THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 122/2005

SILAGI BURORO GORDON::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM;

HON. JUSTICE A.TWINOMUJUNI,JA;

HON. JUSTICE S.B.K. KAVUMA,JA;

HON. JUSTICE M.S. ARACH AMOKO,JA;

JUDGEMENT OF THE COURT

(Appeal against conviction and sentence of the High Court of Uganda at Mbarara (P.K Mugamba.J.) given on the 25th day of April 2005 in criminal session case No. MMB.0813/2001 of 2001)

Introduction

This is an appeal against conviction and sentence by the High court (P.K. Mugamba.J.) in Mbarara HCR-05-CR-C0-0178 of 2007 whereby the appellant was convicted of defilement contrary to section 129(1) of the Penal Code Act and sentenced to 15 years imprisonment.

Background

The appellant was a casual labourer employed by Natukunda Jacquiline, P.W.I, the mother of Ampire Sheila the victim, a girl of 2½ years at the time of the commission of the offence. On the

13.04.2001 at about 10.am the victim who was in the area of P.W.I's canteen near its kitchen came from the direction of the kitchen where the appellant was doing some operation work. The victim came crying calling out her mother and saying that the appellant had molested her. She was also touching her private parts. P.W.I together with one Kedres Kwatampola, P.W.3 decided to examine the private parts of the victim where they found semen. When the victim was shortly afterwards examined by Dr. Trifon Mugisha, P.W.4, she was found to have a freshly ruptured hymen. The doctor also found mobile sperms in the victims tiny vagina.

The appellant was arrested and subsequently charged with defilement contrary to s.129 (1) of the Penal Code Act. He denied having committed the offence. The learned trial judge disbelieved and convicted him as charged and sentenced him to 15 years imprisonment, hence this appeal.

The grounds of Appeal

There are two grounds of appeal stated in the memorandum of appeal thus:-

1. **That the trial judge erred in law and in fact and misdirected himself in finding that the accused was guilty when there was no ample evidence.**
2. **The Trial judge erred in law and in fact to convict the accused and give him a harsh sentence when there was no evidence.**

Representation

Mr. Vicent Okwanga Senior Principle State Attorney appeared for the respondent while Ms Lydia Ahimbisiibwe represented the appellant on state brief.

The case for the appellant

Counsel for the appellant stated that she abandoned ground 2 but in effect argued the two grounds together. She submitted that there was no ample evidence to justify the conviction and sentence of the appellant as there was no one who saw the appellant having sexual intercourse with the victim. She submitted further that the evidence of P.W.I fell short of establishing the penetration of the victims vagina by the appellants penis. According to counsel, the rapture of the victim's hymen could have been due to some other cause.

Counsel argued that the conduct of the appellant, when confronted and asked about the offence, was not that of a guilty person. According to counsel, the appellant denied having committed the offence and calmly went on to do his work. Counsel cited to court and relied on **R. Vs Ronald Iswerlat [1942] 9EACA 58**.

She prayed court to review the evidence on record and dismiss the appeal.

The case for the respondent.

Counsel for the respondent supported both the conviction and the sentence. He submitted that there was overwhelming circumstantial evidence to support the two.

As for the appellants' participation in the commission of the offence, counsel pointed out that on the day and time in issue, the victim came from the direction of the appellant crying that the appellant had molested her and she was touching her private parts, according to the testimony of P.W.I.

The evidence of P.W.I, counsel submitted, was corroborated by that of P.W.4 who found a freshly ruptured hymen and live sperms in the private parts of the victim.

In counsels' view, the grudge set up by the appellant over the nonpayment to him by P.W.I of shs 300,000/= was unsustainable. Counsel cited to court the case of **Semungoma William vs Uganda Criminal Appeal No. 5 of 1999 (SC)** and prayed court to dismiss the appeal, uphold both the conviction and the sentence.

The Duty of Court

It is the duty of this court, being a first appellant court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see the witnesses testify.

See **Rule 30 of the Judicature (court of Appeal Rules) Directions S.I.13-10**. **Pandya VR [1957] EA 336, Okeno V Republic [1972] E.A 32 and Kifamunte Henry V Uganda SCCA NO. 10 of 1997** unreported).

