THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

CRIMINAL APPEAL NO.170 OF 2003

TIGO STEPHEN…….APPELLANT

V E R S U S

UGANDA…….RESPONDENT

[Appeal from conviction and sentence of
the High Court of Mbale (Faith Mwondha)
dated 12/08/2003 in C.S. No.176 of 2006]

JUDGMENT OF THE COURT:

This is an appeal from the decision of the High Court of Uganda sitting at Mbale in which the appellant was indicted and tried of the offence of defilement C/S 127(1) (now s.129(1) of the Penal Code Act. He was convicted and sentenced to life imprisonment.

The background to the case is that during the month of July 2001, the appellant was living with the grandmother of the victim, Nakyebega, (PW3). The victim, a girl then aged 6 years was living with PW3 and the appellant. She was a grandchild of PW3, fathered by her own son begotten with her former husband who had died sometime back.

On the night of 21/7/2001 PW3 left her home at night to attend to her daughter who lived nearby and who was in labour pains. She left the appellant and the victim Kadija Sharon (PW2) sleeping in her house. When she left, the appellant removed the victim, took her to his bed and defiled her. She felt a lot of pain and made a loud cry. Her grandmother returned and knocked on the door but the appellant refused to open the door. She made a lot of loud noise and the appellant opened the door. She found the appellant in the house and noticed that the victim did not have her knickers on. She wondered loudly whether the victim was going to urinate. The victim told her in the presence of the appellant that it was the appellant who removed her knickers and had just had sexual intercourse with her. At that point, the appellant was seated in the house. She could clearly see him with the help of a candle which she had left in the house and a lantern which she had retuned to the house with. When asked why he had removed his grandchild's knickers, he replied that he had done nothing wrong. PW3 then examined the private parts of the victim whereupon the victim informed her that the appellant had used her knickers to clean her private parts. As she was still investigating, she was called to go and attend to her daughter who apparently had not yet delivered her child. When PW3 returned, she found the appellant had left the home. He disappeared for some days but as the matter had already been reported to the police he was subsequently arrested, indicted, convicted and sentenced as aforesaid. He was not satisfied with both conviction and sentence, hence this appeal.

The appeal is based on four grounds of appeal as follows:-

1. **That the learned trial judge erred in law when she charged and based her conviction on a non existent section of the Penal Code Act.**
2. **That the learned trial judge erred in fact and law when she failed to adequately evaluate the evidence to sustain a charge of defilement.**
3. **That the learned trial judge erred in fact and law when she based her conviction on a single witness's evidence which was not corroborated.**
4. **In the alternative that, in the circumstances, the sentence was excessively harsh.**

At the hearing of the appeal, Ms Luswata Kawuma appeared for the appellant on State brief. Mr. Charles Ngabirano, a Principal State Attorney in the office of the DPP appeared for the respondent. Ms Luswata Kawuma decided to abandon the first ground of appeal. She argued grounds No.2 & 3 together and ground No.4 separately. The gist of grounds 2 and 3 is that the learned trial judge failed to evaluate the evidence before her properly as a result of which she wrongly held that the two ingredients of the offence, namely, sexual intercourse and participation of the appellant had been proved.

On sexual intercourse Ms Luswata Kawuma submitted that the prosecution had failed to prove that penetration of a female sexual organ by a male sexual organ had occurred. The victim was found to have her hymen intact and there was no other evidence to corroborate the victim's evidence that sexual intercourse had actually occurred.

On participation of the appellant in the alleged commission of the crime, Ms Kawuma submitted it was not proved that the victim had prior knowledge of the appellant. She contended that the grandmother of the victim had another man living in the house and since the offence was committed in the middle of the night, the other man could have committed the offence.

Mr. Charles Ngabirano did not agree with the appellant's attack on the trial judge. He supported the conviction of the appellant and the sentence mated out to him.

On the issue of penetration, he submitted that the doctor had found injuries around the victim's sexual organ which was enough proof that sexual intercourse had taken place. He submitted that in law, it was not necessary that the victims hymen be ruptured as long as there was proof that there was some penetration, however slight. The victim herself testified that she felt a lot of pain in her private parts which was proof that penetration had taken place.

On participation of the appellant, Mr. Ngabirano submitted that the appellant was a husband to the victim's grandmother. They all lived in the same house and the victim had known him for years. There was light in the house before the offence started. PW3 found the appellant in the house when she returned and the appellant could not explain why he had removed the victims knickers. All these proved that it was the appellant who defiled the victim. He

invited us to reject, as the trial judge did, the alibi set up by the appellant, which was false and to dismiss the appeal and uphold the sentence.

It is the duty of this court to re-evaluate all the evidence that was adduced before the trial court and to determine by itself whether the conviction by that court should be supported by this court. See **Rule 30 of the Court of Appeal Rules.** In so doing this court must bear in mind the fact that it did not have the opportunity, which the trial court had, to see the witnesses give evidence in court and to assess their credibility. A conviction should not be set aside merely because had this court been the trial court, it would have acquitted the appellant. This court should only do so when it is satisfied that because of some act or omission on the part of the trial court, an injustice has been occasioned.

On the issue of penetration the learned trial judge relied on the evidence of PW2, the victim of the defilement, and PW1, the doctor who examined her four days after the incident. Though PW2 was only eight years at the time of the incident, she greatly impressed the trial judge by her straight forwardness and her consistency. The girl said that the appellant had sexual intercourse with her and she felt great pain. As a result she raised a loud cry which forced her grandmother who was some distance away to return home to her rescue. She also said this was not the first time the appellant was doing this.

PW1, the medical doctor testified that on examination of PW2, he found her hymen intact, but there were injuries or inflammation around the private parts. These injuries were 4 days old. The doctor was closely cross-examined on the issue of penetration. This is how he responded:

> **"The injury could have been caused by a person desiring having sexual intercourse forcefully or a child can injure herself if she falls on her self. The most probable cause is sexual intercourse.**
>
> **The hymen was not ruptured or injured. It really depends; it could have been that there was sexual intercourse. Sexual intercourse can be done by touching."**[Emphasis is ours]

The doctor seems to have formed the impression that some form of sexual intercourse took place and he recommended that the victim should take an HIV/AIDS test. We are of the view that, despite the fact that the victim's hymen was not yet ruptured, there is strong evidence on record from which an inference should be made that penetration that is necessary to deserve an act being called sexual intercourse, did actually take place. The injuries found on her vagina could not possibly occur in the context of this incident without some amount of penetration taking place. It is trite that rupturing the hymen is not a necessary part of legal sexual intercourse. Penetration, however slight, is sufficient. This ground of appeal should fail.

Regarding participation by the appellant, there is sufficient evidence on record that the victim (PW2) knew the appellant very well. In fact, in his defence, the appellant said he knew her well and he in fact called her his granddaughter. He said he stayed with her for four years. Therefore, the question of mistaken identity does not arise. The appellant in his defence raised two other matters. First, that his wife had found another man and since she was desirous to chase him out of her home, she concocted a story which she coached PW2 to cram and testify against him as a result of a grudge. Yet the evidence on record does not bear out this grudge. It is to the effect that at that time of the incident, the appellant and PW3 were living together as husband and wife. If they were not, the appellant would not have had so easy access to the victim. The learned trial judge found the evidence of PW2 and PW3 on this matter preferable and he was so entitled to hold. The appellant raised another defence to the effect that on the night of the incident, he did not spent the night at the home of PW3. He claimed he stayed at his second home in a place called Samasyi. The learned trial judge rejected this defence of alibi as an afterthought. In light of the credible evidence of PW2 and PW3, we do not fault the finding of the learned trial judge that the offence of defilement against PW2 Hadija Sharon took place at her home on the night of 21st July 2001 and it was the appellant who committed the crime. This ground of appeal should also fail.

On the fourth ground of appeal, that the sentence was to harsh, we were not given any single reason to justify us to have mercy on a 45 years old man who decided to defile an 8 years old girl whom he calls his granddaughter. The learned trial judge took into account all mitigating factors available to the appellant and passed a sentence of life imprisonment. We see no reason to disturb that sentence.

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

Dated at Kampala this 23rd day of March 2009.

Hon. Justice Amos Twinomujuni

JUSTICE OF APPEAL.

Hon. Justice C.N.B. Kitumba

JUSTICE OF APPEAL.

Hon. Justice C.K. Byamugisha

JUSTICE OF APPEAL.