THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL N0 180 OF 2010

JUUKO MUSA:: APPLICANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the judgment of the High Court of Uganda before the Honourable Mr. Justice Akiiki Kiiza sitting at Kampala High Court Criminal Session Case No.0206 of 2010 dated 19th day of August 2010)

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, DCJ
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE F.M.S. EGONDA NTENDE, JA

JUDGMENT OF THE COURT

Background fact.

The appellant was charged with aggravated defilement contrary to Section 129(3) (4) of the Penal Code Act. He was indicted for having sexual intercourse with Nakyana Dorah, a girl aged below 14 years, on 24th March 2008 at around 1600 hours at Kisimu village, Nabweru Sub-county in Wakiso District. He was tried by the High Court. The trial judge found that the victim of the defilement was aged

15 years and not 14. The trial judge found that she was aged below 18 years at the time of having sex as well as at the time of trial.

The trial judge also found that the victim never had sex with the appellant on 24/03/2008 as charged but that the two had had sex together 3 times before that date. The victim also disclosed to court that she had had sex earlier on with her uncle called Perez. The appellant denied having committed the offence. The appellant was convicted for defilement and sentenced to 12 years imprisonment. He was dissatisfied with both the conviction and sentence hence this appeal. According to the Memorandum of Appeal the appeal is on the following grounds:-

1. **The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record and relied on insufficient uncorroborated evidence and came to the wrong decision that the appellant had defiled the victim Nakyana Dorothy.**

2. **The learned trial judge erred in law and fact when he convicted the appellant of the offence of simple defilement when he was not given a fair opportunity of making his defence to the minor and cognate offence which infringed on his right to a fair hearing and thereby occasioning a miscarriage of justice.**

3. **That the learned trial judge erred in law and fact when he imposed a harsh and excessive sentence on to the appellant which led to a serious miscarriage of justice to the prejudice of the appellant.**

The appellant prayed court that the appeal be allowed, the conviction and sentence set aside, the orders of the trial judge quashed and the appellant acquitted.

In the alternative, the appellant prayed that the sentence be set aside for being harsh and unreasonable.

Legal representation

Mr. Alex Bagada, a Principal State Attorney, represented the State {respondent} at the hearing of this appeal. The appellant was represented by learned counsel, Mr. Bruno Serukuma who was holding brief for learned counsel, Mr. Hammza Sewankambo who was on State brief.

Submissions of counsel for the appellant

Counsel submitted that the conviction of the appellant was unjustified. That there was no proof that the victim was 14 years as alleged by the prosecution and since age is an essential ingredient of the offence of defilement, the conviction was without proof and was therefore unjustified and should be quashed.

Counsel contended that the prosecution had failed to prove that the appellant had sexual intercourse with the victim on 24th March 2008 as charged. According to counsel, the victim mentioned she had had sex with the appellant on previous occasions but did not state the dates when the sexual intercourse took place. Counsel contended further that there was no corroboration of the alleged incidents of sexual intercourse on the unknown dates. The victim never reported those

incidents to anybody and they therefore stood not proved by any other credible evidence.

Counsel submitted that it was unsafe for the trial judge to convict the appellant on the evidence in respect of the alleged previous sexual encounters only mentioned by the victim and not corroborated by any other evidence.

Counsel for the appellant submitted further that the leaned trial judge was at fault when he convicted the appellant of simple defilement, an offence the appellant was not charged with and for which he had no opportunity to defend himself.

According to counsel, the appellant should have been acquitted since he had not had sex with the victim on 24 March 2008 as charged and the previous incidents of sexual intercourse were not proved.

Submissions of counsel for the respondent

Counsel for the respondent supported the conviction and sentence and prayed this Court to maintain both. He submitted that there was evidence that the victim was 15 years and she was therefore below 18 years.

Counsel conceded that the prosecution had failed to prove that the victim was 14 years old as had been earlier alleged by the prosecution. Counsel contended that since the victim was below 18 years, the trial judge was justified when he convicted the appellant for simple defilement rather than aggravated defilement as earlier alleged.

The Principle State Attorney submitted that the learned trial judge was correct when he convicted the appellant of simple defilement on account of the sexual intercourse that took place prior to 24/03/2008 since there was evidence from the victim that he had had sexual intercourse with her prior to 24 March 2008. The appellant had defiled the victim on those occasions.

He submitted that there was no legal requirement for corroboration in sexual offences different from others after the decision of this Court in **Basoga Patrick versus Uganda Criminal Case No.42 of 2002.**

Counsel for the respondent contended that the trial judge was correct to convict the appellant on a lesser and cognizant offence of simple defilement and there was no legal prejudice caused to the appellant by the conviction.

He maintained that the conviction and sentence should both be sustained and the appeal should be dismissed for lack of merit.

The decision of Court

We have carefully studied the court record and considered the submissions of both counsel and the issues they raised. We shall now proceed to resolve the appeal. We are alive to the fact that this Court has a duty, as a first appellate court, under Rule 30 (1)(a) of the Rules of this Court, to re-appraise the evidence and come up with our own conclusion. On this, we are also further guided by the decision of the Supreme Court in the case of **Father Narsensio Begumisa and**

Others vs Eric Tibebaga SCCA 17/20 (22.6.04 at Mengo) from CACA 47/2000 [2004] KALR 236 in which the court held:-

> **"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."**

It was contested on appeal as to whether the age of the victim in the instant case was properly proved by the prosecution.

Age is an essential ingredient for proof of the offence of defilement. It must be proved that the victim of the defilement was aged below 18 years in the case of simple defilement under Section 129(2) of the Penal Code Act and below 14 years, for the offence of aggravated defilement under Section 129(4) of the Penal Code Act. This court has had occasion to pronounce itself on the issue of proof of age in defilement cases in the case of Francis Omuron versus Uganda, Criminal Appeal No.2 of 2000 where it held as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth**

certificate, the victim's parents or guardian and by observation and common sense...."

In the instant case, the learned trial judge handled the proof of the age of the victim in his judgment as below:

"As for the age of the victim, the prosecution conceded, rightly in my view, that the evidence before the court showed that, she was born in 1994. This is through her birth certificate (exhibited DEI). Hence she was not below 14 years of age at the time of the alleged defilement. But, from the victim's own testimony even during her testimony, she said she was around 15 years, and the uncle, PW2 said she was born in 1994. This is proved by the birth certificate DEI. All this evidence puts the victim below 18 years at the time of her having sex.

In the premises therefore, though the prosecution has not proved that, she was below 14 years at the time, it has proved beyond reasonable doubt that, she was and actually she is, still below the age of 18 years of age."

We find that the learned trial judge had sufficient evidence on record on the basis of which he properly made a finding that the victim was 15 years and not 14 years and was below 18 years. He cannot be faulted on that conclusion. He was right not to have convicted the appellant for aggravated defilement.

The learned trial judge found that the appellant and the victim did not have sexual intercourse on the 24th March 2008. On the evidence of the victim he convicted the appellant of simple defilement on account of the two having had sexual intercourse 3 times before 24th March 2008.

Counsel for the appellant faulted the judge on the ground that there was no evidence corroborating that of the victim (Nakyana Dorah). Counsel also faulted the judge on the ground that the appellant had no opportunity to answer to the charges in respect of the incidents prior to 24th March 2008.

These are issues raised in grounds one and two of the appeal.

We shall handle ground one first. The appellant was charged for defiling the victim on 24th March 2008. It was established that no such defilement had taken place. The prosecution did not amend the charge sheet.

Nakyana Dorah, the victim, explained in her testimony that she never had sex with the appellant on that day but that the two had had sex about 3 times before in his house. She testified she had also had sexual intercourse with, Perez, her uncle. The only other evidence was that of a doctor who confirmed that the victim's hymen had been ruptured before though he could not tell how long ago. The appellant denied ever having sex with the victim.

We shall examine whether there was sufficient evidence upon which the conviction of the appellant on sexual encounters prior to 24/03/2008 could be based.

There is only the evidence of the victim that she had had sexual intercourse with the appellant in the latter's house. She never reported any of the three incidents to anybody. We find it pertinent to consider the issue of the legal requirement for corroboration of the evidence of a victim of a sexual offence before a conviction in a sexual offence.

This Court had had occasion to consider the need for corroboration in sexual offences in a number of cases. In the case of **Mujuni Apollo vs Uganda (criminal Appeal No.26 of 1999)** this Court upheld a conviction for defilement where there was no corroboration of the victim's evidence in exercise of its discretion. The DPP had submitted that he was not supporting the conviction on account of the fact that there had been no corroboration of the complainant's evidence regarding sexual intercourse. In disagreement with the DPP this Court held:-

> **"It is clear to us that by basing this appeal on the absence of Medical evidence, Mr. Bwengye is affording medical evidence undue Weight, overlooking the fact that it is merely advisory and goes to the fact and not Law. The court has discretion to reject it. Rivell (1950) Cr. App. R 87 Mathenson 42Cr. Ap. R. 145. The court can even convict without medical evidence as long as there is strong direct evidence when the circumstances of the offence are so cogent and compelling as to leave no**

ground for reasonable doubt, see R v Omufrejezyk [1950] 1Q B388, 39 Cr. Appl. R. a where the conviction for murder was confirmed though the body was never found. We would point out that the type of corroboration evidence will vary from case to case. In sexual offences the Court should normally look for corroboration of the evidence of the complainant but may convict on the evidence of the complainant alone after due warning." (understanding provided).

