THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO COA-00-CR-CN-0329- 2010

OKELLO GEOFFREY …… APPELLANT

VERSUS

UGANDA ……..…… RESPONDENT

Coram:

Hon. Justice Steven B. K. Kavuma JA
Hon. Justice Mwangusya Eldad JA
Hon. Justice Solomy Balungi Bossa JA

An appeal from the conviction of a sentence of the High Court Holden at Kitgum before Hon. Justice Remmy Kasule

JUDGMENT OF THE COURT

The appellant was indicted for the offence of Aggravated Defilement contrary to Section 129 (i) (c) of the Penal Code Act. The particulars were that between December 2008 and January 2009 being a person of authority at Latai Primary School performed sexual intercourse with **AKWERO SARAH**, a girl below 18 years of age. On 20.11.2011 he was convicted by the High Court sitting at Gulu and sentenced to a term of twenty two years imprisonment. He appeals to the Court against both conviction and sentence.

The facts giving rise to the trial and eventual conviction of the appellant were that **AKWERO SARAH** (PW1) hereinafter referred to as the victim who was aged 16 years

at the time of the trial was a primary school pupil of Latayi Primary School where the appellant was a teacher. She was a resident of Latayi IDP Camp. During the month of December 2008 and January 2009, the accused had an affair with her and when her mother learnt of it she confronted him and warned him to keep off her daughter because she was still young. According to the victim, the accused who had been having sexual intercourse with her prior to the warning first stopped having the sexual intercourse with her but later resumed.

On 20.03.2009 the victim was at home when the appellant sent for her. She found him standing by the roadside and they started walking together towards the school. They were found by the Headmaster of the school who accused them of having been having sexual intercourse which they both denied. The Headmaster called a Local Council Official and other people gathered at his home. The other people included Oyat Churchill (P.W.3) and Obalim Francis Bob (P.W.4). The two witnesses testified that the Appellant admitted having had sexual intercourse with the victim and asked for forgiveness. The matter was forwarded to the Police who arrested the Appellant. The following day both the victim and the Appellant were taken to Patongo Hospital for medical examination. The examination of the victim revealed that she was aged 15 years, there were signs of penetration and the hymen had been ruptured sometime back.

The examination of the appellant revealed that he was aged 25 years old, had no physical injuries and his mental condition was normal.

The Appellant gave unsworn testimony in his defence. He stated that on 20.03.2009 between 8:30 and 10:00 p.m. he was at home alone when he saw the victim who told him that she had been told that he has sent for her. He told her that they should go back to her home but before reaching her home they met the Headmaster of the school who told them to go to his home first. On reaching the Headmaster's home, the Headmaster accused him of having been having sexual intercourse with the victim which he denied. Some other people had gathered at the Headmaster's home. The Appellant later went away leaving the gathering at the Headmaster's home. The

following day the matter was reported to the Police following which he was taken to Pader where he was charged.

On the specific allegation that he had defiled the victim, he denied having had sexual intercourse with the victim on the night of 20.03.2009 when he was found with her. He stated that he had known the victim for about five months and had at one time expressed his love for her but when her mother warned him to keep off her daughter because she was still a pupil in primary school, he heeded the warning and stopped his interest in the girl. He denied ever having had sexual intercourse with her during the period he had known her.

The trial Judge accepted the prosecution case and rejected the Appellants denial that he had never had sexual intercourse with the victim. Hence this appeal in which two grounds are raised in the memorandum of appeal. These grounds are:-

1. That the learned judge erred in Law and Fact when he convicted the Appellant on uncorroborated evidence thereby occasioning miscarriage of justice.

2. That the Learned Judge erred in Law and fact when the failed to properly evaluate the evidence, thus arriving at a wrong decision occasioning miscarriage of justice.

His prayer was that his appeal be allowed and the conviction and sentence be set aside.

At the hearing of this appeal, the Appellant was represented by Mr. Duncan Ondimu while the Respondent was represented by Mr. Byansi William, a Principal State Attorney.

In his submissions on the first ground, Mr. Duncan Ondimu stated that the trial Judge erroneously convicted the Appellant on uncorroborated evidence of the victim. He submitted that the evidence of the victim's mother which the judge held to be corroborative of the victims evidence did not amount to corroboration because she did not testify to any sexual act but a relationship that she had warned the Appellant about.

He also submitted that the medical evidence relied on by the trial Court to Corroborate the victims evidence was not reliable because according to the victim's evidence there was no examination of her private parts which was contradictory of the Clinical Officer's evidence who made findings that there had been penetration and rupture of the hymen.

In reply Mr. Byansi submitted that the trial Judge recognized the necessity for corroboration when he was summing up for the assessors and in his judgment. He found corroboration in the testimony of PW3 and PW4 both of whom testified that the appellant had admitted having had sexual intercourse with the complainant and asked for forgiveness.

The ground of appeal raises two points. The first point is whether or not corroboration is a legal requirement before a conviction in a sexual offence is entered and the second, which arises from the first, is whether or not if corroboration was required there was any in the circumstance of this case. In the case of **MUJUNI APPOLO Vs UGANDA (Criminal Appeal No. 26 of 1999**) this Court upheld a conviction for defilement where there had been no corroboration of the victims evidence and the DPP had submitted that he was not supporting the conviction on account of the fact that there had been no corroboration of the complainant's evidence regarding sexual intercourse.

In disagreement with the DPP this is what this Court held:-

> *"It is clear to us that by basing this appeal on the absence of Medical evidence, Mr. Bwengye is according medical evidence Undue Weight, overlooking the fact that it is merely advisory and goes to the fact and not Law. The court has discretion to reject it. Rivell (1950) Cr. App. R 87 Matheson 42 Cr. App. R. 145. The court can even convict without medical evidence as long as there is strong direct evidence when the circumstances of the offence are so cogent and compelling as to leave no ground for reasonable doubt, see RV Omufrejezyk [1950] 1Q B 388, 39 Cr. Appl. R. a where the conviction for murder was confirmed though the body was never found.*

> *We would point out that the type of corroborative evidence will vary from case to case. In 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 (underlining provided)*

From the above authority the position of the law as regards corroboration in sexual offences is that a conviction can be entered even if there is no corroboration so long as the court has cautioned itself of the danger of conviction without corroboration. This court has gone as far as pronouncing that the requirement for corroboration of evidence in sexual offences is discriminatory against women and is therefore unconstitutional. This was in the case of **BASOGA PATRICK Vs UGANDA** (Criminal Appeal No 42 of 2002) where this Court cited with approval of the finding in the Kenyan case of **MUKUNGU Vs R (2003) 2 EA** where it was held as follows:-

> *"the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against the qua women or girls. We think that the time has now come to correct what we believe is a position which the Courts have hitherto taken without proper basis, if any basis existed for treating female witness differently in sexual cases. Such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that decision which holds that corroboration is essential in sexual offences before a conviction are no good law as they conflict with Section 82 of the Constitution."*

So the evidence of a victim in a sexual offence is evaluated like any other evidence in a trial and for Court to base a conviction on un corroborated evidence of a victim of a sexual offence, the test to be applied to such evidence is that it must be cogent. The cogency itself is determined after a full evaluation of the evidence including whether or

not the victim is a truthful and reliable witness. It goes without saying that if the evidence adduced of the victim is worthless, no conviction can be based on it but that if it is credible, a conviction can be based on it even if there is no corroboration.

As a first appellate Court we are enjoined to re-appraise the evidence as a whole and subject it to a fresh scrutiny and reach our own conclusions. See rule 29(i)(a) of the Rules of this Court. **PANDYA VS R (1957) E.A. 336** and **KIFAMUNTE HENRY Vs Uganda SCCA No 10 of 1977**.

Our re-appraisal of the evidence starts from that of the victim who testified that she had an affair with the Appellant between December 2008 and March 2009 and during that time they had sexual intercourse at the appellant house at the school. The Appellant had briefly stopped having sexual intercourse with her when her mother learnt of the affair and warned him to stop having an affair with her daughter. He later resumed having sexual intercourse with her. On the fateful day, they had been found together although they had not had sexual intercourse. The victim was cross examined on her testimony and she confirmed that the Appellant use to have sexual intercourse with her although she did not report to anybody. The testimony of the Appellant on her affair with the Appellant and the acts of sexual intercourse is credible. It could have stood on its own to sustain a conviction and this was one of those cases that Court could have convicted without corroboration. However, the trial Judge found that corroboration was necessary. He found corroboration in the medical report indicating that there had been penetration and the testimony of PW3 and PW4 who testified that the appellant had admitted to having had sexual intercourse with the victim. Mr. Ondim attacked the two pieces of evidence and as required by Law this Court will re-evaluate the evidence to determine its value.

On the medical evidence, this Court does not attach any value to it because apart from the contradiction between the Medical Officer who testified that he carried out an examination of the victim's private parts and the victim who testified that not such examination had been carried out, we do not see what an examination of a girl who had been having sexual intercourse over a period of about three months would show

and as was held in the case of **MUJUNI APPOLO Vs UGANDA** (Supra), Court can convict without medical evidence as long as there is strong evidence to leave no ground for reasonable doubt. In another case of **BASSITA HUSSEIN VERSUS UGANDA Supreme Court Criminal Appeal No 35 of 1995** the Supreme Court was confronted with a case where both the Complainant's and the Medical evidence were never adduced during the trial and on determining whether sexual intercourse was proved the Court had this to say:-

> *"the Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical or other evidence. Though desirable it is not a hard and fast rule that victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse of penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt" (underlining provided)*

Given the unsatisfactory nature of the medical evidence adduced in this case, no reliance can be placed on it to prove the sexual act but that is not to say that the evidence of the girl that she had been having sexual intercourse with the appellant over a period of time would not provide the necessary proof.

