THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 34 OF 2015

(Coram: **Tumwesigye, Mwangusya, Opio-Aweri, Mwondha and Tibatemwa-Ekirikubinza; JJ.S.C)**

BETWEEN

NTAMBALA FRED ..... APPELLANT

AND

UGANDA ..... RESPONDENT

[Appeal against the judgment of the Court of Appeal at Kampala (Kasule, Buteera and Kakuru, JJA), Criminal Appeal No. 177 of 2009 dated 11th February, 2015].

Representation:

Mr. Senkenzi Steven represented the appellant on State Brief, and Ms. Alice Komuhangi Khaukha represented the respondent.

JUDGMENT OF PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA.

I am in agreement with the decision of the Court that the appeal has no merit and ought to be dismissed. I also agree that the conviction of the appellant and the sentence of 14 years imprisonment be upheld.

Nevertheless, this being a defilement prosecution, I have found it pertinent to discuss the law on corroboration in specific regard to sexual assault cases. For purposes of clarity, I take note of the fact that the appellant's ground of appeal was that: *The learned Justices of the Court of Appeal erred in law when they failed to adequately re-appraise the evidence adduced before the trial court and*

therefore upheld the conviction of the appellant for the defilement of Namata Irene.

However, it was specifically submitted by Counsel for the appellant that the evidence of the victim was not sufficiently corroborated so as to warrant a finding that the appellant committed the offence.

As stated in the Judgment of the Court, 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 and "what matters is the quality and not quantity of evidence." I must however emphasize that this must be as true in a sexual assault prosecution as it is in other offences.

I am however aware that historically 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. Such was the cautionary rule in sexual offences.

In East Africa the leading authority on this rule has been the decision of the East African Court of Appeal in **Chila and Another vs. R [1967] EA 722** and this Court has in previous cases followed **Chila** to overturn convictions by lower courts. (See: **Christopher Kizito vs. Uganda, Criminal Appeal No. 18 of 1993; Kibale Ishima vs. Uganda, Criminal appeal No.21 of 1998; Katumba James v Uganda, Criminal Appeal No. 45/99**)

However, as I observed in my book - **Criminal Law in Uganda: Sexual Assaults and Offences Against Morality at page 38**[1] - the reasons historically

[1] Lillian Tibatemwa-Ekirikubinza (2005) Fountain Publishers, Kampala.

given for the need for corroboration of evidence in a sexual assault prosecution was that women are by nature peculiarly prone to malice and mendacity, and are particularly adept at concealing it. I further noted therein that the origin of the rule lies in the opinion of Sir Mathew Hale (Kings Bench England) in 1671 when he said that rape must be examined with greater caution than any other crime as it is easy to charge and difficult to defend. A similar opinion was expressed by Lord Justice Salmon in **R vs. Henry & Manning (1969) 53 Crim. App Rep 150, 153** that: *"in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all."(*My Emphasis)

I am nevertheless alive to the fact that as far back as the 1970's courts in the region and beyond have posited that the rule has neither scientific nor logical basis. (See the American case of **P vs. Rincon-Pineda (14 Cal 3d 864)** and the Namibian case of **S vs. Katamba (SA 2/99) [1999] NASC 7; 2000 (1) SACR 162** where the cautionary instruction was held to be a rule without a reason; See also the South African case of **S vs. Jackson 1998 (1) SACR 470 (SCA)** and Section 32 (1) of the U.K Criminal Justice and Public Order Act, 1994 which abolished the said cautionary rule on similar grounds.

The rule has also been held to be discriminatory against women.

It is universally accepted that a rule which is gender neutral on the face of it, can be discriminatory and can constitute gender bias if its outcome disproportionately disadvantage one gender. The **UN Convention on**

Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women as:

> "...**any distinction**, exclusion or restriction **made on the basis of sex which has the effect or purpose** of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." (My Emphasis)

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 **(**See: **Articles 21, 32 and 33)**.

