

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA DISTRICT REGISTRY

HIGH COURT CRIMINAL APPEAL NO. 2 OF 1998

(Arising from Original Case No. MMA 509 of 1996)

KAYITA EMMANUEL

APPELLANT

VERSUS

UGANDA

RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGEMENT

1. The appellant was charged with and convicted of the offence of indecently assaulting a female contrary to section 122 (1) of the Penal Code Act, in the magistrates' court at Masaka. He was sentenced to three years imprisonment on the 2nd October 1998. He appeals both against the conviction and sentence.
2. In the lower court the prosecution called five witnesses beginning with the complainant or the victim, an eight-year-old infant called Ruth Sanyu Nantale. She testified that at the material time she was staying at the accused's home. She had been previously taken to that home as a baby sister by her father/Uncle. The accused was married but his wife had during the material period gone to Kalangala for studies. One other person called Namazzi was staying with them and they shared the store with the witness as their living quarters.
3. Firstly the accused approached the witness after she had just finished grinding "mukene" (sliver fish). The accused called her to the house. She found that she had laid a towel on the floor. He told her to lie on her back. Sanyu complied. He told her to remove her knickers, which she did. He played sex with her. She felt a little pain. Namazzi at this time was in the garden. The accused requested Sanyu not to say anything about what occurred and that the accused would buy her a dress. The accused bought the dress and it was available at home.
4. Sanyu went on to testify that the accused would at night send Namazzi for fuel and would then call Sanyu and have sex with her. This occurred many times. Namazzi mixed water and salt and told her to wash her private parts. This went on for about a month. She felt a lot of pain as she applied this solution to her private parts. She later fell sick.
5. Pw2 was Nantale Gladys, an aunt to Sanyu the victim. She was a parishioner in the church in which the accused was a pastor. Some time in August 1996 one Namazzi, sister of the accused informed her, that Sanyu was sick. Sanyu did not walk properly and smelled. Namazzi informed her that she was boiling water to bathe her. Pw2 examined Sanyu and

found that there was pus and blood in her vagina. There was a swelling too. Namazzi indicated that Sanyu had been like this for the last ten days.

6. Pw2 asked Sanyu what had happened to her but the child only cried, saying that if she told them they would beat her. She initially declined to talk. Namazzi got hold of a stick and hit her. Sanyu then responded and said it was the pastor doing that to her. Pw2 was shocked and could not believe that the pastor would do that. Pw2 hit Sanyu some more and Sanyu continued to insist that it was the pastor Kayiita doing it. Pw2 asked Namazzi to inform the accused. Two days later the accused called Pw2 and asked her about the story she is alleged to have told one Katuramu that the accused had raped Sanyu. She replied that Namazzi and the witness had examined the child and found her with pus and blood in her private parts. The accused told her to take the child away. She declined, as she was not the one who had taken this child to the accused's home.
7. Pw3 was Scovia Nantongo, a neighbour to the accused on Kasamba village. She testified that one evening in the month of August 1996 She went with Nanjogo to the well and they found Sanyu with her brother Kirumuttu fighting over sweets. Kirumuttu was about eleven years old and he was living with his aunt, Pw2. The witness became concerned and asked Sanyu where she had got the sweets. Kirumuttu made a comment that made the witness suspicious. Pw3 and Nanjogo decided to interrogate Sanyu. Sanyu told them that it was the accused that gave her sweets and that she was playing sex with him. She was shocked by this information and decided not to tell anyone. Later she told Sanyu's Aunt what she had heard. In cross-examination she stated that she was aware of a complaint the accused had made against her husband. She further testified that she respected the accused as a pastor and Muluka Chief.
8. Pw4 was Benaletta Nanjogo, a neighbour to the accused person and member in the church where the accused was a pastor. She retracted her police statement and claimed she told the police lies implicating the accused. The police applied that she be declared a hostile witness but the court made no formal ruling on the matter.
9. Pw5 was Falasiko Kirumuttu who testified not on oath. Kirumuttu was eleven years old. Sanyu was his sister. He recalled that sometime in August 1996 he met with Sanyu at the well. Sanyu had biscuits. He asked her where she got the biscuits. Sanyu replied that she got the biscuits and sweets from her husband, the accused, Pastor Kayita. Kirumuttu knew Pastor Kayita. Kirumuttu further testified that Sanyu told her that the accused takes her on the bed of one Mwesiga. The accused made her lie down facing upwards and he did "stupid things" to her. He was the one in the dock. And that was the close of the case for the prosecution.
10. Dw1 was the accused. He testified on oath. He said that his wife told him that she had heard allegations that she defiled Sanyu who was staying with them. And that the matter was being handled by the Chairman Local Council 111. Dw1 kept quiet and waited for the outcome of investigations. He traveled to Kenya and returned. Unknown people started throwing stones at his house and he reported the matter to the police. The police warned the residents to leave him in peace. That night he slept at the police where he was eventually detained and later charged with the current charges. In cross-examination, Dw1 testified that Nantale had a grudge with him because he had always advised her against her bad behaviour. Since this incident Nantale was no longer a member of their church. And that was the close of the case for the defence.
11. The learned trial Magistrate in his judgement stated that when dealing with evidence of young children corroboration was desirable. He then went on to say, "A further reading of the decided cases on the matter reveal itself of the requirement of corroboration it can still

