**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**HOLDEN AT KAMPALA**

**CORAM:** **HON. MR JUSTICE G.M. OKELLO, J.A.**
**HON. MR JUSTICE J.P. BERKO, JA. AND**
**HON. LADY JUSTICE C.B.N. KITUMBA, J.A.**

**CRIMINAL APPEAL NO.68 OF 1998**

**BETWEEN**

**HABYARIMANA RONARD ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT**

**AND**

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

***(Appeal arising from the decision of the High Court (Bossa J.) sitting at Mubende on 23/11/98 in Criminal Session Case No. 103 of 1998).***

**JUDGMENT OF THE COURT**

This is an appeal against the judgment of the High Court (Bossa J.) sitting at Mubende on 23rd November, 1998 whereby the appellant was convicted of Defilement contrary to Section 123 (1) of the Penal Code Act and was sentenced to 9 years imprisonment.

The facts giving rise to this appeal are brief: The appellant was a timber cutter and resident at Rwamivubo village, Kasambya sub-county in Mubende District. On the 8th of June 1995, he went to the home of Mr. and Mrs. Kasakya seeking for ***dodoo*** (vegetables). Mrs. Kasakya (PW4) instructed her granddaughter, the victim (PW2), together with Nakasawe Madelena, (PW3) another small daughter of hers, to show the appellant where he could pick the vegetables. After picking the vegetables, the appellant requested the victim to show him the way to the home of one Mulumba. Nakasawe Madelena (PW3) had already returned home as her mother had called

her. The victim obliged, but on the way, the appellant defiled her and gave her 100/= not to reveal to anybody what had happened.

When the victim returned home, PW4 noticed that she was uneasy and her dress was wet. When she asked her what had happened to her, the victim could not talk and PW4 beat her. Thereafter, the victim told her that the appellant had defiled her and had given her 100/=. She handed the money to PW4. PW4 examined the victim and found that there was semen on her private part and that she was also wet. The victim was taken to a Hospital for medical examination. The doctor (PW1) who examined her found that there was penetration as her hymen was recently raptured. He also found that the victim was 11 years old.

The appellant was arrested and eventually indicted for defiling the victim. He denied the offence and set up an alibi as his defence. He also claimed that he was framed as a result of a grudge that existed between him and PW5, the grandfather of the victim.

The trial judge rejected his defence, convicted him of the offence, and sentenced him as stated above. Hence this appeal.

There is only one ground of appeal namely:

> "The learned trial Judge erred both in fact and in law in convicting the appellant on insufficient and contradictory evidence"

Mr. Byarugaba, learned counsel for the appellant, criticised the trial Judge for finding that the case against the appellant had been proved beyond reasonable doubt when there was no sufficient and credible evidence to prove: -

[a] age of the victim and;

[b] that there was penetration.

Learned counsel pointed out that the unsworn evidence of the victim (PW2) that she was aged 11 years at the time of the defilement; having been born in 1984 requires corroboration. He argued firstly that, the evidence of PW5, the grandfather of the victim, that the latter was born in 1986 could not corroborate the evidence of the victim because, he contradicted himself under cross-examination that he did not remember the date when the victim was born. In counsel's view, that

contradiction rendered the evidence of PW5 not credible and therefore incapable of corroborating another witness's evidence.

Secondly, that the medical evidence of PW1 and his report Exh. P2, which found the victim (PW2) to be 11 years old at the time of her defilement also, could not corroborate the unsworn evidence of the victim. His argument was that PW1 told court that he examined the victim on 14/4/95 on the day she was brought to him, yet the Indictment and the evidence of other witnesses for the prosecution show that the offence was committed on 8/6/95 which is over one month after the victim had been examined by PW1. In counsel's view, that evidence of PW1 and the report Exh. P2 are not credible. He argued that the evidence shows that either the person who was examined by PW1 was not the victim in this case since the examination took place before the alleged offence was committed, or the offence was not committed and the appellant was merely being framed. He submitted that such incredible evidence couldn't corroborate the unsworn evidence of the victim.

