THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT AMPALA

CRIMINAL APPEAL NO. 120 OF 2009

BUYINZA RONALD :::::::::::::::::::::::::::::::: APPELLANT

V E R S U S

UGANDA :: RESPONDENT

(Appeal from the Conviction and Sentence of His Lordship J.W. Kwesiga at the High Court of Uganda at Kampala dated 22nd-05-2009 Criminal Session Case No. 078 of 2008)

CORAM: HON. JUSTICE A.S. NSHIMYE, JA
HON. JUSTICE REMMY KASULE JA
HON. JUSTICE KENNETH KAKURU, JA

JUDGEMENT OF THE COURT

This is an appeal arising from the judgment of His Lordship Hon. Justice J.W. Kwesiga J, at the High Court of Uganda at Kampala dated 20th May 2009. The appeal is against conviction only, and is based on one ground which is set out in the memorandum of appeal as follows:

"The learned trial judge erred in law and in fact when he convicted the appellant basing on the contradictory evidence when the contradictions were grave".

At the hearing of this appeal learned Counsel Mr. Kafuko-Ntuyo appeared for the appellant on state brief. The appellant was present in court.

Ms. Jenniffer Amumpaire Senior State Attorney appeared for the respondent.

The brief facts giving raise to this appeal as far as we could ascertain from the court record were as follows:

On 7th January 2008 the appellant was indicted with the offence of aggravated defilement, contrary to Sections 129(3) and (4) of the Penal Code Act. The particulars of the offences as set out in the indictment are as follows:

"Buyinza Ronald on the 21st day of September, 2007 at Kikuubo Kanyanya in the Kampala District, had unlawful sexual intercourse with Namutebi Phiona a girl under the age of 14 years."

It was stated in the summary of facts that the prosecution would adduce evidence at the trial to prove the following:

1. *That on the 21st day of September 2007, the victim, a one NAMUTEBI PHIONA, then aged 9 years was sent to buy biscuits at the accused person's place.*

2. *That when the victim entered the accused person's house, the accused person closed the door and had sexual intercourse with her.*

3. *That when the victim went back home, she informed her elder brothers being FRED MAYOMBWE, and EMMA about what had just happened to her. The victim's parents were later informed about what had happened.*

4. *That the victim's father, a one WAMALA CHARLES reported a case of defilement at Kanyanya Police Post. The accused person was arrested and charged in court with defilement.*

5. *That medical examination of the victim on police form 3 revealed that she was 9 years old and that her hymen was ruptured.*

6. That the accused person in his charge and caution statement, confessed to have defiled the victim.

Indeed the prosecution called four witnesses to prove the said facts. The trial judge found that the prosecution had proved their case beyond reasonable doubt and convicted the appellant accordingly. He sentenced him to ten years imprisonment. Hence this appeal.

The duty of this court as a first appellate court is set out in Rule 30(1) (a) of the Rules of this court as follows:

"(1) on any appeal from the decision of the High Court acting in the exercise of the original jurisdiction, the court may;

(a) Reappraise the evidence and draw inferences of facts.."

This court therefore is required to treat the evidence as a whole and subject it to a fresh and exhausitive scrutiny ***(see Pandya versus R [1957]EA 336***.

This court as a first appellate court is in essence required to rehear the whole case on appeal by reconsidering all the materials which were before the trial court and make up its own mind. See ***Kifamunte Henry vs Uganda Supreme Court Criminal Appeal No. 10 of 1997 (unreported).***

The prosecution had the burden in this case to prove beyond reasonable doubt all the ingredients of the offence of aggravated defilement. They were clearly set out by the learned trial judge as follows:

(i) Whether the complainant or victim was aged below 14 years at the time of the offence.

(ii) Whether there was sexual intercourse with the victim.

(iii) Whether the accused person was the culprit who performed the sexual intercourse with the victim.

The first ingredient was admitted by the defence and is therefore not in issue.

The third ingredient would depend on the finding on the 2nd one.

The finding in the negative on the second ingredient would dispose of the case.

In this regard Mr. Kafuko-Ntuyo learned Counsel for the appellant submitted that there were grave inconsistencies and contradictions in the prosecution evidence and as a result sexual intercourse was not proved beyond reasonable doubt.

He submitted that the evidence of PW1, PW2 and PW3 was contradictory in material facts especially on dates. The evidence of PW1 the Doctor who examined the victim and prepared medical reports indicates he examined the victim on 26th September 2007, but the medical report is dated 8th October, 2007.

The victim states in her own testimony as PW2 that she was defiled in April 2007. She also states she was in P.4 at the time and this would put the date of the incident to 2008.

PW3 her mother testified that the victim was defiled in July 2007.

On the basis of the above, Counsel submitted that the case had not been proved beyond reasonable doubt.

Ms. Amumpaire learned Counsel for the respondent explained that the inconsistencies were minor and did not go to the material facts of the case. She agreed with the manner in which the learned trial judge explained away the said inconsistencies. She prayed for the dismissal of this appeal.

The indictment clearly states that the offence was committed by the appellant on 21st September 2007. However no evidence was produced by any witness to prove the exact date on which the offence was committed.

There is nothing in the testimony of PW1 the medical doctor about the date of the defilement. It is neither in his testimony in court nor in the medical report.

PW2 the victim in her sworn testimony said she was defiled in April 2007.

PW2 the victim's mother in cross examination stated that her daughter was defiled in July but could not recall the year. Her testimony was given in court on 4th May 2009

less than two years from the date indicated on the indictment. The witness being the mother of the victim would have been able to recall at least the year in which the incident occurred.

In cross-examination she stated that the victim PW2 was in primary 3 at the time the incident occurred and that at the time of her testimony in court she was in Primary 5. The victim stated in court that at the time of the incident she was in Primary 4.

PW4 the victim's father stated in cross-examination that the appellant was arrested on 25th September 2007, and that the incident had occurred two days earlier. This would put the date of the incident on 23rd September. This is at variance with the date stated in the indictment, that is 21st September 2007.

Again PW1 a Police surgeon in his testimony stated that he examined the victim on 28th September 2009! This could have been typing error. However Police Form 3 Exhibit P1 indicates that the request for medical examination report was made to PW1 on 26th September 2007.

The Police station Dairy No (SD) indicates the date the complaint was first made at police as 25th September 2007. No explanation is made as to why a victim of sexual assault whose father was at the time employed as a special police constable was not taken for medical examination immediately.

Be that it may, the medical report itself indicates two distinct dates. 26th September 2007, which date was sort of cancelled and another date 8th October 2007. A rubber stamp therein indicates also a date of 8th October 2007.

There is a clinical Laboratory report attached to the medical report. It is dated 29th September 2007. This report is indicated to be an annexture to the medical report made on 26th September 2007.

In his judgment the learned trial judge indicates at page 3 to page 5 of the judgment that PW1 examined the victim on 8th October 2007. The medical report does not say so. The medical report does not indicate the date when the victim is likely to have been assaulted. Dates and time in sexual offences are always important and in some cases such as this crucial.

The victim was of tender age. She ought to have been taken for medical examination immediately. The victim's mother PW3 states that the victim was smelling and there was a discharge coming from her vagina. This in our view could have been an indicator that the victim was sexually assaulted some days before the mother found out. However, in the victim's (PW2) own testimony it seems as if she had reported the matter to her mother immediately on the same day. The summary of facts also seems to suggest that the victim reported the incident immediately. If the incident had been reported immediately then it is unlikely that the victim already had a septic infection and was discharging pus as the trial judge held at page 4 of his judgment. This leaves the question open as to when the victim was defiled.

The learned trial judge correctly stated the position of the law on corroboration. But in this particular case, two ingredients required corroboration. Identification and sexual intercourse.

There is no question that victim knew the appellant very well and that the incident took place during broad day light.

With all due respect to the learned trial judge he did not properly evaluate evidence to corroborate sexual intercourse. It could be that he believed PW1's evidence, the Police surgeon.

A close look at the medical examination reveals that the medical report does not conclusively indicate that the victim was sexually assaulted.

PW1 simply answered 'YES' to the question:-

"are there any signs of any form, however slight of penetration?"

He did not bother to explain what those signs were. Indeed the answers to the questions that follow contradict or at least do not support his 'YES' answer to the above question.

The hymen he found had already been ruptured in fact he indicated that it had been ruptured ***"a long time".*** He found no injuries or any inflammations around the private parts of the victim. He found that there was nothing to show that force had been used on the victim.

He found no injuries, or bruises, on the victim's thighs, legs, elbows or back. He found no evidence of resistance.

He made no findings or observations as to venereal diseases (V.D).

It is interesting that he did not indicate that the victim had pus or that she had any smell, from her private parts as her mother testified.

The judge found as a fact that the victim had injuries and believed the testimony of the victim's mother PW3 that pus was coming from the victims private parts. When he stated:

> "***There were no other circumstances to which the injuries which became septic and contained pus could be attributed"***

Clearly the medical examination did not indicate any injuries; neither did it indicate that the victim had septic wounds which were smelly.

In our view there is a difference, and a big one at that, between pus coming out of a victim's private parts and observation through a microscope of pus cells as indicated in the laboratory report.

The Laboratory report found no bacterial growth. It is very unlikely that a septic wound would have no bacteria.

The trial judge did not discount the possibility of any other cause of pus cells such as common urinary tract infection. We also think it was an error for the judge to have admitted and relied upon a Laboratory report which was not prepared by PW1 the medical Doctor. That was not part of his report. He did not conduct the Laboratory test and did not prepare the report. In fact he did not even testify on it.

The Doctor, PW1 indicated in his examination in chief that examination for S.T.D. was negative. He said nothing about pus or pus cells.

We think the learned trial judge dismissed the defence without giving it due consideration. There seems to have existed a motive why the parents of PW2 would have wanted the appellant framed on false charges. The facts set on in the summary differ in a fundamental way from the testimony of the witnesses in court. These facts it is presumed are summarized from statements of witness recorded at the Police Station. Key witness such as the brothers of the victim were not called to testify.

The summary of facts indicate that the appellant admitted to having committed the offence in his charge

and caution statement but no such evidence was adduced at the trial.

The whole prosecution evidence is riddled with gaps and inconsistencies and we find it unsafe to uphold the conviction on such evidence.

We accordingly find that the testimony on sexual intercourse of PW2, the victim, was uncorroborated. Hence sexual intercourse was not proved beyond reasonable doubt in our view. The Doctor PW1 did not testify on the issue of penetration. That question was never put to him, by either the prosecution or the defence. This leaves doubt as to whether there was penetration in view of the inconclusive medical report. We are therefore not satisfied that penetration was proved.

Accordingly this appeal is allowed and the conviction is quashed and the sentence set aside. The appellant is to be released from custody forthwith unless he is being held on some other lawful charge.

Dated at Kampala this ...17th ..... day of December 2013.

.....
A.S. Nshimye
JUSTICE OF APPEAL COURT

.....
Remmy Kasule
JUSTICE OF APPEAL COURT

.....
Kenneth Kakuru
JUSTICE OF APPEAL COURT