THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CRIMINAL APPEAL NO.42 OF 2019

(ARISING FROM CRIMINAL CASE NO. 03/2017; CRB 280/2016)

KITONGO ROBERT :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

JUDGMENT

BEFORE: HON.JUSTICE BYARUHANGA JESSE RUGYEMA

[1] This is an appeal from the judgment and orders of the Chief Magistrate, Mbale at Bubulo where the Appellant was convicted of the offence of Simple Defilement and sentenced to serve 4 years imprisonment.

[2] The facts of the case are that in around October 2015, the accused/Appellant approached the victim as a boyfriend upon which they had multiple sexual encounters which resulted into the victim's pregnancy. The victim was by then in Bushiriho P/S in P.7. The accused/Appellant on the other hand denied any sexual encounters with the victim and in fact demanded for D.N.A to enable him have evidence ruling out his being responsible. Unfortunately, neither court nor the prosecution and the complainant accorded him the opportunity even when it was to be at his cost. The Appellant was eventually found guilty of the offence, convicted and sentenced to 4 years imprisonment.

[3] The Appellant being dissatisfied with the decision of the learned Chief Magistrate appealed to this court against the conviction and the sentence on the following grounds;

"1.That the learned Chief Magistrate erred in law and fact when he failed to properly and judiciously evaluate the evidence on record thus arriving at a wrong conclusion.

2. That the learned Chief Magistrate erred in law and fact when he held that the Appellant was guilty of defilement.

3. That the learned trial Magistrate erred in law and fact when he imposed a manifestly harsh and excessive sentence."

4. The judgment appealed from has occasioned a miscarriage of justice.

[4] **Grounds 1, 2, 4** shall be handled and resolved together because all revolve around the issue of evaluation of evidence.

[5] Representation: The Appellant was represented by **Counsel Wamimbi Jude** while **State Attorney Semakula** appeared for the Respondent.

[6] In his submission, counsel for the Appellant submitted that the evidence adduced by the prosecution in the lower court was not sufficient to secure a conviction of the accused person since such evidence required corroboration; for example, that whereas both the victim (PW_1) and her father (PW_2) stated that the victim was aged 15 years at the time the offence was committed, no documentary evidence was produced to corroborate the age of the victim and neither a birth certificate nor a baptism card was produced in court. That PF3 A which was tendered in court for identification by PW_2 was merely admitted for identification purposes only and no explanation was given as to why the medical officer who examined the victim refused to come.

[7] Counsel for the Appellant submitted further that whereas in sexual offences court can convict an accused without corroboration, in this case, where the victim stated that a one **Penina** saw her having sex with

the accused, the said Penina ought to have been summoned as a witness to buttress the prosecution case.

[8] On his part, state attorney for the respondent submitted that there was no contest regarding whether there was a sexual act or not because the victim was impregnated. What is in dispute is whether the accused was responsible. That the accused in his defence demanded for a D.N.A to prove that the pregnancy was not his but this test never took place and therefore, there is nothing that absolved the accused.

Determination of the appeal.

[9] As regards the age of the victim, the learned trial magistrate in his judgment observed that P.F3A was admitted showing her to be 16 years having been born in December 2000. That besides, the victim's father **Weyanga Milton** (PW_2) told court that the victim was 15 years when the incident happened.

[10] I think it is not correct as the Chief Magistrate observed that the P.F3A was admitted showing the victim to be 16 years of age. The lower court record shows that the father of the victim (PW_2) merely identified P.F3A as a document he took along with as he took the victim to the hospital and then it was filed by the medical officer, he returned it to police. In court, it was tendered through PW_2 for identification and it was received so and marked PD1. The medical officer who examined the victim and filed the form was never summoned with the view to have the P.F3A admitted as a prosecution exhibit.

[11] A document put on record for identification purposes has never been an exhibit. It is merely an article marked for identification awaiting to be formally approved and admitted in evidence; **DES RAJ SHEMA V REGINAM [1953] EACA 310** and **OKWONGA STEPHEN V UGANDA (2002) KALR** .It therefore follows that in this case, the P.F3A having

been put on record for identification purposes, it means that it has not formed part of the evidence to be relied upon. It must be proved first but before that, it is a worthless document on record with no evidential value. From the foregoing therefore, I find that the learned Chief Magistrate erred in convicting the appellant basing on a medical P.F3A document only placed on record for purposes of identification because such documents do not carry any evidential value.

