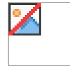

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT POTAL

CRIMINAL APPEAL NO. 0277 OF 2009

SERU BERNARD ………………………………………………. APPELLANT

VERSUS

UGANDA ……………………………………………………. RESPONDENT

Coram:

Hon. Mr. Justice Remmy Kasule, JA
Hon. Mr. Justice Eldad Mwangusya, JA
Hon. Mr. Justice F. M. S. Egonda Ntende, JA

(Appeal from a conviction and sentence by His Lordship Justice A.C. Owiny Dollo in High court Criminal Case No. 06 of 2008 given at the High Court at Fort Portal on the 1st day of April 2009)

JUDGMENT

The Appellant was arraigned before the High Court of Uganda at Fort Portal for the offence of Defilement C/s 129 (I) of the Penal Code Act. The allegation was that on the 15th day of January 2005 at Katembe village, Mwaro Parish, Katooke Sub County in Kyenjojo District he had unlawful sexual intercourse with Katusiime Doreen a girl under the age of eighteen years. He was convicted as indicted and sentenced to ten years in jail. He appealed against the conviction and sentence. Two grounds were set out:-

1. **The Learned trial Judge erred in law and fact when he convicted the Appellant of the offence of defilement.**

2. **The Learned trial Judge erred in Law when he convicted the Appellant to ten years in prison.**

It has to be observed that the above Memorandum of Appeal offends Rule 66 (2) of the Judicature (Court of Appeal Rules) Directions Statutory Instrument 13 – 10 because none of the two grounds raises any specific matter of Law or fact as required under the Rule. This rule is one of those rules repeatedly flouted by appellants and /or their Counsel and in a number of appeals such grounds are struck out to the detriment of the Appellants. Where Appellants are represented by Counsel a lot of care should be taken to ensure that a Memorandum of Appeal specifies the areas where the Court is required to review the Law or re evaluate the evidence in order to arrive at its own conclusion. We set out the sub rule in full:-

> *"The Memorandum of Appeal shall set forth concisely and* ***under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against , specifying, in the case of a first appeal, the points of Law or fact or mixed Law and fact and, in the case of a second appeal, the points of Law, or mixed Law and fact, which are alleged to have been wrongly decided, and in a third appeal***

the matters of Law of great public or general importance wrongly decided."

On our part we do not see any difficulty an appellant who is aggrieved by a judgment specifically pinpointing where the trial court went wrong instead of the generalization shown in this appeal, and numerous others, that we have come across. That is the basic requirement of the rule and this appeal falls far short in compliance.

Be that as it may, when the appeal was called for hearing Ms Angela Behenzire Counsel for the Appellant informed Court that after consultation with the appellant, he had instructed her to abandon the ground of appeal in relation to the conviction and proceed with only the one relating to sentence. At first, Mr. Byansi William, Senior Principal State Attorney, for the Respondent stated that he had no objection to the withdrawal of the appeal against conviction but when Court expressed its disquiet about the manner in which the trial as a whole was conducted and, in particular the manner in which some vital evidence on which Court relied to convict the appellant was admitted, both Counsel conceded that the conviction against the Appellant was not sustainable and once the conviction could not be sustained so would the sentence arising out of the conviction. The appeal of the Appellant was allowed and he was released from custody forth with. We promised to give reasons for our judgment and we proceed to do so.

The prosecution adduced evidence of five witnesses to prove the indictment. Of the five witnesses only **BAZANA GEOFFREY (PW2)** gave direct evidence as to his role in the investigation of the case. He was a Local Council Chairman LCI Katembe "B" village and he, together with his Secretary for defence, had arrested the Appellant on information from the victim and her mother that the Appellant had defiled the victim. On arrest the Appellant had denied the offence. Neither the victim nor her mother testified at the trial. Instead No. 24969 P. C. **ISINGOMA FRANK (P.W.1)** and No 23221 D/C **KAMBERE SAMUEL (P.W.5)** who had recorded statements from the mother of the victim and the victim respectively testified in Court and produced respective Police statements recorded from the victim and her mother as evidence. The statement of the victim was produced as P. E. 4 while that of her mother was produced as P. E. 1. The admission of the Police statements was prompted by representation by the prosecuting State Attorney that the victim and her mother had migrated to some unknown place. The statements of the two witnesses were incriminatory of the appellant and the question that arises and is to be resolved by the Court is as to whether or not the statements were properly admitted in evidence.

