IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO - DCJ, PLATT, J.S.C, TSLKOOKO, J.S.C.)

CRIMINAL APPEAL NO. 18/93

BETWEEN

CHRISTOPHER KIZITO==========APPELLANT

AND

UGANDA==========RESPONDENT

(Appeal is against Conviction and Sentence before Hon. Justice Ouma at Kampala on 23-9-93, in H.C.* Cr. *Ss. No. 183/93

JUDGMENT OF THE COURT:

The appellant was convicted of defilement of a girl under 18 years of age, contrary to Section 123(1) of the Penal Code and was sentenced to 12 years imprisonment. He has appealed against both the conviction and sentence.

The facts as found by the trial Judge were that on the day of incident the seven year old complainant paid a visit to her little girl-friend Mega at her parents' home. Mega was a sister of the appellant. She found Mega and the appellant at home. While there the appellant called the complainant into his parents bed-room where he defiled her. That was at about 5.00 p.m. The fact of defilement was established by Nurse Ruth Nyanzi (PW4) and Dr. Balungi (PW5). They examined the complainant at different times but within a space of five days from the day of incident.

Both found that the complainant's hymen had been ruptured recently. PW4 who was the first to examine her saw bruises in the vagina.

The appellant denied the allegation against him and pleaded alibi, namely, that on the material day he went to work and did not return home until at about 5.30 p.m. He then ate some food after which he took a certain sick child to a Medical Clinic. He returned home at

about 6.30 p.m. He did not see the complainant on that day. He was arrested at 8.00 p.m. by Kabuye (PW2), Sepuya (PW3) and other persons in connection with the offence.

He called his mother Margret Nampala (DW2) to support his alibi. According to her, the complainant had planted the case on the appellant due to family grudges. The trial Judge rejected the defence version while accepting that of the complainant as she knew the appellant very well before the day of incident which took place in broad day light. He found that the evidence of the complainant was corroborated by her distressed condition as seen by PW2. Here he relied on ***Kibazo v. Uganda 1965*** E.A. 509 at 510 where the former Court of Appeal for East Africa stated as follows:-

> ***"We accept the learned trial Judge's finding on the authorities of R. v. Zielinski (1950), 34 Cr. App. R. 193 and Alan Redpath 46 Cr. App. R. 319 that in sexual offences the distressed condition of the complainant is capable of amounting to corroboration of the complainant's evidence, but we think that this would depend upon the circumstances and the evidence."***

It may be that the above authority which still binds the Courts of this Country, should one day be reviewed by this Court because the distressed condition does not amount to corroboration, but merely shows consistence on the part of the complainant. With regard to the crucial question whether it was the appellant who had in fact defiled the complainant, the trial Judge found as a fact that there was no evidence to corroborate that of the complainant, but that that was understandable in view of the private nature of sexual acts. In his view, if Courts were to insist on corroborative evidence of an eye - witness, then few cases of this nature would succeed. He went on:

> ***"It is therefore not surprising that Chila and another v. Republic (1967) E.A. 722 decided in the manner it was decided provided that the assessors are warned and the Judge warns himself of the danger of acting on uncorroborated evidence of the complainant to convict the accused, in a case of this nature in which the evidence of the complainant was not corroborated."***

Now in **Chila** (supra) the direction was not given and on appeal the Court of Appeal was not satisfied that had the direction been, given the appellant would have been convicted. The appeal was allowed. The trial Judge took the position that the real question was whether the complainant had properly identified the accused or not. In this case she had and that was enough to sustain the conviction.

The appellant's complaint in this appeal is that as the complainant's evidence which was not given on oath as the complainant was found (in a voire dire) to be incapable of understanding the nature and meaning of an oath, that evidence required corroboration. There is merit in the complaint. As was pointed out by the Court of Appeal (Law, J.A.) in:
Chila (supra), the law in Uganda in particular and in East Africa in general is that the trial Judge should warn the assessors and himself of the danger of acting on the uncorroborated evidence of the complainant, but having done so he may convict in absence of corroboration if he is satisfied that her evidence is truthful. If such warning is not given then the conviction will not be upheld on appeal. This is a correct statement of the law as derived from England. This Court is therefore bound to follow the law as stated in:
Chila (supra), and ***Lenton s/o Mkirila v. Republic*** (1963) E.A. 9.

However, **Chila** and **Lenton** (supra) dealt with sexual offences generally and not a case concerning unsworn evidence of a child complainant as was the case here. This situation is governed by section 3 8(3) of the Trial on Indictments Decree which was not considered by the trial Judge.

It states as follows:-

> **"38.** ***(1)*** **…….**
>
> ***(2)*** **……..**

(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 evidence may be received, though not given upon oath, if in the opinion 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.

Clearly had the trial Judge considered the above provision, he would not have relied on **Chila**. Since the complainant had not given sworn evidence her evidence, alone could not establish the fact that it was the appellant who had committed the offence against her, however truthful she might have been. It may be that S. 38(3) above should be reviewed by the legislature as it imposes too high a burden on the prosecution and so makes convictions impossible in the face of an offence which is now rampant. We think that where the evidence of the complainant is strong, then it should be accepted as sufficient although it was not given on oath.

In the instant case the appellant put himself at the scene of crime at the material time in his unsworn statement of defence. To that extent he corroborated the evidence of the complainant, which then justified the conviction. It is for this reason and not the reason advanced by the trial Judge that we uphold the conviction.

The ground of appeal against sentence must succeed. The appellant was 16 years old when he committed the offence and barely 18 years old when he was sentenced. He was a first offender and had been on remand for about 2 years. The trial Judge took into account some extraneous matters when considering sentence for example, that it was “anti African Culture” and “vulgar” for the appellant to defile the complainant in his parents’ bedroom. We think that the sentence of 12 years imprisonment was in the circumstances manifestly excessive. We set it aside and substitute a sentence of 8 years imprisonment. The appeal is avowed to

that extent.

DATED at Mengo this 28th day of June 1995

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

H.G. PLATT
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL,

W. MASALU MUSENE,
REGISTRAR, SUPREME COURT.