On the evidence of Oyet Churchill, (PW3) and Obalim Francis Bob, (PW4) that the Appellant admitted that he had sexual intercourse with the victim Mr. Ondimu's main thrust of attack was that the evidence of the admissions was contradictory and there was no evidence as to the circumstances under which the admissions were made at the Headmaster's home. First of all neither PW3 nor PW4 stated that the admissions were made at the Headmasters home. The victim testified as follows:-

> *"Headmaster took both of us to his home. Headmaster called L.C. I Chairperson and made a call to my brothers. They all came; they tried to*

settle the matter up to 2:00 p.m. The accused was taken to Police. I went to Police the following morning. The accused had sex with me from his home, but not on this day when he was arrested.

I was asked by Oyat Churchill and I revealed that the accused had sex with me from December, 2008 stopped a bit in January, 2009, but resumed later up to March 2009."

Oyat Churchill (PW3) testified as follows:-

"There is nothing else she told me at the headmaster's home. Akwero Sarah admitted to me that she had had sex with the accused more that five (5) times and that on that day of arrest they had not done anything.

Akwero Sarah told me that they were having sex in the house of the accused. I was told that the matter would be settled at the sub county.

Accused first denied, but later he admitted and requested for forgiveness. I left the matter in the hand of the Local Administrators and the Police at Acholi Bur Police Station.

Then PW4

"….. I know Akwero as my pupil at Latai Primary School in Primary six. Accused was later handed over the higher authorities. Both accused and victim admitted having had a relationship as man and woman between them from December, 2008 to March, 2009. Both were having sex as, between themselves at accused's home at Latai Primary School."

From the above evidence there is no suggestion that the admissions were made at the headmaster home. Significantly, none of the witnesses who testified about these admissions was cross-examined on them. In the case of **SEBULIBA HARUNA Vs UGANDA Criminal Appeal No 54 of 2002** (unreported) this court restated the Law as regard an omission or neglect to cross-examine a witness on a material point as follows:-

> "The Law is now settled that an omission or a neglect to challenge the evidence in Chief on a material point by Cross examination would lead to an inference that the evidence is accepted subject to its being assailed as inherently incredible or palpably untrue. See **Sawoabiri and Another Vs Uganda SC Criminal Appeal No. 5 of 1990**."

The evidence of PW3 and PW4 cannot be said to be inherently incredible or palpably untrue. The trial Judge was entitled to rely on it for corroboration of the victim's evidence that the appellant had been having sexual intercourse with her before his arrest and prosecution. In conclusion of the first ground of appeal this court finds that the evidence of the Complainant was sufficient to prove the sexual intercourse and that even if corroboration was required, it was to be found in the evidence of an admission by the appellant that he had been having sexual intercourse with the victim.

On the second ground of appeal Mr. Ondimu's complaint was that the Appellant's evidence at the trial was not considered. According to him, there was no evaluation of what the Appellant stated regarding what happened at the Headmaster's house and neither was the conduct of the appellant who never escaped from the area. In reply Mr. Byansi submitted that the evidence of the defence was evaluated by the trial Judge.

Our perusal of the Court record and the judgment shows that the evidence for the prosecution and the defence was considered together. The events at the Headmasters home were not related to the acts of sexual intercourse complained of because no sexual intercourse took place on the day the Appellant was found with the victim in the school compound. The failure by the Court to specifically talk about it did not prejudice him at all. The same with the fact that the Appellant did not run away from the area. According to the Appellant the Headmaster took him to his home together with the Complainant and accused them of having been found having sexual intercourse which they both denied. It was a fact that on that night they never had sexual intercourse. There was no need for him to run away. Afterall he had been having an affair with the girl. This affair was known to the mother of the girl who warned him about it. He later resumed. He believed that the girl was in a secondary school and that it was okay to

have an affair with her because he expressed his love to her. We do not find the fact that he did not run away when found with her significant. We find no merit in the 2nd ground of appeal which is also dismissed.

On sentence no ground was raised in the memorandum of appeal as to severity. There were no submissions on it either. Before passing sentence the trial Judge took into account both the aggravating and mitigating factors. In absence of a ground of appeal this court cannot of its own violation interfere with the exercise of the trial Judge's discretion to pass a sentence which is provided by the law.

In the circumstances the appeal against the conviction and sentence is dismissed. Dated this 18th day MARCH… of 2014

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Hon Justice Steven B. K. Kavuma
Justice Court of Appeal

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Hon Justice Mwangusya Eldad
Justice Court of Appeal

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Hon. Justice Solomy Balungi Bossa
Justice Court of Appeal