- convict on the uncorroborated evidence of a child if that evidence appears truthful." However he went on to hold that the testimony of Pw1 in this case had been corroborated by the testimony of Pw2 and Pw3 and the statement of Pw4 to the police admitted as Exhibit P 1.
12. Corroboration of the evidence of an infant in the present case is governed by Section 99 (3) of the Magistrates Courts Act. It provides, " 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 evidence may be received, though not given on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: Provided that 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 such evidence is corroborated by some other material evidence in support thereof implicating him."
 13. The learned trial Magistrate did not refer to this section or name the decided cases which override, as it were, this section requiring corroboration in respect of testimony not on oath of young children. As far as I am aware this statutory provision still represents the law on this aspect of the evidence of young children.
 14. In determining that the evidence of Pw2, Pw3 and Exhibit P1 provided corroboration of the testimony of Pw1, the learned trial magistrate did not point to the particular pieces of evidence that provided corroboration of the testimony of Pw1. It is important to note that what is required under section 99 (3) of the Magistrates Courts Act is not just corroboration of the infant's testimony, but corroboration by some material evidence, implicating the accused. For instance evidence that corroborates the fact that an indecent act occurred does not necessarily corroborate the fact that the indecent act was committed by the accused. It is the latter rather the former that is required under the proviso to section 99 (3) of the Magistrates Courts Act.
 15. I have examined the testimony of Pw2 and Pw3. I note that the portion of their testimony that mentions the accused as the person who had had sexual intercourse with Sanyu are accounts told to the witnesses by Sanyu. To that extent those portions of the testimony are hearsay. They may qualify as reports from Sanyu that show that Sanyu was consistent in her assertions that it was the accused that assaulted her. In my respectful view, no portion of the testimony of Pw2 and Pw3 amounted to other independent evidence sufficient to corroborate the testimony of Pw1 with regard to the fact that it is the accused that committed the indecent acts of assault.
 16. Turning to the question of the statement of Pw4 admitted as Prosecution Exhibit P1, this tied up with the worth of the testimony of Pw4. The prosecution applied for Pw4 to be treated as a hostile witness since it was evident she was changing the story she had told the police. She admitted this in her testimony. Unfortunately the trial court did not make any ruling on this matter. It was the duty of the trial court to make a ruling on this matter at that stage. I am satisfied upon an examination of her testimony that Pw4 did turned hostile to the prosecution case and ought to have been declared so by the trial court, on account of her own admission that her testimony was in conflict with the statement she made to the police. I accordingly declare her a hostile witness. With the result that her testimony and also Exhibit P1 is worthless and of no effect in these proceedings. It can not therefore provide corroboration to the testimony of Pw1 implicating the accused.
 17. I agree with the Learned Counsel for the appellant that Exhibit P1 had also not been proved in the ordinary way as a statement made by Pw4. Nevertheless as Pw4 in her testimony

accepted that her evidence was in conflict with the story she told the police, that was sufficient for a finding that she had changed her story and was therefore a hostile witness.

