

ADMISSIBILITY OF EVIDENCE PRESENTED BY CHILDREN IN SEX ABUSE
PROSECUTIONS IN UGANDA: THE CASE FOR REFORMS

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ABSTRACT

Presently, the statutory provisions of Uganda prevent the courts from convicting accused persons based on the evidence of a single child witness even when the evidence of the witness is satisfactory in all material respects. This dilemma is more pronounced in cases of child sexual offending because there is rarely any corroborative evidence in these cases. The goal of this paper is to explore the relevant legal loopholes in the trial of child sex offenders and to sustain the argument that, the high incidence of child sexual offending, unmatched by appropriate redress in the form of conviction warrants a departure from the current norm. The paper also seeks to demonstrate that the constitutional obligation of Uganda and the practice of other jurisdictions are seemingly instructive of the need for such reconsideration. The paper concludes that the much needed reform of the legal system will seemingly be effective if the current statutory provisions on caution are expressly abolished and replaced with provisions that further common sense as opposed to a mechanical application of the cautionary rule.

Keywords: Admissibility, Evidence, Sex Offences, Child Sexual Abuse, Uganda.

1. INTRODUCTION

The protection of children from all forms of abuse including child sexual offending has emerged to be a dominant subject in the contemporary agenda of most criminal justice systems. This is evident in the express criminalisation of various forms of sexual acts against children.¹ Although criminal justice systems are making concerted efforts to hold offenders to account through criminal prosecution, the gap between the incidence of child sexual offending and the rate at which convictions are sustained remains glaring.² Seemingly, a major challenge that criminal justice systems have to surmount is the practice of arbitrarily treating the evidence of children with caution. The dogmatic application of the cautionary rules of evidence of children has often led many criminal justice systems to insist on corroborative evidence where there is otherwise none. In Uganda, currently, the cautionary rule on the evidence of children is not

¹ See eg section 129 of the Penal Code Act Chapter 120 of Uganda, the Criminal Law (sexual offences and related matters) Act 32 of 2007 of South Africa.

² Uganda Police annual Crime report of (2009)11. According to this crime report, of the total of 7360 cases registered, 4433 suspects were arrested and taken to court. Of these, only 467 were convicted, constituting only 6.3% of all reported cases. In up 93.7% of the reported cases, there is no indication of convictions.

merely a rule of practice as the case is in other jurisdictions. The requirement has attained statutory backing in the domestic laws of Uganda. Section 40 (3) and section 101(3) of the Trial on Indictments Act (TIA) and the Magistrates Court Act (MCA) respectively, both provide that

Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.³

Thus, as far as the evidence of children of tender years is concerned, the courts are mandated to treat such testimony with caution by requiring corroboration. Divided into brief sections, this article argues that in this era of equality, the current framework of Uganda on the evidence of children not only defies the human rights standards affirmed by the country's constitution, but also, contributes to the glaring gap between the incidence of child sexual offending and the rate at which convictions are sustained. Drawing from the practices of other criminal justice systems, the author makes the case for a reformulation of the cautionary approach to the evidence of children. It is demonstrated that such a reformulation is warranted in light of the distinctive nature of child sexual offences. These offences are rarely supported by corroborative evidence other than the evidence of the single child witness.

2. THE DILEMMA OF *SSENYONDO UMAR V UGANDA*⁴

Calls for reform have to be justified by the gap in the current framework. It would therefore be inchoate to embark on an argument for reform without an exposition of the justification for such reform. For this purpose, one of the judgements in a case of defilement is engaged to provide context upon which the reform vouched for gains credence. In Uganda, defilement is the most prevalent form of sexual offending against children. Under section 129 of Uganda's Penal Code Act, Chapter 120, the offence of defilement is committed when a person 'performs a sexual act with another person who is below the age of eighteen years.'

This case was an appeal to the Supreme Court of Uganda against the conviction and sentence passed by the High Court sitting at Masaka in which the appellant was convicted of the offence of defilement contrary to 129(1) of the Penal Code Act and was sentenced to life imprisonment. The brief facts of the case were that on 12 July 1997 in Masaka District, the complainant's mother, PW2, left a 7 months girl child to the care of her son X. As soon as she left, the appellant sent away X to collect for him a herb for flavouring tea. The appellant then took the child to his house and defiled her. PW1 who happened to be returning home to check on the child found the appellant in action red handed and reported to his mother, PW2, the mother of the victim. The matter was subsequently reported to the authorities who arrested the appellant and indicted him with the offence. At the trial, he pleaded grudges with the mother of the victim and also alibi. Both were rejected and appellant was convicted and sentenced as aforesaid, hence the appeal to the Supreme Court. The Memorandum of Appeal raised one ground of appeal, namely that '[t] he learned trial judge erred in law and fact when he convicted the appellant on the basis of uncorroborated unsworn evidence of a single eyewitness of a child of tender years.'

³ Magistrates Courts Act Chapter 16 and the Trial on Indictments Act Chapter 23 are applicable in the Magistrates Courts and High Courts respectively. Their formulation of the cautionary rule on the evidence of children is however identical.

⁴ *Ssenyondo Umar v Uganda* Criminal Appeal 267 of 2002.

At the hearing of the appeal, the appellant's attorney submitted that the evidence on the record did not prove the indictment against the appellant. He submitted that the only evidence on which the conviction was based was that of the 12 year old, PW1, who testified that he found the appellant defiling the victim. Though it was not disputed that the victim was defiled, the evidence of PW1 on who did it, was never corroborated. Yet the evidence itself was given not on oath and being that of a single witness it was unsafe to base a conviction on it.

