

UGANDA / JUDGMENT

Mugisha v Uganda (Criminal Appeal 161 of 2014) [2024] UGCA 307 (25 October 2024)
[2024] UGCA 307

COURT

Court of Appeal of Uganda

BEFORE

Luswata, JA, Kihika, JA /JCC, Asa Mugenyi , JA/JCC

CASE / FILE NUMBER

Criminal Appeal 161 of 2014

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE R. EPUBLIC OF UGANDA

IN THE COURT OF APPEAL Or. UGANDA HOLDEN AT MBARARA

CRIMINAL APPEAL NO. 161 OF 2014

(ARTSING OUT OF HrGH COURT SESSION AT MBARARA CASE NO. 101 OF 201r1

(Coram: Eva Luswata, Oscar John Kihika and Dr. Asa Mugenyi, JJA)

MUGISHA DEMIRTYANI ::::::::::::::::::::]::::::::::::::::::: APPELLANT

VERSUS

UGANDA RESPONDENT

(Appeal tron conuiction and sentence of the High Court of Uganda at Mbarara beJore Hon, . Iustice V. T Zehurikize dated 76tn August, 2013)

JUDGMENT OF COURT

Introduction

The Appellant was indicted and convicted of the offence of aggravated defilement contrary to section 129131 and (al(a)(bl of the Penal Code Act and sentenced to 30 years' imprisonment.

The Appellant, being dissatisfied with the decision of the trial court, Iiled this appeal on 3 grounds;

J. The learned trial Judge erred in law and fact when he failed to properly analyse and evaluate the evidence relating to the

grudge between the Appellant and PW2 (victim's mother) thereby reaching a wrong conclusion causing a miscarriage of justice.

- 2. The learned trial Judge erred in law and fact when he failed to consider the Appellant's defense of alibi which was not destroyed by prosecution thereby occasioning a miscarriage of justice.
- 3. The learned trial Judge erred in law and fact when he sentenced the Appellant to a harsh and excessive sentence.

Background

The facts of the case, as ascertained from the record of the trial court are that, one KMG the victim then aged 8 years used to reside with her mother Kabegambire Jovia at Katete I cell, Nyalashara, Kenshunga in Kiruhura District together with her brother Ezera and her sister Evelyne. The Appellant, who was helping Kabegambire to plaster the house was residing with them at their home where he slept in the Kitchen.

On the 21st day of September, 2010 Kabegambire went for burial at Kinoni where she spent two days. She left her baby called Evelyne at home. On that same day, when KMG went to the kitchen to get milk for Evelyne, the Appellant lifted her and put her on his bed. He removed her knickers and also removed his trousers and defiled her. He warned her not to say anything or else he would cut her throat. Thereafter he went away.

When KMG's brother one Niwagaba came home, she told him what had happened. She also reported to Kabegambire when she returned home after two days. KMG's father after returning home, asked her to tell him what had happened and he threatened to beat her in case she refused to tell him what had happened. KMG was taken and examined on Police Form 3. She was found to be 8 years old and there were signs of penetration. Her hymen was found to have been freshly ruptured. There were injuries around her private parts, which injuries were consistent with force having been used sexually.

The Appellant was examined on Police Form 24. He was found to be 40 years old and mentally normal.

The Appellant was also examined on Police Form 3 to determine his HIV status. A report thereof indicated that he was HIV positive.

The matter was reported at Rushere Police Station. The Appellant was then arrested and subsequently charged with aggravated defilement. He denied the offence and was sentenced to 30 years' imprisonment.

Representations

At the hearing of the appeal, Mr. Tumwebaze Emmanuel, on state brief appeared for the Appellant, while Ms. Angutuko Immaculate, Chief State Attorney, appeared for the Respondent. Both parties filed written submissions which were adopted with leave of Court.

