THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

[CORAM: OWINY- DOLLO, DCJ; MUSOTA and TUHAISE, JJA]

CRIMINAL APPEAL NO. 185 OF 2015

(Arising from the judgment of the High Court of Uganda at Jinja, (Basaza, J) in Criminal Session Case No. 182 of 2014)

MULIIKA GEOFREY..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

JUDGMENT

Background

The Appellant was the headmaster of St. Mary's College Lugazi; a boarding school. Mwesigye Mary, hereinafter referred to as the victim, was a student at the school. She was 16 (sixteen) years of age at the time; and was in senior three. On the 18th March 2014 at around 5:30 a.m. after she had taken a bath, and was preparing to go for early morning class, she was informed by a fellow student that the Appellant had sent for her. She went to the Appellant's office; and the Appellant led her inside. From there, the Appellant hugged, kissed, and caressed, her. He then forced her into live sexual encounter by penetrating her twice; and thereafter he let her go. He advised the victim to take a shower; and warned her not to tell anybody.

However, while still at the Appellant's office, the victim reported the incident to her mother using the Appellant's phone. Thereafter, she felt a lot of pain, and discovered that she was bleeding. Her mother collected her from school, and took her for medical examination. The

medical examination results revealed that the victim had a ruptured hymen, and there was some evidence of bleeding which could have been due to forceful sexual intercourse. In the course of investigations, the police recovered blood stained knickers from the victim; and this, together with other samples, were exhibited by the police and sent to Government Analytical Laboratory for examination.

The Appellant was arrested; and a charge of defilement contrary to section 129 (3) of the Penal Code Act, was preferred against him. He underwent a full trial before Court; and was convicted, and sentenced to 15 years imprisonment. It is against this conviction and sentence that he has appealed to this Court.

Grounds of Appeal

The grounds of appeal, as are laid out in the Memorandum of Appeal, are as follows:

1. The trial Judge erred in law and fact when she failed to evaluate the evidence on record thereby convicting the Appellant.
2. The trial Judge erred in law and fact when she convicted the appellant basing on an insufficient medical report and disregarded the findings in the DNA Analysis report.
3. The trial Judge erred in law and fact when she convicted the appellant basing on uncorroborated evidence of sole identifying witness.
4. The trial Judge erred in law and fact when she irregularly failed to make a ruling on whether prosecution had established a prima facie case

5. That the trial judge erred in law and fact when she sentenced the appellant to 15 years imprisonment, which is deemed to be harsh and excessive in the circumstances of the case.

Representation

At the hearing of the appeal, the Appellant was represented by Counsel Medad Sseggona. The Respondent was represented by Counsel Macrina Gladys Nyanzi (Principal State Attorney).

The case for the Appellant

Counsel for the Appellant consolidated and argued grounds 1, 2, 3 together; and then argued the alternative ground on sentence. He submitted that the burden of proof in criminal matters lies on the prosecution; and that the standard is beyond reasonable doubt. He submitted further that such evidence must be consistent, coherent and conclusive to sustain a conviction. He contended that in the instant case, the learned trial judge did not apply those principles. Counsel submitted that there were inconsistencies in the evidence of the victim. He attacked the victim's (PW2) testimony that the Appellant pushed her over a chair, held her with one hand, pulled her skirt up and then pulled her knickers down with the other hand, and removed his trousers; and then defiled her.

Counsel argued that it is improbable that a person who has consistently applied one hand to hold his victim, and is using the other hand to lift up her skirt and remove her knickers would, at the same time, remove his own trousers and defile her. Counsel contended further that despite the evidence of PW2 that the Appellant pushed her forcefully over a chair and subjected her to forcible sexual

intercourse, the medical examination report does not show evidence of any bruise on her body. Counsel further pointed out that PW7 who took the swab, discarded it and instead submitted the blood for a test; and yet evidence of the analytical laboratory examination on the swab would have either confirmed or ruled out the fact of contact between a man and a woman. Counsel urged Court to take serious cognizance of the fact that PW2 was shown to have told lies before; which led to her dismissal from her previous school.

