THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE S.B.K. KAVUMA, JA

CRIMINAL APPEAL NO.252 OF 2002

MUTUMBWE WILLIAM……APPELLANT

V E R S U S

UGANDA …….RESPONDENT

[Appeal from conviction and sentence of the High Court at Mbale (Mwondha, J) dated 26th September 2002 in Criminal Session Case No.24 of 2000]

JUDGMENT OF THE COURT:

This is an appeal against the judgment of the High Court at Mbale where the appellant was charged with the offence of defilement, he was convicted and sentenced to life imprisonment. The facts of the case as found by the learned trial judge are as follows:-

On 10th November 1999, at Morotome village, Kabwangasi Sub-county in Pallisa District, the mother of the victim, one Jane Kalepa left her daughter called Barbra Amacu aged 6 years at her home taking care of the baby. She went to the nearby shops. On her return, she found that Amacu had left the baby alone and was nowhere to be seen. Nearby there was a shed where Kalepa sold

Malwa drinks. She heard some noise from shaking forms and she went there to see what was going on. She found the appellant lying on top of the small girl Barbra Amacu, with his pants down and the child's dress pushed up. Her pants had been removed. The appellant started running away while pulling his trousers up. The complainant (PW7) followed the appellant while making an alarm. He entered the house of one Mugugwa (PW4). Many people answered the alarm including the LC Officials of the area who arrested the appellant and took him to Kabwangasi Police Post. Meanwhile the complainant checked the private parts of her daughter and she found that "**she had bruises in the vagina as he was trying to enter".** She took the victim to Pallisa Hospital for examination which was done on the same day. The doctor who examined her found that she had inflammation on her private parts but her hymen was not ruptured.

In his defence, the appellant accepted that on the date in question, he went to the home of the complainant (PW2) to take Malwa. He bought Malwa from her but she left him with her daughter and went somewhere. On her return, she found her daughter jumping around playing with him but to his surprise PW2 started raising an alarm that he had defiled her daughter. Many people started coming as a result of which he feared and fled to the nearby home of PW3 where he was arrested and taken to police and then to court. The appellant was subsequently charged with the offence of defilement, convicted and sentenced as aforesaid. Hence this appeal.

Mr. Henry Kunya who appeared for the appellant on a state brief filed a Memorandum of Appeal with the following four grounds of appeal:-

1. **THAT the learned trial judge erred in law and fact when she convicted the appellant on the basis of uncorroborated and unsatisfactory circumstantial evidence.**
2. **THAT the learned trial judge erred in law and fact when she disregarded the appellant's defence which was credible, truthful and believable.**
3. **THAT the learned trial judge erred in law and fact in imposing a sentence of life imprisonment against the appellant, which was harsh and excessive in the obtaining circumstances.**
4. **THAT the learned trial judge erred in law and fact when she failed to adequately evaluate the evidence adduced at trial and hence reached an erroneous decision.**

Mr. Kunya argued grounds one and four together. He submitted that the evidence upon which the appellant was convicted was neither corroborated nor satisfactory. He argued that since the victim of the defilement was not called to give evidence, it was useless to talk of corroboration because there was no evidence to corroborate. He contended that finding of the appellant lying on top of the victim, even if true, could not of itself prove that there was any sexual intercourse. The doctor's evidence was not satisfactory because it did not prove that there was any sexual intercourse or penetration at all. Mere inflammation of the girls vagina is not proof of sexual intercourse as the hymen was not ruptured at all. In his view, the absence of the evidence of the victim was fatal to the whole case and the appellant was wrongly convicted. He requested us to find so and to quash the conviction and set aside the sentence and order that the appellant be set free.

Mr. Fred Kakoza, the learned Principal State Attorney in the Directorate of Public Prosecutions did not agree. He supported the conviction and the

sentence imposed on the appellant. He argued that there was sufficient evidence to prove that there was penetration of the vagina of the victim. He relied on two pieces of evidence which, in his view, proved penetration:-

(a) PW2 found the appellant lying on top of the victim with his pants down and the victim's pants had been removed and her dress was pushed up.

(b) The mother, (PW2), examined the victim and found bruises on her vagina.

We shall now proceed to dispose of these two grounds of appeal. In order to prove a charge of defilement, it must be proved that the accused person had sexual intercourse with the victim. It is not, however, necessary that full sexual intercourse should have taken place. It will be enough if there is evidence showing that some penetration of the male sexual organ into the victim's vagina took place. It has been repeatedly held in our superior courts that in sexual offences, the slightest penetration will be sufficient to constitute an offence. See **Mujuni Apollo vs Uganda Cr. Appeal No.26 of 1999.**

In sexual offences, the evidence of the victim of the offence is always very essential. She is the one who experiences the act constituting the offence and is the one most suited to describe to court the nature of the experience. This does not mean, however, that sexual offences cannot be proved in the absence of the evidence of the victim. If there is cogent evidence, circumstantial or otherwise, that a sexual act must have taken place and there are no coexistent facts to suggest otherwise, a trial court can, after warning itself of the danger of convicting in absence of the victims evidence, still go ahead and convict on that evidence.