Court's resolution of the grounds of Appeal.

We carefully listened to the submissions of counsel for both parties. We have also carefully considered the law applicable to the matter before us and the authorities cited to court as well as the evidence adduced.

The questions at the center of the resolution of this appeal are the participation of the appellant in the commission of the offence of which he was convicted and the appropriateness of the sentence of 15 years imprisonment imposed on him by the learned trial judge.

We find there is ample circumstantial evidence according to the principles enunciated in **Simon Musoke v R [1958] EA 715** and **Obonyo & others VR [1962] 542** to support the conclusion that it was the appellant who defiled the victim.

By his own admission, the appellant was in the vicinity of the scene of crime at the time of the commission of the offence. P.W.I had also testified that the appellant was doing operational work at her canteen behind its kitchen at that time.

According to the unchallenged evidence of P.W.I, she saw the victim coming to her into the canteen from the direction of the appellant at the material time.

The victim was crying calling out P.W.I and touching her private parts. She immediately reported to P.W.I into presence of P.W.3, as she touched her private parts, that the appellant had molested her. P.W.I and P.W.3, on examining the victim found semen in her vagina. The victims' immediate report to P.W.I of what had befallen her and her crying while touching her private parts was evidence of the conduct of a visibly distressed victim. This conduct corroborates the evidence of P.W.I and P.W.3 stated above. It is also settled law that evidence of a complaint by the victim of a sexual offence is admissible when the complaint is made to a third person. Any information to the identity of her assistant to the third person is admissible evidence. See **Patrick Akol vs Uganda (sc) Criminal Appeal No. 23 of 1992, Badru Mwindu vs Uganda, Court of Appeal No 11 of 1997.**

We are not persuaded by the assertion that the victim's hymen was ruptured by some other cause other than the penetration of the girls vagina by the appellants penis. We find no credible evidence on record to support this. Courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories.

See **Okala vs Republic 1965 EA 555,** and **Kanalusasi vs Uganda [1998-1990] HCB 10,**

We are not persuaded either that the appellant in the instant case was framed because of a grudge between him and P.W.I who had, according to the appellant, failed to pay him shs 300,000/=. There is evidence on record that the appellant and P.W.I had discussed the matter and agreed on terms of payment. But even if there had been a grudge between the two, the appellant cannot take refuge into it to justify his ravishing the victim, a kid and a total stranger to the grudge. We find, that this is an unsustainable afterthought and a concoction by the appellant.

We reject the appellant's denial of his involvement in the commission of the offence he was convicted of as a lie, a scheme intended to mislead court.

As regards the appeal against the sentence, we find no merit in it. The sentence imposed by the learned trial is legal. The Judge considered both the mitigating and the aggravating factors involved in the case before him which included the time the appellant had spent on remand and the breach by him of the trust of his toddler victim. This court held in **Kiwalabye Vs Uganda Court of Appeal Criminal Appeal No. A 143 of 2001,** thus:

> **"The law is well settled that whenever a trial court has exercised its discretion on sentence, an appellate court will not interfere unless the discretion has been exercised unjudicially or on wrong principles. Here the trial court gives reasons, the appellate court ill interfere only if the reasons given are clearly wrong or untenable. Here no reasons are given for the decision, the appellate court will interfere if it is satisfied the is wrong" (sic)**

See also **Kabuye Kibazo vs Uganda Criminal Appeal No. 51 of 2002, (COA),**

In the instant appeal, we find no cause to interfere with the trial courts' discretion in sentencing the appellant. The judge acted properly in sentencing the appellant to 15 years imprisonment.

In the result, we dismiss the appeal for lack of merit. We uphold both the conviction and the sentence of 15 years imprisonment imposed on the appellant**.**

Dated at Mbarara this…**15th**…day of…**November**…2010

……

A. Twinomujuni

Justice of Appeal

…….

S.B.K. Kavuma

Justice of Appeal

……

M.S. Arach Amoko

Justice of Appeal