As regards the issue of penetration, Mr. Byarugaba contended that the unsworn evidence of the victim that she was penetrated also requires corroboration, it being the unsworn testimony of a child of tender age. He argued that the evidence of PW4, the grandmother of the victim that she examined the victim and found semen on her private part and that she was also wet could not corroborate that evidence of penetration. In counsel's view to show penetration, the semen should have been found inside the vagina.

Learned counsel further discarded the medical evidence of PW1 who found that there was penetration as in his observation the victim's hymen was recently raptured. His reason for discarding that evidence is that the doctor was un reliable because of the contradiction shown above.

On his part, Mr. Wamasebu, Principal State Attorney, who appeared for the respondent responded that there was overwhelming evidence to support the appellant's conviction. He explained that the contradiction in the date when the doctor (PWI) examined the victim was caused by the failure of the doctor to date his report after signing it. The date that he gave in his evidence was the date shown on the Medical Report form that was a format made and pre-dated by the Police.

Mr. Wamasebu pointed out that the discrepancy was considered by the trial Judge who found that it was a negligent omission by PW1 in failing to date his report rather than a frame up.

It is now an established principle by numerous case authorities that a first appellate court has a duty to subject the entire evidence on record to a fresh and exhaustive scrutiny and to make its own findings of facts on the issues while giving allowance for the fact that it had no opportunity to see the witnesses as they testified. See: ***Pandya Vs R [1952] EA 336; Okeno Vs R [1972] EA 32.***

This is a first appellate court and with the above principle in mind, we shall now proceed to consider the issues raised in the presentation of that sole ground of appeal.

The complaints raised by counsel for the appellant were firstly that there was no sufficient and credible evidence to prove the age of the victim. He argued that the unsworn testimony of the victim (PW3) requires corroboration. We agree with that submission, as this is the law. See: ***The proviso to Section 38(3) of The Trial on Indictment Decree*** which reads:-

> "38 (3). Where, in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth:
>
> Provided that where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof implicating him."

Learned counsel criticised the evidence of Antonia Kasakya (PW5) the grand-father of the victim, as being contradictory, not credible and that it therefore cannot corroborate the unsworn evidence of PW2 that she was 11 years at the .time of her defilement. The contradiction complained about was that PW5 who had testified that the victim was 11 years at the time of her defilement, having been born about 1986, contradicted himself in cross-examination when he said that he did not remember the date when the victim was born. Learned counsel criticised the

trial Judge for believing that evidence and for finding that it corroborated the unsworn evidence of the victim.

The trial Judge dealt with the question of age of the victim in her judgment in this way:-

> "The next element that needs proof is the age of the complainant. PW5 Kasakya retired Primary teacher stated that PW2 Nakisitu was his granddaughter. He stated that she was born at Rwamivubo in his home in 1986. He stated that at the time of her defilement she was 11 years old. The doctor, PW1, Dr. Wabwona, stated that PW2 Nakisitu was 11 years old when he examined her. **The defence did not Contest the age of PW2 Nakisitu. I find therefore that at the time PW2 Nakisitu was defiled, she was about 11 years old.** (emphasis ours)

That statement that the defence did not contest the age of the victim at the trial is supported by the submission of counsel for the appellant at the trial where he said:-

> "State called 5 witnesses. It failed to prove case Vs accused on element of penetration; this was not proved at all..."

The question of the age of the victim was therefore not challenged at the trial. The only issue at the trial was penetration.

However, the relevant evidence of PW5 against which counsel for the appellant complained reads as follows:

"When she was defiled, she was about 11 years. She is now 14 years, she was born about 1984." (P.19 first two lines on top).

Then under cross-examination the witness was recorded as having said:

"She was born at Rwemivubo in my home. I do not remember the date when she was born. I was present when she was born. She is 14 years now." (Same page).

We do not find any contradiction in the above statements. In his evidence in chief, the witness stated that the victim was born about 1986. He did not mention any date. In cross-examination, he admitted that though he was present when the victim was born in his home, he did not remember the date, but that she was 14 years at the time of the hearing. He had been consistent.

