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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CRIMINAL APPEAL NO. 26 OF 2006

(Arising from Criminal Session case No. 0143 of 2005, High Court, Kampala)

Tujunirwe Conscious::APPELLANT

VERSUS

Uganda :: RESPONDENT

Coram: Hon. Mr. Justice Remmy Kasule, JA

Hon. Mr. Justice Eldad Mwangusya, JA

Hon. Lady Justice Professor Lilian E. Tibatemwa, JA

JUDGEMENT OF THE COURT

The appellant was tried and convicted on 22.06.06 by the High Court at Kampala (Rubby Aweri Opio, J.) of defilement contrary to section 129(1) of the Penal Code Act. He was sentenced to a term of imprisonment, the exact duration of which is a subject of further discussion in this Judgment.

The facts of the case as established in the trial Court were that on 15.07.2004 at Good Hope Nabulagala Primary School, Rubaga Division, Kampala District, the appellant, who was a teacher at that school teaching in primary 3, defiled one Babirye Nabunja Joan, aged 8 years who was a pupil at the said school.

The act of defilement was carried out in the "top class" room at the school premises. The victim had taken her books to the appellant for marking. The appellant instead laid the victim on the bench, removed his trousers first, then the knickers of the victim and then defiled her. After the act, the appellant smeared some semen on the umbilical cord of the victim, put on his trousers and the victim put on her knickers. On going away from the "top class" room the victim told some of her fellow pupils what had happened to her.

Later the matter was reported to Old Kampala Police Station and the Police commenced investigations.

The appellant, after the act of defilement, is said to have left the school and went to Rukungiri from where he was arrested on 27.07.2004. He was subsequently charged and committed for trial by the Chief Magistrate's Court, Nakawa holden at Mwanga II Road Court. The High Court trial started on 03.05.06 and was concluded on 22.06.06.

Dissatisfied with the conviction and sentence, the appellant lodged an appeal to this Court. The appeal is on two grounds:

1. The Honourable trial Justice made an error in law and in fact when he failed to properly evaluate pw5's evidence as corroborating appellant's defence of alibi.

2. The Honourable Trial Judge made an error in law and fact when he failed to evaluate the evidence properly in as much as the prosecution's failure to summon the Director of appellant's former school was concerned.

The appellant prays this Court, on the basis of the above two grounds, to allow the appeal and to set aside the conviction and sentence of the appellant and set him free forthwith.

At the hearing of the appeal, Counsel Yunusu Kasirivu appeared for the appellant on State Brief while Senior State Attorney Faith Turumanya represented the state.

Before dealing with the two (2) grounds of appeal, Appellant's Counsel submitted that according to the typed record of proceedings relating to sentence, the appellant had been sentenced to six (6) years imprisonment and as such he had to be out of prison since the said six (6) years had expired given the period from 22.06.06 when the sentence was imposed and 07.04.2014 when the appeal came up for hearing. Counsel thus prayed the Court to order the immediate release of the appellant.

Counsel for the state by way of reply left the matter raised by Appellant's Counsel to be resolved by the Court exercising its discretion.

We called for the original record of the Court proceedings handwritten by the trial Judge. We found that, with regard to the sentence passed upon the appellant, the typed record of proceedings was stating a different thing from that stated in the handwritten record. The typed record on page 11 paragraph 3 of the Judgment is to the effect that:

".....Therefore I am not going to impose the maximum sentence of death designated by law. However according to the general nature of his offence, the accused is sentenced to six years imprisonment. The

above sentence takes consideration of the fact that he has been on remand for the period stated, otherwise he would have been imprisoned for 18 years".

On the other hand, the handwritten record of proceedings on pages 21 and 22 states that:

".....Therefore I am not going to impose the maximum sentence of death, designated by law. However considering the general nature of this offence, the accused is sentenced to sixteen years imprisonment. The above sentence takes consideration of the fact that he has been on remand for the period stated, otherwise he would have been imprisoned for 18 years".

It is therefore obvious that the trial Judge sentenced the appellant to sixteen (16) years imprisonment and not six (6) years as submitted by his Counsel. The mistake was due to misstating the said term of imprisonment in the typed version of the Court proceedings. It is also the term of sixteen (16) years that is stated on the Committal Warrant that the Prisons authority has. It follows therefore that the appellant is still serving his sentence in a Government prison. This Court hereby corrects the said mistake pursuant to **section 11** of the **Judicature Act, Cap 13**, and **Rule 36 of the Rules of this Court**.

