

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: TSEKOOKO; KATUREEBE; OKELLO; TUMWESIGYE; KISAAYE; JJ.S.C.)

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CRIMINAL APPEAL NO. 19 OF 2007

SABWE ABDU APPELLANT

VERSUS

UGANDA RESPONDENT

10 *[An Appeal from the Judgment of the Court of Appeal at Kampala (L.E.M MUKASA-KIKONYOGO, DCJ, C.B.N KITUMBA and C.K. BYAMUGISHA, JJA) dated 14th May, 2007 in Criminal Appeal No. 237 of 2002]*

Evidence – Identification by voice – whether the appellant was properly identified by his voice

REASONS FOR JUDGMENT OF COURT

15 On 16th December, 2009, we heard this appeal and dismissed it. We promised to give our reasons later. We now give the reasons for our decision.

Sabwe Abdu, the appellant, was on 2nd December, 2002 convicted by the High Court (E.S Lugayizi, J) for the defilement of Faith Nanyonga (PW2), a girl under the age of 18 years, contrary to Section 123 (1) of the Penal Code and sentenced to 12 years imprisonment. He appealed to the Court of
20 Appeal against both conviction and sentence. That Court dismissed his appeal. The appellant appealed to this court against the judgment of the Court of Appeal on once ground.

The facts of the case as accepted by the trial court are that on 14th September, 2000, at Namalinda village, Nakasongola District, at around 1:00 p.m., while Faith Nanyonga (PW2) and her younger sister Teopista Nanyonyi (PW3) in the company of two other persons were returning home from the
25 well where they had gone to fetch water, they met someone who was disguised in a bark cloth and who to them looked like a ghost. They ran away but he stopped them and ordered them to return to the well. He told the other two persons to go back home and then ordered Faith Nanyonga and Teopista Nanyonyi to remove their dresses. He blindfolded them and led them through a swamp to

some bush where he had sexual intercourse with Faith Nanyonga. After that, he left the two girls in the bush where they spent the night.

Meanwhile the father of the two girls, Moses Mbangire (PW4), looked for his two daughter in vain and appealed to his villagemates to

5 assist him find them. Their efforts were not successful either. However, that same day at around 8:00 p.m. the appellant went to the home of Mbangire and told him not to panic. He told Mbangire that if he (Mbangire) gave him two goats and two chickens, he would use his witchcraft powers to find the girls. The following day Mbangire gave the appellant the two goats and the two chickens he had asked for. After conducting some rituals, the appellant went to the swamp and brought back two
10 girls. However, the appellant said that the girls were possessed by evil spirits and they needed treatment. So he took them to his home where they spent two nights.

Mbangire with other people from the village went to the home of the appellant to see the two girls. At the appellant's home Faith Nanyonga told Mbangire that the appellant had had sexual intercourse with her. Mbangire went and reported the matter to police who came and arrested the appellant. Faith
15 Nanyonga was later taken for medical examination which showed that she was about 13 years old. The medical examination also showed that her hymen had been broken and the inner layers of her vagina were red and tender.

At his trial, the appellant denied that he was the person who abducted the two girls and who had sexual intercourse with Faith Nanyonga. In his unsworn statement he said that he went to the home
20 of Mbangire and Mbangire told him that a ghost had abducted his two daughters. He then offered to assist Mbangire get back his daughters if Mbangire gave him two goats and two chicken to sacrifice for the ghosts. He said he used his witchcraft powers to get back the two girls and that he took the girls to his home for treatment because they were not in a normal state of mind.

The learned trial judge rejected the appellant's defence, accepted the prosecution evidence and
25 convicted the appellant as charged. On the question as to whether the appellant was the person who committed the offence, the trial judge relied on the testimony of Faith Nanyonga and Teopista Nanyonyi who told court that they were able to identify the appellant by his voice which the y said they were familiar with. The two girls also told court that they were able to identify the appellant the

following day when he returned undisguised to the bush where they had spent the night, and when they were no longer blindfolded. The trial judge also relied on the evidence of Mbangire (PW4).

The Court of Appeal upheld the decision of the trial judge and dismissed the appellant's appeal. The appellant's complaint in his one ground of appeal is that the Court of Appeal failed to re-evaluate the prosecution evidence about the participation of the appellant in the commission of the offence of defilement.

The appellant in this court was represented by Mr. Tiishekwa A. Rukundo. He lodged a written statement of arguments. Learned counsel argued that the two girls (PW2 and PW3) could not properly identify the appellant by voice because they had never spoken to him. He argued further that the two girls could not have identified the attacker because the person who attacked them was disguised in a bark cloth and the girls were blindfolded.

Ms. Betty Khisa, a Senior Principal State Attorney, supported the decision of two courts below and argued that the Court of Appeal properly re-evaluated the evidence on record especially on identification of the appellant.

On the participation of the appellant in the offence the Court of Appeal had this to say:

“The last ingredient was the participation of the appellant. Mbangire in his evidence stated that when he learnt about the abduction of the girls he went round the village and informed the people what had happened. A search was mounted and it yielded nothing. At about 8:00 p.m the appellant came to his house and told him not to panic. He asked for two goats and two chickens for sacrifice. The next day the items were procured and handed to the appellant. He led the witness and other people to the well and went into the swamp. He returned with the two girls. The appellant in his defence claimed that he performed his duty as a with doctor in recovering the girls. In other words he used magical powers to trace the girls. In other words he used magical powers to trace the girls. Learned counsel for the appellant did not address on the last ingredient of the offence. This means that he did not challenge the trial judge's findings about the participation of the appellant in the commission of the offence. The evidence on record implicating the appellant in the commission of the offence is overwhelming.

He knew where the girls were because he [is] the one who abducted them. He confidently advised the father of the girls not to panic. The last ingredient of the offence was proved beyond reasonable doubt”.

We respectfully agree. There is evidence on record that the two girls were familiar with the appellant because he lived about a quarter of a mile from their home, they always passed by his home as they went to school and they used to hear him speak to other people. The appellant also used to come to their home where they would hear him speak to their father. We agree with the trial judge’s finding that given these circumstance the girls would be able to identify the appellant by voice even if they had never directly talked to him. To identify a person’s voice, one does not necessary have to have talked with that person.

There is further evidence on record that the two girls were able to identify the appellant as the attacker when he came to pick them from the bush the following day. At that time, the appellant was not disguised and they were no longer blindfolded.

The evidence of Mbangire lends support to the evidence of the two girls that it is the appellant who abducted the two girls. He came to the home of Mbangire the day they disappeared and told him not to panic. He asked him for two goats and two chickens to assist him get back his daughters. Indeed when Mbagire gave him the two goats and the two chickens, the appellant went and brought the two girls from the bush. The inference is irresistible that the appellant knew where the two girls were because he is the one who had taken them there in the first place. His defence that he used his witchcraft powers to discover where they had been taken cannot be believed by any reasonable person and so cannot be accepted by this court.

We find no merit in the submission of counsel for the appellant that the Court of Appeal failed to re-evaluate the prosecution evidence. We totally agree with the Court of Appeal that the evidence against the appellant as the person who abducted the two girls and committed the offence of defilement against Faith Nanyonga is overwhelming and that in the face of this evidence it was not surprising that counsel of the appellant decided not to address the Court of Appeal on it.

It was because of the foregoing reasons that we held that the appellant was properly identified as the person who committed the offence and, therefore, dismissed the appeal.

Dated at Mengo this **3rd** day of **February** 2010

J.W.N Tsekooko

JUSTICE OF THE SUPREME COURT

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B.M. Katureebe

JUSTICE OF THE SUPREME COURT

10 G.M Okello

JUSTICE OF THE SUPREME COURT

J. Tumwesigye

15 **JUSTICE OF THE SUPREME COURT**

E.M. Kisaakye

JUSTICE OF THE SUPREME COURT