The second set of evidence admitted in absence of the witnesses was that of the medical reports. **DAVID KISEMBO (P.W.3)**, a Nursing Assistant / Laboratory Microscopic produced a Police Form 3 in respect of the examination of the victim. The

victim had been examined by **RWIRAGIRA ANNETTE** a Senior Nursing Officer who was stated to have gone back for further studies at Makerere University. **AKUGUZIBWE MUTABAZI EDWINS** (P.W. 4), a Clinical Officer produced a Police Form 24 which had been filled by **DR. WAISWA MUSA**, a Medical Officer who had examined the Appellant. There was no explanation for the absence of Dr. Waiswa but his report was simply admitted.

The admissibility of the Police statements made by the victim and her mother concerning the defilement brings into question the issue as to whether or not the appellant received a fair hearing as guaranteed under Article 28 of the Constitution and specifically sub Article 28 (3) (g) which provides that every person charged with a criminal offence shall be afforded facilities to examine in person or by his/her legal representative the witness called by the prosecution and to obtain the attendance and examination of witnesses to testify on his or her behalf.

Under Article 44 (c) of the Constitution the right to a fair hearing is non-derogable. It provides that notwithstanding anything in this Constitution there shall be no derogation from the enjoyment of the **right to a fair hearing** among other rights and freedoms.

The right to a fair hearing entails examination of witnesses as provided under Article 28 of the Constitution and this includes cross examination which is a fundamental step in a trial because it is through cross examination that the veracity and credibility of a witness is tested. The Appellant was denied the opportunity

to Cross Examine both the victim of the defilement and her mother and the trial judge did not specify under what law, if any , he admitted the statements. This is what he stated:-

> ***"In this instant case before me, it was the evidence of the victim, and that of her mother; both admitted in Court in accordance with the provisions of sections 33, 60, 61, 62 (e) 63 and 135 of the Evidence Act which prosecution relied upon.***
>
> ***It was established to the satisfaction of the Court that the Victim and her mother had long since migrated to an unknown place. Indeed Court insisted on their being traced , and it was only when all frantic effort at doing so yielded nothing, that recourse was had, to the provisions of the Law, above on admission of secondary evidence."***

There is no evidence on record that any frantic efforts to trace the two witness were made. The case was mentioned on 16.03. 2009 and fixed for hearing on the 3.04.2009. That is when it was reported that both the victim and her mother had migrated to an unknown place. The statement of the mother of the victim was admitted on that very day and that of the victim was admitted on 22.04.2009. Interestingly the statements were admitted without any objection from the defence Counsel and yet under Section 59

of the Evidence Act oral evidence must be direct. The section provides as here under:

"**59. Oral evidence must be direct**.

Oral evidence must, in all cases whatever, be direct, that is to say:-

(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it;

(b) If it refers to a fact which could be heard it must be the evidence of a witness who says he or she heard it;

(c) If it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the witness who says he or she perceived it by that sense or in that manner;

(d) It is refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds;

Except that:-

(e) The opinions of experts expressed in any treatise commonly offered for sale, and the

grounds on which those opinions are held, may be proved by the production of those treatises if the author is dead or cannot be found, or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable , and

(f) If oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of that material thing for its inspection."

