THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.0177/2009

NTAMBALA FRED.....APPELLANT

V E R S U S

UGANDA.....RESPONDENT

[Appeal against conviction by the High Court presided over by Hon. Justice Elizabeth Musoke sitting at Mpigi on 31st August 2009]

CORAM: HON. JUSTICE A. REMMY KASULE, JA
HON. JUSTICE RICHARD BUTEERA, JA
HON. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT:

The background facts to this appeal are briefly the following:-

The appellant was charged with this offence of defilement for which he was tried, convicted and sentenced to 14 years imprisonment on 31-08-2009. The prosecution case was that the appellant is the biological father of Irene Namata a girl aged 14 years in 2009. Her mother had died in 1996 after she and the appellant had divorced. The appellant lived in the same house with his daughters Irene Namata and her sister Nalugo Jesca who was 12 years old, at the time.

He had been defiling his daughter Irene Namata for about 2 years. Appellant had warned her not to report that to anybody or he would cut her to pieces.
On 26/03/2006 the village children knew he was defiling her in the house at about 4.00 pm. They started throwing stones at the door. The appellant came out with a panga and threatened to cut them. When he returned into the house, villagers followed him in a mob. They entered the house and saw the condom he had used when having sex with his daughter, Namata Irene, on the bed.

They arrested and started beating him. The defence Secretary, Mr. Saad Mukwatangabo PW7, saved him from the mob and took him to police. The defilement victim was medically examined on Police Form 3. The Medical Report was exhibited and it revealed that there was penetration of the victim of defilement. The accused was charged, tried, convicted and sentenced to 14 years imprisonment. He was dissatisfied with the conviction, hence this appeal which is against the conviction only.

The only ground of appeal according to the Supplementary Memorandum of Appeal is that the learned trial judge erred in law and fact when she failed to subject the prosecution evidence to adequate scrutiny and evaluation thus occasioning a miscarriage of justice when the trial judge wrongly found that prosecution witness, PW4, was credible and reliable and that the appellant was guilty as charged.

At the hearing of this appeal, the appellant was represented by learned counsel, Mr. Henry Rukundo. The State was represented by Ms. Nabasitu Daisy, a Senior State Attorney.

Mr. Rukundo for the appellant submitted that the learned trial judge erred in law and fact when she held that, PW4, was a credible and reliable witness and relied on her evidence to convict the appellant. He submitted that the evidence of PW4 was not collaborated. He further submitted, that there was no medical evidence to show that PW4, the alleged victim of the offence, had bruises and that she had no injuries resulting from the defilement and therefore her evidence that she had been defiled was not credible as it was not collaborated.

Counsel prayed court to quash the conviction for the reasons stated above and to set aside the sentence imposed by the trial court.

Ms. Nabasitu, for the State, submitted, opposing the appeal, that the learned trial judge properly evaluated the evidence on record and properly concluded that the prosecution had proved beyond reasonable doubt the offence of defilement and the judge was right to have convicted the appellant.

She submitted that the age of the victim was proved by evidence of prosecution witnesses including the medical evidence. The essential ingredients of the sexual offence of defilement was proved by evidence of the victim (PW4) which was collaborated by the evidence of the other witnesses. The appellant's home had been attacked by the neighbours when he was having sex with the victim. The victim had testified that the appellant had used a condom in the sexual intercourse and the witnesses who came to her rescue found condoms on the bed where the appellant was defiling her.

Counsel submitted that the appellant's conduct of brandishing a panga at those who came to his home was further collaboration of the victim's evidence.

Counsel for the State contended that the trial judge properly evaluated the evidence of the *alibi* raised by the appellant together with the whole of the evidence adduced before the Court and came to the conclusion that the appellant was properly placed at the scene of the crime.

Therefore the learned trial judge arrived at the right decision on the evidence available when she convicted the appellant.

We have carefully considered the submissions as well as Court decisions availed to us by both the appellant and the State counsel. We have also read the record of the lower court.

It is now our duty as a first appellate court under rule 30(1) of the Rules of this Court, to reconsider, re-evaluate the evidence that was before the trial judge and reach our independent conclusion and thus resolve this appeal.

The learned trial judge was faulted that she relied on the un-collaborated evidence of the victim to convict the appellant of the sexual offence of defilement.

