REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: TUMWESIGYE; MWANGUSYA; OPIO-AWERI; MWONDHA; TIBATEMWA-EKIRIKUBINZA, J J. S.C.)

CRIMINAL APPEAL NO: 34 OF 2015

BETWEEN

NTAMBALA FRED :: APPELLANT

AND

UGANDA ::RESPONDENT

[Appeal against the judgment of the Court of Appeal at Kampala (Kasule, Buteera and Kakuru, JJ.A) Criminal Appeal No. 177 of 2009 dated 11th February, 2015]

JUDGMENT OF THE COURT

Ntambala Fred, the appellant, was indicted for Aggravated Defilement contrary to section 129(1) of the Penal Code Act. He was tried by the High Court (Elizabeth Musoke, J) (as she then was), convicted and sentenced to 14 years imprisonment. He appealed to

the Court of Appeal which upheld his conviction and sentence, hence this appeal.

Background

Irene Namata (PW4) aged 14 years was a daughter to the appellant and lived with him in the same house in Kireku village in Mpigi District. On 26th March, 2006, at around 4:00 p.m., village children who believed that the appellant was having sexual intercourse with PW4 threw stones at his house. The appellant came out of the house brandishing a panga and threatened to cut them. He returned to the house but the incident had attracted people from the village who came to the appellant's house. Some entered the house and found used condoms there and arrested him. They took him to the police station from where he was later taken to court and indicted for the offence of Aggravated Defilement. He was tried in the High Court, convicted and sentenced to 14 years imprisonment.

His appeal against conviction and sentence having been dismissed by the Court of Appeal, the appellant appealed to this court on only one ground framed as follows:

That the Honourable Justices of Appeal erred in law when they failed to adequately re-appraise the evidence adduced before the trial court and therefore upheld the conviction of the appellant for defilement.

The appellant prayed that this court quashes the conviction and sets aside the sentence imposed.

Counsel's submissions

Mr. Senkezi Steven appeared for the appellant on state brief while Ms. Alice Komuhangi Khaukha, Senior Principal State Attorney, appeared for the respondent.

Learned counsel for the appellant submitted that the learned Justices of Appeal failed in their duty to adequately re-appraise the evidence before the trial court thereby wrongly upholding the conviction and sentence. More specifically, counsel contended that the court erred in law when it failed to re-appraise the evidence concerning the condoms allegedly used by the appellant. He asserted that while PW5, a neighbor to the appellant, testified that they found two condoms used in the house, PW4 testified that it was only one condom which was used. He contended that this was contradictory and that, therefore, the learned Justices of Appeal erred in law when they ruled that PW4's evidence was sufficiently corroborated by PW5's evidence.

Counsel submitted further that there was no scientific evidence to link the usage of the condoms to the appellant and the victim. He submitted that the judgment of the Court of Appeal was too general and lacked specifics. He prayed that this Court finds that the Court of Appeal did not properly re-evaluate the evidence before confirming the conviction and sentence.

Learned counsel for the respondent, on the other hand, supported the decision of the Court of Appeal. She submitted that the learned Justices of Appeal did not make any error in finding that the evidence of PW4 was sufficiently corroborated. She submitted that the duty of a first appellate court articulated in **Pandya v. R [1957] EA 336** and **Kifamunte Henry vs. Uganda Criminal Appeal No. 10 of 1997** is to re-appraise and re-evaluate the evidence presented before the trial court and the materials thereto. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

Counsel argued that there was no contradiction between the evidence of PW4 and PW5. The fact that PW4 testified that one condom was used did not mean that PW5 could not find another condom. Besides, the number of used condoms was immaterial. She submitted that the material evidence was that by the time the villagemates came, the appellant was in the house with the victim and had already had sexual intercourse with her.

She further argued that the conduct of the appellant was not consistent with that of an innocent person when he came out with a metallic bar brandishing it and threatening to cut those who had thrown stones at his door.

She further submitted that the learned trial Judge who observed PW4 when testifying said in her judgment that even if there was no corroborating evidence to the claim of the victim that it was the

accused who sexually assaulted her, the court would still go ahead and act upon her evidence because the court was satisfied that the complainant was a witness of truth who gave evidence in a consistent and straight forward manner relating to how the accused sexually assaulted her.

Counsel prayed that this court dismisses the appeal and upholds the conviction and sentence against the appellant.

Consideration of the appeal.

This is a second appeal and the duty of a second appellate court is to determine whether the 1st appellate court properly re-evaluated the evidence before the trial court by subjecting it to fresh scrutiny before coming to its own independent conclusion.

It is settled law that it is only in the clearest of cases when the 1st appellate court has not satisfactorily re-evaluated the evidence that a 2nd appellate court would interfere with the decision of the 1st appellate court. (See: **Kifamunte Henry vs. Uganda** (supra) and **Pandya vs. R** (supra)).

On 1st appeal the Court of Appeal is precluded from questioning findings of the trial court provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion. It can only interfere when it considers that there was no evidence to

support a finding of fact: (See: **R. vs. Hassan Bin Said** [1942] 9 EACA 62).

We have carefully read the judgment of the Court of Appeal and we have studied the Record of Appeal and the Record of Proceedings including the judgment of the trial court.

In performing its duty as a 1st appellate court, the Court of Appeal considered the evidence of PW4. She testified that the appellant was her father and had been having sexual intercourse with her almost everyday for the last two years. She together with her young sister were sharing one bed with the appellant. She stated that though she felt pain in the stomach whenever he had sexual intercourse with her, she feared to report him to any person because he had threatened to cut her into pieces if she reported him and that on the day of his arrest, the appellant had had sexual intercourse with her.

The learned Justices of Appeal also considered the evidence of PW5 whose evidence was that as he approached his home at around 3:00 p.m., he saw people gathered around the appellant's house. He was warned that the appellant was violent and saw him holding a metallic bar threatening to use it against people who were at his house. He entered the appellant's house and found there two used condoms and others which were not used. The local people arrested him and took him to the police station.

The court also considered the evidence of PW7 and found it sufficiently corroborative of PW4's evidence. PW7, (defence secretary of the village) stated that on 26th March, 2006, he heard a mob shouting at Ntambala's home. He rushed to the scene and upon arrival, he asked PW4 whether it was true that their father had had sexual intercourse with them. She said "yes". About the allegations of condoms, PW7 stated that he saw the condoms in Ntambala's house; two were used and four were unused.

The Court of Appeal also considered the medical evidence which was to the effect that PW4's hymen was ruptured sometime back. On the issue of ruptured hymen they referred to the case of **Mukasa Everisto vs. Uganda**, SCCA No. 53 of 1999, in which the court held, among other things, that the rupture of the hymen of a victim of defilement was not essential for arriving at a verdict of defilement. "..**What would be of essence is whether on the evidence available, the prosecution has proved beyond reasonable doubt, that the accused before court had had sexual intercourse with the child. The fact that a child's hymen is already ruptured does not mean that the victim cannot be defiled subsequent to the rapture of the hymen."**

Alongside the evidence of the above prosecution witnesses, the Court of Appeal also considered the appellant's defence of alibi. The court found that since the appellant was arrested at the scene of crime in broad day light, he was placed at the scene of crime. Therefore, the defence of alibi was not available to him.

It is, therefore, clear to us that the Justices of Appeal re-evaluated the evidence, scrutinized it and reached their own conclusion as to the guilt of the accused.

Before this court, counsel for the appellant specifically submitted that the evidence of PW4 was not sufficiently corroborated so as to warrant a finding that the appellant committed the offence. In their judgment, the Justices of Appeal pointed out that the trial Judge had made a finding that there was other evidence that sufficiently corroborated the defilement. The learned Justices of Appeal addressed their mind to the law on what amounts to corroboration as stated in **Uganda vs. George Wilson Simbwa (SC) Criminal Appeal No. 37 of 1995** wherein it was held that:

> **"Corroboration affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at common law or within the class of offences for which corroboration is required."**

As seen from the above holding, corroboration is evidence from other sources which supports the testimony of the complainant and

connects or tends to connect the accused person to the commission of the crime.

The value of corroboration is rooted in the legal standard (proof beyond reasonable doubt) that must be met by the prosecution in order to secure a conviction. Consequently, the prosecution may find it necessary to adduce evidence from more than one witness in order to prove their case beyond reasonable doubt.

Nevertheless, section 133 of the Evidence Act provides that: "**Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact**."(Our emphasis).

Consequently, a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. As stated by this court in **Sewanyana Livingstone vs. Uganda** SCCA No. 19 of 2006) "**what matters is the quality and not quantity of evidence**."

We are satisfied that the learned Justices of Appeal properly re-evaluated the evidence to come to their own conclusion that the appellant had sexual intercourse with PW4. The complainant took oath and the learned trial judge found her to be a truthful witness. Additionally, the evidence implicating the appellant in the commission of the offence and which corroborated PW4's evidence can also be found in the evidence of PW1, PW5, PW6 and the medical evidence adduced by PW7.

We agree with the submission of learned counsel for the respondent that there was no contradiction between PW4's evidence and that of PW5. Whether the witness found two used condoms or one in the house is, in our view, immaterial. It is not the number of condoms used that is important in this case but rather evidence showing that sexual intercourse between the appellant and PW4 took place. We, therefore, find no justification to interfere with the judgment of the Court of Appeal.

In the result, we dismiss this appeal. The appellant's conviction and sentence are accordingly upheld.

Dated this 18th day of January 2018.

Hon. Justice Jotham Tumwesigye

JUSTICE OF THE SUPREME COURT

Hon. Justice Eldad Mwangusya

JUSTICE OF THE SUPREME COURT

Hon. Justice Opio-Aweri

JUSTICE OF THE SUPREME COURT

Hon. Justice Faith Mwondha

JUSTICE OF THE SUPREME COURT

Hon. Justice Tibatemwa-Ekirikubinza

JUSTICE OF THE SUPREME COURT

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Representation:

Mr. Senkenzi Steven represented the appellant on State Brief, and Ms. Alice Komuhangi Khaukha represented the respondent.

JUDGMENT OF PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA.

I am in agreement with the decision of the Court that the appeal has no merit and ought to be dismissed. I also agree that the conviction of the appellant and the sentence of 14 years imprisonment be upheld.

Nevertheless, this being a defilement prosecution, I have found it pertinent to discuss the law on corroboration in specific regard to sexual assault cases. For purposes of clarity, I take note of the fact that the appellant's ground of appeal was that: *The learned Justices of the Court of Appeal erred in law when they failed to adequately re-appraise the evidence adduced before the trial court and*

therefore upheld the conviction of the appellant for the defilement of Namata Irene.

However, it was specifically submitted by Counsel for the appellant that the evidence of the victim was not sufficiently corroborated so as to warrant a finding that the appellant committed the offence.

As stated in the Judgment of the Court, a conviction can be based on the testimony of the victim of an offence even when he/she is a single witness since the Evidence Act does not require any particular number of witnesses to prove any fact and "what matters is the quality and not quantity of evidence." I must however emphasize that this must be as true in a sexual assault prosecution as it is in other offences.

I am however aware that historically courts were as a matter of practice required to warn themselves of "the danger" of acting on the uncorroborated evidence of a complainant in a sexual assault case. If no such warning was given, the conviction would normally be set aside unless the appellate court was satisfied that there had been no failure of justice. Such was the cautionary rule in sexual offences.

In East Africa the leading authority on this rule has been the decision of the East African Court of Appeal in **Chila and Another vs. R [1967] EA 722** and this Court has in previous cases followed **Chila** to overturn convictions by lower courts. (See: **Christopher Kizito vs. Uganda, Criminal Appeal No. 18 of 1993; Kibale Ishima vs. Uganda, Criminal appeal No.21 of 1998; Katumba James v Uganda, Criminal Appeal No. 45/99**)

However, as I observed in my book - **Criminal Law in Uganda: Sexual Assaults and Offences Against Morality at page 38**[1] - the reasons historically

[1] Lillian Tibatemwa-Ekirikubinza (2005) Fountain Publishers, Kampala.

given for the need for corroboration of evidence in a sexual assault prosecution was that women are by nature peculiarly prone to malice and mendacity, and are particularly adept at concealing it. I further noted therein that the origin of the rule lies in the opinion of Sir Mathew Hale (Kings Bench England) in 1671 when he said that rape must be examined with greater caution than any other crime as it is easy to charge and difficult to defend. A similar opinion was expressed by Lord Justice Salmon in **R vs. Henry & Manning (1969) 53 Crim. App Rep 150, 153** that: *"in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all."(*My Emphasis)

I am nevertheless alive to the fact that as far back as the 1970's courts in the region and beyond have posited that the rule has neither scientific nor logical basis. (See the American case of **P vs. Rincon-Pineda (14 Cal 3d 864)** and the Namibian case of **S vs. Katamba (SA 2/99) [1999] NASC 7; 2000 (1) SACR 162** where the cautionary instruction was held to be a rule without a reason; See also the South African case of **S vs. Jackson 1998 (1) SACR 470 (SCA)** and Section 32 (1) of the U.K Criminal Justice and Public Order Act, 1994 which abolished the said cautionary rule on similar grounds.

The rule has also been held to be discriminatory against women.

It is universally accepted that a rule which is gender neutral on the face of it, can be discriminatory and can constitute gender bias if its outcome disproportionately disadvantage one gender. The **UN Convention on**

Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women as:

> "...**any distinction**, exclusion or restriction **made on the basis of sex which has the effect or purpose** of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." (My Emphasis)

It is a statistical fact that the majority of victims of sexual assaults are women and therefore the effect of applying the cautionary rule on corroboration in sexual offences affects far more women than it does men.

It therefore follows that the cautionary rule violates Uganda's Constitutional provisions on equality before the law (See: **Articles 21, 32 and 33**).

As far back as 2002, Lugayizi J in **Uganda vs. Peter Matovu, Criminal Case No. 146/2001** declined to apply the cautionary rule in a case of defilement due to its discriminatory effect against women and thus its violation of the Constitution as well as Uganda's international obligations to adhere to CEDAW. The learned High Court Judge stated that:

> **... court had not come across any empirical data or basis for the belief that women are greater liars than men or, for that matter that they are much more likely to lie than to say the truth in matters concerning sexual allegations. For that reason it seems that both the belief and the resultant rule have no logical basis. ... Secondly, and much more importantly, court thinks that the above rule discriminates against women who,**

are by far, the most frequent victims of sexual offences and is, therefore, inconsistent with Uganda's international obligations under various conventions and the Constitution.

[The rule's] effect is to single out women for disfavor in cases involving sexual allegations in the sense that it nullifies the recognition, enjoyment or exercise of their rights to equality before the law and equal protection of the law. Indeed, in such cases, the testimony of a victim is ... suspect; and this is, essentially, because she is a woman or girl! ... Under Article 2 of the Constitution, the fate of any law that is inconsistent with the Constitution is very clear. Such law is null and void. It follows, therefore, that the above rule is null and void.

And in **Basoga Patrick vs. Uganda, Criminal Appeal No. 42 of 2002,** the Court of Appeal held that the requirement for corroboration of evidence in sexual offences is discriminatory against women and is therefore unconstitutional. The court cited with approval the finding in the Kenyan case of **Mukungu vs. R (2003) 2 EA** that: *"the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls."*

In **Mukungu Supra** the court also observed thus:

It is noteworthy that the same caution is not required of the evidence of women and girls in other offences. Besides there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences.

I am convinced that indeed the cautionary rule in sexual offences is not legally justifiable and I cite the above authorities with approval. And the absurdity of

the rule was clearly brought out by the Supreme Court of Jamaica in **Regina v Derrick Williams Criminal Appeal No. 12/98.** The appellant was convicted of illegal possession of a firearm and rape. The brief facts were that he approached the complainant with a gun and demanded that she shut up. He hit her with a gun in the face causing a wound and thereafter rape her. At his trial he denied owning a gun and also said he had never seen the complainant until the day of trial. The major complaint on appeal was that the learned trial judge did not express that there was no evidence of corroboration and that being so that he had warned himself of the danger of acting on the uncorroborated evidence of the complainant before accepting her a witness of truth.

Speaking of circumstances where the sexual offence is just one of several offences charged, e.g. burglary or robbery the court said:

> **... [there is absurdity in calling for a special warning on corroboration for the sexual offence when the only issue is identity]. In those circumstances, if one applies the corroboration rules strictly, the woman's evidence about the identity of the intruder requires no corroboration if he confines himself to robbing or stealing, but must be the subject of the usual warning if, having stolen or robbed, he then goes on to rape the woman, despite the fact that the rape would almost certainly give her more opportunity and more incentive to observe and memorise his appearance than the robbery or theft. If the law demands that in those or similar circumstances the usual warning should be given by the judge, it puts an unexpected and unwelcome premium on rape. Presumably also in such circumstances, the judge would have the task of explaining to the jury that it would be dangerous to convict on the uncorroborated evidence of the victim in respect of the**

rape but not dangerous so far as the robbery was concerned. Moreover, any judge might be forgiven for hesitating long before adding insult to injury by explaining to a jury the reasons for the usual warning, namely that the unfortunate householder, allegedly burgled and raped in her own home, might have made a false accusation owing to sexual neurosis, fantasy, spite or refusal to admit consent of which she is now ashamed or any of the other reasons in R v Manning.

What I must therefore emphasize is that the evidence of a victim in a sexual offence must be treated and evaluated in the same manner as the evidence of a victim of any other offence. As it is in other cases, the test to be applied to such evidence is that it must be cogent.

I would therefore find it right to proceed under Article 132 (4) of the Constitution to depart from this Court's previous decisions cited in this judgment where the cautionary rule was held to be a requirement in sexual assault prosecutions.

Dated at Kampala this ..... day of ..... 2018.

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PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA

JUSTICE OF THE SUPREME COURT.