So the only witness that could have testified to the fact of sexual intercourse were the victim and her mother who would also be liable to cross examination. The Police Officers who recorded their statements were not qualified to testify about the sexual act because they knew nothing about it and quite predictably none of them was cross examined about their testimony. The same goes for the medical evidence that was produced by witnesses other than those who had examined the victim and the appellant. The circumstances under which a Doctor's Medical report may be adduced in evidence by a different Doctor from the one who did the examination was discussed in the case of **ARAMANZANI KAMPAYANI VERSUS UGANDA** (Supreme Court of Uganda Criminal Appeal No. 5 of 1987). Where it was held as follows:-

"According to the record Dr. Ndimbirwe was the one who carried out a post mortem examination of the body of the deceased on 2nd November, 1981 the day after the deceased had been killed, and wrote out a post mortem report (exhibit P.1) He was apparently out of the country on a post-graduate course at the time of the trial. The post mortem report was admitted under S.64; so was the evidence of Dr. Masika, which was to the effect that having previously worked with Dr. Ndimbirwe in Kabale Hospital he was familiar with his signature on the post mortem report which he therefore identified as having been signed by Dr. Ndimbirwe. The purpose of Dr. Masika's evidence was apparently to facilitate the admission of the post mortem report under S. 30 (b) of the Evidence Act as a statement made by a person whose attendance could not be produced without delay or expense which in the circumstance of the case appeared to Court to be unreasonable. In Court's view, the postmortem report should not have been admitted in the manner it was for two reasons. Firstly, the procedure required under section 30 (b) was not complied with in that there was no evidence to show that Dr. Ndimbirwe could not

be found or that his attendance could not be procured without any amount of delay or expenses considered to be unreasonable in the circumstances of the case. In the case of ASSOCIATED ARCHITECTS Vs CHRISTINE NAZZIWA Civil Appeal No. 5 of 1981 (unreported) this Court had this to say.

"in MUZAMIN KISIANGO & ANOTHER Vs SAM BIRABWA Civil Appeal No 1 of 1980, this Court had an occasion to consider the conditions which made Section 30 (b) of the Act applicable. The Court said, "it is the duty of the party seeking to tender the witness statement to satisfy the Court by evidence that the witness cannot be found or his attendance cannot be produced without an amount of delay or expense which in the circumstances of the case appear to Court to be unreasonable. In this case no such evidence was led. The court had no such material upon which it could exercise its discretion to receive the report. Without such evidence the medical report was wrongly admitted. It should be excluded. Section 30 (b) of the Act should be used sparingly and only in the circumstances falling within the purview of that section."

> ***The same criticism of the Court regarding the admission of the medical report in the Muzamiri (Supra) case equally applies to the admission of Dr. Ndimbirwe's post mortem report in the instant case. No evidence was led regarding where Dr. Ndimbirwe had gone for his course; when he went and when he was coming back in Uganda or whether he was still outside Uganda. It was not proved that his attendance could not be procured without an amount of delay or expense which in the circumstances of the case appeared to the Court unreasonable. The trial Court was not asked to, nor did it rule, whether the post mortem report be tendered under Section 30 (b)."***

In the instant case there was no evidence that Rwiragira Annet the Clinical Officer who had examined the victim and was attending a course in Mulago, and not abroad as in the case of Dr Ndimbirwe, could not interrupt her course to attend Court and explain her report. There was time between 3.04.2009, when the case was first called and 6.05.2009 when the prosecution closed its case, to call this witness. There was no suggestion that the expense would be unreasonable because nobody raised it. No reason was advanced for the non attendance of Dr. Waswa Musa who had examined the appellant on Police Form 24. The evidence of Dr. Waswa might not have been vital but the principle

expoused in the case of **Aramanzani Kampayani Vs Uganda (Supra**) is that, if Court has to admit evidence of an unavailable witness, it must do so within the purview of the Evidence Act which was not the case here. It is for that reason that the conviction of the Appellant was quashed and Court would not go on to consider the propriety of a sentence that was founded on evidence the admissibility of which , not only violated the Appellants right to a fair trial, but was also in violation of the Evidence Act, as shown in this judgment.

In the circumstances the trial of the appellant was a nullity and both his conviction and sentence stand quashed and set aside.

We so order.

Dated at Fort Portal this 18th day of December 2014

Hon Mr. Justice Remmy Kasule,
Justice court of Appeal

Hon Mr. Eldad Mwangusya,
Justice Court of Appeal

Hon. Mr. Justice F. M. S. Egonda Ntende,
Justice Court of Appeal