Consideration of the Appeal

This being a first appeal, it must be recalled that the duty of the first appellate court is to re-appraise all the evidence adduced at the trial and arrive at its own conclusions and draw inferences on questions of law and fact, bearing in mind that it did not see the witnesses testify. See *Kifamunte Henry v Uganda*, SCCA No. 10 of 1997, *The Executive Director of National Environmental Management Authority (NEMA) v Solid State Limited* SCCA No.15 of 2015 (unreported) and *Pandya Vs R* [1984 EA 336].

We shall bear the above principles in mind while resolving this appeal. Ground one and ground two shall be resolved together since both grounds challenge the finding of participation of the Appellant in commission of the offence. Ground 3 shall be resolved separately.

GROUND 1 and 2

Appellant's Submissions

Counsel for the Appellant faulted the learned trial Judge for relying on the sole evidence of the victim without corroboration. Counsel contended that it is a settled principle of law that the trial Judge may convict an accused person without necessarily corroborating the evidence, provided that at trial he/she warns himself/herself and the assessors of the danger of relying on uncorroborated evidence of a child. Counsel submitted that in this case the evidence of the victim was not truthful. Counsel cited the authority of *Vindru Patrick v Uganda*, CACA No. 156 of 2011.

It was the Appellant's averment, while faulting the learned trial Judge, that he erroneously came to a finding that the Appellant had been paid part of the money that he was owed by the victim's mother whereas not. Counsel for the Appellant further submitted that the learned trial Judge further rejected the argument that there had been a grudge stemming from the nonpayment of the contractual sum.

Additionally, counsel submitted that the criminal case filed was intended to frame the Appellant and prevent him from demanding money that was owed to him by the victim's mother.

Counsel further submitted that it is a settled principle of law that whenever an accused person puts up the defense of alibi, the duty is on the prosecution to destroy the alibi by adducing evidence which places the

accused at the scene of crime at the time the offence was committed. To support this argument counsel relied on the authority of *Nulu Asumani Kibuuka v Uganda*, CACA No. 23 of 2000

Counsel submitted that at the time when the offence was committed, the Appellant was at his parents' home in Kazo. Counsel further submitted that the Appellant was not placed at the scene of crime and that the prosecution failed to destroy the defense of alibi.

Respondents Submission

In response, counsel for the Respondent argued that the prosecution adduced the victim's evidence to prove the Appellant's participation. It was submitted that the victim went to the kitchen to get milk while her parents were away for her young sister Evelyn. Then Counsel submitted that in the process of getting milk for her young sister, the Appellant who had finished plastering the house and decided to stay with them at their home, defiled her. Counsel further submitted that the evidence of the victim was corroborated by PW2(victim's mother). Counsel cited the case of *Ntambala Fred v Uganda*, SCCA 34 OF 2015.

Counsel submitted that when the mother's victim (PW2) returned from buria-l, she saw the daughter(victim), not walking properly and this propelled her to ask the victim what had happened to her. Additionally, it was also at that time that the father also walked in and asked the child what had happened and at that point, he threatened to beat her if she did not speak out. That is when victim revealed tl.at the Appellant had defiled her.

Counsel called upon Court to consider the report made by the victim (PW1) to be corroborative to the evidence of the mother(Pw2) and it should be regarded as truthful. Counsel also submitted that this Court should find that there existed no grudge between PW2 and the Appellant.

Counsel further submitted that much as the Appellant put up the defence of alibi, it was rebutted by the prosecution by the evidence of PW1 and PW2 which evidence placed the Appellant at the scene of crime at the material time. Counsel cited the Authority of; *R v Sukha Singh S/O Wazir Singh & Others* (f939f 6 EACA 145 for the proposition that if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as possible.

Appellant's submlssion in rejoinder

In rejoinder, counsel submitted that the prosecution did not prove all the ingredients of the case against the Appellant beyond reasonable doubt. Counsel cited the case of *Woolmington v DPP* [f9351 AC 322 for the principle that the burden of proof in criminal cases lies on the prosecution to prove every ingredient of the offence. It was the Appellant's contention that the prosecution failed in its duty to prove participation of the Appellant in commission of the offence.

