

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**AT ARUA**

**CRIMINAL APPEAL NO. 204 OF 2012**

*(Appeal against the Judgment of His Lordship Nyanzi Yasin, J. delivered on 28.06.2012 in Original High Court at Adjumani Criminal Case No. 0067 of 2010)*

**REV. FATHER SANTOS WAPOKRA :::::::::::::::::::: APPELLANT**

**VERSUS**

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

**Coram: Hon. Mr. Justice Remmy Kasule, JA Hon. Lady Justice  
Hellen Obura, JA Hon. Mr. Justice Byabakama  
Mugenyi Simon, JA**

**JUDGMENT OF THE COURT**

The appellant appeals against a conviction for aggravated defilement contrary to Section 129(3) and 4(b) of the Penal Code - Act. He was sentenced to 10 years imprisonment.

At trial the appellant was represented by learned Counsel Bandaru Daisy and the State was represented by State Attorney Harriet Adubango.

The appeal is based on 5 grounds contained in a supplementary memorandum of appeal dated 27.04.2016. These are:

***“1. The learned trial Judge erred in law and fact when he***

***failed to consider material defence evidence in evaluating the evidence thus arriving at a wrong decision to convict the appellant.***

***2. The learned trial Judge erred in law and fact when he relied on the evidence of the prosecution to convict the appellant in isolation of material evidence of the defence.***

***3. The learned trial Judge erred in law and fact to convict the appellant in the absence of evidence to prove all the essential ingredients of the offence.***

***4. The learned trial Judge erred in law and fact when he relied on matters that were not canvassed in evidence.***

***5. The learned trial Judge erred in law and fact when he convicted the appellant on different allegations not contained in the particulars of the indictment***

In the course of submissions by Counsel for appellant and Counsel for the respondent, it appeared from the Court record of proceedings that the appellant was convicted and sentenced on the basis of an amended indictment which was never properly placed before Court and to which the appellant never pleaded. This aspect was not part of the grounds of appeal.

Nevertheless we have decided to deal with it first as we feel it is fundamental to the whole appeal.

The particulars of the offence in the original charge sheet were that between March and November, 2010 at Pakwach Catholic Mission, Nebbi District, the appellant had unlawful sexual intercourse with one Onen Jackline, a girl below the age of 18 years.

On 21.12.2011 the appellant pleaded not guilty to the above charge.

However, on the same day, before Pw1 started to testify, the following happened according to the Court record:

***“M/s Adubango***

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*We need to amend the indictment in particulars of offence in regard to the period within the offence is said to have been committed between November, 2009 to March, 2010 instead of*

*between March and November, 2010.*

***Ms. Bandaru Daisy***

*I have no objection.*

*Court: Indictment is accordingly amended”*

The hearing of the case then proceeded with the prosecution adducing evidence of 7 witnesses and the defendant testifying on oath and not calling any witness. It was on the basis of that evidence that a conviction of the appellant was based.

The learned trial Judge however at the beginning of his judgment stated:

***“According to the particulars of the offence, the State alleged that between the months of November, 2009, December 2009 and March 2010 at Pakwach Catholic Mission in the Nebbi District, the said accused person had unlawful sexual intercourse with Onen Jackline who at the time was under 18 years of age while the accused person was infected with Human Immune Deficiency Virus (HIV)”.***

We note from the Court record that it was only on 21.12.2011 when there was an application to amend the indictment and the same was amended changing the dates when the offence is stated to have been committed.

The Court record does not show that thereafter, at any stage of the proceedings, the indictment was amended to the effect that at the time of the offence the appellant was infected with Human Immune Deficiency Virus (HIV).

A perusal of the same Court record does not also show that after the amendment of the indictment had been allowed, the appellant ever pleaded to the amended indictment.

Counsel for the appellant submitted that the trial was a nullity by reason of the omission by the trial Judge to ask the appellant to plead to the amended indictment. Counsel did not indicate what order Court should make, whether to order a retrial or to discharge the appellant.

For the respondent, the learned Principal State Attorney, while conceding that the appellant did not plead to the indictment, submitted that this did not cause any miscarriage of justice to the appellant. He prayed us to maintain the conviction and sentence of the appellant,

and the appeal to be dismissed.

Section 51(l)(a) of the Trial on Indictments Act requires in mandatory terms that:-

“Where an Indictment is altered under Section 50\_

(a) the Court shall thereupon call upon the accused person to plead to the altered Indictment;”

The above is a Penal Section and as such it ought to be strictly interpreted.

The Court record does not show that the appellant was called upon to plead afresh to the amended indictment.

Plea taking is a fundamental Principle of a fair trial.

Article 28(3)(b) of the Constitution provides:

"Every person who is charged with a Criminal Offence shall

(b) be informed immediately, in a language that the person understands, of the nature of the offence”;

The charge to which an accused pleads serves the purpose of notice

and/or intimation to that accused of the nature of the accusation

the accused is called upon to meet in the trial. It is the foundation of the accusation. Any evidence adduced at trial must be in respect of only those matters stated in the charge, and not others. Thus any material alteration in the charge that introduces a new offence or provision of law calls for the accused to plead afresh to that charge. We are persuaded in this regard by the High Court case of **Zachary Kataryeba & 3 Others vs Uganda [1997] KALR 31** to the effect

that where an accused does not plead to a charge then the trial is a nullity.

In the case before us, not only did the appellant not plead to the amended charge, but it appears from the Court record that evidence was given and Judgment considered upon matters that were not at all part of the indictment, be it the original or the amended one.

In the original indictment the particulars of the offence were that the appellant between March and November, 2010 had unlawful sexual intercourse with Onen Jackline, a girl below the age of 18 years.

The amendment of the indictment allowed by Court on 21.12.2011 was as to the dates when the offence is stated to have happened, that is to say:

“between March and November, 2010” was substituted with "November, 2009 and March, 2010”.

There was no amendment of the indictment that the appellant committed the offence while infected with HIV Virus”. Such an amendment was never prayed for by Counsel for the prosecution, and was never addressed by Counsel for the appellant, and was never considered by Court when making a decision to allow the amendment. The appellant never pleaded to that component of the amendment sought.

While it is true, that on the Court record there is an indictment which is undated signed by one Obale Innocent, Resident State Attorney, Nebbi, with hand written alterations as to the Sections of the law, dates of the offence and that the appellant committed the offence "while infected with HIV VIRUS”, this altered charge was never made a part of the record. The appellant never pleaded to it, particularly with regard to his HIV status.

The above notwithstanding, the trial Judge allowed evidence of Pw1 and Pw6 to be adduced as to the HIV status of the appellant and Exhibits PI and P2 were tendered in evidence in this regard.

In his testimony on oath, the appellant denied ever having sex with the victim, Pw3. He did not say anything about his H.I.V status in the course of his testimony to court.

He was not cross-examined about the same by the prosecution. Nothing was said to him by any one, whether the trial Judge or any of the assessors, or any Counsel, about his HIV status, in the course of his testimony to Court.

However, in summing up to the assessors and in his Judgment, the trial Judge dealt at length with the issue of the HIV status of the appellant. He called upon the assessors to consider the evidence of Pw1 and Pw6 as well as exhibits PI and P2, and then advise Court if the prosecution had proved beyond reasonable doubt whether the appellant was HIV positive at the time of the commission of the offence. The Honourable assessor who continued with the trial up to the end advised the trial Judge that the prosecution had proved beyond reasonable doubt that the appellant was HIV positive when he committed the offence.

In his Judgment, the learned trial Judge considered the evidence of Pw1 and Pw6, exhibits PI and P2 and accepting the advice of the assessor proceeded to hold:

***“I would proceed to conclude the state proved beyond reasonable doubt that the HIV serology of the accused was reactive meaning that he carried the Human Immune Deficiency Virus at the time he committed the offence.”***

The learned trial Judge then convicted the appellant of the charge of aggravated defilement under Section 129(3) and 4(b) of the Penal Code Act.

Having carefully reviewed the trial Court proceedings, the evidence that was adduced by the prosecution and the defence and how the same was handled by the trial Court, we come to the conclusion that the appellant was convicted on an indictment to which he never pleaded. We accordingly find his trial a nullity. We set aside the proceedings of his trial and consequently his conviction and sentence as being wrong in law.

It is necessary to decide whether this Court orders a retrial or a discharge of the appellant.

The overriding purpose of a retrial is to ensure that the cause of justice is done in a case before Court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering a retrial. The Court that has tried

a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and inconvenience by reason of the retrial.

An order for a retrial is as a result of the judicious exercise of the Court's discretion. This discretion must be exercised with great care and not randomly, but upon principles that have been developed over time by the Courts: See: **FATEHALI MANJI v R [1966] EA 343.**

One of the considerations for ordering a retrial is when the original trial was illegal or defective; See: **AHMED ALI DHARAMSI SUMAR v R [1964] EA 481.**

The Court must however first investigate whether the irregularity is reason enough to warrant an order of a retrial: **RATILAL SHAHUR [1958] EA 3.**

However, before ordering a retrial, the Court handling the case must address itself to the rule of the law that:

*“a man shall not be twice vexed for one and the same cause: Nemo bis vexari debet pro eadem causa”.*

A re-trial must not be used by the prosecution as an opportunity to lead evidence that it had not led at the original trial and to take a stand different from that it took at the original trial. The prosecution must not fill up gaps in its evidence that it originally produced at the first trial: See: **MUYIMBO v R 1969 EA 433.**

A retrial is not to be ordered merely because of insufficiency of evidence or where it will obviously result into an injustice, that is where it will deprive the accused/appellant of the chance of an acquittal: See: **M'KANAKE v R [1973] EA 67.**

Where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, a retrial will be ordered: **TAMANO v R : [1969] EA 126.**

Other considerations are; the strength of the prosecution case, the seriousness or otherwise of the offence, whether the original trial was complex and prolonged, the expense of the new trial to the



accused, the fact that any criminal trial is an ordeal for the accused, who should not suffer a second trial, unless the interests of justice so require and the length of time between the commission of the offence and the new trial, and whether the evidence will be available at the new trial. Accordingly each case depends on its particular facts and circumstances.

In the case before us, the offence of aggravated defilement is a grave one given the age of the alleged victim to have been 15 years and that of the appellant being about 43 years at the time the offence is alleged to have been committed. The alleged relationship between the victim and appellant is one where the appellant was a guardian, spiritual and temporal to the victim.

We also find that both the prosecution and defence cases are not flimsy ones, if a proper trial of the case, is carried out.

As to whether the appellant shall be subjected to a double jeopardy if a re-trial is ordered, we appreciate that any criminal trial is an ordeal for an accused in terms of resources expended, the discomfort of having a criminal charge hanging over the accused and being subjected to Court attendance and, where one is not on bail, being on remand. On the other hand, where one is alleged to have committed a serious crime against society, the interests of justice demand that such a one be subjected to a criminal trial, where his/her innocence or guilt may be established. This is, depending on the facts of the particular case, even where it involves a re-trial of the case.

In the case before us, given the grave nature of the offence, and those involved in it as victim and as accused, we are persuaded to hold that the interests of justice will best be served by a retrial being ordered.

It is true the offence is alleged to have been committed almost six

(6) years ago and the appellant spent two (2) years on remand and has now served 4 years of the ten (10) year sentence to which he was imprisoned.

However, it is our considered view that the above considerations are

not sufficient to prevent us from making an order for a retrial, where the interests of justice so demand. Those are considerations that the trial Court will have to take into account in its decision following the re-trial.

As to expense, this is a case where the appellant can be availed defence Counsel by the State. So the appellant need not incur legal expenses of engaging private defence Counsel in case a re-trial is ordered, unless he chooses to do so on his own.

Having carefully considered the factors for and those against ordering a retrial, we have come to the conclusion that the interests of justice will best be served by having a retrial of this case. Accordingly this appeal is allowed and we order as follows:

1. That the conviction and sentence to ten (10) years imprisonment of the appellant for aggravated defilement be and is hereby set aside by reason that the trial before the High

Court of Uganda at Adjuman Criminal Case No. 0067 of 2010 was a nullity.

2. A retrial of the said case is hereby ordered.
3. The retrial shall be on the basis of an indictment by the State against the appellant containing only the components of the offence in respect of which the first trial was held, but which indictment was not pleaded to by the appellant, namely:

**“Statement of the Offence**

***Aggravated defilement c/s 129(3)(4)(b) of the Penal Code Act.***

**Particulars of Offence**

***Rev. Fr. Santos Wapokra between November, 2009 and March, 2010 at Pakwach Catholic Mission in the Nebbi District had unlawful sexual intercourse with one Onen Jackline, a girl below the age of 18 years, while infected with HIV Virus.”***

4. In order to avoid any further delay, the Director of Public Prosecutions is to indicate to Court that he is ready to have the case heard within a period of three (3) calendar months, as from the date of this Judgment, and if the Director of Public Prosecutions does not so indicate, then the High Court sitting at Arua or Adjuman shall discharge the appellant of the offence and release him forthwith, if he is still in Court custody.

5. The High Court sitting at Arua/Adjumani is hereby ordered to carry out the retrial of the appellant at the earliest convenient Criminal Session available, but at any rate not more than three (3) months from the date of this Judgment, otherwise the appellant shall be discharged.
6. The appellant shall continue to be kept in custody, subject to his right to apply for bail from the High Court at Arua/Adjumani, and the said Court in the exercise of its discretion may or may not release him on bail.

We so order.

Dated at Arua this 7<sup>th</sup> day of June 2016.

Hon. Justice Remmy Kasule  
JUSTICE OF APPEAL

Hon Lady Justice Hellen Obura  
JUSTICE OF APPEAL

Hon. Justice Simon Byabakama Mugenyi  
JUSTICE OF APPEAL