18. The appellant relied on five grounds of appeal in support of his appeal. The first ground of appeal was to effect that the learned trial magistrate erred in law and fact in that he came to the conclusion that the prosecution had proved its case beyond reasonable doubt whereas there were two conflicting versions of the prosecution case. Mr. Kamugunda, learned counsel for the appellant argued that Pw4 provided the second version of the prosecution case. As I have already found Pw4 to be a hostile witness, her testimony is worthless both for the prosecution and the defence. It can not be relied on these proceedings. In the result I do not see a second version of the prosecution case. Accordingly this ground fails.
19. The second ground of appeal was to the effect that the learned trial magistrate erred in law and in fact in that he believed the prosecution evidence which was so contradictory in material particulars especially regarding the act of indecent assault. Mr. Kamugunda argued that the evidence on record does not show indecent assault but rather defilement. But that the date of the alleged defilement was unknown. Looking at the prosecution evidence for myself as a first appellate court, I do not find it contradictory in the least. The main evidence is that of Pw1. She was not shaken in cross-examination. The testimony of Pw2 and Pw3 show that she was consistent in her claim that it was the accused who indecently assaulted her by having sexual intercourse with her. Ground two fails accordingly.
20. Ground three of the appeal was to the effect that the learned trial magistrate erred in law and fact in that he ignored the evidence of Pw4 Benaleta Nanjogo that the complainant was defiled by one Kasekende and one Kirumuttu and not by the appellant. As the Pw4 ought to have been declared a hostile witness, which I have done, it would not have been proper for the trial court to have regard to her testimony in this case. This ground therefore also fails.
21. Ground four was to effect that the trial magistrate erred in law and fact in that he based a conviction on evidence that was full of procedural irregularities. Mr. Kamugunda argued that the trial magistrate erred in law in letting Pw1 and Pw5, infants who testified not oath, be cross examined by the accused and that this ought to upset the findings of guilt against the accused. I am not sure if this was an irregularity. Mr. Kamugunda did not provide any authority for asserting so. Neither did he show any prejudice that the accused suffered as a result. I am unable to find any substance in this ground. It fails.
22. The last ground of appeal was on severity of sentence. The sentence was attacked for being harsh and excessive in the circumstances. I will return to this ground after determining whether this conviction ought to stand in light of the fact that I have already held above that the corroboration was essential and that the evidence upon which the trial court relied on to provide corroboration could not in law amount to corroboration.
23. I agree with the learned trial magistrate that on examination of the testimony of the complainant I found that the evidence is credible and truthful. I believe that she was indecently assaulted by the accused based on her own testimony. She was cross-examined. Her testimony was not shaken. Independent witnesses who examined her like Pw2 and Pw3 found that her private parts had pus and blood and some bruises a condition that was consistent with a sexual assault. She stated that it was the accused who had played sex with her. The accused had done so many times. She explained why she had not told anybody about. The accused promised her a dress. And the accused provided the dress.
24. In order for a conviction to occur there must be independent evidence corroborating the testimony of Pw1, that it is the accused who committed the offence in question. I find that in

the evidence for the prosecution there is no such independent evidence providing corroboration as required at law. I am however not restricted at looking at only the evidence for the prosecution. I am entitled to look at the whole evidence on record, including the evidence for defence.

25. Examining the evidence for the defence, that is the testimony of Dw1, it is worth noting that this was on oath. The accused does not answer the prosecution's story in anyway, save to suggest, in cross-examination, that Pw2 may have had a grudge against him. The accused in his testimony does not assert that the allegations of Pw1 are false in anyway. He makes no reference to them. He does not provide a contrary version of events. I will set out below his testimony in full.
26. " It was on 30.8. 96 I left Kalangala District HQ where we had a meeting and went home. On reaching home, I found my wife who told me that a one Sanyu who was staying at my place had been defiled by me. My wife is called Gorette Nantaba. She further told me that the matters were with the Chairman L/C 111 a one Musoke. I kept quiet and waited for the outcome of the allegations. When nothing happened, I went to the L/C Chairman and asked him about the rumours. The Chairman took me to the R D.C. who told me that the matters were at the Police. He told me to play it cool."
27. "However I had a programme of going to Kenya. I went to Kenya and returned and found that nothing had transpired. It was late, that allegation started coming in that I defiled a child and then went to Kenya. From there, people started throwing stones on my house every night. I reported to Mulabana Police Post for help. Police came and warned the residents to leave [me]in peace. However, that night I slept at the Police Post."
28. "It was the following morning what the Assistant D.I.S.O. Kalangala came and alleged that the police wanted to aid my escape to Kenya. The District Internal Security Officer removed me from the Police post and took me to Kalangala Police station where I was detained and eventually charged. That is all."
29. In cross examination the accused testified, "I have a grudge with Nantale which arose from the fact that as a Pastor I had always advised her of loving men when she is a member of my church. However before these incidents, she had been a good church member. This Nantale (complainant) has always been homeless in Masaka. Somebody had left her to take care of his kibanja but because of her bad behaviour, she was sent away. She followed me to Kalangala as she was a member at our church Headquarters, Masaka. At Kalangala she first stayed with me until when the church got a place of plot for her where she now resides. Nantale ceased to be a member of our church when she made the allegations against me. That is all."
30. If an accused chooses to testify his testimony must be considered together with the evidence for the prosecution. It is odd in my view that the accused does not answer in anyway the testimony of the Pw1. He could have chosen to keep quiet and this would not have been taken against him. The accused of course denied this offence when he was arraigned before the trial court. Would his omission to tell his side of the story, with regard to the acts complained of, that constitute the elements of the offence, he is meeting, amount to corroboration? May be, especially where counsel at the trial represented such an accused. I am, however, not sure whether the same should hold, where an accused is not represented by counsel, as this case was in the court below. It may be that such accused may believe his plea of not guilty was sufficient answer.

31. In the result I would find, on a re examination of the evidence in this case, that there is no independent evidence to corroborate the testimony of the infant with regard to the charge that it was the accused who committed the acts of indecency as charged. I accordingly set aside the conviction and sentence made by the court below. I acquit the accused of the charge of indecently assaulting a female contrary to section 122 (1) of the Penal Code Act. He is forthwith set at liberty.

FMS Egonda-Ntende
Judge
27/07/99