In further rejoinder, counsel contended that the prosecution did not destroy the defence of a-libi.

Consideration of grounds 1 and 2

It is settled law that the prosecution has a duty to prove each and every ingredient of an offence beyond reasonable doubt. For the Appellant to be convicted of aggravated defilement, the prosecution must prove beyond reasonable doubt the following three ingredients;

1. That the victim was below 14 years.
- 2. That a sexual act was performed.
- 3. That it was the Appellant (accused) who performed the sexual act.

See also the case of *Kabazi v Uganda*, Criminal Appeal No 268 of 2015 [2022] UGCA 47 where the Court of Appeal discussed the ingredients of the offence of aggravated defilement and added that;

".....following section 729 of the Penal Code Amendment Act 2007 and the authorities cited, a sexual act is committed by mere touching in a sexual manner, the private parts of a girl under the age of 14 with or without Penetration."

With regard to the first ingredient of the offence, PW1, KMG, gave sworn evidence and testified that she is 11 years. PW2, the mother of the victim told Court that the victim is her young biological daughter aged 11 years and that she was born around 2002. This evidence was unchallenged. It is therefore not in dispute that the victim was below the age of 14 years at the time the offence was committed. We find that this ingredient was sufficiently proved.

The 2nd ingredient requires proof that a sexual act was performed on the victim. The prosecution produced the evidence of PW1 and PW2.

PW1 (the victim), gave sworn testimony to the effect that, while her mother was away to attend a burial, she left her behind together with her brother, young sister Evelyn and the Appellant whom the mother had hired to plaster their house. PW1 further testified that at the time of the commission of the offence, he had finished plastering the house but was residing in the kitchen. She testified that she went to the kitchen to get milk to feed her young sister whom her mother had left behind and that the Appellant who was sleeping in the kitchen, defiled her.

PW2 Jovia Kabegambire (mother to the victim) testified that while she was away for burial at Kinoni, she left her children behind who were; KMG, (the victim), Ezera and Evelyn. In her testimony, she told Court that sometime back she had hired the Appellant to plaster their house and at the time of her leaving for Kinoni to attend burial, the Appellant had finished plastering the house but he was still residing in the kitchen. It was her testimony that after returning from Kinoni where she spent two days, she found KMG had been defiled. On interrogating the KMG, she revealed that the Appellant defiled her.

The victim was examined and the medical report indicates that, she was found to be 8 years old and had signs of penetration in her private parts. Her hymen was ruptured about a week prior to the examination. There were injuries around her private parts. The injuries were consistent with force having been used sexually.

The above evidence together with KMG's own evidence and her report to PW2 her mother, proves the 2nd ingredient, that a sexual act was performed on KMG.

Lastly the 3rd ingredient requires the prosecution to prove that the Appellant performed the sexual act on the victim. In proof of this ingredient, the prosecution relied on the testimony of KMG as PW1. She knew the Appellant and identified him. Her testimony was indeed corroborated by that of PW2, the victim's mother, who testified that her daughter had reported to her indicating that the Appellant had defiled her.

In the bid to discredit the testimony of PW2, the Appellant proffered the explanation that there existed a grudge between him and the victim's mother, and that the criminal charges were brought against him in the bid to prevent him from demanding for his money. The Appellant also raised the defence of alibi. He claimed that at the time of the commission of the offence, he was at his mother's residence. It is therefore necessary to review the evidence produced by the Appellant in order to establish whether or not the prosecution's evidence was sufficiently discredited.

With regard, to the grudge, the Appellant claimed that PW2 (KMG's mother) hired the Appellant to plaster their house and they agreed at a contractual sum. The Appellant testified that he and KMG's mother had a dispute over the amount of money that he was owed the grudge.

We note, from the trial court's record, that the Appellant had an opportunity to cross examine PW2 (KMG's mother) about the grudge but he did not do so. This may lead to the inference that the grudge may not have existed as was stated by PW2 in her evidence in chief. In making this inference we rely on the authority of *Sawoabiri James and Musisi Fred v Uganda*, SCCA No. 05 of 1990, where the Supreme Court held that;

> "An ornrlsslon or neglect to challenge the evidence ln chief on d material or essentlal point by cross exannlnatTon would lead to the inference that the euldencl ls accepted subJect to its belng assalled as lnherentlg lncredlble or probablq untrue."

We thus hold the view that the fact that the evidence of PW2 was not challenged in cross examination leads to the conclusion that there was indeed no grudge between the Appellant and PW2. We therefore reject the argument that there had been a grudge stemming from the nonpayment of the contractual sum as alleged by the Appellant.

As regards the defence of alibi, counsel submitted that on the date and time in issue, the Appellant testified that he was residing at a one Gordon's place and he disputed allegations that he was at PW2's home at the material time. However, during his cross examination, we note that the Appellant states that; "I was staying with my parents, I did not have a house for myself. When I was tired I would stay at Gordon"

The case of *Kibale v Uganda* (1990) EA 148 is very instructive as far as guiding court on who has the burden to disprove an alibi. In that case it was held;

"... where an accused set up an alibi as a defense, he/she does not assume any responsibility for proving the alibi and it rests upon the prosecution to negate the alibi by evidence."

In the instant case, the Appellant's defence of alibi was premised on the assertion that on the fateful day, he was at his parents' home in Kazo.

As stated before, the prosecution produced evidence of two witnesses to prove the participation of the Appellant in the commission of the offence. That was the evidence of PW1 and PW2 which has already been reviewed.

We note, however, that the Appellant admitted that at the material time he was hired by PW2 to paint her house and in fact it was for that reason that a disagreement over his payment may have arose. That would lend credence to the evidence of KMG and her mother that he was resident with them at the time the offence was committed for the reason of painting their house. KMG although a single identifying witness previously knew him very well and her testimony placed him at the crime scene. Her testimony was corroborated by PW2 who testified that KMG reported that it is the Appellant who defiled her, soon after it happened.

Considering the evidence the prosecution produced above, the defence of alibi could only be sustained with cogent and credible evidence in support of it. We are of the view that this is not the case in the instant matter before us. The evidence of the Appellant was not credible.

Similarly, the above evidence points to none other than the guilt of the Appellant. The trial Judge in his finding observed that;

"I observed. in the witness box, she was a simple innocent child who naturally narrated what happened to her. Her narrative was straight forward and coherent."

The Supreme Court in *Ntambala vs Uganda*, Criminal Appeal No. 34 of 2018 [2018] UGCA 83 held that;

".....a conviction can be based on the testimony of the victim of an offence even when he/she is a single witness since the Evidence Act does not require any particular number of witnesses to prove a fact and what matters is the quality and not quantity of evidence."

That said, the evidence of PW1 is consistent with that of PW2 and its corroborative. This evidence places the Appellant at the scene of crime, the victim knew the Appellant well as someone who was hired by her mother to plaster their house and he was sleeping in the kitchen for about ² months, the incident occurred during broad daylight, ruling out mistaken identity.

The claim the Appellant raises that he used to stay sometimes at Gordon's place but not at PW2's home was inconsistent to the evidence he gave during cross-examination and it was disproved by prosecution evidence.

In addition to that, this case presented conditions that favored a positive identification as was discussed in *Abudalah Nabulele & 2 Ors vs Uganda, Criminal Appeal No. 9 of 1978* where it was observed that the length of time, the distance, the light, and familiarity of the witness with the accused are factors which go to the quality of the identification evidence. This Court is alive to the above principle. We are of the view that in this particular instance, the conditions pertaining at the time of the commission of the offence, favored proper identification of the Appellant. The victim was familiar with the Appellant, he was known to her, he had stayed with them at their home for about 2 months, the act happened at around 3:00 pm therefore the lighting was good enabling positive identification and the victim had enough time to identify the Appellant at a close proximity.

