THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

(CORAM: Kenneth Kakuru, JA, F.M.S Egonda-Ntende, JA and Hellen Obura, JA)

CRIMINAL APPEAL NO. 0170 OF 2009

OLAA PATRICK ::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Justice P.K.Mugamba holden at Tororo High Court Criminal Session Case No. 0026 of 2009 delivered on 10/08/2009)

JUDGMENT OF THE COURT

This is an appeal against both conviction and sentence. It arises from the decision of the High Court sitting at Tororo delivered on 10th August, 2009 by Hon. Mr. Justice P.K. Mugamba (as he then was) in which he convicted the appellant of the offence of aggravated defilement contrary to sections 129 (3) & (4) (a) of the Penal Code Act and sentenced him to 17 years imprisonment.

Background to the Appeal

The facts giving rise to this appeal as found by the trial Judge are that on 11th August, 2008 in the afternoon, the appellant went to the home of PW1 (Richard Omara) and found PW1's daughter, Apwoyo-Can Nighty at home. When PW1 arrived at home from the garden, he heard the victim crying out from the Kitchen. Upon reaching the kitchen, PW1 saw the appellant having sexual intercourse with her the victim. He took the victim away from the appellant and went and reported to PW2, Wilfred Ongwen (LC1 Vice Chairman of Ogali

Village). The appellant was arrested at the scene of crime and taken to Amuru Police Station while the victim was taken to Anaka hospital to be examined.

The appellant was indicted, tried and convicted of the offence of aggravated defilement and sentenced to 17 years imprisonment. Being dissatisfied with the decision of the trial Judge, the appellant appealed to this Court against both conviction and sentence on the following two grounds;

1. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby occasioning the appellant a miscarriage of justice.*
2. *The learned trial Judge erred in law and fact when he convicted and sentenced the appellant to 17 years imprisonment and which sentence is harsh and manifestly excessive.*

Representations

At the hearing of this appeal, Mr. Donge Opar represented the appellant on state brief while Mr. Martin Rukundo, Principal State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Case for the Appellant

On the first ground, counsel submitted that the court relied on the evidence of PW1 to conclude that the appellant committed the offence which evidence was not sufficient to sustain a conviction. Counsel also submitted that PW1 did not testify that he made an alarm upon finding the appellant defiling his daughter. According to counsel, that would have been one of the natural reactions to alert other people to come and help. He further submitted that when PW1 went to the Chairman's place which was about 200 metres away the appellant did not run away because he did not have any guilty conscience. He added that no steps were

taken by the many people who had gathered around to examine the victim in order to ascertain whether she had indeed been sexually abused.

Counsel further submitted that the medical report which was admitted by consent in court is not dated and the doctor did not indicate whether the girl was bleeding or had any semen on her. He contended that the medical doctor who examined the victim was not called to testify on some aspects of his medical report which were not clear.

On the second ground, counsel submitted that should this Court uphold the conviction, it should find that the sentence of 17 years imprisonment was harsh and manifestly excessive in the circumstances of the case. He submitted that the appellant was a first offender, aged 28 years old at the time of commission of the offence and had spent about 1 year and 10 months on remand. He is a married man with 13 children and 3 wives. He urged this Court to consider these mitigating factors and the range of sentences imposed by this Court in similar offences and sentence the appellant to 13 years imprisonment.

The Respondent's reply

Counsel opposed the appeal and supported both the conviction and sentence. On ground one, he submitted that the evidence was sufficient to sustain a conviction because the offence was committed in broad day light and PW1 found the appellant in the act of defiling the victim. He argued that the medical examination report showed that the victim was found to have sustained injuries which were consistent with sexual intercourse and so this was cogent evidence to sustain a conviction. Counsel also added that the omission to introduce the victim so that court could inquire whether she was able to testify did not occasion a miscarriage of justice. He prayed that the conviction be upheld.

Regarding ground 2, counsel submitted that the trial Judge took into account all the necessary factors and followed the proper procedure in arriving at the sentence of 17 years

imprisonment. He prayed that the appeal be dismissed and both the conviction and sentence be upheld.

