, he argued, was not in the place where he is alleged to have committed the offences because he brought a witness who testified that he was somewhere else at the time he is alleged to have committed the offence. He should have been believed. The burden was on the prosecution to put the accused at the scene of crime.

Counsel further submitted that the appellant alleged a grudge over land with the sister of the complainant which the trial Judge rejected wrongly.

Counsel also submitted that the learned trial Judge did not properly evaluate the evidence. Had he done so, he would have come to a different conclusion.

Learned Counsel for the respondent, Brian Kalinaki, submitted that the appellant was identified by his daughter who was the victim, and that the time they spent together in broad day light was sufficient to enable correct identification. He further submitted that the appellant's sister, PW2, contradicted the appellant about his whereabouts at the material time. He also

submitted that Counsel for the appellant had failed to point out where the learned trial Judge failed to properly evaluate the evidence.

On the alleged grudge, he submitted that it could not have extended to medical expertise. The medical report indicated that there was tenderness in the private parts and inflammation, which were in line with a sexual assault on the victim.

The duty of a first appellate court

We recall the duty of a first appellate court, which is to re-appraise the evidence as a whole and subject it to a fresh and exhaustive scrutiny, weighing conflicting evidence and drawing its own inferences and conclusion. This duty is recognized in **Rule 30(I) (a)** of the **Rules of this Court**. The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. Furthermore, a first appellate court has to bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowances in that regard (**Selle and Another v Associated Motor Boat Company [1968] EA 123**). We have borne these principles in mind in resolving this appeal.

There was not much dispute about the evidence. The appellant accepted that PW5 was his daughter. Undisputed medical evidence established that the victim was approximately 12 years on June 25, 1999, when she went through a medical examination. Her hymen was ruptured. Her private parts were inflamed or injured, which was consistent with force having been used sexually. The appellant did not contest these findings on appeal although among his arguments there was a general complaint that the learned trial judge did not properly evaluate the evidence. We have considered the above evidence carefully and subjected it to fresh and exhaustive scrutiny as required of a first appellate court by law. We find no basis to depart from the

findings of the learned trial judge. We agree with his findings that the age of the victim and the fact that she was defiled were firmly established by the evidence and proved beyond reasonable doubt. We therefore conclude that in this regard, the appellant's general complaint that the court did not properly evaluate this evidence has no merit. We therefore dismiss ground 2 of the memorandum of appeal.

The remaining ground of appeal on alibi and an alleged grudge hinges on whether the appellant was properly identified as the assailant of the victim. The learned trial Judge found that the appellant was properly identified and placed at the scene of crime. The appellant submitted that the learned trial Judge erred in his assessment of the evidence on alibi. The evidence of PW2, the appellant's sister, is that on June 20, 1999, the two daughters of the appellant, Zaina Nakitende and Ajala Nalweyiso approached her around midday and complained that their father, the appellant, had defiled both of them. By the time they reported to her, they had already reported the matter to one Clement Musoke, a member of the LC Executive. He is the one who took them to Police. On her part, she took them for medical examination. She denied having a grudge with the appellant. According to her, the funeral of her child which the appellant stated to have occurred on June 20, 1999, occurred on June 18, 1999. The appellant kept vigil at her home for one day and then left. The latest therefore that the appellant should have left PW2's place is June 19, 2012. The girls went to her home, which is about two miles from that of the appellant, on June, 20, 1999 to report the incident.

The trial Judge preferred to believe PW5 and we cannot say that he erred. A mother of a deceased child is more likely to remember the date of its burial than an uncle, who the appellant was. It is also curious that the appellant disappeared after the incident and the LCs had to look for him. The act of disappearing

and hiding in a hut, instead of living in his own house, indicates culpability and fear on the appellant's part. He was arrested after one and half weeks.

More importantly, the conditions in which the appellant was identified were very conducive to proper identification. The event occurred during broad day light. The victim was his own daughter who knew him very well. Chances of mistaken identity were certainly nonexistent in the circumstances of this case.

This combined evidence squarely puts accused at the scene of crime and destroys his alibi as a fabrication.

On the alleged grudge over a kibanja with his sister PW5, PW4, a former official of the LCs testified that this matter was mentioned by the appellant for the first time on his arrest. It was subsequently mentioned in court in another defilement case. If any land dispute existed, surely the LC officials would have known about it, given that PW5 lived only about two miles away from the appellant's home. The alleged grudge was therefore a further fabrication on the part of the appellant.

In the circumstances, we find no error on the part of the learned trial Judge in reaching the conclusion that he did, namely that it is the appellant who defiled the victim, his own daughter. He also rightly rejected the alleged grudge. This ground of appeal is therefore dismissed as well.

We therefore find that this appeal is without merit and accordingly dismiss it. We uphold the conviction and sentence of the lower court on both counts.

We so order.

Dated at Kampala this 8th day of August 2014

Signed:

Honorable Justice S B K Kavuma_____

Ag. Deputy Chief Justice

**Honorable Justice Eldad
Mwangusya**_____

Justice of Appeal

**Honorable Justice Solomy Balungi
Bossa**_____

Justice of Appeal