THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 183 OF 2012

OLAA ALEX ..... APPELLANT

VERSUS

UGANDA.....RESPONDENT

(An appeal from the decision of the High Court Holden at Kitgum before His Lordship Hon. Justice Wilson Masalu Musene dated 29th June, 2012 in Criminal Case No. 0011 of 2012)

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE F.M.S EGONDA -NTENDE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

This appeal arises from the decision of His Lordship *Wilson Masalu Musene J,* in High Court Criminal Case No. 0011 of 2012 delivered on 29th June, 2012, in which the appellant was convicted of the offence of aggravated defilement contrary to *Section 129 (3)* and *(4)* of the Penal Code Act (CAP 120) and sentenced to 14 years imprisonment.

Brief facts

The brief facts as far as we could ascertain from the record are that, on the 28th of February 2011, the victim PW4 a six year old girl returned from school and did not find her grandmother, PW3 at home as she had gone to the garden. She decided to go and play with her friends a distance away from

home. While playing, the appellant who is her cousin called her but she refused to heed his call. The appellant then chased her, caught up with her and took her to his house where he had sexual intercourse with her. That evening, when her grandmother returned, she told her that the appellant had defiled her. The next day she was taken for medical examination. The doctor found that she had been defiled, a medical report was made to that effect. The appellant was arrested, indicted, tried and convicted of aggravated defilement contrary to *Section 129 (3)* and *(4)* of the Penal Code Act. He was sentenced to 14 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 received and relied on unsworn evidence of prosecution witness 4 without conducting a voir dire examination to ascertain her understanding of the nature of an oath.*
2. *That the learned trial Judge erred in law and fact when he failed to evaluate all the material evidence hence arriving at a wrong decision.*
3. *The sentence of 14 years was harsh and excessive in the circumstances.*

Representation.

At the hearing of this appeal learned Counsel *Mr. Levi Etum* appeared for the appellant while learned Principal State Attorney *Mr. Martin Rukundo* appeared for the respondent.

Appellant's Case

Mr. Etum submitted for the appellant that, the learned trial Judge erred in law when he received and relied on the evidence of PW4 who was at the time a

child of tender years without conducting a *voir dire.* He contended that, the requirement of conducting a *voir dire* is mandatory failure of which results into quashing of the conviction unless there is other material evidence before Court sufficient on its own to sustain a conviction. For the above proposition he relied on *Dhamuzungu Nathan Vs Uganda, Court of Appeal Criminal Appeal No. 70 of 2000, Nyasani S/o Bichana Vs R [1958] E A at 190* and *Section 40 (3)* of the Trial on Indictments Act (CAP 23).

He asked Court to quash the conviction.

On ground two, Counsel contended that, the evidence of the other three prosecution witnesses was full of contradictions and inconsistencies and as such it was incapable of sustaining a conviction. Firstly, Counsel submitted that, the medical report in respect of the victim does not bear a date when she was examined. Secondly, that, whereas PW1 testified that the Police Form 3 originated from Akiraro Police Station. It is indicated on it that it originated from Akwang Police Station. Thirdly, that PW1 told Court that, the Police Form was addressed to him on the 13th day of June 2011, yet in cross examination he testifies that, the examination was within 24 hours after the commission of the offence.

Counsel submitted that, although the victim stated that she was chased by the appellant, no one else corroborated this evidence. Counsel argued that this evidence was inadmissible and there being no other evidence to prove the appellant's participation in the commission of the offence, this appeal ought to be allowed.

On the alternative ground of sentence, counsel submitted that the learned trial Judge erred in law when he failed to comply with the provisions of *Article 23 (8)* of the Constitution. He asked Court to set aside the sentence and impose its own. He proposed a sentence of 10 years imprisonment from which the period he spent on remand be deducted.

Respondent's reply.

Mr. Rukundo opposed the appeal and supported the sentence. Although, he conceded that the learned trial Judge erred in law when he failed to conduct a *voir dire,* he contended that, failure to conduct a *voir dire* does not render the evidence inadmissible. He relied on *Muhirwe Simon Vs Uganda, Supreme Court Criminal Appeal No. 38 of 1995 (unreported),* for the above proposition of the law.

Counsel argued that, the testimony of the victim was corroborated by that of PW2 and PW3 which was independent. He argued that since the victim's testimony was corroborated by independent testimony, the trial judge was justified when he found that the evidence was sufficient to sustain the conviction. For the above proposition he relied on *Nyaguma David Vs Uganda, Court of Appeal Criminal Appeal No. 263 of 2006.*

He further contended that, PW1's failure to indicate the date on the medical evidence was a minor error which did not go to the root of the matter. He added that, PW1 testified that, the examination was within 24 hours, this was consistent with the testimony of PW2 and PW3, and resolved the issue of the date on which the victim was examined.

In respect of ground three which was argued in the alternative, Counsel conceded that the sentence imposed was illegal as the learned trial Judge failed to comply with the requirements of *Article 23 (8)* of the Constitution. He asked Court to invoke Section 11 of the Judicature Act (CAP 13) which allows this Court to exercise the powers of the trial Court and impose an appropriate sentence. He proposed a sentence of 14 years imprisonment from which 1 year and 4 months the period the appellant spent on remand be deducted.

In rejoinder, Mr. Etum contended that, the testimony of PW2 and PW3 did not provide any sufficient independent evidence to corroborate that of the victim as submitted by Mr. Rukundo as it was all based on what she had reported.

Resolution of issues

The duty of this Court as a first appellate Court is to re-evaluate all the evidence on record and come to its own conclusions. *See: Rule 30(1)*of the Rules of this Court, *Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 Of 1997, Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 Of 1997* and *Oryem Richard Vs Uganda, Supreme Court Criminal Appeal No. 22 Of 2014.*

In *Kifamunte Henry Vs Uganda (Supra)* it was held;-

> *"The first appellate Court has a duty to rehear the case and reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on the manner and demeanour, the appellate Court must be guided by the*

impressions made on the Judge who saw the witness, but there may be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a Court in differing from the Judge even on a question of fact turning on credibility of a witness which the appellate Court has not seen."

We shall, in accordance with the above authorities, proceed to re-appraise all the evidence and make our own inferences on both issues of law and fact.

The substance of ground one is that, the learned trial Judge erred in law when he received and relied on the unsworn testimony of PW4 who was a child of 6 years at the time of the trial without conducting a *voir dire.*

Counsel for the respondent concedes that, a *voir dire* was not held, but argued that, this failure did not cause any miscarriage of justice to the appellant.

A *voir dire* is a preliminary examination by Court of a witness required to testify truthfully to Court with respect to the evidence to be given by that witness. The purpose of a *voir dire* is for the Court to determine whether the witness, the subject of the *voir dire*, understands the nature of an oath and the value of telling the truth. Where the witness, as a result of that preliminary examination, appears to Court not to understand the nature of an oath and the duty of speaking the truth then such a witness may testify not on oath or the Court may reject such a witness.

Section 40(3) of the Trial On Indictments Act (CAP 23) provides;-

"Where in any proceedings any child offender years called as a witness does not, in the opinion of the Court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the

opinion of the Court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her".

Where a child gives evidence not on oath that evidence is admissible, but must be corroborated by some other material evidence as a matter of practice.

Guidance from a number of Court decisions is appropriate in this regard. In *R V Surgenor [1940] 2 ALL ER 249* a girl of 9 years of age testified in a house breaking criminal case against an accused. The girl testified without the recorder first satisfying himself as to whether the girl was in a position to be sworn as was required by the law, similar to our *Section 40(3)* of the Trial on Indictments Act. The Court of Criminal Appeal held that:

"It is the duty of the presiding Judge to satisfy himself as to whether or not a child of tender years is in a position to be sworn. Nevertheless, although there had been an irregularity there had been no such miscarriage of justice as would invalidate the conviction".

In this case the evidence of PW4 ought to have been treated as unsworn testimony and we shall treat it as such. See: Muhirwe Simon Vs Uganda (supra). To that extent ground one fails.

In respect of ground two, it was submitted for the appellant that, the learned trial Judge erred in law and fact when he failed to evaluate all the material evidence hence arriving at a wrong decision.

As a first appellate Court we are required to re-evaluate the evidence and to make our own inferences. See;- *Kifamunte Henry (Supra).* This ground of appeal appears superfluous as already showed we shall proceed to re-evaluate.

From the evidence on record, the victim testified that it was the appellant who defiled her. Her evidence as we have already held above required corroboration. PW1, PW2 and PW3 are the only other witnesses whose evidence tended to corroborate that of PW4. In her testimony regarding the appellant PW4 stated as follows;-

> *"Accused came and chased me and took me to the bed. He stripped himself naked and he removed my clothes. Then Oola he did something which was not good. He put his penis in my vagina. I felt pain but accused warned me not to cry. After that bad thing I left and went to the home of the parent of Alokhotoo, she was my friend. We study together, then my friend took me to my grandmother's home and found grandmother was looking for me. I told her that Oola had done something bad to me. By then, my private parts were paining."*

On her part PW3 her grandmother testified as follows;-

> *"...the victim told me that the accused called her from her friends where they were playing. He took her to his house, warned not to cry. The victim told me accused pulled his penis and put in her vagina. I observed that the young girl was not moving well. Her legs were spread apart."*

The law governing corroboration is well established. See: *Chila v R (1967) 722; R v Baskerville (1916) 2 KB 658; Jackson Zite v Uganda SCCA No. 19 of 1995 (unreported).* It is trite that where a child of tender years gives unsworn

evidence before a conviction can be based on it. In *R v Chila (supra),* it was held that, the judge must 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. See *Section 40(3)* of the Trial on Indictment Act (supra),

Section 155 of the Evidence Act defines what is sufficient to corroborate evidence and provides:

In order to corroborate the testimony of a witness, any former statement by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

In *Bukenya Joseph Vs Uganda: Court of Appeal Criminal Appeal No. 222 of 2003),* the victim informed her mother and one Sozi that the appellant in that case had defiled her on the actual day she had been defiled. Both her mother and Sozi testified in Court. In that case the victim testified in Court. This Court held that the information supplied by the victim to the two witnesses on the day she was defiled was sufficient to corroborate her evidence in Court.

In *Livingstone Sewanyana Vs Uganda, Supreme Court Criminal Appeal No. 19 of 2006,* the Supreme Court had this to say in regard to corroboration of the victim's evidence in sexual offences.

> *"we accept the submissions of the learned Senior Principal State Attorney that the reports which PW1 made to her teacher Ireta Mary Rose, PW3 and Fred Watente, PW4, corroborated her evidence that the appellant routinely had sexually abused her."*

In this case before us the victim reported to her grandmother that she had been defiled on the very same day. Both the victim and her grandmother testified in Court to that effect. From the above authority *Bukenya Vs Uganda (Supra)*. We find that PW3 the grandmother's testimony corroborated that of the victim as to the participation of the appellant to the crime.

The trial Judge who saw the victim testify in Court was satisfied that she was telling the truth. We have no reason to find otherwise. The victim was defiled in broad day light. She knew the assailant now appellant very well, as they were cousins. The medical report independently corroborated the victim's evidence that she had been defiled.

We find that, her evidence that she was defiled was corroborated by that of the medical Doctor who examined her. As already stated above, we find that the evidence of the appellant's participation was corroborated by that of the victim's grandmother PW3.

We find that the discrepancies and inconsistencies raised by Counsel for the appellant were minor and the trial Judge was justified when he rejected them as they did not go to the root of the case.

Accordingly this appeal fails and it is hereby dismissed. The appellant's conviction is hereby upheld.

The second ground is in respect of sentence. While passing the sentence the learned trial Judge stated as follows;-

> *"Offences of this nature are very serious, particularly on such small girls who might not recover properly given the medical conditions in Ugandan hospitals. Such a girl will live to hate sexual intercourse and the stigma is*

difficult to imagine. So much as this Court will consider the mitigating factors raised such as period on remand, and being a first time offender, all the same an appropriate punishment is necessary. Court will consider the fact that convict is suffering from HIV/Aids and should not end up dying in prison. In the circumstances, I shall sentence you to 14 years imprisonment."

We accept the submissions of Counsel for the appellant that the trial Judge did not comply with the Provisions of *Article 23 (8)* of the Constitution which requires the Court while passing a sentence to take into consideration the period the appellant spent on pre-trial detention.

In *Rwabugande Moses vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported).* It held that, taking into account requires deducting that period from the sentence that would otherwise have been imposed.

Because of the above omission alone, we find that the sentence imposed by the trial Judge is a nullity as it contravenes the Constitution.

Having found so, we now invoke the provision of Section 11 of the Judicature Act which grants this Court the same powers as that of the trial Court in circumstances such as we now find ourselves to impose a sentence we consider appropriate in the circumstances of this appeal.

The victim in this case was only 6 years old baby girl, the appellant is HIV positive, she sustained serious injuries that may have long lasting effects on her anatomy. These are serious aggravating factors.

However, he was a relatively young man, aged 28 years old at the time. He was a first offender. He had spent 1 year and 3 months on remand. He is a family

man with responsibilities. He was remorseful. He was sickly because of his HIV status.

In *Katende Ahamad Vs Uganda, Supreme Court Criminal Appeal No. 6 of 2004,* the Supreme Court upheld a sentence of 10 years for aggravated defilement. The appellant in this case was the father of the 9 year old victim.

In *Dratia Saviour Vs Uganda, Court of Appeal Criminal Appeal No. 154 of 2011,* the appellant was convicted of the offence of aggravated defilement and sentenced to 20 years imprisonment. The appellant was 33 years old, he was HIV positive and a guardian of the victim. This Court taking into account the period of 2 years the appellant had spent on remand reduced the sentence to 18 years imprisonment.

In *Kabwiso Issa Vs Uganda, Supreme Court Criminal Appeal no. 7 of 2002,* the Supreme Court, reduced a 15 year sentence for aggravated defilement to 10 years imprisonment.

Having taken all the above factors and decided cases into account we are of the view that a term of imprisonment of 10 years will meet the ends of justice and is in line with decided cases at this Court and the Supreme Court. We now deduct from the 10 years 1 year and 3 months the appellant spent in pre-trial detention and order that he serves 8 years and 7 months in prison stating from 26th June, 2012, the day he was convicted.

Dated at Gulu, this 7th day of November 2017.

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HON. JUSTICE KENNETH KAKURU
JUSTCE OF APPEAL

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HON. JUSTICE F.M.S EGONDA NTENDE
320 **JUSTICE OF APPEAL**

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325 **HON. LADY JUSTICE HELLEN OBURA**
JUSTICE OF APPEAL