**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEA OF UGANDA AT KAMPALA**

**CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.**

**HON. JUSTICE S.G. ENGWAU, JA.**

**HON. JUSTICE C.N.B. KITUMBA, JA.**

**CRIMINAL APPEAL NO. 132 OF 2002**

**NUWABUNE NATHAN:::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA:::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

***[an appeal from conviction and jusgement of the high court at Mbarara (Mugamba, J.) dated 20th August, 2002 in HCC Case No. mmb o428of 200]***

**JUDGMENT OF THE COUET**

This is an appeal against both the conviction and sentence for the offence of defilement contrary to section 129 (1) of the Penal Code Act.

The facts were that during the month of February, 2000 the victim Nabada Evelyn (PW1) was sent by her mother Nyakahara Nora (PW2) to sell sorghum in Kabuyanda Market. The appellant Nuwabine Nathan met her in the market from where he seduced her for marriage. He took her to his village at Kyesimbire Kikagati sub-county in Mbarara District where he defiled her. He stayed with the girl for about 2 week before being arrested by the police. He was in the house with the girl at the time of his arrest. He made a charge and caution statement before D/IP Tirugira Damson (PW3) admitting having sexual intercourse with PW1.

At the trial, the appellant denied the offence and knowledge of the victim. He also denied making the statement to PW3. His defence was rejected and he was convicted

as charged and sentenced to 8 years imprisonment hence this appeal on the following grounds:-

1. **The learned trial judge misdirected himself when he relied on the weakness of the defence case as the basis of his decision to convict the appeellant.**

2. **The trial judge erred in law when he handed down a very excessively harsh sentence of eight (8) years.**

3. **The learned trial judge erred in fact and law when he convicted the appellant using uncorroborated evidence of prosecution witnesses.**

4. **The learned trial judged erred in law and fact when he held appellant guilty of defilement.**

5. **The learned trial judge erred in law and fact when he failed to correctly evaluate the appellant's evidence.**

6. **That the learned trial judge erred in law and fact in relying on prosecution evidence which was full of contradictions and discrepancies and went ahead to convict the appellant.**

At the commencement of the hearing of this appeal, Mr. Robert Tumwiine, learned counsel for the appellant, abandoned grounds 1, 3, 4 and 5 and argued grounds 2 and 6 separately, beginning with ground 6 first.

On ground 6, the complaint is that the leaned trial judge erred in relying on the prosecution evidence that was riddled with major contradictions in convicting the appellant. Mr. Timwiine pointed out the following contradictions as being major which should have been resolved in favour of the appellant:

First, that PW1 stated that she went to the market with her brother, one Stefano Omunyesiga whereas her mother, PW2, stated that the girl went to the market with another brother called Francisco Nuwagaba. In counsel's view, that contradiction shows that either PW1 or PW2 deliberately lies to court.

Secondly, that PW1 stated that the brother she went with to the market did not know where she went with the appellant. On the other hand, PW2 stated that it was the brother who informed them where PW1 had gone with the appellant. Mr. Tumwiine contended that the contradiction should have been resolved in favour of the appellant.

Thirdly, that PW1 stated that the distance from the market to her home (about ½ km.) was shorter than the distance from the market to appellant's home. PW2, however, stated that the distance from the market to her home was about 10 miles.

Lastly, that PW1 stated that she had sexual intercourse with the appellant for 2 weeks whereas the doctor, PW4, stated that there were no signs suggestive of recent sexual intercourse though her hymen had ruptured several months before. In counsel's view, the contradictions were major which went to the root of the case and they should have been resolved in favour of the appellant because either PW1 or PW2 or both deliberately told court lies which put their credibility into question.

Ms Nabasa Caroline, learned State Attorney, did not agree. She submitted that there were no contradictions in the evidence of the prosecution witnesses, especially in the evidence of PW1 and her mother, PW2. In her view, when PW1 stated that her brother did not know where the appellant took her was not a contradiction when P W2 stated that it was a brother who informed them that PW1 had been taken.

On the issue of the distance from the market to the home of the appellant, Ms Nabasa submitted that PW2 stated that it was far and PW1 stated that it was farther. In view of the fact that PW1 was a girl of tender age her evidence should not be taken as a deliberate lie, Nabasa contended. The only contradiction she conceded to is which brother PW1 went with to the market. However, in her view, that was a minor contradiction.

On the question of a medical report, Ms Nabasa submitted that the report did not contradict the evidence of PW1. The victim stated that the appellant had sexual intercourse with her during the month of February, 2000 and she was examined on 25-4-2000. Learned State Attorney submitted that in the charge and caution statement, the appellant admitted having sexual intercourse with the girl. The statement was not contested. In her view, the learned trial judge was right to rely on it.

We have taken consideration of the alleged contradictions in the evidence of the prosecution witnesses. We hold the view that considering the tender age of the victim and lapse of time, her evidence should not be taken as a deliberate lie. In her testimony, PW1 stated categorically that she had sex with the appellant. In the charge and caution statement, the appellant admitted having sexual intercourse with her. The statement was admitted in evidence without any contest. Whether PW1 went to the market with brother "x" or "y" is immaterial, Whether brother "x" or "y" informed PW2 where the appellant took PW1 or brother "x" or "y" did not know where PW1 was taken was irrelevant. The distance from the market to appellant's home or from the market to PW1's home is immaterial. To the contrary the medical report does not contradict the evidence of PW1. It corroborates her evidence, according to our finding.

All in all, we find the alleged contradictions minor and the learned trial judge was justified to ignore them. We, therefore, find no merit in the 6th ground of this appeal.

As regards the 2nd ground, the complaint is that the sentence of 8 years was excessively harsh in the circumstances of the case. Mr. Tumwiine submitted that the appellant was a first offender without any previous record. He was 20 years old and bread winner in the family. He was remorseful and has spent 2 ½ years on remand. In these circumstances, Mr. Tumwiine contended that a lenient sentence leading to an immediate release should have been imposed.

Ms Nabasa did not agree. She submitted that the offence of defilement under section 129 (1) of the Penal Code Act attracts a maximum sentence of death. The sentence of 8 years in prison is not only lenient but also appropriate in the circumstances of the

case. The victim was a girl of 11 years at the trial and was a pupil of primary 3 and yet the appellant was 20 years old.

In her view, alleged loss of parents was an afterthought because the appellant was staying with the mother with no brothers or sisters at the material time.

Imposition of a sentence is discretion of the trial court. We can only interfere with it on appeal if the sentence was passed on wrong principle or was manifestly excessive and harsh. **See James s/o Yovan v R (1951) 18 EACA 147.** None of the above conditions are available in the present case. The mitigating factors raised by counsel for the appellant were duly considered by the learned trial judge learned counsel for the appellant did not cite any authority to convince us to the contrary. We are, therefore, unable to interfere with the sentence.

In the result, this appeal is dismissed for lack of merit.

**Dated at Kampala this 19th day of January 2005.**

**A.E.N. MPAGI-BAHIGEINE**
**JUSTICE OF APPEAL**

**S.G. ENGWAU**
**JUSTICE OF APPEAL**

**C.N.B. KITUMBA**
**JUSTICE OF APPEAL**