THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 0304 OF 2010

Arising from Criminal Session Case No. 0053 of 2010 before His Lordship Hon. Justice Wilson Kwesiga.

DIKU FRANCISKO ::::::::::::::::::::::::::::::::APPELLANT

VS

UGANDA :: RESPONDENT

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

JUDGMENT OF THE COURT

This is an appeal against conviction by the High Court of Uganda at Arua before Hon. Justice Wilson Kwesiga on 3-11-2010.

The appellant was convicted of aggravated defilement contrary to **Section 129(3) and (4) (a) of the Penal Code Act** and sentenced to 14 years imprisonment.

The facts, as proved and accepted by the trial Judge, were that on the 28th of June 2009, at about 1:00pm, the victim Ezaru Irene was on her way home when the appellant approached and offered her money. When she declined, he threatened to kill her and pulled her to the

bush. He plucked off her pants, pushed her to the ground and had penetrative sexual intercourse with her.

She bled from her private parts but did not inform her mother (PW3) upon getting home. Some days later she fell sick and that is when she informed her mother as to what had happened to her. The victim was medically examined and found to have been sexually abused.

The appellant's defence was an alibi to the effect that, on the 28-6-2009 he was at Kuluva hospital undergoing treatment. The trial Judge dismissed the alibi as untrue and believed the prosecution evidence that placed him at the scene of crime. The trial Judge convicted and sentenced him to the said term of 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.***

The appellant was represented by Mr. Odama Henry on state brief while Mr. Oola Sam, Senior Principal State Attorney, appeared for the respondent .

Counsel for the appellant argued both grounds together. He contended that had the trial Judge properly evaluated the evidence, he would have taken note of the lapses in the prosecution case that cast doubt on the cogency of the evidence against the appellant.

Counsel contended that there was doubt whether the victim knew the appellant well in view of her evidence to the effect that she had never gone to his shop.

Secondly, he argued that, whereas the particulars of the offence in the indictment stated the appellant was a person in authority over the victim as LCI defence secretary, no evidence was led to prove this ingredient of the offence.

Counsel also cast doubt on the cogency of the Medical Report (Exh. P.1) pertaining to the examination of the victim. He contended that the findings by the Senior Clinical Officer (PW2) lacked credibility, considering that the victim was examined some three weeks after the alleged act of sexual intercourse.

The last aspect addressed by counsel for the appellant concerned the appellant's defence of alibi. Counsel contended that the same was not discredited or challenged. He concluded that, in view of the said lapses, the ingredients of sexual intercourse and participation by the appellant were not proved. He invited this Court, after subjecting the

evidence to fresh scrutiny, to quash the conviction and set aside the sentence.

Counsel for the respondent opposed the appeal. He argued that there was ample evidence to show the victim knew the appellant quite well. He also contended that the issue of whether the appellant was a person in authority was immaterial since it was proved the victim was below 14 years of age at the time the offence was committed. As for the appellant's alibi, counsel contended that this was properly addressed by the trial Judge after he had evaluated the evidence that showed the appellant was not at Kuluva hospital as he claimed. Counsel invited Court to dismiss the appeal, uphold the conviction and sentence.

We have carefully considered the submissions of both counsel and perused the record as well. Our duty as a first appellate Court is to review and re-evaluate the evidence before the trial Court, 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; Begumisa and others vs Tibebaga, SCCA N0. 17/2002** and **Mbazira Siragi and another vs Uganda Cr. Appeal N0. 7 of 2004 (SC)**

On the issue whether the victim (PWI) knew the appellant well, the evidence of PWI was to the effect that she knew the appellant who

lived at Ajia and used to sell in a shop at the said place. This was corroborated by Adiru Suzan (PW4) whose evidence was that the appellant used to sell items at Ajia Trading Centre. In his defence, the appellant stated he lived at Ajia. He did not refute assertions by PWI and PW4 that he used to sell in a shop at the said place.

We note that PWI (victim) was not challenged in cross-examination with regard to her evidence that she knew the appellant.

In the judgment, the learned trial Judge considered the circumstances of identification at the scene, and he warned himself of the dangers of acting on the evidence of a single identifying witness. Having done so, he concluded that, the conditions were favourable for the victim's correct identification of her assailant.

The conditions were that; the time was 1:00pm, the appellant first talked to the victim when he offered her shs. 2000, he then pulled her to the bush and he was on top of her during the sexual act. In those circumstances, PWI had ample opportunity to properly and unmistakably identify her assailant. We are therefore satisfied the learned trial Judge properly evaluated the evidence and came to the correct conclusion that the appellant was positively identified.

Related to the issue of identification was the appellant's defence of alibi to the effect that on the 28-6-2009, he was at Kuluva hospital for medical treatment. The doctor who was to work on him was not

present and he was advised to go back on 17-7-2009. For the period between the two dates, he was staying at the house of one Adroza Muzamira.