In respect of ground 1 of the appeal, appellant's Counsel submitted that the trial Court ought to have evaluated the evidence of pw3 Apostle Sheila Hephzibah, to the effect that after sometime she was not seeing the appellant at Good Hope Primary School. It was the contention of the appellant that this supported the alibi of the appellant that by the time the

alleged offence took place at the said school, he, the appellant was away from school. This was because, according to the Appellant, on 05.07.04, on being paid by the school shs. 60,000= instead of 80,000= as his normal salary, the appellant had become annoyed and decided to abandon teaching due to poor pay. He had thus decided to go back to his village in Rukungiri as he was doing nothing in Kampala. He remained in his village in Rukungiri until when he was arrested by Police on 27.07.04.

In respect of ground 2 appellant's Counsel submitted that the failure by the prosecution to call as a witness, the director of the school who had told the victim, pw7, to keep quiet and not tell anyone else about what the appellant had done to her, should be regarded as rendering the prosecution case unreliable. The said failure also gave credibility to the suspicion that it was possibly the said school director who had himself defiled the victim. Counsel invited Court to follow the decision of the **Uganda Supreme Court Criminal Appeal No. 26 of 1995: Oketcho Richard vs Uganda,** on this point.

For the respondent, Counsel Turimanya, submitted in respect of ground 1 of the appeal that pw3 did not state in her evidence that the appellant was not at school at the time the offence was committed. All that pw3 stated was that on the day she could not recall, but in July 2004, she realized that the appellant was not at school. The same witness, pw3, also confirmed that when she talked to the victim, pw7, she (the victim) told her that it is the appellant who had slept on her. Pw3 then arranged to meet the parents of the victim at the school and thereafter accompanied the said parents to the hospitals at Namungoona and Mulago where the victim was given medical treatment. She then travelled to Rukungiri to trace the

appellant and have him arrested by the Police and then transferred to Kampala. It follows therefore that pw3 realized the appellant was not at school after and not before the offence had been committed upon the victim, pw7.

As to ground 2 of the appeal Counsel for the respondent submitted that the prosecution was not in any way under obligation to summon the Director of the School as a prosecution witness as the said director was not an essential witness to the prosecution case. The prosecution called all witnesses whose evidence was material, in the Judgment of the prosecution, to prove the charge beyond reasonable doubt against the appellant. The School Director's evidence was not essential to prove the prosecution case. The defence did not indicate to Court that it wanted the School Director as a defence witness. The learned trial Judge was thus justified to reach the conclusion he reached in the case on the basis of the total evidence that was adduced before him. The appellant was accordingly properly found guilty of having defiled pw7 and was so convicted and sentenced. Respondent's Counsel prayed Court to dismiss the appeal, uphold the Judgment, conviction and sentence passed by the trial Judge against the appellant.

This Court as the appellate Court of first instance has the duty to re-appraise the evidence adduced at trial and draw inferences of fact, bearing in mind however that it did not have the benefit of observing the demeanour of the witnesses when giving evidence at the trial stage: see: **Rule 30 (1)** of the Rules of this Court. See also: **Kifamunte Henry vs Uganda**: **Criminal Appeal No. 10 of 1997 (sc)** and **Bogere Moses and Another vs Uganda: Criminal Appeal No. 1 of 1997(sc).**

We have carefully considered the submissions of both Counsel for appellant and for the respondent and re-appraised all the evidence adduced at trial for both prosecution and for the defence.

In his Judgment the learned trial Judge first directed himself as to the essential ingredients of the offence that the prosecution had to prove beyond any reasonable doubt so as to secure the conviction of the appellant. These were that pw7, the victim, was aged below 18 years at the time the alleged offence was committed, that pw7 experienced sexual inter-course and that it was the appellant who carried out the act.

The trial Judge further directed himself that the appellant did not bear the burden to prove his innocence as the law presumed him innocent until proven guilty. He did not have to prove the truth of his alibi. It was the prosecution to disprove beyond reasonable doubt the said alibi by placing the appellant at the scene of the crime on the date the offence is alleged to have been committed.

Further, the trial Judge also directed himself that the conviction of the appellant did not depend on the weakness of his defence but rather on the strength of the prosecution case. The appellant, after all, was not under any obligation to put up any defence. He could choose to keep quiet. It was for the prosecution to prove beyond reasonable doubt that he committed the offence: See: **Court of Appeal Criminal Appeal No. 42 of 2002: Basoga Patrick vs Uganda**, unreported.

The trial Judge considered in detail the evidence that was before him and concluded that the prosecution had proved beyond reasonable doubt, that the victim, pw7, was aged 8

years at the time the alleged offence was committed; and that a sexual act had been carried out upon her at the material time.

As to whether it was the appellant who committed the offence against the victim, pw7, the trial Judge considered both the prosecution and defence evidence adduced on this aspect of the case. He noted that the offence took place during broad daylight, the victim pw7, who knew the appellant very well as her teacher, was emphatic that the appellant slept upon her on a bench in a classroom (top class) and that the alibi put up by the appellant that he was away from the school could not be true because he was well known to pw7, the victim, and pw5 Namuje Joviah, also a pupil at the school and a classmate of the victim.

Pw5 had seen the victim pw7 come from the "top class" room crying and she (pw7) narrated what had happened to her to this witness, pw5. Pw6 Nabilla Victoria, a pupil at the same school, also testified that she met the victim leaving top class while crying and later pw7 told her that it is the appellant who had defiled her.

The trial Judge, who had the advantage of seeing the demeanour of these witnesses, concluded that though these witnesses were minors, they impressed him as truthful. He thus believed their evidence as placing the appellant at the scene of the crime when the offence was committed.

The trial Judge on considering the alibi evidence of the appellant that he had left the school because of poor pay and before the offence was committed, rejected the said evidence. The learned Judge concluded that the appellant, having known that he had been exposed by pw7 and the other prosecution

witnesses as the one who had defiled pw7 and was thus being wanted for arrest, is the reason why he went into hiding in Rukungiri.

The prosecution evidence which the trial Judge believed as having placed the appellant squarely at the scene of crime and thus destroyed the appellant's alibi, renders the submission of Counsel for the appellant that the evidence of pw3 Apostle Sheila Hephzibah that the appellant was no longer seen at Good Hope Nabulagala Primary School premises, should have been taken as supporting the appellant's alibi that at the time the offence was committed he had left the school, to be without merit.

Having re-evaluated the whole evidence we come to the conclusion that the period pw3 refers to as to when she was not seeing the appellant at the school premises was in July, 2004 after the appellant had committed the offence. He then left for Rukungiri so as to avoid arrest for the offence he had committed. Otherwise pw3 herself, if she was aware that the appellant was not at the school premises when the offence was committed, would never have proceeded to Rukungiri to trace the appellant and to have him arrested for the very offence committed against pw7 at the school premises. We agree with the trial Judge that the prosecution evidence conclusively placed the appellant at the scene of crime on the day the offence was committed. There is therefore no way the evidence of pw3 can be said to have supported the alibi of the appellant. We disallow ground 1 of the appeal.

As to ground 2 of the appeal, we are satisfied on reviewing the evidence that was before the trial Judge that the prosecution called the material witnesses to support the prosecution case.

The director of the school, fearing that the school may be closed due to what appellant did to pw7 tried to stop the victim, from talking to other people about what the appellant had done to her.

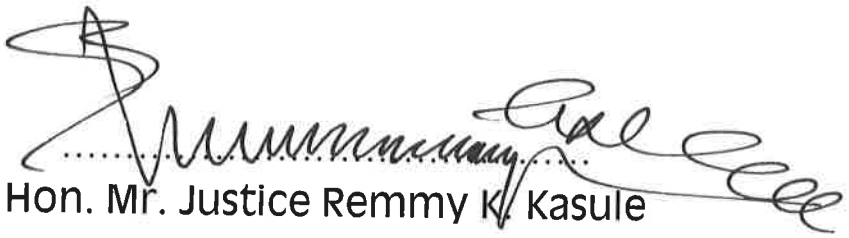
While such a conduct is very much regrettable on the part of the head of the school, we fail to see how this could have made the director an essential witness for the prosecution. We also find no basis for drawing the inference, as appellant's Counsel has urged us to do, that because the director of the school behaved so, it must have been him who defiled pw7, the victim.

We find no merit in ground 2 of the appeal.

The two grounds of the appeal having failed, this appeal stands dismissed. The Judgment, conviction and sentence as passed by the trial Judge upon the appellant are hereby upheld. The appellant is to continue serving the sentence of the term of imprisonment of sixteen (16) years as from the date of sentence of 22.06.06 up to completion.

It is so ordered.

Dated at Kampala this 30th day of April, 2014



Hon. Mr. Justice Remmy K. Kasule

Justice of Appeal

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