THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: **HON. JUSTICE C.M. KATO, JA.**
HON. JUSTICE G.M. OKELLO, JA.
HON. LADY JUSTICE C.N.B KITUMBA, JA.

CRIMINAL APPEAL NO.41 OF 1999

BETWEEN

NFUTIMUKIZA ISAYA::APPELLANT

AND

UGANDA:::RESPONDENT

(Appeal from the judgment of the High court
(Rugadya Atwoki J.) delivered at Mukono on 16/4/99
in Criminal Session Case No. 484 of 1996).

JUDGMENT OF THE COURT

This appeal is against the conviction and sentence imposed on the appellant by the High Court (Rugadya Atwoki J.) sitting at Mukono on 16/4/99 whereby the appellant was convicted of defilement contrary to Section 123 (1) of the Penal Code Act and was sentenced to 12 years imprisonment.

The case for the prosecution at the trial was that on 11/7/98 the victim, an imbecile girl of the age of about 10 years, was sent to buy sugar cane from the appellant. She was accompanied by her sister Irene Namanda (PWI) who was older than her. From the appellant's residence, his friends prevented Namanda from accompanying the victim and the appellant to the plantation. Appellant went to the plantation with the victim alone.

When the victim later emerged from the plantation, Namanda noticed that she was walking badly. She also noticed that the victim's skirt was wet at the rear. She suspected that the victim was defiled. She reported the matter to their mother one Nanyonga Sebagala (PW2). Their mother immediately examined the victim and found her private part wet and damaged. She then took her for medical examination. The Doctor who examined the victim confirmed that she had been defiled as there was inflammation around her vulva though her hymen was intact. The matter was reported to the authorities and the appellant was arrested and charged with defiling the victim.

At the trial, the appellant's defence was a complete denial. He pleaded a frame up as a result of a grudge which existed between his employer and the victim's parent. The trial judge rejected that defence and convicted the appellant and sentenced him as stated. Hence this appeal.

There are two grounds of the appeal namely:

1. the learned trial Judge erred in fact and law when he failed to properly evaluate the evidence on record and then came to a wrong decision.
2. the learned trial Judge erred in fact and in law when be sentenced the accused to 12 years imprisonment which was excessive in the circumstances.

The first complaint raised by Mr. Max Mutabingwa, learned Counsel for the appellant on state brief, was that the act of sexual intercourse, necessary to constitute the offence of defilement was not proved. He argued that as the victim did not give evidence and the medical evidence showed that the victim's hymen was intact, the penetration necessary to constitute sexual intercourse was not established.

Secondly, learned Counsel for the appellant complained that the trial Judge wrongly rejected the issue of grudge which the appellant raised in his defence as being the cause of framing him with this offence.

Mr. Byabakama Mugenyi, Senior Principal State Attorney who appeared for the state supported the conviction and the sentence. He contended that the trial Judge properly evaluated the

evidence before him. In his view, failure of the victim to testify at the trial was not fatal to the prosecution case as there was sufficient evidence which warranted the conviction of the appellant.

On the issue of sexual intercourse, Mr. Byabakama submitted that it was proved. He pointed to the damage to the victim's private part and the presence of a thick whitish fluid in it which her mother PW2 testified to and were confirmed by the Doctor (PW5) who examined the victim a few hours later as evidence of sexual intercourse. According to Mr. Byabakama, the Doctor found inflammation of the victim's vulva and the laboratory analysis established the presence of sperm in the victim's private part. He argued that non-rapture of the victim's hymen was adequately dealt with by the trial Judge who despite that, found that there was penetration.

As regards participation of the appellant in the commission of the offence, Mr. Byabakama submitted that the circumstantial evidence against the appellant was very strong. He pointed out that the appellant was last seen with the victim when she was walking well as they entered the plantation. A few minutes later when the victim emerged from the plantation she was walking badly and her skirt was noted wet on the rear. These aroused her sister's suspicion that she might have been defiled. That suspicion was confirmed by their mother and the doctor who examined the victim. Subsequently, the medical examination on the appellant a few hours later revealed the presence of sperm under the foreskin of his penis. This suggested recent ejaculation. According to Mr. Byabakama, all these circumstances irresistibly pointed to the appellant as the person who defiled the victim.

He contended that the trial judge properly rejected the appellant's issue of grudge as a mere attempt to explain away the strong evidence against him. It was Mr. Byabakama's argument that the question of the grudge was a second thought as it was not put to the victim's mother in cross-examination.

It is now settled 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 and to draw its own conclusions while making allowance for the fact that it had no opportunity to see the witnesses as they testified (See: ***Okeno Vs Republic 119721 EA 32 at 36)***

With the above principle in mind, we now proceed to consider the merits of the appeal. The first criticism was that sexual intercourse was not proved as the victim did not herself give evidence and the medical evidence revealed that the victim's hymen was intact.

The trial judge considered a number of authorities which persuaded him that non-rapture of the hymen of a defilement victim was no proof that there was no penetration. The authorities he consulted were ***Uganda Vs. Apollo George Anywar Cr. Session Case No. 381 of 1995; Uganda Vs. Appolo Mwesigwa, Cr. Session Case No. 99/92; Uganda Vs Odwong Devis and Another [1992 — 93] HCB 70; Christopher Byamugisha Vs Uganda [1976] HCB 317; Gerald Gwayamadde Vs Uganda [1970] HCB 156.*** All these are High Court decisions. He also consulted ***Archibald Criminal Pleadings, Evidence and Practice 36th Edition at page 2880 paragraph 2879*** where the learned author stated that proof of rapture of the victim's hymen was unnecessary. He further consulted ***Halsburv Laws of England 3rd Edition vol. 10 at page 746 paragraph 1438*** where the learned author stated that it is not necessary that the hymen should be raptured. Carnal knowledge was deemed complete upon proof of penetration.

On the strength of those authorities the trial Judge considered the evidence of the mother of the victim which showed that the private part of the victim was damaged and there was in it some thick whitish fluid. He also considered the medical evidence which revealed that the vulva of the victim was inflamed and that there was present around it sperms. Upon this evidence the learned trial Judge found that there was penetration.

From the evidence available on record, we cannot fault the trial judge's finding. Failure of the victim to give evidence is not fatal to the conviction See ***Patrick Akol Vs Uganda, Cr. Appeal No. 23 of 1992 SC unreported; Badru Mwindu Vs Uganda Cr. Appeal No. 1 of 1997 (CA) unreported.*** In the instant case, we are satisfied that there was sufficient evidence to support the conviction as shown above.

As regards sexual intercourse, the law governing it is that the slightest penetration possible suffices to constitute the offence of defilement. In ***Habyarimana Ronald Vs Uganda Cr. Appeal No. 68 of 1998*** this court held that the finding of semen all over the victim's vagina was sufficient. In the instant case, the medical evidence revealed that the victim's vulva was inflamed

and that sperms were found in the victim's vagina though her hymen was not raptured. In our view, that evidence is sufficient to prove the penetration necessary as what is needed is the slightest penetration.

The trial Judge was criticised for not believing the appellant's story that the charge was framed up against him because of a grudge between his employer John and Mayanja Abdu (PW3) over land and with Nanyonga Sebagala (PW2) for uprooting potatoes which Sebagala was harvesting. We think that the trial Judge was justified to disbelieve the appellant as that fact was never put to Mayanja Abdu and Nanyonga Sebagala in cross-examination. That failure rendered the allegation an afterthought. Consequently, ground 1 must fail.

Counsel for the appellant's complaint in ground 2 was that the sentence of twelve years imprisonment imposed on the appellant was excessive. Mr. Byabakama on his part was of the view that the sentence was lawful and commensurate with the offence.

We want to point out that an appellate court can interfere with the exercise of discretion of the trial judge only where the Judge has acted on a wrong principle or where the sentence he passed is manifestly excessive or too low. See ***Ogalo s/o Owoura Vs R [1954] 24 EACA 270.*** None of those conditions has been shown to exist here. The maximum sentence prescribed by law for defilement is death. In the instant case the trial Judge in his discretion imposed 12 years to include the period the appellant spent on remand. The appellant spent four years on remand. If that is deducted from 12, only 8 years is left. We do not find this to be manifestly excessive considering the fact that the appellant took advantage of the unfortunate condition of the victim being an imbecile. We find no merit in this ground.

In the result, we dismiss the appeal and uphold the lower court's decision.

Dated at Kampala this 19th day of May 2000.

C.M. KATO

JUSTICE OF APPEAL.

G.M. OKELLO

JUSTICE OF APPEAL.

C.N.B. KITUMBA

JUSTICE OF APPEAL.