THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT GULU

CRIMINAL APPEAL N0. 198 OF 2004

Coram **Hon Justice L.E. Mukasa-Kikonyogo, DCJ**
Hon Justice S.B.K Kavuma , JA
Hon Justice A.S. Nshimye, JA

NYONDO MUHAMMED ::APPELLANT

VERSUS

UGANDA ::RESPONDENT

APPEAL ARISING FROM THE JUDGMENT OF HON JUSTICE AUGUSTUS KANIA OF 27.5.2004 IN H.C CRIMINAL SESSION N0. 0029/2004.

JUDGMENT OF THE COURT

The appellant Nyondo Muhammed, was convicted by the High Court at Arua of defilement c/s 129(1) of the Penal Code Act and sentenced to 15 years imprisonment. Being dissatisfied, he appealed to this Court against both conviction and sentence.

The following is the brief background of the case.

On 3/7/2002 in Drachanga village, Yumbe District, the victim one **ANDRUWA AFISA** aged 13 years was guarding a garden of groundnuts. The appellant emerged from the unknown, called her, and pulled her to a nearby bush. He had forceful sexual intercourse with her against her will. The victim reported to her mother, who in turn

reported the matter to local authorities. Following a report to the police, the appellant was arrested and charged with defilement.

His defence was an alibi. He claimed that for that whole material day, he was at Lobe trading centre. He also claimed that there existed a grudge between him and prosecution witnesses N0. 2 and 3 who were minors.

The trial judge preferred to believe the prosecution witnesses and rejected the defence hence, this appeal.

The appellant presented two grounds of appeal namely:-

1. ***"That the trial judge erred in law and facts when he held that there was corroborative evidence implicating the appellant in the commission of the offence."***

2. ***"That the sentence imposed was excessive in the circumstances of the case."***

At the hearing of the appeal, Mr. Lowis Odongo appeared for the appellant on State brief, while M/s Khisa Betty a Senior Principal State attorney appeared for the State. Learned counsel for the appellant proceeded with ground one and decided to abandoned ground 2 on sentence.

He submitted that the law required that the evidence of P.W.2 the victim, being a child of tender age be corroborated. He contended that the un sworn evidence of P.W.3 who was only 12 years old, could not provide the required corroborative evidence. Both the evidence of P.W.2 and P.W.3 therefore required corroboration.

Counsel argued further that, apart from the two witnesses, there was no other witness to corroborate their evidence. He criticised the learned judge for finding corroboration in the conduct of the appellant when he ran away and passed through the bush. He prayed that the appeal be allowed, conviction quashed, and sentence set aside.

In reply M/s Khisa Betty submitted that the evidence of P.W.2 the victim did not require corroboration because she was 15years of age at the time of testifying. She was no longer a child of tender years. She based her assertion of the age on the medical report of Dr. Emuku Juventine who found the victim to have been 13 years of age at the time when he examined her on 8/7/2002. She argued that, when she testified two years later, in 2004, she was 15 years. Therefore her affirmed evidence alone, was enough to prove penetration and/or identification so long as it was believed to be true and the judge had warned himself and the assessors of the danger of convicting on evidence of a single witness.

She referred us to the Supreme Court case of **Patrick Akol V Uganda Criminal Appeal N0. 23 of 1992.** In that case Patrick Akol was found in a birth room in a squatting position having sexually penetrated a child of 7years. The two eye witnesses who found him in that position were 13 and 14 years respectively, at the time of the trial. The Supreme Court found that the trial judge was right to use his good sense in knowing the child who was 14 years if he appeared to the judge to be a reasonably a mature person. The court also found that the sworn evidence of the child who was 14 years or above could be relied on by the prosecution. Since it was evidence of a single witness, it would be prudent to look for corroboration.

The learned Senior Principal State Attorney submitted further that the un sworn evidence of P.W. 3 which was taken after administering avoire dire may be used to corroborate the identity of the appellant. She referred us to page 6 of the judgment, in which the trial judge found the evidence of P.W.3 truthful after warning himself and the assessors before acting on such evidence. She prayed that the appeal be dismissed because it was devoid of merit.

