

UGANDA / JUDGMENT

Birungi v Uganda (Criminal Appeal 54 of 2019) [2025] UGCA 6 (24 January 2025)

[2025] UGCA 6**COURT**

Court of Appeal of Uganda

BEFORE

Mulyagonja, JA, Tibulya, JA/JCC, Kazibwe, JA

CASE / FILE NUMBER

Criminal Appeal 54 of 2019

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPAI. A**

(CORAM: Irene Mulyagonja, Margaret Tibulya, Moses Kazibwe Kawumi, JJA)

CRIMINAT APPEAT NO. O54 OF 2019

(Appeal from the decision of Jane Francis Abodo, J delivered at Kampala on 17th December 2018 in Kampala Criminal Session Case No.442 of 20U)

B'RUNGI LEONARD**APPELLANT****VERSUS****UGANDA RESPONDENT****^JU DGM ENT OF THE COURT**

The Appellant was indicted for Aggravated Defilement c/s IZg(3) and 4(a) of the Penal Code Act. After a full trial he was convicted and sentenced to 20 years' imprisonment.

Background.

- 20 The facts upon which the Appellant was convicted are that the victim hereinafter referred to as "NVA" was aged 5 years on 15th January 2017. Between 6.00am and 9.00am on that day, the Appellant entered a house where NVA's resided with her mother to pick his clothes. NVA's mother used to wash and iron clothes for customers including the Appellant.
- 25 The Appellant told NVA to lie down in a chair in the sitting room and defiled her. In the process, Nabatanzi Tracy (PW2), a 7 year old friend of NVA came to visit and found the door locked. She peeped through a hole in the door and saw the Appellant defiling NVA. The Appellant then dressed up and left giving NVA 200/= 56111; ntr and 100/- shillings to her younger sibling.

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PW2 asked the victim what had happened and the response was that the S Appellant had put his private part into hers. PW2 informed the victim's mother about what had happened when she returned home. The mother reported to Police and the Appellant was arrested on 21st January 2017.

NVA was examined on PF 3A on 21st January 2017. It was found that she was 5 years old with an inflamed vestibule and a mucopurulent discharge 10 but the hymen was intact. The Appellant was examined on the same date and found to be 27 years old and of normal mental status.

The Appellant on 20th April 2020 filed a Memorandum of Appeal with five grounds of Appeal. A Supplementary Memorandum of Appeal was filed by his Advocate on state brief on 2nd September 2024.

Grounds of Appeal.

1. That the learned trial Judge erred in law and fact by sentencing the Appellant to 18 years, 2 months and 17 days imprisonment without considering that the appellant was a first time offender, causing a miscarriage of justice.
2. The trial Judge erred in law and fact when she held that the ingredient of participation was sufficiently proved by the prosecution beyond reasonable doubt hence wrongly convicting the Appellant occasioning a miscarriage of justice.

At the hearing of the Appeal on 22nd October 2024 the Respondent applied for leave to file a cross-appeal. The application was granted on the Respondent's promise to file the Cross - appeal on the same day but she had not done so by the 4th November 2024. Accordingly, the court proceeded to handle the appeal based on the supplementary memorandum of appeal and the submissions on record.

⁵ Representation.

Mr. Mbalire Muhamad appeared for the Appellant while Chief State Attorney Lillian Alum Omara appeared for the Respondent. Counsel for the parties filed submissions which were adopted by the Court in determination of the appeal.

Duty of the court. 10

Rule 30(1)(a) of the Judicature (Court of Appeal Rules) requires this court to re-appraise the evidence that was placed before the trial Judge and to make its conclusions on the law and the facts. The court in doing so must be mindful of the fact that it had no opportunity to observe the witnesses.

When a question arises as to which witness should be believed rather than another and that question turns on manner and demeanour, the court will be guided by the impressions made on the judge who saw the witnesses. 15

In *Kifamunte Henry V Uganda. Criminal Appeal No.10 of 1997* the court held:-

"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. The Court of Appeal is precluded from questioning the findings of the trial Court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support findings of fact., 2A 25 30

We have been guided by the above principles in handling this appeal.

Ground of Appeal No.1

Consideration of the Court

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The complaint in this ground of appeal is that before sentencing the S Appellant, the trial Judge did not consider the mitigating factors that the Appellant was a first time offender.

We noted that the fact of the Appellant being a first time offender was raised by both the Prosecution and defence counsel in the proceedings of the trial court at the ¹⁴th December 2018 hearing. While sentencing the Appellant on ¹⁷th December 2018, the trial Judge considered the fact of his being a first time offender.

We find it pertinent to reproduce the relevant portion of the sentencing notes below:

"In view of the aggravating factors, I proposed a beginning point 15 of 35 years' imprisonment. However, proportionality is a cardinal principle in sentencing. The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and a relatively young person at the age of 27 years, still capable of reforming and becoming a useful member 20 of society. He was a successful business man before his arrest and has a family to go and look after. The mitigating factors have mitigated the sentence from the period of 35 years proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty years." 25

We therefore find no merit in the first ground of Appeal.

Ground of Appeal No.2

Submissions for the Appellant.

It was submitted that the trial court failed to evaluate the evidence adduced by the prosecution to prove the participation of the appellant. Counsel argued that participation is satisfied by adducing evidence, direct or circumstantial placing the accused at the scene of the crime as the perpetrator of the offence as guided in the case of *Bogere & Another V Uganda*. SC Criminal Appeal No.2 of 1997.

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⁵ It was argued that the Appellant went to the home of NVA,S mother at around midnight to change his clothes. NVA,S mother was at home so the Appellant could not have defiled her in the presence of the mother.

It was submitted that NVA told court that the Appellant went to their home in the morning when they had finished taking tea but in cross examination

- stated that it was not yet morning and it was still dark. According to Counsel for the Appellant, this was a contradiction in the evidence of the Prosecution relating to the time when the offence was allegedly committed and the court should not have relied on it to convict the Appellant. 10
- The evidence given by PW2 was faulted by Counsel contending that she could not have seen the Appellant defiling the victim. The evidence is doubted for the reason that the purpose of pW2's visit was to go and buy chapati with NVA who had stated that it was still dark. Counsel then suggested that PW2 must have gone to NVA,s home before the alleged defilement. 15
- Counsel further doubted pW2's evidence contending that she had told court that she was aided by light from a bulb to see the Appellant defiling the victim which meant it was still dark as NVA told court. 2A

PW2's evidence was also attacked for she did not also mention the age of the victim's sibling who was in the house at the time of the alleged defilement. It was further argued that whereas pW1 stated that she was alone at home, PW2 claimed to have seen a young sibling of pW1 in the room which is a contradiction in the prosecution evidence. 25

The evidence by the victim's mother(pW3) to the effect that she left home at 6.00am to go to church and returned at 9.00 am confirmed that it was still dark argued Counsel. He further argued that the mother mentioned the existence of a door curtain which pW2 did not mention to court but claimed to have only peeped through a hole in the door.

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- s Counsel concluded with a submission to the effect that the victim,s mother had attempted to withdraw the case but re-instated it on seeing ^a discharge from the victim's private parts. The medical report however did not indicate any injuries, the hymen was intact and no semen like discharge was tested to lin k the Appellant to the victim.
- ro Counsel urged the court to disbelieve the evidence led by the prosecution to prove the participation ofthe Appellant and accordingly acquit him.

Submissions for the Respondent.

It was submitted that NVA and PW2 had known the Appellant for a long time and the offence was committed between 6.00am and 9.00am when

1s it was not dark. The witnesses were further aided by the light from the bulb in the room to properly identify the Appellant.

Counsel further submitted that the Appellant had ample time with the victim whom he instructed to undress and lie in the chair. It was argued that the conditions were favourable for proper identification of the zo Appellant by the victim.

In the case of PW2, it was argued that she saw the Appella nt through a hole in the door, heard him instructing the victim on what to do and saw the Appellant exiting the house. It was submitted that the conditions at the time eliminated any possibility of mistaken identity by both NVA and pW2.

- zs Counsel further discounted the argument about inconsistency in the evidence of PW1 and PW2 relating to the time when the offence was allegedly committed. It was Counsel's submission that it was day time as corroborated by PW3 who stated that she left home at 6.00am and returned at 9.00am after NVA had been defiled.
- 30 It was conceded by the Respondent that NVA and pW2 however gave contradicting evidence about which other person was in the room at the time of the alleged delilement.

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⁵ It was submitted that the contradiction is attributed to the passage of time from the day the defilement took place to the time the two witnesses ^a appeared in court.

Counsel argued that the witnesses did not deliberately attempt to tell lies in court and the trial Judge noted their positive demeanour. The contradiction was also stated to be minor which does not go to the root of the case and the court was urged to ignore it. Reference was made to Alfred Tajar V Uganda. Criminal Appeal No.157 of 1999 and Sarapio Tinkamalirwe V Uganda. SC Criminal Appeal No.27 of 1989 to support the submission. 10

- ¹⁵ The submission to the effect that pW2 did not mention the existence of ^a curtain in the door was countered by the argument that it does not water down the identification evidence of PW1 and pW2. The two eye witnesses gave evidence in court which was not destroyed in cross examination, it was submitted by Counsel for the Respondent.
- Counsel for the Respondent further noted that the submission about the medical evidence not revealing signs of defilement was misleading. It was argued that NVA'S mother checked her privates after being told by PW2. The medical report further confirmed the existence of injuries and ^a discharge though the hymen was intact. 2A
- Nfutumukiza Isaya V Uganda. CA. Criminal Appeal No.41 of 1999 and Uganda V Apollo George Anywar. Criminal Case No.381 of 199G were referenced for the argument that a court can convict an accused in a case where a hymen was not ruptured in the course of committing the sexual offence. 25
- Consideration by the Court. 30

The Appellant contends that he went to the victim's home at midnight when the victim's mother and siblings were there and he could not therefore have defiled her as alleged

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⁵ The court in evaluating the evidence of participation relied on the victim's evidence and PW2. It was the evidence of PW2 that she saw the Appellant through a hole in the door.

The court confirmed that there was a hole in the door from the picture PW2 was made to draw in court. Its existence and the ability for one outside to see what was inside the house, was confirmed by Mangeni Ronald(PW4) the case Investigating Officer. He visited the scene and told court that he could ably see the inside of the house through the hole.

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PW4 saw the chair that the victim and PW2 had referred to. It was directly ^under a light bu lb wh ich had ena bled pro per identification of the Ap pella nt

through the hole. PW4 further did not see a door curtain but saw one which separates the sitting area from the bedroom which lent further credence to the evidence of PW2. 15

It was also not disputed that NVA and PW2 knew the Appellant well. It was also his evidence that he had been their neighbour for a long time and he used to drop and p ick laundry from th eir home. The cou rt fu rth er eva luated the evidence and found that the conditions favoured a proper identification of the Appellant by NVA and pW2.

The trial Judge made the following observation relating to the identification and participation of the Appellant: -

"Having carefully watched all witnesses testify in court, and carefully reviewed all evidence. I am convinced that the conditions for identification by PW1 and pW2 of the accused were conducive. It was in the morning. There was light from a bulb in the house. The accused was known to pwl. The hole in the door was big enough for one to view the inside of the house, pW2 took a long time viewing the accused. I do not find any evidence on record to warrant a case of mistaken identity.,, 25 30

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- 5 The Appellant in defence told court that he used to work in the market at night and he went to the home of pW3 after work. He picked his clothes and proceeded to a shoe shiner's kiosk after which he went to a restaurant. As he was being served PW3 arrived and told him to escort her back to her house where NVA and PW2 accused him of having defiled the former.
- 10 15 We noted that by his own evidence the Appellant confirmed that he went to PW3's house on the day in question. It defeats logic for pW3 to have allegedly followed the Appellant to a restaurant to accuse him of the defilement of NVA if she had been in the house when the Appellant was picking his clothes. The Appellant must have gone to pw3,s house in her absence and it must have been between 5.00 am and 9.00am.

The Appellant's untruthful evidence further lends credence to that of pW2 to the effect that she had gone to pick NVA so that they go to buy chapatti. NVA and PW2 could not have thought of buying chapatti at midnight but during the day time. This evidence supports pW3's evidence that she left home at 6.00am and returned at 9.00am.

NVA and PW2 gave contradicting evidence as to who else was at home at the time of the alleged defilement. We noted that NVA was five years old at the time the incident took place while pW2 was seven years old. The two witnesses appeared in court after close to two years from the date of the

25 ^alleged event.

We attributed the contradiction in their evidence to the passage of time and further noted that all other evidence relating to the identification of the Appellant was not shaken in cross examination during the trial. NVA and PW2 did not attempt to deliberately mislead the trial court about who 30 was or was not in the house at the time

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Counsel for the Appellant challenged the medical report that the trial court 5 further relied on to corroborate the evidence of NVA and PW2. The medical report was admitted by consent of both Counsel and not at all challenged by the defence during the trial.

Evidence admitted under Section 66 of the Trial of Indictments Act is deemed to have been proved and challenging it on appeal would amount \$10\$ to an afterthought.

Abasi Kanyike V Uganda, SC Criminal Appeal No.34 of 1989.

Section 66(2) of the Trial on Indictments Act provides that :-

"Any fact or document admitted or agreed (whether the fact or document is mentioned in the summary of evidence or not) in a 15 memorandum under this section shall be deemed to have been duly proved; but if, during the course of the trial, Court is of the opinion that the interests of justice so demand, the Court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved."

We further noted that PW3 's evidence to the effect that she examined NVA after PW2 told her what had taken place and she saw reddening in the private parts was not challenged in cross examination. It was also her evidence that she took the victim to a nearby clinic and the nurse confirmed that she had been defiled before going to make a report to Police which evidence was not also destroyed in cross examination.

It is settled law that the slightest penetration as defined in **Section 129(7)** of the Penal Code Act amounts to a 'sexual act'. The trial court relying on the evidence of PW1, PW2 and PW3 cannot be faulted on the conclusion that a sexual act was performed on the victim by the Appellant. NVA knew the Appellant and it is now settled that the best person to identify the assailant in sexual offences is the victim.

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- We noted that the trial Judge further remarked on how she was impressed by the victim. The Judge further noted how pW2 was also very impressive and totally unshaken in cross examjnation. The observations by the Judge who had the opportunity to observe and test the credibility of the witnesses must be given its due weight.
- The trial judge properly evaluated the identification evidence and the fact of the defilement of NVA by the Appellant. We find no reason to set aside her findings of fact and the decision to convict the Appellant. 10

The Appeal bears no merit and is accordingly dismissed.

^, t-Dated at Kampala this ...(. day of 2025. 15

Irene Mulyagonja

^Justice of Appeal. 20

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²⁵ ^Justice of Appea l.

Moses Kazibwe Kawumi ^Justice of Appeal.

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