As far back as 2002, Lugayizi J in **Uganda vs. Peter Matovu, Criminal Case No. 146/2001** declined to apply the cautionary rule in a case of defilement due to its discriminatory effect against women and thus its violation of the Constitution as well as Uganda's international obligations to adhere to CEDAW. The learned High Court Judge stated that:

> **… court had 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. For that reason it seems that both the belief and the resultant rule have no logical basis. … Secondly, and much more importantly, court thinks that the above rule discriminates against women who,**

are by far, the most frequent victims of sexual offences and is, therefore, inconsistent with Uganda's international obligations under various conventions and the Constitution.

[The rule's] effect is to single out women for disfavor in cases involving sexual allegations in the sense that it nullifies the recognition, enjoyment or exercise of their rights to equality before the law and equal protection of the law. Indeed, in such cases, the testimony of a victim is … suspect; and this is, essentially, because she is a woman or girl! … Under Article 2 of the Constitution, the fate of any law that is inconsistent with the Constitution is very clear. Such law is null and void. It follows, therefore, that the above rule is null and void.

And in **Basoga Patrick vs. Uganda, Criminal Appeal No. 42 of 2002,** the Court of Appeal held that the requirement for corroboration of evidence in sexual offences is discriminatory against women and is therefore unconstitutional. The court cited with approval the finding in the Kenyan case of **Mukungu vs. R (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 against them qua women or girls."*

In **Mukungu Supra** the court also observed thus:

It is noteworthy that the same caution is not required of the evidence of women and girls in other offences. Besides there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences.

I am convinced that indeed the cautionary rule in sexual offences is not legally justifiable and I cite the above authorities with approval. And the absurdity of

the rule was clearly brought out by the Supreme Court of Jamaica in **Regina v Derrick Williams Criminal Appeal No. 12/98.** The appellant was convicted of illegal possession of a firearm and rape. The brief facts were that he approached the complainant with a gun and demanded that she shut up. He hit her with a gun in the face causing a wound and thereafter rape her. At his trial he denied owning a gun and also said he had never seen the complainant until the day of trial. The major complaint on appeal was that the learned trial judge did not express that there was no evidence of corroboration and that being so that he had warned himself of the danger of acting on the uncorroborated evidence of the complainant before accepting her a witness of truth.

Speaking of circumstances where the sexual offence is just one of several offences charged, e.g. burglary or robbery the court said:

> **… [there is absurdity in calling for a special warning on corroboration for the sexual offence when the only issue is identity]. In those circumstances, if one applies the corroboration rules strictly, the woman's evidence about the identity of the intruder requires no corroboration if he confines himself to robbing or stealing, but must be the subject of the usual warning if, having stolen or robbed, he then goes on to rape the woman, despite the fact that the rape would almost certainly give her more opportunity and more incentive to observe and memorise his appearance than the robbery or theft. If the law demands that in those or similar circumstances the usual warning should be given by the judge, it puts an unexpected and unwelcome premium on rape. Presumably also in such circumstances, the judge would have the task of explaining to the jury that it would be dangerous to convict on the uncorroborated evidence of the victim in respect of the**

rape but not dangerous so far as the robbery was concerned. Moreover, any judge might be forgiven for hesitating long before adding insult to injury by explaining to a jury the reasons for the usual warning, namely that the unfortunate householder, allegedly burgled and raped in her own home, might have made a false accusation owing to sexual neurosis, fantasy, spite or refusal to admit consent of which she is now ashamed or any of the other reasons in R v Manning.

What I must therefore emphasize is that the evidence of a victim in a sexual offence must be treated and evaluated in the same manner as the evidence of a victim of any other offence. As it is in other cases, the test to be applied to such evidence is that it must be cogent.

I would therefore find it right to proceed under Article 132 (4) of the Constitution to depart from this Court's previous decisions cited in this judgment where the cautionary rule was held to be a requirement in sexual assault prosecutions.

Dated at Kampala this .....**18th**.... day of ....**January**..... 2018.

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PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA

JUSTICE OF THE SUPREME COURT.