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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT MBARARA

CRIMINAL APPEAL NO. 0542 OF 2014

KYOMUKAMA FRED:.....APPELLANT

VS

UGANDA:.....RESPONDENT

Coram: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Byabakama Mugenyi Simon, JA
Hon. Mr. Justice Alfonse C. Owiny-Dollo, JA

JUDGMENT OF THE COURT

This is an appeal from the judgment of Hon. Justice Joseph Murangira J in **High Court Criminal Case 089 of 2011** at Rukungiri, dated 6/11/2013 in which the appellant was convicted of rape contrary to **Sections 123 and 124 of the Penal Code Act** and sentenced to 15 years imprisonment.

He now appeals against both conviction and sentence on the following grounds;-

- 1. That the learned trial Judge erred in law and fact when he ignored the major contradictions in the prosecution side and reached a wrong conclusion.*
- 2. The learned trial Judge erred in law and fact when he held that there was no need for corroboration in sexual offences.*

3. The learned trial Judge erred in law and fact when he sentenced the appellant to 15 years imprisonment which was manifestly excessive in the circumstances.

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At the hearing of this appeal, learned counsel Mr. Barekensi Franco appeared for the appellant who was in Court. The respondent was represented by Ms. Jennifer Amumpaire, Principal State Attorney.

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The Appellant's Case.

Ground one

It was argued for the appellant that the learned trial Judge erred when he failed to resolve a major contradiction in the prosecution case in favour of the appellant and thus arrived at a wrong decision.

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Counsel submitted that whereas the complainant who testified as PWI stated in her testimony in court during cross examination that she had been raped by the appellant on 14.5.2010 at 5:30 pm, the same witness had testified in her examination in chief that on that day she met the appellant at 9:00pm. Counsel concluded that this was not a minor contradiction as the Court record indicates that she insisted she had been raped at 5:30 pm in spite of Court's observation that her testimony did not make sense.

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It was submitted further that she was not re-examined on this issue and as such this contradiction stands. Further, that the learned trial Judge ought to have resolved the contradiction in favour of the appellant, but he ignored it.

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He asked Court to find that the contradiction in the testimony of PW1, the complainant, was major and should have been resolved in favour of the appellant. He asked court to uphold this ground and allow the appeal.

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Ground 2 and 3

On ground two, Counsel submitted that the learned trial Judge erred in law and fact when he held that there was no need for corroboration in sexual offences. He argued that there was no evidence to corroborate the story of PW1 that indeed she was raped by the appellant on 14/5/2010. Further that there was no evidence to link the appellant to the crime.

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In the alternative but without prejudice, counsel submitted on ground 3 that the sentence of 15 years imprisonment imposed on the appellant was harsh and excessive in the circumstances. He asked Court to find so and reduce it to 13 years.

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The Respondent's Case

Ms. Amumpaire for the respondent opposed the appeal and supported the sentence.

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95 On ground one, counsel conceded that the complainant
PW1 during her testimony in Court had contradicted
herself. Counsel agreed that while she had stated in her
examination in chief that the offence had been committed
at 9:00pm, in cross examination she stated that the time
100 was 5:30pm.

Counsel however submitted that considering her testimony
as a whole, it could be implied that PW1 was raped at
9:00pm and not 5:30pm as stated in her cross
105 examination.

Counsel submitted that this contradiction was minor and
did not go to the root of the case and asked Court to
disregard it. Counsel submitted that there was
110 uncontroverted evidence by both the prosecution and the
defence that PW1 and the appellant were together that
night of 14/5/2010 at 9:00pm and beyond.

Further, that the contradiction on the issue of time did not
115 point to deliberate untruthfulness on the part of PW1 but
could have been due to lapse of time, the witness having
testified three years after the incident, she could have been
traumatised by the whole incident as the Judge noted.

120 She relied on **Alfred Tajar Vs Uganda, EACA Criminal.
Appeal No. 167/1969**, for the authority that minor
inconsistencies resulting from loss of memory and lapse of

time may be ignored unless they show to be deliberate lies intended to mislead Court.

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On the issue of corroboration, counsel submitted that the evidence of PW1 alone, even without corroboration, was sufficient to sustain a conviction against the appellant.

130 Further, Counsel argued, Court took into account the evidence of all the other witnesses, including evidence on DNA of both PW1 and the appellant that was carried out by the Government Analyst, before coming to the conclusion that the prosecution had proved the case beyond
135 reasonable doubt.

