THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE S.G. ENGWAU, JA
HON. JUSTICE S.B.K. KAVUMA, JA

CRIMINAL APPEAL NO.214 OF 2002

KASAIJA DAVID ……. APPELLANT

VERSUS

UGANDA …….. RESPONDENT

[Appeal from conviction and sentence of the High court of Uganda, at Kasese (Kania, J) dated 12th November, 2002 in Criminal Session Case No.58 of 2001]

JUDGMENT OF THE COURT

The appellant, Kasaija David, was indicted for and convicted of defilement contrary to section 129(1) of the Penal Code Act. He was sentenced to 14 years imprisonment by the High Court of Uganda sitting at Kasese.

The brief facts of the case were that on the 4th June, 2000 at around 6.00p.m at Kaserengete village in Kasese District, the victim Biira Kavumi, PW5, was playing with her friend, Scovia Muhindo, PW6, at her home. The appellant asked the girl to go with him, pretending that he was going to give her money. He took the girl to a nearby uncompleted brick house of one Kaheru where he had sexual intercourse with her.

While the appellant was sexually assaulting the victim, she felt much pain in the stomach and started crying, which attracted her playmate, PW6, who proceeded to the scene to see what was going on. On arrival, PW6 found the appellant putting on his trousers and the victim was bleeding from her private parts. This was in one of the rooms of the uncompleted building.

Thereafter, the appellant left and the girl went back home. As he was going, the appellant told the girls not to disclose what had happened because he was going to buy them a bun.

When the mother, Ms Mbambu Rehema, PW4, returned home, the victim reported to her that the appellant had sexual intercourse with her. PW4 knew the appellant before. He was a wheelbarrow pusher. As PW4 was examining the victim, in the presence of PW6, she found blood and semen in the girl's private parts. Immediately, PW4 reported the incident to Chairman L.C.I of the area.

The following morning, PW4 reported the matter to Bwera Police Post. She was given a police form which she took to Bwera hospital. The girl was examined by a doctor and she returned the form to the police. Consequently, the appellant was arrested on 6th June, 2000 by No.22088 P/C Ochuna.

At the trial, the medical report on the victim, compiled by Dr. Muhindo Joy, PW1, of Bwera Hospital, was admitted in evidence under section 66 of the Trial on Indictments Act. The medical report on the appellant compiled by Dr. Mairuha, PW2, and the statement of the arresting officer, No.22088 P/C Ochuna, PW3 were also admitted in evidence.

After examining the victim, Dr. Muhindo Joy, PW1, made the following findings:

(i) ***Biira Kavumi was 4 years old;***

(ii) ***The hymen had a lateral fresh tear;***

(iii) ***The tear was recent;***

(iv) ***There were recent bruises in the inner aspect of the labia majora;***

(v) ***Injuries or bruises were consistent with force having been sexually used;***

(vi) ***The victim was not capable of putting up resistance; and***

(vii) ***No sign of venereal diseases.***

Regarding the medical evidence of Dr. Mairuha, PW2, concerning the appellant, his findings were:

1. ***The appellant had no bruises, scratches or other injuries or scars on his body;***
2. ***He was 19 years old, and***
3. ***his mental condition was normal.***

The appellant in his defence, denied any involvement in the commission of the offence of defilement. The learned trial judge convicted him on the strength of the prosecution case, hence this appeal on the following grounds:

1. ***The learned trial judge erred in law and fact when he failed to evaluate the evidence on record thereby convicting the appellant.***
2. ***The learned trial judge misdirected himself in fact and law when he relied on circumstantial evidence to reach his decision to convict the appellant.***
3. ***The learned trial judge erred in fact and law when he convicted the appellant using uncorroborated evidence of prosecution witnesses.***

Ms Janet Nakakande Kigozi, learned counsel representing the appellant on state brief, argued the three grounds together. Mr. Odumbe Owere, learned Senior Principal State Attorney, represented the State.

On grounds 1, 2 and 3, Ms Nakakande Kigozi, submitted that the ingredient of penetrative sexual intercourse was not proved beyond reasonable doubt. Counsel pointed out that the medical report was not conclusive to corroborate the evidence of the girl. She further submitted that PW6's evidence was also not sufficient to corroborate the evidence of the victim.

The mother of the girl, PW4, examined her and found blood and some semen in her private parts. According to counsel, her evidence did not connect the appellant with the offence.

According to the above submissions, counsel submitted that the learned trial judge did not properly evaluate the evidence on record before convicting the appellant. In the premises, counsel prayed that we should allow this appeal, quash conviction and set aside the sentence.

In the alternative and without prejudice to the foregoing, learned counsel pointed out that the appellant was 19 years old when he committed the offence. In the circumstances, prayed for a lenient custodial sentence. She suggested 6 years imprisonment would be adequate and appropriate in the circumstances of the case.

Mr. Odumbe Owere submitted that the act of sexual intercourse was proved beyond reasonable doubt. In support of his argument, counsel relied on the testimony of the victim herself, PW5. She stated that as the appellant was sexually assaulting her, she felt a lot of pain in her stomach and she started bleeding from her private parts. PW6 heard the girl crying and when she went to the scene to find out what was happening to her, she found the appellant putting on his trousers but the victim was bleeding from her private parts.

The mother, PW4, examined the victim and found blood and semen in her private parts. The doctor, PW1, who examined the victim found recent tear in the inside part of the vagina. In counsel's view, the evidence adduced establishes that the appellant had defiled the victim. In the premises, learned attorney prayed for dismissal of this appeal.

In the alternative and without prejudice to the foregoing, Mr. Odumbe Owere submitted that the sentence meted to the appellant is not illegal. The victim was 4 years old and the appellant was 19 years old. In the circumstances of the case, Mr. Owere asked court not to interfere with the sentence.

At the trial, the victim in an unsworn statement informed court that she was five years old. When the appellant committed the offence she was 4 years old. Her mother, PW4, confirmed her age. The medical report compiled by Dr. Muhindo Joy, PW!, further corroborates the victim's age was 4 years old. In the circumstances, we agree with the finding of the learned trial judge that the victim was a girl under the age of 18 years when the offence was committed.
As regards the element of penetrative sexual intercourse, the victim informed court that on the material day, the appellant did a very shameful thing to her. In the process, she felt too much

pain in the stomach, she started crying while bleeding from her private parts. The crying noise attracted the attention of her play-mate, PW6, who was in the vicinity.
On arrival at the scene of crime, PW6 found the appellant dressing up his trousers while the victim was bleeding from the private parts. Before the appellant left the scene, he warned PW5 and PW6 not to disclose to anyone what had happened and he promised to buy them buns to eat.

Both PW5 and PW6 reported the incident to the mother of the victim, PW4. Immediately PW4 received that information, she examined the girl and found that there was blood and some semen in her private parts. Dr. Muhindo Joy, PW1, who also examined the victim, found that her hymen had a lateral fresh tear. The tear was recent. There were also recent bruises in the inner aspect of the labia majora.

The evidence of the victim regarding the ingredient of penetrative sexual intercourse, was corroborated by the evidence of her play-mate, PW6, her mother, PW4 and that of the doctor, PW1. We are unable to fault the learned trial judge's finding that penetrative sexual intercourse was proved beyond reasonable doubt.

Both PW5 and PW6 knew the appellant before the incident. He was renting a house near the home of the victim. Both witnesses informed PW4 that it was the appellant who defiled the girl. The incident happened in broad day light in an uncompleted house at around 6:00p.m. PW5 and PW6 properly identified the appellant at the scene of crime. In the premises, we cannot fault the learned trial judge for holding that it was the appellant who defiled the victim. The prosecution had proved beyond reasonable doubt that the offence of defilement was committed.

In the result, this appeal is devoid of merit and we dismiss it, uphold the conviction and sentence.

Dated at Kampala this 12th day of August 2009.

A.E.N. Mpagi-Bahigeine

JUSTICE OF APPEAL

S.G. Engwau

JUSTICE OF APPEAL

S.B.K. Kavuma

JUSTICE OF APPEAL