

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

5 {*Coram: Odoki, CJ., Tsekooko, Kitumba, Tumwesigye & Kisaakye, JJSC.*}

Criminal Appeal No. 17 of 2010

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BUKENYA JOSEPH **APPELLANT**

Versus

UGANDA **RESPONDENT**

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{Appeal from the decision of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ., Mpagi-Bahigeine & Byamugisha, JJA.) dated 22ND July, 2010 in Criminal Appeal No. 222 of 2003}

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JUDGMENT OF THE COURT:

This is a second appeal. It arises from the decision of the Court of Appeal which dismissed an appeal by the appellant, Bukenya Joseph, who had been convicted of the offence of defilement and sentenced to life imprisonment by the High Court.

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Background:

Facts of this case as accepted by the two courts below are simple. On 22nd September, 2000, at Luzira Village, Mpigi District, the appellant, who appeared aged about 65 years, lured a girl aged 6 years, who, during the trial testified as PW4, and had sexual intercourse with her.

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On the day of the defilement, (22/09/2000) in the evening, Paulo Ssozi, PW2, a 14 year grandchild of the appellant met PW4 in the company of her sister. PW4 was in bad condition and according to PW2, PW4 was “**walking like a duck.**” In other words she walked awkwardly. PW4 informed PW2 that she had been defiled by the appellant. Out of sympathy,

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PW2, in the company of another boy took the victim to her mother, Night Nakabiri, PW3. In her evidence PW3 acknowledged this and testified that PW2 delivered the victim to her at about 09:00 pm on 22/09/2000. PW4 informed her mother that the appellant found PW4 on the verandah of her grandmother’s home and lured her by inviting her to accompany him to

get pancakes. He took her around a bush from where he defiled her and then ordered her to return home. The victim who was walking in a strange manner reported how the appellant defiled her. Blood was oozing out of PW4's vagina.

5 According to the evidence on the record, John S. Wamboga, PW1, a Clinical Officer, examined PW4 the following day (on 23rd September, 2000). He found her aged 6 years. Her vagina emitted an "offensive smell." He saw some bruises in the vagina and noticed that the hymen had been ruptured. He was not cross-examined by defence counsel.

10 In his unsworn statement in Court, the appellant acknowledged knowing PW3 but he denied the offence and claimed that the allegations of defilement were made up. He stated that upon returning home he heard about the allegations of defilement from his wife who reported to him that the village LC Vice Chairperson and PW3 had gone to his home and talked about the defilement of PW4 by the appellant. He decided to report himself to police.

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At the conclusion of adducing evidence, the trial Judge summed up the case to the two assessors. In their separate opinions, each of the two assessors believed the prosecution evidence, disbelieved the appellant and each advised the Judge to convict the appellant.

20 In her judgment, the trial judge evaluated the evidence before she convicted the appellant and sentenced him to life imprisonment. He unsuccessfully appealed to the Court of Appeal.

The appellant has now appealed against the decision of the Court of Appeal. The appeal is based on two grounds. These are framed thus—

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1) *The learned Justices of Appeal erred in law and fact when they failed to re-evaluate the evidence and confirmed the conviction and sentence of the appellant whereas there was no evidence to corroborate the evidence of the victim.*

2) *The learned Justices of Appeal erred when they confirmed the sentence of life imprisonment passed by the trial Judge which was harsh and excessive in the circumstances.*

5 **Arguments by Counsel:**

During the hearing of the appeal, Mr. Mutabingwa of Mutabingwa & Co., Advocates, represented the appellant on a state brief. Ms. S. Okalany, Principal State Attorney (PSA), appeared for the respondent. In his submissions on the first ground of appeal, Mr. Mutabingwa contended that there was no corroboration of the evidence of PW4 and therefore the trial judge should not have believed PW4. Further and in a rather confused manner, learned counsel contended that PW4 was not cross-examined. When court pointed out that she was in fact cross-examined, learned counsel turned round and submitted that PW4 should not have been cross-examined. He cited *Chila v R (1967) EA 722, R. v Bakerville (1916) 2 KB. 658* and **S 40(3) of the Indictments Act (TIA)** in support of his arguments and contended that **Chila's** case (*supra*) is distinguishable although he did not point out how. (Interestingly, the authorities he cited had been considered by the Court of Appeal itself in its judgment from which this appeal emanates.)

Regarding the second ground, learned counsel contended that the two lower courts did not consider the appellant's age of 70 years when sentencing him. Counsel submitted that we should quash the conviction and set aside the sentence or alternatively give a lesser sentence. Ms. Okalany, PSA, opposed the appeal and supported the decision of the Court of Appeal. She contended that there was sufficient evidence which was corroborated. According to her, PW2 and PW3 corroborated PW4's evidence because on the same evening of the defilement PW4, the victim of defilement, reported to the two about what the appellant did to her, which is in conformity with S.155 of the Evidence Act. The PSA conceded that S.40(3) of TIA requires corroboration, but contended that PW2 and PW3'S evidence corroborated the evidence of PW4. As regards sentence, when court drew learned PSA's attention to the provisions of Article 23(8) of the Constitution, the learned Principal State Attorney conceded that the trial judge did not take the appellant's remand period into account when passing sentence. However she relied on S.5(3) of the Judicature Act to support her contention that the appellant had no

right of appeal against the sentence. In reply, Mr. Mutabingwa seized upon the view of the court about Articles 23(8) and contended that the sentence of life imprisonment is illegal and unconstitutional.

5 **Consideration:**

The present first ground is in effect a combination of the 1st and 3rd grounds of appeal in the Court of Appeal where the present second ground was ground four. Mr. Mutabingwa appears to have represented the appellant in that court and argued those grounds like he has done before us.

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Arguments put forward in the Court of Appeal were virtually regurgitated before us. A perusal of pages 5 to 7 of the typed judgment of the Court of Appeal, shows that the court reevaluated the relevant evidence (of PW2, PW3 and PW4) and referred to the authorities cited before us and concluded correctly that under S. 155 of the Evidence Act, the fact that PW4 reported the
15 defilement to PW2 and PW3 who testified about that report during the trial constituted sufficient corroboration of her evidence.

The appellant's statement in court confirms the fact that PW4 knew him before the defilement. So she could not fail to recognize or identify him. No reason has been advanced to support the
20 claim that the case was fabricated. We are satisfied that the Court of Appeal properly reevaluated the evidence considered the relevant law and arrived at the right decision that it was the appellant who defiled PW4. The first ground must fail.

As regards the second ground, we note that counsel for the appellant raised in the Court of
25 Appeal the fact that the trial Judge did not comply with Article 23(8) of the Constitution. Court of Appeal however held that —

*It is trite that for an appeal against sentence to succeed, the sentence must be illegal or manifestly excessive or inadequate. R v Mohamed Jamal (1948) 15 EACA 126, Jackson Zita v Uganda SCCA No. 19/1995 (unreported). The learned Judge gave
30 reasons why a stiff sentence was called for. That the appellant who was aged 70 and married with three wives, could even think of having sex with a 6 year old kid was not only unthinkable but morally repulsive. The maximum penalty is death.*

We think the learned Judge properly exercised her discretion. The sentence of life imprisonment is a deserving deterrent. We (consistently) dismiss the appeal.

Clearly the Court of Appeal did not consider the remand period. In our opinion the Court of
5 Appeal erred in not considering the failure by the trial Judge to comply with Article 23(8). This
Court has on many occasions in its many decisions highlighted the need for trial courts to
comply with the provisions of Clause (8) of Article 23 of the Constitution. Among the decisions
of this Court, we refer to *Kabwiso Issa Vs Uganda (Supreme Court Criminal Appeal No. 07
of 2002; Bashir Ssali Vs. Uganda (Supreme Court Criminal Appeal No. 40 of 2003* and
10 *Katende Ahmed Vs. Uganda (Supreme Court Criminal Appeal No. 06 of 2004*. Incidentally
all the three decisions arise from defilement.

Now Clause (8) reads as follows—

15 ***“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.”***

Taking the remand period into account is clearly a mandatory requirement. As observed above,
20 this Court has on many 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. The three decisions which we have just cited are among many similar decisions of this
Court in which we have emphasized the need to apply Clause (8). It does not mean that taking
25 the remand period into account should be done mathematically such as subtracting that period
from the sentence the Court would give. But it must be considered and that consideration must
be noted in the judgment.

The sentiments expressed by the learned trial judge are no doubt reasonable but the law must be
30 followed. Ground two must succeed.

For the foregoing reasons, the appeal against conviction is dismissed while the appeal against
sentence is allowed. The sentence of life imprisonment imposed by the trial Judge and

confirmed by the Court of Appeal is set aside. Taking into account the period of roughly 3 years, from 23rd September, 2000 to 21st November, 2003 which the appellant spent in police custody and on remand, we sentence the appellant, now over 70 years of age, to imprisonment for twenty years. This period will run from 21st November, 2003, the date the trial Court
5 imposed the sentence of life imprisonment on the appellant.

Dated at Kampala this29th.....day of January 2012

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B.J. Odoki
The Chief Justice

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

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C. N. B. Kitumba
Justice of the Supreme Court.

J. Tumwesigye
Justice of the Supreme Court.

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E. Kisaakye
Justice of the Supreme Court.