THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0102 OF 2008

KIIZA SAMUEL.....
APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE RICHARD BUTEERA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGEMENT OF THE COURT

This is an appeal against conviction from the Judgment of the Hon. Mr. Justice A.C Owiny- Dollo in Criminal Session Case ACCT-04-CR-SC-047 of 2004 at Fort portal, dated 11th September, 2008.

The appellant was charged with the offence of defilement contrary to Section 123 (1) of the Penal Code Act. He prays for the conviction to be quashed and for the sentence to be set aside.

It was stated in the indictment that the appellant on 17th March 2003 at Kibasi village, Hakibaale Sub –county in Kabalore District,

had unlawful sexual intercourse with Nsungwa Rose, a girl under the age of 18 years.

The brief facts of the case as set out in the summary of facts as follows:-

"The victim, Nsungwa Rose aged 3 years in year 2003 was staying with her parents at Kibasi village, Kibasi Parish, Hakibaale Sub County in Kabarole District. The accused was a neighbour to the home of the victim. On the 17th day of March 2003 at around 5.00pm he came to the home of the victim and called her to his home. He led her to his house and to his bedroom. He put her on the bed, inserted his penis into her vagina and had sexual intercourse with her.

Meanwhile the mother of victim realised her absence from home. She asked other children where she was and they told her that she had gone with the accused. She got concerned and went to the home of the accused. She found both the accused and the victim not at home and the accused's house was locked. As she was trying to go back she heard the accused in the house telling the victim to go out. He opened the door and the victim came out. Her mother picked her and asked her what she was doing with the

accused in the house. The victim narrated her ordeal to her. She examined her and saw whitish fluids in her private parts. She called the neighbours who also examined her and explained to her what had happened.

The matter was reported to Local Council Chairman of the area. The accused was arrested and handed to Police. The victim was medically examined and the report thereof revealed a recently ruptured hymen and that she had inflammation / injuries around her private parts consistent with force having been used sexually. The accused was also medically examined and found to be normal. He was accordingly charged."

The learned trial Judge being satisfied with the evidence adduced by the prosecution convicted the appellant and sentenced him to 12 years imprisonment.

The appellant being dissatisfied with the conviction filed this appeal. The memorandum of appeal sets out only one ground of appeal as follows:-

"The learned trial Judge erred in law and fact when he failed to subject evidence to scrutiny, evaluation occasioning a miscarriage of Justice

thereby wrongly convicted appellant of offence of defilement."

The appellant prays for the conviction to be quashed and for the sentence to be set aside.

At the hearing of this appeal learned counsel **Mr. Henry Rukundo** appeared for the appellant on State brief while **Ms. Irene Nakimbugwe**, learned State Attorney, appeared for the respondent.

Mr. Rukundo sought and was granted leave to file an amended memorandum of appeal which we have set out above.

Mr. Rukundo submitted that the learned trial Judge had failed to properly evaluate the evidence and as such reached a wrong conclusion.

He submitted that the evidence of PW1 was inconclusive in so far as it related to the defilement of the victim. That when the victim was examined by the Doctor her hymen had already been ruptured. The victim had been examined on the same day of alleged defilement.

The Doctor also testified that the victim had been defiled many times before the incident of 17th March 2003 for which the appellant was convicted.

The Doctor's evidence in this regard, counsel submitted, was insufficient and inconclusive and should never have been relied

upon by the learned trial Judge to which the learned counsel then submitted that in absence of conclusive evidence from the Doctor who examined the victim, the other evidence upon which the learned trial Judge relied on was that of the victim herself.

Mr. Rukundo submitted that in cross examination the victim stated that she had been injured in her private parts and that blood was flowing from her.

Learned counsel submitted that the victim should never have been cross examined because she had not given evidence on oath. That it was an error for court to have allowed a witness who had not taken oath to be cross examined. He cited Section 40(1) of the Trial On Indictments Act (T.I A).

He submitted that the victim who testified 4 years after the incident could not be a reliable witness. At the trial the offence is said to have been committed on 17th March 2003, the witness was about 3 years old. She testified in August 2008 more than five years later.

Learned counsel also challenged the credibility of the evidence of the victim's mother which he described as a pack of lies as it was full of contradiction.

Mr. Rukundo also submitted that there was no evidence adduced in court that the appellant was at the time of the alleged offence a person of sound mind. That there is no medical report or other

evidence to suggest that he was subjected to a medical examination and was found to be of sound mind.

In reply Ms. Nakimbugwe for the respondent opposed the appeal and supported the findings of the trial Judge. She submitted that evidence of PW4, the victim herself, was proof that she had been defiled by the appellant. That at the time of her testimony in court she was 8 years old. That she knows the appellant well, that the appellant took her to his house and had sexual intercourse with her.

She submitted that a witness for the prosecution is subject to cross examination even if that witness makes an unsworn statement. It is only an accused person who is not subjected to cross examination when he or she makes an unsworn statement. She submitted that the practice has been to cross examine children of tender years who have given unsworn testimony in Court.

The learned State Attorney conceded that the medical evidence of PW4 found no inflammation on the complainant's private parts and therefore the victim's evidence is not corroborated. She also conceded that the medical report did not suggest that there was penetration.

However, she submitted that the victim's testimony was corroborated by that of her mother PW2. She supported the

findings of the trial Judge and asked this court to uphold them and to dismiss the appeal.

We have listened carefully to the submissions of both counsel and we have also read the record and the authorities cited to us.

As a first appellate court we have a duty to reappraise the evidence and to make our own inferences, on both issues of fact and law. This we are required to do under Rule 30 of the Rules of this Court. The duty of the first appellate court to reappraise the evidence has long been established. A number of authorities in this court and in the Supreme Court have laid down this duty.

Justice Joseph Mulenga JSC in the case of ***FR. Narsensio Begumisa and other versus Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002)*** (unreported) retaliated the above principle in the following words:-

> "***It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.***

See also ***Bogere Moses vs Uganda (Supreme Court Criminal Appeal No. 1997) and Kifamunte Henry vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997).***

It is trite law that in arriving at its decision a court is under duty to take into consideration the evidence as a whole on issues that have to be determined. A court must not selectively consider evidence favouring one side without any regard for that which is un favourable.

The only issue in contention in this appeal is whether the appellant had unlawful sexual intercourse with the victim on 17th March 2003, and more specifically whether there was penetration.

At the trial the prosecution called four witnesses:-

1. The medical officer who examined the witness (PW1)
2. The mother of the victim (PW2)
3. A Local Council leader Alice Mwesige (PW3)
4. The Victim Nsungwa Rosemary

The victim PW4 gave unsworn testimony. In court the victim testified as follow:-

> ***"I know Kiiza. He is there (pointing at accused in the dock). I knew him from his accused's home. He called me that he was going to buy me bread. He did not buy the bread. He took me inside the***

house and locked me there. He took me to the sitting room. He made me lie down and he lay on top of me. My mother looked for me and when I heard my mother quarrelling outside I started crying.

When he lay on top of me he had sex with me (sexual intercourse) and I cried because I heard Mummy looking for me. I got out of the house. Accused opened the door and told me to get out. He was arrested as there was another person outside. It is my mother who saved me. She carried me home and took me to hospital."

Apparently the victim was cross examined although she had not taken oath. We shall revert to the validity of the testimony given by the victim in cross examination later in this Judgment.

She stated in cross examination as follows:-

"He came home and picked me. Accused had sexual intercourse with me three times on different days. I did not tell my parents. When my mother saved me from Kiiza I did not show her where Kiiza had had sex with me. She did not check me"

In re-examination she stated as follows:-

"My mother examined me when she saved me from Kiiza. She found me with something in my private parts. I was injured and blood was coming out. No other person examined me"

The learned trial Judge correctly set out the law regarding evidence of a child of tender years at pages 2 and 3 of his Judgment. He set out the provisions of Section 40 (1) and (3) of the Trial On Indictments Act (T.I A).

Section 40 (3) stipulates as follows:-

"(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 is possessed of sufficient intelligence to justify reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this sub section 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 learned trial Judge emphasized and quoted rightly that no conviction can be based on the unsworn evidence of a child of tender years unless as a matter of law such evidence is corroborated by some other material evidence implicating the accused. He cited the case of ***Ndyayakwa and others vs Uganda (Court of Appeal Criminal Appeal No. 2 of 1977 (1978) HCB 181*** and ***Muhirwe Simon vs Uganda (Supreme Court Criminal Appeal No. 38 of 1995)***

The learned trial Judge went on to find that the evidence of PW2 Kabasinguzi corroborated the victim's evidence. He also found that evidence of PW3 corroborated with that of the victim.

The learned trial Judge's evaluation of evidence in respect to corroboration related mostly on identification of the victim who had put up a defence of *Alibi*. We agree entirely with the findings of the learned trial Judge that the victim's evidence on identification was corroborated and as such the *alibi* put up by the appellant could not stand.

However, the Judge with all due respect did not address the evidence in respect of penetration. He nonetheless put the position of the law correctly when he stated that:-

> "***To prove that defilement has taken place, the prosecution need only to prove that there was penetration of the girl's vagina and as it was held in <u>Adamu Mubiru versus Uganda Court of Appeal</u>***

(Criminal Appeal No. 4 of 1997) *(Unreported),* ***however slight the penetration maybe, it will suffice to sustain a conviction for the offence of defilement"***

The evidence of the victim in regard to penetration was wanting.

She simply stated as follows;-

> ***"When he lay on top of me he had sex with me (sexual intercourse) and I cried because I heard mother looking for me"***

This evidence in itself is not sufficient to prove penetration beyond reasonable doubt, even if it required no corroboration. Even if the victim had testified that indeed there had been penetration that evidence would still have required corroboration under Section 40 of the Trial On Indictments Act already set out above. PW1, a medical officer, in his testimony stated as follows:-

> ***"I found there was penetration and her hymen was ruptured more than a week before. This was a small infant who could not put up any resistance. There was no other significant finding. I concluded from my observation that the***

patient had been defiled many times. The vulva and vagina are pink. No signs of tenderness on touch. This was suggestive of habitual intercourse. I made the report on 18th March 2003"

In cross examination the same witness stated as follows:-

"I did not find inflammation on private part of the victim. This was not uncommon as there are many types of sexual intercourse, and also this shows that the vulva had been habitually used and had tried to accommodate whatever was being used on it. I examined her on 18th March. If sexual intercourse had taken place the previous day I would not be able to verify so"

Clearly the medical officer's evidence is inconclusive, to say the least, on the issue of penetration. The witness clearly stated that he had not established that the victim had had sexual penetration the day before he examined her. He however, established that she had been defiled a number of times before, the last time having taken place at least one week before she was examined by the witness on 18th March 2003.

The evidence of the medical officer also contradicts that of the victim where she stated in cross examination that she was injured and blood was coming out of her vagina.

PW2 the victim's mother's evidence in respect of penetration is as follows:-

> ***"When my child told me the accused had been lying on top of her, I examined her and found some fluids on her thighs. I observed the fluids well it was slippery fluid."***

Again the above evidence is not sufficient independent evidence to proof penetration.

On this particular issue of penetration, PW3 Alice Mwesige, a Local Council Official, stated as follows in her examination in - chief:-

> ***"The Chairman asked us as women to examine the child……. I went and examined the child. We found some watery fluids on her thighs, I did not examine her vagina because it was not my work. The fluids on her thighs was slippery like mucus. I thought the child had urinated, I just saw and did not examine."***

Again this evidence does not corroborate that of the victim that there had been penetration.

We agree with counsel for the appellant that the evidence of the victim on penetration was not corroborated. We find that

penetration in this particular case was not proved beyond reasonable doubt.

The burden of proof in criminal cases remain upon the prosecution throughout the case. We find that the burden was not sufficiently discharged regarding the question of penetration. Penetration is an essential element of the offence of defilement, at least it was at that time, before the penal code was amended in 2007.

That essential ingredient was not proved beyond reasonable doubt in this case.

However, we find that the evidence adduced is sufficient to prove beyond reasonable doubt that the appellant committed the offence of indecent assault contrary to Section 128(1) and (2) of the Penal Code Act. Indecent assault is a minor and cognate offence to the offence of defilement. We accordingly find the appellant guilty of the offence of indecent assault and we convict him accordingly under Section 87 of the Trial On Indictments Act.

There are other issues raised in this appeal that require resolution.

Learned counsel for the respondent raised the issue of whether or not a child of tender years or any other witness who gives

unsworn testimony under Section 40 of the Trial On Indictments Act can be crossed examined.

He submitted that the learned trial Judge erred when he permitted a child of tender years who had not taken oath to be cross examined and erred further when he relied on the evidence to convict the appellant.

This legal issue was considered at great length by the Supreme Court in the case of ***Sula versus Uganda [2001] 2 EA 556 at pages 560-563.***

The Supreme Court observed that:-

> ***"There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined. This is reflected in the Judgment of the Court Appeal where the Learned Justice stated (at 5) that:-***
>
> ***"We note on the record that the complainant made an unsworn statement but was later cross-examined by the defense counsel. We think that this was irregular because a witness who gives a statement not on oath is not subject to cross–examination as there is no oath binding him or her"***

The learned Justices did not refer to any authority in support of that view which, we think, with the greatest respect, is erroneous"

The Supreme Court then went on to explain the law at great length as it relates to cross-examination of a child of tender years who gives evidence not on oath or affirmation. The Court considered in detail sections 38 (now Section. 40), 41(now Section.43) 70(now Section 72) of the Trial On Indictments Decree 1971, now the Trial On Indictments Act Cap 23 and held that:-

"Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his /her evidence"

The Supreme Court then directed that the decision be circulated to all courts and to the Director of Public Prosecution. This decision has now been followed by the ***Kenya High Court in Criminal Appeal No. 104 of 2010 Michael Kamoru Guautai v Republic*** (unreported) ***and Criminal Appeal No. 111 of 2011 Julius Kiunga M' BIRITHIA V Republic*** (unreported). It is now

therefore settled law that a child of tender years who gives evidence not on oath is liable to be cross-examined in order to establish the truthfulness of that evidence. Mr. Rukundo's argument therefore has no merit.

Counsel for the respondent submitted that the appellant's mental status at the time of the commission of the alleged offence was not established and that there was no evidence that he was a person of sound mind.

However, there is evidence on record that the appellant was examined at Buhinga Hospital on 20th March 2003 and it was found that his mental condition was normal. There was no evidence adduced that the appellant was abnormal at the time of commission of the alleged offence. This court accepts that evidence as to the mental condition of the appellant at the time of commission of the offence.

As to the age of the appellant the court on its own, upon perusal of the record found that there was conflicting evidence as to the exact age of the appellant.

The medical Doctor who examined him on 20th March 2003 indicated on Police Form 24, that the appellant's approximate age was 18 years.

Physical examination by the same doctor indicated on part B of the said form that the apparent age of the accused was 18 years.

No other evidence was adduced by the prosecution to confirm the exact age of the appellant. "Approximately age" and "Apparent age" are simply estimates. The exact age of the appellant was therefore not ascertained. In his own testimony he stated that he was 23 years old. That was on 15th August 2008. If this testimony is taken to be the truth, as it was never challenged, in court, it would mean that he became 18 years of age in August 2003.

However, the offence for which he was indicated is said to have taken place on 17th March 2003. That would mean he was not yet 18 years old when he committed the offence.

This court on 17th April 2014 made an order in the presence of the appellant, but in the absence of his counsel and counsel for the state, though duly served, directing the medical superintendent Murchison Bay Hospital, Luzira, where the appellant is serving sentence, to examine the appellant and determine what his age was on the date he is alleged to have committed the offence on 17th March, 2003.

The court received the report on 26th May 2014 in the presence of the appellant and his counsel, but in the absence of the state, though duly served, the report stated that, the hospital did not have capacity to ascertain his age at the time the offence was committed. However, it was established that on 9th May 2014 when the appellant was examined he was above the age of 18 years.

This leaves the age of the appellant at the time of the commission of the alleged offence undetermined. The burden of proving beyond reasonable doubt that the appellant was 18 years at the time the offence was committed was upon the respondent. The prosecution failed to do so. There is doubt as to whether he was a minor or an adult at the time the offence was committed. This doubt should be resolved in favour of the appellant.

We accordingly find that it was not proved that the appellant had at the time of the alleged offence attained the age of 18 years.

He accordingly ought to have been tried as minor. Upon conviction he ought to have been referred to a Children's Court for sentencing. This did not happen and it occasioned a miscarriage of justice. See ***Birembo Sebastian and Nyonzima Mariko vs Uganda (Supreme Court Criminal Appeal No. 20 of 2001).*** In ***Ssendyose Joseph vs Uganda (Criminal Appeal No. 15 of 2010)*** this Court held that in circumstances such as this, where the appellant had served more than 3 years of custodial sentence, the maximum detention period allowed under Section 94 (1) (g) of the Children Act, Cap 59, he ought to be released forthwith, without the case being referred to the Children's Court for sentencing.

We accordingly follow the above authorities and set the appellant free inspite of the substituted conviction for indecent assault since he has already served more than 3 years of his sentence in prison.

The Judgment of the High Court is hereby set aside and substituted with this Judgment of this Court to the effect that for the reasons we have stated above the appellant is hereby set free unless he is being held on other charges.

Before taking leave of this case, this court points out to the trial courts below of the necessity, upon those courts in the course of the trial, to ascertain the age and mental status of every accused person at the time the alleged offence was committed. The necessity for this is because the age and or mental status of an accused at the time of the commission of the offence have a vital bearing on the whole trial, including the conviction and or sentencing process, amongst other considerations.

Dated at **Kampala** this18th day of JUNE 2014.

HON. MR. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

HON. MR. JUSTICE RICHARD BUTEERA
JUSTICE OF APPEAL

HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL