THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 0007 OF 2012

(Arsing from Criminal case No. 132 of 2012)

BETWEEN

SUNDAY GEORGE..... APPELLANT

AND

UGANDA ..... RESPONDENT.

[Arising from the decision of Stephen Mubiru, J of the High Court of Uganda sitting at Arua in Criminal Session Case No.0132 of 2012 dated 8th August 2016]

Coram: HON. MR. JUSTICE CHEBORION BASHARIKI, J.A

HON. LADY JUSTICE MONICA MUGENYI, JA

HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF COURT.

Introduction.

The Appellant was indicted for aggravated defilement contrary to Section 129(3) and (4) (b) of the Penal Code Act. It was alleged that the Appellant on the 21st day of January 2012 at Arua Trading Centre in Arua District had unlawful sexual intercourse with Alioru Flora a girl under the age of 18years while being infected with HIV. The Appellant pleaded not guilty and after a full trial, he was found guilty, convicted and sentenced to serve 20 years and 6 months imprisonment.

Dissatisfied with the finding of the trial court the Appellant filed this appeal on one ground that:

> The learned trial judge erred in fact and law when he failed to properly evaluate all evidence on record and relied on insufficient, uncorroborated and contradicted evidence of the Victim and the involuntary charge and caution statement to reach a wrong decision that the Appellant defiled Alioru Flora.

Representation

The Appellant was represented by Mr. Samuel Ondoma. The Respondent was represented by Mr. Menya Swaliki.

Submissions of counsel for the Appellant

Counsel for the Appellant submiited that the trial judge erred in fact and law when he failed to properly evaluate all the evidence on record. Counsel submitted that the law on inconsistence as stated in the case of **Alfred Tajar vs. Uganda, EACA Criminal Appeal No. 167 of 1969**, is that major contradictions and inconsistencies will usually but not necessarily result into the evidence of a witness rejected unless they are satisfactorily explained away. That court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

Counsel submitted that in this case the indictment stated that the accused person / Appellant on the 21st day of January 2012 at Arua trading centre in Arua District had unlawful sexual intercourse with Alioru Flora a girl under the age of 18 years while being infected with HIV but the Victim testified as PW3 voluntarily telling Court in examination in chief at Page 13 , paragraph 3 of the Record of Appeal that the incidence was on 16th August, 2012 and that on that day , they had a Disco at the trading centre. She had gone for the disco dance while returning home at around midnight she was grabbed by the Appellant and another boy. There is no other witness who corroborated her evidence on the date and time when the incidence took place yet she was a girl of tender age whose evidence required corroboration. All the other prosecution witnesses alleged that the incidence took place on 21st January 2012 which is not close to 16th August 2012. The Accused person / Appellant raised a defence of Alibi for which he has no duty to prove.

Counsel relied on **Bogere and Another vs. Uganda S.C. Criminal Appeal No. 1 of 97, the Court said:**

> "What amounts to putting an accused person at the scene of Crime? We think the expression must mean proof to the required standard that the Accused was at the scene of crime at the material time, to hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the Prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces (Sic) evidence showing that the accused was at the scene of crime, and the accused not only denies it but also adduces evidence showing that the accused was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted, it is a misdirection to accept the one version and then hold that because of the acceptance per se the other version is unsustainable"

Counsel submitted that the contradictions as regards to the time and date when the alleged defilement took place as seen in the indictment and uncorroborated evidence of the victim who was of tender age are grave, go to the root of prosecution case and point to deliberate untruthfulness in the prosecution case. The prosecution also alleged that the Appellant was HIV Positive which he denied in his defence and there is no prosecution evidence to prove that the victim was HIV Positive and was in fact infected by Appellant.

Counsel for the Appellant submitted that PW3 (Alioru Flora) did not also tell court if there was penetration of her by the Appellant and when the penetration took place as alleged in the indictment. Counsel cited **Akol vs. Uganda Criminal Appeal No. 23 of 1992** where it was held that medical evidence could not afford corroboration if it is inconclusive with regard to whether penetration was by a male organ or finger.

Counsel further submitted that the medical evidence did not corroborate the evidence of penetration by the Appellant because in the Memorandum of Agreed facts, the Medical Examination Form PF3A which was marked as Exhibit PE 1 where the Victim was examined on 26.01.2012 by Dr. Oder Emmanuel at Arua

Regional Referral Hospital shows that the victim was 15 years of age and had signs of penetration.

Additionally, counsel for the Appellant submitted that the trial Judge relied on the alleged Charge and Caution Statement made by the Appellant marked as prosecution Exhibit PE 2A and the English version as Exhibit PE 28 to convict the Appellant / Accused person. This in counsel's view was gross error on the part of the learned trial Judge because the Appellant was not asked to plead to the correctness or truthfulness of the Charge and caution statement before it was admitted in evidence and as prosecution exhibit as required by law . The learned trial Judge relied on the no objection statement by counsel for the accused person to admit the charge and caution statement which is very irregular.

In Musinguzi Jonas VS. Uganda CACA No. 149 of 2004 in 2008 HCB, it was held that the doctrine of the presumption of innocence is enshrined under Article 28(3) of the Constitution of the Republic of Uganda1995 as amended. Where in a criminal trial an accused person has pleaded not guilty, the trial court must be cautious before admitting a confession statement allegedly made by an accused person prior to his trial. This is because unchallenged admission of such statement is bound to be prejudicial to the accused person and put his plea of no guilt in question. It was further held that it is not safe or proper to admit a confession statement in evidence on ground that counsel for the accused person has not challenged or conceded to its admissibility. The trial court ought to hold a trial within a trial to determine its admissibility.

Counsel submitted that in this case the confession or charge and caution statement was admitted in evidence in error by the learned trial judge. The accused person was not asked about the correctness or truthfulness of the charge and caution statement. There was no trial within a trial by the leaned trial judge to determine the admissibility of the charge and caution statement. Counsel prayed that the

conviction and sentence of the Appellant by the learned trial Judge should be set aside.

Submissions of counsel for the Respondent

Counsel submitted that the ground raised by the Appellant in the Memorandum of Appeal offended Rule 66 (2) of the Court of Appeal Rules. It is not concise but rather argumentative and narrative. Counsel cited **Sseremba Dennis vs. Uganda Criminal Appeal No. 480 of 2017**, where this court struck out two grounds offending the said Rule.

On the merits of the appeal counsel for the Appellant submitted that the trial Judge properly evaluated the evidence on record. The prosecution relied on consistent evidence of PW3, PW4, PW5 and PW6.

Counsel for the Respondent submitted that PW3 testified that she was 18 years and that in 2012 she was 15 years old. She testified that while she was returning from disco at midnight, she was approached by the Appellant and another. That they grabbed her. The Appellant held her legs and the other person her hands. They took her through a bush to a home she suspected to be that of the Appellant. That she spent three days in the Appellant's house. During these three days the Appellant had intercourse with the victim.

PW5 testified that on the fateful date, the victim went to Arucha trading centre to buy paraffin, she did not return and a search for her ensued. The victim was found in the house of the Appellant's sister, who disclosed that the Appellant took her there.

Counsel submitted that Exhibit P.E.1 (PF3A) showed that the victim was 15 years old and had signs of penetration and an old rapture of the hymen. PW6 stated that she medically examined the Appellant on 27th January 2012 and found him HIV positive. She tendered in Exhibit P.3. Counsel cited **Okello Geoffrey vs. Uganda , Criminal Appeal No. 0329 OF 2010** cited with approval in the Supreme Court

decision of **Bassita Hussein vs. Uganda , SCCA No.. 35 of 1995** where court held,

> "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 the Victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration"

Counsel submitted that the direct evidence of PW3 was corroborated by PW5 and Exh P.E.1 (PF3A) which had no contradictions that go to the root of the case. That the contradiction as to whether the incident took place on 16th August 2012 or 21st January 2012 is minor. This does not point to a deliberate untruthfulness of the witnesses and does not go to the root of the case. Counsel cited **Sseremba Denis vs. Uganda Criminal Appeal No. 480 of 2017**, where court held that minor inconsistencies unless the trial judge thinks it points to a deliberate untruthfulness does not result in evidence being rejected

Counsel argued that what mattered was that it was proved beyond reasonable doubt by the prosecution that the Appellant had sexual intercourse with the victim who was below 18 years. That at the time the Appellant was infected with HIV. He cited **Ntambala Fred vs. Uganda Criminal Appeal No. 34 of 2015,** where court held that what matters is evidence showing that sexual intercourse between the Appellant and the victim took place.

Counsel additionally submitted that counsel's submission that the victim was a child of tender age and therefore her evidence as a victim of sexual assault required corroboration is misconceived and not credible. Counsel cited in **Dratia Saviuo vs. Uganda Criminal Appeal No. 154 of 2011**, the court defined a child of tender years as one of the apparent age of less than 14 years. Counsel submitted that in this case the victim testified that she was 18 but in 2012 she was 15 years of age.

Exhibit P.E 1(PF3A) indicated that at the time of examination the victim was 15 years old.

He further submitted that in **Ntambala Fred vs. Uganda Criminal Appeal No.34 of 2015** it was held that a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds it to be truthful and reliable

Counsel for the Respondent submitted that it was an afterthought for the Appellant to claim that the charge and caution statement (P. Exhibit PE2A and Exhibit PE 2B) was involuntary. This was not brought to the attention of court during the trial. He argued that there was no evidence on record to the effect that the Appellant was tortured while in police detention for purposes of extracting a confession.

Counsel submitted that the charge and caution statement was freely obtained and facts contained in the charge and caution statement (PEX2A and PEX2B) can only be from a person who must have participated in the commission of the offence.

Counsel cited **Matovu Musa Kassim vs. Uganda Criminal Appeal No. 27 of 2002,** where court held that:

> "Court can convict on a retracted or repudiated or both retracted and repudiated confession alone if it is satisfied after considering all material points and surrounding circumstances of the case that the confession cannot but be true."

Counsel submitted that the confession was not the only evidence relied on by the prosecution, there is direct evidence of PW3, which was corroborated by cogent corroborative pieces of evidence in particular PW4,PW5 and PW6 that irresistibly connected the Appellant to the commission of the offence . The facts as narrated in the Appellant's Charge and Caution Statement were corroborated by those pieces of evidence. This was rightly observed by the trial Judge.

Counsel invited this court to find that the confession was rightly admitted evidence by the learned trial judge.

Consideration of court

We have carefully studied the court record, considered the submissions for either side, and the law and authorities cited therein. As well as those not cited.

A first appeal from the decision of the High Court to this court, requires this court under **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10,** to review, re-evaluate and scrutinise the evidence on record such that it comes to its own inferences of law and fact.

In **Kifamunte Henry vs. Uganda, Criminal Appeal No.10 of 1997**, the Supreme Court held that this court has the duty to;

> "Review the evidence of the case and to 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"

The Appellant in the lower court was indicted with one count of Aggravated Defilement Contrary to Section 129 (3) and (4)(a) of the Penal Code Act. It was alleged that the accused on the 21st day of January 2012 at Arucha Trading Centre in Arua district had unlawful sexual intercourse with Alioru Flora, a girl under the age of eighteen years while being infected with HIV.

The Appellant pleaded not guilty. Like in all criminal cases the prosecution had the burden of proving all the ingredients of the offence beyond reasonable doubt. It is trite law that the burden does not shift to the accused/Appellant and the Appellant will only be convicted on the strength on the prosecution case.

In cases of aggravated defilement the prosecution must prove the following ingredients beyond reasonable doubt;

1. The victim was below 18 years of age
2. A sexual act was performed on the victim
3. It is the accused who performed the sexual act on the victim.
4. That at the time of performing that sexual act, the accused was HIV Positive.

The victim was below 18 years of age.

The age of a child may be proved by the production of her birth certificate, or by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child. In this case the victim, P.W.3 testified that she was born in 1997 and this testimony was corroborated by the mother, who stated that the victim was born on the 24th November, 1997. This was corroborated by the evidence of PW1 Dr. Odar Emmanuel who certified in his report P.E.1 that the victim was 15 years of age on the 26th January 2012. In assessing the evidence on age the trial court held that:

> "The victim, PW3, was before court when she testified and I had the opportunity to observe her. In my assessment, she was about 18 years old at the time she gave her evidence: consequently she must have been below the age of 18 years, more than four year ago when the offence is alleged to have been committed. Counsel for the accused did not contest this ingredient during cross-examination of these witnesses neither did he do so in his final submissions. In agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt"

Considering the evidence on record, we are persuaded that this ingredient was proved by the prosecution beyond reasonable doubt. We agree with the findings of the trial court that the victim was below 18 years at the time of the Appellant's commission of the offence.

The sexual act was performed on the victim.

Secondly the Prosecution ought to have proved the fact that the victim was subjected to a sexual act. **Section 129 (7) of *the Penal Code Act*** defines sexual act to mean:

> (a) Penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or

(b) The unlawful use of any object or organ by a person on another person's sexual organ.

The Appellant in his submissions stated that the respondent did not adduce any evidence to show that there was penetration and when it took place.PW3 in her testimony testified that in the three days that she was with the Appellant, he had sexual intercourse with her. This piece of evidence was corroborated by the evidence of PW1's report exhibit P.E.1, where he affirmed that there was evidence of penetration. This evidence was not contradicted by counsel for the Appellant during cross examination and we agree with the Respondent counsel that this was an afterthought. We therefore find that this ingredient was proved beyond reasonable doubt.

It is the Appellant who performed the sexual act on the victim.

We have found that the victim was below 15 years and that there was penetration. However, the prosecution is required to prove beyond reasonable doubt that the Appellant performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, showing that the Appellant was the participant in the perpetration of the offence. The Appellant argument seems to be around his participation. Counsel for the Appellant submitted that it was erroneous for the trial Judge to rely on a charge and caution statement to convict him as the perpetrator of the offence when the Appellant was not examined on whether it was made voluntarily or not.

According to PW 1 he recorded the charge and caution statement on the 28th January, 2012 at around 10:00am. The Lugbara version was marked as PE2A and the English version as Exhibit PE 2B. This was tendered in as evidence during the trial with no objection from the accused during cross examination. This therefore formed part of the evidence on record. In **Eldam Enterprises Ltd vs. SGS (U) Ltd, SCCA No. 5 of 2005**, it was held that evidence which is not challenged in cross examination must be taken as true. The question of voluntariness will only

arise when the accused person objects the Charge and caution statement. This was not raised by the Appellant and therefore it is taken that whatever was in the charge and caution statement was true.

It has to be observed that the trial Judge did not only rely on the charge and caution statement but also considered it together with other evidence. The trial Judge in the evaluation of his evidence considered the evidence of the victim Pw3 of the circumstances surrounding the abduction and the fact that she stayed in the Appellants house for three days. The judge noted that;

> "Her evidence would have been of questionable reliability standing on its own but for prosecution exhibits P.E. 2A and 2B. In the Charge and caution statement of accused, he corroborated PW3's evidence of identification when he admitted having met her at Arucha trading centre, established a love relationship with her the relationship culminated in sexual intercourse and a brief period of cohabitation in September 2011..."

Since the Appellant did not object to the charge and caution statement the trial Judge properly depended on it. The trial within a trial can only be conducted where the Appellant objects to the charge and caution statement which was not the case in this matter

The Appellant also raised issues on the contradictions on the date when the act took place between the Victim PW3 and the Indictment. The law on contradictions and inconsistencies is well stated In **Obwalatum Francis vs. Uganda Criminal Appeal No.30 of 2015**, the Supreme Court held that.

> "The law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained."

What constitutes a minor or major inconsistency will vary from case to case. This will be determined by how relevant that piece of evidence is in determining the matter before court. In this particular case the contradiction was with regard to the date on which the sexual act actually occurred. PW3 testified that it took place on the 16th August 2012 and the indictment indicated 21st January 2012. This contradiction would have been key if there was no other consistent evidence to corroborate the indictment. The Doctors Report dated 26th January 2012 is evidence that the sexual act was done on 21st January 2012.

It is therefore settled law that grave contradictions and discrepancies unless satisfactorily explained, will usually but not necessarily result into the rejection of that witness evidence. See **Alfred Tajar v Uganda, EACA. Cr. Appeal No. 167 of 1969.**

Bearing in mind that the trial Judge had the opportunity to see the witnesses testify we agree with the finding of the lower court that whether the act happened on the 21st January 2012 or 16th August 2012 is negligible since the actual date is corroborated by other evidence.

The last ingredient is whether the accused was HIV positive at the time he had sexual intercourse with the victim. We are persuaded by the assessment of the trial judge. We will quote it verbatim:

> " to prove this element , the prosecution relied on the testimony of PW6(Driciru Neema) a nurse at Arua Regional Referral Hospital who explained that the accused was on 27th January 2012 medically examined and found to be HIV positive . She presented documentary evidence, exhibit P.E.3 (A Client Slip) to certify the findings of the Sero-status of the accused on the date of examination. It is now common knowledge that HIV is not detectible immediately after infection. There is a "window period" soon after infection during which the presence of the virus in the human body cannot be detected by diagnostic tests. The window period occurs between the time of HIV infection and the time when diagnosis test can detect the presence of antibodies fighting the

virus. The length of the window period varies depending on the type of diagnostic test used and the method the test employs to detect the virus. According to PW6, the diagnostic test used in this case was the confirmatory method. This method involves a fifteen minutes process of testing for antigens/ antibodies using a two millilitre sample of blood drawn from the subject (in this case the accused) by venipuncture , which is then collected into a disposable pipette with a purple top, reagents applied to it to produce a serum or plasma specimen which is then applied to reagent strip. If antibodies to HIV are present in the blood, a positive result is visualised by two pink/red bands in the test region of the strip whereupon the result is recorded on the client strip (such as exhibit P.E3)

Furthermore, it is still common knowledge that if an HIV antibody test is performed during the window period, the result will be negative, although this will be a false negative since the virus will be present in the body, only that it cannot be detected yet. At page one of his paper published in November 2011 entitled, *The HIV Seronegative Window Period: Diagnostic Challenges and Solutions*, Mr. Tamar Jehuda –Cohen of SMART Biotec Ltd. Rehovot Israel; and Bio-Medical Engineering, Technion Israel Institute of Technology, Haifa, Israel reveals that scientific research has established that it takes 95% of the population approximately three months to seroconvert following HIV infection. The window period therefore is generally three months to seroconvert following HIV infection. The window period therefore is generally three months. This research supports PW6'S testimony regarding the duration of the window period. In the instant case, since the HIV diagnostic test done on the accused on 27th January 2012 turned positive, it implies that the window period had elapsed. He therefore must have contracted the virus not less than three months prior to the date of that test, i.e. latest October 2011 and was therefore carrying the virus, PW3. In agreement with the assessors, i therefore find that this ingredient too has been proved beyond reasonable doubt."

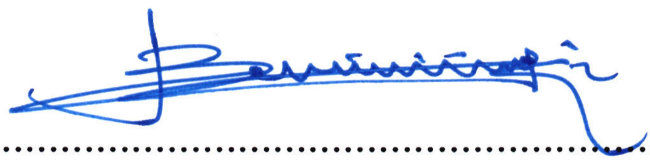
We agree with the assessment of the trial Judge and we cannot fault the trial judge on this ingredient as well. In the circumstances, the prosecution proved all the ingredients of this case beyond reasonable doubt.

It is our finding that this appeal has no merit. We therefore order that:

1. The conviction of the trial court is upheld.
2. The sentence of the trial court is upheld.

We so order.

Dated at Arua this 29th **Of** March **2023**



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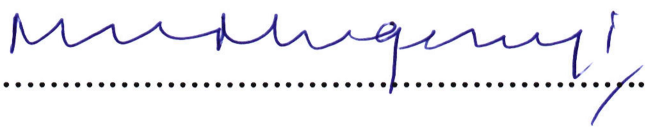
BARISHAKI CHEBORION

JUSTICE OF APPEAL



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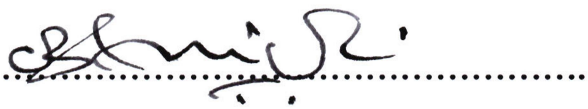
MONICA MUGENYI

JUSTICE OF APPEAL



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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL