

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

HON. MR. JUSTICE G.M. OKELLO, JA.

HON. MR. JUSTICE A. TWINOMUJUNI, JA.

HON. LADY JUSTICE C.N.B. KITIJMBA, JA.

CRIMINAL APPEAL NO. 65/98

KASIBANTE YAHAYA ::: APPELLANT

VERSUS

UGANDA :::RESPONDENT

*(Appeal from the judgment of the High
Court (S.B. Bossa, J.) at Mubende on
23rd November 1998 in C.S.C No.110
of 1997)*

JUDGMENT OF THE COURT

This is an appeal against conviction and sentence for the offence of defilement c/s 123 (1) of the penal Code Act. The appellant was found guilty by the High Court sitting at Mubende and sentenced to twelve years imprisonment.

The brief facts of this case are that on the night of 3rd February 1996 shortly after midnight, a man invaded the home of Fenekansi Batagasa (PW3) at Kyengo village in Kiboga District. He found Batagasa tending his animals in the kraal and forcefully entered the kitchen of the house where Christine Nalubega (PW2) the wife of Batagasa was sleeping with children including Theopista Babirye, the victim in this case who was then aged about ten years. The attacker alleged that PW3 had committed an offence by being out of his house at such a late hour and he menacingly ordered PW1 and his daughter Babirye to accompany him to the police post to answer for their alleged crime. About 50 metres away from Batagasa's home, the attacker

demanded shs.2000/= from him so that he could release the young girl. PW3 then returned to his home to look for the money leaving the attacker with the girl. On his return he could not find the attacker and the girl. After a lengthy search that took him to about half a mile from his home, he returned to the spot near the home of Yovan where he had left the attacker and his daughter only to find there his wife and one Yovan wondering as to what had happened to PW3 and his daughter. As he was narrating to them how his search for the attacker and Babirye had proved futile, the attacker emerged from a nearby bush with Babirye and demanded to be paid so that he could release the girl. He forced the family to return to their home where he was paid shs.3000/= and he left.

After the departure of the attacker, Babirye revealed to her parents that she had been defiled by the attacker. On examination of her private parts, her mother (PW2) observed blood oozing out, semen and a swollen vagina. It was later confirmed by a doctor who examined her (PW1) that Babirye had been defiled. PW2 who recognised the attacker reported to the authorities the very next morning. As a result of the report the appellant was arrested and charged with defilement. In his defence the appellant denied the charge and stated that the whole thing was a frame up as a result of a grudge he had with the parents of Theopista Babirye. The learned trial judge rejected this defence and convicted the appellant. Hence this appeal.

There are two grounds of appeal, namely:-

1. The learned trial judge erred in law and in fact when she convicted the appellant in spite of the unsatisfactory evidence of identification.
2. The learned trial judge erred in law and in fact when she imposed a sentence of imprisonment without taking into account the period the appellant had spent on remand.

Mr. Stephen Mubiru, learned counsel who appeared for the appellant on a state brief challenged the conviction. On the 1st ground of appeal, he submitted that the evidence of identification on which the learned trial judge relied to convict was unsatisfactory as conditions for correct identification did not exist during the night of the offence. He pointed out the following factors which in his view made correct identification difficult: -

- (a) The assailant is said to have had a hat on his head covering the whole face.
- (b) The assailant is said to have threatened his victims with death so much so that in fear and panic, they could not have recognised the man.
- (c) There is no evidence on record from which an inference could be made that the assailant stayed on the scene of crime long enough to be recognised by anyone.

Mr. Mubiru then submitted that the trial judge ignored all these factors which clearly raise a doubt in favour of the appellant on the issue of identification. He invited us to so hold.

On sentence, Mr. Mubiru submitted that the trial judge did not take into account the period the appellant had spent on remand. He said that this could be seen clearly from the record whereby after pronouncing a sentence of 12 years imprisonment, she added:-

“Remand period to be taken into account”

Which in his view meant that the trial judge had not at the time of pronouncing the sentence taken the remand period into account. He suggested that the sentence be reduced to 9 years.

Mr. Vincent Okwanaga, Senior State Attorney who represented the respondent supported the conviction. He submitted that there were conditions favourable to correct identification during the night of the crime. In respect of PW2, the main identifying witness counsel submitted that:

- (a) She had seen the appellant many times before that night.
- (b) There were three sources of light that enabled her to make correct identification –
 - (i) An electric torch which the appellant had switched on as he moved about in their home.
 - (ii) A lamp which she had lit in the room where the appellant found her which was producing bright light.
 - (iii) Bright moon light which was shining outside.

Mr. Okwanga further submitted that PW2 had the following opportunities to observe the assailant:

- (a) When he stormed into the kitchen.

- (b) When she was seated with the children on the verandah.
- (c) Around the home of one Yovan when the assailant emerged from the bush with the victim Theopista Babirye.
- (d) The appellant ,after defiling the victim forced her parents to return to their home where he entered into protracted negotiations with them demanding and subsequently receiving shs.3000/= from them in exchange for their freedom.

Mr. Okwanga submitted that all these factors clearly show that the conditions for correct identification did exist and the possibility of a mistaken identification was eliminated. He argued that the evidence of PW2 was corroborated by that of PW3 her husband who described the manner of dress of the assailant in the same way that she had done and the fact that in his defence the appellant had admitted that PW2 and PW3 knew him before the night in question. He invited the court to uphold the conviction and dismiss the appeal.

On sentence, Mr. Okwanga conceded that from the record, it appears the learned trial judge had not taken into account the period the appellant had spent on remand. He therefore submitted that this court should take the period into account when considering an appropriate sentence.

We now turn to the merits of this appeal. The main issue in this case is whether there existed conditions favouring correct identification of the appellant on the night this crime was committed. The law on the subject of identification is now well settled. It has been discussed in numerous cases and more recently was discussed in detail by the Supreme Court of Uganda in the case of Bogere Moses & Another vs. Uganda, Criminal Appeal No.1 of 1997. The Supreme Court cited with approval the case of Roria vs. Republic [1967] EA 583 where at page 584 D-E, the former Court of Appeal for East Africa highlighted the problem of cases which are dependent on the evidence of identification only as follows:-

“ A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords in course of a debate ‘There may be a case in which identity is the question and if any innocent people are convicted today I should think that in nine cases out of ten - If they are as many as ten - it is on the question of identity’ - That danger is, of course, greater when the only evidence against

an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

(Emphasis added)

It is with this in mind that we now examine the quality of the identification evidence in this case.

On this issue Mr. Mubiru counsel for the appellant conceded that on the night in question at the home of the victims of this crime, there were three sources of light namely, the torch, the lamp and the moon. All of them were emitting light during the attack. Though the assailant was putting on a hat, it is not true that he had pulled it to cover the whole of his face. In fact the unchallenged evidence of the witnesses is that the attacker had not covered his face when he entered their home. Given that there was quite a lot of light around, the hat could not have hidden the face of the assailant to make it difficult to be identified. To this we must add the fact that the appellant was before this night well known to PW2. The appellant talked to the witnesses and indeed issued threats against them but in our judgment, the threats were not of such a nature as to deprive PW2 and PW3 of the capacity to correctly identify the assailant. There is quite a lot of evidence from which it can be inferred that the assailant stayed at the scene of crime long enough to be correctly identified. He was also very close to the witnesses, like when he was in the same kitchen with PW2 and her children, like when he returned from the bush with Babirye, the girl victim of defilement. In the circumstances of this case we are satisfied that conditions for correct identification did exist.

What remains is to consider whether in those circumstances evidence of a single identifying witness was sufficient to justify a conviction based on it. On this point the Supreme Court case of Bogere Moses & Another vs. Uganda (supra) cited with approval the well known case of Abdala Nabalere & Another vs. Uganda [19791 HCB 77] where the court stated:

“Where the case against an accused’ depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason

for special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly the length of time, the distance the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger.....

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warn itself of the special need for caution. “(Emphasis **added**)

In the instant case we have observed that conditions for correct identification were satisfactory especially for PW2 who knew the appellant before. The appellant himself confirmed in his defence that PW2 knew him before the date of this incident. The learned trial judge directed herself on the evidence and the law and although she does not appear to have expressly warned herself of the danger of the special need for caution before conviction, she had no doubt in her mind that the identification was free from any possibility of a mistaken identity. We agree with her finding and we uphold her conviction of the appellant.

On the question of sentence, we agree with both counsel that the learned trial judge did not take into account the period the appellant had spent on remand before passing a sentence of 12 years imprisonment on him. However this offence is very grave with a maximum sentence of death. Taking into account all the circumstances of the case including the age and condition of the victim, the age of the accused and the fact that no record of crime was reported against him and the period of three years he spent on remand, we are unable to hold that a sentence of 12 years imprisonment was manifestly harsh and excessive to justify our interference. The failure to take into account the remand period did not in any way occasion any miscarriage of justice against the appellant. This ground of appeal also fails.

In the result we uphold the conviction and sentence and dismiss this appeal.

Dated at Kampala this 12th day of May 1999.

G.M. OKELLO

JUSTICE OF APPEAL

A. TWINOMUJUNI

JUSTICE OF APPEAL

C.N.B. KITUMBA

JUSTICE OF APPEAL