THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

CORAM: ODOKI, CJ; TSEKOOKO, MULENGA, KANYEIHAMBA, AND KATUREEBE, JJ.SC.

CRIMINAL APPEAL No.6 OF 2004

KATENDE AHAMAD ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

[An Appeal from the decision of the Court of Appeal at Kampala (Okello, Twinomujuni and Kitumba, JJ.A) dated 16th July, 2004 in Criminal Appeal No.2 of 2002.]

JUDGMENT OF THE COURT

The appellant, Katende Ahamad, was tried and convicted by the High Court (C.A.Okello, J.) on an indictment of defilement contrary to S.123 (1) of the Penal Code. He was sentenced to a period of ten years. The Court of Appeal dismissed his appeal. He has now appealed to this Court.

According to the indictment, between April and June, 1999, in Bulongo village, in Mukono District, the appellant had unlawful sexual intercourse with Nalweyiso Hajala, a girl under the age of 18 years.

The appellant fathered Nalweyiso Hajala (PW2) with Hadija Nakakande (PW3) before the two separated. PW2 and other children lived in the same house with their grandmother together with the appellant's sister, Betty Nakibule, (PW4). The grandmother died during the month of April, 1999. The appellant, who was working and staying away in Kampala, returned to the village and lived in that same (grandmother's) house with PW4 and the children including PW2 and her sister Zaina Nakitende. The appellant slept on his deceased mother's bed. It appears that during the month of April, 1999, while PW4 was away, the appellant forcefully ravished PW2 who was then 9 years. Her evidence reveals what took place. The following is part of the record showing how she narrated her testimony to the trial Judge.

> ***"My father grabbed me when I was at Bulongo. When he grabbed me and told me not to speak else he would cut me. 1st time he grabbed me, we were in the house when my Aunt had gone for last funeral rites…… at night he went to sleep in his bed. He slept on grandmother's bed, he called me. He said that I should go and sleep with him. I told him children were crying. He ordered me to go to him.***

He came and put off the light then pulled my hand. He made me to lie down. He removed his trousers. He asked me if I had underpants. I said yes. He told me to remove it. I refused. He removed my underpants. He then lay on me. He removed his penis and put it in my vagina. I was about to cry he told me to stop. That he would cut me with a panga. There was a panga in the room. He then removed himself from me. He put on his trousers. He asked me whether I had put on my underpants. I saw something looking like pus on the pants, my body, mattress and on his penis. The pus white thing was in my vagina. I did not see blood.

Next day our aunt came from the village. I did not tell anybody because my father was in the sitting room with my aunt and I feared him. He told us to go and pick coffee. I did go. Katende (her brother) also came to pick coffee…….. Father told Katende to go and pick coffee from upper part. He called me to go and pick coffee with him. I went and started picking coffee. He went far and called me to go and pick coffee with him. I refused to go. He came to me. He removed his trouser. He pulled me. He removed my pants. Then he lay on me. He put his pens into my vagina……. It was morning hours. We returned home.

……. He went on repeating the same until my mother came. I told her and she abused him.

Eventually the defilement was reported to LC officials and to Police. Subsequently, Dr. Charles Kimera (PW1) examined PW2 on 26/6/1999. He established that the little girl was then aged 9 years and that her haymen had been raptured. The appellant was arrested on 5/7/1999 and was charged with the offence of defilement and was prosecuted.

In his unsworn statement during his trial, he denied the offence. He claimed he was a religious man and because of strong religious beliefs, he could not defile his daughter. He claimed in effect that he was being framed by his sister (presumably PW3) because the two had had disputes about sharing of their father's land. The assessors and the trial judge believed PW2 and disbelieved the appellant who was found guilty, convicted and sentenced to 10 years imprisonment. His appeal to the Court of Appeal was dismissed. His appeal to this Court is based on two grounds.

These grounds are framed as under –

1. **The learned Justices of Appeal erred in law when they failed to direct themselves regarding the propriety of the trial court's finding after its conduct of a voire dire in respect of PW2 thereby misdirecting**

themselves concerning the requirement for corroboration.

2. **The learned Justices of Appeal erred when they misconstrued an otherwise vague sentence thereby upholding an unjust sentence.**

The two grounds are vague. His submission on ground 2 indicates the complaint to be that the sentence is unlawful.

When arguing the first ground, Mr. Mubiru, counsel for the appellant, conceded that the notes of the record of the conduct of PW2's Voire Dire by the trial judge show that PW2 appreciated the duty of telling the truth. He however contended that the same record shows that PW2 did not appreciate the nature of an Oath and, therefore, there was need for corroboration of her evidence. He argued that the Court of Appeal misdirected itself when it found corroboration in the statement of Stephen Mbowa, PW5, who testified in effect that for about a week the appellant could not be traced. Mr. Waninda, Senior State Attorney, supported the holding of the Court of Appeal that the one week's disappearance of the appellant was sufficient corroboration of the evidence of PW2.

Mr. Mubiru did not point out to us any statements from the notes made by the learned trial judge to support his contention that PW 2 did not appreciate the nature of an oath.

In our opinion this ground of Appeal has no merit. First of all, the learned trial judge properly conducted the Voire dire. The answers of the witness she recorded fully support the judge's conclusion that not only was PW2 possessed of sufficient intelligence to justify the reception of her evidence but also that she understood the duty of speaking the truth, and further that the witness understood the nature of an oath. We do not find it necessary to reproduce the statements recorded by the learned judge. But in summary the statements of the witness as recoded are clear and straight forward indicating that –

- PW2 appreciated the need to tell the truth;
- She was sufficiently intelligent; and
- She understood what an oath means.

