Court copy

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[Coram: Egonda-Ntende, Bamugemereire & Mulyagonja, JJA]

CRIMINAL APPEAL NO. 691 OF 2015

(Arising from High Court of Uganda Criminal Case No. 40 of 2012 at Lira)

BETWEEN

Baguma Robert ==========Appellant

AND

Uganda==========Respondent

(*Appeal from a Judgment of the High Court of Uganda (Nabisinde, J.) delivered on the 20th, June 2014*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) and (4) of the Penal Code Act. The particulars of the offence were that the appellant on 12th November 2012 at Amiomola Island, Apac District, unlawfully performed sexual intercourse with TP, a girl aged 3 years. The learned trial Judge sentenced the appellant to 30 years' imprisonment.

[2] Dissatisfied with that decision, the appellant appealed against conviction and sentence on the following grounds

> '1. The learned trial judge erred in law and fact, when she failed to properly evaluate evidence on record thereby arriving at a wrong decision that the appellant was positively identified as the person who committed the crime.

2. The learned trial judge erred in law and fact when, after finding that the victim was so young and did not understand what happened failed to establish the necessary corroborative evidence before making the decision to convict the appellant.

3.The learned trial judge erred in law when she passed an illegal sentence in the circumstances and imposed a jail term of 30 years without taking into consideration the period spent on remand which occasioned a miscarriage of justice.

4.The learned trial judge erred in law and fact when she imposed sentence which in the circumstances was manifestly excessive and very harsh which occasioned a miscarriage of justice.'

[3] The respondent opposed the appeal.

[4] At the hearing the appellant was represented by Mr. Walter Okidi Ladwar. The respondent was represented by Mr. Simon Peter Ssemalemba, Assistant Director of Public Prosecutions in the Office of the Director of Public Prosecutions. Both counsel filed written submissions.

Submissions of Counsel

[5] Counsel for the appellant submitted that the trial judge relied on the evidence of the father of the victim. The father found injuries in the child's private parts and medical examination confirmed that the injuries were caused by a sexual penetration attempt and the appellant escaped from home that night. He submitted that the child was unable to testify. She could not remember the appellant and the sexual assault at all. Counsel for the appellant further submitted that there was no eyewitness to the offence. The sexual assault was reported many days later and there were no indicators as to when it took place.

[6] Counsel for the appellant argued that the court did not find any useful evidence to corroborate the testimony of PW3. He stated that all other witnesses had no information with regard to the participation of the appellant. That PW3 in his testimony stated that the child started to cry when the mother was bathing her on 2nd November 2012. PW3 left home for Masindi where he

stayed for 10 days and later returned on 16th November, 2012 but the mother of the child did not testify. He argued that the witnesses who arrested the appellant claimed that he admitted to them and police that he committed the crime but no such evidence was adduced from police.

[7] Counsel for the appellant submitted that the trial judge did not consider the period the appellant spent on remand in passing the sentence and he gave a harsh sentence. He prayed that this court allows the appeal, sets aside the judgment and acquits the appellant or in the alternative, sets aside the sentence and substitutes it with an appropriate one.

[8] In reply counsel for the respondent submitted that PW3 noticed the victim's discomfort while bathing her on 12th November 2012 and interested himself in the matter on 16th November 2012 after the persisted discomfort of the child. Counsel further submitted that the victim, being only 3 years old, could not recognise the appellant as the appellant had only worked at their home for a short period, in addition to the lapse of time between the offence and the trial

[9] Counsel for the respondent submitted that there was circumstantial evidence to show that the appellant committed the crime. There is the evidence of PW3 whom the victim told that the appellant put a stick inside her private parts. There is the medical report EXP1 which showed that there were bruises around the labia and haematoma of the inner vaginal wall which suggests penetration; and the fact that the appellant run away when he heard PW3 talk to the victim. He argued that the evidence of PW4 and PW6 that the appellant admitted to have had sexual intercourse with the victim and asked for forgiveness also pointed to the fact he committed the crime. He relied on Okello Geoffrey v Uganda Criminal Appeal No. 329 of 2010 where the Supreme Court stated that an act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Counsel for the respondent submitted that the trial judge evaluated the evidence on record and properly convicted the appellant.

[10] Counsel for the respondent submitted that the trial judge took into account the period the appellant spent on remand while passing the sentence of 30 years' imprisonment and contended that the sentence passed was neither harsh nor excessive in the circumstances. He relied on Mutebi Ronald v Uganda Court of Appeal Criminal Appeal No. 383 of 2014 (unreported) where the appellant was sentenced to 23 years' imprisonment, and on appeal this court reduced the sentence to a period of 20 years' imprisonment after deducting 2 years and 6 months the appellant had spent on remand.

Analysis

[11] It is our duty as a first appellate court to subject the evidence adduced in this case to a re-appraisal and reach our own conclusions on the facts and law, bearing in mind, however, that we did not have the opportunity to see the witnesses testify. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10; Kifamute Henry v Uganda [1998] UGSC 20; and Bogere Moses v Uganda [1998] UGSC 22.

[12] The case for the prosecution was that the appellant was a herdsman employed by the victim's father. The victim was aged 3 years and lived with her parents at Amiamola Island in Apac District. On 12th November 2012 during the day, the victim was at their home playing. The appellant who was a resident of the same cell, told the victim to follow him to a nearby bush. While in the bush the appellant picked the victim, removed her skirt and had sexual intercourse with her. The matter was reported to Ibuje Police Post and the appellant was arrested. The victim was medically examined and found to be 3 years old with a raptured hymen.

[13] The appellant in the court below gave an unsworn statement. He stated that he was employed as a herdsman by a Mr John Kibirige, PW3. One night Mr Kibirige was fighting with his wife and he separated them. Mr Kibirige then beat up the appellant and tied him up. He called Local Council officials, who came and took him to the Police Station.

[14] The trial court accepted the case put forward by the prosecution, convicted the appellant and sentenced him to 30 years' imprisonment.

Ground 1

[15] Counsel for the appellant contended that there was no evidence identifying the appellant as the perpetrator of the crime in question. Neither was there evidence to corroborate the testimony of PW3. PW3 stated that he learnt of the incident on 2nd November 2012 when the mother was bathing the victim. At first he thought the child was fearing water but the mother informed him that the child was feeling pain in her private parts. He travelled to Masindi on 12th November 2012 and upon his return on 16th November 2012 he heard the victim cry again when the mother was bathing her. He checked the victim's private parts and observed wounds about three days old. That the appellant run away on learning that PW3 had received information about the cause of injuries to the victim and never returned home.

[16] The appellant claimed that PW3 tied him up with a rope and beat him up after he separated him from his wife and invited the L.C1 Chairperson, Vice Chairperson and Defence Secretary who took him to the police. PW4 stated that he received a call from PW6 telling him to look for the appellant. He traced the appellant at the home of Mr Masege. They asked the appellant why he ran away from Cela and he told them that he had sexual intercourse with PW3's child. That the appellant requested PW6 to call PW3 so that he could ask for forgiveness. This was confirmed by PW6.

[17] The learned trial judge treated this case as one of a single identifying witness and extensively directed herself as to the law with regard to a single identifying witness citing the leading authorities of Abdalla Bin Wendo v Republic, 20 EACA 186; Bogere Moses v Uganda, (SCCA No.1 of 1997) [1998] UGSC 22 and Nabulere v Uganda [1979] HCB 77, [1978] UGCA 14. The learned trial judge accepted the hearsay evidence of PW3 that the victim who did not testify told him that it was the appellant that put a stick in her private parts. She wrote in part,

'PW3 was clear in her evidence that she asked the victim immediately after he examined her private parts what had happened to her, she mentioned the accused person as having pushed a stick in her private parts. The victim although she was too young to testify she knew the accused well and had lived at home with him for some weeks. While defence counsel submitted that there were 5 people in PW3's compound, PW3 under cross examination stated that he was the only other male in that compound apart from the accused person. He also clearly stated that he had no house help and this was not denied by the defence. I therefore have no doubt that despite being too young to understand what had been done to her, the victim had identified her assailant at the time the offence was committed and knew him very well. The findings and injuries sustained by the victim tallies with the evidence that was recorded on P. Exhibit No. I and P. Exhibit No. 2 and P. Exhibit No.3 which was admitted unchallenged indicate that the injuries were a result of attempted sexual penetration and not any other object. It must also be noted that the position of the law as far as defilement is concerned is that the slightest penetration is enough.

The assessors, Mr. Owaa John and Mrs. Ebuu Eca-is who sat throughout the trial of this case after considering the facts, the evidence and the points of law on which I directed them, were unanimous that the accused was put at the scene of crime by the prosecution witnesses and that the prosecution had proved its case beyond reasonable doubt. I have no reason to disagree with the findings of the assessors in this case (on) all the ingredients of this offence. My own conclusion after considering all the evidence of both sides and the submissions of the state and defence is without any doubt that the accused was at the scene of crime at the material time and took advantage of the victim by having unlawful sexual intercourse with her.'

[18] The learned trial judge erred to treat this as a case of a single identifying witness. It was not. There was no eyewitness to the commission of this offence

and no such admissible evidence was tendered before court. The victim did not testify for reasons that the learned trial judge was right to accept.

[19] In the absence of evidence identifying the perpetrator of the offence, the court was left with no alternative but to consider the other evidence available in this case to determine if indeed there was sufficient evidence to prove that the appellant was the person that committed the offence.

[20] The evidence that remains is the testimony of PW3, the testimony of the PW4 and PW6 who arrested the appellant and took him to the Police Station. This evidence ought to be considered together with the evidence of the medical officer that examined the appellant on his arrest and the testimony of the appellant.

[21] The evidence of Dr Odong Joel of Apac Hospital who examined the appellant on the 20th November 2012, soon after his arrest, was to the effect that his age was estimated to be 20 years old. He appeared physically fit and of normal mental status. He had bruises on the face, the back, the upper and lower limbs. The probable cause of the injuries was assault. This evidence was admitted at the instance of the prosecution by agreement.

[22] The appellant testified that he was assaulted by PW3 after he intervened to stop him beating his wife. He stated that PW3 then tied him up with a rope and called the Local Council authorities who took him to the Police Station. The version by the appellant in relation to his arrest is at variance with the testimony of PW4 and PW6 who testified that they arrested him at Masege's kraal.

[23] The appellant's testimony in relation to his assault is corroborated by the prosecution evidence of the Dr Joel Odong who examined him on 20th November 2012. If there was any admission or confession, to PW4 and PW6, as those witnesses claimed it was not possible to dismiss the possibility that it was not voluntary. PW 4 and PW6 do not speak to the injuries suffered by the appellant, which were observed by Dr Odong. Neither did the appellant accuse them beating him up. He testified that it was PW3 that beat him up and then

called PW4 and PW6 to whom PW3 handed the appellant. Once the evidence of the admission to PW4 and PW6 is excluded we are left with only the evidence of PW3 who did not witness the offence being committed.

[24] PW3 raised the theory that as there were only 2 males in his compound and the appellant being the only other male in his compound, must have committed this crime. It is not known exactly when and where the crime was committed. Neither is it known as to who committed this offence. The mother of the victim never testified, and she is probably the first person that saw the victim with injuries. She is the person that bathed the victim regularly or at least on the days in question, watched by PW3. And logically the mother would be the first person that the victim would tell what happened to her. There is no explanation why the mother of the victim did not testify. Would this lend credence to the testimony of the appellant that he stopped PW3 from beating his wife on the evening that he was arrested? Was this the cause of the assault on him by PW3 as well as his subsequent arrest?

[25] It was part of the prosecution's case that the appellant was arrested in Masege's kraal or home where he had gone to sleep on that night having run away from the home of PW3. No witness was called from this home to testify and support the evidence that the appellant had gone to Masege's home where he was sleeping when the arresting party came to arrest him.

[26] The appellant gave evidence, not on oath, that he was arrested at PW3's home, by PW4 and PW6, after he had been assaulted and tied up by PW3. No police officer testified in this matter. No evidence of first information received at the Police Station was tendered. It was therefore important to establish beyond reasonable doubt which version of the arrest of the appellant was the correct one.

[27] Ordinarily if the prosecution fails to call a witness that should be called it is possible to draw an adverse inference that this was due to the fact that the evidence from that witness may not support its case.

[28] We are satisfied upon a review of the evidence on record that the prosecution failed to prove that it was the appellant that committed the offence in question. The evidence falls short of the required standard of proof, beyond reasonable doubt. The only evidence available is circumstantial evidence which does not lead to only one possible inference that the appellant committed the offence he was indicted of.

[29] We would allow ground no.1 of the appeal. In light of this finding, it is unnecessary to consider the rest of the grounds of appeal.

Decision

[30] This appeal is allowed. The conviction of the appellant is quashed. The sentence is set aside. We order the immediate release of the appellant unless he is being held on some other lawful ground.

Dated, signed, and delivered this 26th day of [illegible] 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Irene Mulyagonja
Justice of Appeal

16/06/2023

Appellant :- [illegible] V.L

No 15247 ~~was~~ [illegible] [illegible] Kiboi.

Mr. Wahome - CC

[illegible] [illegible]. CL

[illegible] Judgment delivered

[illegible]

16/06/2023