In any case, failure to remember the exact date of birth is not a very serious discrepancy when the year of birth is remembered. In the instant case whether the victim was born in 1984 or in 1986 would make no difference because in either case, she was still under 18 years old on the 8/6/95 when the offence was committed. The evidence of PW5 is therefore not tainted. It is still credible and could corroborate the unsworn testimony of the victim.

Evidence which counsel for the appellant complained about was the evidence of PW1, the doctor who examined the victim, and his report Exh. P2. He found that the victim was aged 11 years when he examined her and that there was penetration as her hymen was recently raptured. The complaint was about the date when the doctor examined the victim. The doctor (PW1) testified that he examined the victim on 14/4/95 on the day she was brought to him. This was clearly a discrepancy as the Indictment and the evidence of other witnesses for the prosecution indicated that the offence was committed on 8/6/9 5, over one month after the date when PW1 said he examined the victim.

The trial Judge dealt with that discrepancy in her judgment in this way:-

> "A discrepancy on a date of defilement would be major but I believe this particular discrepancy was reconciled when PW1 stated that he forgot to date his report and PW2 confirmed and identified PWI as the one who examined her. Also a close examination of his report will show that the date on the report was not necessarily the day the Doctor examined. His notes are in his handwriting. Also PW4 and PW5 gave the correct dates on which PW2 was defiled and examined. PW2 was able to identify PW1 as the doctor who examined her at Mubende Hospital the day following her defilement which would be the 9th June 1995. Both Counsel for the accused and the accused attacked the Doctor's report for bearing the wrong date and submitted that the victim examined by PWI was not the complainant PW2 Nakisitu but some other person. I have carefully studied the medical report and the evidence of the doctor in court. I also observed his demeanour carefully. While he was careless in failing to date the report, I believe him when he says he examined PW2 Nakisitu and found her to be defiled."

Learned trial Judge who had the opportunity to observe the demeanour, of the witness agreed with his explanation and believed his report Exh.P2. We think that the trial Judge was justified in believing the witness even though he had been careless. He was not a liar. We looked at the evidence of PW1 and his report Exh.P2. The date he referred to in his evidence was clearly the date of the Police Form 3 format. It was typed. All the information's he supplied were filled in that Form handwritten. This did not include the date. We agree with the trial Judge that the doctor was careless or even negligent in failing to date his report after signing it. The actual date when PW1 examined the victim was not mentioned in the evidence but PWS stated that it was on the day following her day of defilement. That would mean the 9th of June 1995. We therefore cannot fault the trial Judge in her finding the evidence of PWI and EXh.P2 truthful. They are thus capable of corroborating the unsworn testimony of PW2 as to her age as well as on the question of penetration.

Finally, counsel for the appellant complained about the evidence of PW4 the grandmother of the victim who testified that she examined the victim and found semen all over her private part. She further testified that the victim was also wet. Mr. Byarugaba criticised the trial Judge for finding that the above evidence corroborated the unsworn evidence of PW2 that she was penetrated.

In this issue the trial Judge recorded in her judgment that:

"I find further corroboration of the fact of defilement in the evidence of PW4 Winfilda Nakafeero who examined PW2 Nakisitu soon after her defilement. She found her wet and all her clothes were wet. She examined PW2 Nakisitu and found semen all over her private part."

We agree with the above finding of the trial Judge. Finding semen all over the vagina must mean that there had been penetration as all that the law requires to prove sexual intercourse is penetration however slight.

The evidence of PW1 who found that the hymen of the victim was recently raptured provided further corroboration to the unsworn evidence of PW2 that she was penetrated. For the reasons given above, we find no merits in the appeal.

In the result, the appeal is dismissed and the conviction and sentence imposed by the lower court are upheld.

Dated at Kampala this 12th day of May 1999.

G.M. OKELLO

JUSTICE OF APPEAL

J.P. BERKO

JUSTICE OF APPEAL

C.B.N. KITUMBA

JUSTICE OF APPEAL.