

UGANDA / JUDGMENT

Aluelo v Uganda (Criminal Appeal 823 of 2014) [2024] UGCA 209 (9 August 2024)

[2024] UGCA 209

COURT

Court of Appeal of Uganda

BEFORE

Kiryabwire, JA, Mulyagonja, JA, Luswata, JA

CASE / FILE NUMBER

Criminal Appeal 823 of 2014

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

Coram: Kiryabwire, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO. 823 OF 2014

BETWEEN

ALUELO MIKE APPELLANT

AND

UGANDA : : : : : i : : : : : 3 : : 3 : : ! : : : : : ! : : : : : 3 : : RESPONDENT

(An appeal from the decision of Vincent Okwanga, J. delivered at Adjumani on 14 September 2014, in High Court Criminal Session Case No. 004 of 2014) 10

JUDGMENT OF THE COURT

Introduction

The Appellant was indicted with the offence of aggravated defilement contrary to Section 129 (3) and (4) of the Penal Code Act. After a full trial he was convicted and sentenced to 21 years' imprisonment. 15

Background

The background to the appeal, as ascertained from the lower court Record, was that on 24th June 2013, at Alere Secondary School, Alere Village, Pachara Sub-County in Adjumani District, the Appellant who was from South Sudan and a Dinka by tribe defiled VF who was 13 years of age. 20

It was the prosecution case that on the fateful morning, the victim and her friends were tasked to slash the football pitch at their school (Alere Primary

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School) that the Appellant, who was a prefect and a pupil in Primary Seven (P7) at the same school, was supervising them. Further, that upon completion of the task, the Appellant chased VF and two of her classmates who were prompted to run towards Alere Secondary School. The Appellant kicked VF's leg and she fell down two times before she finally got tired. In a hilly area about one kilometre away, next to the Secondary School, the Appellant again kicked her to the ground, removed her knickers and had sexual intercourse with her. VF tried to scream but the Appellant covered her mouth with his hand so that her alarm could not be heard from far. However, two girls who were students at Alere Secondary School who happened to be reading nearby heard VF's cry and responded to it. They found the Appellant in the act of defiling her. One of them pushed him off the victim and he got up, put on his shorts and ran back to the Primary School.

The two girls took VF to their school's matron. She in turn took her to the Primary School and reported the incident upon which the Appellant was identified as the one who defiled her. The Appellant denied that he committed the offence and soon thereafter, a fight ensued between the Ugandan and South Sudanese pupils in the school leading to destruction of property. The Appellant was arrested and together with VF taken to the Police Station and a report made of the offence. Medical examinations were carried out in respect of both of them and he was subsequently charged with aggravated defilement. 15/20

When the matter came up for trial, the prosecution presented 4 witnesses while the Appellant denied the offence stating that he did not go to the football ground to supervise pupils on that day, or at all. He claimed he 25

was assigned to teach Mathematics to the P3 class. He presented two witnesses to support his alibi.

The trial Judge found sufficient evidence to convict him of the offence and sentenced him to 21 years' imprisonment. Dissatisfied with both conviction and sentence, he appealed to this court on the following ground:

1. The learned trial Judge erred in law and fact when he conducted a mistrial and failed to turite a Judgment as required by law.

IN THE ALTERNATIVE AND WITHOUT PREJUDICE to the above the Appellant raised the following grounds of appeal:

- 2. The trial Judge erred in law and fact when he convicted the Appellant on hearsay evidence and hence reached an erroneous decision to the prejudice of the Appellant. 10
- 3. The learned trial Judge erred in law and fact when he ignored the Appellant's defence of alibi thereby occasioning the Appellant a miscarriage of justice.
- 4. The learned trial Judge erred in law and fact when he imposed a sentence of 21 years' imprisonment upon the accused which was deemed illegal, harsh and excessive given the obtaining circumstances.
- ²⁰ The Respondent opposed the appeal.

Representation

When the appeal came up for hearing on 20th November 2023, the Appellant was represented by Mr. Madira Jimmy on State Brief Ms. Nabasa Carolyn, Assistant Director of Public Prosecutions in the Office of

the Director of Public Prosecutions (DPP) represented the Respondent. The Appellant was present in court.

Submissions of Counsel for the Respondent

Ms. Nabaasa informed court that she did not file any submissions for the Respondent because their office was not availed with a copy of the Judgment. Further, that efforts were made to peruse the original file of the High Court but the Judgment was not on it. Instead there was a series of correspondence calling for it.

She further submitted that the hand written notes of the trial Judge indicate, at page 66, that he delivered Judgment on 17th September 2012. That this was also reflected at page 56 of the typed Record of Appeal where it was stated that the Judgment was read in open court. 10

Ms Nabasa further pointed out that in this appeal, the Appellant seeks a declaration that the absence of a written Judgment on file means there was a mistrial, though there are alternative grounds faulting the Judgment. She submitted that it was not possible for the DPP to respond to complaints in respect of a Judgment that they had not read. She then pointed out that this court has the same powers on appeal as the trial court and proposed that since the proceedings are a-11 on file, this court should reappraise the evidence and render Judgment in the matter. In the alternative, she submitted that since the Judge who tried the Appellant retired, the court orders that the file be sent back to the trial court for another Judge to render Judgment so that the appeal can proceed. 20 15

Mr. Madira, for the Appellant agreed that indeed there was no Judgment on the Record. He applied to abandon grounds 2, 3 and 4 of the appeal, which were in the alternative, so that court considers the written submissions which were in respect of ground one, where the Appellant complained that there was a mistrial.

We then reserved Judgment to be delivered on notice.

⁵ Submissions of Counsel for the Appellant on the appeal

The Appellant's grievance was that the trial Judge erred when he conducted a mistrial and failed to write a Judgment as required by law'

Mr. Madira submitted that the triat Judge never delivered any Judgment, which in his view was a serious procedural irregularity that was incurable and rendered the whole trial a nullity. He referred to Section 82 (1), (2)' (5) and (6) of the Trial on Indictments Act (TIA) to support his submissions. He further stated that he perused the entire Record of proceedings of the High Court availed by the Deputy Registrar of this court but did not find any Judgment delivered by the trial Judge' Counsel went on to highlight Section 86 (l) of the TIA which is to the effect that every Judgment must be written or reduced into writing in the language of court and that it should be dated and signed by the presiding Judge. 10 15

20 Mr Madira further submitted that the trial Judge followed the right procedure while conducting the trial and he summed up the law and evidence to the assessors. That however, there was no Judgment on the court Record contrary to section 85 (l) of the TIA. Counsel further stated that contrary to Section 86 (3) of the TIA, the trial Judge did not enter ^a conviction on the indictment which is fatal and an incurable irregularity because he proceeded to sentence the Appellant without recording ^a conviction. It was his contention therefore that the entire proceeding was 25

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a mistrial thereby rendering the resultant sentence illegal. He referred to Karim Bagenda & 3 Others v. Uganda, SCCA No. 10 of 1994, to support his submissions.

Counsel further pointed out that there was no Record on the file to show $\$ \mathbf{S}$ that the Appellant was called upon to mitigate his sentence contrary to Section 98 of the TIA. It is the case for the Appellant therefore, that the trial Judge flouted known fundamental procedures in criminal law and the continued incarceration of the Appellant for over 9 years was the highest form of injustice since the same cannot be atoned in any way other than ordering his immediate release.

Analysis

The Appellant's complaints about the proceedings were that:

- $\$ i$ the trial Judge did not write a Judgment in the matter;

- ii) there was therefore no conviction recorded;
- 15
- the Appellant was not given an opportunity to address the court iii) before he was sentenced.

That as a result, the whole proceeding was a mistrial and should be set aside. It was further argued that the Appellant be released because he was sentenced and imprisoned on proceedings in which the trial Judge erred by not following the procedure laid down in Section 82 of the TIA, which provides as follows:

82. Verdict and sentence.

- (1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall

Record each such opinion. The judge shall take a note of his or her summing up to the assessors.

- (2) The judge shall then give his or her judgment, but in so doing shall not be bound to conform with the opinions of the assessors.

- (3) Where the judge does not conform with the opinions of the majority of the assessors, he or she shall state his or her reasons for departing from their opinions in his or her judgment.

(4) The assessors may retire to consider their opinions if they so wish and during any such retirement or, at any time during the trial, may consult with one another.

(5) If the accused person is convicted, the judge shall pass sentence on him or her according to law.

(6) ...

We carefully considered the submissions of counsel in this matter and perused the original file of the High Court with the Judge's hand written notes. We observed that at page 84 of his notes, the trial Judge recorded the proceedings for the 17th September 2014. The Appellant was present in court and he was represented by Mr Isaac Jurugo on State Brief' Mr Jatiko Thomas represented the State. Court received the joint assessors' opinion read by Mrs Josephine Mawawi Ujjeyo. The assessors were of the 15 20

opinion that the evidence was sufficient to convict the Appellant of the offence of aggravated defilement and so advised the trial Judge to do so.

We further observed that the trial Judge had before that summed up the case for the assessors and the notes on summing up were also on the Record. The notes were typed and were at pages 67-68 of the Record that was placed before us. The trial Judge thus complied with the requirements of Section 82 (1) of the TIA.

After the assessor's opinion, at page 85-86 of the Judge's notes, there appeared the following record:

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Crt: This matter shall be adjourned to 4.30 pm for final Judgment. Acansed AFR (accused further remanded).

Signed: Judge

5 17/ 09/ 2014

5.00 pm

Court as before this morning, except that Thon Jacob S. Sudanese national as Dinka interpreter is not present.

Court

Judgment read in open court. 10

Signed:

Judge

17/ 09/ 2014

Court

This matter is adjourned to 18/09/2014 for submissions in mitigation at 9.30 a.m. AFR

Signed: Judge 17/ 09/ 2014

There was on Record a separate set of sheets of paper entitled " Sentence

and Reasons. " These were numbered 1-3. They were typed and reflected at pages 69-70 of the Record of Appeal that was placed before us, and as follows: 20

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Conuict. Aluelo Mike. ls d first offender', aged 79 uears old now, has ²⁵ been on rentand or ¹ r and.3 months to dat

Conuicted of a serious offence of aggravated defilement c/s 129 (3)(C)(a) of Tial Indictment Act. (sic) This type of offence is senozsly on the rise. Conuict committed this offence on a Aoung girl aged 13 years old at the time.

