THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TSEKOOKO, KATUREEBE, KITUMBA, TUMWESIGYE, KISAKYE, JJ.S.C.)

CRIMINAL APPEAL NO.19 OF 2006

BETWEEN

LIVINGSTONE SEWANYANA ::::::::::::::::::::::::::::APPELLANT

AND

UGANDA :: RESPONDENT

[An Appeal from the judgment of the Court of Appeal at Kampala. (Before Mukasa-Kikonyogo DCJ, Okello and Byamugisha JJA) Criminal Appeal No.31 of 2005 dated 19th April 2006]

Criminal law – Defilement C/S 129(1) of the penal Code Act and Incest C/S 149(1) OF THE Penal Code – Motive in offences of defilement and incest.

Criminal procedure – witnesses – number of witnesses required in law to prove a criminal offence – lapse in time to institute a criminal matter – whether lapse of time relevant – sentencing – section 5 (3) of the Judicature Act – appeal to the supreme court against excessive sentence – appeal against severity and not legality of sentence – whether appeal sustainable.

Evidence – Demeanor – procedure for assessment of demeanor of witnesses – corroboration – failure by the trial judge to warn self on dangers of convicting on uncorroborated evidence in sexual offences – whether no miscarriage of justice occasioned by uncorroborated evidence.

JUDGMENT OF THE COURT

This is an appeal against the judgment of the Court of Appeal dismissing the appeal of the appellant from his conviction by the High Court on count 1, for defilement, contrary to section 129(1) of the Penal Code Act and on Count 2, for incest, contrary to section 149 (1) of the Penal Code Act.

The following is the prosecution case as accepted by the High Court and the Court of Appeal. The victim, Mordreen Mbekeka, PW1, is the biological daughter of Livingstone Sewanyana, the appellant and one Mpagi Yunia who got married to another man before the victim was born. The victim was born on 28th January 1980. PW1 lived with her grandmother until she was aged seven years. Then she went to live with the appellant at Ndejje Namasuba.

There were three half brothers of her age group with whom she lived. There were also two other girls of her age who were workers of the appellant. They all lived in the same home. All the children slept in one of the houses in the homestead. The appellant and his wife slept in another house.

The victim's problem started in 1993, when the appellant one night tiptoed into the room where the victim and the other children were sleeping and accused the three girls, of flirting with boys. On that ground, he removed the victim, took her to his bedroom, where he first beat her up and later forced her into sexual intercourse with him. The stepmother was not at home that night. The appellant told the victim that sexual intercourse was what she was looking for from boys. The victim took the sexual intercourse that the appellant had with her as part of the punishment for their alleged crime. But she was wrong. That was the beginning of many more sexual relations with her father. When the two girls who were workers went away, it became a routine practice for the appellant to have sex with the victim. The victim used to inform her elder brother one Kalibala, who was four years older. In 1994, the victim was in P.7 when she started her menstrual cycle. Because of the routine sexual intercourse with the appellant, the victim became pregnant. The appellant took her to Nsambya Hospital and had the pregnancy removed. The victim continued with her schooling, but the appellant also continued with his incestuous sexual assaults on her. She used to tell her pupil friends, Maria and Sera in confidence what was going on between her and her father. She had to tell them in confidence because the appellant had threatened her with death if she ever let any one know about it.

The two girls however, without the victim's knowledge, told the senior teacher called Ireta Mary Rose, PW3, about the victim's problem with her father. The teacher called the victim who pleaded with her never to tell the appellant about it. She feared that the appellant would carry out his threat to kill her. The teacher, however, talked to the appellant and advised that he should allow the victim to live with her biological mother for the sake of her academic performance. The appellant refused

that advice and continued with his incestuous activity with the victim. He had the victim pregnant again in 1998 and 2000, but on each occasion, arranged for her abortion.

When the victim one day came home with a friend called Simon, the appellant became so furious that he beat up the victim in front of her friend. The victim who was now old, demanded to be allowed to leave the appellant's home to go and live with her biological mother. The appellant refused. However, in a bid to settle the dispute between him and the victim, the appellant went with her to pastor Fred Watente (PW4). They talked to the pastor. The following day, the victim returned to the pastor alone and without the appellant's knowledge. She shared with the pastor all her experiences. The pastor advised her to report the matter to Police. This was done and the appellant was arrested and indicted for the offences of defilement and incest.

