THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE C.M. KATO, J.A.
HON. MR. JUSTICE S.G. ENGWAU, J.A. &
HON. LADY JUSTICE C.N.B. KITUMBA, J.A.

CRIMINAL APPEAL NO. 14 OF 1998.

KARIM ZAWEDDE ABDU.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

[An appeal from the judgment of the High Court of Uganda at Kampala (Lugayizi, J.) dated 15/5/98 in Cr. S.C. No. 55 of 1996.]

JUDGMENT OF THE COURT:

This is an appeal against the judgment of the High Court sitting at Kampala whereby the appellant was convicted of defilement contrary to S. 123(1) of the Penal Code Act and sentenced to ten years imprisonment.

The brief facts of the case which were accepted by the learned trial judge were as follows. During the evening of 29th September 1995 at Nalyamagonja village in Mpigi District the complaint, Federesi Namuddu, who was then aged 9 years was sent by her grandmother to collect fire wood. This was in the afternoon. The appellant found the complainant in the bush and had sexual intercourse with her, threatening to cut off her head if she refused. He was armed with a panga. He also threatened to cut off her head if she revealed to any one what happened to her. The complainant knew the appellant very well because they were neighbours. When the complainant returned to the home of Nakato Regina (PW 6), her grandmother, with whom she

lived, she (the complainant) looked depressed and refused to eat. PW 6 observed that the complainant walked with her legs apart. PW 6 examined the complainant's private parts and found that there was pus. She asked her what had happened to her and she revealed that the appellant had defiled her in the bush. The matter was reported to the local authorities (LCs). PW 6 took the complainant to Christine Vital Busimo (PW 5) a retired nurse, who lived in the area. PW 5 examined the complainant and found bleeding and pus in her private parts and there was a tear. She had a bad smell. PW 5 referred the complainant to a police surgeon. The complainant was examined by Dr. Barungi Tadeus (PW 7) on police request. The doctor found that the complainant was aged 9 years. She had septic wounds on her skin and knee. Her hymen was torn and inflamed with fluids and she had a pus discharge. In the doctor's opinion all those features were consistent with defilement.

When Segawa Stephen (PW 3) the (LC) Vice Chairman went together with some youths to arrest the appellant, he ran away. However, the youths chased the appellant, arrested him and handed him over to the police. Dr. Birungi examined the appellant and found him to be 25 years old. He had a pus discharge from the urethra which, in the doctor's opinion, was likely to be a venereal disease. The appellant was mentally normal.

The appellant's defence was a complete denial. In his unsworn testimony he told court that he was found at his place of work and was arrested. The learned trial judge believed the prosecution case, convicted him as charged and sentenced him to 10 years' imprisonment. He now appeals against conviction and sentence on the following 4 grounds, namely:-

> *"1. The learned Trial Judge erred in law and fact for having noted the fact that the Prosecution alleged that there was PUS or discharge in the hymen of PW 1 and likewise pus/discharge in the penis of the Appellant and failed to culture and compare the two specimen and show them to lead to the same infection and failed to put due discredit to the prosecution.*

2. *The required high standard of proof in capital offences and therefore the onus of proof lying upon the prosecution to prove the case beyond reasonable doubt was not discharged.*

3. *The word* ***"Unlawfully"*** *in Section 123 (1) is not surplusage as was asserted by the learned Judge and proof of it was a legal requirement which was not discharged.*

4. *The sentence was manifestly too excessive.****"***

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On ground I, Mr. Zagyenda, learned counsel for the appellant, submitted that the trial judge erred to find that the doctor's finding of the existence of pus in the complainant's private parts and in the urethra of the appellant was corroboration of the fact that it was the appellant who had defiled the complainant. He contended that this was a wrong conclusion because the pus from both the complainant and the appellant was not cultured to determine the nature of the organisms.

In response Ms. Damalie Nantudde Lwanga, learned Principal State Attorney for the respondent, submitted that failure to culture the pus from the appellant and the
20 complainant was not fatal to the case. The pus found in the complainant's private parts and in the appellant's urethra was one piece of circumstantial evidence which the learned trial judge relied on. Ms. Lwanga contended that the learned trial judge in his judgment properly directed himself on the law and applied it to the facts. In his judgment the learned trial judge found that the complainant was a truthful witness and warned himself of the danger of convicting on the uncorroborated evidence of the complainant. Ms. Lwanga further submitted that there was other corroborative evidence on record which the learned trial judge took into account in his judgment. This was that the appellant ran away when the local authorities went to arrest him, which conduct was inconsistent with the innocence of the appellant.

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We entirely agree with the submissions of Ms. Lwanga. The learned trial judge properly directed himself on the need of corroboration in sexual offences. He was also alive to the position of the law that in cases where a complainant is truthful a

conviction could be based on her evidence as long as the court warns itself of the danger of convicting on the uncorroborated evidence of the complainant.

The learned trial judge found that the complainant was a truthful witness and in addition there were other pieces of evidence corroborating her testimony.

The learned trial judge said at p. 3 of his judgment:

"I warned the assessors and I hereby warn myself that it is dangerous to act upon the uncorroborated evidence of a complainant in a case involving a sexual offence. However, having sounded that warning, I can act upon the complainant's evidence without looking for corroboration for it if I am satisfied that the complainant was a truthful witness. (See Chila v. Republic [1967] E.A. 922 and Tuwamoi v. Uganda [1967] E.A. 84). As I pointed out earlier on, I had the opportunity of observing the complainant in the witness box. Although she was a girl of tender age she gave her sworn evidence firmly and in a straight/forward manner. I have no doubt that she was truthful witness. I am therefore willing to find that she told court the truth that on the day in issue she was forced into sexual intercourse.

The learned trial judge found that the complainant's evidence was corroborated by that of the doctor PW 7 and the evidence of PW 6 and the evidence PW 3 who went to arrest the appellant and he ran away.

We find that the learned trial judge properly applied the law to the evidence and came to the correct conclusion.

Ground 1 therefore must fail.

We turn to ground 2 which is that the prosecution failed to prove the charge against the appellant beyond reasonable doubt.

Mr. Zagyenda submitted that there were grave inconsistencies in the prosecution case which the learned trial judge in his judgment ignored as being minor.

Learned counsel contended that there were contradictions in the sequence of events as testified to by the witnesses which indicated that their evidence was not truthful. The doctor (PW 7) testified that he examined the complainant on 2nd October 1995 whereas, the nurse PW 5 said that she examined the complainant on 3rd October 1995 and the complainant testified that she was examined by the nurse (PW 5) one week after the incident. He further contended that the finding of the doctor (PW 7) differ from those of the nurse (PW 5). The name of the appellant is Zawedde Karim Abdu but the complainant testified that she was defiled by Kadogo.

Ms. Lwanga submitted that these contractions were referred to by the learned trial judge in his judgment as minor and she requested this court to regard them so. She submitted that some of those contradictions may be due to lapse of time.
Though the complainant referred to the appellant as Kadogo, she pointed him out in court as the person who defiled her. Besides, the appellant did not deny that in court.

We find that the submissions of Mr. Zagyenda have no merit. The finding of the medical examination of the doctor (PW 7) and the nurse (PW 5) could not have been the same. In her testimony PW 5 told court that as a nurse she did not go further in her examination of the complainant and that is why she referred the victim to a police surgeon. Surely their findings could not have been the same.

We agree with the submission of learned Principal State Attorney that the contradictions were minor and the learned trial judge rightly found them to be so.

Ground 2 must fail.

On ground 3 the complaint is on the interpretation of the word ***"unlawful"*** *in Section 123 (1) of the Penal Code Act.* Learned counsel for the appellant took great pains to explain to this court that sometimes defilement may take place and it is not unlawful as the offender might be affected by evil spirits or witchcraft and has no mens rea. Ms. Lwanga replied that the learned trial judge rightly held that defilement was an offence for all people and did not exclude people because of their religious beliefs. She argued that the examples elaborated by learned counsel for the appellant can not be maintained.

With due respect to Mr. Zagyenda, being possessed by devils or acting under the influence of witchcraft, if properly presented before the trial court and believed, could amount to a defence of insanity according to section 12 of the Penal Code Act. However the actus reus of defilement contrary to Section 123(1) of the Penal Code Act remains as an unlawful act. We would like to add that once a person has had sexual intercourse with a girl under the age of 18 years; the act is per se unlawful.

We find no merit in ground 3.

We now turn to ground 4 which is that the sentence was manifestly excessive. Mr. Zagyenda contended that the sentence of ten years imprisonment was manifestly excessive. He further contended that the learned trial judge did not take into account the mitigating circumstances. He suggested that a sentence of 6 years' imprisonment would be adequate.

In reply Ms. Lwanga supported the sentence passed by the learned trial judge. She argued that the sentence was not excessive in view of the age of the victim. Before passing sentence, the learned trial judge took into account the mitigating factors that the appellant was a young man of 28 years, was a first offender and had been on remand for 3 years.

This court will only interfere with the sentence where it is either illegal or manifestly excessive. See: S. 137 of the Trial on Indictments Decree 26 of 1971.
We agree with Ms. Lwanga that taking into account the age of the complainant, the learned trial judge was justified to impose a sentence of ten years' imprisonment. The sentence is therefore not manifestly excessive in the circumstances of this case.

Ground 4 too must fail.

In the result, the appeal is dismissed.

Dated at Kampala this .....23rd ...day of.....February.....1999.

C.M. Kato

Justice of Appeal.

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S.G. Engwau

Justice of Appeal.

C.N.B. Kitumba

Justice of Appeal.

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