THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Musoke, Gashirabake & Luswata, JJA]

CRIMINAL APPEAL NO. 216 OF 2017

(Arising from Criminal session No. 0084 of 2016)

LUGEMWA CHARLES.....APPELLANT

VERSUS

UGANDA ....RESPONDENT

[Arising from the decision of Wilson Masalu Musene, J of the High Court of Uganda sitting at Mpigi in Criminal Case No. 0084 of 2016 dated 12th June 2017]

JUDGMENT OF COURT.

Introduction.

The Appellant was indicted for the offence of aggravated defilement contrary to Section 129(3)(4)(a) of the Penal Code Act. It was alleged that on 31st October 2014 at about 17:00hrs the victim NL aged 4½ years and her brother BT aged 2½ years were returning home from buying paraffin from a nearby shop. The Appellant induced the victim sent away the brother and performed a sexual act on the victim. The Appellant was arrested and charged with Aggravated Defilement. The learned trial Judge found that the prosecution had proved its case beyond reasonable doubt and accordingly convicted and sentenced the Appellant to 12½ years imprisonment.

The Appellant was dissatisfied with both the conviction and the sentence passed by the trial Judge hence lodging this appeal on ground that:

> "The learned trial Judge erred with in law and fact when he failed to properly evaluate the evidence on record thereby convicting the Appellant basing on uncorroborated hearsay evidence full of contradictions and inconsistencies thereby occasioning a miscarriage of justice"

Representation

The Appellant was represented by Mr. Kenneth Ssebabi. The Respondent was represented by Ms. Carolyn Hope Nabaasa, Assistant Dpp and Mr. Innocent Aleto, State Attorney.

Submissions by counsel for the Appellant

Counsel cited **Buyinza Emmanuel Vs. Uganda Criminal Session Case 139 of 2013,** where court held that in an offence of aggravated defilement the prosecution must prove beyond reasonable doubt that:

1. The victim was a child under the age of 14 years.
2. The victim experienced carnal knowledge
3. It was the accused who had sexual intercourse with the victim.

In his submissions counsel for the Appellant agreed that the prosecution proved the first two ingredients of the offence beyond reasonable doubt. Counsel however, disputed the participation of the Appellant in the crime.

Counsel for the Appellant submitted that to prove their case the prosecution led two witnesses. PW1 the father of the victim who testified that he sent the victim together with the brother for fuel. He realised that Busulwa returned without the sister, Busulwa informed him that the sister had been called for biscuit. PW1 testified that he proceeded to look for her and he found her on the way checking between her legs. The mother of the victim checked her and water was coming out of the private parts. The father reported the matter to police who arrested the Appellant.

PW 1 testified that the Appellant agreed that he gave the accused some biscuits.

It is counsel's submissions that PW2 an investigating officer testified that Mr. Kiwanuka Gerald sent his children to buy fuel and after the purchase the Appellant

sent Leticia and asked her for pop corns of UGX 200/=. The accused sent away the boy. The Appellant took Leticia in the house and had sexual intercourse. This information was revealed to him by the father of the victim. The victim was interrogated and confirmed being defiled by the Appellant. He issued her medical forms and referred to Gomba Hospital.

Counsel for the Appellant submitted that in his defence the Appellant testified that he got up early to rear his chicken up to 4:00pm. He further testified that as he was preparing a charcoal stove for the hens, the complainant came with a child who was holding a biscuit and asked if he was the one who brought her biscuit but the Appellant denied. Later in the day a police officer came to his house telling him he was needed at the Police station.

Counsel submitted that the evidence of PW2 should be considered as hearsay evidence. Counsel cited **Ndyaguma David vs. Uganda CACA No. 236** cited with approval in **Apea Moses Uganda CACA No. 0653 of 2015**, where court held that in cases where the victim of a sexual offence is not brought to testify in court, evidence by persons called as witnesses, that the victim told them that the accused defiled her is hearsay evidence, and is inadmissible at common law. Such evidence ought to be rejected.

Counsel for the Appellant further submitted that the testimony of PW1 was full of inconsistencies. PW 1 stated that he found the victim checking between her legs and during cross examination he stated that he found the victim in the accused's house. Counsel cited **Candiga Swadick vs. Uganda CACA No.23 of 2012,** held that, the law on contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand will only lead to rejection of the evidence if they point to deliberate untruthfulness the part of the witness.

Consequently, counsel prayed that this court finds that the prosecution evidence was hearsay and should not have been relied on by the trial court.

Submissions by counsel for the Respondent.

Counsel for the Respondent raised a preliminary Objection under Rule 66(2) of the Court of Appeal Rules, so far as the ground was not concise but rather general and argumentative. Counsel cited **Sseremba Dennis vs. Uganda Criminal Appeal No. 480 of 2017,** where this court struck out two grounds for offending Rule 66(2) of the Court of Appeal Rules.

On the merits of the Appeal counsel for the Respondent divided their submissions into three parts:

1. **Uncorroborated evidence of PW1 and PW2.**

Under this counsel for the Respondent submitted that the victim was unable to testify because of her age as the judge pointed out in the record of appeal. Counsel submitted that the evidence on record was sufficient to convict the accused to the required standard of the law. Counsel further submitted that the victim pointed out the Appellant as the one who perpetrated the crime. Counsel submitted that this evidence was corroborated with that of PW2.

Counsel further submitted that the lies of the Appellant corroborate the evidence of the prosecution.

Additionally, counsel for the Respondent argued that it is not mandatory that in all defilement cases the victim has to testify. Counsel cited **Bassita Hussein vs. Ug. Supreme Court Criminal Appeal No. 35 of 1995,**

> "Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every defilement case..... whatever evidence must be such that it is sufficient to prove the case beyond reasonable doubt"

Counsel further cited **Sewanyana Livingstone vs. Uganda SCCA No 19 of 2016,** which cited with approval by the Supreme Court in **Ntambala Fred vs. Uganda SCCA No. 34 of 2015,** where court held that what matters is the quality and not quantity of the evidence. The court can convict on the strength of one witness. In **Omuroni vs. Uganda (2002) 2 EA 508,** where court held that evidence of people who are not eye witnesses but told of a crime of defilement if admissible.

2. The Contradictions and consistencies

Counsel for the Respondent submitted that counsel for the Appellant only cited one instance of inconsistences. Counsel argued that the position of the law regarding grave inconsistencies or contradictions is that they are resolved in favour of the accused for such inconsistences or contradictions go to the root of the case. Counsel further submitted that minor inconsistencies or contradictions which do not affect the main substance of the prosecution's case should be ignored. See **Kato Kajubi Godfrey vs. Uganda, SCCA No. 20 of 2014.**

Counsel submitted that in the circumstances of this case the contradictions were minor and does not go to the root of the case.

3. Disregarding the Appellant's defence

Counsel for the Respondent submitted that the defence raised by the Appellant was an afterthought having not raised it during cross examination of PW1 and PW2. Counsel submitted that the trial court found that the evidence of the Appellant was untruthful, so it was right for the trial judge to disregard the evidence of the Appellant.

Counsel prayed that this appeal should be dismissed.

Submissions in rejoinder.

Counsel for the Appellant submitted that the ground of the Appellant is neither argumentative nor general in nature. Counsel further submitted that the Respondent has not demonstrated how the ground is argumentative. Counsel argued that the objection as therefore misguided and the Appeal should be heard on its merits under article 126 (2) (e) of the Constitution which enjoins this Court to administer substantive justice without undue regard to technicalities.

Consideration of Court.

We must state from the onset that this court as the first appellate court is required under Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions, to review and revaluate the evidence before the trial Court, by subjecting it to a fresh and exhaustive scrutiny, and draw its own inferences of fact and come to its own conclusion. This court is therefore going to subject the evidence on record to a fresh scrutiny and come to its own conclusion. See **Kifamunte vs. Uganda, SCCA No. 01 of 1997.**

We agree with the submissions of counsel for the Respondent that the first ground is not concise as required under Rule 66 (2) of the Rules of this court. We shall however proceed under Rule 2 (2) of the Rules of this Court and Article 126 (2) (e) to hear the case on its merits.

The essential ingredients of the offence of aggravated defilement were ably set out by the trial Judge as:

1. The victim was at the time of the offence under the age of 14 years of age.
2. That the sexual intercourse with the victim took place
3. The accused participated in the sexual intercourse.

It is not in dispute that the victim was below the age of 14 years at the time of the offence. It is conceded by the Appellant that the prosecution had proved beyond reasonable doubt that the victim was 4 and half years at the time the offence was committed.

The Appellant also conceded to the fact that the prosecution proved the fact that the sexual intercourse with the victim took place. The uncontroverted medical evidence marked as PEXh1, indicates that the victim was 4 and half years of the offence. According to the report, it was found that the hymen was raptured recently and the vulva is reddish in colour. The clitoris was inflamed and there was a bad smell from the external genital. The examination shows that the penetration was by a penis.

This evidence was corroborated by PW1 who is the father of the victim who testified that the he found the victim checking between her legs. The victim's mother checked her and saw water coming out of her private parts. It is therefore our considered opinion that the prosecution proved this ingredient beyond reasonable doubt.

We agree with the submissions of the Appellant that this appeal is hinged on whether the Appellant participated in the sexual intercourse with the Victim. It was PW1 evidence that when the victim and the little brother had over delayed he followed them and found the victim checking between her legs. When the mother checked there was water coming out of the victim. He averred that when he went to the Appellant's home and asked him whether he gave the victim some biscuits he had admitted but later changed. PW1 stated that the victim pointed at the Appellant as the perpetrator of the crime.

The Appellant objected to this evidence that it was hearsay having failed to adduce the victim as a witness.

The general rule on Hearsay is well articulated in the **Evidence Act section 59 (a)** which provides that:

> "oral evidence must, in all cases whatever, be direct; that is to say,
>
> If it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it"

This rule is to the effect that a statement given in proceedings about something other than that by the person who directly perceived it, is inadmissible. The rule against hearsay is exclusionary in the sense that it excludes hearsay evidence in the course of proceedings. However, this rule has exceptions clearly stated under section 30 of the Evidence Act which are not applicable to the circumstances of this case.

In **Apea Moses vs. Uganda Criminal Appeal No. 0653 of 2015,** court captured the principle regarding hearsay evidence. It stated that;

> "our understanding of the position articulated in the decision in the Badru Mwidu case (supra) is that in all cases, whether involving hearsay evidence or not, the Court may only convict the accused person if it is satisfied that the evidence adduced justifies such a decision."

In **Badru Mwindu vs. Uganda Supreme Court Criminal Appeal No 15 of 1997**, court held that hearsay evidence is admissible and can be relied upon if the totality of the prosecution evidence points to the guilty of the accused person. This position is consistent with the principle set out in the case of **Bassita Hussein vs. Uganda Supreme Court Criminal Appeal No. 35 of the 1995,** where court held that;

> "Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution

> may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt'"

PW1 Kiwanuka Gerald, the victim's father testified that at about 4:00 p.m. on 31st October, 2004, he met the victim coming from the appellant's house. The victim was checking between her legs. PW1 testified that the victim's mother also checked her shortly thereafter and saw water coming out of her private parts. In cross- examination, he gave contradictory testimony that he met the victim at the appellant's house. We can conclude that PW1 met the victim coming from the direction of the appellants' house. The evidence was that shortly thereafter, PW1 went to the nearby Kibibi Police Station and reported the incident to the Appellant.

PW2 Detective Corporal Abuber Marjan testified that he was at Kibibi Police Station when PW1 went with the victim to report a case of defilement. PW2 stated that the victim confirmed to him that the Appellant had defiled her. PW2 further testified that shortly thereafter, the victim was sent to Gomba hospital for medical examination.

According to the report from the medical examination, the victim was examined at 5:00 p.m. on 31st October, 2014. The examining doctor observed that:

> "[the victim's] hymen was ruptured recently. Vulva is reddish in colour. Clitoris in inflamed and there is bad smell from external genitals."

The medical examination report therefore confirmed that a sexual act had been performed on the victim. PEX1, indicated that the victim suffered injuries in her private parts.

In our view, the circumstances as portrayed by the evidence formed part of the same transaction. They began with the defilement of the victim at around 4.00pm and ended with the medical examination of the victim at 5.00pm which confirmed

the defilement. It can therefore be said that all circumstances, including the hearsay evidence point to the guilt of the appellant as the person who defiled the victim.

On whether there were inconsistencies and contradictions in the evidence of the prosecution evidence, the position of the law on inconsistence and its effects is set out in **Obwalatum Francis vs. Uganda, Criminal Appeal No. 30 of 2015.** The Supreme Court held that:

> "the law on inconsistency is to the effect that where there are contradictions and discrepancies between witnesses which are minor and of a trivial nature, these maybe ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained"

Where the inconsistency is minor in nature it can be ignored. In the circumstances of this case PW 1 during cross examination stated that he found the victim in the house of the Appellant yet he had earlier told court that he found the girl on her way while looking between her legs. Whereas PW2 told court that it was revealed to him by PW1 that the victim was found out bleeding. The bleeding was not mentioned by PW1. We are persuaded that these contradictions are minor and inconsequential.

We therefore uphold the conviction and the sentence of the lower court.

We so order.

Dated at Kampala this 30th **Of** January **2022**

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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