Like we have stated in numerous cases before, our duty as a 1st appellate Court, when confronted with an appeal of this nature, is to reopen the case and review or appraise the whole evidence and come to our own conclusion. The review however is done with focus in mind, of the grounds of appeal. We may also in the process discover such matters though, not comprised in the grounds of appeal, were of such fundamental nature or highly prejudicial to the appellant, that would lead to a miscarriage of justice if not addressed. See Rule 30 of the Judicature (Court of Appeal

Rules Directions, **Pandya V R [1957] EA 336**, **Bogere Moses V Uganda Supreme Court Cr Appeal N0. 1[1999]** unreported, **Siraje Kisembo Vs Uganda Cr. Appeal N0. 13/1998 (SC). See also James Kalo Vs Uganda, Court of Appeal Cr. Appeal N0. 8/1996 (unreported).**

We have heard submissions of both counsel, and read and appraised the evidence and authorities referred to us. This appeal is premised on a single point of law, whether or not the evidence of (P.W.2) the victim, required corroboration or not to sustain the conviction. It suffices to state the statutory law on evidence of children of tender years.

Section 40(3) of the Trial on Indictment Act Cap 23 provides:-

> ***"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 duty of speaking the truth; but where the evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her".***

The expression of "a child of tender years" is not defined by the above Act. However a number of decisions of this Court and other Courts in the Eastern African region, have defined the expression "child of tender years" to mean any child of any age or apparent age of under 14 years, in the absence of any special circumstances. See **Mukasa Deogratius Vs Uganda Supreme Court Cr. Appeal 21/1993**, **Kibageny Arap Kolil V R (1959) EA 92.**

While dealing with this issue of corroboration on page 5 of his judgment, the learned trial judge stated:-

" it is trite law that in a sexual offence the evidence of the complainant requires to be corroborated and the accused should only be convicted on the uncorroborated evidence if the complaint after the assessors have been warned of the danger of acting on such evidence and after the judge adverts his or her mind to such evidence.

If after administering such caution, the judge may then proceed to act on such evidence if he or she finds it to be truthful"

He quoted the case of **Chila and another Vs Republic [1967] EA 722.**

We find no fault in the above statement of the law and we agree with it.

We also find merit in the submission of the learned counsel for the State that P.W.2 was 15 years of age at the time she gave evidence, As long as the trial judge found her evidence truthful after warning himself and the assessors. The trial judge had the benefit, which we do not have, of watching the demeanour of P.W.2 when testifying. His finding regarding to the truthfulness of the witness, can not be interfered with by this court. We find that even on the evidence of P.W.2, alone a conviction could be sustained against the appellant. Better for the prosecution, her evidence was improved by corroboration from the un sworn statement of P.W.3 who found the appellant on top of P.W.2.

In the case of **Patrick Akol (supra**), the Supreme Court quoted Lord Goddard in the case of **R V Campbell [1956] 2 ALLER 272** which we find persuasive to quote also:-

"We, therefore, have to consider the case of a child of tender years being called to give un sworn evidence in regard to an offence committed against some other person or against property. In as much as the statute which permits a child of tender years to give un sworn evidence expressly provides for such evidence being in any proceedings against any person for any offence, it appears to us that the evidence of a child can be given to corroborate the evidence of another person given on oath. At the time it is obvious that the jury should be warned that such evidence must be regarded

with care, but in view of the terms of the section, it seems to us that the evidence is admissible though its weight is for the jury".

The corroborative evidence of P.W. 3 was not standing alone. We agree with the learned counsel for the State that there was also the evidence of P.W.I, the doctor that the victim was sexually penetrated.

The learned judge found other evidence as we also find when on page 5 of this judgment he stated:-

"In the instant case both P.W.2 Andru P.W.3 Waiga Muhammed testified that after the commission of the offence, the accused fled the scene. This is confirmed further by the evidence of P.W.4 Dragule Akasa that when he followed the accused to his home after learning that the he had fled, the brother of the accused informed him <u>that the accused had just come home running through the bush</u>. I find that the accused 's acts of fleeing the scene of crime and running to his home through the bush and immediately leaving his home is incompatible with his innocence and infact corroborates the evidence of P.W. 2 Ajisa Bako Andru and that of P.W.3 Waiga Muhammad that it was the accused who had sexual intercourse with the complainant. By the above evidence of the witness and the conduct of the accused, the prosecution has proved the participation of the accused in the commission of this offence beyond reasonable doubt."

We are unable to fault the trial judge that the above further testimonies provided corroborative evidence to the evidence of the victim and that of P.W.3 the only eye witness.

We are satisfied there was sufficient evidence before the trial court to sustain a conviction which we uphold.

The appeal is therefore dismissed for lack of merit.

Dated at **Gulu this 16th Day of June 2010.**

L.E.M. MUKASA KIKONYOGO
DEPUTY CHIEF JUSTICE

S.B.K. KAVUMA
JUSTICE OF APPEAL

A.S. NSHIMYE
JUSTICE OF APPEAL