

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA (COA) AT KAMPALA**  
**CRIMINAL APPEAL NO.0147 OF 2008**

**SERUBEGA JOSEPH:.....APPELLANT**

**VS**

**UGANDA:.....RESPONDENT**

**CORAM: HON. MR. JUSTICE S.B.K KAVUMA, DCJ.**

**HON. MR. JUSTICE RUBBY AWERI OPIO, JA**

**HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA.**

**JUDGMENT OF THE COURT.**

This is an appeal against conviction and sentence by Hon. Justice Ralph Ochan delivered on 19<sup>th</sup> July 2008 in Criminal Session Case No.013 of 2008 High Court sitting at Masindi, in which the appellant was indicted for the offence of rape c/s 123 and 124 of the Penal Code Act.

The case for the prosecution was that at around 7.30p.m on 21/11/2002 at Kamuwanda village in Kibale district, the appellant met Kyakuhaire Oliver (the complainant) who was on her way home from the garden and offered to help her carry her luggage.

The victim rejected the offer and continued her journey home.

Upon the victim rejecting the Appellant's offer, the Appellant went ahead of her, grabbed her, threw her down and forcefully had sexual intercourse with her without her consent.

Amidst the scuffle between the Appellant and the victim, the victim managed to raise an alarm which was responded to by residents in the neighbourhood. However, the appellant escaped before he was caught, leaving behind his t-shirt and slippers.

The matter was reported to Kakumiro Police Station the following day and the appellant was arrested on 27<sup>th</sup> December 2002 at Bukumi. He was indicted and found guilty of the offence of rape and was convicted and sentenced to 15 years imprisonment. He now appeals to this Court against both the conviction and the sentence.

Through his advocates Rukundo Seth & Co. Advocates, the appellant filed a Memorandum of Appeal and a supplementary memorandum of appeal containing the following three grounds;

1. The Learned Trial Judge erred in law when he failed to evaluate contradictory and uncorroborated evidence of PW4, PW5 and other evidence on record to adequate scrutiny occasioning a miscarriage of justice thereby wrongly found the appellant guilty of the offence of rape.
2. The Learned Trial Judge erred in law when he failed to consider the fact that by 21<sup>st</sup> November 2002 the Appellant was a child.
3. The Learned Trial Judge erred in law when he sentenced the Appellant to a harsh excessive custodial sentence of 15 years imprisonment.

The Appellant prayed that this Court quashes the conviction and sets aside the sentence.

### **Representation**

At the hearing of the appeal, Mr. Rukundo Henry appeared for the Appellant on State Brief while Ms. Jackline Okui, Senior State Attorney, appeared for the Respondent.

In considering the arguments of the appeal, we are alive to our duty as a first appellate court of re-evaluating the evidence on record and making our own conclusion. This is provided for in **Rule 30 (1) (a) of the Rules of this Court** that:

**“On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—**

**(a) Re-appraise the evidence and draw inferences of fact.”**

The above rule has been fortified in the cases of **KIFAMUNTE HENRY V UGANDA SCCA NO. 10 of 1997, BANCO ARABE V BANK OF UGANDA SCCA NO.8 of 1998** which in effect state that the first appellate court has a duty to re-appraise or re-evaluate evidence by affidavit as well as evidence by oral

testimony, with the exception of the manner and demeanour of witnesses, where it must be guided by the impression made on the trial Judge.

## **Ground 1**

### **Appellant's arguments**

Counsel for the Appellant argued that the learned trial Judge erred in law when he failed to subject the contradictory evidence of PW4 (the victim) and PW5 to adequate scrutiny. The contradictions Counsel alluded to were specifically in the victim's testimony when she stated that the appellant, in an attempt to escape, removed his t-shirt and run away before he was seen by anyone. Later, that the victim contradicts her earlier testimony when she testified that that the people who responded to her alarm found the appellant on top of the victim but he struggled and escaped.

He also argued that the learned trial Judge erred in law when he convicted the appellant on the uncorroborated testimony of the victim hence occasioning a miscarriage of justice. Counsel supported his argument with the case of **MAINA v R [1970] E.A 370** for the proposition that in all sexual offences, corroboration was mandatory.

Counsel further argued that the non-production of the appellant's t- shirt and slippers that were left at the scene of crime as exhibits in court weakened the corroborative link to the appellant as the perpetrator of the rape. He therefore prayed that ground 1 succeeds.

### **Respondent's arguments**

The respondent submitted that the evidence before the trial judge was corroborated even though it did not have to be corroborated. That the evidence of PW4 (the victim) was corroborated by the evidence of PW5 who was in the company of the appellant when they first encountered the victim, and the evidence of PW3, the investigating officer. She further submitted that the position of the law concerning corroboration in sexual offences in the MAINA case (supra) had been overturned in **BASOGA PATRICK V UGANDA CRIMINAL APPEAL NO.42 of 2002**, where Court held that the requirement of corroboration of evidence in sexual offences is discriminatory against women and is therefore unconstitutional.

Counsel also argued that there was no grave error or mistake occasioned by the fact that the exhibits of the t-shirt and the slippers alleged to belong to the appellant and found at the scene of crime were not produced in Court. She submitted that the reason for non-production of the exhibits was that they could not be traced and retrieved from the store which explanation was given in Court during trial.

### **Resolution of Court**

In order for the offence of rape to be proved, the following ingredients have to be proved beyond reasonable doubt.

- I. Unlawful carnal knowledge of a girl or woman
- ii. Lack of consent to sexual intercourse.
- iii. Accused committed the offence.

Ingredients 1 and 2 above were not contested at the hearing of the appeal. However, what was contested was the trial court's finding that it was the appellant who committed the offence. Mr. Rukundo, counsel for the appellant argued that the evidence of PW4 and PW5 which was contradictory and full of inconsistencies did not point to the appellant as the perpetrator of the offence. Counsel contended that the contradiction impacted on the identity of the appellant as the person who committed the offence since none of the people who responded to the alarm raised by the victim saw the appellant. In essence, counsel is raising an issue regarding the need for proper identification of an accused at the scene of the crime.

In considering whether the appellant was indeed the perpetrator of the rape, regard must be had to issues surrounding his identification at the scene of crime. We are guided by the authority of **ABDALLAH NABULERE V UGANDA [1979] HCB 76**, which stipulated the guidelines for

positive identification in unfavourable circumstances of identification to be:

1. Period for which the accused has previously been known by the victim.
2. Source of light for identification.
3. Period for which the accused was under observation by the victim.
4. Distance between victim and the accused.

On the issue of identification of the appellant as the perpetrator of the rape, we take note of the fact that it is on record that just before the rape, the victim (PW4), interacted with the appellant when he offered to help her with her luggage. The victim's testimony was further supported by that of PW5 who was in the company of the victim when he encountered the appellant. Furthermore, a sexual act by its very nature occurs when the complainant and the accused are in close proximity. We therefore find that the circumstances favoured proper identification of the appellant as the perpetrator of the rape. We further find that although the offence was committed in the dark, the appellant was properly identified as the person who raped the victim (PW4).

In regard to the non-production of the exhibits in Court, we find that since the appellant was properly identified by PW4 and PW5, and the fact that the non-production of the exhibits was explained during the trial and that the explanation was accepted, no miscarriage of justice was occasioned by the non-production of the same.

In regard to the issue of corroboration, we reject the appellant's submission that corroboration is mandatory in sexual offences.

*First, we must point out that the law on the need for corroboration of a complainant's testimony in sexual offences has long changed. The old position in MAINA V R [1970] E.A which was that: 'it is really dangerous to convict on the evidence of the woman or girl alone because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute'<sup>9</sup> has long been departed from in our jurisdiction.*

The desirability of the rule on corroboration was first questioned in **UGANDA V PETER MATOVU CRIMINAL SESSION CASE NO.146/2001** where Justice E.S. Lugayizi boldly condemned the rule as unconstitutional. His Lordship stated that:

*"Court has not come across any empirical data or basis for the belief that women are greater liars than men or, for that matter that they are much more likely to lie than to say the truth in matters concerning sexual allegations,*

*Court simply wishes to say that it will not apply the above rule because it discriminates against women and is therefore in conflict with Uganda's international obligations and the constitution. ”*

**Later, this Court in BASOGA PATRICK V UGANDA CRIMINAL APPEAL NO.42 of 2002, emphatically held that:**

*“The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls... we think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis. If any basis existed for treating female witnesses differently in sexual cases, such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences.*

*In the result, we have no hesitation in holding that decisions which hold that corroboration is essential in sexual offences before a conviction are no good law as they conflict with the Constitution. ”*

Although corroboration is not a requirement in sexual offences, we are of the view that there was overwhelming evidence of corroboration in the instant case. First of all, medical evidence was consistent with the victim’s evidence that in attempting to prevent the victim from raising alarm, the accused held the throat of the victim and in the process scratched and injured the victim’s neck. Secondly, the alarm which the victim raised was able to attract Kaloli Mugerwa (PW5) and Nankumbi to the scene. Lastly, the evidence of Detective Officer David Bawulire (PW3) was to the effect that there was evidence of a struggle at the crime scene in that the grass at the scene had been trampled on.

Having resolved the question of identification and the legal issue on corroboration, we hold that ground 1 fails.

## **Ground 2**

### **Appellant's arguments**

Counsel for the appellant argued that at the date of the commission of the offence viz 21<sup>st</sup> November 2002, the Appellant was 17years of age and should have been treated as a child offender. He supported his submission with the evidence on the court record indicating that in his testimony at trial, the appellant testified that he was 17years in 2002. The appellant's counsel further noted that the medical report stated that the "apparent" age of the appellant was 18 years at the time of the commission of the crime. That basing on the above, the trial court should have taken the appellant to be a minor and ought to have tried him within a period of 3 months from the date of the commission of the offence as required by the Children's Act. He supported his submission with the authority of **KIIZA SAMUEL V UGANDA: CRIMINAL APPEAL No. 102 of 2008 (CA)** where the Court of Appeal set aside the judgment of the High Court and ordered the immediate release of the appellant who was a child offender but tried as an adult.

### **Respondent's arguments**

It was the Respondent's argument that the appellant did not adequately prove that he was a child. Police Form 24 showed the apparent age of the appellant to be 18years in 2002. That since the appellant did not contest this age from the time that the charge sheet was read to him and indicted, he could not raise the issue on appeal. Counsel further argued that by the appellant's own testimony on record, he stated that he was 21 years as on 23<sup>rd</sup> January 2008 (during trial) and hence he could not have been 17 years at the time of the commission of the offence in 2002. That the appellant's age would have been 15 years in 2002. Counsel argued that this lack of accuracy goes to show the untruthfulness of the appellant and his assertion that he was a child should not be believed. Counsel for the respondent further submitted that since no corroborating evidence like a birth certificate was produced in Court, to prove the appellant's age, his testimony that he was a child should not be believed.

### **Resolution by Court**

**Section 2 of the Children Act** defines a child as a person below the age of 18years.

**Section 104 of the Children Act provides that:**

**"In any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children."**

**In addition, Section 107 of the Children Act provides:**

**"(1) Where a person, whether charged with an offence or not, is brought before any**

**court otherwise than for the purpose of giving evidence and it appears to the court that he or she is under eighteen years of age, the court SHALL make an inquiry as to the age of that person. (Emphasis ours)**

**(2) In making the inquiry, the court shall take any evidence, including medical evidence, which it may require.”**

In the instant appeal, Police Form 24, containing the results of the medical officer's findings, indicates that the appellant was of the "apparent age of 18". This evidence was an agreed fact and entered on the court record. When the appellant testified that he was 17 years at the time of the commission of the offence, the prosecution did not challenge this assertion.

In line with **Sections 104 and 107 of the Children Act**, the trial court should have gone ahead to ascertain the age the accused person. The necessity for this is because the age of an accused at the time of the commission of the offence has a vital bearing on the whole trial, including the conviction and/or sentencing process(



We therefore, fault the learned trial judge for not resolving this issue which has implication on a court's sentencing jurisdiction.

This Court held in the case of **FRANCIS OMURONI V UGANDA, CRIMINAL APPEAL NO.2 of 2002**, that apart from medical evidence, age may also be proved by a birth certificate, the testimony of the victim's parents or guardian, by observation of the court and by common sense.

In the recent decision of **KIIZA SAMUEL v UGANDA CRIMINAL APPEAL NO.0102 OF 2008 (CA)**, this Court held: *the words "apparent age" are simply estimates*. It went on to hold further that:

*\*The burden of proving beyond reasonable doubt that the appellant was 18years 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 a 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. "*

We have no reason to depart from this decision and thus hold that in the instant appeal it was not proved that the appellant had, at the time of the alleged offence, attained the age of 18 years. Consequently, the trial court should have, on conviction, referred the file to the Family and Children Court for sentencing.

Having resolved the issue of age in favour of the appellant, we take note that under **Section 94 (7) of the Children Act** the maximum detention period that the Family and Children Court can order in the case of a child above sixteen years who is convicted of an offence punishable by death is three years.

In the appeal before us, it is on record that at the time of trial, the appellant had been on remand for nearly 6 years. At the time of the hearing of this appeal, he had served 6 years and 8 months of the 15 year sentence.

**In the case of SSENDYOSE JOSEPH V 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) [now Section 94(7)] of the Children Act, he ought to be released forthwith, without the case being referred to the Children’s Court for sentencing*

We see no reason for departing from this decision and find that ground 2 succeeds.

### **Ground 3**

Having resolved ground 2 in favour of the appellant, we need not deal with ground 3.

### **Order of Court**

We hereby order that the appellant be set free forthwith.

Dated at Kampala this 16<sup>th</sup> day of October 2015

**HON. JUSTICE S.B.K KAVUMA, DCJ.**

**HON.JUSTICE RUBBY AWERI OPIO, JA**

**HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA.**

