

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT ARUA**

**CRIMINAL APPEAL NO. 154 OF 2011**

**(Original High Court at Adjumani Criminal Session case No. 0023 of 2011)**

**DRATIA SAVIOUR:..... APPELLANT**

**VERSUS**

**UGANDA :..... RESPONDENT**

**Coram: Hon. Mr. Justice Remmy Kasule, JA**

**Hon. Lady Justice Hellen Obura, JA**

**Hon. Mr. Justice Byabakama Mugenyi Simon, JA**

**JUDGMENT OF THE COURT**

This is an appeal against the decision of the High Court sitting at Adjumani (Nyanzi Yasin, J.) dated 16.06.2011. The appeal is against conviction for aggravated defilement contrary to Section 129(3) and (4) of the Penal Code Act.

The brief facts of the case as were adduced at trial are that Jomani Janel, Pw4 was wife to appellant and both stayed in their home at Nyojo trading Centre, Metu Sub-County, Moyo District, with Pw3, Robert Vukoni aged 13 years and Pw5, Welia Evaline, also aged 13 years, the victim of the offence. Both Pw3 and Pw5 are related in that, their respective mothers are sisters to Pw4.

On 17.01.2010, both Pw4 and the appellant were away from their home, Pw4, having gone for a burial while the appellant was somewhere else. Thus Pw3 and Pw5 remained alone at home.

When Pw4 returned home at about 6.30 p.m., Pw3 reported to her that he (Pw3) had seen the

appellant and Pw5 have sex on a bed inside the house. Pw4 reported the matter to the Sub-County Police Post, who later arrested the appellant when he returned home.

The appellant was subsequently charged, tried and convicted of aggravated defilement and sentenced to 20 years imprisonment. Hence this appeal.

The Memorandum of Appeal has three grounds:

- 1. The learned trial Judge erred in law and fact when he relied on evidence of Pw 5, WELIA EVALINE, a child of tender years without first conducting a voire dire and wrongly convicted the appellant.***
- 2. The learned trial Judge erred in law and fact when he convicted the appellant for the offence of aggravated defilement based on evidence that did not satisfy the standard of corroboration in sexual offences.***
- 3. The learned trial Judge erred in law and fact when he convicted the appellant for the offence of aggravated defilement when the essential ingredient of participation of the appellant was not proved beyond reasonable doubt.***

The appellant prayed that the appeal be allowed, his conviction and sentence be set aside and he be set free forthwith.

At the hearing Counsel Paul Manzi appeared for the appellant on state brief while Senior Principal State Attorney Sam Oola was for the respondent.

In respect of ground 1, appellant's Counsel submitted that the trial Court erred to rely on the evidence of Pw5, the victim, a minor and who testified without the trial Judge first holding a voire dire to determine whether or not she appreciated the nature of an oath.

As to ground 2 Counsel submitted that the evidence of Pw3 and Pw5, both minors, required, as a matter of law, corroboration before it could be acted upon. There was no such corroboration. The trial Judge thus erred to convict the appellant on the basis of the uncorroborated evidence of Pw3 and Pw5.

Further, the evidence of Pw3 and Pw5, apart from requiring corroboration, was grossly not credible at all. Pw3 had testified that she saw Pw5 naked on a mattress, yet she reported to Pw4 that he found the appellant on the lower bed and Pw5 on the upper bed. Pw5, was also contradicted by stating that there was only one bed in the house to which the appellant took her, contrary to the version of Pw3 regarding the existence of a lower and upper bed in the house.

With regard to ground number 3 Counsel maintained that there was no credible evidence that it was the appellant who carried out the sexual act upon Pw5. The only evidence available was that of Pw5 and the same was full of contradictions as already submitted upon in respect of ground number 2.

Counsel thus prayed Court to allow the three grounds of the appeal.

Learned Counsel for the respondent, in reply, conceded that Pw3 and Pw5, both minors, testified without voire dire first having been administered. However, he argued that this failure did not cause a miscarriage of justice to the appellant, as both Pw3 and Pw5 were subjected to rigorous cross examination by appellant's Counsel and the trial Judge found their evidence credible and truthful.

As to ground number 2, Counsel contended that both Pw3 and Pw5 having testified on oath, there was no requirement, as a matter of law, that their evidence had to be corroborated, though the trial Court could, as a matter of practice, require for such corroboration. At any rate, the medical evidence, that was admitted by consent, revealed that on being medically examined three days after the alleged sexual act, Pw5, had inflammations, tear of the vulva and a ruptured hymen.

As to identification of the appellant during the sexual act, the respondent's Counsel contended that the evidence of Pw3, Pw4, Pw5 and that of the appellant proved beyond any doubt that the appellant remained with Pw3 and Pw5 in the house on 17.01.2010. The same evidence was corroborated by the medical evidence of Pw 1 and the report by Pw3 to Pw4 as to how Pw3 had seen the appellant and the victim naked in bed having sex. Counsel contended that this evidence put the appellant at the scene of crime.

The respondent's Counsel invited Court to regard the alleged contradictions in the evidence of Pw3, Pw4 and Pw5 as nonexistent, and or as very minor.

Counsel for respondent, as an officer of Court, invited this Court to consider the sentencing of the appellant by the trial Judge as being vague in its wording that **"The 17 months he has spent on remand will be considered in computation of his sentence foresaid"**.

Counsel however maintained that the sentence of the appellant to twenty (20) years imprisonment was appropriate. He thus prayed Court to dismiss the appeal.

The duty of this Court as the first appellate Court is to reappraise the evidence adduced at trial and to draw inferences of fact there from. Court has to bear in mind that it did not have the opportunity to assess the demeanour of the witnesses at trial.

**See: Rule 30 of the Judicature (Court of Appeal Rules) Directions A.I: 13-10. See also: Uganda vs George Wilson Simbwa: Supreme Court Criminal Appeal No. 37 of 1995 and Court of Appeal at Mbale Criminal Appeal No. 55 of 2008: Oriangatum Samuel vs Uganda.**

The substance of Ground 1 is that the appellant's trial was a miscarriage of justice because he was convicted partly on the basis of the evidence of Pw3 and Pw5 who were children of tender years, but who testified without the trial Judge first having conducted a *voire dire* in respect of each one of them.

Counsel for the respondent concedes that a *voire dire* was not held, but contends that this failure did not cause any miscarriage of justice to the appellant.

A *voire dire* is a preliminary examination by Court of a witness required to testify truthfully to Court with respect to the evidence to be given by that witness. The purpose of a *voire dire* is for the Court to determine whether the witness, the subject of the *voire dire*, understands the nature of an oath and the value of telling the truth. If the witness, as result of that preliminary examination, appears to Court to be incompetent to **“speak the truth”** then such a witness may testify not on oath or the Court may reject such a witness.

**Section 40(3) of the Trial On Indictments Act, Cap. 23 provides**

*“Where in any proceedings any child offender years called as a witness does not, in the opinion of the Court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the Court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her”.*

**A child of tender years is one of or the apparent age of less than 14 years: See: Kibageny Arap Kolil vs R[1959] EA 92 relied upon in Uganda in Muhirwe Simon vs Uganda: Supreme Court Criminal Appeal No. 38 of 1995: [1999] KALR 9.**

Pursuant to the already stated **Section 40 (3) of the Trial on Indictments Act**, where a witness is a child of tender years, in the Judgment of Court, then that Court must first investigate, through a *voire dire*, whether or not that child understands the nature of an oath and the value of telling the truth.

Each of Pw3, and Pw5 was aged about 13 years at the time they testified. No *voire dire* was conducted by the learned trial Judge in regard to each one of them.

Pw3 testified after taking an oath. Pw5 did not take oath. Both were cross-examined.

When summing up to the assessors the learned trial Judge stated with regard to the evidence of Pw3 and Pw5 as follows:

*“Here both Pw3 and Pw5 knew the accused well before the offence, however I caution you to rely on their evidence since both of them were children of tender age unless well*

*corroborated, it is not safe to convict on such evidence”*

In the Judgment, the trial Judge stated with regard to Pw5:

*“I will consider the evidence of the victim but I am aware that she is a child of tender age and a complainant of sexual assault, consequently the evidence requires being corroborated before being acted upon. ”*

Specifically with regard to Pw3 the trial Judge held in his Judgment that:

*“.....Pw3 was himself a child of tender age whose evidence required corroboration”.*

We have carefully reviewed the proceedings and the Judgment of the trial Court. We conclude that on the evidence adduced Pw3 and Pw5 were both children of tender years at the time they testified in Court. Each one of them ought to have been subjected to a *voire dire* before doing so. This was not done. It was an error on the part 195 of the trial Judge.

We have to decide whether the failure to hold a *voire dire* and the trial Court subsequently acting on the respective evidence of Pw3 and Pw5, amongst other evidence, caused a miscarriage of justice to the appellant.

Miscarriage of justice is a failure of justice. In a criminal trial, as regards an accused/appellant, a failure of justice occurs if by reason of a mistake, omission or irregularity, in the trial, the accused/appellant loses a chance of acquittal which was fairly open to that accused/appellant save for the mistake, omission or irregularity. See: Archibold, 38<sup>th</sup> Edition, para 925.

Guidance from a number of Court decisions is appropriate in this regard. In **R V Surgenor [1940] 2 ALL ER 249** a girl of 9 years of age testified in a house breaking criminal case against an accused. The girl testified without the recorder first satisfying himself as to whether the girl was in a position to be sworn as was required by the law, similar to our Section 40(3) of the Trial on Indictments Act. The Court of Criminal Appeal held that:

*“It is the duty of the presiding Judge to satisfy himself as to whether or not a child of tender years is in a position to be sworn. Nevertheless, although there had been an irregularity there had been no such miscarriage of justice as would invalidate the conviction”.*

In that case the Jury had accepted her unsworn evidence, and was unlikely not to accept the same if she had been sworn. So no injustice had been done.

The above case was relied upon by the Court of Appeal for East Africa in the case of **KIBANGENY ARAP KOLIL-v-R (Supra)**; where the appellant was convicted of murder on the strength of evidence of two witnesses aged below 14. The trial Court did not satisfy itself, before these witnesses testified, whether or not they understood the nature of an oath or affirmation and the trial Court had also not warned itself and the assessors of the danger of convicting on their uncorroborated testimony.

Allowing the appeal, the Court stated that before a child of tender years can be allowed to give evidence upon oath (or affirmation) the Court must satisfy itself that he/she does understand the nature of an oath. The trial Court must carry out that investigation before the swearing and the giving of evidence. The investigation need not be a lengthy one but it must be made, and the trial Judge ought to record it. The investigation must also be directed to the particular question whether the child understands the nature of an oath rather than to the question of the general intelligence of the child.

The East Africa Court held that since the evidence of the two child witnesses was of so vital a nature, the learned trial Judge's failure to first administer a *voire dire* occasioned a miscarriage of justice. The appeal was allowed on that ground alone. There was however also another irregularity committed by the trial Judge in the same case. He had failed to warn either himself or the assessors of the danger of convicting on the uncorroborated evidence of the two witnesses of tender years. The Court thus held:

“In the present case the learned trial Judge gave no such warning, either to himself or to the assessors, in respect of the evidence of either of the two boys. 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. ”

The Kibangeny Arap Kolil case (Supra) was one of the precedents relied upon by the Uganda Supreme Court in the decision of **MUHIRWE SIMON VS UGANDA, Criminal Appeal No. 38 of 1995, [1999] KALR 9.**

The facts of the case, were that an accused was alleged to have defiled a girl aged 11 years but 13 at the date of Court testimony.

The trial Judge first swore her and then held a *voire dire*. She then gave her evidence to the effect that she had been defiled and by the appellant. The prosecution also presented a 13 year old girl witness, who claimed to be an eye witness to the defilement. Without the trial Judge first conducting a *voire dire*, this witness was sworn and testified confirming the

complainant's story. The trial Judge on the strength of the evidence of the complainant and the other witness, corroborated by the medical evidence and that of the complainant's mother, held that the prosecution had proved its case beyond reasonable doubt, convicted and sentenced the accused. The Accused appealed the decision.

The Supreme Court, found that the trial Judge was in error in having first sworn the complainant and then thereafter conducted a *voire dire*. The Judge was also in error for having failed to conduct a *voire dire* in respect of the second witness, before receiving her testimony as an eye witness to the defilement. The Supreme Court however, unlike as it was held in the **Kibangeny Arap Kolil case** (supra), held that the errors committed by the trial Judge did not cause a miscarriage of justice to the appellant. The conviction of the appellant on the basis of the evidence of the two witnesses of tender years was thus upheld.

The Supreme Court in the **Muhirwe Simon case (Supra)** that, inspite of the failure to properly hold the *voire dire*, the evidence of the complainant and that of the eye witness, though children of tender years, had been sufficiently corroborated by other evidence.

We conclude after reviewing of the statutory law and the above Court decisions that the overriding consideration that Court must take into account is whether or not the non-holding of a *voire dire* resulted in a miscarriage of justice to the accused/appellant. Where a miscarriage of justice occurs, then the evidence so obtained must be rejected and a conviction based upon such evidence must be set aside. However, where no miscarriage of justice is caused, then the evidence so obtained may be received by Court and a conviction based upon such evidence will be sustained.

Hence, no miscarriage of justice is caused to the appellant, where the evidence received by the trial Court in absence of a *voire dire* is evidence that is not of vital importance and requires no corroboration:

See. R vs Surgenor(supra)





There is miscarriage of justice when the evidence received without holding a voire dire is of crucial importance to the case before the Court, and the trial Court, apart from being in error as to the voire dire, is also in error of acting on that evidence when the same is not corroborated, or the trial Judge does not warn himself/herself and the assessors of the danger of acting on such evidence See: **KIBANGENY ARAP KOLIL-v-R (Supra)**.

Where evidence is obtained by Court from a witness of tender years without a voire dire being first taken is of vital importance but that evidence is sufficiently corroborated by other independent evidence, and the trial Court warns itself and the assessors of the danger of acting upon such evidence, then no miscarriage of justice is caused: See: **Muhirwe Simon vs Uganda: (Supra)**

The evidence of Pw3, Pw4 and Pw5 in the instant case has already been reproduced in detail.

Pw5 was medically examined on 20.01.2010 and the medical evidence was admitted by consent.

According to the medical report, she had been penetrated and had inflammations and tear of the vulva, as well as a ruptured hymen. She was HIV negative.

The appellant was also medically examined and he was found to be HIV positive. The medical evidence on the appellant was also admitted in evidence by consent.

At the closure of the prosecution case, the trial Judge found a prima facie case established against the appellant. Court explained to him the options from which he could choose one to defend himself. The appellant chose to keep quiet and said nothing to Court by way of defence.

We have re-submitted all the evidence that was adduced to a fresh scrutiny. The evidence of Pw5, the victim, and Pw3, the eyewitness to the alleged defilement is of vital importance in establishing whether or not the victim was subjected to a sexual act and whether or not it was the appellant who carried out this act.

Therefore, given the fact that no voire dire was administered by the trial Court before the evidence of Pw5 and Pw3 could be received whether on oath or not on oath, it is necessary to determine whether or not this evidence was sufficiently corroborated. It is also necessary to ascertain whether the trial Judge warned himself and the assessors of the necessity to look for corroboration, and if it is absent, of the danger of convicting on the basis of the said evidence without such corroboration.

We too, as the first appellate Court, have warned ourselves in similar terms as we subject the available evidence to a fresh scrutiny.

