

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

**CRIMINAL APPEAL NO. 21 OF 2001**

**(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, AND KATO,  
JJSC.)**

**NO.0875 PTE. WEPUKHULU NYUGULI ::::::::::: APPELLANT**

**VERSUS**

**UGANDA ::::::::::: RESPONDENT.**

**(Appeal from the judgment of the Court of Appeal of Uganda at Kampala. (Okello, Berko,  
and Engwau JJ.A) in Criminal Appeal No. 110 of 1999 dated 1/6/2001).**

**JUDGMENT OF THE COURT**

This appeal is against the decision of the Court of Appeal which upheld the conviction and sentence imposed by the High Court against the appellant for defilement Contrary to Section 123(1) of the Penal Code Act.

The facts of the case as presented to and accepted by the trial court and confirmed by the Court of Appeal are as follows:

Wepukhulu Nyuguli, the appellant, was a soldier before his arrest. He lived near the hut where the complainant's parents were living at Ngoriom Army Detach. On the evening of 24/9/97, before the defilement complained of, the

appellant, who had recently wedded, went to the mother of the complainant and asked her to allow the complainant, Jaquiline Nandudu, to go to his home and keep

his wife company as he was away on night duty. The mother, Jeniffer Nalyaka (P.W.2), permitted the daughter to go and stay with the appellant's wife over night. The appellant returned from duty early in the morning and found the complainant still sleeping. She was alone as the appellant's wife had gone to fetch water. He defiled her. When the complainant reached home her mother observed that she was not walking properly and kept her legs apart when sitting. The mother asked her what was wrong. The complainant replied that the appellant had persuaded her to sleep with him as his wife and that he "had poured his liquid into her." The girl's thighs had dried whitish smear on them. The mother then proceeded to examine the girl's private parts and observed whitish substance and some bruises on the opening of her vagina.

The matter was reported to the officer in charge who caused the arrest of the appellant. Both the appellant and the girl were sent to Kapchorwa where the appellant was detained and the girl was examined by Dr. Yeko on 27/9/97. The medical examination revealed that the girl was about 8 years old, her hymen had been ruptured, and the vaginal opening was inflamed. The injuries appeared to be about 5 days old.

At the trial the appellant denied having committed the offence. He stated that on the day he could not remember, he was summoned to the office of the O.C. where he was informed that he had defiled the complainant, an allegation which he denied. He was arrested and later sent to Kapchorwa Police Station.

The trial judge rejected the appellant's denial and accepted the facts as established by the prosecution. He convicted the appellant and sentenced him to 12 years' imprisonment. His appeal to the Court of Appeal was dismissed, hence this appeal based on two grounds, namely:-

- 1. The Learned Justices of Appeal erred in fact and in law when they found the prosecution had established all the ingredients of the offence by confirming the conviction.**

**2. The Learned Justices of Appeal erred in fact and in law when they failed to find that the Appellant's conviction could not rest on the contradictions and inconsistencies in the prosecution case.**

Mr. Atuhaire, learned counsel for the appellant, argued these grounds together. He started with the second ground. Counsel submitted that there were material contradictions in the prosecution evidence regarding the date when the offence was committed. He pointed out that while the complainant stated that she was defiled on 25/9/97 her mother testified that the offence was committed on 26/9/97 and the doctor who examined her on 27/9/97 stated in his report that the injuries on the girl were inflicted about 5 days before the examination. It was learned counsel's contention that if the trial court had considered these inconsistencies, a doubt would have been cast on truthfulness of the evidence of the prosecution witnesses. He further submitted that because of those contradictions the medical report did not corroborate the evidence concerning the ingredient of penetration.

On his part, Mr. Okwanga, Principal State Attorney for the Respondent, submitted that the contradictions complained of were minor and should be ignored and that the Court of Appeal rightly ignored them. On the issue of penetration, he contended that the prosecution had proved that ingredient through the evidence of the complainant, that of her mother and of the doctor who examined her.

We shall discuss the issue of inconsistencies first. This same issue was raised before the Court of Appeal which held that the inconsistencies were minor. It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses, should be ignored and that major ones which go to the root of the case, should be resolved in favour of the accused (**See Alfred Tajar -V- Uganda Cr. Appeal No. 167 of 1969 EACA**) (unreported). But each case must be decided on its facts. In the case now before us the inconsistencies or discrepancies relate to the dates when the girl was defiled. The girl testified that she was defiled on the morning of 25/9/97 , but the mother mentions 26/9/97 as the date when the defilement took place. In our opinion a difference of a day is not so

crucial so as to go to the root of the case. The two witnesses, it would seem, were testifying from their own memory without the aid of any written record of their own about an event which took place nearly a year earlier, it was therefore natural for them to make such a slight mistake. There is nothing on record suggesting that the contradictions were deliberately intended to mislead the court. We would also like to point out that a date on which defilement is committed is not one of the ingredients of the offence of defilement. As for the doctor's statement that the defilement had taken place about 5 days previous to the examination, we agree with Mr. Okwanga's contention that this was mere estimate. The doctor was not definite about the date so his statement about the age of the injuries cannot be treated as a contradiction with regard to what the complainant and Nalyaka (P.W.2) stated. We find no merit in the second ground of appeal. It must fail.

We now turn to the first ground which concerned the question of penetration which is one of the ingredients that must be proved by the prosecution in a case of defilement. Learned counsel for the appellant complained that due to the contradictions in the prosecution case it could not be conclusively said that sexual intercourse had taken place. As indicated earlier, Mr, Okwanga counsel for the respondent, was of a contrary view.

The issue as to whether or not sexual intercourse took place in a particular case is a matter of fact to be established by evidence. In the instant case the evidence relied upon by prosecution to prove that there was penetration is contained in the testimonies of the complainant, Nandudu (P.W.I), her mother, Jenniffer Nalyaka (P.W.2) and the medical report. The evidence of Jaquiline Nandudu (P.W.I) was to the effect that while she was sleeping in the appellant's house at about 6.00 a.m., the appellant went to her and lay on her and used his 'Kasolo' (penis) to "pour into her his water" (meaning he ejaculated into her). This happened when she was wearing her knickers and the appellant was wearing his trousers which he unzipped. She did not feel pain at the time of the alleged intercourse but she felt pain when she rose and she could not walk normally. She further stated that the

liquid was poured on her thighs. The story as told by her mother (P.W.2) is that when the complainant returned home, she (the mother) observed that she was walking and sitting with considerable difficulty. On examination of her private parts, she saw some whitish substance there and some bruises. The doctor's report (Ex.P2), which was admitted in evidence with the consent of the defence counsel, shows that the victim's vaginal opening had inflammation and the hymen had been ruptured about five days prior to 27/9/97. The doctor estimated the period which, in the circumstances of this case, puts the occurrence of the defilement closer to 25/9/97.

When this evidence is considered together as a whole, it leaves no doubt that the prosecution sufficiently proved that there was penetration. We are satisfied that both the trial court and the Court of Appeal correctly held that the appellant had sexual intercourse with the complainant. It is the law that however slight the penetration may be it will suffice to sustain a conviction for the offence of defilement. (**See: Adamu Mubiru - V - Uganda (Cr. Appeal No. 47/97 Court of Appeal)**) (unreported). We have anxiously considered the evidence of the complainant that she had her knickers on when the appellant slept with her. However, in view of her own description of what happened and taken together with the medical evidence there can be no doubt that there was penetration. This first ground of appeal also fails.

In the result, we uphold the decision of the courts below and do dismiss the appeal.

Dated at Mengo this 5<sup>th</sup> day of March 2002.

**A.H.O. Oder**  
**Justice of the Supreme Court**

**J.W.N Tsekooko**  
**Justice of the Supreme Court**

**A.N. Karokora**  
**Justice of the Supreme Court**

**J.N. Mulenga**  
**Justice of the Supreme Court**

**C.M. Kato**  
**Justice of the Supreme Court**