THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: HON. C.M. KATO, J.A.
HON. G.M. OKELLO, J.A.
HON. S.G. ENGWAU, J.A.

CRIMINAL APPEAL NO. 102 OF 1999

BETWEEN

ASUMAN OLIBORIT::::::::::::::::::::::::::::::::::::::APPELLANT

AND

UGANDA::RESPONDENT

(Appeal from a judgment of the High Court
at Mbale (Maniraguha, J.) dated 30/8/99).

JUDGEMENT OF THE COURT

Asuman Oliborit, the appellant, was on 3 0/8/99 convicted in the High Court at Mbale of Defilement contrary to section 123 (1) of the Penal Code Act. He was sentenced to 8 years imprisonment. He now appeals to this court against the conviction.

The facts which gave rise to this case can be briefly stated as follows:-

On 19/9/96 at about 1.00 p.m. at Obolisio village, in Pallisa District, the victim went to harvest sweet potatoes from a garden which was 400 meters away from home. She found the appellant, who is her paternal uncle, grazing goats. He called the victim to him but she refused, whereupon, the appellant went and carried her to a nearby bush and had sexual intercourse with her. The

victim returned home crying. She was not walking properly and blood was flowing on the inner side of her thigh from her private part. On noticing the victim's condition, her mother Jessica Mary Amukadde (PW2) asked her as to what had happened to her. The victim told her that it was the appellant who had defiled her. Upon that information, the mother reported the matter to the Chairman Local Council I (LCI) of the area. When she failed to get prompt assistance from the area LCI Chairman, the mother reported the matter to police. The appellant was eventually arrested and indicted for the offence of defilement.

At the trial, the victim did not give evidence because the trial judge found that she was not possessed of sufficient intelligence to justify receipt of her statement. The appellant put up a defence of alibi. According to him, at the material time he was at a place called Amugelinga visiting his brother Oketel. In his view, the charge was concocted by the victim's mother because of a grudge that existed between him and the victim's parents following the death in 1979 of one Tukei, another uncle of the victim. The trial judge rejected that defence and convicted the appellant as stated here earlier.

There are four grounds of appeal namely:

(1) that the learned judge erred in law and fact in the application of the principle governing the issue of standard of proof but merely paid up lip service to the principles,

(2) the learned judged erred in law when he ignored or failed to identify in prosecution evidence major contradictions,

(3) the learned judge erred in law in the application of the principles of alibi and

(4) the errors were so grave that they occasioned a serious and material miscarriage of justice.

At the hearing, ground 2 was abandoned. On ground1, learned counsel for the appellant complained against the finding of the trial judge that it was proved beyond reasonable doubt that the appellant was the assailant when there is no such evidence. Mr. Zagyenda, learned counsel for the appellant, argued that since the victim did not give evidence, there was no other evidence on which the trial judge could find that the identification of the appellant as the assailant was

proved beyond reasonable doubt. In his view, the evidence of the mother of the victim, as regards the identification of the appellant is hearsay since she was merely relating what the victim had reported to her.

As a first appellate court, this-court has a duty to review the evidence on record to determine whether the findings of the lower court can be supported. Failure by the victim of a defilement case to give evidence is not necessarily fatal to the prosecution case provided that there is other cogent evidence to support the conviction. That was the view held by the Supreme Court in **PATRICK AKOL VS UGANDA, CR. APPEAL NO. 23 OF 1992 (S. C) (unreported).** This court followed that decision in **Badru Mwidu Vs Uganda, Cr. Appeal No. 1 of1997.**

In that case, the victim did not give evidence as she was outside the country for treatment. The appellant who was a boda-boda man had collected the victim from school and after defiling her returned her to her parents' home where she arrived crying. She complained to the house- girl who received her that the appellant had **sat on her.** When the house- girl asked him why the child was crying, the appellant replied that the victim was only stubborn and that he even found her crying in school. The victim continued to cry and would not eat but continued to complain of pain. The house-girl who wanted to wash her discovered that her knickers were blood stained.

It was argued on appeal that the evidence of the house-girl regarding the identification of the appellant was hearsay. This court rejected that argument on the ground that the appellant brought the victim who was received by the house-girl. That gave the house-girl opportunity to see him. When the victim complained that he sat on her, the house-girl confronted the appellant as to why the child was crying. He lied that the victim was only stubborn and that he found her even crying in school. The appellant's conviction was confirmed because there was other cogent evidence supporting it.

This is not so with the instant case. The only evidence that appears to connect the appellant with the offence is that of PW2, the mother of the victim. Ms Khisa argued that the evidence of PW2 as to the identification of the appellant is not hearsay. We do not agree. The evidence of PW2, as is relevant to the identification of the appellant, went as follows:-

"On 19/9/96 my child Amulen went to pick potatoes from the garden at about 1.00 p.m. While I was resting inside the house. It was about 400 meters away. The child came back where she was spoilt having blood combing (sic) from her vagina. She told me that Asuman had sexual intercourse with her. She told me that Asuman had carried her, removed her knickers and removed his two trousers **(pants and knickers) laid her face upwards and had sex with her."**

The above is clearly hearsay as the witness was relating what the victim had told her. There is no other evidence to prove participation of the appellant in the commission of the offence beyond reasonable doubt. This ground therefore succeeds.

On ground 3, the appellant complained against the trial judge's rejection of the appellant's defence of alibi when the evidence on which he relied is hearsay.

It is the law that an accused who sets up an alibi as an answer to a charge against him is not under a duty to prove that alibi. It is the duty of the prosecution to disprove the alibi by adducing evidence that places the accused squarely at the scene of crime. See Sekitoleko Vs Uganda [1967] EA 531.

We have held on ground I that the only evidence that tended to connect the appellant with the commission of the offence is that of PW2. We have further held that that evidence is hearsay. That, therefore, left the trial court with no other cogent evidence from which it could properly find that the prosecution had disproved the appellant's alibi beyond reasonable doubt. This ground also succeeds.

In view of the above holdings, ground 4 also succeeds.

In the result, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant by the lower court. We order that the appellant be set free forthwith unless he is being held on some other lawful ground.

Dated at Kampala this 3rd day of. November 2000.

C.M. KATO

JUSTICE OF APPEAL

G.M. OKELLO,

JUSTICE OF APPEAL

S.G. ENGWAU,

JUSTICE OF APPEAL