Counsel submitted in the alternative that if Court finds that the trial judge was justified in convicting the appellant, then there are mitigating factors that Court should consider. These are that the convict is a 1st time offender, he is a professional with a career ahead of him since he is only 35 years of age, and he cooperated with the police in their investigations. Counsel also admitted that there are aggravating factors in this case; namely, that the appellant being a head teacher, the victim was under his parental care; hence, he had a parental duty to her, and this aggravated the offense. Counsel then prayed for a lighter sentence of 5 years jail term.

Counsel for the Respondent

Counsel for the Respondent referred Court to page 5 of the record of proceedings with regard to sexual intercourse. He submitted that the trial judge relied on the evidence of the victim (PW2), of PW1, and the medical evidence exhibited as 'P4'. Other evidence was from the investigating officer (PW6) who, from the hospital, saw the redness in the victim's private parts. All this, Counsel argued, corroborated the evidence of the victim (PW2). Counsel submitted that further evidence

in corroboration was that of Sonia (PW4); who testified that (PW2) had disclosed to her at about 5.30 a.m. from the dormitory that the appellant had summoned her (PW2) to his office; and that about 30 to 40 minutes later, PW2 returned to the dormitory looking tired, cold, and with tears in her eyes.

Counsel pointed out that what was examined on the instructions of the police was the blood sample from the victim, the blood stains on the knickers, and blood sample from the appellant. The purpose was to establish whether the suspected blood on exhibit 'B' (victim's knickers) was of human origin; and to ascertain whether either the victim or the appellant was the donor of the suspected blood stains on exhibit 'B'. Counsel then submitted that the test carried out was about DNA; hence the finding that there was no genetic evidence showing that the appellant was the donor of the DNA profile recovered from exhibit 'B'. it was not about establishing the existence of spermatozoa in the blood stain in exhibit 'B'.

Counsel challenged the contention by counsel for the appellant that it was not possible for the appellant with two hands to do the things the victim said he did to her. He argued that PW2 was clear in her testimony as she described the manner and process of the sexual assault the appellant meted out on her. She narrated how the appellant pushed her onto the armless chair; and when she fell on the chair, he let go of her hand, lifted her skirt up, and then pulled down her knickers. The accused therefore had his second hand free to pull down his own pants; following which he then sexually molested her.

With regard to sentence, Counsel submitted that there are two types of aggravating factors; one, where the victim is below 14 years of age,

and then where there exists a parental relationship between the perpetrator and the victim. Counsel relied on the case of ***Ntambala Fred vs. Uganda - S.C. Crim. Appeal No. 34 of 2015***; and so, he prayed for a sentence of 10 years in jail since the aggravating factor in the instant case is the parental relationship between the appellant and the victim.

COURT'S DETERMINATION OF THE APPEAL

The substance of this appeal is whether, in convicting the appellant, the learned trial Judge properly evaluated the evidence adduced at the trial. We think in this regard, grounds 1, 2 and 3 of appeal can safely be considered together. The duty of this Court, being a first appellate Court in the matter, is settled in law. The Supreme Court, in the case of ***Oryem Richard vs Uganda; Criminal Appeal No. 22 of 2014 (SC)*** stated thus:

> *"We should point out at this stage that rule 30 (1) of the Court of Appeal Rules places a duty on the Court of Appeal, as a first appellate court, to reappraise the evidence on record and draw its own inference and conclusion on the case as a whole; but making allowance for the fact that it has neither seen nor heard the witnesses. This gives the first appellate court the duty to rehear the case...."*

Owing to this duty, we shall herein reappraise the evidence on record; to enable us determine whether, as was contended by the counsel for the appellant, the trial judge relied on uncorroborated evidence to reach a verdict of guilty; upon which she convicted the appellant. Corroboration evidence is defined in ***Osborne's Concise Law Dictionary, 5th Edition,*** at page 90, as independent evidence which implicates a person accused of a crime by connecting him with it; evidence which

confirms in some material particular not only that the crime has been committed but also that the accused committed it.

Where the offence in issue involves alleged sexual intercourse, it is incumbent on the prosecution to prove that there was carnal knowledge of the victim. Accordingly then, in the matter before us, the prosecution was under duty to prove that there was penetration of PW2's vagina. In ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), the Court clarified that once there is penetration, however slight it may have been, it suffices to prove that carnal knowledge of the victim took place. The burden lies on the prosecution to adduce evidence, which proves beyond reasonable doubt, that the alleged sexual assault on the victim in fact occurred. As was held in ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995,*** this may be established either by direct or circumstantial evidence.

The evidence adduced by the victim, regarding the sexual assault, provides the best proof of penetration. As was succinctly put in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997***, albeit that it was with regard to the issue of evidence of identification, the inculpatory evidence adduced by the victim of the criminal act, in a case of this nature, offers the best evidence. Medical evidence and, or any other evidence may be adduced to corroborate that evidence. In ***Abbas Kimuli vs. Uganda; C.A. Crim. Appeal No. 210 of 2002*** (unreported), where it followed the decision in ***Hussein Bassita*** (supra), the Court reiterated the position of the law that the doctor's report is desirable for proof of sexual offence; but, however, it is not a mandatory requirement.

In ***Chila & Anor vs Republic [1967] E.A. 72*** at 77, in upholding the conviction appealed against, the Court of Appeal for East Africa clarified that in

East Africa, the position of the law on corroboration in sexual offences was as follows: -

> *"The Judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant. But having done so, he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no warning is given, then the conviction will normally be set aside, unless the appellate court is satisfied that there has been no failure of justice".*

In ***Kibale Isoma vs Uganda, S.C. Cr. Appeal No. 21 of 1998 [1999]1 E.A. 148***, the Supreme Court followed the decision in ***Chila & Anor*** (supra), and held that it is *'still good law in Uganda'*. In ***Uganda vs. George Wilson Simbwa (SC) Criminal Appeal No. 37 of 1995***, the Court stated that:

> *"Corroboration affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at common law or within the class of offences for which corroboration is required."*

Although corroboration helps to establish the truth of a witness' testimony with greater certainty, a witness' uncorroborated evidence can still suffice to found a conviction based entirely on it. It is provided in section 133 of the Evidence Act that:

"Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact."

The prevailing position of the law now is that there is no requirement for corroboration of the evidence of a victim of sexual offence for Court to use it to secure a conviction. We find the Court's advice in ***Nabulere vs. Uganda - Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77***, which was with regard to evidence of identification, but is applicable in considering evidence of the victim of a sexual offence, as a single witness, quite relevant in this case before us. In that case, the Court stated as follows: -

> *"If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered."*

Hence, upon the Court finding the victim a truthful and reliable witness, and this as applicable for proof of sexual offence, as it is in other offences, conviction would properly result even when it is founded solely on the testimony of the victim as a single witness. As was stated by the Supreme Court in ***Sewanyana Livingstone vs. Uganda SCCA No. 19 of 2006*** *"what matters is the quality and not quantity of evidence."*

In the instant case before us, the trial judge relied on the evidence of the victim (PW2); which, alone, was sufficient to secure a conviction. Upon reviewing the evidence before us, we find that the learned trial judge was justified in relying on the evidence of the victim. We should point out that there is no evidence suggesting any motive for the

victim (PW2) to frame the appellant. To the contrary, the summoning of PW2 by the appellant, to appear before him at 5.30 a.m. was questionable; and would raise eyebrows. The fact that the victim was earlier dismissed from another school for giving a false name as hers, which Counsel for the appellant intimated was evidence of her untruthfulness, is in our view insufficient to show that she could go as far as fabricating such a grave allegation against the appellant; with no apparent benefit to her at all.

Although there is no requirement for corroboration of the evidence of a victim of a sexual offence, the evidence of PW2 (the victim) herein was in fact amply corroborated by that of PW1, the medical evidence (exhibit 'P4'), and, as well, evidence of PW6 the investigating officer who saw the reddish stain in the victim's private parts. The trial Judge rightly relied on the medical examination report (Form 3A) adduced by PW7; which established that the victim's hymen had recently been ruptured, resulting in a hyperaemic vaginal wall condition.

