

5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

10 **CRIMINAL APPEAL No. 23 of 2012**

15 { *Arising from Criminal Session Case No. 0042/2010*
Before His Lordship Hon. Justice Lameck N. Mukasa at Arua on 2.11.2011. }

CANDIGA SWADICK:.....APPELLANT

VS

20 **UGANDA :.....RESPONDENT**

25 **Coram : Hon. Justice Remmy Kasule, JA**
Hon. Lady Justice Hellen Obura, JA
Hon. Justice Simon Byabakama Mugenyi, JA

JUDGMENT OF THE COURT.

30 The appellant was convicted of aggravated defilement contrary to **Section 129 (3) and (4) (a) of the Penal Code Act** and sentenced to 18 years' imprisonment by the High Court of Uganda at Arua before Hon. Justice Lameck N. Mukasa. He has appealed against conviction only.

35 The facts, as proved and accepted by the trial Judge were that, the appellant was husband to Arimu Nanve, the aunt to the victim Minala Jealous. She lived with the appellant and his wife.

In the night of 18-1-2009, the victim Minala Jealous with other children
40 were asleep when the appellant returned home. He picked the victim, took her to his bed and had penetrative sexual intercourse with her. He threatened to stab her and she started crying. After the act, the appellant returned her to her bed. It was a one roomed house and the victim's aunt was away for a funeral. The incident was witnessed by
45 Zumula Binti (PW2) who was also in the house.

The victim reported the incident to her aunt when she returned home in the morning. The matter was reported to the Local Council authorities and the appellant was arrested. The victim was medically examined and found to be 10 years old. She had injuries in her private parts that were consistent with penetrative sexual intercourse.

The appellant was charged, tried, convicted and sentenced to 18 years imprisonment hence this appeal.

The appeal is premised on two grounds, namely;

1. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record hence arriving at a wrong decision.

2. The learned trial Judge erred in law and fact when he convicted the appellant based on evidence that did not satisfy the standard of corroboration in sexual offences.

At the hearing of the appeal, the appellant was represented by Mr. Odama Henry while Ms. Adubango Harriet, Senior State Attorney, appeared for the respondent.

Counsel for the appellant abandoned the second ground and argued ground 1 only. Counsel submitted that the learned trial Judge did not properly evaluate the evidence on record and, as a result, he did not address himself to the contradictions in the prosecution's case. He pointed out the discrepancies between the oral testimonies of the victim (PW1), and Zimula Binti (PW2) and their respective police statements.

Counsel contended that whereas the victim testified that the appellant pulled out a knife and threatened to stab her, she did not state so in her police statement (exhibit D1).

Counsel referred to another contradiction in the testimonies of PW1 and PW2 in that, whereas PW1 stated PW2 moved out of the house to inform the appellant's wife, PW2 denied doing so.

85 The other contradiction concerned the room, the scene of crime. P.W.1's evidence was that the house was a single room with no partition separating the parents' bed and the area where the children used to sleep. The evidence of PW2 on the other hand was that;

90 *“It is a single room where there is a curtain to separate the bed. There was a curtain between the accused's bed and the mat where we were sleeping. At the material time, the curtain was up.”*

95 The other contention by counsel was that the learned trial Judge disregarded the appellant's defence. In Counsel's view, it was a misdirection on the part of the trial Judge to have ignored the contradictions and the appellant's defence. He prayed that Court be
100 pleased to quash the conviction and set aside the sentence.

Counsel for the respondent opposed the appeal. She argued that the contradictions in the prosecution case were minor and ought to be ignored. Counsel contended that the fact that the knife was not
105 mentioned in PW1's police statement did not affect her credibility as a witness. Further, that P.W.1 and PW2 were subjected to rigorous cross-examination but were not discredited.

As for the contention that the trial Judge disregarded the appellant's
110 defence, counsel for the respondent submitted that the trial Judge considered and evaluated the evidence thereof in his judgment. She invited Court to dismiss the appeal.

We have carefully listened to the submissions of both counsel and
115 have also perused the Court record.

As a first appellate Court, it is our duty to review and re-evaluate the evidence before the trial Court, by subjecting it to a fresh and exhaustive scrutiny, draw inferences and reach our own conclusions, bearing in mind that this Court did not have the opportunity to hear and observe the witnesses testify as the learned trial Judge did- see **Rule 30(1)(a) of The Judicature (Court of Appeal Rules) Directions; Bogere Moses & another vs Uganda [1996] HCB 5; Begumisa & others vs Tibebaga, Civil appeal N0. 17 of 2002 (SC).**

We agree with the submissions of learned counsel for the appellant that the trial Judge did not address himself to the contradictions in the prosecution's case. The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness- see **Alfred Tajar vs Uganda E.A.C.A Cr. Appeal N0. 167 of 1969 (unreported); Sarapio Tinkamalirwe vs Uganda, Cr. Appeal N0. 27 of 1989 (SC) and Twinomugisha Alex and 2 others Vs Uganda, Cr. Appeal No. 35 of 2002 (SC).**

In the matter before us, our considered view is that the contradictions were minor and did not point to deliberate untruthfulness. To begin with, while it is correct PW1 had told Court that PW2 went out that night which the latter denied, this contradiction was ironed out by PW1 during re-examination, when she clarified she did not see PW2 going out of the house.