The prevalence of this type of offence especially in this case of HIV/AIDS epidemic calls for deterrent sentence. The offence of defilement has very *traumatic effects upon the victims of such offence.*

It is the duty of this Honourable court to protect such young vulnerable children from defilers such as the accused in the instant case.

The maximum sentence for this offence is death penalty. **The accused does not seem remorseful** at all seeing from his demeanour after this conviction.

Taking into account that he is a first offender, barely aged 19 years old at the time, and the 1 year and 3 months already spent on remand by him, which period I have accordingly deducted from my intended sentence herein and the fact that this girl was below 14 years of age at the time, I sentence *the convict/accused person to 21 years' imprisonment.*

Right of Appeal explained."

{Emphasis added}

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We further observed that there was correspondence on file between the Assistant Registrar of the Court of Appeal and the Deputy Registrar of the High Court of Uganda at Arua. In a letter dated 6th December 2021, the Assistant Registrar wrote to the Deputy Registrar at Gulu requesting him to send the certified copy of the typed Judgment of the High Court in the matter. On 19th January 2022, the Deputy Registrar responded. She stated that, "the file was signed and forwarded on 25th November, 2018 and was received by your court on 28th November, 2018 with all certified copies of Judgment." She indicated that attached to her letter was a copy of the list

of documents that was sent to this court.

It is not clear from the Deputy Registrar's letter whether the list referred to was in respect of the contents of this particular file or all the files that were sent to this court according to her list. We came to that conclusion because the list was not attached to the letter that we found on the Record.

Nonetheless, given our findings from the Record of proceedings, the trial Judge complied with the requirements of Section 82 $\$(2)\%$ to $\$(5)\%$ of the TIA. However, there is no written Judgment on file which was contrary to Section 86 of the TIA which provides as follows:

$\$S\%$ 86. Contents of Judgment.

> (1) Every judgment delivered under section 85 shall be written by, or reduced to writing under the personal direction and superintendence of, the Judge in the language of the court, and shall contain the point or points for determination, the decision on it and the reason for the decision and shall be dated and signed by such presiding Judge as on the date on which it is pronounced in open court.

> (2) For the purposes of subsection (1), any judgment may be recorded in shorthand or by any mechanical means under the superintendence of the Judge and the transcription of it signed by that Judge.

(3) In the case of a conviction, the judgment shall specify the offence 15 of which, and the section of the written law under which, the accused person is convicted.

(4) The judgment in the case of a conviction shall be followed by a note of the steps taken by the court prior to sentence and by a note of the sentence passed together with the reasons for the sentence when there are special reasons for passing a particular sentence.

We noted that in spite of the absence of a written Judgment on the Record sent to this court, the trial Judge observed the tenets of subsection 4 of Section 86 TIA. However, counsel for the Appellant opined that the proceedings resulted in a mistrial. It is that assertion that we must now interrogate in this appeal.

In *R v. Rose & Others* [1982] 2 All ER 536, the Court of Appeal of England and Wales explored what constitutes a mistrial. The court came up with the following criteria to establish whether there was a mistrial, at page 543 of the Judgment:

"... The first requirement is irregularity in procedure. Secondly, it seems from this analysis that the irregular incident may happen at any stage of the proceedings. Thirdly, the defect must be fundamental. The trial must be marred by an irregularity so serious as to entitle the defendant to a retrial at the least, so serious that it can be properly termed a 'mistrial' or, as some authorities put it, a 'nullity'."

We do not think that given the process that the court went through, the whole process was a nullity entitling the Appellant to retrial. This is because it appears to us from the whole of the original Record of the court that the trial Judge did write and deliver Judgment on the 17th September 2014. We see no reason for him writing a note that he read the Judgment in open court when he did not. There would also have been no reason for the hand written note, at page 85 of his notes, that the matter would be adjourned to the 18th September 2014 for the mitigation proceedings and

sentencing. 15

> Indeed, the sentence and reasons which we have reproduced above show that there were mitigation proceedings in which it was advanced for the Appellant that he was only 19 years old at the time and he was a first-time offender. Though the age could have been deduced from his testimony and the charge sheet, the fact that he was a first-time offender could have only

- 20 come from the allocutus. The sentencing ruling also indicates that when he was convicted, he did not show any remorse. The trial Judge could not have come to that conclusion in the absence of a conviction and mitigation proceedings.
- We are also of the view that given the fact that the sentence and reasons 25 were on three loose sheets of paper on the file, there is a high probability that the crucial documents, the Judgment and mitigation proceedings,

were also on loose pieces of paper. These sheets of paper appear to have been deliberately taken off the file or misplaced in the Registry.

As a result of our careful analysis of the Record and the trial Judge's notes, we are persuaded that the trial Judge *did* render Judgment on the 17th September 2014 in which he convicted the Appellant of the offence for which he was indicted and tried. He also took the Appellant through proceedings to mitigate his sentence on 18th September 2014, after which he sentenced him to 21 years' imprisonment.

However, in order to come to a comprehensive decision on the matter, we had recourse to Section 139 of the TIA which provides as follows:

139. Reversibility or alteration of finding, sentence or order by reason of error, etc.

- (1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, Judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice. *{Emphasis added}**

The key words in the provision above are "failure of justice." Black's Law 20 Dictionary, 9th Edition by West Publishers, equates a "failure of justice" to a "miscarriage of justice." A "miscarriage of justice" is then defined, at page 1088 thereof, as:

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"A grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."

