**The Republic of Uganda**

**In the Supreme Court of Uganda.**

**At Mengo**

(Coram: Tsekooko JSC, Karokora JSC, Mulenga JSC, Kanyeihamba JSC, and Kikonyogo, JSC,).

Criminal Appeal No 15/1998

Ochitti Lagol Patrick ……....Appellant.

Vs.

Uganda ……Respondent.

"(Appeal from the decision of the Court of Appeal
at Kampala. Okello JA, Engwau JA, and Twinomujuni JA) dated 16/7/1998 in the Court of Appeal Criminal Appeal
No.21 of 1997.

**REASONS FOR THE JUDGMENT**

This is an Appeal against the decision of the Court of Appeal in its appellate jurisdiction. It came up for hearing before this court on 2nd November 1998. After hearing the counsel for both parties we dismissed the appeal and promised to give reasons later. We now give our reasons.

Ochitti Lagol Patrick hereinafter to be called the appellant was arrested with one Okello, who escaped whilst on remand, for committing robbery and rape contrary to Sections 272 & 273 and 117 of The Penal Code Act respectively. The appellant was subsequently tried by the High Court sitting at Gulu and was convicted on three counts of capital robbery and two on rape. He was sentenced to death on all the five counts but sentences on the four counts were deferred.

The brief facts of the case as found by the High Court and accepted by the Court of Appeal were that on 24.4.1992 at II p.m. Sarafina Areta, PWI and her children hereinafter to be referred to as the victims were in their house at Baromol village in Gulu District when two men armed with a

gun attacked them. During the incident which lasted for some two hours the victims recognized the appellant as one of the assailants. They identified the second attacker as Okello. Both men were related to the victims and hence well known to them. The appellant pulled grass from the house and lit fire in two places in the compound and inside the house. He also carried lit grass to various places in the home apparently searching for money. There was also a tadooba light in the house already burning. The grass torch light enabled the victims to recognize assailants. The appellant tortured the victims. He shot at each one of them many times but missed each time. He also beat them but fortunately none of them was seriously injured. Four of the victims who were called as P.WI, P.W.2, (J.B. Komakech), P.W.4, (Joyce Arach) and P.W.6, (Betty Auma) were definite that they correctly identified the appellant as one of the assailants who attacked them

When the attackers eventually left they took some properties from the home which included cash, a T-Shirt, waragi, a bar of soap and an identity card belonging to Akot, P.W 1's son. They also abducted three of P.W.1's daughters. The appellant and Okello forced two of the girls, PW4 and PW6, to have sexual intercourse with them. However, later the girls managed to escape from the two men and returned to their mother. The matter was reported to the authority as a result of which the appellant was traced and arrested. He led the soldiers who arrested him to the recovery of the gun allegedly used in the robbery. He was subsequently charged with robbery with aggravation contrary to sections 272 & 273 on three counts and Rape Contrary to S. 117 on two counts (of the Penal Code).

During his trial, the appellant denied the charges in his sworn statement. He, however, admitted having led the soldiers to the recovery of the gun but he said it was due to torture. He put up a plea of alibi as his defence. He said that at the material time he was sleeping in his brother's house whom he called as one of his witnesses, D.W1. The learned trial judge rejected his defence. He convicted and sentenced him to death on all five counts.

His appeal to the Court of Appeal was dismissed and the convictions on all five counts were upheld. The sentences of death on the three counts of robbery with aggravation were confirmed. However, the sentences of death on the two counts of rape were set aside to be substituted with lesser but appropriate sentences of imprisonment.

The appellant being aggrieved by the decision of the Court of Appeal lodged this appeal to this court. It is based on three grounds namely:

> 1. That the learned justices of the Court of Appeal erred in law and fact in holding that the appellant had been properly identified when the circumstances that prevailed at the time did not favor correct identification.
> 2. That the learned justices of the Court of Appeal erred in law and fact in holding that the offences of rape had been proved against the appellant when there was insufficient evidence to support such a finding.
> 3. That the learned justices of the Court of Appeal erred in law and fact not to find the appellant if he was the culprit, which is denied, was on the prosecution evidence too drunk to be responsible for the acts of robbery and rape.

In his submissions, Mr. Zagyenda, learned counsel for the appellant, argued both the first and second grounds together. He submitted that the High Court and Court of Appeal wrongly held that the identification was satisfactory. They erred to find that the appellant raped PW1's daughters, PW4 and PW6. As far as Mr. Zagyenda was concerned the counsel who represented the appellant in the Court of Appeal did not put in all the vigour and effort to show that the conditions at the material time did not favour correct identification. PW1's evidence fell, far too short of the required standard of proof. She was not sure when she first recognised the assailants. Her evidence must have been guess work.

Although Mr. Zagyenda conceded that, there was some light, he submitted that it was insufficient and of poor quality. It was raining too. That light could not have aided correct, identification by already frightened victims. The appellant was not properly identified as claimed by the prosecution witnesses. With regard to the rape charges. Counsel argued that as the trial judge found that it was dark when the two girls were raped, they could not have properly identified the appellant as one of their assailants or the rapists.