We are of the firm view that the Appellant's alibi was weakened by the testimonies of prosecution witnesses PW I and PW2. We find that the conditions favored a positive identification of the Appellant and this disproves the alibi.

Consequently, grounds 1 and 2 fail.

Ground 3

Appellants Submissions

It was submitted for the Appellant that there is need for this Court to consider and maintain the principle of consistency while passing sentences. Counsel prayed that the sentence of 30 years be set aside and substituted with a lesser sentence of 12 years.

Respondent's Submissions

In reply, counsel submitted that the sentence of 30 years is neither harsh nor excessive. Counsel prayed that this Court maintains the sentence of 30 years as no illegality was occasioned and that further the learned trial Judge considered all factors before imposing such a sentence

Consideration of ground 3

This Court is aware that it cannot interfere with the sentence imposed by a trial court which exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which

ought to be considered when passing the sentence or where the sentence imposed is wrong in principle. (See *Kyalimpa Edward v. Uganda SC Cr. App. No. 10 of 1995* and *Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001*).

The Appellant, a man aged 40 years at the material time he committed the offence, was sentenced to 30 years in prison. The Appellant appealed this sentence on grounds that it was harsh and excessive. We have had an opportunity to peruse the sentencing notes of the learned trial Judge, he stated as follows;

> "I have considered submissions by both Counsel and the convict's prayer. He has been on remand close to three years. He is a first offender and probably he has family responsibilities. But on the other hand he committed a serious offence to the prejudice of an 8 year old girl. Medical report - Exhibit P3 discloses that the convict at

time of his examination on 2A1912010 some seven days after the incident; he was HIV positive. Although we have no report on the victim's HIV status it is not farfetched to consider that she might not be safe. In any case this court is under a duty to protect girls that might fall victims of the convict's lust for sex. Considering all the circumstances of this case and doing the best I can I would sentence the convict to 33 years' imprisonment, but since I have to deduct the period he has been on remand I sentence him to a term of Thirty years' imprisonment.'

It is evident the learned trial Judge considered all relevant points in his judgement. However, this Court in determining this ground considers the principle of consistency to resolve this ground of appeal.

In *Bachwa Benon vs Uganda*, CACA No. 869 of 2014, an HIV Positive Appellant defiled a 10 year old girl, infected her with HIV and was sentenced to life imprisonment on his own plea of guilt, this Honorable Court upheld the sentence.

In *Kabazi Issa vs Uganda*, CACA No. 268 of 2015, this Court found a sentence of 32 years for the offence of aggravated defilement was within the permissible range.

In *Senoga Frank vs Uganda* CACA No. 74 of 2010, this Court found a sentence of 28 years and 4 months for the offence of aggravated defilement was neither manifestly harsh nor excessive.

Basing on our analysis of the authorities above and the circumstances of this case, we find that the sentence of 30 years was within the range and appropriate.

We see no reason to interfere with the discretion of the learned trial Judge.

We uphold both conviction and sentence.

We so order.

.day of \$\\bigcirc\$ dobor, 2024 Signed and dated at Kampala this HON LADY JUSTICE EVA LUSWATA JUSTICE OF APPEAL HON. JUSTICE OSCAR JOHN KIHKA JUSTICE OF APPEAL HON. JUSTICE DR. ASA MUGENYI

JUSTICE OF APPEAL

\$\bullet \quad \rightarrow\$

\$\cdot\$

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ugca/2024/307/eng@2024-10-25>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/mugisha-v-uganda-criminal-appeal-161-of-2014-2024-ugca-307-25-october-2024-unknown-topic-unknown-court-2024>

Prepared on 13 October 2026 · Esheria