In the instant case, we have the evidence of Jane Kalepo (the mother of the victim who gave evidence as PW2). She found the appellant lying on top of her daughter. His trouser was down and the victim's pants had been removed and her dress was pushed up. She stated that when she examined the victim, she found some bruises on her vagina caused by the appellant, according to the witness, **because he was trying to enter**. The impression which was formed by this witness after examining her daughter was that the appellant was trying to enter the vagina of the victim but she was not sure whether he succeeded. She formed this impression after observing some redness on the vagina which she also refers to as bruises. Apparently the victim did not tell her anything to suggest that penetration had occurred.

We do not think that this evidence alone is enough to lead to an irresistible inference that penetration must have occurred. It does not rule out the possibility that the appellant was still fumbling when his diabolical attempts were frustrated by the sudden arrival of the victim's mother (PW2). Then, there is the evidence of the doctor (PW1) who examined the victim some seven hours after the incident. He said he examined the victim Amacu Barbra who was then aged 5 years. He was told that she was sexually assaulted. He stated in his own words that.

> **"There was penetration, the hymen was not ruptured".**

He also found inflammation in her private parts and some injuries on her knee. She had no venereal decease or pregnancy. Under cross examination, the doctor clarified:-

> **"The entry of the vagina was red. There were no signs of spermatozoa. Redness can be caused by friction. Friction can be caused by anything physical. I didn't find what caused the redness. I**

concluded because the police officer told me that she was sexually assaulted. Redness in female organs can be caused by infections also. I didn't talk to the victim about what had happened to her."

After examining the victim, the doctor filed Police Form 3 Appendix. The second question on that form asked:

"Are there any sign of any form, however slight of penetration?"

The Doctor replied:- **"Yes (Red)"**

Question No.5 on the form asked:-

"Are there any injuries or inflammation around the private part?"

The doctor answered **"Yes"**

Question No.6 asked:

"Are injuries in (5) Consistent with force having been met sexually?"

The doctor put – (dash) on the space provided for his answer.

On this evidence, it seems clear to us that though the doctor used the word **"penetration"** he was only making an inference from the fact that he was told that a sexual assault had occurred and from the inflammation (redness) of the vagina of the victim. That is why he was not prepared to answer positively on the police form that the injuries or inflammation he saw on the victim was consistent with force having been met sexually. He said that such redness could be consistent with an infection. He was not prepared to state categorically that he saw anything, penetration or inflammation (redness) consistent with only a sexual act.

This is where the evidence of the victim of the defilement would have proved crucial. Her evidence would have assisted the court to make an informed inference as to whether penetration took place or not. For a child of only five years, one would have expected her to complain to her mother of feeling pain. It seems the interview the mother had with her left her with no doubt that the appellant was still trying to penetrate but had not yet succeeded. In the absence of the vital evidence of the victim, we are unable to support the finding of the trial judge that the evidence before her proved beyond reasonable doubt that sexual penetration took place. This means that the offence of defilement cannot stand. But, as I shall show presently, the evidence could support the commission of other minor cognate offences to the offence of defilement.

The second ground of appeal complains that the trial judge erred in law and fact to disregard the appellant's defence which was a total denial of having sexually assaulted the victim. We have carefully studied the evidence of PW2, the mother of the victim, PW3 the Chairman of LCI who rescued the appellant from a mob which was threatening to lynch him and PW4 in whose home the appellant took refuge. The learned trial judge found these witnesses to be credible. On the other hand, she did not believe the defence of the appellant. We are equally satisfied that on the morning of 10th November 1999, the appellant sexually assaulted the victim Amacu Barbra a girl who was then aged 5-6 years of age. This type of sexual assault is called, in light of the evidence before the trial court, attempted defilement. The offence is provided for in section 123(2) of the Penal Code Act which states:-

> **"Any person who attempts to have unlawful sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to imprisonment for eighteen years."**

The offences of attempts are defined under 369 of the Penal Code Act as follows:-

> **"369 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some over act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**
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> **(2) It is immaterial-**
>
> **(a) except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention;**
>
> **(b) That by reason of circumstances not known to the offender it is impossible in fact to commit the offence."**

There is credible evidence that the appellant was found red handed lying on top of a small girl aged 6 years. He had lowered his trousers to set free his sexual organ. He removed the pants of the small girl and pushed her dress upwards away from the area of her private parts. When he was forced to abandon his project by the arrival of the girl's mother, he took off leaving the girl on top of a form where he tried to ravish her. Examination of the girl shortly after the crime revealed that her vagina had been bruised and she had other injuries on her thighs and knees. Though we were not satisfied that penetration had occurred, yet we have no doubt that he had completed all the necessary preparations by removing her and his clothes, lying on top of her and bruising her sexual parts to enable him defile the young girl. He had started putting his intentions into execution and manifested the intention with overt acts of

undressing himself and the child and lying on top of her. We therefore find the appellant not guilty of the offence of defilement but guilty of the offence of attempted defilement c/s 123(2) of the Penal Code Act. The conviction for defilement is quashed and the sentence of life imprisonment is accordingly set aside.

We shall now proceed to hear the allocutus, if any, of the appellant and the reply from the respondent to enable us pass our appropriate sentence on the appellant.

Dated at Kampala this 4th day of July 2008.

Hon. Justice S.G. Engwau
JUSTICE OF APPEAL

Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL

Hon. Justice S.B.K. Kavuma
JUSTICE OF APPEAL