THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.26/99

MUJUNI APOLLO :: PETITIONER

VERSUS

UGANDA :: RESPONDENT

CORAM: HON MR. JUSTICE S.T. MANYINDO, DCJ
HON LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON JUSTICE J.P. BERKO, JA.

Reasons for the Decision

On 31.8.98, the appellant Mujuni Apollo was convicted by the High Court at Fort Portal (Katutsi J.) of the offence of defilement contrary to section 123(1) of the Penal Code and was sentenced to fourteen years imprisonment. He now appeals to this court, against the conviction only. He was convicted with a co-accused who successfully filed a separate appeal to this court and had his conviction quashed, as the complainant's evidence against him was not corroborated.

We heard Mujuni's appeal on 23.10.2000 and dismissed it reserving our reasons, which we now give.

At the commencement of the hearing learned Principal State Attorney, Mr. Machael Wamasebu, told the court that he did not support the conviction on the ground that the offence of defilement had not been proved beyond a reasonable doubt due to lack of corroboration of the complaint's evidence regarding the sexual intercourse.

We did not agree. We preferred to hear the appeal on merit in view of the evidence on record.

The prosecution case was that on 3.8.1993 at around 4.00 p.m., the complainant was on her way to Mujunju village where she was visiting her elder sister when she met the appellant and his co-accused, (Ruhangaliyo Amooti). Both men pulled her into a nearby banana plantation where they proceeded to have sexual intercourse with her in turns. She raised an alarm, which was first

answered by Bakole Joseph, PW2, and then Mbabazi Tefilo, PW3. Bakole Joseph found Ruhangaliyo squatting nearby holding the complainant's basket while the appellant was ravishing the complainant not far off. The two prosecution witnesses tried to disentangle the appellant from the complainant in vain until Mbabazi had to hit him with a stick, which dislodged him. The appellant and the co-accused were well known to the two witnesses as village mates in Mujunju. They escaped but were shortly apprehended and handed over to Balinda Moses, PW4, a Special Police Constable attached to Kibiito Police Post.

The complainant was medically examined by a German doctor on 12.8.93 but the medical report could not be tendered in evidence as he had left the country before the trial, and there was nobody familiar with his handwriting.

The appellant in his very brief unsworn statement of defence set up an alibi, maintaining that he was at this home at the material time where he was arrested from by the LDU on an allegation of defilement.

The assessors were impressed with the truthfulness of the complainant and the prosecution witnesses. They advised the trial judge to convict both accused persons.

The learned judge carefully considered the evidence on both sides and considered the absence of medical evidence. He observed:

> **Though there is absence of medical doctor as to the act of intercourse, the evidence of both Bakoli and Mbabazi who were truthful witnesses leave no reason of doubt. (Sic) that the prosecutrix was sexually assaulted by Al in their presence. A2 tried his level best to exculpate himself while implicating Al."**

The appellant appealed to this court on two grounds:

1. That the learned trial judge erred in fact and law in holding that the offence of defilement had been proved beyond reasonable doubt inspite of uncorroborated evidence due to absence of a medical report.
2. That the learned trial judge erred in fact and law when he rejected the appellant's defence of alibi.

Mr. Mark Bwengye, learned counsel for the appellant abandoned the second ground of appeal, thus leaving only the sole issue of lack of corroboration of the complainant's evidence for decision. In support of his argument he referred us to Francis Jondo Vs Uganda, Criminal Appeal No.3/97 where this court found it unsafe for the trial judge to convict the appellant of rape in absence of medical evidence. The prosecution evidence in that case was full of inconsistencies, and the complainant admitted being a liar.

The court observed:

> **"It is not disputed that the complainant was not examined medically. In our view, this was a serious lacuna in prosecution case. We agree with the learned counsel for the appellant that in sexual offences like this one, medical examination of the complainant is desirable. It is strange that this complainant who was working at the hospital where there were qualified nurses and doctors could not be medically examined promptly. One reason given for this omission was that she had washed herself before she could see a doctor. We find this explanation not convincing since the doctors and nurses at Butabika could easily have examined her on the very day she was allegedly raped… On the issue of washing the knickers the stories as told by**
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> **the witnesses were rather conflicting…."**

We can straight away say that the authority cited was most unhelpful to Mr. Bwengye's case. He further surprisingly argued that there was no rupture of the hymen as that could have only been established by medical evidence. It is well established that in a sexual offence the slightest penetration will be sufficient to constitute the offence. The hymen need not be touched let alone injured.

It is clear to us that-by basing his appeal on the absence of medical evidence, Mr. Bwengye is according medical evidence undue weight, overlooking the fact that it is merely advisory and goes to fact and not law. The court has a discretion to reject it - **Rivell (1950) Cr App R 87; Matheson 42 Cr. App R.145.** The court can even convict without medical -evidence as long as there is strong direct evidence or when the circumstances of the offence are so cogent and compelling as to leave no ground for reasonable doubt, see **R V Omufrejczyk (1955) 1 Q.B.**

388; 39 Cr. App. R.1 where the Conviction for murder was confirmed though the body was never found.

We would point out that the type of corroborative evidence will vary from case to case. In sexual offences the court should normally look for corroboration of the evidence of the Complainant but may convict on the evidence of the complainant alone after due warning. We are satisfied that there was ample corroboration in the direct and independent evidence of Bakole Joseph and Mbabazi Tefilo, who answered the complainant's alarm and screams, and found the appellant on top of the complainant, having sexual intercourse with her.

The learned trial judge carefully examined the evidence before him aware of the absence of medical evidence. We find that there is impeccable evidence to support the judge's finding.

Mr. Bwengye's argument that the appellant was merely playing with the complainant can only be described as absurd and an afterthought and can only serve to reinforce the judge's finding. It was an afterthought because the original defence was one of alibi.

For these reasons, we see no merit in the appeal. It is dismissed.
Dated at Kampala this 28th day of November 2000.

S.T. Manyindo
Justice of Appeal

A.E.N. Mpagi-Bahigeine
Justice of Appeal

J.P. Berko
Justice of Appeal