In addressing the defense' submission, the Supreme Court unanimously ruled that having carefully studied and re-evaluated all the evidence on record, it was satisfied that the finding by the trial judge that the victim in this case was a young girl aged only 7 months and that she was defiled is justified. The evidence of PW1, PW2 and PW4 was very clear on that. However, the court was concerned about the finding by the learned trial judge that it was the appellant who defiled the victim. The court pointed out that this finding was based on the sole unsworn evidence of PW1 who was himself a child of tender years. He was allowed to give unsworn testimony after a *voire dire* in which the judge found that he did not understand the meaning of an oath. He was the only one who testified to the participation of the appellant in the crime of defilement. None of the two adult witnesses, PW2 and PW4, saw the appellant defile the victim. All they knew about the crime was what PW1 told them. The court observed that all that it had was evidence of a single witness who is a child of tender years and who gave unsworn testimony. There was no corroborative evidence at all. The Supreme Court made reference to *R v Campbell (Campbell case)*⁵ in which Lord Goddard summed up the law as follows:

The unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on him or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence, though a particularly careful warning should in that case be given.

In applying the dictum in *the Campbell case* to the apparent case, the Supreme Court observed that no amount of self warning or warning of the assessor can justify convicting an accused on the unsworn evidence of a single identifying witness of a child of tender years. The Supreme Court made reference to section 40(3) of the TIA on the requirement of corroboration. It accordingly ruled that since the unsworn evidence of PW1 who was the sole identifying witness against the appellant was never corroborated, the trial judge was wrong to base a conviction on it.⁶ Accordingly, the appeal was allowed, the conviction was quashed and the sentence of life imprisonment was set aside.

This case has served to set the stage for the practical implication of the cautionary rule, particularly its dogmatic application, on the prosecution of child sexual offences in

⁵ *R v Campbell* (1956) 2 ALLER 272, 276.

⁶ See *Uganda v Ochwo Laston* HCT-00-CR-SC-0301 of 2010. In this case Mugenyi J, observed that '[t]he import of [section 40(3) of the TIA] would appear to be that generally the evidence of a child prosecution witness requires corroboration before being relied upon for a conviction.

Uganda. It suffices to note that in this case, the credibility of PW1 was of little concern. What the court was concerned about was whether PW1's evidence past the statutory test of corroboration as entrenched in section 40(3) of the TIA. The *Ssenyondo* case demonstrates how deeply engrained the dogmatic application of the cautionary rule is in Uganda's present law. While the focus here is on Uganda, the position of other criminal justice systems in Uganda may mirror Uganda's position. The conclusions and recommendations arrived at with respect to Uganda should therefore be of useful insight to other jurisdictions.

3. THE CONCEPT OF CAUTION IN THE LAW OF EVIDENCE

In furthering the case for reform of Uganda's current framework, it is needful to briefly discuss the concept of caution in the law of evidence and its exact place in Uganda's legal framework.

The cautionary rule evolved in England, where judges warned juries to exercise caution when considering the evidence of certain types of witnesses, particularly young children, accomplices and complainants in sexual-offence cases. In the 'traditional' sense, the 'purpose of the cautionary rule is to assist the court in deciding whether or not guilt has been proven beyond a reasonable doubt.'⁷ As such, emphasis is to be placed on the fact that the cautionary rule 'exists only to provide guidance in answering this overriding question'.⁸ This emphasis is of critical importance in the present day because over the years, cautionary rules 'seem to have become something of a fetish.'⁹ As Zeffert, Paizes and Skeen put it, it has become a mechanical test which 'automatically answers the question of guilt or innocence.'¹⁰ Thus, although the cautionary rule was born out of judicial experience, regrettably, it has become a 'victim' of inappropriate interpretation and application. It is arguably based on its misapplication that arguments in favour of its abolition are justified in as far as the law of evidence is concerned.

However, contrary to popular assumption that cautionary rules defy the current human rights regime as entrenched in a number of constitutions, including Uganda's, Sebba has observed that it is wrong to describe the rule or rather practice as an anomaly because the practice merely requires a judge to be cautious.¹¹ It is, however absurd that once a rule of practice, the rule has been unduly slanted in favour of the accused and often displacing the exercise of common sense.

Presently, Uganda's legal framework, despite having its foundation in English common law, seems to have detracted from the original essence of the rule. The rule as applied in Uganda seems to proceed on the premise that the evidence of children is inherently suspect. The current position, as apparent in the *Ssenyondo* case seemingly affirms the popular yet unsubstantiated notion that children are prone to lying, suggestibility, fantasy and exaggeration.¹² The evidence of children is therefore considered dangerous *ab initio*. As Goodman puts it, earlier scholars were convinced that children are 'the most dangerous of all witnesses.'¹³ Such strong pronouncements in the present day are ostensibly an insult to children. Yet the broad indication is that some criminal justice systems continue to affirm these notions.

⁷ DT Zeffert, AD Paizes & A StQ Skeen A *The South African Law of Evidence* (2003) 793.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Zeffert, Paizes & Skeen *supra* note 7, 798.

¹¹ L Sebba 'The requirement of corroboration in sex offences' (1968)3 *Israel Law Review* 86.

¹² J Spencer & R Flin *The Evidence of Children: Law and Psychology* (1990) 286-287. London: Blackstone. Spencer and Flin identified the six main objections to relying on children's evidence as follows: (a) children's memories are unreliable; (b) children are egocentric; (c) children are highly suggestible; (d) children have difficulty distinguishing fact from fantasy; (e) children make false allegations, particularly of sexual assault; and (f) children do not understand the duty to tell the truth. According to Spencer and Flin, this belief accords with societal and 'expert' views that were prevalent up until the 1960s.

¹³ GS Goodman 'Children's testimony in the Historical perspective' (1984)40 *Journal of Social Issues* 1

Although it is not necessarily essential for courts to require corroborative evidence for the cautionary rule to be met, for criminal justice systems that dogmatically apply the rule, this rule will most likely be met if there is some corroborative evidence.¹⁴ It is seemingly based on this premise that Uganda's current laws expressly require corroborative evidence when dealing with the evidence of children of tender years. During trial, the cautionary rule as dogmatically applied requires that a presiding officer be aware of the dangers inherent in assessing a child's evidence. In consequence, the court will require corroborative evidence for a conviction to be sustained. The South African case of *R v Manda*¹⁵ provides a practical example of how the courts deal with the evidence of the child witness in a suspicious manner. Schreiner, JA, observed that '[t]he imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion ...' Similarly, in the Zimbabwean case of *S v S*,¹⁶ Ebrahim J stated that in determining if a child witness is credible, such credibility must be tested against the shortcomings in his or her evidence. Judge Ebrahim referred to Spencer and Flin,¹⁷ where they listed six main objections to relying on a child's evidence, namely that children have unreliable memories, are egocentric, are highly suggestible, have difficulty distinguishing fact from fantasy, make false allegations, particularly of sexual assault, and do not understand the duty to tell the truth.

Taken together, though the original essence of the cautionary rules of practice never insisted on corroboration, its present dogmatic formulation in the case of Uganda and other criminal justice systems alike seems to proceed with a misguided application of the rule. It is the misinterpreted version of the rule that seems to defy the current notion of equality of all individuals before the law. Having discussed the current formulation of the cautionary rule, it is now needful to briefly discuss its implication on cases such as child sexual offending with a view demonstrating its impracticality in these cases.

4. THE PROBLEMS WITH THE STRICT REQUIREMENTS OF CORROBORATIVE EVIDENCE

While Uganda has an express law in place requiring that evidence of children of tender years be corroborated, this requirement seemingly defies the nature of child sexual offences. It is to be noted that in most child sexual abuse cases, the corroborative evidence that criminal justice systems often looks out for constitutes of medical evidence and eyewitness testimony. Regrettably, most of these cases are rarely supported by medical evidence or the testimony of eyewitnesses.¹⁸ These offences are often committed in private, the implication of this being that hardly will there be any eyewitnesses to the offence.¹⁹ Similarly, there is a well established body of empirical research demonstrating that child sexual abuse cases are rarely supported by

¹⁴ In the case of *R v Baskerville* (1916) 2 K.B 658, Lord Reading stated that corroborative evidence Denotes '... independent testimony which affects the accused by connecting or tending to connect him with the crime, i.e. it must be evidence which implicates him, meaning that the evidence which confirms in some material particular, not only the evidence that the crime has been committed, but also, that the accused committed it.'

¹⁵ *R v Manda* 1951 (3) SA 158 (AD), 162.

¹⁶ *S v S* 1995 (1) SACR 50 ZS.

¹⁷ Spencer & Flin *supra* note 12, 286-287.

¹⁸ S Estrich 'Rape' (1986) 95 *Yale Law Journal* 1175. Estrich points out that corroboration is not a neutral requirement. '[i]n a rape, corroboration may be difficult to find. In most cases there are no witnesses. The event cannot be repeated for the tape-recorder as bribes or drug sales are. There is no contraband, no drugs, no marked money, no stolen goods. Unless the victim actively resists, her clothes may be untorn and her body unmarked.... On the surface, at least, rape seems to be a crime for which corroboration may be uniquely absent.'

¹⁹ S Herman 'The Role of Corroborative Evidence in Child Sexual Abuse Evaluations' (2010)7 *Journal of Investigative Psychology and Offender Profiling* 191.

medical evidence.²⁰ This is the case because some child sexual abuse cases are not disclosed immediately and further, even with timely disclosure, genital injuries heal rapidly, often leaving no trace of injury in the form of corroborative medical evidence.²¹ With this state of affairs, the most reliable piece of evidence at the disposal of the prosecutor is the testimony of the child sexual abuse victim. Unfortunately, decisions on prosecution often depend on the availability of corroborating evidence in light of the express requirement of corroborative evidence under Uganda's laws.²² However credible the child sexual abuse witness may be, the express statutory requirement of corroboration of evidence for children of tender years means that the child sexual abuse case is not prosecutable. This state of affairs seemingly explains why the incidence of child sexual offending is often not matched with appropriate redress in the form of successful criminal prosecution. The case of *Ssenyondo* as discussed above is instructive of this dilemma. The critical questions then are:

- Does Uganda still need to retain a cautionary approach that insists on corroborative evidence?
- Could it be argued that in this new era of equality before the law, the only yardstick that should consistently apply is one of whether or not a case has been proved beyond a reasonable doubt?
- Is it not yet time for Uganda to progress its laws to high standards, where the evidence of a single child sexual abuse victim can sustain a conviction if such evidence is satisfactory in all material respects to prove sexual offending beyond reasonable doubt?