In his defence the appellant denied the offences and stated that he was framed up by the victim for two reasons.

1. *She did not want him to press charges against Simon Kizito and James Lwanga who were her boyfriends and*
2. *She wanted to revenge the misunderstanding between him and her mother.*

Katutsi, J. heard the case. He rejected the appellant's defence and convicted him and sentenced him to 18 years imprisonment on count 1, 19 ½ years on count 2. Both sentences were to run concurrently.

The appellant appealed to the Court of Appeal on two grounds which were briefly, that the learned judge erred in fact and in law when he failed to properly evaluate the evidence before him and came to the wrong conclusion that the appellant committed the offences for which he was indicted.

Secondly, that the Learned Judge erred in fact and in law when he convicted the appellant on the uncorroborated evidence of PW1.

The learned Justices of the Court of Appeal found that the learned trial judge had properly evaluated the evidence. They held that the evidence of PW1 only required corroboration as a matter of practice but as her evidence was truthful, the learned judge was right to base the appellant's conviction upon it. The Court of Appeal dismissed the appellant's appeal against the convictions. The appellant was dissatisfied with the decision of the Court of Appeal and has filed his appeal to this Court on the following grounds.

1. ***The learned Appeal Judges erred in law when they failed to note corroboration as always necessary ingredient in all sexual offences.***
2. ***That their Lordships ignored the medical evidence which cast doubt on victim's status that her private parts were alright.***
3. ***That their Lordship ought to have given the benefit of doubt to the appellant because of the absence of crucial witness and evidence of bad motive and time lapse.***
4. ***That their Lordship confirmed the sentences that were manifestly excessive in view of the scanty evidence.***
5. ***That their Lordship did not pay any due regard of the period the appellant had spent on remand.***

During the hearing of the appeal learned counsel, Sam. K. Njuba appeared for the appellant and Vincent Tonny Okwanga learned Senior Principal State Attorney, represented the respondent.

Counsel for both parties were permitted by court to file written submissions. They argued the grounds of appeal according to the following order. Grounds 1 and 3 together, ground 2 separately and grounds 4 and 5 jointly. In this judgment we shall deal with ground 3 first followed by ground 1, then ground 2 and grounds 4 and 5 jointly.

Ground 3

The complaint by appellant's counsel in ground 3 is that the Court of Appeal should have given the benefit of doubt to the appellant because of the absence of crucial witnesses, the evidence of bad motive and the time lapse.

Grounds 3 in this court, is partly what was appellant's ground 1 in the Court of Appeal, namely failure by the learned Judge to properly evaluate the evidence. The point regarding demeanour of witness was never argued by appellant's counsel in the first appellate court but has been raised by counsel in this court

Appellant's counsel contended that the prosecution case was weakened by failure to call key witnesses such as PW1's biological mother, her elder step brother David Kalibala and her stepmother.

Counsel criticized the Justices of the Court of Appeal for endorsing the trial judge's comment on the demeanour of PW1 while testifying in the trial court whereas there was no recorded evidence on the behaviour or attitude of both PW1 and the appellant on which the learned trial judge based his conclusion about the innocence of PW1. He supported his submission with the Kenyan authority of ***Kiarie Vs Republic [1976 – 1985] E.A at p 215.***

Appellant's counsel further criticized the Justices of the Court of Appeal for failing to consider the lapse of time when PW1 was defiled by the appellant and the time when the matter was reported to the police. He argued that since PW1 did not report the appellant when she was 18 years of age that made her a willing participant in the offence of incest. Appellant's counsel further contended that the learned trial judge disagreed with the opinion of the assessors. However, he did not give reasons and the Court of Appeal upheld his judgment. In support of his submission he relied on the Kenyan case of ***Kinuthia Vs Republic [1986 – 1989] E.A. 282***

The learned Senior Principal State Attorney did not agree and fully supported the decision of the Court of Appeal. He submitted that the best judge about the demeanour of a witness is always the trial judge and that was the case in the instant appeal. He contended that the key witness was the complainant, PW1 and submitted that the circumstances of this particular case made it impossible to call other witnesses. According to him the case was professionally handled and in any case there is no number of witness required by law to prove a case.

The issue for determination in ground 3 is whether the Court of Appeal re-appraised the evidence.

This is a second appellate court and as such we are not required to re-evaluate the whole evidence unless we find that the first appellate court did not re-appraise the evidence and drew its own inferences of facts and properly considered the judgment from which the appeal arose. When this court finds that there was evidence to support the first appellate court's decision we may not disturb it. See ***Kifamunte Henry Vs Uganda Criminal Appeal No 10 of 1997. S.C.***

The learned Justices of the Court of Appeal like the trial judge found that the evidence of PW1 proved all the ingredients of the two offences with which the appellant was charged. The appellant knew very well that PW1 was his biological daughter and started defiling her since 1993 when she was under 18 years of age.

With respect, we do not agree with the contention by counsel for the appellant that the Court of Appeal erred in upholding the decision of the trial judge because of the latter's reliance on the demeanour of PW1.

With due respect to counsel, he has misquoted the holding in ***Klarie Vs Republic*** (supra). In that case the Kenyan Court of Appeal held that there must be in the judgment of the trial court material or recorded evidence on the behaviour or attitude of the witness concerned. In the appeal before court there was such material in the judgment of the trial judge. On the demeanour of PW1 the learned trial judge stated as follows in his judgment.

"Sentiments are a poor guide to justice. But I will say this without fear or favour. Looking at this girl in the witness box, all I could see was a pristine face of innocence. I subjected her demeanour in witness box to an intensive and anxious examination. I followed every movement of her eyes. I studied her body language with meticulous care and curiosity. I followed her body expression when faced with an embarrassing situation and revelation and I can say with full confidence that I could not detect any sign of sinister in this girl. In short, I can say with confidence that she was a truthful witness. This is a young girl of some remarkable beauty. Why should she put her name, beauty and future to a ruin. If she did not have a wrong to put right? She would have been much, nay, very much better off by keeping silence. Why did she open up? There must be a strong motive and I find that motive to be in the search for justice"

We have perused the record and observed that PW1 testified on 24/02/2005. The trial judge delivered his judgment on 22/3/2005. This is a period of less than a month. He must have had full impression of demeanour of PW1. The best course of action would have been to record impressions but in this particular case the judge was alive to the facts of the case and they were very fresh in his mind.

The law is that the trial judge must adopt the impression on the demenour of the witness by testing it against the evidence given by the witness in the case as a whole. The learned trial judge did that. ***Lugolobi Lwetute and another Vs Uganda, Criminal Appeal No 150 of 2002 C.A.***

In the premises we cannot fault the learned Justices of the Court of Appeal when they held that the trial judge is the best judge on the demeanour of the prosecution witness (PW1) in the following terms.

"The trial judge had the privilege to observe both PW1 and the appellant testify before him. He observed their demeanour. He was, therefore, better suited to assess the credibility of the two. As appellate judges, we do not have that privilege. In the instant case, there is nothing on the record to persuade us that the learned trial judge was wrong in his assessment of the credibility of PW1 and the appellant".

In the judgment of the trial Court the judge gave reasons why it took so long for the appellant's crimes to come to light. It is trite law that time does not run against the state in a criminal matter. The complaint by appellant's counsel about lapse of time is not tenable.

We are at a loss to understand what appellant's counsel means by lack of motive. There is no motive required in offences of defilement and incest.

Section 8(3) of the Penal Code provides:
"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or form an intention, is immaterial so far as regards criminal responsibility."

In his judgment the learned trial judge gave his reasons why he disagreed with the opinion of the assessors and the first appellate court correctly upheld his decision.

There are no clear reasons on the record why the stepmother and stepbrother of PW1 were not called as prosecution witness.
We are of the considered view that the prosecution did not fail in its duty to call material witnesses.

We agree with the submission by the Senior Principal State Attorney that PW1's step mother was not a compellable witness because she was the appellant's wife. Besides, she had assisted the appellant to abort the first pregnancy and was, therefore, an accomplice. We do not want to speculate but PW1's brother Kalibala could not have easily given evidence against the appellant who is his own father for fear of adverse repercussions. It is correct that there is no number of witness required by law to prove a criminal case. The evidence in the appeal before court was sufficient. Ground 3 is devoid of merit and fails.

Ground 1

We now consider ground 1 in which the appellant's counsel complained that there was no corroboration of PW1's evidence.

He submitted that the law is that the court had to warn itself and the assessors before convicting the appellant. He argued that it was wrong for the Court of Appeal to hold that although the judge did not warn himself of the danger of convicting the appellant on the uncorroborated evidence of PW1 that did not cause a miscarriage of justice to the appellant.

In reply, the Senior Principal State Attorney contended that corroboration of the complainant's evidence is not always necessary in sexual offences so long as the judge believes that her evidence is true.

According to him PW1's evidence was amply corroborated by her reports to her teacher Ireta, PW3, her Pastor Fred Watente, PW 4, and the reaction of the appellant when PW1 met her at the CID Headquarters. He submitted in the alternative that if there was no corroboration and the judge had not warned himself on the dangers of convicting the appellant on uncorroborated evidence there was no miscarriage of justice caused to the appellant.

We accept the submissions of the learned Senior Principal State Attorney that the reports which PW1 made to her teacher Ireta Mary Rose, PW3, and Fred Watente, PW4, corroborated her evidence that the appellant routinely had sexually abused her. We note that the appellant did not in cross-examination challenge the testimony of Ireta Mary Rose, PW3, that she called him at school. This was an omission or neglect to challenge such important evidence supporting the testimony of PW1. The courts below were entitled to find that the evidence was accepted by the appellant as being true. See ***Sawabiri and Another Vs Uganda Criminal Appeal No 5 of 1990 S.C.***

That not-withstanding we are of the considered view that even if such corroboration was not there, as the Court of Appeal held, it is the quality and not the quantity of evidence that matters and the learned trial judge was aware of that. The learned trial judge found that PW1 was a truthful witness and believed her. The Justices of the Court of Appeal relied on the authority of ***Kibale Ishma Vs Uganda*** Cr App No 21 of 1998 where this Court quoted with approval the case of ***Chila and another Vs Republic*** [1967] E.A. 722 where the law on sexual offences in East Africa was stated thus.

> ***"The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so, he may convict in the absence of corroboration if he is satisfied that the evidence is truthful. If no warning is***

given, then the conviction will normally be set aside, unless the appellate court is satisfied that there has been no failure of justice."

In ***Kibale Ishma Vs Uganda*** (Supra) the trial judge warned the assessors of the danger of acting on uncorroborated evidence of the complainant in sexual offences, but omitted to warn herself in her judgment. On that omission, the Supreme Court found that the omission to warn herself did not cause a miscarriage of justice.

We are of the considered view that failure by the learned judge to warn himself on the dangers of convicting the appellant on uncorroborated evidence did not cause a miscarriage of justice as the judge properly evaluated the evidence and applied the right principles. Ground 1 has no merit and fails.

Ground 2

We now consider ground 2. In this ground counsel criticized the Justices of Court of the Appeal that they ignored the medical evidence which cast doubt on the victim's status that her private parts were alright.

The arguments in this ground concern the evaluation of evidence. In short counsel argued that since the complainant's private parts did not have any injuries she was never defiled by the appellant and was a willing participant in the offence of incest.

We note that, this is essentially what was ground 3 which the appellant abandoned in the Court of Appeal. The submissions by appellant's counsel have already been dealt with by this court in ground 3. This disposes of this ground. Ground 2 has no merit and must, therefore, fail.

We turn to grounds 4 and 5 which is an appeal against sentence. Counsel contended that the sentences that were passed against the appellant were manifestly excessive. He submitted that the learned trial judge when passing sentence did not take into account the period which the appellant had spent on remand.

The Senior Principal State Attorney submitted that the sentences were legal, fair in the circumstances and commensurate with the gravity of the offences.

We note that the appellant did not appeal against sentence in the Court of Appeal. However, he has appealed against sentence in this Court.

Section 5(3) of the Judicature Act provides:

"In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of the sentence."

We are of the considered view that the appellant is not allowed to appeal against sentence to this Court as his complaint is that the sentences were excessive. This complaint is about severity of sentence and not legality of sentence. The two grounds must, therefore, fail.

In the result this appeal against convictions and sentences is dismissed.

Dated at Kampala this **9th** day of **December** 2010

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J.W.N.TSEKOOKO

JUSTICE OF THE SUPREME COURT.

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B.M. KATUREEBE,

JUSTICE OF THE SUPREME COURT

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C.N.B. KITUMBA,

JUSTICE OF THE SUPREME COURT

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J. TUMWESIGYE

JUSTICE OF THE SUPREME COURT

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E.M. KISAAKYE

JUSTICE OF THE SUPREME COURT