THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CRIMINAL DIVISION)

CRIMINAL CASE SESSION CASE NO. 103 OF 2023

(ARISING FROM CRIMINAL CASE NO. 181 OF 2021)

WAYU JUNIOR.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

JUDGMENT OF THE COURT

Before Hon Lady Justice Rosette Comfort Kania

Background

The appellant was convicted of the offence of Simple Defilement contrary to section 129(1) of the Penal Code Act and sentenced to 3 (three) years imprisonment. The particulars of the offence were that, the appellant on the 11th day of February 2021 at Kyebando in Kampala District performed a sexual act with Yikpamungu Gracious a girl aged 14 years. He was arrested and pleaded not guilty before court. When put on his defense the appellant opted to keep quiet. The appellant was sentenced to 3 years imprisonment. Dissatisfied with the decision of the Trial Chief Magistrate, the appellant now appeals against the conviction and the sentence on the following grounds;

1. That the Trial Magistrate erred in law and fact when she failed to evaluate the evidence on record of PW2 with regards to participation of the Appellant which occasioned a miscarriage of justice on the appellant.
2. The learned trial Magistrate erred in law and fact when she convicted the Appellant in the absence of substantial medical evidence with regards to participation of the Appellant thereby occasioning a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact when she passed a manifestly harsh and severe sentence against the appellant in the circumstances thereby occassioning a miscarriage of justice.

The respondent opposed the appeal.

The appellant was represented by Ms. Teddy Namuga while the respondednt was represented by Ms. Hope Mutoni, Senior State Attorney in the Office of the Director of Public Prosecutions. The parties were directed to file written submissions before the hearing of the appeal. The appellant's submissions were filed on 25th February 2024 while the respondent's submissions were filed on 14th March 2024. The appellant's submissions in rejoinder were filed on 14th March 2024. This appeal was therefore disposed of solely on the basis of written submissions.

For the offence of simple defilement to stand against the appellant, the prosecution should have proved the following ingredients beyond reasonable doubt;

(a) That the victim was below 18 years
(b) That a sexual act was performed on the victim
(c) That it is the accused person who performed the sexual act on the victim.

The fact that the victim was below 18 years old at the material time and that a sexual act was performed on the her is not in dispute. What is in dispute is the participation of the appellant.

Submissions of Counsel

Ground 1

Counsel for the appellant submitted that, it was the testimony of PW2 who is the victim, on page 4 of the record stated that she never had any sexual intercourse with the appellant. PW2 stated that, "it is not true that the accused played sex with me. I used to go to the accused's home to see his sister Liz who is my friend. I have never had any sexual intercourse with him." Counsel contended that, the trial Magistrate erred when she wrongly quoted PW2 as having testified that the appellant had performed a sexual act on her and despite her unequivocal testimony that she had never had sexual intercourse with the accused person went ahead to convict and sentence the accused person. She contended that participation of the accused had not been proved as the evidence of PW2 and PW4, the investigating officer whose name is Lanyero Cavine, regarding his participation was contradictory.

It was argued for the appellant that PW2's evidence was hearsay evidence and pointed out that it is a general rule that hearsay evidence is inadmissible and that the testimony of PW2 should not have been admitted.

Counsel for the respondent on the other hand submitted that the appellant, had been properly convicted and sentenced. She stated that from page 3 of the record of proceedings, it is indicated that PW1 received a call from the victim's mother informing her that the accused defiled the victim. In addition it is on the record that the victim told PW1 that she had been defiled by the accused. It was further submitted for the respondent that, it was not therefore hearsay evidence but direct evidence on the basis of which PW1 reported the matter to the police. She added that PW1's evidence was corroborating the evidence of PW3 who as in stated on page 4 of the lower court record that, the victim kept on crying and rejected food and stated that the accused person had defiled her when PW3 asked her what was wrong. It was argued for the respondent that, PW4 the investigating officer, testified that it is the victim who led him to the scene of the crime where he drafted the sketch plan.

In rejoinder, counsel for the appellant submitted that, PW1's evidence was hearsay as she did not see, hear or immediately observe with her bodily senses that it was the appellant who committed the offence. PW1 was simply relaying to court what she was told. It was further submitted for the respondent that, PW3's evidence was insufficient to prove the appellant's participation as PW3 learnt of the alleged incident a week later. Counsel for the respondent added that the sketch plan consisting of the appellant's house, his bed and compound were insufficient to prove participation of the appellant. In addition, there were no samples collected or any other evidence implicating the appellant.

Ground 2

It was submitted for the appellant that that the victim's hymen had been raptured but had a minor bruise on her genitalia. However no medical evidence was adduced to prove that the bruise was occasioned by the appellant.

Counsel for the respondent submitted that, the victim was examined on PF3A by a Kizito Eric, a medical clinical officer attached to Praise Clinic. He found that the victim's hymen had been recently raptured and she had mild bruises on her hymen.

In rejoinder Counsel for the appellant submitted that, on page 6 of the record, PF3A indicates that the hymen had not been raptured recently. Neither was there evidence to indicate that the same was occasioned by the appellant.

