THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 150 OF 2021

KABAREEBE MOSES::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala, before Hon. Justice Flavia Senoga Anglin, dated 30th March, 2021).

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT OF THE COURT

This is an appeal against both conviction and sentence arising from the decision of Hon. Justice Flavia Senoga Anglin, whereby she convicted the appellant on a charge of rape contrary to **Sections 123** and **124** of the **Penal Code Act, Cap. 120**. The appellant was then sentenced to 10 years imprisonment upon conviction.

The facts giving rise to this appeal as found by the trial Judge were that on 25th October 2019, at Kyebando, Kisalosalo, Kampala District, the appellant had unlawful sexual intercourse with Akello Juliet, a girl then aged 16 years without her consent.

The appellant denied the offence. In his unsworn testimony in Court, he stated that he did not know anything about the allegations raised by the prosecution.

The trial Judge believed the prosecution evidence, convicted the appellant and sentenced him to 10 years imprisonment. Being dissatisfied with the decision, the appellant appealed to this Court against both conviction and sentence.

Grounds of Appeal:

"1. **The learned trial Judge erred in law and fact when she convicted the appellant while relying on the uncorroborated evidence of the victim.**

2. **The learned trial Judge erred in law and fact when she convicted the appellant while relying on hearsay evidence of PW1 and PW3.**

3. **The learned trial Judge erred in law and fact when she failed to evaluate the inconsistencies and contradictions in the evidence between PW1 and PW2 and convicted the appellant on false evidence.**

4. **The learned trial Judge erred in law and fact when she failed to evaluate the Medical Report, DNA evidence *visa-a-vis* the alleged paternity of Daniela Adoi.**

5. **The learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence of 10 years imprisonment upon the appellant."**

Representation:

At the hearing of the appeal, the appellant was represented by counsel David Gureme Mushabe, while counsel Nabasa Caroline Hope appeared for the respondent.

Either party filed written submissions in support of and in reply to the appeal respectively. We shall address grounds 1, 2, 3 and 4 concurrently and conclude with ground 5 of the appeal.

Appellant's case:

On ground 1 of the appeal, counsel for the appellant submitted that the victim's evidence was inconsistent, unreliable and not corroborated by independent evidence. He relied on section 38(3) of the Trial on Indictments Act which requires for the corroboration of evidence given by a child of tender years.

Counsel submitted that while Acen Daisy (PW1) first testified that she was the one who reported the matter to Police, she again testified that the

matter had been reported by her husband. Further, that whereas Nyakecho Yunia (PW3) testified that the rape took place on 25/10/2019, the victim (PW4) testified that the rape took place on 26/10/2019.

It was counsel's further submission that while PW1 testified that the appellant's wife had initially called her and informed her that the victim was having an affair with the appellant, the said wife was never brought to Court to corroborate the evidence of PW1. Further, that PW1, PW2 and PW3 were not eye witnesses but simply recycled PW4's statement.

Further, that it was questionable why PW1, who was a General Service Assistant at AAR Health Care chose not to examine the victim after the alleged rape but took her for checkup after two days. He argued that the victim's testimony revealed deliberate untruthfulness when she denied having a child until she was pressed further in cross examination.

It was counsel's submission that the prosecution only proved the ingredient of sexual intercourse having taken place but did not prove that it was not consensual and that it was the appellant who committed the offence.

On ground 2, counsel for the appellant submitted that PW1's evidence that the appellant's wife told her that the appellant was having a sexual affair with the victim was hearsay considering that the said wife was never a witness to the rape. Further, that PW1's evidence that the victim had told her that the appellant threatened her with a gun was also hearsay evidence. Counsel also argued that the victim's evidence that the appellant's wife had confronted PW1 about the affair between her and the appellant was hearsay evidence considering that the said Victim was not around at the time of the alleged confrontation.

On ground 3 of the appeal, counsel for the appellant submitted that the medical report could not reveal the person responsible for the sexual offence unless advanced tests like DNA were carried out. The fact that the medical examination did not include testing whether there were traces of the appellant's spermatozoa rendered the report unreliable.

Counsel further submitted that the trial Judge ignored the fact that the victim who had lied about her previous sexual encounters and paternity of her child could have also lied about whether the sexual intercourse between her and the appellant was consensual or not.

Counsel further faulted the trial Judge for falling short of evidential analysis when she allegedly reproduced the victim's evidence without supporting corroborative evidence. It was erroneous for the trial Judge to admit the evidence of PW1, PW2 and PW3 when their evidence was hearsay. Further, that the trial Judge erred when she accepted the evidence of PW1 that the appellant's wife had called to inform her about the affair between the victim and the appellant. In counsel's view, the prosecution ought to have adduced the evidence of telephone printouts as corroborative evidence to prove the above. Further, that in PW1's statement at Police, she never mentioned that the appellant's wife initially called her in regard to the alleged affair.

It was counsel's further submission that the trial Judge erred when she considered the allegation that the appellant's father tried to settle the matter. He reasoned that there was no evidence of a single witness who attended the alleged settlement meeting.

Counsel further submitted that the trial Judge never warned the assessors about the dangers of convicting without corroborative evidence. The absence of such warning to the assessors caused a miscarriage of justice.

On ground 4 of appeal, counsel for the appellant submitted that the trial Judge erred in finding that although the DNA Report indicated that the appellant was not the father of the child, that did not mean that he never had sexual intercourse with the victim. In counsel's view, had the alleged rape and pregnancy of the victim been separated from the start of the trial, then the appellant would not have demanded for the DNA test. This was considering that the victim claimed that she became pregnant resulting from the rape.

Counsel further submitted that the victim's testimony that it was not the first time that she had been sexually assaulted by the appellant was inconsistent with the medical Report which indicated that there were fresh bruises. In counsel's view, had the victim been sexually active with the appellant, it was not probable that such bruises would have manifested.

In counsel's view, the victim's false evidence under oath that she had never had a sexual relationship with any other person prior to the rape and that the appellant was the father to her child amounted to perjury. However, the trial Judge ignored the said lies by the Victim.

In reply, counsel for the respondent submitted that the victim was 16 years at the time of the incident and thus not a child of tender years. In that regard, that the law requiring the corroboration of evidence of a child of tender years was not relevant in the present case.

Counsel further pointed out that the argument raised by counsel for the appellant was in regard to who reported the matter to police and the date of the incident. However, that the above did not demonstrate the requirement for corroboration of the victim's evidence. It was counsel's further submission that the sexual assault happened during the day and the conditions for proper identification were not disputed.

Counsel made reference to counsel for the appellant's argument that the victim was a liar having failed to disclose to Court that she had a child until pressed during cross examination. It was counsel for the respondent's argument that the victim gave a satisfactory explanation for the failure to disclose that she had a child. She explained that it was the appellant who had instructed her not to reveal the said fact to Court. It was counsel's submission that the appellant had the chance to interfere with the prosecution witnesses considering that he was on bail. Counsel pointed out that the trial Judge had the chance to observe the demeanor of the victim at trial and believed her testimony regardless of the minor contradictions.

Counsel submitted that there was no need for corroboration of the victim's evidence regarding the identity of her assailant or as to whether she consented to the sexual assault.

In reply to ground 2 of the appeal, counsel for the respondent submitted that PW1's evidence could not be treated as hearsay since the victim testified about the same. Further, that PW3 was an investigating officer who gave evidence regarding statements recorded from the victim. It was unrealistic to expect an investigating officer to be an eye witness. Further, that the trial Judge never based her decision on the telephone conversation between the appellant's wife and PW1.

In reply to ground 3 of appeal, counsel for the respondent submitted that the victim gave a clear account of what happened to her and the same was confirmed by the medical Report. Counsel argued that no contradictions and inconsistencies were demonstrated under this ground.

Counsel submitted that if this Court finds any contradictions during re evaluation of evidence, the same should be treated as minor to go to the root of the case.

On ground 4 of the appeal, counsel for the respondent submitted that counsel for the appellant's submission presupposes that negative paternity test results extinguished the rest of the evidence that implicated the appellant. It was counsel's contention that ordinarily, if at all the prosecution's theory was based on the child resulting from the alleged rape, then it would have been part of the investigations before trial. Besides the above, the victim's testimony was that it was the appellant who asked her not to say anything about the child.

Counsel further submitted that the trial Judge accepted the explanation given by the victim as to why she first denied existence of the child. Court then agreed with the prosecution and resolved that the issue of the appellant not being the father of the child did not take away the fact that he was properly identified by the victim during the rape.

Counsel contended that DNA positive results would be additional evidence but not the only evidence implicating the appellant.

Decision by the Court:

We have considered the submissions of Learned Counsel on either side and carefully perused the court record and the Judgment of the trial Court. We are alive to the duty of this Court as the 1st appellate court being to re-appraise the evidence adduced at trial and draw inferences there from, bearing in mind that we did not have the opportunity to observe the demeanor of witnesses at the trial.(***See Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, Kifamunte Henry Versus Uganda, SC Criminal Appeal No.10 of 1997, Bogere Moses Versus Uganda, SC Criminal Appeal No.1 of 1997***).

The burden of proof was upon the respondent to prove the allegations against the appellant beyond reasonable doubt.

In addressing the matter before us, we are alive to the ingredients for the offence of rape as follows:

1. That the act of sexual intercourse took place;
2. Non-consent of the victim of rape; and
3. Participation of the accused in the alleged offence.

From the evidence on record, the first ingredient, being whether the act of sexual intercourse took place, was never contested by the defence. The Medical Report (EXH P2), which was never contested, indicated that the injuries appearing on the victims genitals were as a result of sexual intercourse within 12 to 48 hours after the alleged assault. What was contested was whether the victim did not consent to the sexual intercourse and the participation of the appellant in raping the victim.

At trial, prosecution relied on several witnesses to prove the above contested ingredients against the appellant.

Acen Daisy (PW1) testified that the victim was her house help in 2019. On the fateful day, she returned from work and found the victim crying. The victim then informed her that when she was in the bathroom bathing at around 3 PM, the appellant found her there and raped her. Further, that the victim tried to scream but the appellant held her hand and threatened to shoot her if she said anything. PW1 further testified that during the same week prior to the incident, the appellant's wife had called her and informed her that the appellant was having a sexual affair with the victim. Upon confronting the victim, she denied. However, after the rape, the victim informed PW1 that the sexual assault had happened before but the appellant had threatened her not to tell anyone.

PW1 further testified that she then called the appellant's wife and informed her about the incident. The appellant's wife told PW1 to inform the appellant's father, who in turn advised PW1 to report the matter to police. PW1 reported the matter to Police and the victim was taken for medical examination.

Two days after the incident, the appellant's father telephoned PW1 requesting that they settle the matter. When PW1 talked to the victim's parents, they informed her that they had forgiven the appellant.

Erick Kizito (PW2) was the Medical Clinical Officer who examined the victim upon police request. He testified that the victim went for the examination on 26/0/2019. Upon examination, the victim had bruises and tenderness at the labia majora and minora. He indicated that the probable cause of the injury was recent sexual intercourse.

DC Nyakecho Yunia (PW3) was the investigating officer in the matter. He recorded the Victim's statement and testified explaining the events as indicated in the police statements and on the events leading to the arrest of the appellant.

Akello Juliet (PW4) was the victim. At the time of the incident, she was 16 years and at the time of the hearing, she was 7 years. She testified that in

2019, she was working as a house maid at PW1's home and the appellant was their landlord. On the fateful day, the appellant followed her to the bathroom, grabbed her and held her mouth. He threatened that if she made an alarm, he would shoot her with a gun. He then forcefully had sex with her and thereafter warned her not to tell anyone. When PW1 returned from work, the victim told her and in turn PW1 reported to police. She indicated that the rape happened on 26/10/2019. She also indicated that she had sex with the appellant once before the incident and that the appellant threatened to kill her if she told anyone.

During cross examination, the victim first denied having a child. Later in cross examination, she testified that she discovered that she had become pregnant after the rape. At the time of the hearing, the child was 5 months old. She indicated that she had never been involved in any sexual relationship prior to the rape by the appellant. She pointed out that the appellant had told her not to tell Court that she had a child.

The Court ordered for a DNA to be carried out to determine whether the appellant was the biological father of the child, Adoi Daniella. The DNA test results showed that the appellant was not the father of the said child.

The appellant chose to give unsworn evidence at trial. He testified that he did not know anything about the evidence given by the prosecution witnesses.

The first complaint raised for the appellant was that the trial Judge relied on the uncorroborated evidence of the victim. From the arguments raised for the appellant, it can be deduced that counsel was of the view that the trial Judge wrongly relied on the uncorroborated evidence of the victim who was a child of tender years.

According to section 155 of the Evidence Act, corroboration can take form of testimony of a witness, any former statement made by such a witness relating to the same fact. Corroboration was defined in ***Uganda Versus***

George Wilson Simbwa, Supreme Court Criminal Appeal No. 37 of 1995, as follows:

> *"Corroboration affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rue of practice at common law or within the class of offences for which corroboration is required".*

Section 38(3) of the Trial on Indictment Act, provides as follows:

> *"Where in any proceedings, any child of tender years called as a witness does not, understand the nature of an oath, his evidence may be received though not given upon oath, if he is posed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: provided that where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be convicted unless such evidence is corroborated by some other material evidence in support thereof implicating him or her".*

While relying on ***Mukasa Deogratius Versus Uganda, Supreme Court Criminal Appeal No. 21/1993***, this Court in ***Nyondo Muhammed Versus Uganda, Court of Appeal Criminal Appeal No. 98 of 2004***, defined a child of tender years to be a child of any age or apparent age of under 14 years, in the absence of any special circumstances.

In the present case, it was not disputed that the victim was 16 years old at the time of the alleged rape and 17 years at the time when she gave evidence at trial. She could not be termed as a child of tender years and, therefore, this provision could not be applied in this case.

The above notwithstanding, it is a rule of practice in Uganda that sexual offences should be corroborated. However, even if there was no corroborating evidence, the Court would still go ahead and rely upon the uncorroborated evidence of a witness if it was satisfied that he/she was truthful. This basically means that a conviction can be based solely on the evidence of the victim as a single witness.

The argument raised for the appellant was that the victim's evidence was tainted with deliberate untruthfulness and was never corroborated. First, that she had denied having a child until pressed further in cross examination. Secondly, that she had lied about her ever being involved in any sexual relationship prior to the alleged rape. The trial Judge believed the explanation given by the victim that it was the appellant who had told her not to reveal to Court that she had a child. The trial Judge was persuaded by the prosecution witnesses and stated as follows:

> *"When all the surrounding circumstances are put together, I find that I am satisfied with all the evidence adduced by the prosecution".*

We take into consideration that the trial Judge who had the opportunity to observe the demeanor of the victim at trial believed her as a truthful witness. Besides the above, we find that the evidence of the victim was corroborated by that of PW1, PW2 and PW3. While counsel for the appellant sought to indicate that the evidence of the above witnesses was hearsay since they were not eye witnesses to the rape, we do not accept that argument. First, the victim who narrated the ordeal to PW1 and later recoded a statement at police before PW3 gave evidence in Court. The evidence given by PW1 described the condition in which she found the victim after the said sexual assault, what the victim told her and what happened thereafter. In our view, there would have been an evidential gap if PW1 had not given evidence at trial. PW3, as an investigating officer could not, logically, be expected to have been an eye witness to the crime. His evidence was relating to the circumstances under which the matter was reported to police and on the arrest of the appellant.

Counsel for the appellant also argued that PW1 ought to have examined the victim after the alleged rape. PW1 could have chosen to do a check up on the victim and this could have been further supporting evidence on record. However, the fact that she did not carry out the examination did not render her evidence not credible. First of all, PW1 was the victim's employer and the said victim was considerably a mature girl of 16 years. Secondly, PW1 was not working as medical personnel as to be expected to carry out the check up of the victim after the rape.

PW1's evidence that the appellant's wife had initially called her to inform her about the sexual affair between the appellant and the victim was circumstantial evidence seeking to connect the appellant to the participation in the commission of the offence. Contrary to what counsel for the appellant submitted, it was not hearsay evidence since PW1 who was informed about the said affair was the one who testified about it. It was, thus, left to Court to determine whether the said evidence was reliable or not. In believing the said evidence, the trial Judge stated as follows:

> *"And it is also the undisputed evidence of PW1 that the wife of the Accused had phoned her asking her why her maid (victim) was having an affair with her husband. This evidence was not challenged in cross examination".*

We, therefore, disallow counsel for the appellant's submission that the trial Judge wrongly relied on the uncorroborated evidence of the victim. The victim's evidence was corroborated by that of PW1, PW2 and PW3.The argument that the trial Judge ought to have warned the assessors on the dangers of convicting the appellant on the uncorroborated evidence of the victim is also, hereby, disallowed.

The Medical Report revealed that the victim was sexually assaulted. As rightly pointed out by counsel for the appellant, the same did not reveal who the assailant was. In counsel's view, advanced tests like the DNA of the appellant's spermatozoa present in the victim ought to have been carried out. However, we find that there was other sufficient evidence to

prove the appellant's participation in the commission of the crime. As stated in ***Sewanyana Livingstone Versus Uganda, Supreme Court Criminal Appeal No. 19 of 2006***, what matters is the quality of the evidence and not the quantity of evidence.

Counsel for the appellant also pointed out that the trial Judge wrongly relied on the prosecution evidence that was tainted with a number of contradictions and inconsistencies. The law relating to contradictions and inconsistencies was stated in ***Nasolo Versus Uganda, Supreme Court Criminal Appeal No. 14 of 2000*** as follows:

> *"The law governing inconsistencies in evidence was stated in Alfred Tatar Vs Uganda (1969) EACA Cr. Appeal No. 167 of 1969, to be that minor inconsistency unless the trial judge thinks it points to a deliberate untruthfulness does not result in evidence being rejected the same case also laid the principle that it is open to a judge to find that a witness has been substantially truthful even though he/she had lied in some particular respect".*

The first contradiction pointed out in the prosecution evidence was that while PW1 testified that she was the one who reported the matter to police, she later testified that it was her husband who reported the matter to police. Further, that while PW3 testified that the rape took place on 25/10/2019, PW4 testified that she was raped on 26/10/2019. While we find that these were contradictions in the prosecution evidence, we are of the opinion that this did not in any material way point to untruthfulness in the prosecution evidence adduced against the appellant. The fact remained that the matter was reported to police whether by PW1 or her husband.

We also find that the victim was inconsistent in her evidence when she first told Court that she did not have a child but later confirmed that she had a child. As found by the trial Judge, the victim satisfactorily explained that it was the appellant who told her not to disclose to Court that she had a child. We, thus, also ignore this inconsistence in the prosecution evidence.

We have also taken consideration that the DNA results determined that the appellant was not the biological father of the victim's child. However, from the start of the trial, it was never the prosecution case that the appellant had fathered a child with the victim. This aspect was later introduced in the trial during the victim's cross examination. It was never the gist of the prosecution case. If it had been found that the appellant was the biological father of the child, this would have been further supporting evidence to prove the participation of the appellant in the rape. However, the finding that the appellant was not the biological father of the child did not by itself raise a conclusion that the appellant did not sexually assault the victim. There was independent corroborative evidence besides the victim's testimony connecting the appellant to the commission of the crime.

We also disallow counsel for the appellant's argument that the trial Judge ought to have disregarded the prosecution evidence that the appellant's father tried to settle the matter. This was considering that the prosecution did not produce as witnesses any persons who attended a meeting in that regard. However, this evidence was not disputed by the defence during trial. We do not find reason to fault the trial Judge in believing the said evidence.

We find that the contradictions and inconsistencies pointed out by counsel for the appellant were minor and we do not find reason to fault the trial Judge in ignoring them and finding the prosecution evidence credible.

Grounds 1, 2, 3, 4 and 5 of the appeal are disallowed.

Ground 5

On ground 5 of the appeal, counsel for the appellant submitted that considering all the evidence/absence of evidence on record, the trial Judge had no basis of sentencing the appellant to 10 years imprisonment.

Counsel prayed for the appeal to be allowed and for the conviction and sentence to be set aside.

In reply, counsel for the respondent submitted that counsel for the appellant had not demonstrated how harsh or excessive the sentence passed against the appellant was. This was considering that the maximum sentence for the offence of rape was death.

Counsel relied on ***Aharikundira Yustina Versus Uganda, Court of Appeal Criminal Appeal No. 104 of 2009***, for the submission that interference with sentence is not a matter of emotions but rather one of law. Counsel invited this Court to consider the circumstances of the victim being a house help aged 16 in relation to the appellant who was aged 51 and at the rank of Major in the Uganda People's Defence Forces. The victim was vulnerable at the hands of the appellant.

It was counsel's argument that the sentence of 10 years imprisonment accorded to the appellant was at the lowest end given the circumstances of the case.

Counsel prayed for this Court to dismiss the appeal and uphold both conviction and sentence.

It is trite law that this Court can only interfere with the discretion exercised by the lower Court in imposing sentence where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. ***(See Kiwalabye Bernard Versus Uganda, Supreme Court Criminal Appeal No.143 of 2001)***.

We have carefully looked at the reasons given by the Court in sentencing. We find that the trial Judge took into consideration and specifically mentioned all the aggravating factors raised against the appellant as well as all the mitigating factors.

We have taken into consideration that the Victim who was only 16 years at the time was raped by a 51 year old army officer at the rank of Major. The appellant took advantage of this vulnerable girl by threatening to shoot her

instead of protecting her. He should have been in position to protect her and guide her, but chose to threaten and violate her.

We are also considerate that the offence with which the appellant was convicted carries a maximum penalty of death.

In light of the above, we do not find reason to interfere with the 10 year sentence imposed by the trial Court. The said sentence was not illegal nor based on wrong principles and neither was it manifestly harsh as to be set aside by this Court.

Consequently, this appeal is dismissed and the Judgment of the trial Court is hereby upheld.

Dated at Kampala this 14th day of April 2022

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Richard Buteera
Deputy Chief Justice

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Elizabeth Musoke
Justice of Appeal

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Cheborion Barishaki
Justice of Appeal