THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

ATMENGO

(CORAM: WAMBUZI, C.J., ODER, J.S.C., KAROKORA, J.S.C.)

CRIMINAL APPEAL NO. 38 OF 1995

BETWEEN

MUHIRWE SIMON ..... APPELLANT

AND

UGANDA ..... RESPONDENT

(Appeal from a conviction of the High Court of Uganda at Kabale (Mr. Justice R. Rajasingham Q.C) dated 1h September 1995 *in High Court Criminal Session Case No. 103 of 1995)*

JUDGMENT OF TE[E COURT.

This appeal is against a conviction for defilement contrary to Section 123 of the Penal Code.

There is no appeal against the sentence of 8 years imprisonment but leave of the Court was granted to appeal against the sentence of 6 strokes of the cane.

Mildred Asiimwe, a Primary School girl aged about 11 years, was in the company of two other girls picking flowers in a garden around 3.00 p.m. in Buhara Village, Kabale District.

She described in detail how the appellant frightened the three girls and ravished her. Her story of the attack was confirmed by one of the two girls, Agnes Kembabazi. Apparently this was on a Friday.

As a result of information given to her on Saturday by an unnamed lady, Rukeijakare, mother of Asiimwe, questioned Asiimwe as to what happened the previous day when she went to school. Asiimwe told her mother

her how she had been attacked by a boy when they were picking flowers in the company of other girls. She named the other girls Kereya and Kembabazi. She wanted to know who had done this thing, so she went to inquire. She asked Agnes who did not know their assailant either.

On information from Agnes' mother Rukeijakare returned home, examined Asiimwe and noticed pus in her private parts. She boiled water and washed her. She went to look for the boy, but apparently without success because on Sunday she went to ask Kereya, the third girl. She then went of the appellant's home accompanied by Asiimwe.

In the presence of the appellant and the appellant's mother. Asiimwe repeated what happened to her on the previous Friday. The appellant stated he could not deny it. Rukeijakare then said since the appellant was a relative, all she wanted was to take Asiimwe to hospital. The appellant agreed to pay Shs -, *4,0001-* as medical expenses. The group went to visit the scene accompanied by a brother of the appellant. The mother and brother of the appellant agreed that Asiimwe should be taken to hospital. Back at the appellant" s home the appellant wrote a chit which he gave to

Rukeijakare. The chit was an undertaking to bring the money that afternoon, so that Asiimwe could be taken to Kabale the next day.

The appellant went to Rukeijakare's home in the afternoon at about 5.00 p.m. to say he had faded to raise the money. The appellant prayed for mercy, saying he would go and tell his father. He went away but did not return. The following day Rukeijakare went to Agnes' father from where she went to report to the RCs of the area who advised her to report to the Gombolola Headquarters. Someone advised her to go back to the appellant's home. In the presence of the RCs, Butera, father of the appellant agreed to pay for the medical treatment of Asiimwe as the appellant had run away. Rukeijakare ultimately reported the matter to the police.

Dr. Pius Ruhemmana examined Asiimwe on the 17th January 1993. She was aged 11 years, had a ruptured hymen and she felt pain in her private parts but was without visible external injuries or bruises. In his estimation rapture of the hymen was as recent as six days. He thought the rapture of the hymen was a case of defilement.

The appellant gave evidence on oath, denied the offence and set up an alibi that on the day of the alleged offence he was in Ntungamo at the alleged time.

Both assessors recommended that the appellant be found guilty of the offence giving their reasons.

The learned trial Judge considered all the evidence and stated,

> *"This is an unusual case because it has a purported eye witness to a sexual assault I was very impressed with the evidence of Kembabazi Agnes. She spoke clearly anti at a reasonable level and did not seem at all*
> *overawed by her surroundings. She never hesitated and*
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> *in my estimate of her character she was just the sort of person to be told enough to defy the warning and satisfy her curiosity by peeping through her blindfold The victim Asiimwe was shy and timid and just slow enough to have believed it was a sorghum stick being used by Agnes as the accused had told her. But even she seems to have realised it was not. The victim's mother was full of anguish at what had happened but more so at the treatment her complaints received and at*
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> *the hands of the accused and his father. I have no doubt that when this irate lady confronted him with her daughter's story, the accused accepted the truth of it to try to turn aside her anger by offering to pay for the girl's treatment.*
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> *I have no difficulty in concluding that the accused's attempt at an alibi has been disproved by these three witnesses - the girls, Asiimwe and Agnes and the victim's mother. It was broad daylight and they were within beating range of the accused and could not have failed to see him clearly enough to now identify him with certainty. The evidence of the two girls along with that of the mother of the pus in the vagina and the doctors evidence of a vagina ruptured a week before 11h June,* 1993, *leave no doubt as to the fact of defilement and penetration. I agree with the assessors.*
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> *I therefore find the accused guilty and convict him of the offence of defilement contrary to Section* 123 *of the Penal Code. "*

The appeal against conviction is on six grounds, the seventh was

abandoned.

Learned Counsel for the appellant, Mr. Lubwa, argued ground 2 and 3 together. In these two grounds the appellant complained that it was an error in law to base a conviction on the evidence of a child of tender years first, without conducting a vior dire and secondly without corroboration.

According to the record Kembabazi was aged 13 years when she testified. The record also show that Asiimwe, the complainant, was also aged 13, but a voir dire was conducted by the learned trial Judge although it appears that the witness was first sworn and then the voir dire was conducted. The correct procedure in such a case would have been to conduct the voir dire first and then to swear the witness if the Court is satisfied that the witness should be sworn.

Be that as it may, it is a little strange that in the case of Kembabazi who is stated to be the same age as Asiimwe no voir dire was conducted.

Section 38 (3) of the Trial on Indictments Decree, 1971 provides,

> *"Where, in any proceedings a child of tender years called as a witness does not, in the opinion of the Court, understand tile nature of an oath, his evidence may be received though not given oath, if, in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking tire truth.*
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> *Provided that where evidence admitted by virtue of this sub-section is given on behalf of the prosecution, the*

accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof implicating him. "

The expression "child of tender years" is not defined in the Decree but considering a similar provision the Court of Appeal in Kibangeny Arap Kolil v. R. 1959 E.A 92 at page 94, had this to say;

> *"There is no definition in the Oaths and Statutory Declarations Ordinance of the expression 'child of tender years' for the purpose ofs.19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although, as was said by Lord Goddard, CJ. in R. v. Campbell (1),* (1956) 2 *All E.R.* 272, *'whether a child is of tender years is a matter of the good sense of the Court .... ' where there is no statutory definition of the phrase. The two boys in this case, both of whom were estimated to be under fourteen years old, must therefore be considered as children of tender years. "*

The Court went on to say at page 95.

> *"In the present case the learned trial Judge, so far as appears from the record, made no such investigation before affirming either of the two boy witnesses. Such an investigation need not be a lengthy one, but it must be made and, when made, the trial Judge ought to record it His only note of any relevance upon the record was one written after the conclusion of the evidence of the elder of the two boys, and before the calling Of the younger boy, that:*
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> > *'the witness appears to be a boy of twelve to fourteen but answers intelligently!'*
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> *That is not enough. The investigation should precede the swearing and the evidence, and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence. Since the evidence of the two boys was of so vital a nature we cannot say that the learned trial Judge's failure to comply with the*

ground alone the appeal must be allowed upon this

In the case before us quite clearly the learned trial Judge was in error but although Kembabazi' s evidence is vital and was relied upon by the learned trial Judge there is other evidence unlike in the Kibangeny case where the evidence of the two boys was the only evidence.

There is the evidence of Asiimwe and that of her mother an accordingly, we do not think there is merit in the second ground of appeal that the learned trial Judge erred in law and fact in convicting the appellant on uncorroborated evidence of a child of tender years in so far as that ground relates to the evidence of Kembabazi. Under Section 38 (3) of the Trial on Indictments Decree, 1971 corroboration is required as a matter of law only if evidence is received not on oath from a child of tender years, who in the opinion of the Court, is possessed of sufficient intelligence to justify the reception of the evidence and who understands the duty of speaking the truth.

A matter which could. have been raised but was not, was the absence of any warning to the assessors and, indeed, to the learned trial Judge himself of the danger of convicting on the evidence of Asiimwe without corroboration. In the case of Kabura v. Republic 1974 E.A. 188 Saiedi J, as he then was, said at page 189:

> *"It is now settled that even where the evidence of a child of tender years is sworn, then although there is no necessity for its corroboration as a matter of law, a Court*

ought not to' convict upon it, if uncorroborated, without warning itself o the danger of so doing. The question which I must ask myself is whether in the circumstances of this case these irregularities have occasioned a miscarriage of justice.

The position is not dissimilar to' Kalil's case (supra) where the evidence of two boys of tender years was received on affirmation after in irregular voir dire with no direction as to' corroboration of their evidence. The appeal was allowed nil the ground that both irregularities had occasioned a miscarriage of justice. That case is of interest in so far as the Court of Appeal had this to' say at the end of its judgment at p. 96.

> *'Had there in fact been corroboration of their story, implicating the appellant, we might have held the failure to have occasioned no miscarriage of justice. But since there was no such corroboration, nor any admission by the appellant, the failure affords an additional ground for allowing the appe4'll '. "*

There was the evidence of Rukeijakare that the appellant admitted assault on Asiimwe and offered to pay medical expenses in the presence of his father. The learned trial Judge noted the anguish of this witness at what had happened to her daughter. He had no doubt she was irate when she

confronted the appellant with her daughter's story but accepted her evidence as true.

The appellant was represented by counsel in' the Court below. There was no objection to this evidence when it was adduced. Rukeijakare was not cross-examined on this evidence. The appellant in his evidence denied generally that the evidence of Rukeijakare was true. Rukeijakare testified in detail including the fact that her daughter Asiimwe told her that she did not know her assailant and had to beat her to elicit the story of her sexual attack. She does not appear to have been anxious to implicate anybody. In the circumstances we hold that the admission of the appellant to Rukeijakare amounted to sufficient corroboration of the evidence of both Asiimwe and Kembabazi that Asiimwe was sexually abused. We are satisfied that the failure to hold a voir dire in respect of Kembabazi did not occasion a failure of justice and accordingly both ground 2 and 3 must fail.

In ground 5 the appellant complained that the learned trial Judge erred in law in failing to comply with requirements regarding summing up to the assessors. Mr. Lubwa referred to Section 81 of the Trial on Indictments Decree, 1971 which provides in subsection (1) thereof as follows:-

> *"When the case on both sides is closed, the Judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his opinion orally and shall record each such opinion. The Judge shall take a note of his summing up to the assessors. "*

Learned Counsel submitted that there was no direction to the assessors as to the need for corroboration in sexual offenses.

We think this ground of appeal is unhappily worded. The record indicates that the Learned trial Judge did sum up to the assessors and made notes as required under the law. There is, however, some merit in the complaint that the learned trial Judge appears not to have directed the assessors in his summing up on the issue of corroboration in sexual matters nor does he refer to this matter in his judgment but for the reasons already appearing in this judgment we find that there was no miscarriage of justice as a result of the omission. Ground 5 must therefore fail.

In ground 4 the appellant complained that his alibi was not properly dealt with. We find no substance in this ground. We already referred to the learned trial Judge's finding on this issue which on the evidence we are unable to fault.

Ground I and 6 are really different aspects of the same point relating to insufficiency of the evidence to sustain the conviction. We find that the learned trial Judge properly weighed the evidence before him came to the correct decision subject to our remarks regarding corroboration in sexual matters. Accordingly the appeal against conviction is dismissed.

The appeal against the sentence of corporal punishment is, quite rightly in our view, conceded by Mr. Okwanga, Counsel for the respondent. Section 123 (1) of the Penal Code does not provide for any corporal

punishment. We dealt with this matter in detail in the recent cases of ***Jackson Zita v. Uganda*** Criminal Appeal 19 of 1995 and *Bimbi* ***Peter*** *v.* ***Uganda*** Criminal Appeal 33/94 both 'unreported'.

We accordingly allow the appeal against the sentence of six strokes of the cane and set it aside.

Dated at Mengo this .... 18th ... day of ... July .. .l997.

S.W.W. WAMBUZI
CHIEF JUSTICE.

A.H.O.ODER
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS A
TRUE C F HE ORIGINAL

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W. MASALU MUSENE,
REGISTRAR, THE SUPREME COURT.