We wish here to first remind ourselves of the law on what amounts to collaboration. The law was stated by the Supreme Court in **Criminal Appeal No.37 of 1995 Uganda vs. George Wilson Simbwa** where it cited with approval its own decision in the case of **Constantino Okwel alias Magendo vs. Uganda, Criminal Appeal No.12 of 1990 (SC),** unreported. The Court held:-

affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular, not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at common law or within the class of offences for which corroboration is required……."

In the instant case we find that the evidence of the PW5, who went to the appellant's house at around 3.00 pm and found the appellant with a metallic bar was independent evidence. Appellant lived with his two daughters. The victim, PW4 ,was in the house with him. PW5 found condoms used and unused on the bed. We find this evidence to be independent.

We also find that the evidence adduced in Court by PW5, PW6 and PW7 sufficiently collaborated the evidence of PW4. We do not agree with counsel for the appellant that there was lack of independent evidence to collaborate that of PW4.

Counsel for the appellant contended that the evidence of PW4 should have not been found credible by the trial judge as there was no evidence of bruises and injuries on her body after sexual intercourse with an old person of over 50 years of age. He contended further that there was need for medical evidence to collaborate the victim's evidence.

We have looked at the whole evidence that was before the trial judge which she evaluated. PW4, the victim testified on what had happened to her. The medical evidence was to the effect that her hymen had been ruptured sometime back. The issue of a hymen ruptured before the incident under investigation was considered by this Court in the case of **Mukasa Everisto vs Uganda, Criminal Appeal No.53/1999** and the Court held as follows:-

> **"Consequently, the question of when the hymen of a victim of defilement in a particular case was ruptured is not essential for arriving at a verdict. Each sexual act with a child below 18 years constitutes an independent offence and the fact that a child had, prior to the occurrence of event upon which an accused has been arraigned before Court, lost her hymen would not offer a defence to the accused on a charge of defilement. What would be of essence is whether, on the evidence available, the prosecution has proved beyond reasonable doubt, that the accused before Court had had sexual intercourse with the child. The fact that a child's hymen is already ruptured does not mean that the victim cannot be defiled subsequent to the rupture of the hymen."**

In the instant case the rupture was found to be prior to the defilement of 26/03/2006.

The trial judge did find, however, that there was other evidence that sufficiently proved the defilement that occurred on 26/03/2006.

Counsel for the appellant was critical of the trial judge that she did not properly consider the defence of *alibi* raised by the appellant at the trial.

We find it appropriate to first state the law on the defence of alibi. This Court has had occasion to state the position of the law in the case of **Oyee George versus Uganda Criminal Appeal No.159/2003 (unreported).**

> **"The law is now settled that an accused person who sets up an *alibi* as a defence does not assume any burden to prove it. It is the duty of the prosecution to disprove it by adducing evidence that will put the accused at the scene of crime at the material time."**

See **Ssekitoleko v Uganda [1967] EA 531 Sentale v Uganda [1968] E.A. 365.**

The Supreme Court had occasion to consider the defence of *alibi* and state what amounts to putting the accused person at the scene of crime. This was in the case of **Bogere Moses and another vs. Uganda, Criminal Appeal No.1 of 1997** (unreported).

It stated as follows:

> **"What then amounts to putting an accused person at the scene of crime? We think that 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 upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of**

crime, and the defence not only denies it, but also adduces evidence showing that the accused person 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 that acceptable *per se* the other version is unsustainable."

In the instant case, the appellant was arrested at the scene of the crime in broad daylight. We find that he was placed at the scene of the crime. The defence of *alibi* would not be available to him.

We have re-appraised that evidence as discussed above. We agree with the learned trial Judge that defilement of the victim by the appellant as charged was proved beyond reasonable doubt.

We do not find any merit in this appeal and we accordingly dismiss the same.

The conviction by the trial judge is hereby upheld and sentence imposed is confirmed.

Dated at Kampala this .....11th.....day of ...February.....2015.

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Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

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Hon. Justice Richard Buteera
JUSTICE OF APPEAL

.....
Hon. Justice Kenneth Kakuru
JUSTICE OF APPEAL

11.02.15.

Jackline Okwi for the State
Rukundo Henry for Appellants (absent)

Ms Okwi the matter is for judgment and am ready to receive the judgment.

Ct Judgment delivered in chambers

Ag Asst. Reg.