On the alternative ground of sentence, counsel submitted that 15 years for rape was neither harsh nor manifestly excessive. She relied on **Mubangizi Vs Uganda, Court of**
140 **Appeal Criminal Appeal No. 12 of 2012** (unreported), in which this Court upheld a sentence of 30 years imprisonment for rape. She asked Court to dismiss the appeal and to confirm the sentence.

145 **Resolution of Issues.**

This being a first appeal, this Court is required to re-appraise all the evidence and come up with its own inferences on all issues. This is a requirement under **Rule**
150 **30(1)(a) of the Rules of this Court** which stipulates as follows;

Rule 30(1) (a)

155 ***“On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the Court may:-***

(a) Reappraise the evidence and draw inferences of fact;

160 This duty of the first appellate Court was re-echoed by the Supreme Court in **Kifamunte Henry Vs Uganda, Criminal Appeal No. 10/1997** as follows;-

165 ***“The first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make its own mind not disregarding the judgment appealed from but carefully weighing and considering it”.***

170 We shall therefore proceed to reappraise all the evidence adduced at the trial and we shall make our own inferences on all issues of law and fact.

175 We have carefully listened to the submissions of both counsel on all the grounds of appeal. We have also read the Court record carefully and perused the authorities cited to us.

The appellant's case is that the evidence adduced by the prosecution contained contradictions on material issues and, as such, was insufficient to sustain a conviction. We have looked at the evidence of the prosecution and we have indeed found contradictions. The first contradiction as pointed out by counsel for the appellant is in respect of time. Whereas PW1, the complainant, in her examination in chief testified that she met the appellant who was well known to her and asked him for a lift at 9:00pm on the evening of 14/5/2010, in her cross examination she stated that the appellant raped her at 5:30pm on the same day.

In this regard the Court record in respect of her testimony during cross examination reads as follows;

"He drove me to the play ground, and raped me. It was one mile from where he picked me. He took completely a different direction from where he got me. It was 5:30pm when he raped me. (The witness insists at 5:30pm despite courts' observation that it does not make sense)"
(emphasis added).

There was no clarification by PW1 in re-examination as the State Counsel ~~choose~~ ^{chose} not to re-examine her. We don't think that this was a simple matter attributable to loss of memory due to lapse of time. It appears to us that the witness was emphatic about the exact time she was raped.

205 We know from her own testimony in chief and from that of
PW4 that she was seen with the appellant at about 8:00pm
when she bought drinks from PW4's shop, returned to the
appellant's car and they both drove off.

210 Her testimony in cross examination that she was raped by
the appellant at 5:30pm appears to have been deliberate
falsehood. We do not want to speculate why PW1 would tell
such an obvious lie on oath, but the record remains
unchanged even when she was warned by the trial Judge.
215 She had an opportunity to correct the record in re-
examination but she did not. We note that this was not an
ordinary witness, she was a police officer.

We are unable to deduce from the prosecution evidence as
220 a whole the exact or even approximate time PW1 could
have been raped. PW1 stated that she had met the
appellant at 9:00 pm, the two drove 200 meters, stopped at
PW4's shop where she bought drinks. She returned to the
appellant's vehicle and both drove to a play ground one
225 mile away where she was raped by the appellant.

From PW1's testimony, therefore, she was probably raped
between 9:00pm and 10:00pm on 14/5/2010. We would
put the time at 9:30pm from our own evaluation of her
230 evidence, because PW1 herself puts the distance between
PW4's shop and the place she says she was raped as one
mile away.

235 PW3 in his testimony stated that PW1 was outside his house crying at 3:00am on 15.5.2010 and sought his help to escort her to police because she had been raped. Further that he escorted her to the police post at 4:30am where the police officer on duty recorded her statement after which
240 PW2 took her to a health centre, apparently to seek medical help.

PW4 put the time she saw PW1 with the appellant at his shop at 8:00pm on 14/5/2010. No other witness said
245 anything about the time the rape may have taken place, not even PW5 who states to have received PW1 at his house on the morning of 15/5/2010 and who received her police statement.

250 But this is not all. PW1's entire testimony is full of gaps and contradictions and it is largely unbelievable. She states that she met the complainant at 9:00pm on 14/5/2010 somewhere near Kanungu Police Barracks. She does not state the exact place. The appellant had parked
255 his car near the road and he offered her a lift. She was going to PW4 Alex's place, which is just 120 meters away, apparently this place was a bar or shop. Upon getting to PW4's shop or bar, she disembarked. But the appellant did not leave, he remained in his car parked outside the
260 shop. She returned to the car with drinks. She does not

mention the kind of drinks. The appellant stated that she bought alcohol for both of them. She just stated she bought drinks. PW2 states that he had sent her to buy soda. The two, PW1 and the appellant then drove off. In her
265 testimony, PW1 stated that she was then driven by the appellant one mile away to a play ground where she was raped.

