

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 263 OF 2006

NDYAGUMA DAVID.....

APPELLANT

VERSUS

UGANDA.....RESPONDENT

[Appeal from a conviction and sentence of the High Court at Mbarara presided over by Hon. Justice Yorokamu Bamwine dated 13th May, 2009 in Criminal Session No. 0127 of 2006.]

CORAM: HON MR. JUSTICE KENNETH KAKURU, JA**HON. MR. JUSTICE BYABAKAMA MUGENYI SIMON, JA****HON. MR. JUSTICE ALFONSE C. OWINY-DOLLO, JA****JUDGMENT OF THE COURT**

This appeal arises from the decision of *Hon. Justice Yorokamu Bamwine* in Mbarara High Court *Criminal Session Case No. 0127 of 2006* in which the appellant was convicted of the offence of defilement contrary to *Section 129(1)* of the Penal Code Act and sentenced to 15 years imprisonment.

Being dissatisfied with the decision the appellant appealed to this Court against both conviction and sentence on the following grounds

1. **The learned trial Judge erred in law and fact when he relied on circumstantial evidence to convict the appellant of the offence of defilement.**
- 2) ***The learned trial Judge erred in law and fact to convict the appellant on the strength of the prosecution evidence without considering and evaluating the defence evidence which has occasioned a substantial miscarriage of justice to the appellant.***
- 3) ***The sentence of fifteen years was harsh and excessive in the circumstances.***

At the hearing of this appeal **Mr. Peter Kabagambe** learned counsel appeared for the appellant who was present in Court, while **Mr. Alex Bagada** appeared for the respondent.

Mr. Kabagambe sought leave to withdraw this appeal¹. We rejected his application preferring to have it heard as we envisaged that it raised important issues of law that required adjudication. Mr. Kabagambe then reluctantly agreed to proceed.

The Appellant's case

Mr. Kabagambe argued the first two grounds together and he abandoned the third ground on sentence.

Mr. Bagada applied to have the appeal struck out on the ground that the two remaining grounds of appeal offended the provisions of **Rule 66** of the Rules of this Court.

10 That Rule stipulates as follows

“(2) 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

Mr. Kabagambe opposed the application contending that the grounds clearly set out the objection to the decision appealed against. We overruled the objection.

We found that the two grounds of appeal as set out above sufficiently set out the objection to the decision appealed against. We observe however, that the grounds of appeal could have been better drafted.

Mr. Kabagambe submitted that the evidence adduced against the appellant at the trial was insufficient to sustain a charge of defilement. He contended that the prosecution had failed to link the appellant to the crime. Counsel argued that the appellant's participation had not been proved.

Counsel argued that the appellant was convicted on circumstantial evidence as there was no witness to the crime. The victim's father PW2 is stated to have been told by the victim that it was 'David' who had defiled her. Counsel argued that there was no direct evidence to link the appellant to the crime.

Counsel submitted that the evidence adduced against the appellant was circumstantial and fell short of legal requirement that before a court convicts in a case entirely based on circumstantial evidence it

must be satisfied that the inculpatory facts are incapable of explanation on any other hypothesis except the guilt of accused.

He asked Court to allow the appeal.

The Respondent's case

Mr. Baraga for the respondent opposed the appeal and supported the sentence. He contended that the conviction was not based on circumstantial evidence as the learned trial Judge had found but on direct evidence.

Counsel contended that the evidence of Pw2 the appellant's father was direct evidence linking the appellant to the crime. Counsel argued that Pw2 the appellant's father having been told by the victim that it was David the appellant who had defiled her constituted direct evidence once the witness was believed by the trial Judge. He relied on the decision of the Supreme Court in **Basiita Hussein vs Uganda: Supreme Court Criminal Appeal No. 35 of 1995** for that proposition.

He asked Court to find that Pw2 Tindyebwa the appellant's father's testimony was believable and therefore the learned trial Judge was justified when based on his evidence he convicted the appellant.

He asked the Court to dismiss the appeal,

In rejoinder Mr. Kabagambe was emphatic that the evidence against the appellant was questionable. He contended that the victim had not reported to her father Pw2 of the defilement in the presence of the appellant as to make the father's evidence admissible in the absence of her evidence. Counsel also faulted the prosecution's failure to subject the appellant to medical examination, arguing that it created a gap in the evidence against him.

Counsel submitted that circumstances under which evidence of person who is told of a crime of defilement but is not an eye witness is admissible were set out in the case of **Omuroni vs Uganda (2002) E.A 531 (SCU)**. In that case counsel submitted the victim had told the father that she had been defiled by the appellant in the presence of the appellant and her father.

Counsel argued that that facts and circumstances of this appeal were different from those in the **Omuroni vs Uganda (Supra)**.

He reiterated his earlier submissions and asked this court to allow the appeal.

We have heard the submissions of both counsel. We have also carefully perused the court record and the authorities cited to us.

We are mindful of the duty of this Court as a first appellate Court, as set out in Rule 30(1) of the Rules of this Court and as it well explained by the Supreme Court in Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses Vs Uganda Supreme Court Criminal Appeal No. 1 of 1997.

We are required to evaluate the whole evidence that was adduced at the trial and to come up with our own inferences on all issues of law and fact. We shall proceed to do so.

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The only issue for determination in this appeal is participation of the appellant in the commission of the offence of defilement. The only evidence that directly implicates the appellant to the crime is what the victim, told her father PW2 and her mother PW3. The victim did not testify in court, but the father and mother did.

Counsel for the respondent strongly argued that in the authority of **Basiita Hussein Vs Uganda (Supra)**, the evidence of victim's father and mother in this appeal constituted direct evidence since the victim had reported to them while she was distressed immediately after the incident. He faulted the learned trial Judge for having considered the evidence as circumstantial.

In **Omuroni Vs Uganda [2002J 2 EA 508 at page 534, the Supreme Court** observed and held as follows concerning evidence of a victim who was the only eye witness:-

“The evidence was circumstantial as the victim who would have given direct evidence as the only eye witness did not testify but nonetheless constituted sufficient proof of the offence of which the appellant was convicted as it was corroborated by independent evidence”.

It follows from the above excerpt that where a victim is the only eye witness to a crime of defilement and she is not called to testify the evidence adduced at the trial, would only be circumstantial.

In **Omuroni Vs Uganda (Supra)**, the evidence of the victim's father who was not an eye witness, that the victim had been defiled by the appellant, was admissible as the accusation had been made contemporaneously with the offence and therefore was part of the **res-gestae** and is an exception to the hearsay rule.

In that case, the victim's father returned home late in the evening at about 10:00pm. He called out his daughter to open the door for him but she delayed. He heard some movements in the house. He forced the door open upon which the victim told him the applicant in that case had defiled her.

The appellant was lying on the floor in that room. The appellant's father called the appellant to respond to what his daughter had just stated, but the appellant fled and was arrested later. The Court found that the evidence of the father of the victim was admissible in those circumstances.

In this particular appeal, the father PW2 stated that he was in his house when he heard the victim crying. When he asked her what had happened, she pointed a finger between her legs. The mother was called to find out what had happened. When asked by her mother what had happened to her, the

victim just replied “David” implying the appellant. PW2 stated there was semen flowing from the victim’s vagina and she was bleeding.

5 The evidence of PW3, the mother of the victim differs somehow from that of PW2 the father. The mother states that she is the one who first saw the victim and she is the one who was told that the appellant had defiled her in the bush. PW3 then called her husband PW2 the father of the victim and told him that the “girl had been defiled.” The victim was never called to testify.

We find that the evidence of both Pw2 and Pw3 was admissible as to what they saw and were told by the victim about the fact that she had been defiled.

However, the evidence remains hearsay as to the participation of the appellant. In this case we have a child of tender years who did not testify. If she had testified, her evidence would have required corroboration. She was also a single identifying witness, and as such her evidence would on this account have required corroboration.

This being sexual offence corroboration is usually required. However a Court may convict in the absence of evidence of a victim for defilement if there is evidence sufficient to prove the offence. **Kobusheshe Vs Uganda: Court of Appeal Criminal Appeal No. 110 of 2008** and **Basiita Hussein Vs Uganda (Supra)**.

In **Kobusheshe (Supra)** the appellant in this case admitted having defiled the victim. Although the victim did not testify, court found there was sufficient evidence to convict the appellant.

In Bukenya Joseph Vs Uganda: Court of Appeal Criminal Appeal

No. 222 of 2003, this Court heard and observed as follows:-

“The law governing corroboration is well established. See Chilla v R [1967] 722; R v Baskerville [1916] 2 KB 658;

Jackson Zite v Uganda SCCA No. 19 of 1995 (unreported). It is trite that where a child of tender years gives unsworn evidence, that evidence must be corroborated with independent material evidence before a conviction can be

based on it. It was stated in R v Chila (supra) that the Judge must warn himself of the dangers of conviction of an accused

with uncorroborated testimony and may convict in the

absence of corroborating evidence if he or she is satisfied

that the evidence is truthful.

Section 40(3) of the Trial on Indictment Act states:-

“Where in any proceedings, any child of tender years does not in the opinion of the Court understand the nature of an oath, his evidence may be received though not on oath, If in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth.

Provided that where the evidence admitted by virtue of this subsection is given on behalf

of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some material evidence in support thereof implicating him”.

Section 155 of the evidence Act defines what is sufficient to corroborate evidence and provides:

“In order to corroborate the testimony of a witness, any former statement by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved”.

In Okello Geoffrey Vs Uganda: Court of Appeal Criminal Appeal No. 032 of 2010, Munjuni Apollo Vs Uganda Criminal Appeal No. 26 of 1999 and in Francis Birungi Binaisa vs Uganda: Court of Appeal Criminal Appeal No. 171 of 2010, this Court observed as follows

“On sexual offences, the Court should normally look for corroboration of the evidence of the complainant but may convict on the evidence of the complainant alone after due warning. ”

In **Bukenya Joseph (supra)** the victim informed her mother and one Sozi that the appellant in that case had defiled her on the actual day she had been defiled. Both her mother and Sozi testified in Court. In that case the victim testified in Court. This Court held that the information supplied by the victim to the two witnesses on the day she was defiled was sufficient to corroborate her evidence in Court.

In this appeal as already stated above the victim did not testify and as such there was no evidence to be corroborated. The evidence of both PW2 and PW3 in respect of the appellant’s participation being circumstantial since it was their own interpretation of what the victim meant by pointing between her legs and mentioning the name ‘David’ did not irresistibly point at the appellant's participation. It did not satisfy the test required for founding a conviction solely on circumstantial evidence.

The Judge would have had to warn himself and the assessors of convicting on uncorroborated evidence in a sexual offence in which the only identifying witness the victim was a child of tender years.

In this case the Judge did not warn himself of that danger. Even if the victim had testified, he would have had to warn himself at least on three issues before conviction. Evidence of a child of tender years, uncorroborated evidence of a single identifying witness and uncorroborated evidence in a sexual offence. In this case he did not warn himself even once.

We find that there was no sufficient evidence to link the appellant to participation in the commission of the offence.

We find that the learned trial Judge erred when he convicted the appellant in the absence of sufficient evidence linking him to the crime.

This appeal is accordingly allowed. The conviction is hereby quashed and the sentence set aside. The appellant is hereby set free unless he is being held on other charges.

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Dated at Mbarara this 26th day of October 2016.

HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL

HON. JUSTICE BYABAKAMA MUGENYI SIMON

JUSTICE OF APPEAL

HON. JUSTICE ALFONSE C. OWINY DOLLO

JUSTICE OF APPEAL