The evidence of Pw5 that she was subjected to a sexual act is corroborated, in our considered view, by the medical evidence, the medical examination upon Pw5 having been carried out only about 3 days from the date Pw5 asserts she was defiled. The injuries found upon the private parts of Pw5 corroborate the evidence of Pw5 and Pw3. The distressed condition of crying that Pw4 noticed on Pw5 upon return home from the burial also corroborated Pw5's evidence that she had been molested, even though due to fear she did not tell Pw4 who had molested her.

As to whether or not the appellant was properly identified as having committed the sexual act against Pw5, the evidence is that Pw5 and Pw3 knew the appellant very well and the sexual act was done in broad day light, at about 4.00 p.m., on the 17.01.2010. This evidence of Pw5 and Pw3 is corroborated by the report that Pw3, an eyewitness to the act, made to Pw4 immediately she returned home at 6.30 p.m., to the effect that he, Pw3, had found the appellant and Pw5 on bed "doing something". From the medical evidence that corroborates the evidence of Pw5, the "doing something" must have been doing the sexual act.

We also find that, though the trial Judge was in error as regards the voire dire in respect of Pw5 and Pw3, he properly directed himself and the assessors on the need for corroboration of the evidence of Pw5 and Pw3 who were children of tender years.

On our part, upon re-evaluation of the evidence, we come to the conclusion that the report made by Pw3 to Pw4, when the latter returned home, to the effect that he, Pw3, had heard Pw5 crying and then he had seen with his own eyes the appellant and Pw5 on bed, while both were naked inside the house, corroborated the

assertion of Pw3 as to what he saw the appellant and Pw5 do on bed inside the house pursuant to Section 156 of the Evidence Act.

It was contended for the appellant that the evidence of Pw3 and Pw5 was so grossly contradictory that no reliance at all should be placed upon it, whether the same is corroborated or not. On a review of the said evidence we are unable to accept the said submission. Pw3 made mention of the existence of a mat and a bed in the house where the sexual act was said to have taken place. He was not however asked to clarify whether the mat was on the floor or whether it was on the bed.

In similar measure, he was not asked to explain what he meant when he spoke of the lower bed and an upper bed. Counsel for appellant was satisfied with the evidence of Pw3 as regards those details and, that is why he did not cross examine Pw3 or any other prosecution witness about them. We, on the whole find that there were no major contradictions pointing to deliberate lying on the part of any prosecution witnesses. We reject the submission.

We accordingly find as regards ground 1 of the appeal that the failure to conduct a voire dire in respect of the evidence of Pw5 and Pw3 was an irregularity that did not cause a miscarriage of justice to the appellant. Ground 1 of the appeal therefore fails.

As to ground 2, this has been partly considered while dealing with ground 1. As already noted, the learned trial Judge directed himself and the assessors of the need for corroboration: that is independent evidence implicating the appellant with the offence for which he was indicted. See: **Mugoya Wilson vs Uganda: Supreme Court Criminal Appeal No. 8 of 1999.**

We too, after directing ourselves in the same terms, find that as the evidence of the sexual act being done upon the victim, Pw5, was corroborated by the medical evidence and the distressed condition of Pw5 as observed by Pw4. Also, the evidence of Pw3 as to what he heard and saw, that is Pw5 crying and she and the appellant being naked on the bed, is corroborated by the fact that Pw3 reported this to Pw4 immediately on her return.

As to whether the appellant was properly and correctly identified as the one who carried out the sexual act upon the victim, Pw3's evidence is corroborated by the report he made to Pw4 that he saw the appellant and Pw5 naked on the bed and Pw5 was crying. The same report to Pw4 also corroborates Pw5's assertion that it is the appellant who did the sexual act upon Pw5. There is therefore no merit in Ground 2 of the appeal. The same is dismissed.

With regard to ground 3 of the appeal, this has been resolved while considering grounds 1 and 2. The appellant was clearly identified as it was broad day light and both Pw3 and Pw5, whose evidence was sufficiently corroborated, very well knew the appellant before the offence and no grudge existed between them and the appellant.