Currently, in Uganda, the Evidence Act provides that a conviction could be reached based on the evidence of a single witness.²³ However, the Evidence Act goes on to provide that this is subject to 'any other law in force'.²⁴ Put precisely, although the general rule is that the evidence of a single witness is enough to prove any fact in a case, where 'any other law in force' provides for an exception, then the evidence of more than one witness may be required. With regard to the evidence of children of tender years, although generally their evidence can prove a fact in a case, because sections 40(3) and 101(3) of the TIA and MCA respectively require their evidence to be corroborated, their evidence, standing alone, cannot be relied on to found a conviction in child sexual abuse cases. But as already pointed out, Uganda's current formulation of the rule is in stark departure from the original purpose. Because of the misguided application of the cautionary rule of evidence of children of tender years, even though the

²⁰ For a further detailed discussion on the paucity of medical evidence in cases of child sexual abuse see A Heger, L Ticson, O Velasquez & R Bernier 'Children referred for possible sexual abuse: Medical findings in 2384 children' (2002)26 *Child Abuse & Neglect* 645; JA Adams, K Harper, S Knudson & J Revilla 'Examination findings in legally confirmed child sexual abuse: It's normal to be normal' (1994) *Pediatrics* 310; VJ Palusci, EO Cox, TA Cyrus, SW Heartwell, FE Vandervort & ES Pott 'Medical assessment and legal outcome in child sexual abuse' (1999) *Arch Pediatr Adolesc Med* 388; AR De jong & M Rose 'Frequency and significance of physical evidence in legally proven cases of child sexual abuse' (1989)84 *Pediatrics* 1024; CW Christian, JM Lavelle, AR De Jong, J Loiselle, L Brenner & M Joffe 'Forensic evidence findings in prepubertal victims of sexual Assault' (2000)106 *Pediatrics* 100; AB Berenson, MR Chacko, CM Wiemann, CO Mishaw, WN Friedrich & JJ Grady 'A case-control study of anatomic changes resulting from sexual abuse' (2000) 182 *Am J Obstet Gynecol* 820; ND Kellogg, SW Menard, & A Santos 'Genital anatomy in pregnant adolescents: "Normal" does not mean nothing happened"' (2004)113 *Pediatrics* 67.

²¹ For a further detailed discussion on the implication of delayed disclosure on medical examination findings in child sexual abuse cases see Christian *et al supra* note 20, 100 & 102; ME Rimsza & EH Niggemann 'Medical evaluation of sexually abused children: A review of 311 cases' (1982)69 *Pediatrics* 11; D Muram 'Child sexual abuse: Relationship between sexual acts and genital finding' (1989)13 *Child Abuse & Neglect* 213.

²² WA Walsh, LM Jones & T Lippert 'Prosecuting child sexual abuse: The importance of evidence type' (2010)56 *Crime and Delinquency* 436-438.

²³ Section 133 of the Evidence Act of Uganda Chapter 6

²⁴ *Ibid.*

evidence of a single child witness alone may be sufficient to prove a child sexual offence beyond reasonable doubt, the accused has to be acquitted. The absolute requirement for corroboration in these cases has been affirmed in a number of court decisions, including the above discussed Supreme Court judgment of *Ssenyondo*. The reason why Uganda retains a dogmatic approach than that of the English law from which it borrowed is hard to fathom. It seems wrong for, the evidence of a child witness which is satisfactory in all material respects to fail to found a conviction merely because the evidence is adduced by a child of tender years. If the only evidence available before the court is the satisfactory evidence of a child of tender years and the option is to acquit the accused, it seems reasonable for the satisfactory evidence of the child witness to found a conviction. It is particularly critical that caution is not reduced to the requirement of corroborative evidence. Caution, it is submitted, should merely guide the courts in ensuring that convictions are only sustained after the evidence before the court proves the issue of determination beyond a reasonable doubt. In essence, the argument here is that caution in its objective sense should be retained. However, as Diemont J puts it in *S v Sauls*, the caution should not be allowed to displace common sense and the long established requirement of proving a case beyond reasonable doubt.²⁵

Empirical studies and theoretical arguments have been advanced to demonstrate the effect of the strict requirement of corroboration on child sexual abuse case disposition. Results show that since prosecution authorities have discretionary power to close a case where for instance, they see no possibility of securing convictions, absence of corroborative evidence has stood out as a major contributing factor for closure.²⁶ At the level of court proceedings, acquittals or conviction for less serious charges than the original charge is a common occurrence where there is no corroborative evidence.²⁷ On the part of law enforcement officers, where the probability of securing corroborative evidence in the form of medical evidence and eye witnesses is low, there is hesitation on their part to pursue investigations in child sexual abuse cases.²⁸ Thus, the strict requirement of corroboration, though merely constituting a section in Uganda's laws, can have profound implications on the actions of various criminal justice professionals.

This section demonstrates that while Uganda's current legal framework of cautionary rules, insists on corroborative evidence for the rule to be met in dealing with evidence of children of tender years, little regard is accorded to offences such as child sexual offending which are hardly supported by corroborative evidence. In light of the available studies on the devastating impact of the strict requirement of corroboration, the import of the current formulation for child sexual offences is that offenders will not be charged, and if they are charged, hardly will convictions be sustained because in most of these cases there will be no corroborative evidence. Having briefly illustrated the dilemma in Uganda's case, it is now needful to explore whether Uganda can find a way out of this dilemma in light of the practices in other criminal justice systems.

5. THE CAUTIONARY RULE IN OTHER SELECTED JURISDICTIONS

Whenever there is a gap in national legal frameworks, more guidance can be obtained from international standards or foreign comparative law. For this purpose, to inform reform in the case of Uganda, insight from foreign jurisdictions is pivotal. In South Africa, part of the common law derives from English law. In this regard, South Africa's system share common attributes with Uganda since both nations historically derived their common law principles from the English legal system. Pertaining to the common law on cautionary rules, some criminal

²⁵ *S v Sauls* 1981 (3) SA 172 (A), 180E.

²⁶ See eg Walsh *et al supra* note 22, 436-454; Sebba *supra* note 11, 69-74.

