THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA) SITTING AT MASAKA

CRIMINAL APPEAL NUMBER 0051 OF 2012

SSENYOMO CHARLES ::::::::::::::::::::::::::::APPELLANT

VS.

UGANDA :: RESPONDENT

(Arising from the judgment of Hon. Justice Singh Choudry in Masaka Criminal Session Case No. 069 of 2010)

CORAM:

HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA

HON. LADY. JUSTICE HELLEN OBURA, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF THE COURT

The appellant was indicted, tried and convicted by the High Court of the offence of Aggravated Defilement contrary to section 129(3) (4) (a) of the Penal Code Act and sentenced to life imprisonment. He was dissatisfied with both conviction and sentence and appealed to this court.

Background

The brief facts are that on 27th January 2008, the appellant confronted the victim, Najjuko Joan, resident of Kabale, Bugonzi and flashed a torch at her and had sexual intercourse with her in a nearby banana plantation after undressing her trousers and

nickers. The victim informed her grandmother and consequently, the appellant was arrested.

The appellant filed this appeal against the decision of the High Court on 3 grounds but ground 1 was abandoned at the hearing of the appeal.

The remaining grounds of appeal are that;

1. The Learned trial Judge erred in law and fact when he relied on PW1's unsworn evidence which was not corroborated to prove the participation of the appellant.
2. The Learned trial Judge erred in law and fact when he sentenced the appellant to life imprisonment.

Representation

At the hearing of the appeal, Mr. Tusingwire Andrew appeared for the appellant while Mr. Ndamurani David Atenyi Senior Assistant DPP appeared for the respondent.

Submissions of the appellant

Counsel for the appellant submitted that PW1 gave unsworn evidence and that the principle to be followed by a trial court is under Section 40(3) of the Trial on Indictments Act which provides that courts should not convict an accused person on unsworn evidence which is not corroborated. In this matter, PW1 a child of tender years gave an unsworn evidence and it is their contention that this evidence was not corroborated at all. The victim in her evidence states that she left home in the night at around 7pm going to her uncle's place and that is when the appellant grabbed her and committed a sexual act on her. That this evidence contradicts the evidence of the grandmother, PW2 at page 10 who alleges that she sent the victim to the shops at 5pm. There is a contradiction between the statements in relation to time.

That in addition, PW5 who testified in court did not receive this evidence from the victim, he only got it from another party who were the children, Jackie and Jepha, that the victim had talked about it.

That therefore, there was lack of the chain of disseminating this information to the 3rd party.

On ground 2, counsel submitted that the sentence that was imposed on the appellant is manifestly excessive and harsh in the circumstances of the case. That court ought to have considered the mitigating factors at that point before passing such a harsh and excessive sentence. He cited the case of **Abasa Johnson and another Vs Uganda, C.O.A Criminal Appeal No. 33 of 2010** in which court used its discretion to impose an appropriate and lesser sentence of 15 years imprisonment. He prayed that this court allows the appeal and quashes the conviction and sentence of the appellant.

Submissions of the respondent

In reply, counsel for the respondent submitted that the trial judge properly directed himself in holding that there was sufficient credible corroboration of the victim's story that she had been defiled on the material day by the present appellant. That the testimony of a victim of a sexual offense told to a 3rd party immediately after the commission of an alleged crime is admissible in law. Counsel cited the case of **Mayombwe Patrick vs. Uganda COA Criminal Appeal Number 17 of 2002** in which it was held that

> *"It is also settled that evidence of a complaint by the victim of a sexual offense is admissible when the complaint is made to a 3rd person, any information as to the identity of the assailant to a 3rd person is relevant and admissible evidence".*

In addition, he cited **Oyek Charles vs. Uganda Criminal Appeal Number 126 of 1999** in which the justices were of the opinion that medical evidence is certainly the best evidence to prove sexual intercourse but doesn't mean that it should be the only evidence, other cogent evidence could also be sufficient.

On the sentence, counsel relied on the case of **Kiwalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001 (S.C)** which initiated the principle that an appellate court should not interfere with a

sentence imposed by a trial judge unless that sentence is either illegal or has overlooked some important principle of the law. In this case, the maximum sentence is death and having got a sentence of life imprisonment, and considering the circumstances of the case and age of the victim, it was an appropriate sentence that should be upheld by this court.

The duty of a first appellate court

A first appellate court must review/rehear the evidence and consider all the material facts before the trial Court and come to its own conclusion regarding those facts. See ***Kifamunte Henry v. Uganda SC Cr App No. 10 of 1997; Pandya v R [1957] EA 336; Bogere Moses v. Uganda SC Cr App No. 1 of 1997***. See also ***Rule 30*** of the ***Judicature (Court of Appeal Rules) Directions*** SI 13-10 under which Court has power to re-appraise the evidence and draw inferences of fact.

We have been guided by the above principles in resolving this appeal. We have also taken into consideration all the submissions made by the parties and the authorities cited.

The first ground of appeal as argued by counsel involved two pertinent issues for this court to address. The first being the unsworn statement of the victim and the requirement of corroboration.

Section 40 (3) of the **Trial on Indictments Act** 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."

PW1 gave an unsworn statement. She stated that;

"...I know Senyomo Charles. He lives at Kabale Bugonzi, about 100 metres from my grandmother's home. I used to see Ssenyomo Charles at his home. (Identifies Ssenyomo in court) it was at night, I was passing through the accused's home. It was dark. I did not know his name but the children told me his name. He took me in a bush. He removed my knickers. He lay on me. After that I saw blood in my private parts. I threw away my knickers. He promised to give me sweets. I told my friends. I told Jaffer. I am older than Jaffer. I also told Getulida Nassimbwa. My grandmother got herbs and treated me...."

That evidence was corroborated with that of her grandmother, PW2, Getulida Nassimbwa, who first got the information from PW5 which was confirmed by the victim when she asked her. All the other prosecution witnesses got the information from the victim. The trial Judge rightly found that the evidence of PW1 was truthful and consistent and also considered the fact that PW1 had no difficulty identifying the appellant. The trial Judge also held that the subsequent conduct of the accused offering sweets after the commission of the offence was a corroboration of his being at the scene of the crime.

In this particular case, the victim, PW1, was a child of tender age being 6 years at the time the offence was committed. Counsel for the appellant argues the victim did not report what had happened to her immediately. That all the prosecution witnesses who testified got this information on a secondary basis and it could therefore not amount to corroboration. Counsel further argued that the unsworn evidence of the victim was not sufficiently corroborated so as to warrant a finding that the appellant committed the offence he was convicted of.

We are aware that initially courts were as a matter of practice required to warn themselves of "the danger" of acting on the uncorroborated evidence of a complainant in a sexual assault case. If no such warning was given, the conviction would normally be set aside unless the appellate court was satisfied that there had been no failure of justice. It was the cautionary rule in sexual offences as was stated in **Chila and Another vs. R [1967] EA 722.**

We must state that a conviction can be based on the testimony of the victim of an offence even when he/she is a single witness since the Evidence Act does not require any particular number of witnesses to prove any fact. Section 133 of the Evidence Act states that;

"133. Number of witnesses.

Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact."

The Supreme Court decision in **Ntambala Fred Vs Uganda Criminal Appeal No. 34 of 2015** enunciated the issue of corroboration in sexual offences. It was held by Justice Lilian Tibatemwa Ekirikubinza, JSC that *"It is a statistical fact that the majority of victims of sexual assaults are women and therefore the effect of applying the cautionary rule on corroboration in sexual offences affects far more women than it does men. It therefore follows that the cautionary rule violates Uganda's Constitutional provisions on equality before the law."*

In **Mayombwe Patrick vs Uganda Criminal Appeal No 17 of 2002**, this court held while referring to the Kenyan case of Mukungu vs Republic [2003] 2 EA that;

> "The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is *agaithem*

qua women or girls... We think that the time has come to correct what we believe is a position which the courts have hitherto taken without 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 hestation 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**).

It is true that in sexual offences, it is usually the victim that is the only identifying witness as is the case in the matter before us. All the other prosecution witnesses derive their testimonies from the victim. Like we already stated above, there is no legal requirement on the number of witnesses required to prove a fact. We therefore find no reason to fault the learned trial Judge for convicting the appellant on unsworn evidence of a single identifying witness. In the instant case, there was other material evidence pointing to the appellant as the perpetrator of the offence.

On the issue of sentencing, the appellant argues that the life imprisonment sentence given by the learned trial Judge was harsh and excessive. It is trite law that an appellate court should not interfere with a sentence imposed by a trial court where the trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignored to consider an important

matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle See: ***Kyewalabye Bernard v. Uganda Supreme Court Criminal Appeal No. 143 of 2001***.

It is established law and practice that punishment for an offence is meant to be a retribution as well as a deterrent. It is also meant to rehabilitate the offender. The sentencing Judge should ideally take into account the aggravating factors and the mitigating factors before sentencing. On the aggravating factors, the victim was only 6 years old at the time the offence was committed. On mitigating factors, the appellant was only 24 years at the time the offence was committed and was a first time offender. He was therefore a youth who was capable of reforming. These should have been considered as mitigating circumstances.

We have taken into account both mitigating factors and aggravating factors and accordingly set aside the sentence of life imprisonment for being harsh and excessive. We substitute it with a sentence of 16 year's imprisonment effective from the date of conviction of 16/02/2012, after taking into account the 4 years and 11 days spent in pre-trial custody pursuant to Art. 23(8).

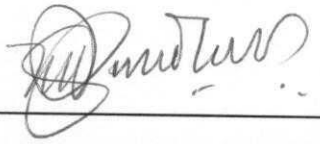
The appeal of the appellant against conviction is dismissed and that against sentence is allowed in the above terms.

We so order.

Dated this 30th Day of July 2018

Hon. Justice Egonda Ntende, JA

Hon. Justice, Hellen Obura, JA



Hon. Justice, Stephen Musota JA