[12] However, in this case, even without the medical officer who filed the P.F3A being summoned to testify, the trial magistrate as court had an option of forming its opinion as regards the age of the victim. In **UGANDA V APPOLO MWESIGWA H.C.CRIM.SESSION CASE NO. 99/92,** Court observed that the best way of proving the age of a child is by producing a duly certified birth certificate. In the absence of a birth certificate, age can be proved by any other lawful evidence including observation and common sense; **GRIMSBY EXPARTE PURSER (1951) 2 All ER 889;** the testimony of a close relative acquainted with that child; **R V COX (1898) 1 QB 179.** See also **UGANDA V ENOCK BABUMPABURA H.C.CRIM. SESSION CASE NO. 135/92.** In this case, the learned trial Magistrate did not take the opportunity to have his own observation of the victim, then have his observations recorded down so as to make and form his own opinion as regards the age of the victim. Otherwise, in this case, even the father of the victim (PW_2) in his testimony, he never helped matters to give evidence regarding the age of the victim. He also relied on the P.F3A which was never admitted as an exhibit. It was as if he himself (PW_2) never knew the age of his daughter. In view of the totality of the above, it is my view that the learned trial Chief Magistrate erred in proceeding to convict the appellant without proof that the victim was under the age of 18 years, one of the essential ingredients of the offence that needed to be proved by the prosecution; **Section 129 (1) PCA.**

[13] As regards the issue and necessity of corroboration in sexual offences the court of Appeal in the case of **OKELLO GEOFREY V UGANDA CRIM APPEAL; NO. 0329/2020;** quoting **BASOGA PARTRICK V UGANDA CRIM APPEAL NO.42/02 (CA)** and **MUKUNGU V R (2002) E.A 482 (CAK)** held 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 as long as the court has cautioned itself of the danger of conviction without corroboration...the evidence of the victim in a sexual offence , the test to be applied to such evidence is that it must cogent. The cogency itself is determined after full evaluation of the evidence including whether or not the victim is 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 if it is credible, a conviction can be based on it even if there is no corroboration."

[14] In the instant case, the learned trial Chief Magistrate did not make any observations on record for the impression whether the victim was honest and truthful in her testimony. Amidst the accused's total denial and demand for **Deo Xyribonucleic acid** (DNA) test as a way to prove to court that he is not responsible for the victim's pregnancy and in the circumstances where neither court nor prosecution and the father of the victim gave him the opportunity to rule out the possibility of another man being responsible for the pregnancy, required court to secure corroboration of the victim's evidence before a conviction of the appellant. In this case, it is not correct as the learned trial Chief Magistrate found, that the appellant in demanding for the DNA was only challenging the paternity. The Appellant wanted to prove to court that since the prosecution were inter alia relying on the pregnancy of the victim as proof of his being responsible, he wanted to show court that another man is responsible. I think it was a legitimate demand on the

part of the appellant which ought to have been given serious attention and consideration. Unfortunately, it was not. In this case, the evidence of **Penina** who is stated to had seen the victim and the appellant play sex would have been ample corroboration of the victim's evidence. Unfortunately, the said **Penina** was not summoned to testify.

[15] **Ground 3**, the learned trial Chief Magistrate erring in law and fact when he imposed a manifestly harsh and excessive sentence. The appellant appears to had abandoned this ground of appeal. As correctly submitted by the State Attorney Mr. Semakula for the Respondent, the sentence of 4 years imprisonment meted by the Chief Magistrate on the appellant was lenient considering that the offence the appellant was convicted of carries a maximum sentence of life imprisonment. This ground of appeal would have failed.

[16] In conclusion generally, I find that in the premises the appeal is successful and it is allowed, the conviction is quashed and the sentence is set aside. The appellant is released from prison forthwith unless he is being held on other lawful charges.

Dated at Mbale this 9th day of February, 2021.

Byaruhanga Jesse Rugyema

JUDGE.