Nobody got to know that she had been raped until she
270 turned up at PW3's house at 3:00a.m, the morning of 15/5/2010. PW3 in his testimony stated that he then escorted her to Kihihi police post, where they reached at 4:30am and thereafter went to a health centre.

275 However PW5 Detective Sergeant Turayayebwa's testimony sharply contradicts both the evidence of PW1 and PW3. He states that PW1 came to his house crying very early on 15.5.2010. He does not state the exact time she came to his house. He states that he referred her to the police
280 station, then he immediately followed her there and recorded her statement after which he advised her to go to a health centre. But he does not mention anything about PW3 who said he was the one who took PW1 to the police station and thereafter to the Health Centre.

285 PW3 himself said nothing about PW5. The complainant PW1 said nothing about having gone to PW3's house at 3:00am. She stated that she was driven to her aunt's

house by the appellant after the rape, and she reported to
290 her aunt what had happened to her. The time again is not
mentioned. Her aunt was not called to testify. There is a
gap between 9:30pm on 14/5/2010 (the probable time of
rape from her own testimony) to 3:00am when she is stated
to have reported to PW3's home. Again, in her testimony,
295 she does not mention that she reported the rape to PW3 at
3:00am on 15/5/2010. She stated that she reported to
PW5 but even then does not state the time neither does
PW5.

300 None of the witnesses could positively corroborate her
story. Because we find that she was not persuasive, her
testimony required corroboration. There was none. PW7
Dr. Kasada David who presented the medical examination
report in Court in the absence of Dr. Matumaine Kibanshe
305 who examined her, testified that the medical report
indicated vaginal injury. We have seen that report. It
indicates that PW1's vagina had bruises. The report
classifies the injuries as grievous. We do not accept the
conclusion of this report. Bruises cannot be classified as
310 grievous harm. Doctor Kasada, PW7 stated that PW1 had
vaginal injury, whereas the report mentions only bruises. It
was stated that the appellant was a known H.I.V victim
and as such PW1 was put on H.I.V emergency treatment
and also given emergency contraceptives. This would

315 clearly indicate that PW1 had unprotected sex. What is surprising is that no traces of semen were found in her vagina or on her clothes. Semen was also not found on the appellant's clothes, at least there is no such evidence on record.

320 There is no indication on record as to how Dr. Kasada came to testify and present a medical report made by Dr. Matumaine. We presume that this was done under **Section 30 of the evidence Act**. However there is nothing on
325 record to indicate that the prosecution had applied to invoke **Section 30 of the evidence Act** and there is no ruling of Court permitting them to do so. The evidence of PW7 therefore appears to have been improperly admitted and we would expunge it from the record.

330 P.W.8 presented DNA test results from samples lifted from the appellant's clothes, which were matched with samples taken from PW1 and the appellant. The tests were positive for both PW1 and the appellant. The only logical conclusion
335 from the testimony of this witness was that the appellant and PW1 were in contact with each other.

Be that as it may, the appellant in his defence stated that
340 his clothes were forcefully removed from him at the police station by the police without any blood stains and that the blood was smeared on the clothes by the police, in order to

frame the appellant. This is not farfetched evidence. With all due respect to the learned Judge, he erred when he
345 rejected the appellant's defence without giving it any consideration at all. Had he done so, he would have observed that the chain of exhibits was broken. There is no evidence on how exactly the clothes were recovered from the appellant, who received them, who marked them and
350 how they ended up at the government analyst laboratory. We know that PW1 was a police officer stationed at Kanungu. The arresting officer, the investigating officer and other police officers were her colleagues at the same police station. The appellant's defence that his clothes were
355 removed and then stained later with PW1's blood is not farfetched in the circumstances of this case. Here the trial Judge erred when he summarily dismissed it.

The appellants' defence, coupled with the broken chain of
360 exhibits should have been resolved in the appellant's favour. The judge stated that he relied on retracted statements of the appellant to PW5 and PW6 to conclude that he had sexual intercourse with PW1. There is nothing in PW6's testimony which suggests that the appellant ever
365 admitted having sexual intercourse with PW1.

In his testimony in chief, PW5 states in regard to this issue as follows;

370 ***“The victim led me to the scene, in an isolated
football pitch. She showed me the place. I drew a
sketch map. The accused accepted he had sexual
intercourse with her consent”.***

375 There is nothing on record to indicate that a charge and
caution statement was ever taken from the appellant and
that he had admitted the charge.

380 It is not indicated anywhere on Court record or proceedings
that a charge and caution statement of the appellant was
exhibited. There is none on record. This issue was never
put to the appellant in cross examination at all. We are
therefore at a loss as to where the learned trial Judge
found this evidence.

385 Even if such a statement had been recorded and later
retracted, it would not have been admitted without first
holding a trial within a trial. We find that the learned trial
Judge erred when he found that the appellant admitted
having had sexual intercourse with PW1.

390 We find that the prosecution case was contradictory,
contained lies, was full of glaring gaps and was insufficient
to sustain the charge of rape against the appellant.

395 We find also that the learned trial Judge erred when he
based the conviction of the appellant on an admission that
was not made under charge and caution.

We also find that the learned trial Judge erred when he
400 dismissed the appellant's defence summarily without giving
it proper and due consideration.

We find that the prosecution failed to prove the time the
rape took place. We also find that the complainant PW1
405 lied when she stated that she was raped at 5:30pm.

The learned trial Judge also erred when he found that PW7
had testified that he had examined PW1 and found that
"there was penetration." Firstly PW7 never examined PW1.
410 He simply presented to Court a report made by another
doctor one Dr. Matumaine Kibanshe who was unable to
come to Court. She is the one who examined PW1 and
made a report set out in PF3 exhibit PE2. That report does
not state that PW1 had been sexually assaulted. She
415 makes no such conclusion. It simply states that the doctor
had observed vaginal bruises, and that is all. There was no
basis upon which the learned trial Judge could have
concluded that the doctor had found that there was
penetration.

420 We find that nothing in that witnesses' testimony to
confirm the blood stains on the clothes was that of PW1.
What was matched was DNA and not the blood sample
from the appellant's clothes. At least the testimony does

425 not state so. We find that ground one of the appeal has
substance and we uphold it. This appeal therefore
succeeds on this ground alone.

430 However, we find it necessary to address ourselves on issue
of law raised in ground 2 of this appeal.

Learned counsel for the appellant contended that the
learned trial Judge erred when he convicted the appellant
on uncorroborated evidence. This ground is not
435 sustainable as a court may in certain circumstances
convict on uncorroborated evidence. In **Bukenya Joseph
Vs Uganda Court of Appeal Criminal Appeal No. 222 of
2003**, this Court held as follows on the law governing
corroboration in sexual offences.

440 *"The law governing corroboration is well
established. See Chilla v R [1967] ^{E.A.} 722; R v
Baskerville [1916] 2 KB 658; Jackson Zite v
Uganda SCCA No. 19 of 1995 (unreported). It is
445 trite that where a child of tender years gives
unsworn evidence, that evidence must be
corroborated with independent material evidence
before a conviction can be based on it. It was
stated in ~~R v Chila~~ ^{Chilla v R} (supra) that the Judge must
450 warn itself of the dangers of conviction of an
accused with uncorroborated testimony and may*

convict in the absence of corroborating evidence if he or she is satisfied that the evidence is truthful.

455 A court may also convict on uncorroborated evidence of child of tender years, in this regard *Section 40(3) of Trial On Indictment Act* states:-

Section 40(3) of the Trial on Indictment Act states:

460 ***“Where in any proceedings any child of tender years does not in the opinion of the court understand the nature of an oath his evidence may be received though not on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth.***

465 ***Provided that where the evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some material evidence in support thereof implicating him”.***

In **Okello Geoffrey Vs Uganda Court of Appeal Criminal Appeal No. 032 of 2010, Munjuni Apollo Vs Uganda Criminal Appeal No. 26 of 1999** and in **Francis Birungi Binaisa Court of Appeal Criminal Appeal No. 171 of**
475 **2010**, this Court observed as follows;

480 ***“On 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.”***
(Emphasis added).

We would dismiss ground 2 of this appeal.

485 This appeal therefore succeeds on the first ground alone. The appellant’s conviction is hereby quashed and sentence is hereby set aside. The appellant is set free unless he is being held on other charges.

490 We so order.

495 **DATED AT MBARARA THIS ²⁶.....DAY OF OCTOBER 2016.**


500 **HON. JUSTICE KENNETH KAKURU**
JUSTICE OF APPEAL

505 **HON. JUSTICE BYABAKAMA MUGENYI SIMON**
JUSTICE OF APPEAL


510 **HON. JUSTICE ALFONSE C. OWINY-DOLLO**
JUSTICE OF APPEAL