Counsel for the Appellant referred court to the decision in **Karim Bagenda & 3 Others v. Uganda** (supra) in which the Supreme Court held that the failure to enter a conviction was a serious irregularity that could not be cured by giving reasons later. However, he did not provide copies of the decision and our efforts to trace it were futile. We were therefore unable to determine whether the facts in that case were on all fours with those in the present appeal.

In the absence of the decision cited by counsel, we considered the decision of this court in **Okello Robert v. Uganda**, Court of Appeal Criminal Appeal No 77 of 2020; I2023l UGCA 138, in which it was very clear from the Record of Appeal that the trial Judge omitted to write a Judgment. This resulted from the fact that there was on the Record a document headed "Judgement" but it only'

contained the submissions of counsel in the mitigation proceedings. Court therefore found as a fact that there was no Judgment written and so quashed the proceedings and released the Appellant, on account of the proceeding being a mistrial.

We were of the view that the proceedings in this case could be distinguished from those in the case of Okello Robert because the Record clearly indicated that Judgment was delivered in open court. When it was discovered that it was missing, the Deputy Registrar asserted that it had been sent to this court in the original file of the court. In the circumstances, we could not come to a finding that the trial Judge did not write the Judgment. we therefore take a different course of action in this matter. This is meant to discourage those that might think that if parts of the Record of proceedings are lost or misplaced, they are entitled to an automatic acquittal on the basis of the argument that there was a mistrial 15 20

and discharge by this court. 25

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We do not think that our decision to further interrogate this matter will be prejudicial to the Appellant. We say so because it was evident from the record that the Appellant was in court when judgment was read and signed by the trial judge. He subsequently participated in the pre-sentencing proceedings, as it is indicated in the sentencing ruling. Consequently, before we come to our final decision in this appeal, we must establish whether the Appellant's trial in the lower court was a mistrial; a conviction for the offence of aggravated defilement without sufficient evidence to prove it beyond reasonable doubt.

The Appellant was indicted of the offence of aggravated defilement contrary 10 to Sections 129 (3) of the Penal Code Act. He went through a full trial in which the prosecution called 3 witnesses and had medical examination reports admitted, without any objection from the Appellant. The Appellant denied the offence and testified on oath in his own defence. He pleaded an alibi and called 2 witnesses to support it. Counsel for both parties duly 15 offered submissions in the case upon which the trial Judge rendered his decision, now challenged because the Judgment is absent and cannot be found.

The duty of this court on any appeal from the High Court acting in its original jurisdiction is stated in rule 30 (1) of the Court of Appeal Rules. 20 The Supreme Court explained the import of the provision in **Kifamunte Henry v. Uganda** [1998] UGSC 20, as follows:

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"We agree that on first appeal, from a conviction by a judge the Appellant is entitled to have the appellate Court's own consideration and views of the *evidence as a whole and its own decision thereon. The first appellate court* has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the Judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question

turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the judge even on a question of fact turning on credibility of a witness which the appellate Court has not seen. See **Pandya vs. R. (1957)** E. A. 336 and **Okeno vs. Republic (1972)** E. A. 32, **Charles B. Bitwire vs Uganda - Supreme Court Criminal Appeal No. 23 of 1985** at page 5."

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In addition, Section 11 of the Judicature Act confers powers on this court on an appeal that are similar to the court from which the appeal emanates when it provides as follows:

11. Court of Appeal to have powers of the court of original jurisdiction.

For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.

Given that we have the powers under this provision to rehear the case and 20 come to our own decision, we shall reappraise the whole of the evidence that was adduced before the trial court and review the submissions of counsel in that court, in order to establish whether there was sufficient evidence to convict the Appellant of the offence with which he was indicted.

Reappraisal of the evidence 25

It will be recalled that though the Appellant's counsel framed grounds in the alternative in this appeal, he withdrew them at the hearing. He however informed court that he framed those grounds out of the trial Judge's notes on summing up to the assessors. Since the summing up usually comes out of the issues identified from the submissions of counsel, we relied on those submissions to reappraise the evidence that was placed before us.

In order to prove the offence of aggravated defilement contrary to Section 129 (31 and (4) (a) of the Penal Code Act, the prosecution has to prove the following ingredients:

- 1. That the victim was at the time below the age of 14 years;
- 2. A sexual act was performed on her; and
- 3. The accused person participated in the offence.

In his submissions before the High Court, Mr Isaac Jurugo who represented the Appellant conceded that the prosecution proved the first two ingredients of the offence, beyond reasonable doubt. He therefore only challenged the third ingredient. 10

With regard to participation of the Appellant therefore, Mr Jatiko Thomas, Sate Attorney, referred to the testimony of the victim who was PW2 and narrated what happened on that fateful day. He submitted that it was corroborated by another pupil, Mundua Joyce (PW3) who was present at the

time the Appellant began to chase the victim caught up with her, tussled her down and then defiled her. He further submitted that the testimonies of DW2 and DW3 contradicted the testimony of the Appellant and instead supported the testimonies of the victim and PW3 that he was in the playing field with them before he committed the offence. Further that the testimony of PW4 lent credence to that of the victim with regard to the fact that during the assault by the Appellant she lost a button off her blouse and it was found at the scene of the crime. 20 15

Counsel for the Appellant also pointed out that the offence took place in broad day light, at 9.00-9.30 am. He asserted that because of that there was no possibility of a mistaken identity.

5 Counsel finally submitted that the violent conduct of the Appellant when he was confronted about the offence was indicative of a guilty person. He submitted that it corroborated the testimonies of the victim and PW3 that he was the perpetrator of the crime, because there was no other Dinka boy that had sexual intercourse with PW2. He concluded that the Appellant was placed at the scene of the crime and his participation was proved beyond reasonable doubt. 10

In reply, Mr Jurugo for the Appellant submitted that the Appellant raised an alibi that he was not in the playing field that day. He testified that he was given an assignment to teach Primary 3 pupils and after that he went to the P7 classroom where he joined DW2 and DW3. That it was from here that the head teacher called him and asked him to go to his office and then

explained the accusations against him. He added that the Appellant's defence was supported by the testimonies of DW2 and DW3. That the contradictions in the evidence pointed out by counsel for the Respondent, if any, did not go to the root of the case, because they did not point to any deliberate lies to mislead the court. He concluded by pointing out that the accused was to be convicted on the strength of the prosecution case, not 20

Counsel went on to challenge the testimonies of PW2 and PW3 because both of them made unsworn statements before the court given that they were children who did not take the oath before they testified. He asserted that under the law, their evidence required corroboration and there was

his defence.

none. This was because the prosecution did not call the two girls that rescued the victim from the Appellant who made statements to the Police to that effect after the crime was committed.

5 Mr Jatiko finally challenged the evidence about the violent conduct of the Appellant when he was summoned to the head teacher's office for questioning about the offence, which resulted in a riot at the school. He argued that this did not infer that he was guilty of the crime. That as a result, he should be acquitted and set free.

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- In view of the submissions before the lower court, four issues fall for the resolution of this court with regard to the participation of the Appellant in the offence as follows: 10

- i) Whether the Appellant was positively identified at the scene of the crime;
 - ii) Whether the testimony of the victim and PW3 required corroboration; 15
 - iii) Whether the violent conduct of the Appellant could be used to infer that he was guilty; and
- iv) Whether the Appellant presented a viable defence of alibi to absolve him of the offence.

We addressed the issues in the same order as they appear above.

i) Identification of the Appellant

It is now settled that the best person to identify an assailant in a sexual offence is the victim. This is because such offences are not committed in

public places and the hidden nature of the offence means that there are often no eyewitnesses. The basis of the general assumption that the victim is the best witness results from the fact that the assailant and the victim are close to each other during the assault, and almost invariably in assaults against women and girls, the assailant faces the victim in order to have sexual intercourse with her.

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The appeal now before us seems to be out of the norm because according to the victim (PW2), at page 20 of the Record,¹ the crucial facts were as follows:

"Vumjua Flavia, female and states: 13 years old, Unna village, within Adjumani Trading Centre. Yes, I go to school at Unna Primary School. I am *in P.4 this year, 2014.*

In June 2013, I was in Alere Primary School. On 24/06/2013 in the morning I came from home to school. I reached late in school as such we were sent to slash the compound. The accused who is standing was the one to 15 supervise the work we were doing. After finishing the slashing, we were told to go back to the class. I saw the accused running towards me. I did not know why he was doing that. I then started running away also while alarming as well. We were three girls with Mandua Joyce and Teria. He caught up with me and kicked my leg and I fell down, rose up and started 20 running again and he kicked my leg again. I fell the second time and I got up again but because I was tired I stood there and accused came and kicked me and I fell down again. The place was hilly and behind the secondary school. When I was down accused came on me and I started struggling with him, he removed my pants and he removed his trousers, pulled out his penis 25 and had sexual intercourse with me. I tried to make (an) alarm but he closed my mouth with his hand and my voice could not be heard far. However, one girl from Alere Secondary School heard me and ran to find accused on me and pulled accused off from me and as soon as this girl pulled him off from me accused put on his trousers and ran away." 30

^¹ The pagination referred to in this Judgment is that which is typed in the top right hand margin of the Record of proceedings.

PW2 was cross examined but her testimony did not waver. She confirmed that though she did not know the Appellant before that day, he was the boy who supervised them while they did their punishment because he also got to school late. She said she recognised him by his appearance and was

sure he was the person who had sexual intercourse with her. She asserted 5 that, "I saw him by appearance and I am sure he is the one who had sexual intercourse with me. There are no other pupils in the school who resembled him."

The court also put questions to the victim. She explained that the assailant chased her for a distance of about one (1) kilometre from the school. He 10 continued to pursue her only because the other girls run away in different directions.

Counsel for the Appellant contended that contrary to Section 40 (3) of the TIA, there was no evidence to corroborate the evidence of the victim. However, PW3 stated thus:

"I am 13 years old, Alere Primary School, Kalamario village, Pachara, Adjumani District. I know Mundua Flavia. She is here in court. She is also called Walea. We go to the same school. Last year in June 2013, we were in the same school with her.

