THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.23 OF 1999

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.
HON. MR. JUSTICE A. TWINOMUJUNI, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

KATIMA JOHN ……..……..APPELLANT

VERSUS

UGANDA ……..RESPONDENT

(Appeal from the Judgment of the High Court (Mukanza J.) dated 918196 in Criminal Session Case no. 298/93 at Mbarara.)

JUDGMENT OF THE COURT:

Katima John, the appellant, was tried and convicted on an indictment that charged him with the offence of defilement, contrary to Section 123(1) of the Penal Code Act and was sentenced to 10 years imprisonment on 9/8/1996 by the High Court. He now appeals against both the conviction and sentence.

The prosecution evidence as accepted by the learned trial judge was that Allen Tumwebaze, the complainant, was a girl under the age of18 years. On the 15th December 1992, the complainant went together with her sister Jennifer Tumukwasire to the home of the appellant to demand money from him for the work they had done for him when they weeded his banana plantation. The appellant invited them inside his house and when it began raining they decided to go back home. The appellant sent the complainant's sister away. He locked the complainant inside the house. The complainant made an alarm which was not answered.

The appellant forcibly had sexual intercourse with her and detained her the whole night. In the early morning of the following day the complainant returned to the home of her uncle, Bernard

Ntanda, PW3, and reported that she had been defiled by the appellant. She was treated with hot water by her mother. Bernard Ntanda (PW3) who reported the matter to Katono Vicent, PW4, Resistance Council I Chairman. Katono Vicent (PW4) issued them with a letter forwarding them to Kabingo Gombolola Headquarters from where the matter was reported to Mbarara police station. The complainant was later medically examined by Dr. Wasswa George, PWI. Dr. George Wasswa (PWI) found that the complainant was 14 years old. He also found scratch marks on the back. There were no tears or scratches on the vagina and no recent tears of the hymen. He found a dark mark on the urethral meatus which was caused by forced entrance into the vagina.

The appellant's defence was a complete denial. He testified that he had been framed up by Bernard Ntanda, (PW3) because he had a grudge against him. Some time back, he refused to buy beer for Bernard Ntanda (PW3) who beat him up severely. Ntanda was arrested and ordered to treat the appellant but failed to do so.

The learned trial judge disbelieved the appellant's defence. He found that the prosecution had proved the case against him beyond reasonable doubt and convicted him.

There are 8 grounds of appeal, namely:-

"1. The learned trial judge erred in fact and law when he failed to properly evaluate the evidence on record and therefore came to a wrong decision that the appellant had defiled the complainant.

2. The learned trial judge in fact and law when he convicted the accused to the offence of defilement when it was clear from the evidence on record that prosecution had totally failed to prove it and instead relied on incredible evidence to convict the accused. (sic),

3. The learned trial judge erred in fact when, after properly observing that the evidence of PW2 needed corroboration, he wrongly held that the evidence was corroborated whereas it was not, hence reaching a wrong and unjust decision.

4. The learned trial judge erred in fact and law when he disregarded evidence on record and relied on his mere opinions and speculations which was not part of the evidence and hence came to a wrong decision.

5. The learned trial judge erred in fact and law when he held that the contradictions in the prosecution's evidence were minor whereas they were major, unexplained and pointed to deliberate falsehood and framed up case against the accused.

6. The learned trial judge erred in fact and law when he rejected the accused defence of grudge which was corroborated by PW2.

7. The learned trial judge erred in fact and law when he held that the prosecution had disproved the accused's alibi whereas they had not.

8. The learned trial judge erred in fact and law when he sentenced the appellant to 10 years imprisonment which was excessive in the circumstances."

Mr. Maxim Mutabingwa, learned counsel for the appellant argued the grounds of appeal in the following order; 1, 2 and 4 together, 3 and 7 together, 5 and 6 together and 8 separately. We shall deal with them in the same sequence.

Counsel's complaint in the first batch was that the learned trial judge erred in fact and law when he convicted the appellant on insufficient evidence. With regard to this, he raised basically two issues. Firstly, that there was no evidence to prove that the complainant was below the age of eighteen years. Counsel submitted that in his evidence Dr. Wasswa (PWI) stated that the complainant was fourteen years old. The same witness stated in cross examination that he did not have the machine to examine her age but used his experience. The complainant stated that she was told by her father that she was born in 1977 whereas her mother Joven Sinalirwe, PW5, testified that the complainant was born on the 9th June 1979. Secondly, Mr. Mutabingwa submitted that it had not been sufficiently proved that sexual intercourse took place. The complainant testified that she was defiled on 16/12/1992 whereas Dr. Wasswa (PW1) stated that he examined the complainant on 19/11/1992.

Mr. Wagona learned Senior State Attorney responded that the evidence on record was sufficient to prove that the complainant was below the age of 18 years. Learned counsel submitted that it does not matter whether the complainant was born in 1979 or 1977 because whichever date you take at the time of defilement she was under the age of 18 years. The doctor physically examined the complainant and in his opinion the complainant was under the age of 18 years. Mr. Wagona further contended that sexual intercourse took place. The complainant said so and the medical examination showed a dark mark at the urethral meatus which was evidence of penetration.

Looking at the evidence on the record as a whole we find that the learned trial judge came to the right conclusion that the complainant was under the age of 18 years. Even if the court believed that the complainant was born in either 1979 or 1977, she was defiled in 1995 and whichever date is taken she was definitely below 18 years of age. The doctor physically examined the complainant and determined that she was 14 years of age. The learned trial judge observed the complainant while she was giving evidence in court and formed his opinion about her age, which he was entitled to do.

We are satisfied that the act of sexual intercourse was proved. The learned trial judge believes the complainant's evidence that the appellant forcibly had sexual intercourse with her. He rightly found that her evidence was corroborated by the evidence of Dr. Wasswa (PWI) who testified that he found a dark spot at the urethral meatus which was about 5 days old and was caused by forced entry into the vagina. Grounds 1, 2 and 4 must fail.

The substance of the complaint in grounds 3 and 7 is that the learned trial judge erred to convict the appellant on the evidence of PW2 which was not corroborated and to reject the evidence of a grudge which was testified to by the appellant and corroborated by the evidence of the complainant.

In his submissions, learned counsel did not allude to the complaint in ground 7 and we take it that he abandoned that ground. On ground 3, counsel contented that the evidence of the complainant was not corroborated in as far as the identity of the appellant was concerned. He submitted that the learned trial judge warned the assessors of the danger of convicting on uncorroborated evidence but did not warn himself accordingly when he should. In counsel's

view, failure of the judge to warn himself was fatal to the conviction. Mr. Wagona submitted to the contrary, that as the learned trial judge had warned the assessors he was alive to the law and that corroboration was a matter of practice and not of law.

Considering the evidence on record and the judgment of the trial judge, we are satisfied that the learned trial judge was alive to the law that corroboration was required as a matter of practice. He found corroboration in the medical evidence.

He had the opportunity of observing the complainant as she gave her evidence and believed her to be a truthful witness. He was therefore right to convict the appellant in spite of the fact that his identity was not corroborated. See **Chila & Another v R [1961] EA 722**. We believe that in the circumstances the complainant could not have been mistaken about the identity of the defiler as she knew him before and he detained her for the whole night. Ground 3 has no merit.

Regarding grounds 5 and 6, Mr. Mutabingwa submitted that the inconsistencies and untruthfulness of the prosecution witnesses were major and pointed to deliberate untruthfulness of the prosecution witnesses. The contradictions counsel complained of were four. Firstly that the complainant testified that she was defiled on 16/12/1992 whereas Bernard Ntanda's (PW3) testimony is to the effect that the complainant was defiled in November 1992. Secondly, that the complainant testified that she was treated by her mother whereas Joven Sinalirwe in her evidence said that she knew of the defilement of her daughter after one year. Thirdly, that Bernard Ntanda (PW3) told court that he went to the home of Vicent Katono (PW4) on 15th November at night to report the matter but did not find him at home. He returned on the morning of 16th November then he found Katono Vicent (PW4) and reported the case. The evidence of Katono Vicent is to the contrary, that PW3 went to his home only once in the morning of 16th November 1992 report. Fourthly, that the complainant testified that there was a grudge between her uncle Bernard Ntanda (PW3) and the appellant but the latter denied the existence of that grudge but Bernard Ntanda (PW3). In reply Mr. Wagona supported the learned trial judge's finding that all those contradictions and inconsistencies were minor.

We also agree with the learned trial judge's finding. The contradictions and inconsistencies were minor. We appreciate that the complainant was an illiterate peasant girl and it is possible to

testify that the incident took place in December when it was in November. The complainant lived with her uncle Bernard Ntanda (PW3) and when she told court that she was treated by her mother she must have meant her uncle's wife, with whom she lived. Whether Bernard Ntanda (PW3) went to report the matter at night or not cannot be taken as a deliberate lie. It is possible that the witness went to the chairman's home at night and did not see him. Regarding the grudge, even if it were true that the appellant fought with Bernard Ntanda (PW3) the alleged grudge is far removed from the offence the appellant was charged with, as it does not concern PW3. Ground 5and 6 too fail.

In ground 8 Mr. Mutabingwa contended that the sentence of ten years imprisonment was manifestly excessive in the circumstances. The appellant was a first offender, was aged 24 years and had spent on remand a period of 4 years. He suggested that a period of four years imprisonment was sufficient. Counsel quoted no legal authorities to support his submissions. Mr. Wagona supported the sentence that it was not excessive.

Before passing sentence of ten years imprisonment the learned trial judge took into account the age of the appellant, the period he had spent on remand and the nature of the offence committed. This court will only interfere with the sentence passed by the trial court if it is evident that the trial court acted as a wrong principle or overlooked some material factor or the sentence is either illegal or is manifestly excessive or so low as to amount to a miscarriage of justice. See Section 137 of The Trial on Indictments Decree No. 26 of 1971. **Livingstone Kakooza v Uganda Supreme Court. Criminal Appeal** No. 17 of 1993 (unreported) in which **Ogalo s/o Owoura V R (1954) 21 EACA 270** was quoted with approval. The maximum sentence for the offence of defilement is death. We find that the sentence of 10 years imprisonment was neither illegal nor manifestly excessive. Ground 8 too must fail.

As we find no merits in this appeal it is accordingly dismissed.

Dated at Kampala this 5th day of June 2000.

S. T. Manyindo
Deputy Chief Justice

A. Twinomujuni

Justice of Appeal.

C.N.B Kitumba
Justice of Appeal.