Ground 3

Counsel for the appellant submitted that, the sentence was harsh in the circumstances as there was no previous criminal record. In addition, the record did not indicate whether the accused was given an opportunity to say anything in allocutus. It was further submitted that, that notwithstanding, the appellant ought not to have been convicted and sentenced.

In rejoinder, counsel for the appellant submitted that,

It was the contention of counsel for the respondent that, the offence of simple defilement carries the maximum penalty of death. It was further submitted for the respondent that, a sentence of 3 years imprisonment was therefore not harsh.

Determination of the Court

The case for the prosecution was that, the appellant on the 11th day of February 2021 at Kyebando in Kampala District, performed a sexual act with Yikpamungu Gracious a girl aged 14 years. It was stated that the victim was staying in the same area as the appellant at the time of the alleged incidents. It is alleged that the appellant called the victim who was a friend to his sister. That on going to the appellant's place, the appellant defiled her. The victim started crying, was not eating and eventually told her sister seven days after the alleged incident that she had been defiled. The victim was taken to police, recorded a statement. A medical examination was conducted on the victim which indicated that there was a mild scratch on her vagina. On PF3A, the conclusion on the findings upon examination of the victim's genitalia were that they indicated recent defilement within 72 hours. The appellant was arrested and charged with the offence of defilement. The appellant denied ever having had sexual intercourse with the victim. When placed on his defence, the appellant opted to remain silent. The appellant was eventually convicted of the crime of simple defilement and sentenced to 3 years imprisonment. The appellant was dissatisfied with the findings of the learned trial magistrate hence this appeal.

The appellant denied having defiled the victim and when put on his defence he opted to keep quiet.

Ground 1 and 2

The learned trial magistrate went on to state that were prosecution is based on the evidence of a single identifying witness, the court must exercise great care so as to satisfy itself that there is no danger of

mistaken identity and quoted the cases of Abdala Bin Wendo and another –vs- R (1953) E.A.C.A 166, Roria-vs- Republic (1967) EA 583 and Abdala Nabulere and 2 others –vs- Uganda (1975) HCB 77.
She stated that, PW2 told court that she knew the accused person since they live in the same area and that on the 11th day of February 2021, the accused person was in the same home where the victim went to see his sister and he performed the sexual act on her.

In sexual offences, the basic standard is that, sexual intercourse or penetration may be proved by direct or circumstantial evidence. In establishing this fact, it is usually the victim's inculpatory evidence which is the best proof. Usually, sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or any other cogent evidence.
Penetration may, as was decided in ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995,*** be proved either by direct or circumstantial evidence. What the prosecution is required to do, the Court pointed out, is to prove by evidence beyond reasonable doubt, that there was carnal knowledge of the victim.

From the evidence on record, it is clear that there is no direct evidence implicating the appellant in the defilement of the victim. On page 4 of the record of proceedings of the lower court, PW2 who is the victim stated as follows, "it is not true that the accused played sex with me. I used to go to the accused's home to see his sister Liz who is my friend. I have never had any sexual intercourse with him."
In the case of **Woolmington-vs- DPP (1935) AC 462,** the burden is upon the prosecution of proving all the ingredients of the offence beyond reasonable doubt and the accused has no duty to prove his innocence.

The victim was 14 years old at the time of the alleged offence and understood the nature of the questions that were posed to her. She unequivocally stated that the accused person did not have sexual intercourse with her. The learned trial judge therefore erred in finding that the appellant performed a sexual act on the victim on 11th day of February 2021 when the victim went to the appellant's home to visit his sister, despite the fact the victim categorically stated that the appellant had never performed a sexual act on her.
By denying that the appellant had ever performed a sexual act on her, the victim cast doubt on the prosecution case as far as participation of the appellant in the defilement of the victim was concerned. The learned trial magistrate ought to have resolved this doubt in favour of the appellant. It is trite law that where there is doubt, it has to be resolved in favor of the accused person. See **Obwalatum Francis Vs Uganda Supreme Court Criminal Appeal No.030 of 2015**

When there is an allegation of a sexual offence, in addition to direct evidence, other forms of proof, such as medical or other evidence in support may provide corroboration. On the lower court record, the learned trial magistrate also relied on the medical evidence comprised in PF3A which was admitted in evidence as PE II. In ***Abbas Kimuli vs. Uganda; C.A. Crim. Appeal No. 210 of 2002*** (unreported), the Court followed the decision in ***Hussein Bassita*** (supra), and reiterated that medical evidence for proof of sexual assault, while desirable, is however not mandatory. It is a rule that the Court needs to look for other evidence that corroborates the evidence of the complainant, before reaching a finding of guilt of the accused. However, in cases such as this one, where the victim denies ever having had sexual intercourse with the appellant and medical evidence is adduced to support the prosecution's case, court is obliged to evaluate such medical evidence.

On page 4 of her judgment, the learnt trial magistrate stated that, PW4 who was the investigating officer stated that "he took the victim for medical examination and it was established that she had been penetrated 7 days ago." The learned trial magistrate found the evidence of PW4 convincing and reliable. On the record of the proceedings it is stated at page 9 that, PW4 testified that the "... the victim had already been examined from Kyebando." Although in the judgment, the learned trial magistrate stated that it was PW4 who took the victim for medical examination, PF3A indicated the police officer as Nyakeyo Yunia. The medical evidence on which PW4 submitted stated that the penetration was recent in any case not more than 72 hours.

The victim was medically examined on 20th February 9 days after the appellant allegedly defiled her. It was stated on PF3A that the slight injuries to the victim's genitalia were a result of defilement which had occurred recently within 72 hours of the medical examination. It was stated on PF3A that the victim's hymen had been raptured but not recently. The only plausible conclusion is that the defilement in respect of which the medical officer made remarks on PE3A which was tendered in evidence and marked PEII, occurred on or around 17th February 2021. The incident in respect of which the appellant was convicted allegedly occurred on 11th February 2021, 9 days before the medical examination was conducted. This was therefore a major contradiction between the testimony of PW2, PW4 and the medical evidence comprised in PEII. To crown it all, the most damning contradiction was in the testimony of PW2 who stated that the appellant had never had sexual intercourse with her.

In law, serious inconsistencies and contradictions, may result in the evidence of a witness being rejected. Where there are contradictions pointing to deliberate untruthfulness they will result in the evidence of a witness being rejected. See **Alfred Tajar-vs- Uganda (1969) EACA Crim Appeal No. 167 of 1969**. In light of the fact that PW2, the victim, stated unequivocally that the appellant did not have sexual intercourse with her, the medical evidence indicated that the victim had been defilement recently within 72 hours, while PW4 came to court and stated that the medical evidence indicated that the victim had been defiled within 7 days of the medical examination, I find this medical evidence inadequate in linking the appellant to the sexual act performed on the victim which was the subject of the medical examination conducted on the victim on form PF3A. Furthermore, there was no evidence to indicate that the slight injuries to the victim's genitalia were caused by the appellant. It appears that, the defilement the details of which were captured on PF3A which was tendered in evidence, related to a sexual act perpetrated by a different person and on another date and not on 11th February 2021 the date on which the appellant allegedly defiled the victim. The medical evidence considered together with the testimony of PW2, rather than implicating the appellant in the defilement of the victim, served to concretize the doubt of the appellant's participation in the defilement of the victim.

It is my conclusion that there was no direct evidence linking the appellant to the defilement of which he was convicted. Following the testimony of the victim that the appellant did not perform a sexual act on her, the other evidence comprising of the medical evidence and the testimony of the other witnesses was circumstantial. In the case of **Tajudeen Iliyasu-vs- The State SC 241/2013**, the Supreme Court of Nigeria described circumstantial evidence as ".... Evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics..... this is so for in their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person caused the death of the deceased person. Simply put, it meant that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence." The court however cautioned that, "....such circumstantial evidence

must point to only one conclusion, namely that the offence had been committed and that it was the accused person who committed it." In this case, the testimony of the victim that the appellant did not have sexual intercourse with her, coupled with the conclusions of the medical expert on PF3A, the testimony of PW4 and the rest of the witnesses do not point to participation of the appellant in the defilement of the victim.

In **Bogere Charles v Uganda SCCA NO. 10 of 1996**, court following the case of **Teper v Queen [1952] AC480** held that before drawing inferences of the accused's guilt from circumstantial evidence, it is necessary to be sure that there were no other co-existing circumstances that weaken or destroy the inferences. In the instant case, as discussed above, the fact that the victim stated that the appellant did not perform a sexual act on her fatally destroyed any inferences of the accused person's guilt.

What is paramount in law is the quality of evidence adduced against an accused person and not the quantity of evidence. **See Ssewanyana Livingstone-vs- Uganda Supreme Court Criminal Appeal No. 19 of 2006.** In this case whereas there were four witnesses for the prosecution, I am not persuaded that they succeeded in proving that the sexual intercourse performed on the victim, was performed by the appellant.

Ground 3

Having found that there was no evidence pointing to the participation of the appellant in the defilement of the victim and that the learned trial magistrate erred in law in relying on insufficient medical evidence **corroborate evidence** to convict the appellant, there is no merit in expending court's time in delving into the severity or otherwise of the sentence imposed on the appellant upon his conviction.

Decision

In the circumstances, although there is medical evidence pointing to the fact that a sexual act was performed on the victim, there is neither direct nor circumstantial evidence to the effect that, the appellant is responsible for the said sexual act performed on the victim. This is especially so since in her testimony the victim stated that, "it is not true that the accused played sex with me. I used to go to the accused's home to see his sister Liz who is my friend. I have never had any sexual intercourse with him."

Consequently, it is my view that, the learned trial magistrate erred in convicting the appellant on the basis of evidence which was manifestly unreliable so as to be unsafe to base a conviction. The conviction of the appellant on the basis of the evidence on record was accordingly manifestly unjust and occasioned a miscarriage of justice.

In the premises, the appellant's conviction for defilement is hereby quashed, his sentence therefor is set aside and he is accordingly discharged forthwith unless held on any other lawful charge(s).

It is so ordered.

Rosette Comfort Kania
Judge
25th March 2024.