THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPLALA

CORAM: HON. JUSTICE C.M. KATO, JA.

HON. JUSTICE G.M. OKELLO, JA.

HON. JUSTICE S.G.ENGWAU, JA.

CRIMINAL APPEAL NO. 114 OF 1999

OPIRA MATHEW::APPELLANT

VERSUS

UGANDA ::RESPONDENT

(Appeal from the decision of the High Court
at Gulu (Rubby Opio Aweri, Ag.J. as he then was)
dated 21.10.99 in Criminal Session Case No. 459 of 1999).

JUDGEMENT OF THE COURT:

The appellant, Mathew Opira, was tried and convicted by the High Court at Gulu on the first count of defilement, contrary to section 123 (1) of the Penal Code Act, and on the second count of incest, contrary to section 144 (1) of the Penal Code Act. He was sentenced to 13 years' imprisonment on each count and the sentences were to run concurrently.

The brief facts of this case expose an ugly scenario in that on the night of 28.1.97, at Layibi village in Gulu District, the appellant had unlawful sexual intercourse with his daughter, Akello Night, a girl under 18 years old. On that fateful night, his wife Rose Adong (PW3) was away from home. She had paid a visit to her brother and spent a night there. She left the appellant at home with the complainant and other three young children. The complainant with those children

were sleeping in another house different from that of the parents. At first, the appellant went into the house but retreated when he found Akello Night still awake.
On the second attempt, the appellant found that the victim had already fallen asleep. The girl was awakened by the severe pain she felt in her private parts as the appellant was on top of her doing the act. The appellant pleaded with her not to reveal the matter to the mother and even offered her shs. 1000/= to conceal the affairs.

On the following day, 29.1.97 at around 1.00 p.m. Adong Rose (PW3) returned from her visit and found appellant and the children at home. In the evening, Night narrated to the mother her ordeal with the appellant the previous night. Adong Rose after hearing the mess angrily called for the appellant who was drinking outside in the company of other people. Sensing some trouble, the appellant ran away and spent the night at his brother's home, one Joseph Ocaka.

The following morning of 30.1.97, Rose Adong reported the matter to Local Council I Chairman of the area, one George Otto, PW4. The crowd was about to lynch the appellant when he was saved by PW4 who rushed him to Gulu police station where he was detained and subsequently charged with the offences of defilement and incest. The victim was examined by Dr. Thomas Okello Oyok, PW2, who found that she was 13 years old, her hymen had ruptured 72 hours ago and there were inflammations around her private parts and the upper thigh. There were other injuries also especially around the elbow. The girl, in the opinion of the doctor, was not strong enough to put up a resistance.

On a sworn statement, the defence was a total denial and the appellant alleged that he was framed up on this matter by one Santa whom he had refused to love and that she wanted to cause trouble to his family on the basis of that refusal. He now appeals against the convictions in both counts on the following three grounds after abandoning the 4th ground.

1. **The learned Judge erred in law when he wrongly failed to frame the correct ingredients of the offence of incest.**
2. **The learned Judge erred in law when he ignored or failed to identify in the prosecution evidence major contradictions.**

3. **The learned Judge erred in law in prejudging or judging the case before throwing overboard the defence side of the case in only one sentence and this occasioned a serious failure of justice."**

On ground 1, Mr. Joseph Zagyenda, learned Counsel for the appellant, contended that when summing up to the assessors, the trial Judge omitted to frame the ingredient indicating that the appellant participated in the commission of the alleged offence of incest. In Counsel's view, the omission meant that the prosecution did not prove all the ingredients of incest beyond reasonable doubt as required by law. In the premises, the appellant should have not been convicted of the alleged offence.

Ms. Betty Khisa, Principal State Attorney, submitted that though the learned trial Judge never mentioned that the appellant was responsible for the alleged incest when summing up to the assessors, this was a minor error which the trial judge corrected in his judgement when he found as a fact that the appellant had sexual intercourse with his daughter. Counsel argued that in the first count of defilement, it was found as a fact that it was the appellant who defiled the girl and the girl in question had been proved to be his daughter. In her view, the logical conclusion was that the appellant was responsible for the offence of incest. In the alternative, learned Counsel submitted that when summing up to the assessors, the trial judge had mentioned that the appellant has blood relationship with the victim.

We think that the complaint in the first ground of this appeal cannot be sustained because in his summing up notes to the assessors and also in his judgement, the learned trial judge adequately mentioned that the appellant was responsible for the alleged incest. We find no merit on this ground of appeal.

As regards ground 2, Mr. Zagyenda's complaint was that the medical report, Exbt P1, conflicted with the testimony of the doctor, PW2, who compiled it. He pointed out as major contradictions in the evidence of the prosecution case the fact that the medical report shows that there were injuries on the elbow, thigh and neck of the victim whereas the doctor in his evidence in court testified that there were no such injuries and that he even forgot to include the injury on the thigh.

Ms. Betty Khisa, for the respondent, submitted that there were no major contradictions in the prosecution case as Counsel for the appellant failed to mention them. In her view, evidence distorting the injuries sustained by the victim would not affect the prosecution case in respect of both counts because it did not go into the root of those offences. Learned Counsel submitted therefore that the trial judge was entitled to reject such contradictions and ignore them as minor.

We are unable to say that there were major contradictions in the prosecution case. In our view, the injuries complained of both from the medical report, Exbt P1, and the evidence of the doctor, PW2, do not affect the prosecution case in any way. Ground 2 also lacks merit.

On ground 3, Mr. Zagyenda complained that the learned trial judge had evaluated the prosecution evidence in isolation of the defence case and as a result this occasioned a miscarriage of justice to the appellant. Learned Counsel argued further that the defence was considered in only one sentence as follow:

"**His explanation was not plausible considering the overwhelming evidence produced by the prosecution Witnesses."**

In Counsel's view, the trial judge had already made up his mind to convict the appellant before considering his defence. Ms. Khisa conceded that the learned trial judge had prejudged the case before considering the defence. However, she hastened to submit that this being the first appellate court it can scrutinize the evidence on record exhaustively and come out with its own conclusion. In her view, there is an overwhelming evidence to support the convictions in both counts.

We agree that the trial judge was in error when he first believed the prosecution case before he considered the evidence for defence. However, we think, with respect, that the misdirection is not fatal to the Convictions. It is trite law that the Court of Appeal as a first appellate court is entitled to review the evidence on record and make its own conclusions on the case bearing in mind the fact that the appellate court did not enjoy the opportunity of seeing witnesses testify. See: **DR. Pandya V. R [1957] E.A 336, Bogere Moses V. Uganda Supreme Court, Criminal**

Appeal No. 1 of 1997 Unreported Kifamunte Henry V. Uganda, Supreme Court, Criminal Appeal No. 10 of 1997 (unreported) and rule 29 (1) of the Rules of this court.

In the present case, the appellant was indicted on the first count with defilement and on the second count with incest. The ingredients of the offence of defilement which the prosecution was supposed to prove beyond reasonable doubt include the following:

(a) that the victim was a girl under the age of 18 years.

(b) that sexual intercourse took place however slight the penetration; and

(c) that the suspect participated in the commission of the alleged offence.

The complaint here is that the learned trial judge first believed the prosecution case before he considered the evidence for the defence in only one sentence. As regards the offence of defilement, it appears from the evidence on record that the age of the girl was not in dispute at the trial. However, for clarity, the victim testified that she was born in January, 1983 and her mother, Rose Adong confirmed the same. Dr. Oyok, PW2, put her age at 13 years and the court also observed that the girl was under the age of 18 years at the trial. The defence did not challenge the question of age in any way. We think that there is overwhelming evidence on record to show that the prosecution had proved that element of the offence beyond reasonable doubt and the learned trial judge was right when he came to the same conclusion.

On the second ingredient regarding sexual intercourse, the evidence of the complainant, PW3, is that she woke up due to pain in her private parts when the appellant was in the act. The trial judge was alive to the position of the law when he stated that it is not a requirement of law that the evidence of the complainant in sexual offences requires corroboration but as a rule of practice, corroboration is necessary although court may convict an accused person without corroboration if it is satisfied that the complainant was truthful. However, Dr. Okello Oyok, PW2, who examined her only 72 hours after the alleged incident, found that she had inflammations on her private parts and the hymen had ruptured. The learned trial judge, in our view, was justified when he found this piece of evidence to be corroborative of the girl's complaint.

The distressed condition of the complainant when she was crying while narrating to her mother, PW3, what the appellant had done to her, was also corroborative of her complaint that the appellant had sexual intercourse with her. See: **Chila V. Republic [1967] E.A 722.** We think that the learned trial judge was right to hold so. He was also right to hold that the conduct of the appellant was not that of an innocent person when he ran away after his wife, PW3, asked him to account for the incident. All in all, we are satisfied that the trial judge was justified when he held that the prosecution had proved this ingredient beyond reasonable doubt.

Finally, on whether or not the appellant participated in the alleged defilement, the learned trial judge rightly, in our view, relied on the evidence of identification. The victim testified that when she felt some one was on top of her and having sexual intercourse with her, she realized it was the appellant because he talked to her while pleading that she should not reveal the affairs to the mother. She easily recognized the voice of the appellant because he is her father. He even lured her with shs. 1,000/= so that she could conceal the revelation but she refused to accept the offer. The trial judge, in our view, was right to hold that the girl was not mistaken about the identity of the appellant. In fact, when the appellant's wife confronted him over the incident, he ran away, a conduct which was not consistent with that of an innocent person.

As, regards the offence of incest, the prosecution was under duty to prove beyond reasonable doubt each and every ingredient as follows:
(a) that the victim of incesLwas1to his knowledge, related to the appellant pursuant to the provisions of section 144 (1) of the Penal Code Act.
(b) that sexual intercourse took place; and
(c) that it was the appellant who was involved in the act.

On ingredient (a) above, the complainant, PW3, clearly stated that the appellant is her biological father. In the same vein, the appellant's wife, Rose Adong, confirmed that she is the mother and the appellant is the father of the girl. The defence, according to the evidence on record, conceded and the matter became a non-issue at the trial. We think that the trial judge was justified when he held that the victim was related to the appellant in accordance with the provisions of section 144 (1) of the Penal Code Act.

When considering the issue of sexual intercourse on the first count of defilement, there is overwhelming evidence on record to show that on the night of 28.1.97 the appellant had sexual intercourse with the girl. We find that he is the father of the girl, both of whom are strictly prohibited under section 144 (1) of the Penal Code Act from having sexual intercourse between themselves with or without consent. We are also unable to fault conviction on the second count.

As there was no complaint about sentences imposed, we make no comment on the matter. In the result this appeal is dismissed.

Dated at Kampala this 2nd day of November 2000.

C.M. KATO
JUSTICE OF APPEAL

G.M OKELLO
JUSTICE OF APPEAL

S.G. ENGWAU
JUSTICE OF APPEAL.