There is accordingly no merit in this ground. The same stands dismissed.

The respondent's Counsel, as an officer of Court, for which we are grateful to him, drew this Court's attention to the fact that the sentence passed by the trial Judge in this case was vague and thus wrong in law by the way it was worded. He prayed that the ambiguity be rectified but that the sentence of 20 years imprisonment should be maintained.

Counsel for the appellant did not oppose the submissions of Counsel for the respondent on this point. The appellant had also not raised any ground of appeal as regards sentence.

The learned trial Judge stated in his Judgment while sentencing the appellant that:

*".....Therefore I sentence him to 20 (twenty) years of imprisonment.*

*The 17 months he has spent on remand will be considered in computation of his sentence foresaid. "*

We agree with the submission of Counsel for the respondent that the sentencing of the appellant by the learned trial Judge was not in compliance with the law.

The trial Court that must determine with completeness, and without any vagueness, the exact sentence that a

convict is to serve. The convict, while serving that sentence may earn some remissions in accordance with the provisions of the prison Act, but that is no justification for the trial court not to be definitive when passing sentence.

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In this particular case, the learned trial Judge appeared to have left it to some other authority, possibly Uganda Prisons, to consider in future the period of 17 months that the appellant had spent on remand. This was wrong in law.

Article 23 (8) of the Constitution is in mandatory terms. It provides: “23

*(8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment. ”*

**In Katende Ahamad vs Uganda: Supreme Court Criminal Appeal No. 6 of 2004 reported in Uganda Law Reports [2007] Vol. 1 P.21, the Court held that the words “to take into account” do not require the trial Court to apply a mathematical formula by deducting the exact period, be it years or months or weeks or days, spent by an accused person on remand from the sentence to be imposed by the trial Court. All that the words mean and require the trial Court to do is to take into account specifically along with other relevant factors that period which an accused person spends in lawful custody before completion of the trial. The Supreme Court even gave further guidance that when sentencing a person to imprisonment a trial Judge or Magistrate should say**

*“Taking into account the period of..... Years (months) or weeks, whichever the accused has already spent on remand, I now sentence the accused to a term of..... Years (months or weeks, as the case may be).*

We therefore find that the sentence passed upon the appellant in this appeal was wrong in law. We accordingly set it aside.

The appellant was a first offender, he was aged 33 years at the time of conviction, with family responsibilities and he is HIV positive; thus requiring frequent medical treatment and care. He spent 17 months on remand before he was tried. These are mitigating factors to be taken in favour of the appellant.

On the other hand, the appellant was in the status of a parent/guardian to the victim, who at the age of 12 to 13 was more or less a child of the appellant, given that he was 33 years old. The fact that the appellant’s health status is that he is HIV positive, placed a heavy duty upon him not to expose to the defenceless young victim, Pw5 to risk of infection. It is by great luck that the victim was not infected. These are grave aggravating factors.

In **Katende Ahamad vs Uganda** (Supra) the convict for defilement who had spent 2 ½ years on remand, was an adult, the victim was aged 9 years and the Supreme Court reduced the sentence

from 15 years to 10 years imprisonment. In **Mugoya Wilson vs Uganda** (Supra), the appellant who was convicted of defilement was also an adult, the victim was also aged 9 years. He was sentenced to 15 years imprisonment on count 2, which was also defilement but was not the subject of the appeal.

Having considered the mitigating and aggravating factors as well as the Court decisions referred to above, and in particular having taken into account the fact that the appellant spent 17 months on remand, we find that the ends of justice will be met by sentencing the appellant to a period of imprisonment of eighteen (18) years.

In conclusion the appellant's appeal stands dismissed as to convictions.

However the sentence of the appellant to twenty (20) years imprisonment is vacated as having been wrong in law. It is substituted by a sentence of eighteen (18) years imprisonment which the appellant is to serve from the date of his conviction, that is 16<sup>th</sup> June, 2011.

We so order.

Dated at Arua this 6<sup>th</sup> day of June 2016.

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL

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