THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. MR JUSTICE C.M. KATO, JA.

HON. MR JUSTICE G.M. OKELLO, JA.

HON. LADY JUSTICE C.N.B. KITIMBA, JA.

CRIMINAL APPEAL NO.30 OF 1999

KATO SULA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from a judgment of the High

Court of Uganda at Mukono (Rugadya, Ag. J.)

dated 3 1/3/99 in C.S.C. No.382/96)

JUDGMENT OF THE COURT

The appellant Kato Sula was convicted by the High Court for the offence of defilement contrary to section 123(1) of the Penal Code Act and sentenced to 8 years imprisonment. He has appealed against conviction.

The material facts of the case as presented in the court below are as follows. The complainant Agila Gabula was a student of Yudaya Islamic School. The appellant was her teacher in primary two at the same school. On 6/8/95 the appellant called the complainant to his house. She went with other children whom the appellant chased away. The complainant's uncle, Habib Kalema, resisted leaving the place but the appellant ordered him to go and collect a Koran from a nearby mosque. When the appellant was alone with the complainant (PW5) he pulled her into his room where he demanded to have sex with her. She refused but he overpowered her and she was defiled. The following morning she did not go back to school and when her grandfather Jafali Kimera (PW2) asked her why she told him that she feared the appellant who had defiled her. The matter was reported to the relevant authorities. The appellant was arrested and charged accordingly.

At the trial the appellant denied ever having committed the offence. He refuted the allegation that he was a teacher at Yudaya Islamic School where the complainant was defiled. He

pleaded alibi contending that the complainant might have mistaken him for his identical twin brother called Waswa.

The learned trial judge rejected the defences put up by the appellant and convicted him, hence this appeal.

The following 5 grounds of appeal where lodged, namely:

1. The learned trial judge erred in law and fact when he convicted the appellant of the offence of defilement whereas there was no sufficient evidence to prove the offence.

2. The learned trial judge erred in fact and law when he wrongly evaluated the evidence on record and came to a wrong decision that the appellant had defiled the prosecutrix.

3. The learned trial judge erred in fact and law when, after rightfully holding that the evidence of the victim, as a matter law, needed to be corroborated, held that the evidence was sufficiently corroborated whereas it had not been corroborated at all and hence came to a wrong decision.

4. The learned trial judge erred in fact and law when he sentenced the appellant to 8 years imprisonment which was excessive in the circumstances.

5. The learned trial judge erred in fact and law when he failed to properly evaluate the evidence on record and hence came to a wrong decision.

When the appeal came up for hearing Mr. Mutabingwa, learned counsel for the appellant abandoned ground 4. He argued the remaining 4 grounds together. His submission was in two parts. The first part dealt with the issue of act of sexual intercourse having not been proved. The second part concerned lack of proper identification of the appellant. We shall consider the matter in the same order.

Mr. Mutabingwa submitted that the trial judge did not properly evaluate the evidence as presented before him and that had he done so he would have found that no sexual intercourse had taken place. He attacked the doctor’s finding that the hymen was ruptured when he had examined the girl 7 days after the incident. He complained that the doctor did not even know how old the rupture was nor did he see any injury on the girl apart from the ruptured hymen.

On his part Mr. Byabakama Mugenyi Senior Principal State Attorney contended that the doctor’s evidence supported the act of sexual intercourse as the rupture of the hymen is evidence of penetration. The fact that the doctor did not know how old the rupture was did not lessen his finding that the girl had been defiled.

There is no doubt that the case for prosecution regarding penetration and the act of sexual intercourse was based on the complainant's testimony and that of the doctor (PW4A) who examined her. The complainant in her unsworn statement in court gave in great details how she was defiled. Her statement as a matter of law required corroboration (see Proviso to section 38(3) of T.I.D.) which was provided by the doctor's evidence. He had examined her about 11 days after the incident and found her hymen ruptured. There was also the evidence of the complainant's grandfather (PW2) who observed her distressed condition. A distressed condition of a victim in appropriate cases may serve as corroboration of her evidence, and in this case it did. (See Edmund W. Brotow Zielinski v R [1950] 34 Cr.App. Reports 193 at 197 and Abasi Kibazo v Uganda [1965] EA 507 at 510. Before he came to his conclusion that the girl had been defiled, the trial judge, considered all these matters in considerable details. We are satisfied that he made a correct decision which was amply supported by the evidence on record. We find no substance in Mr. Mutabingwa's contention that the judge did not properly evaluate the evidence before him.

Regarding the issue of identification, Mr. Mutabingwa was of the view that the appellant was not properly identified as the person who defiled the complainant. He argued that the appellant might have been mistaken for his twin brother Waswa who was teaching at the same school where the complainant was defiled. He supported this argument by pointing out that at one time the appellant's brother had been mistakenly arrested and released by the police in this same case. On his part Mr. Byabakama Mugenyi did not agree with that view he contended that the girl had properly identified the appellant as he was her class teacher.

It is not in dispute that this incident took place during the day time at about 10.00 a.m; the complainant was very familiar with the appellant being her teacher, the appellant spent a lot of time talking to her before and after the defilement. The following day the complainant did not go to school and told her grandfather (PW2) that her teacher called Kato had defiled her the previous day. All these facts show that the girl was certain as to the person who defiled her. Conditions favouring correct identification existed in our view. In her statement the complainant stated that she knew the brother of the appellant and she was emphatic that it was Kato not Waswa who defiled her. According to the evidence of Jafali Kimera, the appellant disappeared from his place of abode after the incident. In our view such conduct by the appellant corroborates the complainant's statement that it was the appellant who defiled her. The judge properly

considered the law relating to identification by a single witness and the need for corroboration of that evidence. We are satisfied that he correctly applied it to the facts of this case.

Before we take leave of this case we wish to observe that we noted on the record that the complainant made an unsworn statement but was later cross-examined by the defence counsel. We think this was irregular because a witness who gives a statement not on oath is not subject to cross-examination as there is no oath binding him or her. In our view the irregularity did not occasion miscarriage of justice considering the facts of this particular case.

For the reasons, we find no merit in this appeal, it is accordingly dismissed.

Dated at KAMPALA on this 22nd day of May, 2000

C.M. Kato
JUSTICE OF APPEAL

G.M. Okello
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL