

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

HCT-0OCR-CN-O108 - 2015

CHRISTOPHER MUBIRU KISINGIRI ::::::::::::::::::::APPELLANT

VERSUS

UGANDA:::::::::::::::::: RESPONDENT

BEFORE: THE HON. MR. JUSTICE WILSON MASALU MUSENE

JUDGMENT:

This Judgment arises out of an appeal by Christopher Mubiru Kisingiri, appellant. It is an appeal against the Judgment/conviction, sentence and orders of Her Worship Nabakooza Flavia delivered on 8th September 2015.

The grounds of Appeal were:

1. The trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record, thereby coming to a wrong decision.
2. The trial magistrate erred in law and fact when she partly based her evidence on a video recording that was not tendered in court as an exhibit.
3. The Trial Chief Magistrate erred in law and fact, when after finding that there was no sufficient evidence against the appellant convicted him.
4. In the alternative, the trial Chief Magistrate erred in law and fact when she handed the appellant a manifestly harsh sentence and order.

Mr. Ssenyonyi Brian, assisted by Mr. Kaweesi Anthony appeared for the appellant, while M/s Anna Kabajungu represented the State.

Counsel for the Appellant argued grounds No. 1 and No. 3 together as they basically touch on the evaluation of evidence by the lower court.

The brief background was that the appellant Christopher Mubiru Kisingiri was convicted by the Buganda Road Chief Magistrate's Court with the offence of having carnal knowledge of a

person against the order of nature contrary to section 145(a) of the Penal Code Act.

He was sentenced to 10 years imprisonment and ordered to compensate the victim in UGX. 50.000.000/= in addition.

Counsel for the appellant agreed with the ingredients of the offence as:-

1. Anal sexual intercourse was performed against the victims.

2. The accused participated in performing the Act.

Counsel for the appellant emphasized that it was the duty of the prosecution to prove the two ingredients beyond reasonable doubt. He however, disagreed with the holding of the Chief Magistrate that the only issue for determination was whether accused had anal sex with the victims.

Counsel for the appellant submitted that since there was no evidence of penetration, then the offence had not been committed. He added that the holding of the trial magistrate on page 2 of the Judgment that there was no direct evidence of a sexual act was enough to confirm that the offence was never committed by the appellant.

Counsel for the Appellant quoted Hals bury Laws of England where it was stated that a conviction could only be sustained if there was proof that the appellant's penis penetrated the anus of the victim.

He argued that since there was no such proof, then the appellant was wrongfully convicted. Counsel for the appellant further doubted the credibility of PW1, Nyanzi Emmanuel, first with regard to his exact age, whether he was 17 or 18 years at the time the alleged offence took place. Counsel for the appellant also emphasized the evidence of PW3 has been discredited. He further argued that there were contradictions in the evidence of PW2 and PW1 about what PW1 discussed with the appellant, Mubiru.

And that it was not clear whether they discussed the appellant offering PW1 a scholarship and other benefits or ended at soft drinks only.

Counsel also wondered how PW1 could have slept and only woken up with pain in the legs and anus without knowing what had happened, especially on such a sensitive part of the body. Counsel also doubted the alleged bleeding from the anus for 2 days without any medication to stop the same, apart from alleged pain killers. And finally, counsel for the appellant wondered why the doctor was not called as a prosecution witness to tell court what exactly had happened. It was also the appellant's submissions as to how a person sodomised in 2009 waited for 4 years till 2013 when he told Pastor Male Solomon (PW2). Learned counsel for the appellant also wondered how PW2, Pastor Solomon Male could be a reliable witness when he had been convicted of publishing malicious information of sodomy against Pastor Kayanja. It was also submitted on behalf of the appellant that the trial court erred on relying on videos that were never tendered in evidence, in court.

Counsel for the appellant also wondered why the evidence of PW6, a medical officer was rejected by the trial magistrate.

Then counsel for the appellant also stressed the need for corroboration in sexual offences and quoted the case of Mugoya Vs. Uganda [1999] E.A 2002 in support.

The fourth ground of appeal was that the sentence was excessive in the circumstances.

M/s Anne Kabajungu in reply reiterated that both ingredients of the offence of having carnal knowledge of a person against the order of Nature were handled together by the trial magistrate. She argued that it was not in all cases that there is direct evidence of sexual Act.

She quoted the case of Basita Hussein Vs. Uganda Supreme Court Criminal Appeal No. 35 of

1995, where it was held that it is not a hard and fast rule that medical evidence must always be produced. And that courts can convict without medical evidence where circumstances so allow.

Counsel for the State further submitted that PW1 was invited by the appellant for a party which was never there. And that he was instead given a glass of wine by the appellant which made him black out.

The next thing he saw was that he found himself bleeding from the anus and that he saw appellant coming from downstairs.

Learned counsel for the State emphasized that since it was only appellant and PW1 who were present, then it was the appellant who was the perpetrator of the unlawful Act. She added that there was no contradiction in the evidence of PW1 and PW2 as submitted by counsel for Appellant.

On the issue of PW1 not reporting the case till after 4 years, counsel for the state referred to page 5 of the proceedings whereby PW1 felt ashamed to ask the appellant what had happened. She added that it was common for victims of sexual offences not to report, particularly sodomy which is against culture, norms and traditions.

Counsel for State also submitted that as stated by PW4, a search was carried out in the home of the complainant and a bottle of chloroform recovered, and that it was sufficient evidence of corroboration.

She referred to pages 3 and 5 of the Judgment of the Chief Magistrate where medical evidence was considered.

Counsel for the state also refuted allegations that the trial Chief Magistrate relied on the video recordings which were never tendered in court.

She concluded on ground 4 of appeal that the sentence of 10 years was not excessive in the circumstances. She prayed that the appeal be dismissed.

I have carefully considered the submissions of counsel for the appellant and counsel for the state. I have also studied the record of the lower court and internalized the Judgment.

I wish to emphasize that it is the duty of the first appellate court to scrutinize and weigh the evidence on record and draw its own inferences and conclusions. And as was held in Panadiya V.R. [1957] E.A 336, the first appellate court should always bear in mind that it did not hear nor see the witnesses and should make due allowances of that, especially their demeanors.

Section 145(a) of the Penal Code Act provides:-

“Any person who has carnal knowledge of any person against the order of nature commits an offence and is liable to imprisonment for life.”

The burden of proof in all criminal cases lies on the prosecution and never changes. The law is that the prosecution has to prove all the ingredients of the offence before securing a conviction. And as was held in Oketcho Richard vs. Uganda, SCCA No. 26 of 1995, and accused person is presumed innocent till proved guilty.

As far as the offence in question is concerned, the trial Chief Magistrate correctly identified the ingredients of the offence as:-

1. Anal sexual Act was performed against the victims.
2. That it was the accused who participated in performing the act.

According to the evidence on record, PW1, Nyanzi Emmanuel, one of the victims testified that appellant invited him at appellant's home where he was offered a glass of wine. Thereafter he did not know what happened thereafter, but when he woke up, he found himself on bed naked. He said he was bleeding from the anus and feeling pain in the legs. PW1 feared to ask accused what had happened because he felt ashamed. Accused gave him shs. 50,000= and he left.

The following day when he went to the doctor, the doctor told him it appeared he had been sodomized. Then PW1 did not take it serious and was given pain killers and ointment. So as correctly observed by the trial Chief Magistrate at page 2 of her judgment, there was no direct evidence of a sexual Act. In other words, the witness, PW1 did not tell court that

accused/appellant mounted on him and pushed his penis into his anus. There was nothing of the sort and yet the first ingredient of the offence, performance of the sexual Act had to be proved. The doctor told PW1 that it appeared he had been sodomized. Appearing to have been sodomised and being sodomised are two different things. And to make matters worse, PW1 the victim did not tell anyone about it either on that day or the following day. During cross examination by Defence counsel, (page 6 of proceedings), the victim, PW1 stated that the following day after the incidence, he went to appellant's gate when he was angry and asked appellant why he had sodomized him. Then he said accused /appellant threatened to call police and he feared and went away. PW1 did not tell any of the people he lived with at the time; but only told Pastor Male about it in 2013 after hearing him on Radio.

The Act of victim not reporting such a serious matter of bleeding in the anus to any of the people he was staying with, not to any authorities immediately cast a lot of doubt in the prosecution case.

In the case of Sam Butera Vs. Uganda, Supreme Court Criminal Appeal No. 21 of 1994, it was held that the distressed condition of the victim was an important factor when the victim of aggravated Defilement reported to her immediate relatives while crying what had happened to her.

Similarly in the present case, after coming from clinic where doctor told him he might have been sodomised and after attacking the accused/appellant, that was the time when he could have told people who were close to him or even police. It would have made sense to report the incident when it was still hot, and not to wait for 4 years to pass and then tell PW2, Pastor Male in 2013. The victim's failure to take advantage of his distressed condition at the time left a lot to be desired.

In my view, that was the time when his case would have been better and when the doctor who examined him would have given his views in court. When there was no medical report given to PW1 at the clinic and this was also noted by the trial magistrate in her Judgment.

The case at PW3, the second victim was worse as he himself was a homosexual who, stated that he had consensual anal sex with appellant only once in 2004. PW3, Oundo George testified that he was offered shs. 100,000/= and he did not go to hospital but treated himself. PW3's evidence was that after having it with accused only once in 2004, he continued with others till 2010. Since PW3 was a self-confessed homosexual then he was an accomplice.

However, since he did not even go for medical checkup or treatment and was told by police that

the time lag was too long, between 2004 and 2013, (9 years), the medical report would have been unnecessary. In any case, he had continued, to be sodomised by other people other than the appellant.

The only genuine case against appellant would have been in respect of PW1. However in the absence of any medical report to bring out clear evidence of anal sex having occurred on PW1, then there was no corroboration as required under the law.

In Mugoya Vs. Uganda, [1999] 1 E.A 202, the Supreme Court held that in cases involving sexual offences, there was need for corroboration of both the evidence proving that sexual penetration of the complainant took place, and the complainant's evidence that implicating the accused in the commission of the offence.

In the present case, there was no corroboration of penetration as PW1 found himself bleeding in the anus without knowing what had happened to him, and secondly there was no corroboration implicating the appellant now in the commission of the offence.

And even when PW1 was allegedly told he might have been sodomised by the appellant, he did not take it seriously. The question in the mind of this court is why not, if at all he was aggrieved.

That casts doubt in the prosecution case whereby such doubt should have gone to the benefit of the appellant who should have been acquitted.

Whereas learned counsel for the state quoted the case of Bassita Hussein Vs. Uganda, SCCA No. 35 of 1995, where it was held that it was not a hard and fast rule that medical evidence must be produced.

However, their Lordships added that other evidence could Act as corroboration.

The position in the present case is that not only was medical evidence lacking, but there was no other evidence to corroborate the alleged direct evidence of PW1. None at all.

On the submissions by counsel for the State that PW1 did not report the incident till 4 years later as he did not probably know it was a criminal Act, it is clear practice that ignorance of the law is no Defence.

This court was therefore surprised at the reasoning of the trial magistrate that PW1's failure to report the incident in 2009 was because PW1 was ashamed and that it was a natural reaction that

would come from any person. That finding and holding of a natural reaction was not supported by any evidence since no expert in social behavior analysis or psychologist testified to that effect. The trial magistrate therefore erred to have believed the testimony of PW1 and found it to be true upon no basis other than personal imaginations. PW2, Pastor Moses Solomon Male's evidence on page 8 of the proceedings was that while he was preaching in Namungoona, one Julius Semakula told him that Emma Mugala had been sodomised by Patrick Grace Kitaka, a young brother to Chris Mubiru. PW2 went on to testify that Chris Mubiru the appellant had sodomised many people without substantiating as none of such people came up to testify. Even when PW2 produced a video of boys being sodomised by accused appellant, it is clearly recorded on page 10 of the proceedings that none of the victims in the video was Nyanzi (PW1) nor Oundo (PW3).

The question to be asked here is what was the relevancy of PW2's evidence when he clearly added during cross-examination that he did not see the accused sodomising Nyanzi Emmanuel (PW1) or Oundo (PW3)?

Such evidence was irrelevant and waste of court's time in view of the provisions of S.52 of the Evidence Act.

The trial magistrate therefore erred on page 5 of the Judgment to have come to the conclusion that as the accused did not dispute his face appearing in those videos, that it reflected a degree of uncertainty about his conduct or misconduct. That was erroneous on the part of the trial magistrate as none of the victims was reflected as being sodomised in the videos. And as if that was not all, the trial magistrate continued in paragraph 3 of her Judgment on page 95) that there was ample circumstantial evidence that accused had unnatural sexual intercourse with PW1 when PW1 is clearly on record that he did not know what had happened to him, and did not tell anybody. And despite the clear irrelevancy of PW2's evidence which was basically rumors and therefore hearsay, the trial magistrate erred to have held that evidence of PW1, PW2, and PW4 had established the guilt of the of the accused in respect of count I. I have already touched on the evidence of PW1 and PW2. But even PW4, Detective. Sup. Of Police Nalubega Rose on page 16 of the proceedings stated:-

"When I asked him (PW1) why he did not report the case in 2009, the victim said he didn't know

he had been sodomised until releases came out in Red Pepper _____”

And later on during cross-examination by Defence counsel on page 19 of the proceedings, the same witness, PW4 stated that whereas the victims said they were sodomised at accused’s home, according to Red Pepper Publications, offence occurred at Namboole. That shows that PW4 was not sure of what she was talking about as she even added that the evidence of Namboole did not come out. PW4 was in my view not a reliable witness.

Lastly, on chloroform being found in the house of appellant in 2013 was not an indication that it was applied on PW1 four years earlier.

It would have made sense if the chloroform was found in accused’s house immediately after the alleged sodomy in 2009.

And even then, no medical evidence was carried out to show that the victim, PW1 had chloroform in his body.

All in all, in view of the inherent contradictions in the evidence of the key witness, PW1 and since the prosecution did not prove the first ingredient of the offence (penetration) beyond reasonable doubt, I find and hold that the trial magistrate failed to evaluate the evidence on record properly and therefore wrongfully convicted the appellant.

And since the appellant was wrongfully convicted, I shall not dwell on ground 4 of appeal as to whether the sentence was excessive or not.

In the premises, I do hereby allow the appeal, quash the conviction and set aside the sentence and orders of the lower court.

The appellant is accordingly hereby set free unless lawfully held on other charges.

WILSON MASALU MUSENE

JUDGE

19.4.2016

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19.4.2016

Appellant present

Sserunjogi Brian for appellant

Nalwanga Sharifa, Senior State Attorney for State

Olivia Nansuna , court clerk

COURT:Judgement read out in open court

WILSON MASALU MUSENE JUDGE

JUDGE

19.4.2016