In that regard, the proviso to **section 38 (3) of the Trial on Indictments Act,** upon which Mr. Mubiru must have based his submission was inapplicable in the sense that corroboration of the evidence of this witness was not obligatory. Her evidence on oath was sufficient to found a conviction. However, we think that even if corroboration had been necessary, the Court of Appeal was right in its conclusion that the conduct of the appellant regarding his disappearance for a week constituted sufficient corroboration.

His explanations were justifiably disbelieved by both the two assessors and the trial judge.

Accordingly the first ground of appeal must fail.

On the second ground, Mr. Mubiru submitted that the words of the judge in sentencing the appellant are ambiguous and as such render the sentence unlawful. Mr. Mubiru relied on our judgment in **Kabwiso Issa Vs Uganda,** Supreme Court Criminal Appeal No.7 of 2002 in support of his contention. Mr. Waninda did not agree.

When sentencing the appellant this is how the learned trial judge expressed herself -

> ***"I sentence you to ten (10) years imprisonment. This is inclusive of the years spent on remand."***

The Court of Appeal relied on two of its previous decisions and two decisions of this Court for the proposition that the words "**This is inclusive of the years spent on remand,"** *can only mean that the period spent on remand was taken into account and the final sentence imposed was ten years.*

With the greatest respect to the Court of Appeal, that construction is inappropriate. As already noted, the Court of Appeal relied on two of its decisions namely **Kyakika James Vs Uganda** (Criminal Appeal No.22 of 2001) and **Kyalimpa Richard Vs Uganda** (Criminal Appeal No.130 of 1999) (both unreported) to support their conclusions in this appeal. In the former case the trial judge apparently expressed himself in words similar to those employed in the present case thus-

> **"……. the period spent on remand inclusive."**

The Court of Appeal apparently upheld the sentence in that case because the Court's opinion was similar to that expressed in the present appeal. In the **Kyalimpa** appeal (supra) the Court appears to have considered the import of the words **"to take into account the period lawfully spent on remand."** The court opined that these words require a trial court to pass **"an ascertainable and final sentence after it has taken the remand period into account."** This in effect is the construction which this Court has placed to provisions of clause (8) of Article 23 of the Constitution in a series of its decisions made in the recent years. This is evident from our two decisions relied upon by the Court of Appeal in this case. The first is **Kiberu Christopher Vs Uganda,** (S. Court Criminal Appeal No.66 of 1990). The second case also relied on is **Kizito Semakula Vs Uganda**, (Supreme Court Criminal Appeal No.24 of 2001) where this Court held that in Article 23 (8), the words **"to take into account"** does not require a trial court to apply a mathematical formular by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by trial court.

In the last three years or so, we have made a series of decisions including **Sebule Vs Uganda** (Criminal Appeal No.22 of 2002) (unreported), **Sande Vs Uganda**, Supreme Court Criminal Appeal No.46 of 2001; **Bashir Ssali Vs Uganda,** Supreme Court Criminal Appeal No.40 of 2003 and **Kabwiso Issa Vs Uganda** (supra) and pointed out what trial courts ought to do. We decided the last appeal on 27th October, 2003

that is after the trial judge in the present case had sentenced the appellant on 14/1/2002. However, the Court of Appeal decided the appeal there from on 16/7/2004 after our decision. We cannot tell whether the court was or was not by then aware of our decision.

Be that as it may in that appeal, the trial judge in sentencing the appellant there stated –

> ***"……. he is sentenced to 15 years imprisonment. The period he has been on remand shall be taken into account against the whole sentence."***

In the Court of Appeal, the complaint against the sentence had been that it was excessive. That Court did not agree. When the appeal came to this Court, the complaint, in effect, was that it is unlawful in that it contravened Clause (8) of Article 23 of the Constitution.

That Clause states: -

> ***"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."***

We held-

"This Court has on a number of occasions construed this clause to mean in effect that the period which an accused person spends in

lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. In the appeal before us it is not clear how the period from 9/12/95 to 29/9/2000 (5 years) spent on remand ***"will be taken into account against the whole sentence"*** *of 15 years. It appears the judge meant that the sentence commenced from 9/12/95. This would be absurd because a trial court can not sentence a person before conviction. We accordingly allow ground two.*

We reduced the sentence to 10 years. We further observed that - *We understand that prison authorities experience difficulties in determining remission periods in cases where convicts are sentenced in terms similar to the words used by the trial judge in this case. We would therefore give the following guidelines to trial courts. When sentencing a person to imprisonment a trial judge or magistrate should say –*

> ***"Taking into account the period of…… years (months or weeks whichever is applicable) which the accused has already spent in remand, I now sentence the accused to a term of …… years (months or weeks, as the case may be).***

In such an event the sentence imposed shall be definite and be treated as excluding the period spend in custody on remand."

We have not changed our opinion. Therefore, we think that in the present case the trial judge erred in the way she sentenced the appellant. Similarly the Court of Appeal erred in upholding her sentencing model. This ground must, therefore, succeed. We are doing this as a matter of duty. However, we take a serious view of the fact that the appellant defiled his daughter more than once. Normally this would attract a deterrent sentence. But as there was no cross appeal against the sentence, we cannot pass a sentence of more than ten years. Considering that the appellant was in custody for a period of $2^{1}/_{2}$ years before he was convicted by the High Court, the ends of justice will be met by sentencing him to imprisonment for ten (10) years. We order accordingly.

Dated at Mengo this 5th day of July 2007.

B.J.ODOKI
CHIEF JUSTICE

J.W.N.TSEKOOKO
JUSTICE OF THE SUPREME COURT

J.N.MULENGA
JUSTICE OF THE SUPREME COURT

G.W.KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

B. M .KATUREEBE
JUSTICE OF THE SUPREME COURT