On the aspect of the partition in the room, PW2's evidence was that it was a mere curtain which was up at the time of the incident, thus

leaving the appellant's bed exposed. This therefore enabled PW2 to observe what was taking place between the victim and the appellant on the latter's bed. The evidence of PW1 that there was nothing separating the children's bed from their parents' bed was clearly a minor contradiction.

The other aspect is the knife that was not mentioned by both PW1 and PW2 in their respective police statements.

In her cross-examination PW1 stated:

“Accused threatened me with a knife. I made a statement at police. I stated it to police. I can't read well. I am still learning..... The accused had a knife and he put it on the bed. I saw it, maybe the police did not write it down”.

We have noted two factors pertaining to the evidence relating to PW1's police statement.

Firstly, it is not clear if the statement was read back to her by the recording police officer and that she confirmed the contents therein before she thumb printed the same. The record does not reveal this matter was raised with PW1 during her cross-examination.

Secondly, in view of PW1's assertion that she mentioned the knife to the recording officer, the said officer ought to have been summoned to rebut PW1's claim. As it turned out, PW1 challenged the statement when she maintained she mentioned the knife to the police officer, yet he did not include it.

The Supreme Court in **Mureeba Janet and 2 others vs Uganda, Criminal Appeal No. 13 of 2003**, had this to say about police statements:

“It is trite that for a police statement to be treated as evidence, it must be properly proved and admitted in evidence unless the authenticity of that statement is not challenged. If it is not proved, it cannot be acted upon by any Court.”

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Generally speaking, it is insufficient for counsel for the accused to merely require the witness to confirm if he or she signed the statement. It should also be ascertained whether the statement was read back to the witness and he or she confirmed it to be correct before appending his or her thumbprint.

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Once the witness disputes the contents (or some of them) in the statement, the party seeking to rely on the statement has to call the recording officer to prove the statement.

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In the instant case, our finding is that the police statements of PW1 and PW2 were not properly proved although they were admitted in evidence. In the result, they cannot be acted upon to discredit the testimonies of the two witnesses.

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We are therefore not persuaded by the submissions of the appellant's counsel that the evidence of the two eyewitnesses (PW1 and PW2) was discredited by contradictions and inconsistencies so as to render the same unbelievable. As we have already stated, the said contradictions were inconsequential.

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Having subjected the evidence to fresh scrutiny, we are satisfied the learned trial Judge came to the correct decision that the prosecution had proved the case beyond reasonable doubt.

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The available evidence revealed that the appellant was well known to PW1 and PW2 and the offence was committed in the confines of their

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one-roomed house. The two witnesses used to sleep on a mat on the floor. There was light from a tadoba (small paraffin lamp). The following day the appellant's wife (PW3) who is also aunt to PW1, examined her and observed semen in her private parts. The victim was
220 in a distressed state (crying).

The learned trial Judge correctly warned himself of the need for caution while dealing with the evidence of PW1 and PW2 in view of the fact that the offence was committed at night. He was satisfied the
225 conditions at the scene were favourable for correct and unmistakable identification of the appellant. We agree with that finding in light of the evidence on record.

The trial Judge also found the victim's evidence was sufficiently
230 corroborated by the medical evidence, that of PW2 and PW3. The former (PW2) witnessed the incident as she was in the same house with PW1. The appellant threatened to stab her with a knife as well when she responded to PW1's cry. She therefore corroborated the victim's evidence on identification of the appellant.

235 The appellant's defence was a general denial and he attributed it to domestic misunderstandings with his wife (PW3). He claimed she even denied him sex and when her brothers arrived and tried to resolve their problems, that is when PW3 alleged he had sex with the victim.

240 The trial Judge considered the appellant's defence and disbelieved the same as a lie. We cannot fault the trial Judge for doing so. If there was an ounce of truth in the appellant's claim that the case was fabricated by his wife (PW3), it ought to have been put to PW1 that she was acting
245 under the influence of her aunt (PW3) to falsely implicate the appellant in the commission of the offence. PW3 on her part denied the allegation. She even stated that she was encouraging the appellant to


marry another woman who could bear him children since she could not.

250 All in all, it is our considered view that there was ample evidence to justify the conclusion of the learned trial Judge.


255 For the foregoing reasons, we find no merit in this appeal and it therefore fails. We accordingly dismiss it. We uphold the conviction and sentence imposed by the trial Judge.

We so order.

260 DATED AT ARUA THIS ^{6th}.....DAY OF ^{June}.....2016.

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HON. JUSTICE REMMY KASULE,
JUSTICE OF APPEAL.

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HON. LADY JUSTICE HELLEN OBURA,
JUSTICE OF APPEAL.

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280 HON. JUSTICE SIMON BYABAKAMA MUGENYI,
JUSTICE OF APPEAL

