

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT – CR – CA – NO. 004 OF 2016**  
**(Arising from KAS – 00 – CR – CO – 358 of 2015)**

**NDYANABO SHABAN.....APPELLANT**

**VERSUS**

**UGANDA.....RESPONDENT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Judgment**

This is an appeal against the decision of His Worship Matenga Dawa Francis, Chief Magistrate at Kasese, delivered on 27/4/16.

**Background**

The Appellant was charged with the offence of Attempted Defilement Contrary to **Section 129 (2)** of the Penal Code Act. It was alleged that the Appellant on 7<sup>th</sup> June 2015 while at Top Hill Village in Kasese District attempted to perform sexual intercourse with Muhindo Irene a girl aged 4 years.

The trial Magistrate found the Appellant guilty and sentenced him to 7 years imprisonment. The Appellant being dissatisfied with this decision lodged this appeal whose grounds are as follows;

1. The trial Magistrate erred in law and fact when he relied on insufficient evidence to convict and sentence the Appellant/accused.
  - a) No medical examination report on the victim was exhibited as evidence in Court by the prosecution.
  - b) The evidence of PW1 and PW2 was not corroborated.

2. The trial Magistrate erred in law and fact when he did not properly evaluate the prosecution evidence thereby reaching a wrong decision to convict and sentence the Appellant herein.
  - a) The evidence of prosecution on identification of the Appellant at the scene of the crime was not properly evaluated by the trial Magistrate.
3. The trial Magistrate erred in law and fact when he did not put into consideration the period spent on remand while sentencing the Appellant herein.
4. The trial Magistrate erred in law and fact when he convicted and sentenced the accused in his absence.
  - a) The date the matter was adjourned for judgment is not the date on which judgment was delivered in Court.

Counsel Angella Bahenzire appeared for the Appellant.

First, it is trite law that the duty of a first Appellate Court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial Court. **(See: Pandya versus R (1957) EA 336, Ruwala versus R. (1957) EA 570, Bogere Moses versus Uganda Cr. App. No.1/97(SC), and Okethi Okale versus Republic (1965) EA 555).**

The Appellate Court should give proper weight and consideration to such matters as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of doubt and the slowness of an Appellate Court in disturbing the finding of fact arrived at by the trial court which had the advantage of observing the witnesses **(See: Okeno versus Republic [1972] E.A 32, Anim versus Republic [2006] 2 EA 10.**

The Appellate Court should also be always mindful that the onus to prove the case against the accused beyond reasonable doubt lies on the prosecution and in event of any doubt that doubt ought to be resolved in favour of the accused.

Attempt is defined under **Section 386 (1)** of the Penal Code Act as follows:

*“when a person, intending to commit an offence, begins to put his or her intention into execution by means adapted for its fulfilment, and manifests his or her intention by some overt act, but does not fulfil his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.”*

The ingredients of Attempted Defilement are:

- a. Attempt to perform a sexual act.
- b. The age of the victim.
- c. The participation of the Accused.

**Ground 1: The trial Magistrate erred in law and fact when he relied on insufficient evidence to convict and sentence the Appellant/accused.**

Counsel for the Appellant submitted that the no medical report on the victim was ever exhibited in Court and this makes it difficult to actually ascertain the age of the victim in order to determine if she was of tender age.

Whereas I agree with Counsel that in sexual offences against children age is key, I believe some things can be determined using common knowledge and may not necessarily require medical proof.

In the instance case I do not think it was so hard for the trial Magistrate to tell that the victim was below the age of 14 years and he clearly pronounced himself on the aspect of age in his judgment. It would have been something different all together if the victim was say 17-18 years old. This was a matter involving almost a toddler and therefore, I find no fault in the trial Magistrate finding that the victim was below 14 years.

I take note of the fact that the trial Magistrate did not give advanced explanation of the physical appearance of the victim, he at least made an endeavour to state that from the conduct of the victim and the way she expressed herself were all consistent with a child below 14 years of age. In the circumstances I find that the trial Magistrate was right to conduct a voir dire.

Thus, the ingredient of age was proved sufficiently in my opinion.

In regard to the attempt to perform a sexual act, Counsel for the Appellant cited the cases of **Chila versus R. (1967) 722** and **Jackson Zite versus Uganda, SCCA, No. 19 of 1995** on corroboration where it was held that;

*“It is trite that where a child of tender years gives unsworn evidence, that evidence must be corroborated with independent material evidence before a conviction can be based on it. It was stated in R versus Chila (supra) that the judge must warn himself/herself of the dangers of conviction of an accused with uncorroborated testimony and may convict in the absence of corroborating evidence if he or she is satisfied that the evidence is truthful.”*

**Section 40(3)** of the Trial on Indictment Act states:

*“Where in any proceedings any child of tender years does not in the opinion of the court understand the nature of an oath his evidence may be received though not on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth. Provided that where the evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some material evidence in support thereof implicating him.”*

**Section 155** of the Evidence Act defines what is sufficient to corroborate evidence and provides:

*In order to corroborate the testimony of a witness, any former statement by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.*

PW2 told Court that she found the Appellant sleeping on top of PW1 when she was told by Kabila to go and see what was happening to her granddaughter. That the two went to the Appellant’s house however found it locked and there were two doors which were both locked. PW2 further stated that it is upon finding the Appellant on top of PW1 that she took her and straight away headed to report at Police.

Counsel for the Appellant submitted that the evidence of PW2 pointed to a different offence all together since she stated that she noticed that the victim had semen flowing out of her and the same was observed by the Police Officer that went to arrest the Appellant. That PW1

herself stated that the Appellant used his thing in her private parts which makes it defilement and not attempted defilement.

Further that Kabila the lady that informed PW2 about her granddaughter's predicament was not brought to Court yet her evidence was so crucial to corroborate the evidence of PW1 and PW2.

In my view, the lack of a medical report on the victim did not do good to the prosecution case. PW1 and PW2 in their testimonies seemed to all be narrating an occurrence of defilement and not attempted defilement which is inconsistent with the offence the Appellant was charged with.

The prosecution miserably failed to prove its case by not producing medical evidence on the victim, the crucial witness that would have corroborated the evidence of PW1 and PW2, Kabila, and the investigating Officer or at least the arresting Officer who also according to the evidence of PW2 examined the victim.

This ground therefore succeeds.

**Ground 2: The trial Magistrate erred in law and fact when he did not properly evaluate the prosecution evidence thereby reaching a wrong decision to convict and sentence the Appellant.**

Counsel for the Appellant submitted that the prosecution evidence in regard to identification was not properly evaluated. That PW2 told Court that it was dark and she could not see yet the alleged incident took place during the day. In the circumstances if it was dark how was PW2 able to identify the Appellant.

PW2 contradicted herself when she stated that the alleged offence was committed during the day but was unable to identify the perpetrator. This in the circumstances creates doubt in the identification of the victim for him to be sufficiently placed at the scene of crime.

In the case of **Uganda versus Abdallah Nassur [1982] HCB**, it was held that where grave inconsistencies occur, the evidence may be rejected unless satisfactorily explained while minor inconsistencies may have no adverse effect on the testimony unless it points to deliberate untruthfulness.

I find that the Appellant was not sufficiently placed at the scene of crime and the evidence of PW2 with its inconsistencies is neither credible nor reliable. This ground succeeds.

**Ground 3: The trial Magistrate erred in law and fact when he did not put into consideration the period spent on remand while sentencing the Appellant herein.**

**Article 23(8)** of the Constitution of the Republic of Uganda, 1995, provides that;

*“Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.”*

I concur with the submission of Counsel for the Appellant that the trial Magistrate erred in law and fact when he did not put into consideration the period spent on remand while sentencing the Appellant herein. This ground succeeds.

**Ground 4: The trial Magistrate erred in law and fact when he convicted and sentenced the accused in his absence.**

Counsel for the Appellant submitted that the Appellant was denied a right to fair trial since judgment and sentencing were passed in absentia. That this was done in contravention of **Article 28 (1) and (5)** of the Constitution of the Republic of Uganda, 1995 and **Article 14(3) (e)** of the International Covenant on Civil and Political Rights 1996. That neither was the Appellant notified of the new date of judgment or date of sentencing. (**See: Colozza Versus Italy (1985) 7 EHRR 516.**)

Further, that the Appellant was not given a chance to mitigate his case.

I agree, the Appellant should have been notified on the new date of judgment and date of sentencing and this was indeed in contravention with the Right to a fair trial. This ground also succeeds.

In a nutshell, I find that the prosecution did not prove its case beyond reasonable doubt. The appeal is allowed on all grounds.

Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**1/12/16**