THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE LE.M. MUKASA-KIKONYOGO, DCJ.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO. 45 OF 1998

BARUGIRA UMARU …………………………………………………………APPELLANT

VERSUS

UGANDA……………………………………………………………………….RESPONDENT

(Appeal from a conviction and sentence of the High Court of Uganda holden at Mbarara before Mr. Justice I. Mukanza dated the 10th day of July 1995 in Criminal Session Case No. 297 of 1993)

JUDGMENT OF THE COURT:

This was an appeal from the judgment of the High Court dated 10th July 1995 in a ***Criminal Session Case No. 297 of 1993*** in which the appellant was convicted for defilement contrary to ***Section 123(1) of the Penal Code Act*** and sentenced to 14 years in prison.

The material facts are these. The appellant was a famous native doctor. He paid a visit to the home of one Kakuba at Kashoza village in Mwizi sub-county on 8/6/92. People with various ailments went to see him for advice and treatment. On that day Deziranta Nyinandegeya, PW4, took her children, including her step-daughter Caroline Rubesuza, her father and father-in-law to the Kakuba's home to see the appellant. PW4 told the appellant that the children had some abdominal problem. The appellant told PW4 the children's problem had a family connection. Because the appellant had many people to attend to he could not work on PW4's problem. PW4 and her group went home. They went back to see the appellant on the following day, that is to say, 9/6/92. They found the appellant, Kakuba and a certain boy at home. The appellant demanded Shs. 30,000/= for the treatment he was going to give to PW4's children and PW2,

PW4 and PW2 and the other children went into a room in Kakuba's house. The appellant blew off the light and spoke some words which PW4 and her group did not understand. After that he put on the light. He then cut PW2 and the other children on the chest and neck and smeared some medicine in the cuttings.

After the alleged treatment he demanded Shs. 100,000/= from PW4. PW4 refused and said they had agreed on 30,000/=. The appellant told PW4 that she either paid the Shs. 100,000/= or leave PW2 behind, adding that his magic would kill them if they went away with PW2 without paying. Because of the threat PW4 and the rest of the group went away and left PW2 behind.

After PW4 and the rest had gone the appellant told PW2 that he was going to marry her. PW2 replied that she was too young to marry. The appellant told PW2 that she would die if she did not stay with him. The appellant held her and put her on the bed and had sexual intercourse with her. The appellant and PW2 stayed together throughout the night. He had sex with her three times at intervals. Kakuba and the boy slept in the sitting room the whole night. The following morning the appellant asked one Kabaresire to take PW2 to his home at Ryamuyonja. PW2 remained in the house with appellant's wife, while the appellant remained at Kakuba's house.

PW4 and the rest returned home and reported what had happened to the family. The following morning members of the family, including PW3 Vincent Sunday, his brother Kapere (who did not testify) and his father went to Kakuba's home. They found the appellant in the house, but PW2 was not there. The family asked the appellant where PW2 was. At first he denied he knew where she was, but later he said he had sent her to his real home at Ryamiryongo. The members of the family went with the appellant to the LC1 Chairman. The appellant confirmed to the Chairman that the girl was in his home. The Chairman and the family went with the appellant to the Mwizi sub-county headquarters. The appellant was detained in the sub-county cells. The sub- county Chief Muzee Mugisha and his askari went to the tome of the appellant where they found PW2. She was brought to the sub-county Headquarters. The sub-county Chief forwarded the appellant with a letter to the Mbarara Police Station.

PW2 was sent to the Mbarara University Hospital on 12/6/92 where she was examined by Dr. Yonasani Begumye, PW1. The doctor found a cut wound in the hymen, tenderness around the

hymen, and smelly discharge. In the opinion of the doctor the cut wound and tenderness of the vagina were presumably caused by a penis. The doctor examined the girl 48 hours after the incident. The doctor found the girl to be 14 years old. After investigation the appellant was charged.

In his defence, the appellant said that he was a native doctor who treated people who came to him with native medicine, but did not practice witchcraft. He said he went to Ngoma market on 13th May 1992 to sell his medicine. PW4 and her father-in-law Paulo Bamuzaire came to him. Paulo Bamuzaire told him he had a swollen abdomen and paralysis. He told Paulo Bamuzaire that he would treat him and that he would charge Shs. 200,000/= if he got cured. Paulo Bamuzaire agreed and paid Shs. 1,000/= consultation fees. PW4 also told him that she had got a sick person called Tigasesa who was suffering from abdomen pain at home. PW4 asked the appellant to go home with her and see the sick person. The appellant said he could not go as he was busy selling his medicine. He gave PW4 medicine and told her that he would charge Shs. 100,000/= if the sick person got cured. PW4 agreed and paid Shs. 1,000/= consultation fee. Sometime later PW4 and Paulo Bamuzaire sent one Tiwanje to collect more medicine for them. Tiwanje told him that PW4's sick person was improving. He supplied the medicine. He told Tiwanje to inform PW4 and Paulo Bamuzaire that he would call on them on 8 June 1992.

On 8/6/92 he went to the home of Paulo Bamuzaire at Kashoza village where PW4 also stays. He demanded his money. He was told to spend the night there and that he would •be paid the next day and he agreed. The following morning he demanded his money. Paulo Bamuzaire told him he was going to collect money from his sons. Paulo Bamuzaire returned later at 5p.m. with two men who asked PW4 why she had allowed a witchdoctor to spend a night at their home without informing them. PW4 replied that he, the appellant, was the one who had cured her child called Tibagesa. The two men took his graduated tax and practicing license. He was tied Kandoya and the legs and beaten. He was taken to LC Chairman. From there he was taken to the sub- county headquarters and handed over to the Administrative Police. Himself, Paulo Bamuzaire, and his son, Tiwange, and PW4 were put in cells. The following day Tiwanje and Paulo Bamuzaire were released. Himself and PW4 were escorted to Mbarara Police station. PW4 was charged for giving her daughter PW2 for marriage. He was also charged with the same offence. He denied defiling PW2. He finally said that PW4 testified against him, because she did not want to pay him. The

learned trial judge disbelieved the appellant's story. He preferred the prosecution case and convicted him.

There are two grounds of appeal, namely:

(1) the learned trial judge erred in law and fact in convicting the appellant on the unreliable and uncorroborated evidence of the victim (PW2), and

(2) the learned trial judge erred in law and fact when he failed properly to evaluate the evidence adduced at the trial.

These grounds were argued together by learned counsel for the appellant, Mr. Henry Kunya. He submitted that if the learned trial judge had evaluated the evidence adduced properly, he would have found that the prosecution evidence was unreliable. The first reason was that PW2 said that the sexual intercourse took place throughout the night. From the evidence of PW2 she was a virgin. Yet the only injury the doctor found was a cut of the hymen of the vagina measuring 2 in diameter.

With due respect to Mr. Kunya, we find no merit in this argument. It is not part of the element of the offence of defilement that the victim should sustain serious injuries in the genital parts. In any event, much depends on the size of the male organ and the intensity of the action. As Ms. Betty Khisa rightly pointed out it is not even true that the only injury found by the doctor was the cut wound of the hymen. The doctor also found that examination with a finger caused tenderness on the freshly cut hymen. These findings corroborated the victim's evidence that the appellant had sexual intercourse with her. She said he sa*w* blood when she was penetrated. The doctor was believed by the judge and we find no reason to differ.

The same observation applies to counsel's argument that the doctor did not find sperms in the private part of the girl. The presence of sperms in the victim's private parts is not one of the elements requiring proof in defilement case. The doctor even said that it was not strange that the laboratory test did not detect any sperm. He reasoned that the man could not have ejaculated or that the sperm could have dried up at the time of examination.

Mr. Kunya further argued that the medical evidence was Inconclusive because the doctor said that the cut of the hymen was ***presumably*** caused by a penis. This argument was based on what the doctor said that the hymen could be ruptured by something other than a penis. He mentioned a finger or a foreign body. That argument did not take into account the other evidence on record. The evidence of PW2 clearly showed that the appellant had sexual intercourse with her. We agree with the argument of Ms. Khisa that the medical evidence, in our view, was conclusive and amply corroborated the evidence of PW2 that there was penetration.

Mr. Kunya also argued that failure to call Kakuba as a prosecution witness was fatal in view of the evidence on record that the incident happened in Kakuba's home. We find no merit in this argument. The prosecution is not obliged to call as a witness a person whose evidence will not support its case. The evidence available shows that the appellant carried out his practice in the home of Kakuba whenever he visited Kashoza. The prosecution did not know the relationship between the two and it would have been unwise for the prosecution to call him. If Kakuba had information favourable to the appellant nothing prevented him from calling him as his witness.

Mr. Kunya also argued that majority of the prosecution witnesses were relatives and as such there was the possibility that they told deliberate lies. There is no merit in this argument. There is no law that prevents relatives from being witnesses in matters affecting a member of the family, Of course, in circumstances such as these, the people on the scene are most likely to be relatives. It has not been shown that the relatives who testified told deliberate lies,

Mr. Kunya further argued that the local askari who arrested him was not called by the prosecution He relied on the case of ***Kasule v Uganda Criminal Appeal No. 10 of 1987 (1992-1993) HCB 38*** authority for what he said. The evidence on record shows that PW4 and her family 30 confronted the appellant to show them where PW2 was. The appellant told them that he had sent her to his home at Ryamiryongo. The appellant confirmed to the LC1 Chairman that the girl was at his home. The LC1 Chairman and the search party and the appellant went to the Mwizi sub-county headquarters and reported the incident. The appellant was detained in the sub-county cells. This was on 11/6/92. The sub-county Chief and his askari including the search party went to the appellant's home and found the girl. The sub-county Chief gave a letter to PW6, Fredson Ndijukye, a local administrator police attached to Mwizi sub-county headquarters, to

take appellant to Mbarara Police Station. The appellant was brought to Mbarara Police Station on 12/6/92 where he was detained up to the time he first appeared in court. As was said in ***Lt. Mike Ociti v Uganda, Criminal Appeal No 7 of 1998*** ***(unreported)*** Judgment of Supreme Court, a trial Court is entitled to know the circumstances surrounding the arrest of an accused person. Here the circumstance of the arrest of the appellant and when he was arrested are known. The case is therefore distinguishable from ***Kasule v Uganda*** (supra) where it was not clear when the appellant in that case was arrested. We find no merit in this argument also.

The appellant set up an alibi. He said he spent the night of 9/6/92 in the home of Paulo Bamuzaire where he had gone to demand his money. The evidence linking the appellant with the offence came from the evidence of PW4 and PW2. The evidence of PW4 shows that PW2 was left with the appellant in the home of Kakuba. The following day PW2 was found in the home of the appellant. The evidence of PW2 shows that after PW4 and the others had gone, she remained with the appellant who played sex with her the whole night. The appellant only sent her away to his home early morning of the 10/6/92. Her evidence shows that she had been with the appellant from 8p.m. on the 9/6/92 up to 5a.m. on 10/6/92. She and the appellant shared the same bed. PW2 said there was light in the room as they played sex. The learned trial judge found PW2 a truthful witness. The assessors found that the time PW2 spent with the appellant, aided by the presence of light in the room enabled her to identify the appellant without mistake. They accordingly rejected the appellant’s alibi. Once the evidence of Identifying witnesses was accepted, the conviction of the appellant was inevitable and we can see no reason to suppose that the learned trial judge was wrong in accepting it.

The last argument of Mr. Kunya was that as there was doubt about the age of PW1, a voire dire should have been held. PW2 said her father told her before he died that she was born in 1979. This was corroborated by PW3.

That means she was 13 or 14 years when the incident happened. The doctor said she was about 14 years when he examined her in June 1992. She said she was 16 years when she testified on 21/6/95. At the time she testified she was not a child of tender years. Consequently the judge was right not to have held a voire dire. We find no merit in that argument.

In the result we think that the appellant was rightly convicted and his appeal is dismissed.

Dated at Kampala this 29th day of May 2001.

L.E.M. Mukasa-Kikonyogo

Deputy Chief Justice.

J.P. Berko

Justice of Appeal.

C.N.B. Kitumba

Justice of Appeal.