The legal position therefore is that a conviction can be entered even if there is no corroboration so long as the Court has cautioned itself and the assessors of the danger of conviction without corroboration.

In the case of **Basoga Patrick v Uganda. Criminal Case No.42 of 2002** this Court has gone further. It cited with approval the finding in the Kenya case of: **Mukungu v Republic [2003] EA 482,** where the court held:

> "The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against the qua women or girls. .....We think that time has come to correct what we believe is a position which the Courts have hitherto taken without proper basis, if any basis existed for treating female witness differently in sexual cases. Such basis cannot properly be justified presently. The framers of the constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that

decision which holds that corroboration is essential in sexual offences before a conviction is no good law as they conflict with Section 82 of the Constitution."

In the instant case, therefore, we need to look at the evidence of the victim and assess that evidence like any other evidence and determine whether it was cogent. The question we need to answer, which the trial judge should have considered, is whether the evidence of the victim which was uncorroborated was cogent. Was her evidence truthful and reliable enough to be the basis of a conviction though uncorroborated? Does the evidence of the victim alone leave the Court without reasonable doubt that the appellant committed the offence and should be convicted?

We note in the instant case that there was evidence from the victim that she had had sexual intercourse with her uncle Perez also. She had never reported all those sexual intercourse incidents with Perez or with the appellant to anybody. She mentioned all those previous incidents when she was found talking with the appellant and was questioned and reprimanded.

Is the appellant a truthful and credible witness judging from her conduct.

For a capital offence like aggravated defilement the court has to consider the evidence available carefully and analyse it in the circumstances in which the facts arose.

The trial judge had the advantage of seeing the demeanour of the witness in Court on the day of her testimony. The incidents of sexual intercourse she narrated had occurred prior to the offence the appellant was charged with. She had never reported those sexual encounters with the appellant or with Perez her uncle to any person or authority. She never even stated in her evidence when the sexual acts occurred.

Medical evidence on record was to the effect that the medical officer could not establish when the hymen of the victim was ruptured. The appellant was charged for aggravated defilement that occurred on 24/03/2008. A specific date. Was it safe for the trial judge to convict the appellant on simple defilement that occurred on unknown dates. The appellant does not know on which dates he is alleged to have committed the offences. Could he defend himself in respect of those offences that occurred on unknown dates?

The victim's evidence in respect of those incidents is totally uncorroborated. Was her evidence cogent, truthful and credible for the trial judge to convict on the basis of that evidence without corroboration. We find that it was unsafe for the trial judge to base his conviction on the uncorroborated evidence of the victim given the circumstances described above. Ground one of the appeal therefore succeeds.

Having found as we have done in respect of ground one, it would not be necessary to proceed to resolve ground two. However, we find it desirable to address the ground only for purposes of clarifying the legal point raised in respect

of the trial judge having convicted the appellant on a minor and cognizant offence.

Section 87 of the trial on Indictments Act provides as follows:-

> **"87. Person charged may be convicted of minor offence**
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> ***When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or he may be convicted of the minor offence although he or she was not charged with it."***

The process the Court has to go through to convict an accused person on a minor and cognizant of offence was stated in the case ***Ali Mohamed Hassani Mpanda v R [1963] EA 294*** as follows:

> ***'The Court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence.'"***

Applying the provisions of section 87 of the Trial on Indictments Act to the facts of this case which we have already summarized in this judgment, we find that the learned trial judge would be correct to convict the appellant of the offence of simple defilement except for the reasons we have discussed in our handling of ground one of the appeal.

Having found that the conviction of the appellant cannot stand for the reasons, that were stated in ground one, we do not find it necessary to discuss ground three of this appeal.

We find this appeal to have been with merit and do allow it.

The conviction is quashed together with the sentence. The appellant is set free unless he is being held on a different lawful reason.

Dated at Kampala this 30th day of June 2015.

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Hon. Justice S.B.K. Kavuma
DEPUTY CHIEF JUSTICE.

.....
Hon. Justice Richard Buteera
JUSTICE OF APPEAL.

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Hon. Justice F.M.S. Egonda-Ntende
JUSTICE OF APPEAL.