²⁷ *Ibid.*

²⁸ *Ibid.*

justice systems have chosen to modify it rather than reject it in its entirety. South Africa is one notable example. Unlike the position in Uganda, where the cautionary rule is statutorily entrenched, in South Africa, there is no statutory requirement for, the evidence of children of tender years to be corroborated. Nevertheless, as is the case in Uganda, traditionally the evidence of children has been treated with caution. Over the years, seemingly South Africa's common law has developed to embrace the growing body of research on the credibility of children. In *Woji v Santam Insurance Co Ltd*, Diemont, JA, stated as follows:

The question which the trial court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness ... depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. In his capacity of observation will depend on whether he appears 'intelligent enough to observe.' Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has the 'capacity to understand the questions put, and to frame and express intelligent answers... There are other factors ... Does he appear honest. . . is there a consciousness of the duty to speak the truth... At the same time the danger of believing a child where evidence stands alone must not be underrated.²⁹

Although the dictum in the *Woji* case was a significant step forward is as far the evidence of children is dealt with, it was still criticised for proceeding on the premise that children are inherently less credible in comparison to their adult counterparts. But the decision of the court in *S v Jackson (Jackson case)*, though pertaining to an adult rape case opened the discussion on the need to lay to rest the popular and unfounded tendency to treat children's evidence as inherently suspicious. Olivier J in the *Jackson* case stated as follows:

The notion that women are habitually inclined to lie about being raped is of ancient origin. In our country judges have tried to justify the cautionary rule by relying on 'collective wisdom and experience.' ... This justification lacks any factual or reality-based foundation and can be exposed as a myth simply by asking: whose wisdom? whose experience?...[empirical research has refuted the notion that] 'women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses'.³⁰

Indeed, in *Director of Public Prosecutions v S (DPP case)*,³¹ Kirk-Cohen, J questioned whether the same conclusion should apply to children.³² The judge acknowledged that it is common cause that problems do occur with the testimony of children. 'These problems arise, not from an unwarranted distinction, as was rejected in *Jackson's* case, but from the very fact that witnesses are young.'³³ But quite interestingly, in underscoring the ideal role and place of caution in appropriate context, Kirk Cohen J, in the *DPP* case stated as follows:

²⁹ *Woji v Santam Insurance Co Ltd*, 1981 (1) SA 1020 (A), 1028B-D.

³⁰ *S v Jackson* 1998 (1) SACR 470 SCA.

³¹ *Director of Public Prosecutions v S* 2000 (2) SA 711 TPD.

³² *Idem*, 713D-F.

³³ *Ibid.*

It does not follow that a court should not apply the cautionary rules at all or seek corroboration of a complainant's evidence. In certain cases caution, in the form of corroboration, may not be necessary. In others a court may be unable to rely solely upon the evidence of a single witness. This is so whether the witness is an adult or a child.³⁴

The import of the court's stance in the *DPP* case is that the solution lies not in abolishing the cautionary rules. In appropriate circumstances and upon appropriate application, caution in the form of corroboration may be necessary. On a case by case basis, judicial officers should be able to exercise common sense without tying their critical faculties of the evaluation to the requirement of corroboration. Notably, where the evidence of the single child sexual abuse complainant is satisfactory in all material respects, it would be problematic to insist on corroborative evidence before a conviction can be sustained. Conversely, where the evidence of a single child sexual abuse complainant is not satisfactory and marred with grave inconsistencies, it seems reasonable for corroborative evidence to be required. In this regard, Schwikkard has observed that '[e]ach case must be considered on its merits and this might involve a finding on whether the evidence of the child witness concerned is such that it can for purposes of a conviction safely be relied upon.'³⁵ Meintjes, in reflecting on the decision in the *DPP* case has added that 'in approaching such cases with a single-minded eye towards seeking corroboration, the courts tend to lose sight of the reasons for seeking it...the mere fact that the witness is a child does not provide a ground for seeking corroboration.'³⁶ The case of *S v Sauls & others*³⁷ is also instructive in guiding the courts. Here it was stated that:

There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness... The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule... may be a guide to a right decision, but it does not mean 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded.'... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

Taken together, the cautionary rule in South Africa has not been abolished. Rather, it has been modified, taking away the element of mechanical application and favouring a common sense approach that is not inspired by ancient prejudice against child witnesses. It has however been the argument of some scholars that although the current position is well augmented, modification of the cautionary rules 'does not restrain the discretion decision makers have to weigh up evidence and make findings. This process is based on fixed patterns of behaviour and sociological factors. Such a change may also not alter the decision to prosecute, which could still be based on a de facto requirement of corroboration before energy is poured into criminal proceedings.'³⁸ As such, there has been increasing impetus by the South African Law Reform

³⁴ *Director of Public Prosecutions v S* supra note 31, 716 B-D.

³⁵ PJ Schwikkard *Principles of evidence* (2010) 552 & 553. Claremont: Juta.

³⁶ R Meintjes 'A call for a cautionary approach to common sense: The Director of Public Prosecutions v S' (2000)1 *CARSA* 43.

³⁷ *S v Sauls & others* supra note 25, 180E.

³⁸ F Viljoen 'Removing insult from injury: reviewing the cautionary rule in rape trials' (1992) *Journal of South African Law* 747.

Commission for an express codification of this position as a precautionary mechanism to avoid the risk of mechanical application of the rule.³⁹

The position in England, a country where most of Uganda's common law finds basis should possibly persuade Uganda's criminal justice system to re-evaluate the feasibility of retaining sections 101(3) and 40(3) of the MCA and TIA respectively. In England, the cautionary rule applicable to children's evidence was abrogated by section 34(2) of the Criminal Justice Act of 1988.⁴⁰

Canada's position is similar to that of South Africa and England. Emphasis is placed on the need to exercise common sense on a case by case basis. This position was evident in the 1992 decision of *R v W*,⁴¹ where the Supreme Court of Canada rejected the dogmatic application of the cautionary rule together with the notion that children's testimony was inherently unreliable and, consequently, needed to be treated with special care. The Supreme Court, however took cognisance of the fact that children are not miniature adults and this should be appreciated on a case by case basis when assessing their credibility. In this regard Wilson J categorically stated as follows:

The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than adults⁴²

Similarly, in the Canadian case of *R v W (R)*,⁴³ McLachlin J stated that:

These changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilty, whether the complainant, whether an adult or child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a 'common sense' basis, taking into account the strengths and weaknesses which characterise the evidence offered in the particular case.

