THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE S.B.K. KAVUMA, JA

CRIMINAL APPEAL NO.267 OF 2002

SSENYONDO UMAR……..APPELLANT

V E R S U S

UGANDA……..RESPONDENT

[Appeal from the judgment of
the High Court at Masaka (Akiiki-Kiiza, J)
on 4th April 2000 in C.S.C. No.18 of 1999]

JUDGMENT OF THE COURT:

This is an appeal against the conviction and sentence passed by the High Court sitting at Masaka in which the appellant was convicted of the offence of defilement c/s 123(1) [Now.s.129(1)] of the Penal Code Act and was sentenced to life imprisonment.

The brief facts of the case were that on 12th July 1997 at Rukono village in Masaka District, Nakachwa Scolastica left a 7 months girl child to the care of her son Sekyanzi. As soon as she left, the appellant sent away Sekyanzi to collect for him a herb for flavouring tea called **Mujaaja.** The appellant then took the child to his house and defiled her. PW1 Semanda Charles who happened to be returning home to check on the child found the appellant in action red handed and reported to his mother, PW2, the mother of the victim. The matter was subsequently reported to the authorities who arrested the appellant and indicted him with the offence. At the trial he pleaded grudges with the mother of the victim and also alibi. Both were rejected and appellant was convicted and sentenced as aforesaid, hence this appeal.

The Memorandum of Appeal raises one ground of appeal, namely that:-

> **"The learned trial judge erred in law and fact when he convicted the appellant on the basis of uncorroborated unsworn evidence of a single eye witness of a child of tender years."**

At the hearing of the appeal, the appellant was represented by Mr. Andrew Tiishekwa while Ms Betty Agola, a Senior State Attorney at the Directorate of Public Prosecution, represented the respondent. Mr. Tiishekwa, arguing the one ground of appeal, submitted that the evidence on record did not prove the indictment against the appellant. He submitted that the only evidence on which the conviction was based was that of the 12 year old Semanda Charles who testified that he found the appellant defiling the victim. Though it was not disputed that the victim was defiled, the evidence of Semanda (PW1) on who did it, was never corroborated. Yet the evidence itself was given not on oath and being that of a single witness it was unsafe to base a conviction on it. He relied on the authority of **Patrick Akol vs. Uganda Criminal Appeal No.23 of 1992 (S.C.).** He requested us to allow the appeal on that ground alone.

Ms Betty Agola supported the conviction and sentence. She submitted that there was sufficient evidence to justify the conviction. She argued that the evidence of PW1 was corroborated by the evidence of PW2 (the mother of the victim) who examined the baby shortly after it was defiled and she found a lot of blood in her vagina. She stated further that medical evidence (PW4) also corroborated the evidence of PW1. Ms Agola submitted that the evidence of PW1 itself was very strong and credible and the court would be justified in

convicting relying on that evidence alone. In view of the finding by the trial judge that the prosecution witnesses were credible, the trial judge was justified to convict.

We have carefully studied and re-evaluated all the evidence on record. We are satisfied that the finding by the trial judge that the victim in this case was a young girl aged only 7 months and that she was defiled is justified. The evidence of PW1, PW2 and PW4 is very clear on that. What has given us a lot of concern is the finding by the learned trial judge that it was the appellant who defiled the victim. This finding was based on the sole unsworn evidence of Semanda Charles (PW1) who was himself a child of tender years. He was allowed to give unswron testimony after a voire dire in which the judge found that he did not understand the meaning of an oath. He is the only one who testified to the participation of the appellant in this sordid crime of defilement. He found corroboration of that evidence in the evidence of PW2, his mother and PW3 his father. With respect, none of the two saw the appellant defile the victim. All they know about the crime was what PW1 told them. PW2 and PW3 did not see the appellant that afternoon. So, we have evidence of a single witness who is a child of tender years and who gave unsworn testimony. There is no corroborative evidence at all. This is how the learned trial judge handled the issue:-