I can recall what happened on \$24/06/2013\$, around 9.00 a.m. We were in 20 school slashing in the football field of the school. I was slashing together with those of Walea. A boy whom I don't know came and started chasing us and when we started running this boy followed Walea as we took different directions. He chased Walea and caught her, kicked her to the ground, removed her panties (underparts), he lay on Walea and had sexual 25 intercourse with her. I was about 30 metres away. I was making alarms as he did this to Walea. There were Alere Senior Secondary girls studying *nearby there and one of the girls from that school heard the alarm and came* and pushed the boy away from Walea and the boy took off after putting on his trousers (shorts) and ran back to school. I was also taken to the office 30 where Walea was taken and accused denied any knowledge of the

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accusation and a certain boy of the secondary school slapped the accused and accused made a call in the Dinka language and the dinka boys in the school came out and started fighting in the school.

This boy who had sexual intercourse with Walea is the accused in the dock. The Dinka boys destroyed a lot of things and this prompted the Head teacher to call the Police on phone and the Police responded promptly."

This witness was also cross examined and she did not waver in her testimony. Counsel for the Appellant did not explain why he thought this did not amount to corroboration but perhaps, it was because Mundua also made an unsworn statement.

Although it was not directly in issue in this appeal, we deemed it necessary to point this out because it affected the credibility of the evidence adduced by the victim and PW3. We observed that both witnesses whom the trial Judge thought did not understand the nature of the oath actually did understand it as can be seen from the viore dire conducted. PW2 at page 18 of the Record, said:

> "God likes young children like me. God wants children to go to church. God wants children to tell the truth. When you tell a lie God will punish you. I don't know what it meant to swear before God. I will tell the truth before this court."

We also observed that PW3 in her viore dire, at page 24 of the Record stated thus:

"I go to church to pray to God. I pray to God for him to help me with my requirements in life. God stays in heaven. God does not like people who tell lies. He likes people who tell the truth. He also likes children who tell the truth. I don't know how to swear. I don't know an oath. God punishes people who tell lies."

In Opolot v. Uganda (Criminal Appeal No. 151 of 2018) [2023] UGCA 40, this court set out the criteria that determine whether a Judge complied

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with the requirement to subject a witness of tender years to a viore dire as follows:

"In order for a viore dire (sic) test to stand it ought to comply with whether the child has an understanding of the obligation to speak the truth on the witness stand; has capacity to distinguish right from wrong and the reliability to prove that at the material time, she had conceived an accurate *impression of the occurrence concerning which she stands to testify and has* a memory sufficient to retain an independent recollection of the occurrence *and the capacity to express in words such memory of the occurrence when* asked simple questions."

We entirely agree with this summary but would add that it is not always necessary for the Judge, or judicial officer to use the word "oath" while conducting the viore dire. We say so because, especially in the indigenous languages ordinarily used while such witnesses testify, it might not be possible for an interpreter to explain what is meant by that word or find its equivalent in a particular language that is comprehensible to a child of tender years. Essentially, what is required is to establish whether the child knows the difference between right and wrong and the importance of telling the truth, as well as the sanctions if she/he tells lies.

- We therefore find that given the responses of PW2 and PW3 during the 20 viore dire test, the trial Judge ought to have allowed them to give their testimonies on oath for they both understood the importance of telling the truth. This would have obviated the need for corroboration of their testimonies.

- Nonetheless, both witnesses were cross-examined on their unsworn 25 statements, and rightly so. (See *Sula v. Uganda* [2001] 2 EA 556 at pages 560-563; cited with approval by this court in *Kiiza Samuel v. Uganda*, Criminal Appeal No. 0102 of 2008; [2014] UGCA 19.

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Although the older girls who rescued the victim from her assailant did not testify, when PW4 made her report to the school authorities, they were able to identify the Appellant as the boy that PW2 and PW3 described. He was the only Dinka boy that was assigned to supervise the slashing of the football pitch that morning. Both PW2 and PW3 were with him during the punishment and it was immediately after this that he set upon them and allegedly chased them out of the school compound in broad daylight, like a rooster chasing chickens.

It was between 9.00 and 9.30 am and so the victim could see her assailant clearly. He had been with her and other students for a while as they did their punishment. It was not long after it that the offence was committed. Both witnesses were thus able to positively identify him in the head teacher's office as the boy that chased them caught up with PW2, tttssled her down and defiled her. Their testimonies were credible and subject to our decision on the Appellant's defence of alibi, we believed them. 10 15

fU Corroboratlon

As to whether there was still need for corroboration after PW3 testified, it is still a contentious subject because Section 40 (3) of the TIA still requires it with regard to the unsworn testimonies of children of tender years. However, we are also aware of the decision of the Supreme Court in *Ntambala Fred v. Uganda*, Criminal Appeal 34 of 2015; [2018] UGSC 83, where the Appellant was convicted of the offence of aggravated defilement and the court observed and held that:

"The value of corroboration is rooted in the legal standard (proof beyond reasonable doubt) that must be met by the prosecution in order to secure a conviction. Consequently, the prosecution may find it necessary to adduce

evidence from more than one witness in order to prove their case beyond reasonable doubt.

Nevertheless, Section 133 of the Evidence Act provides that: "Subject to the provisions of any other law in force, no particular number of witnesses shall *in any case be required for the proof of any fact." (Our emphasis).*

Consequently, a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. As stated by this court in *Sewanyana Livingstone vs. Uganda SCCA No. 19 of 2006*) "what matters is the quality and not quantity of evidence."

This was amplified in the supporting opinion of Tibatemwa-Ekirikubinza, 10 JSC, where she concluded that:

"What I must therefore emphasize is that the evidence of a victim in a sexual offence must be treated and evaluated in the same manner as the evidence of a victim of any other offence. As it is in other cases, the test to be applied *to such evidence is that it must be cogent.*

I would therefore find it right to proceed under Article 132 (4) of the Constitution to depart from this Court's previous decisions cited in this Judgment where the cautionary rule was held to be a requirement in sexual assault prosecutions."

We are bound by the decision of the Supreme Court that corroboration is not necessary to prove that a sexual offence was committed against a woman or girl, even as a single identifying witness, where that victim testifies on oath. However, the court did not do away with the provisions of Section 40 (3) of the TIA. It still applies to unsworn testimonies in all criminal cases, including sexual offences. We are therefore still bound by it and will observe it.

In that regard, Muraa Rose, a female adult aged 39 years and a teacher (Matron) at Alere Secondary School, testified on oath as follows:

"On 24/06/2013, around 9.00 a.m. I was preparing to go and wash clothes." I then saw two students coming to me with a young girl. I was in the girls

'dormitory. The younger girl was crying. As they approached me I asked who the young girl was and why she was crying. The two girls told me that as they were studying under a tree they heard alarms and they feared to go there. They wanted to run back to school but when the alarm persisted, they decided to go, run to the source of the alarm. As they ran towards the alarm site, they saw a boy in school uniform of Alere Primary School who was lying on this girl crying. As the boy saw them running towards them, he decided to run away. I can see the girl seated here in court (witness points at the victim, PW2) seated in court. When the girls reached where the young girl was the little girl explained to them what accused did to her.

When I asked this young girl crying, she told me she is called Walea, and she comes from Kalamairo. She also told me that as they were slashing the school compound, and were returning to class, a certain boy who had slashed earlier than them started running after them and as they took the village path the boy blocked Walea from the school side and diverted Walea towards the bush and hilly area, caught up with her, kicked her to the ground, removed her knickers and removed his pair of shorts, pulled his penis and has sexual intercourse with her."

In child sexual offences, a report of the incident made to a person in authority soon after the occurrence of the assault corroborates the fact that the child was sexually assaulted. In this case VF made a report to PW4 about the circumstances under which she was defiled soon after she was rescued by the students from the Secondary School. She was in a distressed condition and in tears. She described the circumstances of the sexual assault in her testimony and they were consistent with what she reported to PW4.

PW2 was examined by a medical doctor and the report was not contested by counsel for the Appellant in the lower court. The report admitted in evidence as PE1 proved that she was indeed defiled. The circumstances under which she was defiled were also stated in the medical report. There were no other circumstances put before the court to challenge the fact that it was the Appellant here that committed the offence.

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fiU Vloent conduct on confrontatlon of the Appellant

counsel for the Respondent in the lower court asserted that the violent reaction of the Appellant when he was confronted by the school authorities about PW2's complaint led to the inference that he was guilty. On being confronted, the Appellant ran out of the head teacher's office and called out to the other Dinka pupils in the school who responded by staging a riot.

According to PW2, while the Appellant was before the Senior Woman teacher, he refused to explain what happened before he was taken before her. She explained that there was another boy who was ordered to cane the Appellant and when he did so, the Appellant began to fight the boy and ran out of the office. He caused commotion which attracted the attention of other pupils who all came out of their classrooms. The Dinka pupils were from their camp and threw stones at the other pupils and destroyed property, including the teachers' bicycles. The head teacher had to call in the police who came to the school, arrested the Appellant and took him and PW2 to the Police Station. PW3 narrated the same story. 15 10

20 25 It appears to us that the Appellalt protested against the punishment that was meted out to him by the school. He did not think he should be canned for refusing to explain what happened. The reaction was violent and resulted in crimes being committed both by the Appellant and the Dinka pupils in the school. However, we cannot say that an inference can be drawn from this fact that he was guilty of the offence. It is not clear that he ran away because he was guilty of the offence or because he was being caned. We therefore disregarded it as a matter that was dealt with by the Police as a sepa-rate crime, if at all.

Defence of Alibi \$iv)\$

The burden on the person who sets up an alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act (R v. Chemulon Wero Olango (1937) 4

EACA 46). It is also settled that where an accused person raises an alibi, $\$S$ he need not prove it. Instead it is the duty of the prosecution to disprove it using evidence on the Record to put the accused person at the scene of the crime at the time the offence was committed.

In the instant case, we are mindful of the testimonies of PW2 and PW3 who said the Appellant was the Dinka boy who was assigned to supervise 10 them as they did their punishment. The two also said he too was late for school. However, the Appellant's defence at page 37-38 of the Record was partly as follows:

On 24/06/2015, I was in class in Alere Primary School. I came to school late. I arrived at 8,30 a.m. The Headmaster called me to organize pupils of *P.7, P.7 and P.5 to go and slash the football field (sic). It was a general day* for those 3 classes to go and slash. The Headmaster assigned me this work *because I was a prefect in the school. It was the Head boy and other prefects who organized this slashing. For me I was told to go and give P.3 class some* work. I did not ever step in the football field that time. The football pitch is outside the school compound. The football field is about 100 - 120 metres away from the school compound.

I gave the P.3s Mathematics exercise. This was from 8.40 a.m. - 9.00 a.m. After giving them the work, I went back to the Headmaster's office whom I did not get in office. I then went back to my class around 9.05 a.m. I found the Head boy and the P.2 late comers in the class as the rest of P.2 were still slashing. The P.2s had no teacher in class by that time. The Headmaster then came and found me in class and asked why I was in the Headmaster's office and I explained to him that I had gone to replace the chalk and took back the books. I did not even meet with Flavia that day.

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The Appellant called DW2 and DW3 to prove his alibi. DW2 stated that he was the head boy and knew the accused very well because they were friends. Further that on the fateful day, he directed the P5 - P7 pupils to go to the playing ground and slash. That he was with his prefects, including the Appellant. That he left other prefects in the field and went to 5 instruct pupils in P1-P4. That he left the field with the Appellant and went to the P7 class. Further that the head teacher went to the P7 class and asked the Appellant to go and teach P3. And that when he finished he went back to his class and it was then that the head teacher went and summoned him to his office, while in the company of two boys from Alere 10 Secondary School.

DW3 stated that he and the Appellant were late getting to school and were punished. They were told to pick up rubbish around the compound. That thereafter, the Appellant was instructed to go and teach the P3 class. Further that he did so and completed the task but when they were leaving 15 school to go home, the head teacher summoned the Appellant to his office, took him to his office where they found 10 secondary school students. That the office was locked but through a window at the back, he saw one of the boys slap the Appellant.

In *Bogere Moses v. Uganda* [1998] UCSC 22, while considering the 20 defence of alibi and the allegation that the trial judge shifted the burden of proof from the prosecution to the Appellant with regard to his defence of alibi, the Supreme Court observed thus:

"Where the prosecution adduces, evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that *acceptance per se the other version is unsustainable."*

In view of the decision above, much as we already held that the version of events that was presented by PW2 and PW3, circumstantially supported by PW4 was credible, we are under the obligation to carefully appraise the Appellant's defence of alibi as well.

The two versions of the events presented by the Appellant and his witnesses varied from the statements made by PW2 and PW3. However, the trial judge made notes about the demeanour of the two witnesses during their testimonies. With regard to DW2, at page 46 of the Record, he made the following observation about his responses as he was cross examined by prosecuting counsel:

"(*The witness appears to be relating what was rehearsed as he appears to* be changing positions as were (sic) every time the counsel for prosecution *puts a question to contradict an earlier position he had mentioned before.)*"

And in respect of DW3, during his examination in chief at page 50 of the Record, the judge observed that, "(The witness appears to be very high *tension - has been wiping stream of sweat continuously)." (sic)* Further to that, during cross examination, the witness contradicted the testimony of the Appellant when he stated thus:

"Accused is telling lies if he says that the Head teacher called him from the assembly (and not when we were in the compound). Accused came back with the text book of P.3 and was marking the work in class P.7. I saw him marking the P.3 work. I am sure about that. Accused is telling lies when he says that he took the text book to the Head teacher's office and left it there when the Head teacher was not around instead of giving it to Ms. Kapuru."

The judge then noted that, "(The witness is stammering and profusely *sweating the more)."

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The observations of the trial judge show that he doubted the narrative that the two witnesses called by the Appellant presented to the court. He observed that the two had rehearsed what they stated in court, in view of the testimony of the Appellant, because when they were cross examined, they were thrown off course.

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We accept the observations of the trial judge because while he saw and heard the witnesses testify, we did not have that advantage. Further to that, though the narrative of the Appellant and his witnesses was that he was never in the playing field with the victim and PW3 that day, DW2 during his examination in chief said that while he was supervising the pupils doing the punishment the Appellant was with him.

We therefore still find that in spite of the alibi set up by the Appellant and his witnesses, the testimonies of the prosecution witnesses were more credible than the alibi. They placed the Appellant squarely at the scene of the crime beyond reasonable doubt.

In addition to the principles that we stated above about the defence of alibi, in *R v. Sukha Singh s/o Wazir Singh & Others* (1939) 6 EACA 145, it was observed that:

"If a person is accused of anything and his evidence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its *genuineness proceedings will be stopped."*

There was nothing on the Record to show that the Appellant indicated that he would present a defence of alibi. He was able to object to one of the assessors but he did not indicate that he was not present at the scene of

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the crime and so would be calling witnesses to prove his defence. He therefore, most probably, took the opportunity to concoct the defence while he was in prison.

We therefore find that the Appellant perpetrated the offence for which he was convicted and we affirm the decision of the trial judge convicting and 5 sentencing him for the offence of aggravated defilement.

In his alternative grounds of appeal, the Appellant appealed the sentence of 21 years' imprisonment as harsh and excessive in the circumstances of this case. However, he opted to abandon those grounds and challenge the

conviction only on account of the fact that there was no Judgment on the 10 Record. In the circumstances, we have no other option but to affirm the sentence imposed by the trial court.

Decision

This appeal therefore fails and it is dismissed. The Appellant shall continue to serve the sentence imposed upon him by the trial judge. 15

We so order.

| Dated this | day of | 2024 |

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Geoffrey Kiryabwire 20 JUSTICE OF APPEAL

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