

2nd draft  
18/10/2001

**REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

CORAM: ODOKI, C.J., ODER, KAROKORA, MULENGA AND  
KANYEIHAMBA, J.J.S.C.

CRIMINAL APPEAL NO. 43/2000

B E T W E E N

MUKASA EVARISTO ..... APPELLANT

A N D

UGANDA ..... RESPONDENT

*(Appeal from the decision of the Court of Appeal at Kampala (Manyindo,  
D.C.J., Kato and Twinomujuni, J.J.A), dated 7<sup>th</sup> September, 2000, in Criminal  
Appeal No. 53 of 1999)*

**REASONS FOR THE JUDGMENT OF THE COURT**

The appellant was tried by the High Court sitting at Kampala for defilement contrary to Section 123 (1) of the Penal Code. He was convicted and sentenced to 13 years imprisonment. He appealed to the Court of Appeal which dismissed the appeal. We heard and dismissed his appeal on 19<sup>th</sup> September, 2001. We

intimated that ~~he~~ would give reasons for our decision at a future date which we now give.

The brief facts of the case were as follows: On the afternoon of 13<sup>th</sup> May, 1996, the appellant invited Nankya Jennifer, the victim, to his house pretending that he wished to send her on an errand to purchase bread for his son. When she reached the appellant's house, he pulled and took her inside the house and defiled her. After leaving the appellant's house, the victim reported the incident to her brother and later to her father. The matter was eventually reported to the authorities and the appellant was arrested in the morning of 14<sup>th</sup> May, 1996. At his trial, the appellant denied having committed the offence. The learned trial judge believed the prosecution's case and rejected the appellant's story. He was convicted and sentenced to 13 years' imprisonment. His appeal to the Court of Appeal was dismissed and he appealed to this court.

The Memorandum of Appeal before this court contained two grounds of appeal framed as follows:

- 1- *The learned Justices of Appeal erred in law and fact by finding that there was proof of penetration.*
- 2- *The learned Justices of Appeal erred in law and fact when they failed to reevaluate the evidence on record and subsequently upheld the decision of the High Court.*

Mr. Henry Kunya, counsel for the appellant, argued the two grounds together. He submitted that the Court of Appeal as a first appellate court, is enjoined to subject the evidence on record to fresh scrutiny and come to its own conclusions. He contended that this was not done in this case. He enumerated and discussed issues which he contended had not been properly considered by

the learned Justices of Appeal. These were non-compliance with ss. 37 and 64 of the Trial on Indictments Decree and lack of corroboration.

Counsel submitted that the doctor's evidence purportedly admitted under s.64 of the Trial on Indictments Decree should not have been relied upon because no memorandum of admitted facts thereof had been prepared as required under subsection (3) of that section. He further contended that if that medical evidence is discounted and in the absence of the evidence of first aid on the victim then there would not have been sufficient evidence of penetration, Counsel further submitted that there was no corroborative evidence as required under section 37 of the Trial On Indictments Decree. He cited *Mugoya v. Uganda*, Criminal Appeal No. 8 of 1999, (S.C.), (unreported), in support of his submissions.

Mr. Kunya finally prayed that the appeal should be allowed and sentence quashed. In the alternative, he prayed that the appellant should be convicted of the lesser offence of attempted defilement and be given an appropriate sentence as a substitute.

Ms. Khisa, Principal State Attorney, for the Respondent, supported the conviction. She submitted that the only relevant issue raised by the appellant for the court to decide was whether or not there had been penetration to complete the offence of defilement since all the other matters presented and argued by counsel for the appellant had not been raised or argued in the Court of Appeal. Ms. Khisa submitted that, according to the evidence presented, there had been sufficient penetration to complete the offence of defilement and therefore the Court of Appeal rightly upheld the conviction. Counsel for the respondent prayed that the appeal should be dismissed and the conviction be upheld.

In our view, it is not a requirement of the law that all the evidence and all witnesses in support of a criminal charge has to be presented or to be called. What is required is sufficient evidence which proves the charge beyond reasonable doubt.

With regard to failure to comply with provisions of section 64 (2) of the Trial On Indictments Decree, we agree with appellant's counsel that it was an error to omit to record a memorandum of admitted facts. Consequently, the doctor's evidence which was placed on record without compliance with the said subsection ought not to have been taken into consideration. However, we would reiterate what we said in *Kwoba Yosamu v. Uganda*, Criminal Appeal No. 2 of 2000, (S.C.), (unreported), where we exhaustively considered the provisions of that section. We said,

*"Trial judges must comply with the mandatory requirements of section 64 (2)..... Be that as it may, the exclusion of the admitted evidence leaves ample evidence that the stolen property was found in the possession of the appellant".*

In our opinion, there was sufficient evidence to prove the charge.

On corroboration, we note that the victim, though of tender age, showed that she understood the nature and meaning of an oath and she subsequently gave evidence on oath. The learned trial judge believed her evidence which was corroborated by the testimony of her father, PW2, and of her brother, David Mankanza, PW4. In our recent decision of *Mugoya Wilson v. Uganda*, (supra), we observed,

*"The complainant, Namurwa (PW1) was a child of tender years when she gave evidence. She did so on oath. It appears therefore, that under section 38 (3) of the Trial On Indictments Decree, corroboration of her evidence as such witness was not necessary."*


However, as already observed in this particular case, the victim's evidence was amply corroborated.

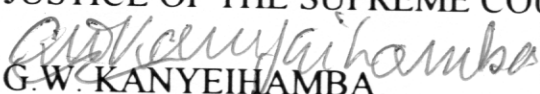
We found no merit in the appeal and accordingly dismissed it.

Dated at Mengo, This day of <sup>22nd.</sup> November 2001

B. J. ODOKI.....  
CHIEF JUSTICE

  
A.H.O. ODER.....  
JUSTICE OF THE SUPREME COURT

  
A. N. KAROKORA.....  
JUSTICE OF THE SUPREME COURT

J.N. MULENGA.....  
JUSTICE OF THE SUPREME COURT  
  
G.W. KANYEIHAMBA.....  
JUSTICE OF THE SUPREME COURT