On the third ground, Mr. Zagyenda submitted that even if not raised both the High Court and Court of Appeal ought to have found that the appellant was too drunk to have been responsible for the acts of robbery and rape he is alleged he committed. His judgment was too impaired to

form an intent to rob or rape. Counsel, therefore, prayed the court to allow the appeal, quash the convictions and set aside the sentences of death and imprisonment, imposed on the appellant.

In reply Mr. Bireije, the learned Principal State Attorney opposed the appeal. He supported the decision of the Court of Appeal. He conceded that the appeal depended entirely on correct identification by the prosecution witnesses. He submitted that the issue was properly considered by both the High Court and Court of Appeal. Counsel for the appellant did not mention the conditions which did not favour correct identification. Further the evidence of the prosecution witnesses was strengthened by the recovery of the stolen property belonging to the victims. There was no serious contradiction in PW l's evidence as claimed by Mr. Zagyenda. Mr. Bireije asked this court to dismiss the appeal and uphold the decision of the Court of Appeal. We are satisfied that the learned trial judge was, on the evidence adduced before him, justified in finding that the appellant had been correctly identified. He also came to the right conclusion when he found that two of P.W.1 s daughters, PW4 and PW6, were raped by the appellant.

We find that the Court of Appeal properly examined and reevaluated the evidence on the record. We cannot fault their decision. We, too, agree that the conditions at the material time favoured correct identification. We do not accept Mr. Zagyenda's submission that the prosecution witnesses could have been mistaken about the identity of the assailants and that PW1's evidence was a guess. Her testimony was corroborated by that of her three children, PW2, PW4 and PW6. They were all definite that they recognised both assailants as Ochitti and Okello. The discrepancy as at what stage she recognized the appellant, in PWI's evidence was minor and could be easily explained away on scrutiny of the evidence on record. We agreed with both the trial judge and the Court of Appeal that the conditions at the time of the incident satisfied the test laid down in the cases of **Roria Vs Republic 1967 E.A 583 and Abdala Bin Wendo & Another Vs R 1953 (20) EACA 166.**

Firstly, there was sufficient light from the tadooba and fire from the grass lit by the assailants and put in three places in the home. Further the appellant carried some of the lit grass to various places as he was searching for money. It is true it was raining but from the evidence on record it was only drizzling. It was not a heavy down fall to put out the bright fire from the grass, as testified by PW1, Areta. Secondly, all the prosecution eye witnesses, PW1, PW2, PW4 and PW6

knew the appellant very well. He and the second assailant, who escaped, were their relatives and lived in the neighbouring villages. Thirdly, these witnesses came very close to the appellant during the incident, especially as he was torturing them. Fourthly, the incident lasted for two hours although the appellant did not remain in one place. He was moving within the home. Fifthly, some of the items stolen during the incident like, T-Shirt, soap, jerry can of waragi were recovered in circumstances that implicated the appellant with the commission of the offences for which he was convicted. With regard to identification on the two counts of Rape we are in agreement with the decision of the Court of Appeal. The appellant was properly identified at the home of the victims at Bormal Village. The court believed that the assailants abducted the girls, raped them and parted with them when the girls escaped from them.

As for his defence, both the trial court and Court of Appeal rightly rejected the appellant's alibi. We agree that it was false. The defence witnesses did not support his case, whilst the evidence of the prosecution witnesses squarely put him at the scenes of the crimes at the material time. Hence, both grounds I and 2 must fail.

With regard to the procedural issue raised during the trial namely whether the appellant was properly charged with and convicted of rape since the victims were below 18 years the answer to this question is not hard to find. The definition of rape extends to girls under 18 years. Section 117 of the Penal Code reads inter alia that; -

> **Any person who has unlawful carnal knowledge of a woman or a girl without her consent ……..is guilty of the offence of Rape.**

The section does not exclude a girl under the age of 18 years although defilement under Section 123 of the Penal Code is confined to girls under 18 years of age. We think that defilement was intended to protect young girls against sexual abuse and disease by making proof easier since consent of the girl is no defence to the offence of defilement. The failure to indict the appellant with defilement was not detrimental to the prosecution case. It did not make the indictment defective, although it would have been more appropriate to charge him with defilement. There was evidence to prove rape so no miscarriage of justice occurred. We do not accept, as submitted by the learned principal state Attorney, Mr. Denis Bireije, that a retrial on the two counts of rape will be necessary since defilement is not a minor cognate offence of rape. The Appellant was

properly convicted of rape. In any case in the circumstances of this case a retrial will serve no practical use.

As for Mr. Zagyenda's submission on ground 3 that both the High Court and Court of Appeal should have found that appellant was too drunk to form the intention to rob and rape, intent was not in issue. Besides there was no evidence on which to base such a finding. Again this ground would fail.

It was for the aforesaid reasons that we dismissed the appellant's appeal, and upheld the decision of the Court of Appeal.

Dated at Mengo this 4th day December l998.

J.W. N Tsekooko
**Justice of the Supreme Court**

A.N. Karokora
**Justice of the Supreme Court**

J.N. Mulenga
**Justice of the Supreme Court**

G.W. Kanyeihamba
**Justice of the Supreme Court**

L.E.M. Mukasa -Kikonyogo
**Justice of the Supreme Court**

Appellant absent
Tayebwa holding brief for Zagyenda for appellant
Respondent absent
Judgement delivered