The trial Judge rightly held that the absence of spermatozoa or other material from the accused on the victim did not mean that the appellant did not subject the victim to sexual intercourse. Despite evidence of ejaculation being clear manifestation of sexual intercourse, it is not exclusive proof of sexual intercourse; see ***Uganda vs Kizito Mutyaba HC Cr. Case No. 8/2003 (Supra)***. All that is required to prove sexual intercourse is penetration; and for this, the slightest penetration of the victim's vagina suffices to perpetrate the offence, and justifies a conviction. However, before convicting the perpetrator, the trial judge must first warn the assessors and himself or herself of

the danger in convicting the perpetrator basing on the uncorroborated evidence of the witness whom the Court has found to be truthful.

In the ***Chila & Anor*** case (supra), the trial judge was satisfied that the victim was a truthful witness. However, without either warning the assessors or himself of the need for other evidence, which would implicate the accused in the commission of the offence, and thus corroborate the victim's evidence, he convicted the accused. On appeal, the Court of Appeal for East Africa upheld the conviction, but laid down the rule on the need for Court to warn the assessors and itself in the terms reproduced herein above.

In the instant case before us, the learned trial judge did warn the assessors, and herself, of the danger that lies in relying on the evidence of a single identification witness. We think in this regard, that the learned trial judge applied the wrong test. The test for the credibility of evidence of a single identifying witness seeks to ensure that the witness was not mistaken in the identification of the assailant. Hence, it considers factors that could enhance or reduce the possibility of correct identification. With regard to a victim of a sexual assault as a single witness, the test for the establishment of the truth that the sexual offence took place is the credibility of the victim as a sole witness to the occurrence of the sexual assault.

In the matter before us, the identity of the assailant of PW2 was not in issue. Both the appellant and PW2 agree that they were both at the place PW2 claimed the assault took place. The appellant however denies that the sexual assault PW2 contends the appellant subjected her to, took place. Despite the learned trial judge applying the wrong test regarding the evidence of a single witness in circumstances as

this, it did not occasion any miscarriage of justice. The learned trial judge properly and adequately evaluated the evidence before her, inclusive of the evidence that corroborated that of the victim, and came to the correct findings and conclusions that the prosecution had proved beyond reasonable doubt that the appellant did defile the victim as was alleged. We are therefore unable to fault her in her findings and the conclusions she reached.

Issue 4

It is trite that sentencing is a matter for the discretion of the trial Court; and as with all judicial discretions, it must be exercised judiciously. Therefore, an appellate Court can only interfere with the lower Court's exercise of discretion if the sentence imposed is either manifestly excessive or so low as to occasion a miscarriage of justice. The appellate Court can also interfere where the trial court ignores to consider an important matter or circumstance, which it ought to have done while passing the sentence, or where the sentence imposed is illegal or wrong in principle; see ***Kiwalabye Bernard v Uganda; Criminal Appeal No.143 of 2001 (unreported).***

In the case of ***Ntambala Fred vs. Uganda - SCCA No. 34 of 2015***, the appellant was the biological father of the 14 year old girl he was convicted of having defiled. The appellate Court upheld both the conviction and the 14 years sentence. In the instant case before us, the appellant being the victim's head teacher was similarly placed in a parent/child relationship with her; thus aggravating the offence. The defence has presented mitigating factors for Court's consideration. These are that the appellant was a head teacher; and given the opportunity, he could still serve society better as a reformed person.

He is the sole bread-winner for his family. The victim was 16 years of age at the time of commission of the offence.

We have taken note of the aggravating factors that were pointed out to Court by the respondent; and have taken into account the fact that the offence of defilement is quite rampant. Most noteworthy is the fact that parents hand over their children to the school administration in the knowledge and faith that the children are in the hands of fellow parents whose responsibility is to afford the children not only academic, but a wholesome education. It is thus a grave breach of trust and an exhibition of moral depravity for one of the other parents to turn against the child and subject her into sexual abuse.

Nonetheless, we take into account the mitigating factors favouring the appellant; and take into account the 7 months he spent on remand before conviction. Therefore, we reduce the sentence imposed by the trial Court, to 14 (fourteen) years; to run from the date of conviction.

Dated at Jinja this 4th day of April 2019

Alfonse C. Owiny - Dollo
DEPUTY CHIEF JUSTICE

Stephen Musota
JUSTICE OF APPEAL

Percy Night Tuhaise
JUSTICE OF APPEAL