Resolution by the Court

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 as was held in ***Oryem Richard vs Uganda; Supreme Court Criminal Appeal No. 22 of 2014***. We have carefully studied the court record and considered the submissions of both counsel together with the authorities cited. We are also alive to the standard of proof in criminal cases and the principle that an accused person should be convicted on the strength of the prosecution case, and not on the weakness of the defence. ***See: Akol Patrick & Others vs. Uganda, Court of Appeal Criminal Appeal No. 60 of 2002.***

On the first ground of appeal, the appellant faults the learned trial Judge for failing to properly evaluate the evidence on record thereby occasioning a miscarriage of justice. We note from the court record that PW1 testified to have found the appellant naked in his kitchen, having sexual intercourse with the victim. In his defence, the appellant completely denied participation in the offence and alleged that he was framed. He stated that while on his way home through PW1's compound, PW1 attacked him for having a love affair with his brother's wife and he raised an alarm alleging that he had sexually abused the victim. The appellant further stated that while at the police station, the victim was asked whether he had had sexual intercourse with her and she said that he did not. The appellant also alleged that the medical doctor who examined the victim had been coerced by the Police Criminal Investigation Department at Amuru to make the report.

It is our finding from perusal of the court record that this defence evidence was never controverted. Prosecution did not adduce evidence of the victim or the medical doctor to

discredit the appellant's assertions. They only produced a medical report which, in our view, was not sufficient in the circumstances of this case where the appellant had alleged that he was being framed. The medical doctor who carried out the medical examination needed to have been called to be examined on when he carried out the examination and to be subjected to cross-examination by the defence.

Curiously, the victim was also not called to testify so that court could ascertain whether she understood the nature of an oath and was possessed of sufficient intelligence to justify the reception of her evidence and the duty of speaking the truth, through conducting a *voire dire* so as to determine whether she could give sworn or unsworn evidence as required by section 40 (3) of the Trial on Indictment Act. The record shows that, contrary to what the law provides, it was the prosecutor who informed court that the victim was incapable of giving evidence and the trial Judge accepted it without examining the victim to satisfy himself that she was indeed unable to testify.

We note from the record that the victim was 6 years old at the time the offence was committed and must therefore have been 7 years a year later when the trial commenced. A 7 year old child is capable of giving testimony in court under normal circumstances. The decision as to whether or not she was capable of testifying ought to have been left to court and not the prosecution. We are alive to the fact that a conviction may be sustained without the evidence of the victim. However, in such a case there must exist other evidence capable of sustaining the conviction. This does not appear to have been the case in the matter before us.

In ***Bogere Moses vs Uganda, SCCA No. 1 of 1997,*** the Supreme Court drew adverse inference from the failure of the prosecution to adduce police evidence of arrest and investigation in absence of explanation as to why such evidence was not adduced.

In this case, the same inference could also be drawn in the absence of any satisfactory reason why the victim was not presented to court for a *voire dire* proceedings to be conducted by the trial Judge.

In the circumstances, we find that the failure to call the medical doctor to explain the medical report and the absence of the victim's evidence that she had been defiled by the appellant, left gaps in the prosecution case. In our view, the prosecution failed in its duty to prove the case beyond reasonable doubt as the evidence only pointed to suspicion. It is now a settled principle that suspicion however strong it may be is not sufficient to infer criminal responsibility against a person. See: ***R vs Israel Epuku s/o Achietu [1934] 1 EACA 166***.

In the premises, with all due respect to the learned trial Judge, we find that the evidence adduced by the prosecution at the trial was insufficient to sustain a conviction.

It is also noteworthy that, the learned trial Judge did not evaluate the evidence in accordance with the established legal principles. The prosecution evidence appears to have been evaluated in isolation of the defence evidence. At pages 2-3 of his judgment, the learned trial Judge upon evaluating the prosecution evidence stated that he was satisfied that appellant had participated in the illegal offence. He then proceeded to assess part of the defence evidence and found the appellant guilty and convicted him. In so doing, the learned trial Judge failed to evaluate all the evidence in the case in its totality and even omitted some of the appellant's vital evidence. It is evident that he failed to attach much weight to the defence case because after all, he had already found that the appellant had participated in the offence. Had the trial Judge properly evaluated the evidence by critically analysing the appellant's defence against the prosecution evidence, he would have observed the apparent gaps in the prosecution case. Had he done so he would not have arrived at the erroneous conclusion that he did.

In light of the fore going, we find that the learned trial Judge erred in fact and in law when he failed to properly evaluate the evidence on record and convicted the appellant of the offence of aggravated defilement based on insufficient evidence.

In the circumstances, this appeal succeeds. In the result, the conviction is quashed and the sentence is set aside. We order that the appellant should be set free forthwith.

We so order.

Dated at **Gulu** this..6th...day of..November.....2017

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Hon. Mr. Justice Kenneth Kakuru

JUSTICE OF APPEAL

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Hon. Mr. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL