THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 016 OF 2013

(Appeal from the Judgment of the High Court of Uganda at Arua (Nyanzi Yasin, J.) dated 07.03.2013)

ASEGA GILBERT :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

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

JUDGMENT OF THE COURT

The appellant was convicted on two counts of aggravated defilement contrary to Section 129(3) and (4) (a) and (b) of the Penal Code Act. He was sentenced to 30 years imprisonment in respect of each count, the sentences to run concurrently.

The brief facts of the case are that on 03.10.2010, at Kubala village, Arua, the appellant defiled two minor children Azayo Charity aged 9 years and Amaniyo Winny aged 6 years in a house of Bandagayo Margaret, Pw3, mother of the first victim, Azayo Charity.

The mother of the second victim Amaniyo Winny, was Ochiru Santina, Pw4. Pw3, Pw4, the two minor victims and the appellant all happened to live in one homestead at Kubala village.

Pw3 was a paternal aunt of the appellant. The father of appellant was a brother of Pw3.

Pw4, was a neighbor of Pw3 in the homestead and was also a teacher. At this material time of 03.10.2010, she decided to go to her home away from the homestead at Kubala village to harvest her beans. She left her daughter Amanniyo Winny and her house in the homestead under the care of her neighbor, Pw3.

On 03.10.2010, Pw3 left the two minor victims to stay and sleep in her house, while she went and stayed in the house of Pw4 that she was looking after.

It is while the two minor children were alone in the house of Pw3 that the appellant entered the said house and defiled them. Later the two victims informed Pw3 of what the appellant had done to them and Pw3 reported the appellant to his father who also stayed in the same homestead. Later Pw3 reported the matter to the Police. The appellant denied the accusations against him.

The appellant was tried, convicted and sentenced by the High Court. Dissatisfied with the conviction and sentence, appellant lodged this appeal to this Court.

The appellant's appeal is on two grounds.

1. ***The learned trial Judge erred in law and fact when he held that the offence of aggravated defilement had been proved beyond reasonable doubt against the appellant in both Count 1 and 2.***
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 learned Counsel Paul Manzi represented the appellant on private brief, while Senior State Attorney Jacqueline Okui was for the respondent.

Counsel for the appellant submitted on the two grounds together.

First, he contended that the evidence of Pw7 and Pw8, the alleged victims, required corroboration before it could be acted upon. The medical evidence was found wanting by the trial Judge and as such it could not provide any corroboration. Pw3's evidence could not corroborate that of Pw7 as both witnesses contradicted themselves with Pw7 asserting that she reported the defilement to Pw3 the next day in the morning, while Pw3 in her testimony stated she received Pw7's report two days after the incident. As

to Pw4, her testimony was that she got information of the defilement on 19.10.2010, almost two weeks after the event.

Further, there was considerable delay in reporting the offence to the police and also in carrying out any examination, medical or otherwise, on the victims. All these aspects rendered the prosecution evidence not credible and incapable of being a basis for the conviction of the appellant.

As to whether the appellant was the one who was identified as having committed the offence, Counsel submitted that there was no credible evidence to that effect. Pw8, having seen the appellant for only two days could not be in a position to identify him by voice, as she claimed. The evidence that there was a lamp in the house when the defilement was being carried out was that of Pw7 and Pw8 both minors, which evidence was not at all corroborated and therefore could not be acted upon.

Counsel thus invited this Court to conclude that on the basis of the evidence that was adduced, it was not proved beyond reasonable doubt that a sexual act had been performed upon Pw7 and Pw8 on 03.10.2010. Further, it was not proved that it was the appellant who had carried out the said act. He prayed for the appeal to be allowed, the conviction and sentences be quashed and set aside and the appellant be set free forthwith.

For the respondent, it was submitted that the learned trial Judge rightly held that the prosecution had proved beyond reasonable

doubt that a sexual act had been performed upon Pw7 and Pw8, both aged below 14 years, and that the appellant had been properly identified as the one who committed the said act. The evidence of Pw7 and Pw8 was credible and had not been challenged through cross-examination or otherwise. An inference had to be drawn that it had been accepted.

Further, the said evidence of Pw7 and Pw8 had been corroborated by the evidence of Pw1 the Clinical Officer, who found that the injuries in the private parts of Pw7 and Pw8 were consistent with a sexual act having been performed upon each one of them.

As to identification of the appellant, Pw7 knew him very well before the sexual act, there was closeness of the appellant with both Pw7 and Pw8 in the commission of the act, and, at any rate, there was a lamp that provided sufficient light to identify the appellant before the same was blown out.

The fact that the crime was reported late to police did not go to weaken the prosecution case since it was explained that the elders had asked for time to consider the matter when the same was reported to them. Further, Pw4 was new in the place and this caused her to delay in reporting the crime. Court was thus prayed by Counsel for the respondent to dismiss the appeal.

Being a first appellate Court, it is our duty to subject the trial evidence to a fresh review and scrutiny, making our own inferences in the process, while bearing in mind that we did not see the witnesses testify: See **Rule 30 of the Judicature (Court of Appeal Rules) Directions:** and also **Okeno vs Republic [1972] EA 32** and **Court of Appeal at Mbale Criminal Appeal No. 91 of 2008: Lowong Apangira & Another vs Uganda**, unreported.

We note that Pw7 and Pw8, the defiled victims were both of tender years respectively aged 12 and 9 at the time of trial. Therefore pursuant to Section 40 (3) of the Trial on Indictments Act, Cap. 23, Court was duty bound to first administer a voire dire in respect of each one of them, before deciding whether to receive each one's evidence on oath or not on oath.

While the trial Judge carried out a voire dire and came to the conclusion that each witness appreciated the duty to tell the truth, the Judge just proceeded to receive the evidence of each witness without any oath being administered to any one of them. In effect, though cross-examined, both Pw7 and Pw8 testified without having taken an oath. This was an error on the part of the trial Judge.

The need for a voire dire in respect of a witness of tender years, is for the Court to be able to decide whether such a child witness is to give evidence on oath or not on oath. By so deciding the Court ensures that the accused is not denied of the Statutory

protection provided by Section 40(3) of the Trial On Indictments Act. The protection is that where a child's evidence is received without taking an oath, then the conviction cannot be sustained unless there is corroboration by some other material evidence implicating the accused person.

In **Kibangeny VR (1959) EA 92**, the Court of Appeal stated that a voire dire investigation need not be a lengthy one, but the trial Court ought to record it. The investigation should be done first, and the same should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his/her general intelligence. This should be followed by the swearing of the witness, if found to appreciate the nature of the oath and then the evidence can be received from the witness.

Since, in the present case, the learned trial Judge apparently received the evidence of Pw7 and Pw8 without first having had each of those witnesses take an oath, then the evidence of Pw7 and Pw8 must be taken as having been given not on oath.

It follows therefore, that in terms of Section 40(3) of the Trial on Indictments Act the appellant's conviction on the basis of the evidence of Pw7 and Pw8 can only be sustained if that evidence was corroborated by some other material evidence in support thereof implicating the appellant in the crime.

We shall determine this as we subject the evidence to fresh scrutiny while resolving the specific grounds of appeal.

Ground 1 faults the trial Judge for holding that the evidence before him proved aggravated defilement beyond reasonable doubt.

The trial Judge directed himself and the assessors, rightly in our view, that the prosecution had the burden to prove each of the ingredients of the offence throughout the trial and further that the standard of proof was one beyond reasonable doubt. Any doubt had to be resolved in favour of the appellant: He guided himself with the decision of **Mancini vs DPP [1942] AC** and **ABDU NGOBI VS UGANDA: Uganda Supreme Court Criminal Appeal No. 10/1991.**

The trial Judge reviewed both the prosecution and defence evidence and held that prosecution had discharged the burden that both, Pw7 and Pw8, the victims, were aged below 14 years at the time of the offence. The defence never challenged this conclusion whether at trial or on appeal. We too, on reviewing the evidence find this ingredient of the offence having been proved.

As to whether Pw7 and Pw8 were subjected to the sexual act, the trial Judge considered the evidence of Pw7 and Pw8, the victims.

Pw7 was related to the appellant and knew him very well. They stayed in the same homestead. On the day she was defiled she

was with Pw8 in the house. Appellant entered the house. She lit a light. Appellant put it off and threatened to kill both of them if any one made an alarm. He then undressed, had sex with Pw8 first, and thereafter did the same to Pw7 whose clothes he also removed. Then he got up, opened the door and left. Pw7 reported this to her mother, Pw3 the next day.

Pw8's evidence is similar to that of Pw7 as to how appellant opened door, entered the house where both of them were. A lamp was lit by Pw7, appellant put it off, then threatened to kill them, he started sex with Pw8 and then Pw7.

The trial Judge found the evidence of Pw7 and Pw8 consistent and truthful, but he directed himself and the assessors that their evidence had to be corroborated before he could act on the same. In the same breath however, the trial Judge proceeded to hold that:

"Both Pw7 and Pw8 gave evidence on oath. One's evidence was capable of corroborating the other as the two had sworn."

We find the trial Judge to have been in error by holding as above. We have already held that there was no evidence on record that after administering the voire dire, Pw7 and Pw8 were subjected to an oath before they gave their evidence. The trial Judge's assertion that the two were sworn is only stated in the Judgment but not in the Court proceedings he conducted when taking their evidence. It therefore follows that the evidence of Pw7 and Pw8

has to be taken as having been not on oath and as such requiring corroboration as a matter of law.

On re-submitting the whole evidence to a fresh scrutiny we find that the evidence of Pw7 is sufficiently corroborated by Pw3's evidence to the effect that Pw7 reported to her soon after she had been defiled that:

> *"It is like my private part is getting torn that she urinates blood that her body is painful..... I wanted to call Asega (accused) to eat with us, then Azoya started crying that she does not want to call Asega to eat with us. I asked her why; she then told me that when she was away in Centina's house, the accused had sexual intercourse with them. My daughter told me the boy had bad manners with her".*

The alleged contradiction that Pw3 stated that she received the report in 2 days whereas Pw7 stated she reported to Pw3 in the morning of the next day, is a minor contradiction, in our considered view, given the fact the witnesses were testifying almost 2½ years (20.02.2013) since the commission of the offence. We hold the above reproduced evidence of Pw3 as corroborating Pw7 as to a sexual act having been done to her and that it was the appellant who did the act.

We find that the evidence of Pw8 was corroborated by the evidence of Pw4 who, on return home, found Pw8 lying down, and on inquiring as to what had happened, Pw8 reported to her

in detail how appellant had defiled them and how he had threatened to cut her with a panga if she disclosed this to anyone. On checking Pw8's private parts, Pw4 found wounds and she was walking with her legs apart. We accordingly, on reviewing the evidence find that the evidence of Pw4 corroborated the evidence of Pw8 that she had been defiled, and that it is the appellant who did so.

As to the medical evidence of Pw1, we are unable, on a review of the whole evidence adduced, to agree with the holding of the trial Judge that the said medical evidence did not corroborate the evidence of Pw7 and Pw8 at all.

We have appreciated the fact that Pw7 and Pw8 asserted that they were defiled on the same day, in the same place and by the same person. They were both below 10 years at the time. It was therefore expected that their injuries would be similar in a number of respects. Thus each one had wounds and swellings in the private parts. The wounds were painful on touch. There was pain on passing urine. The hymen could not be examined because the speculum could not be used to view inside their bodies as both victims were too young.

These injuries tally very well with the accounts of Pw7 and Pw8 as to how they were defiled in that the medical evidence is to the effect that the injuries were due to forceful sexual penetration into a child.

While it is true that the medical examination was carried out almost two weeks after the event, this alone does not render the medical evidence useless, since the evidence on record clearly showed that from the date of the defilement each of the victims was in a distressed condition and complained of similar injuries to Pw3 and Pw4. We accordingly, in disagreement with the learned trial Judge, hold that the medical evidence corroborated the evidence of Pw7 and Pw8 as to the fact that a sexual act was performed upon each one of them in a period of about two weeks before the medical examination was performed on 19.10.2010.

As to whether the appellant was HIV positive at the time of the commission of the offence, we too agree with the reasoning of the trial Judge that there was no conclusive evidence to prove that assertion. This however does not in any way affect the nature of the offence against the appellant, given his age and that of the victims. The appellant, given his blood relationship with Pw7, was in the category of a parent and/or guardian to Pw7.

We have reviewed the evidence of Pw3, Pw4, Pw6, Pw7 and Pw8 and that of the appellant, Dw2 and Dw3 as to whether or not the appellant was placed upon the scene of crime. The trial Judge also considered and evaluated both the evidence of the prosecution and that of the defence. We find that the trial Judge treated the evidence very well and that he reached the right decision that the prosecution evidence placed the appellant squarely at the scene of crime, thus destroying the appellant's

defence of alibi. The trial Judge rightly concluded that it was the appellant who is the one who carried out the defilement of both Pw7 and Pw8.

In conclusion we find no merit in grounds 1 and 2 of the appeal. This appeal is accordingly dismissed. We uphold the conviction and sentence.

Dated at Arua this ..6th.. **day of** ..June.. **2016.**

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Hon. Mr. Justice Remmy Kasule
Justice of Appeal

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Hon. Lady Justice Hellen Obura
Justice of Appeal

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Hon. Mr. Justice Byabakama Mugenyi Simon
Justice of Appeal