THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT TORORO

HCT-04-CR-SC-150-2013

UGANDA :: PROSECUTOR

VERSUS

MADOLO JAMES alias MUKAMA:::::::::::::::::::::::: ACCUSED

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused was charged of aggravated Defilement c/s 129 (3) and (4) (a) of the Penal Code Act. The charge is that on 16th day of June 2012 accused performed sexual intercourse with **Mukera Fahina**, a girl aged 7 years.

Accused denied the charge.

The evidence on record was led through **PW.1 Mukera F, PW.2 Tiiba Nambira PW.3 Naughama Dorothy**, **PW.IV Okaye David**, and accused testifying as DW.1 (on oath). The prosecution also relied on PE.I-PF.3, PE.2-PF.24, PE.3- Short Birth Certificate.

The prosecution has the evidential and legal burden to prove that:

1. There was sexual intercourse or act performed on the victim.
2. The victim was a girl below 14 years.
3. The accused performed the act.

Both prosecution and defence agreed that evidence on record satisfactorily proves that:

1. The girl was below 14 years (evidence of PE.3 (Birth Certificate), PE.1- (Medical examination of victim), evidence of PW.2- Mother). The court confirms that by virtue of that evidence age was proved. This ingredient was therefore proved.
2. There was sexual act performed on the victim. (Evidence of PW.1, (victim), PE.1 (medical examination of the victim).

This court agrees that on the strength of that evidence sexual action was proved in terms of Section 129 (1) of the Penal Code Act.

> "*Sexual act means penetration of vagina, mouth and anus however slight of any person by a sexual organ*."

This ingredient is proved.

By his submissions, Counsel for accused challenged participation of the accused on grounds that there were grave contradictions in the evidence of PW.1, PW.2 and PW.3. He also observed that the evidence of PW.1 lacks corroboration.

Prosecution through Resident State Attorney, argued that the inconsistencies were minor and ought to be ignored. They further agreed that the law no longer requires corroboration of a victim's evidence; but the evidence has to be tested for cogency.

I resolve the above issue as follows:

1. Inconsistencies

According to the case of ***ALFRED TAJAR V. UGANDA CR. 167 OF 1969 EACA***, "*minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses should be ignored, major ones which go to the root of the case should be resolved in favour of the accused*."

It is the duty of this court to examine the evidence and find whether there are major contradictions, which can resolve in favour of the accused.

The defence contends that PW.1's evidence is that when PW.3 found accused, he ran away and she PW.1 ran to her mother at home. However PW.2 instead said when PW.3 informed her she ran to the garden and found the victim motionless on the anthill while accused was crawling away. He also pointed out that PW.1 stated that her mother PW.2 took her to the LC.I Chairperson but PW.2 denied going to the chairperson.

Counsel further argued that PW.2 contradicts herself when she said she found out the defilement from victim's wet clothes when the victim was with her at night (7:00p.m) yet she goes on to state the victim was taken to **Musiho**'s clinic at 8:00p.m. Counsel further argues that PW.1 said PW.3 made an alarm yet P.2 said PW.3 did not raise an alarm. Furthermore that PW.1 stated accused ran away upon hearing PW.3 alarm yet PW.2 and P.W.3 said PW.2 found accused in the garden.

The evidence on record if assessed as a whole in my view is not greatly affected by the above. It is notable that much of the difference in accounts is from PW.2 (mother of the victim's account of the events). However evidence of PW.1 (victim) who was at scene, and PW.3 (who found her at the scene is similar and agreed on the events as they unfold. PW.1 says she ran home so does PW.3. PW.1 said she made an alarm, and informed PW.2- so did PW.1 also state.

PW.1 stated she was taken to the LC by her mother, which PW.4 – the LC himself confirmed. Therefore PW.2's evidence seems to have been affected either by lapse of memory or otherwise but in my view it does not affect the value of the evidence as a whole. This is more so when the evidence of the accused is also considered.

The accused confirmed in his evidence in chief the fact that he was at the scene (millet garden), he confirmed that PW.2 confronted him there and asked about the defilement. He also confirmed that PW.3 was at the scene and that PW.1 was playing nearby. The alleged contradictions therefore are of minor significance and cannot affect the prosecution's case as they do not go to the root of the matter.

Corroboration:

Counsel for defence argued that the evidence of PW.1 regarding participation of the accused lacks corroboration. He referred to ***R. v. Manilal Purohit [1949] 9 EACA 58, and Buyinza Ronald v. Uganda CA Cr. App No. 120/2009***. He was of the view that since PW.2 and PW.3 were inconsistent, PW.1'S evidence needed corroboration.

In answer, the prosecution relied on the recent court of appeal decision of ***Okello Godfrey v. Uganda CA. 0329/2010*** where court observed that the position of the law as regards corroboration in sexual offences is that a conviction can be entered even if there is no corroboration so long as the court has cautioned itself of the danger of conviction without corroboration. The court further referred to its decision in ***Basoga Patrick v. Uganda (Cr. App. 42/2002)*** pronouncing that "the requirement for corroboration of evidence in sexual offences is discriminatory against women and is therefore unconstitutional.

The evidence of a victim in a sexual offence is evaluated like any other evidence in a trial and for court to base a conviction on uncorroborated evidence of a victim of sexual offence the test to be applied to such evidence is that it must be cogent. The cogency itself is determined after a full evaluation of the evidence including whether or not the victim is a truthful and reliable witness. It goes without saying that:

> " *if the evidence adduced of the victim is worthless, no conviction can be based on it but that if it is credible, a conviction can be based on it even if there is no corroboration*."

The above position settled the question of corroboration. It is therefore the duty of this court to evaluate PW.1's evidence like all other evidence and determine its evidential worth.

From the submissions and from the evidence on record, I find that the inconsistencies pointed at by the defence were minor. I go ahead to evaluate the entire evidence as a whole. I cautioned the assessors and indeed myself, and do so again on the dangers posed by this type of evidence which depends on the evidence of a child witness and a single identifying witness. Single in the sense that only PW.1 described the sexual intercourse. PW.2 found when the child and the alleged assailant were at the scene but she did not actually see the accused assaulting the victim sexually but depended on PW.1's account. PW.3 saw the accused tying his trouser. PW.3 confirmed that accused asked for forgiveness "that satan tempted him. This was the same evidence given by PW.2. however she also did not see accused in action with PW.1. PW.1's evidence therefore was crucial. She is the one who said accused is the one who sexually assaulted her. PW.2 found signs of assault on PW.1 when she checked her. The medical report

also showed that the victim had been sexually assaulted between 24-36 hours before examination. The assault is said to have occurred on 6th June 2012, and examination done on 7th June, 2012.

I have weighed this evidence alongside the defence which does not deny the occurrences save fact that he never defiled. The sum total of all evidence on record strikes me that PW.1, PW.2, PW.3 and PW.4 are all truthful.

I find further conviction in the truthfulness of this evidence from PW.4's account to evade arrest. PW.2 narrated that earlier on accused was let to go by the villagers. Accused explains that "having checked the girl" the villagers (who are not experts) let him go. However, later when confronted with arrest, accused behaved savagely. As rightly argued per the case of ***Uganda v. Simon Onen 1991 (HCB) 7*** the conduct of the accused of running into hiding after committing the offence was held not to be conduct of an innocent person. Similarly I find that the conduct of accused of resisting arrest was not conduct of innocence.

The thesis of a grudge as put up in defence was destroyed in cross-examination, when accused conceded that at time of this offence he had no grudge with PW.2 or her husband.

I have also addressed myself to the question of identification. I find that the evidence shows that PW.1 knew accused well as a neighbor, so did PW.2 and PW.3. Accused agreed he was at the scene. There was no mistaken identity.

For all reasons above, I find that the ingredient of participation has been proved by the prosecution.

In their opinion assessors jointly advised this court to convict the accused as charged.

I agree with this opinion.

Having found that accused participated, I find that the prosecution has dully proved the charge against the accused; as required. I accordingly find him guilty and convict him thereof.

Henry I. Kawesa

JUDGE

10.03.2016