The common sense approach had earlier been underscored in the 1991 case of *R v K (V)*⁴⁴ where Wood, JA stated that:

³⁹ See eg South African Law Commission Project 107 Sexual offences report (2002). See also PJ Schwikkard 'Backwards to the cautionary rule: *S v Van der Ross* 2002 (2) SACR 362 (C)' (2003)19 *South African Journal of Human Rights* 256.

⁴⁰ Section 34(2) of the Criminal Justice Act 1988 provides as follows: 'Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated.' See also the Ireland position, Section 28 of the Criminal Evidence Act, 1992 of Ireland provides as follows: 'The requirement in section 30 of the Children Act, 1908, of corroboration of unsworn evidence of a child given under that section is hereby abolished.'

⁴¹ *R v W (R)*, (1992) 74 CCC (3d) 134.

⁴² *R v W (R)*, (1992) 74 CCC. (3d) 134, 142 & 143.

⁴³ *R v W (R)*, (1992)2 SCR. 122, 134.

⁴⁴ *R v K (V)* (1991) 68 CCC. (3d) 18 (BCCA), 29 & 30.

There is an infinite range of circumstances that can arise in the criminal trial process, and it would not only be impossible, it would be self-defeating, to attempt any precise guidelines for the exercise of the discretion in favour of giving the caution... The focus of the new discretion, which has replaced the old common law rules of practice, is the potential for the witness's evidence to be unreliable. No automatic assumptions of unreliability arise because of age, or the nature of the complaint. There must be an evidentiary basis upon which it would be reasonable to infer that the witness's evidence is or may be unreliable. In essence, while the courts in Canada underscore the need to discard ancient myths about the credibility of children, they do not lose sight of the limits of the cognitive abilities of children which must be assessed on a case by case basis. Conceivably, it is such an approach that guarantees the rights of both the complainant and the accused.

In sum, in drawing insight from the foreign, comparative law, it is particularly critical for context to be taken into account. The fact that practices from other jurisdictions afford broader protection to child witnesses in a justice system does not automatically warrant a transplant of practices. However, in terms of context, where the practices of other jurisdictions are compatible, there is reason to consider insight from these jurisdictions. Contextually, Uganda's cautionary rules derive from English law, a country that has long abandoned the mechanical application of cautionary rules. The approach of South Africa and Canada are very much similar to the approach of England, thus equally informs the practice of Uganda. In terms of legal reform it is submitted that Uganda should draw insight from criminal justice systems such as these. The extremely high incidence of sexual offending against children in Uganda unmatched with conviction rates mandates Uganda to consider legal reform. But even if the comparative foreign law is not as persuasive, conceivably the constitutional obligations of Uganda leave the system with no option but to adopt an approach that is compatible with the country's constitutional values. The next section engages Uganda's constitutional obligation with respect to cautionary rules on evidence of children.

6. THE CASE FOR LEGAL REFORMS

The added advantage of having constitutionally guaranteed rights in informing reform is that reform is removed from the arena of discretion to a binding obligation. Since the hallmark of many constitutions, including Uganda's is their supremacy, any law that is inconsistent with the values and rights enshrined in the constitution are unconstitutional.⁴⁵ As noted in the introduction, the strict requirement of corroboration has been expressly codified in the laws of Uganda as evident is sections 101(3) and 40(3) of the MCA and TIA respectively. The issue that falls to be resolved is whether these provisions would remain standing if measured against the supreme law of Uganda.

The current constitution of Uganda was enacted in 1995. It represents a major breakthrough in terms of guaranteeing the rights of individuals. The reasons advanced for the need to mechanically apply the cautionary rules when dealing with the evidence of children of tender years are that children are suggestible, imaginative, have poor memory, are prone to lying; tend to exaggerate incidents, among others. Based on this premise, children as witnesses are deemed to be less credible *ab inito*. Seemingly, this is the premise upon which the court in the *Ssenyondo* case proceeded. There is, however a growing body of social research that

⁴⁵ Article 2 of the constitution of Uganda underscores that it is the supreme law of the country and any law or custom that is inconsistent with it is void.

appropriately displaces these allegations against children. In fact, when measured against the growing social research these myths about children as witnesses increasingly pale and crumble.⁴⁶ It is to be noted that the constitution of Uganda expressly entrenches the right of everyone to equality.

Article 21 (1) provides that '[a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.' Article 21(3) prohibits any kind of discrimination against any particular category of individuals. Generously interpreted, this provision prohibits discrimination against children. Indeed the constitution of Uganda takes cognisance of the fact that the rights guaranteed in the constitution are not absolute.⁴⁷ They can be limited, but such limitation has to be justifiable in a free and democratic society.⁴⁸ The cautionary rule as couched under sections 101(3) and 40(3) of the MCA and TIA respectively undoubtedly discriminate against particular categories of witnesses-children. In light of the formidable body of research displacing the myths about the credibility of children, this limitation does not seem justified in a free and democratic society.⁴⁹ Research has tested these assumptions and found

⁴⁶ SJ Ceci & M Bruck 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993)113 (3) *Psychological Bulletin* 403-439.

⁴⁷ See article 43 of the constitution of Uganda of 1995.

⁴⁸ *Ibid.*

⁴⁹ For a detailed discussion on the reliability of children as witnesses, See generally studies and arguments of the following: L Berliner 'The child and the criminal justice system' In AW Burgess (Ed.) *Rape and sexual assault* (1985) 199-208. New York: Garland Publishing; B Ackerman 'Speaker bias in children's evaluation of the external consistency of statements' (1983)35 *Journal of Experimental Child Psychology* 111-127; SJ Ceci, R Caves & MJA Howe 'Children's long term memory for information incongruent with their knowledge' (1981)72 *British Journal of Psychology* 443-450; SJ Ceci 'Some overarching issues in the child suggestibility debate' in JL Doris (Ed.) *The suggestibility of children's recollections* (1991)1-9. Washington, DC: American Psychological Association; SJ Ceci, M Leichtman, M Putnick & N Nightingale 'Age differences in suggestibility' in D Cicchetti & S Toth (Eds.) *Child abuse, child development, and social policy*, (1993) 117-137. Norwood, NJ: Ablex; SJ Ceci, D Ross & M Toglia 'Age differences in suggestibility: Psycholegal implications' (1987)117 *Journal of Experimental Psychology: General* 38-49; SJ Ceci, M Toglia & D Ross 'On remembering...more or less' (1988)118 *Journal of Experimental Psychology: General* 250-262; CB Cole & EF Loftus 'The memory of children' in SJ Ceci, M Toglia & D Ross (Eds.) *Children's eyewitness memory* (1987) 178-208. New York: Springer-Verlag; D Davidson *Children's recognitions and recall memory for typical and atypical actions in script-based stories* Paper presented at the biennial meeting of the Society for Research in Child Development, Seattle (1991); GM Davies, A Tarrant & R Flin 'Close encounters of a witness kind: Children's memory for a simulated health inspection' (1989)80 *British Journal of Psychology* 415-429; H Dent & GM Stephenson 'An experimental study of the effectiveness of different techniques of questioning child witnesses (1979)18 *British Journal of Social and Clinical Psychology* 41-51; JH Flavell, E Flavell & FL Green 'Young children's knowledge about the apparent-real and pretend-real distinction (1987)23 *Developmental Psychology* 816-822; R Gelman, E Meek & S Merkin 'Young children's numerical competence' (1986)1 *Cognitive Development* 1-29; G Goodman 'Children's testimony in historical perspective' (1984a)40 *Journal of Social Issues* 9-31; G Goodman 'The child witness: Conclusions and future directions' (1984b)40 *Journal of Social Issues* 157-175; GS Goodman, JE Hirschman, D Hepps & L Rudy 'Children's memory for stressful events' (1991)37 *Merrill Palmer Quarterly* 109-158; GS Goodman & RS Reed 'Age differences in eyewitness testimony' (1986)10 *Law and Human Behaviour* 317-332; GS Goodman, L Rudy, B Bottoms & C Aman 'Children's concerns and memory: Issues of ecological validity in the study of children's eyewitness testimony' in R Fivush & J Hudson (Eds.) *Knowing and remembering in young children* (1990) 249-284. New York: Cambridge University Press; RV Kail *The development of memory in children* (1989). New York: Freeman; G Melton 'Children as partners for justice: Next steps for developmentalists' (1992)57 *Monographs of the Society for Research in Child Development*; EE Perris, NA Myers & RK Clifton 'Long term memory for a single infancy experience' (1990)67 *Child Development* 1796-1807; K Saywitz, R Geiselman & G Bornstein 'Effects of cognitive interviewing, practice, and interview style on children's recall performance' (1992)77 *Journal of Applied Psychology* 744-756; K Saywitz, G Goodman, G Nicholas & S Moan 'Children's memory for genital exam: Implications for child sexual abuse' (1991)59 *Journal of Consulting and Clinical Psychology* 682-691; W Schneider & M Pressley *Memory development between 2 and 20* (1989). New York: Springer-Verlag; R Taylor & M Howell

that children are not intrinsically more unreliable.⁵⁰ In light of the social research on the cognitive abilities of children, the mechanical application of the rule has no evidential basis. If anything, the current formulation of the rule only serves to further the acquittal of possible child sexual abuse offenders. The object of the mechanical application of the cautionary rule is to reduce error. The current formulation, however increases the chances of error as accused persons are automatically acquitted notwithstanding the satisfactoriness of the child witness' evidence. This is certainly not in the best interest of the child, a principle that Uganda affirms as primary in all decisions pertaining to children.

Similarly, the tendency to treat children's evidence as suspicious *ab initio* seemingly defies Uganda's constitutional commitment to respect the dignity of all individuals. Even more absurd is the fact that in addition to the cautionary rule applicable to children as child witnesses and as single witnesses, in Uganda, the evidence of sexual abuse complainants continues to be generally treated with caution merely because of the nature of the offence. A recent 2010 decision is instructive on this position.⁵¹ Thus seemingly, the child sexual abuse complainant or witness is subjected to three arbitral forms of caution namely, the caution applies to children, single witnesses and sexual abuse complainants. This is notwithstanding the defensible wealth of social research displacing some of the myths behind the arbitrary application of cautionary rules. Jurisdictions such as South Africa, Canada and England have responded to the available research on the reliability of children as witnesses and indeed abolished the mechanical rule on caution. Uganda should not only be persuaded by the practice in other criminal justice systems, but should also be inspired by its constitutional commitment to enforce its constitutionally guaranteed rights. In this new era of equality and respect of guaranteed rights, the yardstick in assessing the evidence of children should be whether or not the burden of proof has been discharged beyond a reasonable doubt. The evidence of a single child sexual abuse witness should be able to found a conviction where the child's testimony is satisfactory in all material respects. Such an approach, it is submitted, would be a furtherance of the rights that Uganda deems as fundamental.

7. CONCLUSION

The current formulation of the cautionary rule in Uganda puts criminal justice professionals in a precarious position in which a conviction cannot be sustained where the unsworn evidence of a child of tender years is not corroborated. This dilemma is more pronounced in child sexual abuse cases because these cases are rarely supported by corroborative evidence in the form of eyewitness testimony and medical evidence. The practice in some other criminal justice systems demonstrates a departure from the mechanical application of the cautionary rule with these systems, preferring a common sense approach when dealing with evidence of children. A mechanical application of the cautionary rule that insists on corroborative evidence is slanted in favour of the accused. An approach that is based on common sense as opposed to a dogmatic insistence on corroboration seemingly re-establishes the balance that was lacking. By expressly codifying the requirement of corroboration when dealing with evidence of children, the draftsmen of the current TIA and the MCA ostensibly closed the possibility of a common sense approach. The dictum in the *Ssenyondo* case affirms the notion that even when the judge or magistrate in Uganda is convinced beyond a reasonable doubt that the child sexual abuse complainant's testimony is satisfactory in all material respects, a conviction cannot be sustained. It is submitted that the

⁵⁰ 'The ability of 3-4 and 5-year-olds to distinguish fantasy from reality' (1973)122 *Journal of Genetic Psychology* 315-318; Spencer & Flin *supra* note 12.

⁵⁰ *Ibid.*

⁵¹ See eg the decision of *Uganda v Anyolitho* Session case 0074 of 2010 where court made reference to the decision of *Chila & Another v R* (1967) EA 722 in which the need for caution was underscored merely on account of the nature of the offence.

current position is not justified in this age and era of equality before the law. Despite the readiness of some judges and magistrates to depart from this outdated position,⁵² sections 40(3) and 101(3) of the TIA and MCA respectively imply that the common sense approach is illegal and any decision based on this approach can be successfully appealed. If the mechanical approach to the cautionary rule is abolished, Uganda's criminal justice system has great potential in successfully holding child sexual offenders to account. However, the corroborative evidence requirement remains a serious challenge. It is therefore necessary for sections 40(3) and 101(3) to be abolished. With the continued delay to abolish these provisions, they will continue to raise an alarm over the legality of founding a conviction on the uncorroborated evidence of a single child sexual abuse witness.

Of note, however, emphasis on the abolition of the current cautionary rule formulation does not lead to a conclusion that caution when dealing with evidence of children of tender years should be undermined. Although children can give coherent testimony capable of satisfactorily proving child sexual offending beyond reasonable doubt, sight should not be lost of the limited cognitive abilities of children in which children in some cases may be prevented from giving coherent testimony that is satisfactory in all material respects. Thus, on a case by case basis, common sense should be a useful guide in cautiously dealing with the evidence of children just as the case is for adults. Equally critical is that on the part of the prosecution, a reformulation of the cautionary rule should not cause prosecutors to discard their duty of gathering as much evidence as possible to discharge the burden of proof. Prosecutors must still concern themselves with obtaining enough corroborative evidence where such evidence is available to avoid situations where judges set aside convictions on appeal due to insufficiency of evidence. Reformulation does not necessarily mean that convictions shall automatically be sustained on a 'silver platter.' In the absence of corroborative evidence, the evidence of the single child sexual abuse witness will need to be satisfactory in all material respects. Indeed corroborative evidence if available remains helpful in casting out doubt hence the need to adduce it if it is available. It can be therefore be concluded that the only benefit that prosecutors gain from the reformulation is that they don't have to concern themselves with the

⁵² *Uganda v Peter Matovu* Cr. Case 146 of 2001. The reasoning of Lugayizi J represents the readiness of some judges to displace the unsubstantiated myths about the reliability of certain categories of witnesses. In this case, the accused was indicted for defilement. The particulars of the indictment were that on 18 July 2001, Peter Matovu had carnal knowledge of the complainant who was below the age of 18 years. In substantiating on the long established East African precedent of *Chila v R* (1967) EA 722, in which the need to treat the evidence of sexual abuse complainants was underscored, Lugayizi J made interesting and memorable observations. The learned Judge observed that 'court has not come across any empirical data or basis for the belief that women are greater liars than men or, for that matter that they are much more likely to lie than say the truth in matters concerning sexual allegations.' The learned judge consequently concluded that these are myths that discriminate against women and ought to be discarded. Of note however, the learned judge's commendable articulation was only capable of displacing the precedent in *Chila v R* because there was no statutory requirement in Uganda to treat the evidence of sexual abuse complainants with caution so as to insist on corroborative evidence. In fact Lugayizi J, categorically observed that for 'any law in force' to require corroboration of the evidence of a single witness, such law must be a creature of statute. Indeed, since the requirement of corroborative evidence when dealing with evidence of sexual abuse complainants is not statutorily entrenched in Uganda's legislation, the court ably disregarded the precedent in *Chila v R*. However, the requirement of corroborative evidence when dealing with the evidence of children of tender years is created by statute. Thus while Lugayizi J's ruling is commendable and a giant stride in the right direction, it seemingly may not be able to surmount the immense power that the TIA and MCA wield in as far the evidence of children of tender years in concerned. But perhaps, the same conclusion drawn by the learned judge in the case of *Uganda v Peter Matovu* as it pertains to discrimination of women should apply to children in an effort to abolish sections 40(3) and 101(3) of the TIA and MCA respectively. This is because the strict requirement of corroborative evidence when dealing with the evidence of children of tender years is equally based on unwarranted myths about the reliability of children as was rejected by the learned judge in the case of *Uganda v Peter Matovu*.

possibility of acquittal due to lack corroborative evidence where the child sexual abuse victim's evidence is satisfactory in all material respects. Thus reformulation of the cautionary rule does not displace the established standard of proving child sexual offending beyond reasonable doubt.

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