THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.0012 OF 2012

(Appeal against the conviction of the of High Court Uganda at Masaka by Hon. Mr. Justice Dan Akiiki Kiiza on 28th of April 2012 arising from Criminal Session Case No.014 of 2011)

MUBANGIZI ALEX.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM: HON. MR. JUSTICE ELDAD MWANGUSYA, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT COURT:

This is an appeal against conviction. The Memorandum of Appeal, sets out the following grounds:-

1. **The learned trial judge erred in fact and law when he convicted the appellant basing on evidence of single identifying witness without it being corroborated.**

2. **The learned trial judge erred in fact and law when he failed to adequately consider the circumstances under which the appellant was arrested simply because he had no contention about it.**

3. **The learned trial judge erred in law and fact when he failed to adequately evaluate the entire evidence and as a result came to a wrong conclusion.**

The appellant prays to the Court to quash the conviction. The facts of the case are briefly the following:-

The appellant was charged and convicted of rape contrary to Section 123 and 124 of the Penal Code Act. The victim, Nasimbwa Maria Josepher was 60 years old when the offence occurred. At the time she was a peasant, residing in Kasambya village Kasambya Parish, Kaliro Sub-County Lyantonde.

The accused Mubanguzi Alex alias Turyagenda was then 23 years old, self-employed, was as a resident of Kooki Ward C Lyandtonde Township, Lyandonde District.

On 22nd February 2009, the victim went to a forest to search for firewood near Lyandonde Hospital. A stranger who she clearly identified by appearance told her that she had trespassed in the forest and told her to accompany him to the sub-county headquarters. She obliged. On their way the said stranger instead led the victim into a bush and demanded for sex.

The victim pleaded with the stranger, telling him that he was the age of her son, but in vain. The stranger got hold of the victim's neck threw her down. She tried to resist but was overpowered. He stopped her from making an alarm and he by force had sexual intercourse with her.

Three days later, while the rape victim was in Lyandtonde Hospital with her son, Kasibante Yuda Tadeo, she revealed the entire ordeal to him. As she was still undergoing medical treatment her son reported the matter to police where he was advised to take the victim.

The victim after being discharged reported to police where she found an on going identification parade. She was asked to participate in the identification parade and identify the one who raped her.

She identified the stranger as the appellant as the stranger whom she had clearly seen on the fateful day in broad daylight. She was informed that the said person, now the appellant was under arrest on another rape charge. She identified the appellant as her assailant in the identification parade.

The appellant then underwent a medical examination and he was found to be mentally normal with no physical bodily injuries. He was tested for HIV and was found to be HIV positive. The accused's sero status was relied upon at trial. Medical examination of the victim showed that she had bruises on her neck and the legs. She also had a vaginal discharge containing pus and blood and her injuries were classified as harm.

The appellant was tried, convicted for rape and was sentenced to 30 years imprisonment. He was dissatisfied hence this appeal.

At the hearing of this appeal learned counsel, Mr. Asiimwe John Barunga, represented the appellant on private brief.

The State was represented by Mr. Semalemba Simon Peter, a Principal State Attorney.

Counsel for the appellant submitted that the learned trial judge erred in law and fact when he convicted the appellant on evidence of a single identifying witness without it being corroborated. That PW2 was the only witness for identification of the appellant. She had never seen the appellant in her life. It was four days after that incident that she identified the appellant at police in an identification parade. Counsel argued that there was need for collaboration of her testimony and there was need for evidence by the arresting officer to explain the circumstances of the appellant's arrest.

Counsel contended that the instant case was reported to police after the appellant had been arrested on another charge. It is not clear in what circumstances he was arrested and this would have been explained by the arresting officer, if he has been summoned to testify.

Counsel further contended that although the victim was attacked in broad daylight she would have been terrified and would not able to identify the assailant.

He prayed to this court to quash the conviction.

Mr. Simon Peter Semalemba, for the State in his reply supported the conviction and sentence of the lower court.

He submitted that although PW2 was a single identifying witness, she was a credible witness. She identified the appellant in circumstances that were ideal and conducive to proper identification. The offence was committed at about 10.00 am in broad day light and there would be no question of mistaken identity. The witness narrated how she had met the appellant and they were together for a long time. They moved together deep into the forest while they talked as the appellant was negotiating for sex. They struggled and he forcefully had sex with her which put the two close enough for the victim to properly identify the assailant. Counsel submitted that the appellant was properly identified by the victim (PW2) and there was no question of mistaken identity. The trial judge, according to counsel, was correct to find that the appellant

was properly identified. He further submitted that the identification parade was properly conducted. According to the Principal State Attorney, the trial judge properly evaluated the evidence as a whole and both the conviction and sentence should uphold.

We have carefully studied the court record and the submissions of both counsel. We have also studied the authorities availed to us by counsel on the issues raised and other available authorities. We shall now proceed to resolve the appeal.

As a first appellate court we shall fulfill our duty under rule 30 (1)(a) of the Rules of this Court which provides:-

> **"30. Power to reappraise evidence and to take additional evidence**
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> **(1) on an appeal from a decision of the High Court acting in the exercise of its original jurisdiction, at the Court may-**
>
> **(a)Reappraise the evidence and draw inferences of fact;"**

We shall handle all the grounds of appeal together as we find them interconnected. They are all hinged on proper evaluation of evidence. The first ground is on the handling of evidence of a single

identifying witness. The second is on the arrest of the suspect which again goes to evaluation of evidence and identification and the third ground is rather general but again rests on proper evaluation of evidence.

Both counsel submitted on what we find to be a critical element of this case and that is the issue of identification of the appellant as the person who committed the offence.

We find it necessary to state the law on how the evidence of a single identification witness should be handled.

The Court has to consider the conditions available for proper identification. The principles for consideration were stated in the case of **Abdulla Nabulere & Anor vs Uganda Cr. App. No.9 of 1978,** in the following passage in the judgment.

> **"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, the 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 the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witness 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 light, the familiarity of the witness with the accused. All those 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 warns itself of the special need for caution."

In dealing with evidence of identification by single identifying witnesses in criminal matters, the starting point is that the court ought to satisfy itself from the evidence whether the conditions under which the

identification is claimed to have been made were favourable or were difficult, and to warn itself of the possibility of mistaken identity.

We are guided on this by the case of **Sentale vs Uganda Crim Appeal No 56 of 1968** , where the court held: ***"If there was a case in which an identification parade was essential this was it"*** **because the robbery took place at near mid-night , although there was moonlight as well as street lights. The assailant was never known to the complainant prior to the incident.**

Following **Sentale** (supra) this Court, in the case of **Ssenoga Sempala Jafari vs Uganda Crim Appl No 34 of 2005** , stated as follows:- ***"we should , perhaps for emphasis, point out that in carrying the parade, the rules in Sentale vs Uganda , must be observed as much as possible depending on the circumstances of the case. However, failure to observe one or two of them does not render the identification a nullity"***

And according to the instant case there was an ongoing identification parade at police and the victim was asked to participate and see whether the one who raped her could be among the parade participants. Of which she did participate and was able to identify the alleged rapist.

Therefore the identification parade having been carried out, the trial judge did caution himself about failure to follow the steps or procedure to the word as described in the **Sentale case,** because identification

parades are held as a means of corroborating the identification claim made by a witness. Because as a matter of fact there is overwhelming evidence that the appellant was properly identified at the scene, it would be an affront to justice to acquit him. The duty of the Court is protect the community against wrong elements in society and not to follow on a matter of practice and lower the rules of logic in order to produce unreasonable results which would hinder the course of justice" .

We are therefore convinced by the authority above that indeed failure to observe one or two of them does not render the identification a nullity because there was much more overwhelming evidence pointing to the guilt of the appellant.

On the facts of the instant case all the conditions favouring correct identification are present. The incident was at 10.00 am in broad daylight. The appellant and PW2 spent a long time together talking and then the struggle ensued. All this time the victim was very aware of the person who was trying to rape her. During this time the hat he was putting on fell off and his face was fully exposed. He went ahead to rape her. There is no basis for saying identification was poor. All the conditions favoured correct identification much as the victim had never met the appellant before. The issue of correct identification was properly handled by the trial judge. We agree with his finding that the appellant was properly identified by PW2.

Counsel for the appellant pointed out in ground 3 the need for the arresting officer to have given evidence in court. Counsel for the appellant, says that the arrest was before the matter was reported to police and that the arresting officer should have testified to explain when and how the arrest was conducted.

Counsel also pointed out that it was necessary for the investigating officer to have been called to testify.

This Court and the Supreme Court have in numerous decided cases made it clear that it is necessary and always desirable for the state to call investigating and arresting offices to testify and explain their roles in the criminal cases they handled. The Supreme Court elaborately stated this position in **Okwanga Anthony vs. Uganda SCCA 20/2000 (10/01/02 at Mengo), [2000] KALR 24.**

> **"The effect of failure by the prosecution to call police investigating and arresting officers to give relevant evidence at a trial was considered by this Court in Bogere Moses and Another vs. Uganda Criminal Appeal No.1/97 (SCU) (unreported) in which the court referred with approval to what Sir Udo Udoma, CJ said in Rwaneka vs. Uganda (1967) EA 768 at page 771**

'Generally speaking, criminal prosecutions are mattes of great concern to the State; and such trial must be completely within the control of the police and the Director of Public Prosecutions. It is the duty of the prosecutors to make certain that police officers, who had investigated and charged and an accused person, do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contests between two private individuals.'

This Court also followed its own earlier decision in Alfred Bumbo vs. Uganda, Criminal Appeal No.28/94 (SCU) (unreported), in which it had said:

'While it is desirable that the evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of

such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition, to prove the charges.'

We agree with the court's view in Rwaneka vs. Uganda (supra) and in Alfred Bumbo & Ors vs. Uganda (supra)."

What happened in that case was the police officers had not testified though the State had made effort to call them. The Court held **"our view is that the absence of police evidence was not fatal to the appellant's conviction as there was other evidence to support the conviction."**

In the instant case, we find that it would have been proper to call the arresting and investigating police offers to testify but their failure to testify would not have been fatal to the case as there was other sufficient evidence available that the trial judge appropriately considered and reached a decision we find correct.

We accordingly agree with the learned trial judge in his evaluation of evidence and the conclusion he reached that the appellant committed the offence as charged. We find no merit in the appeal and accordingly

dismiss it. The appellant did not appeal against sentence. The sentence is neither illegal nor irregular we accordingly uphold it.

Dated this day.....17th..... of .....December.....2014.

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Hon. Justice Eldad Mwangusya

JUSTICE OF APPEAL

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Hon. Justice Richard Buteera

JUSTICE OF APPEAL

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Hon. Justice Kenneth Kakuru

JUSTICE OF APPEAL