THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. MR. JUSTICE J.P. BERKO, J.A.

HON. MR. JUSTICE S.G. ENGWAU, J.A. &

HON. LADY JUSTICE C.N.B. KITUMBA, J.A.

CRIMINAL APPEAL NO. 31 OF 1998

KAYONDO FRED)

MUTAGAYIKA SILAS) ……APPELLANTS

VERSUS

UGANDA…… RESPONDENT

(Appeal against conviction and sentence of the High Court of Uganda sitting at Mukono (Mukiibi J) dated 11.8.1998. In Criminal Session Case No. 450 of 1995)

JUDGMENT OF THE COURT:

This is an appeal against the judgment of the High Court sitting at Mukono whereby the two appellants were convicted of defilement, contrary to section 123(1) of the Penal Code Act and sentenced to 7 years' imprisonment.

The facts of the case, as accepted by the trial Judge, were as follows: On the 14th November 1994 at Busiro village, Mukono District at around 6.OOp.m. the two appellants went to the home of Justin Mpiima. They found Margaret Nakaddu, PW 2, present together with her younger sister Nakiryowa Keti, PW 3 and another small child called Magala. The parents were not present. PW 2 suffers from epileptic fits. The appellants persuaded PW 2 to go with them, though she did not

know where they were taking her. When her young relatives followed them, the appellants gave them Shs. 100/= to go and buy. pancakes and the children left. The appellants took PW 2 to a nearby bush. They told her to remove her knickers and to lie down. Kayondo Fred, the first appellant, removed his pants and had sexual intercourse with PW 2 while Mutagayika Silas, the second appellant, held PW 2's hands.

She felt a lot of pain. After defiling PW 2 both appellants went with her to Sekamwa's bar in the same village. They sat with PW 2 between them. The appellants bought her bread which she ate while they consumed local brew. In the meantime Justin Nakangu (PW 5) the victim's mother had returned home and had looked for PW 2, but had failed to find her. John Kaddu, PW 4, who had seen PW 2 in the bar together with appellants went to Mpiima's home and informed the mother that he had seen PW 2 in the bar. PW 5 went to the bar where she found PW 2 sitting between the two appellants. PW 5 took her daughter home. PW 5 asked PW 2 what had happened to her but she did not answer. Then PW 5 examined the female organ of her daughter and found that she had been defiled and was bleeding from her vagina. The next day PW 2, told her mother what had happened to her. PW 5 in turn informed her husband Justin Mpiima who reported the matter to the Local Council officials. Justin Mpiima took PW 2 to Ngogwe police Post and reported the incident and later took her to Kawolo hospital where she was medically examined on the 7th November 1994, by Dr. Fabiano Opal. According to the doctor's medical examination report Ex. P 1, there was a tear at the posterior junction between the left and right labia minora, bruises in the labia minora and labia major, the hymen was ruptured, there were signs of penetration which were consistent with force having been used sexually and there was pus discharge indicating a sexually transmitted disease. The injuries were about a week old.

The appellants were arrested and charged with defilement. At the trial both of them gave unsworn statements. In his statement, the first appellant testified that on 4/11/1994 he was at home the whole day. He said that Mpiima and his family had concocted the case against him because Mpiima had a love affair with the appellant's step mother. As the appellant did not approve of that relationship, Mpiima wanted to get him out of the way. The second appellant testified that on the 4/11/1994 he was in the forest cutting timber the whole day and went to his

home later in the evening. He testified that PW 4 has a grudge against him because the latter had failed to pay his debt amounting to Shs. 70,000/= and that the second appellant was about to sell PW 4's Kibanja which he had pledged as security. The learned trial Judge rejected their defences, convicted them as charged.

Though there was one ground of appeal, it complained of two matters, namely:

(a) that no sexual intercourse took place and

(b) that the appellants were not responsible!

During the hearing of the appeal Mr. Muhwezi, learned counsel for the appellants abandoned the second part of the ground of appeal on identification of the appellants and rightly so in our view, as the offence was committed during the day and appellants were known before this incident by the victim(PW 2)and her young sister PW 3.

Counsel for the appellants argued that no sexual intercourse took place. Firstly, because PW 2, the victim of the defilement was not mentally normal and could not therefore understand what took place. Accordingly, the learned trial Judge erred in relying on her evidence.

With due respect to learned counsel, we disagree. We agree with the submissions of Mr. Bireije, that although PW 2 suffered from epilepsy, this was a periodic illness and that she was able to understand what happened when she had no attacks. The learned trial Judge received and accepted her evidence that both appellants seduced her from her home, took her to the bush and the first appellant had sexual intercourse with her while the second appellant held her hands. PW 2 was able to testify before court. We are unable to fault the learned trial Judge on this matter.

Secondly, Mr. Muhwezi argued that there was no corroboration of PW 2's evidence that she was defiled. Learned counsel contended that the learned trial Judge was wrong in relying on the medical evidence as corroboration of PW 2's evidence. PW 2 was defiled on 4/11/1994 and examined three days afterwards. However, the medical evidence is to the effect that the injuries found on PW 2's private parts were one week old. According to counsel, the rupture of the hymen and other injuries found by the doctor might have been caused by her falling during an attack of epilepsy on 31st October or 1st of November. We are unable to agree with the above submission. We are of the view that a difference by a few days in the doctor's estimate of the date when the sexual intercourse took place does not render his evidence unreliable. The doctor simply estimated the period. He said that the injuries were caused about a week prior to the date of examination. This clearly shows that he was, not trying to give the exact date when the incident happened.

Counsel for the appellant attacked the evidence of PW 5 that it did not provide corroboration of PW 2's evidence because PW 5 was not an eye witness and that when she took PW 2 from the bar she did not talk to her. We are in entire agreement with learned counsel for the respondent that PW 5's evidence corroborated PW 2's evidence that the latter had been defiled. Our reason for saying so is that as soon as PW 5 took her daughter home, she examined her private parts and observed that she had been defiled and blood was oozing from her vagina.

We find that the learned trial judge properly directed the assessors and himself on the issue of corroboration, and correctly found that the evidence of PW 2 that she was defiled was corroborated by the evidence of PW 5 and the medical evidence of PW 1. ***Chila v Another v Reøublic [1967]EA. 722.***

We find no merit in this appeal. It is accordingly dismissed.

DATED at Kampala this 12th day of May 1999.

J.P. Berko

Justice of Appeal.

S.G.Engwau

Justice of Appeal.

C.N.B. Kitumba

Justice of Appeal.