THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TSEKOOKO; KA TUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJ.SC).

CRIMINAL APPEAL **NO. 08 OF 2008**

BETWEEN

MUTUMBWE WILLIAM::APPELLANT

AND

UGANDA:::RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (5. G. Engwau, A. Twinomujuni, and S.B.K. Kavuma, JJ.A) dated 4h July, 2009].

JUDGMENT OF THE COURT

The appellant, Matumbwe William, was tried and convicted by the High Court at Mbale (F.Mwondha, J) on an indictment for the offence of defilement contrary to section 123(1) of the Penal Code. He was sentenced to life imprisonment. He appealed to the Court of Appeal which overturned the conviction for defilement on grounds that there was no evidence of sexual penetration of the victim, and, instead convicted the appellant of the lesser offence of attempted

defilement contrary to section 123(2). The Court of Appeal set aside

the sentence of life imprisonment and substituted therefore a

sentence of 15 years imprisonment. The appellant appealed to this Court.

The facts giving rise to this case are well stated in the judgment of the Court of Appeal. They are that on 10th November 1999, at Morotome village, Kabwangasi sub-county in Pallisa District the accused was alleged to have defiled one Barbra Amacu, a minor aged 6 years at the time. The mother of the victim, one Jane Kalepo (PW2) testified that she left her daughter at home taking care of a baby. On return she found the baby alone, and the victim, Barbra, nowhere to be seen. There was a shed nearby where Kalepo sold malwa drinks. She heard some noise from shaking forms and went there to investigate. She found the appellant on top of the small girl Barbra, with his pants down and the child's dress pushed up. Her pants had been removed. The appellant started running away while pulling up his trousers. PW2 followed the appellant while making alarm. Many people, including L.C officials of the area answered the alarm. The appellant entered the house of one Mugugwa (PW4) where he was arrested by the L.C officials and taken to Kabwangasi Police Post. Meanwhile the complainant (PW2) checked the private parts of the victim and found that:-

> *"**She had bruises in vagina as he was trying** **to** **enter.”***

PW2 took the victim to Pallisa Hospital for examination which was done by a doctor the same day. Doctor Clement Kirya (PW1) found that the victim had inflammation on the entry of her private parts but that her hymen was not ruptured. It is on the evidence of PW2 and that of the doctor} PW1} that the appellant was convicted of defilement. It was also the same evidence that} on appeal} the Court of Appeal found that the evidence did not prove penetration} hence quashing the conviction for defilement and substituting therefore the lesser offence of attempted defilement. The appellant appealed to this court against conviction. Dissatisfied with the decision of the Court of Appeal, the Director of Public Prosecutions cross-appealed against that decision and sought to reinstate the conviction and sentence of the High Court.

The appellant filed two grounds of appeal as follows:-

1- *"**THAT the learned Justices of Appeal erred in law in confirming the appellant's conviction on the basis of unsatisfactory and uncorroborated circumstantial evidence."***

2- ***"That the learned Justices of Appeal erred in law when they failed to adequately re-evaluate the evidence adduced at trial and hence reached an erroneous decision."***

Of course the first ground, is wrongly framed because the Court of Appeal quashed the conviction by the trial judge.

For his part, the DPP in cross-appeal filed 5 grounds of appeal as follows:- .

1- "The learned Justices of Appeal erred in law and fact in holding that sexual penetration (in respect to the act of defilement) had not occurred in order to prove the offence of defilement to the prejudice of the appellant"

2- ***"The learned Justices of Appeal misdirected themselves and based their decisions on speculation in holding that. ……..it seems the interview the mother had with her left her with no doubt that the appellant was still trying to penetrate but had not yet succeeded"***

3- ***"The learned Justices of Appeal erred and gravely misdirected themselves on the law in holding that in the absence of the vital evidence of the victim in a sexual offence the offence of defilement cannot stand."***

4- ***"The learned Justices of Appeal erred in law and failed in their duty as the first appellate court to properly scrutinize the evidence before the trial court and subject it to proper evaluation in order to arrive at the right conclusion."***

5- "The learned Justices of Appeal erred in law and misdirected themselves in evaluating the evidence of PW2 Jane Kalepo, (mother of the victim) in isolation and rejected it before considering and evaluating the rest of the evidence in

support of the prosecution case* to *the prejudice of the appellant.”

At the hearing, in this court, the appellant was represented by Mr. Henry Kunya on State brief, and the State was represented by Mr. Vincent Okwanga, Senior Principal State Attorney.

Mr. Kunya argued both grounds together. He initially argued that the evidence upon which the appellant had been convicted by both the trial Court and the Court of Appeal was unsatisfactory and purely circumstantial and would not support a conviction be it for defilement or attempted defilement.

On being presented with the cross-appeal, however, counsel quickly changed his mind and supported the decision and sentence of the Court of Appeal, namely that the evidence could only support a conviction for attempted defilement, and that the sentence of 15 years imprisonment was commensurate with that offence.

For the state, Mr. Okwanga argued that the Court of Appeal had totally misconstrued the evidence on record. He contended that both the mother of the victim, PW2, and the doctor, PWl had testified that the victim had bruises in her vagina. He asserted, quite rightly in our view, that in sexual offences, such as defilement, or

rape, the slightest penetration into the victim's vagina was sufficient to warrant a conviction for that offence. There was no requirement that the hymen of the victim had to be broken. He conceded, as had indeed been observed by both the trial Court and the Court of Appeal, that the victim had not given evidence in court which was highly desirable, but that nevertheless independent, strong, circumstantial evidence could support a conviction. The court should not make adverse inference on the non-appearance of the victim if other credible circumstantial evidence is available, as was in this case.

He prayed that this court, as the highest court should clarify on the law and set the record straight. He submitted that on the evidence on record, this court should quash the decision of the Court of Appeal and uphold the decision of the High Court for both conviction and sentence.

The only issue that arises in this appeal is whether there was sufficient evidence to support a conviction for defilement. We are of the view that the Court of Appeal correctly stated the law when it stated in its judgment thus:-

> ***"In order to prove a charge of defilement, it must be proved that the accused person had sexual intercourse with the victim. It is not, however, necessary that full sexual***

intercourse should have taken place. It will be enough if there is evidence showing that some penetration of the male sexual organ into the victim's vagina took place. It has been repeatedly held in our superior courts that in sexual offences, the slightest penetration will be sufficient* to *constitute an offence. See MUJUNI APOLLO -Vs- UGANDA CR. APPEAL NO. 26 OF 1999."

In this case, the evidence is that the appellant was found by PW2 on top of the victim while his pants were pulled down and the victim's panties pulled off. On examination shortly after by the mother, PW2, she found bruises in the vagina of the child. She testified thus:-

"I checked the girl and she had bruises in the vagina as he was trying* to *enter. From police, I took her* to *the hospital Pallisa for examination."

The witness further testified under cross-examination that she was present when the doctor examined the victim.

The doctor, PW1, testified as follows:

"The age of the girl is* 5 *years. There was penetration, the hymen was not ruptured."

Under cross-examination, the doctor stated:-

"The entry of the vagina was red. There were no signs of spermatozoa. Redness can be caused by friction. Friction can be caused by anything physical. I didn1t find out what caused the redness. I concluded because the police officer told **me** *that she was sexually assaulted."*

As the Court of Appeal observed in its judgment after examining the victim the doctor filed Police Form 3 where the second question on the form asked was:-

"Are there any signs of any form however sight of penetration."

The doctor replied "Yes (Red)"

The fifth question on the form asked was:-

"Are there any injuries or inflammation around the private part?"

The doctor however left unanswered the question whether the above injuries was consistent with sexual force having been used.

From this evidence it appears to us that there was consistency in the evidence of PW2 and PWl that there was some injury in the vagina of the victim, and the only explanation that could possibly be made for that injury was the fact that the appellant was found on top of The victim in the circumstances described above. In our view, the Court of Appeal erred in

speculating that the injury in the girl's vagina could have been caused by infection or any other

cause not being a sexual act. The Court's conclusion that the doctor used the word "penetration"

because he was only making an inference from the fact that he was told that a sexual assault had

occurred and from the inflammation (redness) of the vagina of the victim, was unfair because

there was sufficient explanation how that injury got there. There was no evidence of disease or

any other means by which the victim could have· got the injuries. In any case, if the court was

prepared to convict the appellant of attempted defilement, it would seem to follow from

evidence that in the process of that attempted defilement, some injury was caused in the entry of

the child's vagina. That entry did not need to be deep enough as to break the hymen to constitute

the offence of defilement. This is in fact consistent with the finding of the court when it stated thus:-

> ***"Though we were not satisfied that penetration had occurred, yet we have no doubt that he had completed all the necessary preparations by removing her and his clothes, lying on top of her and bruising her sexual parts*** **to** ***enable him defile the young girl. "***

In fact, according to the evidence of both PWl and PW2, the injuries

were in the victim's vagina. There is no doubt in our mind that the offence of defilement was

committed

We would therefore dismiss the appeal allow the cross appeal and restore the conviction for defilement as held by the trial Judge. We however, think that the sentence of life imprisonment imposed by the trial judge was harsh in the circumstances. We impose a sentence of 15 years imprisonment.

Dated at Kampala this ....6th ..... day of December.. 2011.

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

B. M. Katureebe
Justice of the Supreme Court

C. N. B. Kitumba
Justice of Supreme Court

J. Tumwesigye
Justice of the Supreme Court

E. M. Kisaakye
Justice of the Supreme Court