> **"I am aware that PW1 is a child of tender years and he is the sole eye witness. I warned myself as I did to the gentlemen assessors of the danger of convicting on his evidence without corroboration. (See the case of <u>Muhirwe Simon vs. Uganda S.C.U. Criminal Appl. No.38/92).</u> As was held by the Supreme Court in the case of: <u>Patrick Akol vs. Uganda, S.C.U. Criminal Appl. No.23/92.</u>**
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> > ***The unsworn testimony of a child of tender years is risky to act upon, without corroboration.'***
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> **It is for the court to weight the reliability of the evidence of the particular unsworn witness.**
>
> **On our facts, I can find corroboration for the testimony of PW2 who received the report from PW1 about what he had seen the accused do to the little girl. Later, the same information was framed on to PW3 which eventually led to the rest of the accused.**

Secondly, the accused raised a defence of alibi in that he was visiting a relative at the time of defilement. Of course under our law, he assumes no legal duty to prove it, but the burden is on the prosecution to disprove it by adducing cogent evidence (Sekitoleko vs. Uganda [1967] E.A 531. It was however, recently held by the supreme Court of Uganda that, the accused should raise an alibi as early as possible so as to make it genuine and secondly to enable the prosecution to inquire into it. (See the cases of Kibale Ismar vs Uganda S.C.U., Crim. Appl. No. 1/98, and **Festo Androa Asenua and Anor. vs. Uganda S.C.U. Crim. Appl. No. 1/98 (both unreported).**

In the latter case, one of the accused raised an alibi, belatedly at the trial, during re-examination. The court held that this reduced its value. In the instant case, the accused raised the alibi during cross examination, in the circumstances, I agree with the Mr. Ojok, the learned State Attorney, that this was rather belatedly and an afterthought, besides has a diminished value.

In any case as I have found PW1 a more credible witness than the accused, I dismiss his claims of being away from the scene as lies and hold that, he was at the scene of the crime at the material time of committing this offence. The prosecution has therefore succeeded in destroying his alibi as false."

As we have observed above, we do not agree with the learned trial judge that the evidence of PW2 and PW3 can corroborate the evidence of their son, PW1, simply because the parents did not see the appellant defile their daughter. Beyond what they were told by their son, they know nothing about it. Furthermore, we do not think that it is correct to hold that because you find the alibi of the appellant false, therefore the finding corroborates the evidence of PW1 as to the identity of the defiler. Therefore, the learned trial judge misdirected himself when he held that the evidence of PW1 was sufficiently corroborated. What remains is whether the trial judge was at liberty to warn himself and the assessors of the risk of convicting on the unsworn and uncorroborated evidence of a single witness of a child of tender years and to convict if he was convinced that the witness was truthful.

The law on this matter is contained in the case cited by learned counsel for the appellant; **Patrick Akol vs. Uganda, Criminal Appeal No.123 of 1992.**

In that decision, the Supreme Court of Uganda cited with the approval the opinion of Lord Goddard in the case of **R vs. Campbell (1956) 2 All. E.R. 272** in which he summed up the law at page 276 as follows:-

> **"To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on him or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned not that they must find corroboration but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given."**

The holding in this case is that no amount of self warning or warning of the assessor can justify convicting an accused on the unsworn evidence of a single identifying witness of a child of tender years. In Uganda the law is contained in section 40(3) of the Trial on Indictments Act which states:-

> **"40(3)**
>
> **Where in any proceedings any child of tender years called as a witness does not in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duly of speaking the truth; <u>but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to conviction unless the evidence is corroborated by some other</u>**

material evidence in support thereof implicating him or her." [Emphasis supplied]

In our view, the unsworn evidence of PW1 who was the sole identifying witness against the appellant was never corroborated. Therefore the learned trial judge was wrong to base a conviction on it. This appeal therefore succeeds, and it is hereby allowed. The conviction is quashed and the sentence of life imprisonment is set aside. The appellant is set free unless held on other lawful charges.

Dated at Kampala this 23rd day of March 2009.

Hon. Justice S.G. Engwau

JUSTICE OF APPEAL.

Hon. Justice Amos Twinomjuni

JUSTICE OF APPEAL.

Hon. Justice S.B.K. Kavuma

JUSTICE OF APPEAL.