**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CRIMINAL APPEAL NO. 054 OF 2014**

**NSENGA EDWARD .....APPELLANT**

**VERSUS**

**UGANDA.....RESPONDENT**

*(Appeal against conviction and sentence in High Court Criminal Session Case No. 0231 of 2012, before Hon. Lady Justice Alividza Elizabeth Jane, J. dated 25/02/2014).*

**Coram: Hon. Lady Justice Elizabeth Musoke, JA**

**Hon. Lady Justice Hellen Obura, JA**

**Hon. Mr. Justice Ezekiel Muhanguzi, JA**

## JUDGMENT OF THE COURT

### Introduction

This is an appeal against the decision of the High Court made in Kampala Criminal Session Case No. 0231 of 2012 – Uganda V Nsenga Edward, wherein the appellant was convicted of the offence of aggravated defilement C/s 129 (3), (4), (a) of the Penal Code Act; and sentenced to life imprisonment.

**Brief background**

The facts of this case as accepted by the trial judge are that on 3rd September 2012, the victim a girl called N. A, then aged 7 years was sent by a neighbor to the nearby shops to buy cooking oil. She did not return and her family started looking for her. Her disappearance was reported to Police and later in the night, she was brought home by two gentlemen who reported that she had been found along the Northern bypass and taken to Kyebando Police post and was then escorted home. The victim appeared distressed and was taken to hospital where it was discovered that she had been defiled. She informed the police that she would identify the house where she was taken and also the person who defiled her. The next day, she led the police and her relatives to a place in Kifumbira Zone and the appellant was subsequently arrested, tried, convicted and sentenced to life imprisonment.

Being aggrieved with the conviction and sentence the appellant has accordingly appealed to this court against both conviction and sentence. The memorandum sets out four grounds as follows:

1. ***The learned judge erred in law and fact when she convicted the appellant on the basis of unsworn and uncorroborated evidence of identification of the victim (a girl of tender years).***

2. ***The learned trial judge erred in law and fact when she convicted the appellant on the basis of insufficient circumstantial evidence.***

3. ***The learned trial judge erred in law and fact when she convicted the appellant in the absence of vital DNA evidence and witnesses not adduced or called by the prosecution.***

4. ***In the alternative but without prejudice, the learned trial judge erred in law and fact when she imposed a sentence of life imprisonment on the appellant based on wrong legal principles. that is:-***

   ***(i) Failure to consider the period the appellant had spent on pre-trial remand.***

   ***(ii) Sentence based on the fact that the appellant was not remorseful and maintained his innocence.***

   ***(iii) Sentence is harsh and manifestly excessive***

**Representation**

The appellant was represented by Mr. Andrew Ssebugwawo, learned counsel on State Brief while Ms Annette Namatovu Ddungu, learned Senior State Attorney, represented the respondent. The appellant was present in court.

**Submissions by the Appellant**

Counsel argued grounds 1, 2, and 3 together and ground 4 separately. Mr. Ssebugwawo submitted that the appellant was not properly identified by the victim. Counsel pointed out that the victim ($PW_4$) testified that the appellant was putting on a black trouser and a yellow shirt and that she had marked his face and eyes yet the said black trouser and the yellow shirt were never recovered and tendered in court to connect them to the appellant. Counsel argued that the aspects that the victim mentioned as having assisted her to identify the victim were not sufficient and there could have been a possibility of mistaken identity.

Counsel further submitted that the trial judge clearly set out the law in respect to identification, that is, the factors of light, time spent with the

accused but never considered the items that the victim mentioned that helped her identify the appellant.

Counsel further submitted that $PW_4$ was a child of tender years and a single identifying witness in this case and that when a *voir dire* was conducted, the learned trial judge found that the child did not understand the importance of telling the truth yet he convicted the appellant on her unsworn evidence which was not corroborated.

In support of the above argument Counsel relied on ***Mdiu Mande*** *alias* ***Mnyambwa Mande V Republic,*** *[1965] EA 193,* ***Minani Joseph v Uganda,*** *Supreme Court Criminal Appeal No. 30 of 1995* and ***Kamudini Mukama v Uganda,*** *Supreme Court Criminal Appeal No. 36 of 1995,* and submitted that there is a requirement that there should be some other independent evidence to corroborate an unsworn evidence of a child of tender years.

Counsel further submitted that the DNA results of the appellant and the victim which were meant to connect the appellant to the offence were never tendered in court. He pointed out that the doctor who made the report was never brought to court to connect the appellant to the commission of the offence. Counsel relied on ***Okello Geoffrey V Uganda,*** *Court of Appeal Criminal Appeal No. 320 of 2010,* and submitted that, medical evidence of DNA results would be the best evidence to corroborate the unsworn evidence of $PW_4$, the victim, which in this case, were never tendered in court by the prosecution.

In relation to sentence, counsel submitted that the learned trial judge did not take into account the period the appellant had spent on remand. He also pointed out that the sentence was based on the fact that the appellant was not remorseful because he maintained his

innocence. Counsel further relied on ***Livingstone Kakooza V Uganda,*** *Supreme Court Criminal Appeal No.17 of 1993* and submitted that since the appellant maintained his plea of not guilty, he still had the right of appeal to a superior court and this fact should not have been considered by the learned trial judge against him.

Counsel submitted further that the sentence imposed by the trial court was harsh and excessive in the circumstances. He relied on ***Rwabugande Moses V Uganda,*** Supreme Court Criminal Appeal No. 25 of 2014 where court substituted a sentence of 35 years imprisonment with a sentence of 21 years imprisonment for the offence of murder. Counsel asked court to allow the appeal, quash the conviction of the appellant and set aside his sentence.

**Submission by the respondent**

Counsel for the respondent opposed the appeal and supported the findings of the trial court. In reply to grounds one, two and three, counsel submitted that the appellant was positively identified by the victim. She pointed out that from the time the victim was found by police she stated that she could remember the house from where she was defiled.

Counsel submitted that the evidence of $PW_4$ was corroborated by that of $PW_2$, a Police Officer who testified that when she presented the appellant to the victim, she screamed stating that it was the appellant who defiled her. Counsel prayed to court to consider this evidence ($PW_2$'s) as corroborative evidence in the circumstances.

Counsel submitted that further corroboration is the conduct of the appellant during his arrest. She pointed out that the appellant ran

when he saw the police officers and this conduct points to the guilt of the appellant.

Counsel relied on ***Susan Kigula V Uganda***, *Supreme Court Criminal Appeal No. 1 of 2004* and submitted that, corroboration in part corroborates the whole evidence. She submitted that even without the DNA report being tendered in court as evidence, the prosecution had led enough evidence to point to the fact that it was the appellant who defiled the victim. She prayed to court to uphold the conviction of the appellant.

In reply to ground 4 on sentence, counsel submitted that the sentence of life imprisonment was appropriate given the fact that the victim was of tender age and had suffered extensive injuries from the acts of the appellant.

**Consideration by Court**

This is a first appeal and as such we are required to re-appraise the evidence adduced at the trial and make our own inferences on all issues of law and fact. See: Rule 30 (1) of the Rules of this court, ***Bogere Moses V Uganda,*** *Supreme Court Criminal Appeal No. 1 of 1997,* and ***Kifamunte Henry V Uganda,*** *Supreme Court Criminal Appeal No. 10 of 1997.*

**Grounds one, two and three**

> ***"1. The learned judge erred in law and fact when she convicted the appellant on the basis of unsworn and uncorroborated evidence of identification of the victim (a girl of tender years)."***
>
> ***"2. The learned trial judge erred in law and fact when she convicted the appellant on the basis of insufficient circumstantial evidence."***

***"3. The learned trial judge erred in law and fact when she convicted the appellant in the absence of vital DNA evidence and witnesses not adduced or called by the prosecution."***

The appellant was charged with the offence of aggravated defilement contrary to sections 129 (3), (4) (a) of the Penal Code Act. It was the prosecution case as alleged in the indictment, that the appellant on the 3rd day of September 2012 at Kifumbira Zone Central Division in Kampala District unlawfully had sexual intercourse with N. A, a girl under the age of 14 years.

At the trial, the appellant pleaded not guilty to the offence and the prosecution called 8 witnesses namely:-

$PW_1$, the mother to the victim, $PW_2$ a Police Officer who arrested the appellant, $PW_3$, the victim's father, $PW_4$ the victim herself, $PW_5$, a Police Officer who first met the victim, $PW_6$, a neighbor, $PW_7$, the Investigating Officer and $PW_8$, the Doctor who examined the victim.

We have carefully perused the evidence of all the above 8 witnesses and found that the only direct evidence linking the appellant to the crime is the testimony of $PW_4$, the victim. At the time she was in court on 16/10/2013, she was stated to be 7 years old. This was about 1 year after the incident.

A *voire Dire* was conducted and she was found to be unable to testify on oath. She gave evidence not on oath but was cross-examined since court found her to be consistent.

The evidence of $PW_2$ the arresting officer or that of $PW_5$, the police officer who first met the victim does not directly corroborate that of the victim on material facts of sexual intercourse and the appellants

participation in the commission of the crime. $PW_2$ states that when the appellant was brought towards the victim, $PW_4$ the victim started screaming stating that it's the appellant who put something in her. The evidence of $PW_1$, Ainembabazi Immaculate, the mother to $PW_4$ is not direct. She stated that she was told by $PW_4$'s sister Niringire Fabiola that $PW_4$ was sent to buy cooking oil but she did not return. At around 9.00 pm, $PW_4$ was brought to her home by two men and noticed that $PW_4$ could not stand nor walk. $PW_1$ then took $PW_4$ to Mulago hospital and upon examination she was informed that $PW_4$ had been defiled. $PW_1$ saw the appellant at police when he was arrested.

$PW_3$, the victim's father testified that on the fateful day, he was not home but he was informed by $PW_1$ that their daughter $PW_4$ went missing. He participated in the search and during the search, he chased the appellant who was putting on a yellow cream shirt. He testified further that when the appellant was arrested, $PW_4$ identified him as a man who had defiled her. This evidence is not sufficient to link the appellant to the offence.

Dr. Silvester Onzivua testified as $PW_8$, he stated that on 4th September 2012 he examined $PW_4$ who was aged 7 years and found that she had been defiled. He had observed signs of penetration as the bruises of the vaginal walls were fresh. His findings were set in Police form 3 which was exhibited as PEI.

The witness states further that he did not do DNA test since it is supposed to be carried out by government analytical laboratories which the CID officer did not follow.

We find that the investigating officers in this case did not investigate the case properly. They did not exhibit the clothes that $PW_4$ mentioned

while describing the person who defiled her. They did not follow up the DNA results. The evidence on record from all witnesses is not direct and it does not point to the participation of the appellant in the commission of the offence.

We find that the oral evidence of $PW_8$ proved that $PW_4$ was defiled, but the medical report/evidence does not prove the participation of the appellant.

The only testimony that links the appellant to the crime is that of PW4 the victim. But since she was a child of tender years and did not testify on oath, a court would not convict an accused person on such evidence alone. The black trouser and yellow shirt were not exhibited. The DNA report was not exhibited. There was nothing found on the appellant or in his home to link him to the offence.

The trial court warned itself of the danger of convicting on uncorroborated evidence of $PW_4$. Court noted that though the victim gave unsworn evidence, she was consistent and appeared truthful that it was the accused who defiled her and court believed her.

The law on evidence of a child of tender years is now well settled. It was elaborately discussed by this court in ***Ssenyondo Umar V Uganda***, *Court of Appeal Criminal Appeal No.267 of 2002* (unreported) as follows:-

> ***"No amount of self-warning or warning of the assessors can justify convicting an accused on the unsworn evidence of a single identifying witness of a child of tender years. In Uganda the law is contained in section 40 (3) of the Trial on Indictments Act which provides that, 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 on oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to conviction unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.***

***In our view, the unsworn evidence of $PW_1$ (child of tender years) who was a sole identifying witness against the appellant was never corroborated. Therefore the learned trial judge was wrong to base a conviction on it."***

In the above cited case, the victim was 7 months old. The sole eye witness ($PW_1$) aged 12 years testified not on oath as to the participation of the appellant. The trial judge found that the unsworn evidence of $PW_1$ a child of tender years was credible and corroborated by the evidence of $PW_2$ and $PW_3$ who $PW_1$ told what had happened.

The learned Justices of appeal disagreed with the trial judge and observed that the evidence of $PW_2$ and $PW_3$ could not corroborate the evidence of $PW_1$ (their son) because they did not see the appellant defile their daughter.

In the same case court discussed the need for the trial judge to warn himself and the assessors of the risk of convicting on the unsworn and uncorroborated evidence of a single witness of a child of tender years. The Justices of appeal cited ***Patrick Akol V Uganda***, *Supreme Court Criminal Appeal No. 123 of 1992* and ***R V Campbell***, *(1956) 2 ALLER 272* wherein it was stated as follows:-

***"To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference***

***whether the child's evidence relates to an assault on him or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal the article. The unsworn evidence of a child need not as a matter of law be corroborated, but the jury should be warned not that they must find corroboration but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced that the witness is telling the truth, and this warning should also be given where a child is called to corroborate evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should be given."***

We find that the learned trial judge erred when he accepted the evidence of $PW_4$ as sufficient evidence to base a conviction of the offence of aggravated defilement without it being corroborated by some other independent evidence.

We find that this appeal has merit. Grounds 1, 2 & 3 are hereby allowed. Having allowed these grounds, it is therefore not necessary to consider the alternative ground on sentence.

The appellant's conviction is quashed and his sentence set aside. He is hereby set free unless he is being held on any other lawful charge.

Dated at Kampala this.....15th.....day of.....July.....2019.

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Elizabeth Musoke

**JUSTICE OF APPEAL**

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Hellen Obura

**JUSTICE OF APPEAL**

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Ezekiel Muhanguzi

**JUSTICE OF APPEAL**