THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Musoke, Gashirabake & Luswata, JJA]

CRIMINAL APPEAL NO. 381 OF 2019

(Arising from Criminal session No. 0040 of 2019)

KASUJA EDWARD.....APPELLANT

VERSUS

UGANDA ....RESPONDENT

[Arising from the decision of Henry Kawesa, J, of the High Court of Uganda sitting at Mpigi in Criminal Case No. 0040 of 2019 dated 27th September 2019]

JUDGMENT OF COURT.

Introduction.

The Appellant, Kasuja Edward was indicted for aggravated defilement c/s 129(3)(4)(a) of the Penal Code Act and sentenced to 23 years of imprisonment.

Background to the Appeal

It was alleged that the Appellant on the on 25th October, 2017, at Maya Busembe in Wakiso District, performed a sexual act on MJM a girl aged 4 years. The appellant lived in the same neighbourhood with the victim's parents. On the fateful date, when the victim's mother had gone for burial, the victim went to a neighbour's house to watch television with her friend. The appellant also entered the same house and told the victim to follow him up-to an incomplete house. The appellant made the victim to lie down on a properly laid white sack.

The accused removed the victim's knicker and then pulled out his penis and inserted it in the victim's vagina. When the victim cried out, he ordered her to keep quiet and threatened to beat her.

In the evening, when the victim's mother was bathing her, the victim cried as a result of pain in her vagina. When the mother asked her what caused the pain, the victim revealed the entire ordeal to her mother. The victim's mother rushed the victim to a nearby clinic, when the victim was examined the mother was advised to report a case of defilement at police. The matter was lodged at police and the appellant was accordingly arrested and charged. The victim was medically examined and found with mild laceration around the vulva.

The Appellant was dissatisfied with the decision of the trial court and he appealed the decision on grounds that:

1. The learned Judge erred in law and fact when he failed to appraise prosecution evidence alongside defence evidence and draw inferences of fact of not guilty in particular, the absence of police witnesses thereby wrongly convicted Appellants of offence of aggravated defilement.
2. The learned Judge erred in law when he failed to consider the fact that at the date of the alleged offence the Appellant's trial should have been heard as child occasioning a miscarriage of justice.

The Respondent opposed the appeal.

Representation

At the hearing, the Appellant was represented by Mr. Seth Rukundo. The Respondent was represented by Mr. Kyomuhendo Joseph. During the hearing of this appeal, counsel for both parties prayed that their submissions be adopted .

Duty of this Court.

The duty of this court as the first appellate court is provided for under **Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions S.1 13-10,** which provides thus:

> "On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
> reappraise the evidence and draw inferences of fact;"

This was re-echoed in **Fr. Narsensio Begumisa and 3 others vs. Eric Tibebaga, SCCA No.17 of 2002,** where court held that:

> "The legal obligation of the 1st appellate court to reappraise the evidence is founded in the common law rather than rules of procedure. It is well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witness"

Additionally, the court bears in mind that in evaluating the evidence on record, the burden of proof is upon the prosecution to prove the guilt of Appellant beyond reasonable doubt. The prosecution is enjoined to prove all the ingredients of the said offence to the required standard of beyond reasonable doubt. See **Woolmington Vs. DPP ,(1935) AC 462.**

In **Miller vs. Minister of Pensions, [1947]2 ALLER 373,** court held that the standard should not be beyond a shadow of doubt, however the prosecution evidence should be of such standard as leaves no other logical explanation to be derived from the facts other than that the accused person committed the said offence.

Preliminary objection.

Before we delve into the merits of the Appeal, counsel for the Respondent raised a preliminary objection under **Rule 66 of the Judicature (Court of Appeal Rules) Directions S.1 13-10(here referred to as the rules of this court),** which is to the effect that the Memorandum of appeal shall set forth concisely and under distinct heads , numbered consecutively without argument or narrative , the grounds of objection to the decision appealed against, specifying , in the case of the first appeal , the points of law or fact or mixed law and fact.

Counsel submitted that the first ground offended the above mentioned rule because it is stated in general terms. The said ground does not state the particular points of law or facts being appealed from. Counsel prayed that this ground is struck off the record.

We have evaluated the said ground and we agree with the submissions of counsel for the Respondent that it offends Rule 66 (2) of the Rules of this Court. The ground is general in nature and does not state concisely the objection against the lower court decision. However, in the interest of justice under Article 126(2)(e) of the Constitution of the Republic of Uganda 1995, this court invokes its inherent powers under Rule 2(2) of the rules of this court to proceed and hear the appeal on its merits.

Ground 1

Submissions of Counsel for the Appellant.

Counsel for the Appellant submitted that there was no evidence to prove that contrary to **Section 129(3) and 4(a) Penal Code** on 25/10/2017, the Appellant had Sexual act with MJM, a girl aged four years. Counsel additionally submitted that **Section 11 of the Judicature Act Cap 13**, gives Court of Appeal powers of Court of original jurisdiction when determining an appeal. Counsel submitted further that

Section 132 of the Trial on Indictments Act Cap 23 and **Section 34 Criminal Procedure Code Cap 116,** allows Appellant to appeal to Court of Appeal from High Court acting in the exercise of its original jurisdiction.

Counsel submitted that there is no police officer witness that appeared to support the prosecutions' case.

Counsel further submitted that the trial Judge erred in law when he convicted the Appellant on the uncorroborated testimony of PW3 MJM. Counsel cited **Maina vs. R ,1970 E. A 370**, where court held that in all sexual offences corroboration evidence is mandatory. He submitted that non-production of the investigating officer left a corroborative link between the appellant and the actual perpetuator.

Counsel for the Appellant further submitted that the evidence of PW1 (Rose Kirabo) and PW2(Ronald Mayiga) was inconsistent and contradictory. Counsel submitted that the evidence of PW1 and PW2 did not point to the Appellant as perpetrator of the offence under **Section 129(2) and 4(a) of the Penal Code.**

Counsel further submitted that there was no evidence of the proper identification of the Appellant as the perpetrator of the alleged offence against the victim MJM. Counsel argued that the victim was aged 3 years when she testified and could not remember what happened the previous two years ago.

Counsel further submitted that the evidence of the appellant person remained unshaken even through cross examination. Counsel submitted that the findings of the trial Judge with regard to the participation of the Appellant was hypothetical theory of reasoning.

Submissions of counsel for the Respondent.

Counsel for the Respondent submitted that from the reading of submissions of the counsel of the Appellant on ground 1, the main objection is the fact that the Respondent did not bring the investigating police officer as a witness. Counsel cited Section 133 of the Evidence Act, Cap. 6, which is to the effect that no particular number of witnesses are required to prove any particular fact. Counsel submitted that the absence of the investigating officer was therefore immaterial since the prosecution has proved beyond reasonable doubt. Counsel further relied on the Supreme court decision in **Ntambala Fred vs. Uganda ,SCCA No. 34 of 2015**, where court held that,

> "a conviction can be solely based on the testimony of the eviction as a single witness, provided the court finds her to be truthful and reliable. As stated by this court in *Sewanyana Livingstone vs. Uganda SCCA No 19 of 2006*, what matters is the quality and not the quantity of evidence"

Counsel for the Respondent submitted that under section 40(3) of the Trial on Indictments Act, Cap. 23, the unsworn evidence of a child of tender years cannot be relied upon unless corroborated by other material evidence. Counsel submitted that in the current case all witnesses including the victim gave sworn evidence. Counsel further submitted that section 40(3) above does not apply to them. Counsel relied on decision of this court in **Senyondo Umar vs. Uganda, Court of Appeal Criminal Appeal No. 267 of 2007** which quoted with approval the case of **Patrick Akol vs. Uganda SCCA No. 23 of 1992,**

> "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

> an article. The sworn evidence of a child need not as a matter of law be corroborated, but a 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 through they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl 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 carefully warning should in that case be given."

Counsel submitted that the trial Judge rightly relied on the victim's testimony as corroborated by the testimony of PW1, and PEX1 to find that it is the Appellant who performed the sexual acts upon the victim. Counsel prayed that this court finds that this ground had no merit.

Consideration of Court

The main contention in this Appeal is the participation of the Appellant in the offence for which he was convicted. Counsel for the Appellant submitted that the trial Judge erred when he convicted the appellant basing on uncorroborated evidence of PW3. The argument of the Appellant was that the Respondents ought to have brought the investigating police officer as a witness to support the victim's evidence.

The supreme court has discussed extensively what amounts to corroboration and its effect on evidence in **Uganda vs. George Wilson Simbwa ,SCCA No. 37 of 1995**, where it was held that,

> "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 confirming 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 rule of practice at common law or within the class of offences for which corroboration is required."

Guided by the above holding corroboration of evidence is rooted in the criminal cardinal criminal principle requiring the prosecution to prove their case beyond reasonable doubt and not necessarily beyond the shadow of doubt. In order to secure a conviction, if the prosecution deems it necessary it may adduce evidence through more than one witness. Under the Evidence Act specifically section 133, there is no number of witnesses that are required by law for the prosecution to prove their case beyond reasonable doubt.

Consequently, the prosecution can secure a conviction against the accused based on the witness of a single witness who is the victim provided court finds such victim to be truthful. See **Sewanyana Livingstone vs. Uganda, SCCA No. 2006**, cited by counsel for the Respondent.

The Appellant averred that there were inconsistencies in the evidence of the Respondent's evidence between PW1 and PW2. However, the Appellant did not demonstrate to this court which inconsistency there was in the evidence. The law on inconsistency is very clear, that the contradictions will not have effect on the outcome of the matter unless they go to the root of the case or it is demonstrated that the inconsistencies are deliberate lies. The case of the Respondent was consistent through the evidence of PW1, PW2 and PW3. There was nothing to show that the evidence was full of falsehood.

We are satisfied that the learned trial Judge properly evaluated the evidence to come to the conclusion that the Appellant had sexual intercourse with PW3. The complainant took oath. We agree with the submissions of Counsel for the Respondent that once a child gives sworn evidence then court can rely on such

evidence even when it was not corroborated. However, in this particular case the sworn evidence of PW3, was corroborated by PW1, PW2 and PEX1.

This ground therefore fails.

Ground 2

Submissions of counsel for the Appellant.

Counsel for the Appellant submitted that the trial Judge erred in law when he failed to consider the fact that on the date the offence was committed the Appellant was a child. The appellant should therefore have been tried and sentenced as a child ,in accordance with the Children's Act ,Cap .59. Additionally, counsel submitted that the trial Judge failed to handle the trial within a period of 3 months as required by the Children's Act. He cited that Section 2 of the Children's Act defines a child as a person below the age below of 18 years. Counsel cited **Kiiza Samuel vs. Uganda, CACA No. 102 of 2008, Francis Omuroni vs. Uganda ,CACA No. 2 of 2002, Ssendyose Joseph vs. Uganda ,CACA No 15 of 2010 and Serubega vs. Uganda, CACA No. 147 of 2008.**

Counsel prayed that the court finds the sentence imposed on the appellant illegal and sets it aside.

Submissions of Counsel for the Respondent

Counsel for the Respondent submitted that the Appellant was examined on PF24 which was admitted as PEX2 and was found to be 18 years. PEX2 shows that the Appellant at the time of the examination was 18 years depending on the eruption of the 3rd molar and physical appearance and distribution of pubic hairs. Counsel submitted that the was therefore rightly tried as an adult.

Counsel cited **Section 66 (3) of the Trial on Indictments Act**, which provides that:

> "any fact or document admitted (whether the fact or document is mentioned in the summary of evidence or not) in a memorandum under this section shall be deemed to have been duly proved: but if during the course of the trial, the court is of the opinion that the interest of justice so demand, the court may direct that nay fact or document admitted or agreed in a memorandum filed under this section be formally proved"

Counsel submitted that the PF24 that stated the age of the Appellant was admitted in evidence with no objection from the Appellant during the trial. The trial Judge did not doubt its contents neither did the Appellant bring the issue of age into contention. Counsel prayed that this court finds that the Appellant was rightly charged , tried and sentenced as an adult.

Consideration of Court

We observe that the appellant's age was not put into issue at the trial. Even so, age of an offender as a matter of law, must be proved through credible evidence. It is provided under Section 88 (5) Children's Act that:

> *A person shall be presumed to be a child if he or she claims or appears to be younger than 18 years old pending a conclusive determination of age by court.*

An amendment to Children Act (S.19 Children's Amm. Act) made further provisions that:

> *"(2) In determining criminal responsibility or an order for a child offender, the police, prosecutor or a person presiding over the matter shall consider the age of the person at the time the offence was allegedly committed;*
>
> *(3) Subject to subsection (2), Court shall determine the age based on a full assessment of all available information, giving due consideration to official documentation including a birth certificate, school records,*

health records, statements certifying age from the parent or child, or medical evidence.

Thus, it was the duty of the court to inquire into the appellant's age especially in view of the imprecise entry into PF24 and the appellant's own submission of his age.

It is our duty then to re-consider the evidence available which indicates a strong probability that at the time he committed the offence, the appellant was a child. He should thus have been sentenced in that capacity.

We find it highly probable that the appellant was below 18 years when he committed the offence. The report from the medical examination of the appellant in 2017 gave an imprecise estimation of the appellant's age "*about* 18 years". The appellant, on the other hand, while testifying in 2019 said that he was 18 years meaning that, two years earlier when the offence was committed, he was 16 years.

We would give the appellant the benefit of doubt and put his age at the time of commission of the offence at 16 years. The consequence is that the appellant should have been sentenced as a child, to a sentence not exceeding 3 years' imprisonment. Therefore, the sentence of 23 years that was imposed on him is illegal and ought to be set aside. **(see: Sebuma Vs Uganda, Court of Appeal No. 0617 of 2014 which offers some guidance).** In light of that authority, unless the appellant has been in custody for less than 3 years, he ought to be set free, as he has fully served the permissible sentence.

We are therefore satisfied that according to the evidence on record the Respondent did not prove the age of the Appellant beyond reasonable doubt.

This ground succeeds.

The appellant was arrested on 25th October,2017 and has been in custody for over 5 years, longer than the maximum sentence of 3 years imprisonment that can be imposed on a child under the Children's Act, Cap 59. Therefore , the appellant ought to be set free immediately, unless he is otherwise held on other lawful charges.

We so order.

Dated at Kampala this 11th **day of** January **2023.**

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ELIZABETH MUSOKE

JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

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EVA K. LUSWATA

JUSTICE OF APPEAL