The appellant's alibi was rebutted by the evidence of Mawa Wilfred (P.W 8), a Records Officer at Kuluva hospital for 16 years. According to his evidence, there was no record of the appellant having been at the hospital as a patient during June/July 2009.

The learned trial Judge evaluated the evidence regarding the said alibi before he rejected it as untrue.

We have, on our own, re-evaluated the evidence on this point and find ourselves unable to fault the trial Judge for rejecting the appellant's alibi. To begin with, the alibi was not raised during cross-examination of PWI (victim), yet she was the sole indentifying witness. From the record, her identification evidence was never challenged, nor was it suggested that the appellant could not have been at the scene since he was at Kuluva hospital at the time.

A defence of alibi should be disclosed at the earliest opportunity, as belated disclosure undermines its credibility. See **R vs Sukha Singh Wazir and others (1939)6 E.A.C.A 145** and **Festo Androa Asenwa and another vs Uganda, Cr. Appeal N0. 1 of 1998 (Sc).**

In the instant case, it is our finding that the learned trial Judge properly evaluated the evidence pertaining to the appellant's alibi and rightly rejected the same as untrue.

Learned counsel for the appellant also raised the issue of failure to prove the ingredient that the appellant was a person in authority over the victim, as it was alleged in the particulars of offence in the indictment.

Under **Section 129(3) and (4) of the Penal Code Act,** the offence of aggravated defilement is committed under either of these four instances, namely:

1. ***Where the victim was below 14 years of age.***
2. ***Where the accused was a person in authority over the victim.***
3. ***Where the accused was H.IV positive at the time.***
4. ***Where the victim was a person suffering from a disability.***

In the instant case, the particulars of the offence stated that the accused was a person in authority and also the victim was below 14 years. In our view, it was improper for the State Attorney who prepared the indictment to include both instances of the offence in the particulars of one count. The said instances under **Section 129(4)** constitute independent and separate offences.

Despite the said error, we are satisfied no substantial miscarriage of justice was occasioned to the appellant.

From the record, it is evident the prosecution led evidence to prove the victim was below 14 years at the material time and, the learned trial Judge discussed the evidence thereof before he came to the finding the said ingredient had been proved.

In the submissions in this appeal, the complaint by counsel for the appellant was that the ingredients of sexual intercourse and participation were not proved, clearly implying that the finding by the trial Judge that the victim was below 14 years was not being contested.

In the judgment, the trial Judge was satisfied that the appellant was proved to have had sexual intercourse with a girl below 14 years and convicted him accordingly.

To our understanding, it was not necessary for the trial Court to make a finding whether the other instance (a person in authority) was proved before the offence of defiling a girl below 14 years could be said to have been proved.

The complaint in ground No. 2 was that the learned trial Judge convicted the appellant based on evidence that did not satisfy the standard of proof in sexual offences.

Learned counsel for the appellant briefly touched on this ground, by arguing that the medical findings were incapable of corroborating the victim's evidence, owing to the fact that she was examined three weeks after the sexual act.

According to the report, (Exh P1), the victim had extensive wounds on both labia minora and majora in her private parts which were consistent with force having been used sexually.

We wish to observe that, the examining clinical officer (PW3) was not challenged on the credibility of his findings during cross-examination.

In our view, the argument by counsel for the appellant that the injuries could not be linked to the incident of 28-6-2009 was a matter of evidence which the defence ought to have put to PW3. The omission or failure to do so implied PW3's findings were accepted as correct or unassailable.

The trial Judge did find that the victim's evidence regarding sexual intercourse was corroborated by the medical evidence. We too, upon re-evaluation of the evidence, are satisfied that her evidence was amply corroborated.

We must state here that, corroboration of the victim's evidence is not a prerequisite for purposes of securing a conviction in cases of a sexual nature. The trial court can convict on the uncorroborated testimony of a victim in a sexual offence provided it is alert to the dangers of doing so and is satisfied the victim was a truthful witness. See **Mugoya Vs Uganda [1999]1 EA 202(SC); Kibale Vs Uganda [1999]1 EA 148 (SC);** and **Mohammed Kasoma Vs Uganda SCCA N0. 1/94** (SC).

In the final analysis, we find no merit in both grounds of appeal and this appeal fails. We dismiss the same and uphold the sentence.

We so order.

DATED AT ARUA THIS .....7th.....DAY OF.....June.....2016.

HON. JUSTICE REMMY KASULE,
JUSTICE OF APPEAL.

HON. LADY JUSTICE HELLEN OBURA,
JUSTICE OF APPEAL.

HON. JUSTICE SIMON BYABAKAMA MUGENYI,
JUSTICE OF APPEAL