THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[CORAM: Kakuru, Egonda-Ntende & Obura, JJA]

Criminal Appeal No.78 of 2014

(Arising from High Court Criminal Session Case No. HCT-02-CO-SC-087 of 2013 at Gulu)

Between

OKELLO SIMON PETER==========Appellant

And

Uganda==========Respondent

(*On Appeal from the Judgment of the High Court of Uganda [John Eudes Keitirima, J.,] sitting at Gulu and delivered on the 7th March 2014*)

JUGDEMENT OF THE COURT

Introduction

1. The appellant was indicted and convicted of the offence of aggravated defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act. The particulars of the offence were that the appellant had on the 28th day of January 2010 at Obiya East, Lacor in Gulu District, being a person infected with the Human Immuno Deficiency Virus (HIV), performed sexual act with Lanyero Winnie, a girl below the age of 14 years. The appellant was sentenced to 35 years imprisonment. He now appeals to this Court against both conviction and sentence.

2. The appellant set forth 3 grounds of appeal which we reproduce below.

> '(1) The learned trial judge erred in law and fact when he found that the appellant had defiled the victim without ample evidence in proof of that ingredient.
>
> (2) The learned trial judge erred in law and fact when he sentenced the convict without subtracting the period the convict had spent on remand prior to the trial.

(3) The learned trial judge erred in law and facts when he sentenced the convict to 35 years imprisonment which sentence [was] harsh and excessive in the circumstances.'

3. The respondent opposed the appeal.

Submissions of Counsel

4. Mr Levi Etum appeared for the appellant and Mr Patrick Omia, Senior State Attorney appeared for the respondent. Mr Etum submitted in relation to ground 1 that the learned trial judge erred in law and fact when he found that the appellant had defiled the victim without ample evidence of proof of that ingredient. The only evidence pointing to the participation of the appellant in this offence was the testimony of the victim whose evidence was received without the record of *voire dire* having been conducted. It was essential under section 40 (3) of the Trial on Indictments Act for the trial judge to conduct a *voire dire*. The victim was only 6 years old at the time of the commission of the offence and 11 years old when she testified.

5. The evidence of the other witnesses for the prosecution shows that the victim was not able to tell them the identity of the person who had sexual intercourse with her. She only led them to a house. Neither, PW3, the mother of the victim, nor PW1, the LC1 Chairman, to whom the report was made testified that they were told the identity of the person who had had sexual intercourse with the victim. So the first report did not point to the appellant as the perpetrator of the crime. The victim did not know the person who had had sexual intercourse with her. There was no independent evidence upon which the trial court could have concluded that it was the appellant who had committed the offence in question.

6. Mr Etum further submitted in relation to ground 2 that the learned trial judge in sentencing the appellant had failed to comply with article 23 (8) of the Constitution which rendered the sentence a nullity. He referred us to the case of Rwabugande Moses v Uganda SC Criminal Appeal No. 25 of 2014 (unreported) in support of this ground. The learned trial judge failed to subtract the 4 years and 1 month that the appellant had spent on remand from the sentence imposed on the appellant.

7. Lastly in relation to ground 3, in the alternative, Mr Etum submitted that the sentence of 35 years imprisonment was harsh and manifestly excessive in the circumstances of this case. He referred to the case of Kabwiso Isa v Uganda, SC Criminal Appeal No. 7 of 2002 where the

Supreme Court set aside a sentence of 15 years and substituted it with 10 years' imprisonment.

8. Mr Patrick Omia for the respondent submitted that much as the record did not contain proceedings conducted in relation to a *voire dire* the learned judge had carried out the *voire dire* and decided to receive the evidence of the victim on oath. The testimony of the victim was therefore properly received and could be acted upon by the trial judge.

Duty of a First Appellate Court

9. It is the duty of a first appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account of course that the appellate court did not have the opportunity to hear and see the witnesses testify. See Rule 30(1) of the Court of Appeal Rules; Pandya vs R [1957] EA 336; Ruwala vs. Re [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC). We shall do so accordingly.

Analysis

10. The main evidence against the appellant was the testimony of PW2, the victim. At the time the offence was committed she was 6 years old and was 11 years old when she testified in the trial court below. She was definitely a child of tender years. See Tomasi Omukono v Uganda [1978] HCB 171 where the Court of Appeal of Uganda held in part,

> 'The expression "child of tender years" in the absence of special circumstances means any child of average or apparent age of 14 years and whether or not a child is of tender years is a matter of good sense of the court where there is no statutory definition of the phrase. Thus, whereas the age of 14 years may be taken as a guideline and a child of tender years must be under that age, not every child under that age is of tender years as the whole matter is left to the good sense of the court.'

11. The reception of the evidence of PW2 or its admissibility is objected to by the appellant on account of the absence of any record that shows that a *voire dire* was conducted prior to the decision of the court to receive that testimony on oath. On the 21 January 2014 the record of the court reads as follows:

'Accused in court.

Mr. Obale Innocent for the State.

Ms Oroma Judith for accused.

Mr. Ochan Interpreter.

Mr Obale:- I have witnesses in Court.

Examination in Chief:- PW2 takes Oath and states:-
(After voire dire proceedings).

Court:- Witness appreciates the importance of taking an oath.
[Thereafter the testimony of the witness is recorded.]'

12. There is no record of proceedings in relation to the *voire dire* that was stated to have been carried out. A *voire dire* is the preliminary examination of a witness, in this case a child of tender years to determine if such child appreciates the meaning of an oath to allow court to determine whether that witness may testify on oath or not on oath. A record is ordinarily made of such examination for the simple reason that on appeal the first appellate court is required to re appraise the evidence in the court below and reach its own conclusions with regard to the facts of the case. The only way to determine whether the court below had carried out a *voire dire* and that the conclusion that the witness appreciated the meaning of an oath was correctly made can only be re appraised if the record of such preliminary examination is present.

13. In his address to us Mr Etum suggested that the note of the court 'after *voire dire* was taken' was an afterthought after the witness had actually been sworn. Much as it is possible that a *voire dire* was carried out it is evident that there is no record of proceedings of such examination. It appears that the witness was sworn first from the chronology of the record and then the court made a finding that the child understood the meaning of an oath. This would be a reversal of the process. The court had first to carry out a preliminary examination of the child and make a finding whether the child understood the meaning of an oath. The child witness would then be sworn if the determination was that he or she understood the meaning of an oath.

14. And if the child did not understand the meaning of an oath the court would then have to determine if the child understood the duty of telling the truth. If this was in the affirmative the child could then testify, not on

oath but such evidence would require corroboration if it was the basis upon which a conviction was founded. If the child did not understand the duty of telling the truth the evidence of such child would not be received in court.

15. Section 40 (3) of the Trial on Indictments Act states,

> '(3) Where in any proceedings any child of tender 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.'

16. Clearly it was an error by the learned trial judge to swear the child witness before conducting a *voire dire* and before making a finding that the child understood the meaning of an oath. On the face of the record there are no proceedings showing that the *voire dire* was carried out. We cannot therefore dismiss the appellant's claims that no *voire dire* was carried out. Given the fact that carrying out a *voire dire* has significant consequences to the production of evidence and the rights of the accused person in relation to a fair trial the failure of the court to carry out a *voire dire* may result in a miscarriage of justice. It has the potential of causing reception of evidence which ought not to be received by court. In light of the foregoing we do not think that this is the kind of error that can be saved by section 139 of the Trial Indictments Act.

17. Section 139 states,

> ' 139. Reversability or alteration of finding, sentence or order by reason of error, etc.
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> (1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.

(2) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.'

18. In the case of Sabani Luhari v Uganda, MB44/70, the appellant was convicted of theft on the evidence of a boy aged 12. The Magistrate had been satisfied before the boy was sworn that he understood the nature of an oath and made the following note. "I am satisfied that he understands the nature of the oath and has possessed sufficient intelligence to understand the truth and falsehood." The High Court on appeal held:

> 'While it was quite clear that the magistrate had the provisions of s.149 of the CPC in mind, there was no indication of what investigations, if any, he made before coming to that conclusion and swearing the witness. It was essential that the *voire dire* be recorded. It was not sufficient for the magistrate to have stated that he was satisfied that the child understood the nature of an oath. The facts upon which that conclusion was based ought to be apparent on the record; in other words, the answers given by the child ought to be recorded. The reason for this was obvious.
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> In the case of an appeal, the appellate court, in the absence of details of the investigation, would not be in a position to say whether the decision of a trial magistrate that a child of tender years be allowed to give evidence on oath was correct. The absence from the record of the investigation as to whether or not the witness should give evidence on oath was an irregularity. In these circumstances, the court must regard the boy's testimony as unsworn.'

19. We shall treat the testimony of PW2 as unsworn testimony in light of the errors made by the trial judge aforesaid. This means that such evidence requires corroboration in terms of section 40 (3) of the Trial on Indictment Act. There must be independent evidence implicating the appellant in the commission of the offence.

20. Apart from the evidence of PW2 there were only 2 other witnesses that testified in this matter. This was PW1, the local council chairman, who participated in the arrest of the appellant on the information supplied by PW2 and PW3, the mother of the appellant, who reported the offence. In her report to PW3, PW2 did not identify the person who had had sexual intercourse with her but only said she knew the house where he lived and

she had spent the night. There is no independent evidence that implicates the appellant in the commission of this offence.

21. When the appellant was arrested they removed a bed sheet from his bed that had what appeared to be blood on it. This bed sheet was never submitted for examination to determine that the blood on it was the blood of the victim or of some other person. Had this been done, and the DNA examination revealed that this blood was that of PW2, this may well have amounted to sufficient independent evidence to corroborate her testimony.

22. In the result we allow ground no.1 of the appeal. We quash the conviction and acquit him of the offence he was indicted of. We set aside the sentence imposed on him. We direct the immediate release of the appellant from custody unless he is held on some other lawful charge.

Dated, signed and delivered at Gulu this 7th day of November 2017

Kenneth Kakuru
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal