THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. LADY JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ.***

HON. LADY JUDTICE C.N. B. KITUMBA, JA.

HON. LADY JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO. 237/02

BETWEEN

SAABWE ABDU:::APPELLANT

AND

UGANDA::RESPONDENT

[***Appeal from conviction and sentence of the High Court of Uganda at Kampala (*****Lugayizi J)** ***dated 5th December 2002 in HCCSC No.137/01***]

JUDGMENT OF THE COURT

This is an appeal against conviction and sentence.

The appellant was charged with defilement contrary to ***section 129(1)*** of the Penal Code Act. It was alleged in the particulars of the indictment that on 14th September 2000 at Namalinda village in Nakasongola District unlawfully had sexual intercourse with Faith Nanyonyi a girl under the age of 18 years.

The case for the prosecution as found and accepted by the trial judge is as follows. On the day in question, at about 1 p.m. the complainant, Faith Nanyonga (P. W.2) was sent to the well to fetch water. She was accompanied by her sister, Topista Nanyonyi (P. W 3) her brother Kyenkya and another woman. These two did not testify at the trial. When they were returning home, they met a person covered in bark cloth. He abducted the two girls and took

them away. He had sexual intercourse with the complainant and the two girls identified the assailant by voice.

When the girls failed to return home, their father, Mbangire (P.W.4) consulted the appellant who was known in the village as a witch doctor. He advised Mbangire to bring two goats and two chickens for sacrifice to the gods before his daughters could be returned. The goats and chickens were brought taken to River Sezibwa and were sacrificed. The appellant went and collected the girls from the forest where they had spent the night. They informed their what the appellant had done to the appellant had to the complaiant. The matter was reported to the police. The appellant was arrested and charged.

The complainant was examined by a Clinical Officer, one Samuel Kasozi (P.W. 1) who compiled a report (exhibit P.1).

The appellant in his unsworn statement denied having committed the offence. He stated that he was a witchdoctor and Mbangire was one of his regular clients. He stated that when the complainant and her sister disappeared, Mbangire consulted him. He advised him that in order to solve the problem, Mbangire had to bring two goats and two chickens for ritual sacrifice which was done. Soon thereafter, the two girls returned. He maintained that he simply did his job as a witch doctor in finding the girls.

The learned trial judge with the unanimous opinion of the lady and gentleman assessor rejected his defence. He was found guilty as charged and sentenced to 12 years imprisonment hence the instant appeal.

The memorandum of appeal filed on his behalf has the following grounds:

1. **The learned trial judge erred in law and fact when he convicted the appellant of the offence of defilement when the prosecution failed to prove all the ingredients of the offence.**
2. **The learned trial judge erred in law and in fact when he relied on the contradictory and inconsistent evidence to convict the appellant.**
3. **The learned trial judge did not properly evaluate the evidence on record and therefore came to the wrong conclusions before convicting the appellant.**
4. **The sentence imposed on the appellant was excessive and unjustified in the circumstances.**

He prayed that the appeal be allowed. The conviction quashed and the sentence set aside. In the alternative, the court should find that a minor offence of indecent assault as having been committed by the appellant and impose an alternative sentence or a reduced sentence from that imposed by the trial court.

When the appeal came before us for disposal, Mr Ntuyo-Kafuko who represented the appellant argued the first three grounds together and last ground separately. We shall treat them in the same order.

The main thrust of Mr Kafuko's arguments was that the ingredients of the offence of defilement were not proved beyond reasonable doubt. He referred to the testimony of the complainant and medical evidence contained in exhibit P.1. He claimed that no penetration took place. He also pointed out that contrary to what the learned trial judge found, the evidence of the clinical officer and that of the complainant contradicts rather than compliment each other. It was counsel's contention that the trial judge did not evaluate the evidence properly.

In reply, Mr Okwanga, Principal State Attorney, supported the conviction and sentence. He contended that the prosecution proved all the ingredients of the offence beyond reasonable doubt by the evidence on record. He asserted that there is ample evidence that the victim experienced sexual intercourse with a man. He stated that the victim had sexual intercourse on three occasions. He contended that any slight penetration will suffice and the evidence of the victim was corroborated by medical evidence. The inflammation found by the clinical officer, the ruptured hymen Okwanga stated, was evidence that the victim suffered injury in her private parts.

The prosecution called four witnesses to prove the indictment against the appellant. The prosecution had to prove three ingredients of the offence. These are:

1. The age of the complainant being under 18 years of age.
2. penetrative sex by a male organ into the female sex organ
3. Participation of the appellant.

As for the age of the complainant, there was no birth certificate produced to prove her age. But there was other evidence to prove her age. The complainant gave evidence and stated that she was 14 years of age. She was not challenged in cross-examination. Moses Mbangire, the father of the complainant stated that she was 11 years old. He, too, was not challenged in

cross- examination. Kasozi, a clinical officer at Nakasongola Hospital examined the complainant. He put her age at 13 years.

The law requires the prosecution to prove that the complainant was under the apparent age of 18 years of age at the time the offence was committed. What is needed is evidence to prove beyond any reasonable doubt that the complainant was under the apparent age of 18 years. The law does not require the prosecution to prove the exact age of the complainant.

In the matter now before us, the evidence that was adduced by the prosecution and which was not contested by the defence at the trial proved the age of the complainant as being under 18 years. Mr Kafuko did not point out to us where the trial judge erred in his findings as far as the age of the complainant is concerned. On a proper appraisal of the evidence, we are satisfied that the prosecution discharged the burden of proving beyond reasonable doubt the age of the complainant being under 18 years.

The second ingredient that the prosecution is required to prove is penetrative sex. As Mr Okwanga rightly pointed out, the slightest penetration will suffice. Once it is proved that a male sex organ penetrated a female sex organ however slight the penetration is, the offence is complete.

The prosecution adduced the evidence of three witnesses namely the complainant, her sister and Kasozi. In giving her version of events, the complainant at page 11 of the record of proceedings said:-

"It was after crossing that expanse of water when the man inserted his sexual organ in my sexual organ. The man's sexual organ was on surface of my sexual organ I could not fit in. I felt pain in my private parts. I did not bleed".

Later she said:-

"The following morning he again had sexual intercourse with us"……..

"We spent 4 days at accused's home. He had sexual intercourse with me 2 times at his home".

In cross-examination, the witness stated that the appellant tried to penetrate her but failed.

The physical examination of the complainant on 20th October 2000 revealed a raptured hymen, injuries and inflammations around the private parts. The injuries and the rapture of the hymen were stated to be four days old.

He, too, was cross-examined. His findings as to the injuries and the raptured hymen were not challenged.

When the two girls returned from the bush, they were taken to the home of the appellant because he claimed according to the evidence of Mbangire that they were possessed of evil spirits and he wanted to treat them. The girls spent the night at the home of the appellant and the next day, Mbangire and other people visited the girls at the home of the appellant. When they were questioned as to what had happened, the complainant revealed in the presence of the appellant that he had had sexual intercourse with her. The appellant was immediately arrested and taken to police. The evidence of these witnesses proves beyond reasonable doubt that there was penetrative sex. Like the trial judge we are satisfied that the prosecution proved the second ingredient of the offence to the standard required by law.

The last ingredient was the participation of the appellant. Mbangire in his evidence stated that when he learnt about the abduction of the girls he went round the village and informed the people what had happened. A search was mounted and it yielded nothing. At about 8 p.m. the appellant came to his house and told him not to panic. He asked for two goats and two chickens for sacrifice.

The next day the items were procured and handed to the appellant. He led the witness and other people to the well and went into the swamp. He returned with the two girls.

The appellant in his defence claimed that he performed his duty as a witch doctor in recovering the girls. In other words he used magical powers to trace the girls. Learned counsel for the appellant did not address on the last ingredient of the offence. This means that he did not challenge the trial judge's findings about the participation of the appellant in the commission of the offence.

The evidence on record implicating the appellant in the commission of the offence is overwhelming. He knew where the girls were because he the one who abducted them. He confidently advised the father of the girls not to panic. The last ingredient of the offence was proved beyond reasonable doubt.

As for the sentence, an appellate court will not normally interfere with exercise of discretion by a trial court except where it is shown that there was failure to take into account some mitigating factor or that the sentence is illegal, harsh or excessive in the circumstances of the case.

The sentence imposed by the court was not illegal. It was not shown to us that there was failure on the part of the trial judge to consider any mitigating factor. It has not been shown that the sentence was illegal, harsh or excessive in the circumstances. The complainant was still a very young girl at the time the offence was committed. We find the sentence imposed appropriate and we shall not interfere with it.

In the result, this appeal fails in its entirety.

Dated at Kampala this 14th day of July 2007

L. E. M. Mukasa- Kikonyogo

Deputy Chief Justice

C.N.B.Kitumba

Justice of Appeal

C.K.Byamugisha

Justice of Appeal