THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT KAMPALA

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.
HON. MR. JUSTICE J.P. BERKO, JA. &
HON. MR. JUSTICE S.G. ENGWAU, JA.

10 **CRIMINAL APPEAL NO. 10 OF 1999.**

LWASA SSEMPIJJA..APPELLANT

VERSUS

UGANDA...RESPONDENT

(Appeal from a conviction and sentence of the High Court at Mukono (Rugadya Atwooki Ag. J.) dated 5.3.99 in Criminal Session Case No. 381 of 1996).

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<u>JUDGMENT OF THE COURT</u>:

The appellant, Lwasa Ssempijja, was tried and convicted by the High Court at Mukono of defilement, contrary to section 123(1) of the Penal Code Act. He was sentenced to 12 years' imprisonment on 5.3.99.

Briefly, the facts of the case are that on the night of 8.3.96 at around 9p.m., the complainant, Nakibuka Harriet (PW1) was having supper in her step-mother's house with her cousin sister, Nakakawa Rose, PW2. The door was closed but not locked. 30 There was a tadoba light (wick lamp) burning in the room. The appellant entered the house and sat on a bench. PW1 and PW2 were sitting down on a mat while having their dinner. The appellant asked for food but he was not given any. He then blew out the tadoba light from the table and grabbed both PW1 and PW2. In the process PW2 escaped and ran outside to call neighbours to rescue PW1. In the meantime the

appellant had already overpowered the complainant who was shouting that he was defiling her. Halima Nabukenya, PW3, a neighbour, answered the alarm. She found the appellant locked in the house together with the complainant. PW3 and her husband, Zirimanya, ordered the appellant to open the door which he did. Both PW2 and PW3 with the aid of moonlight saw the appellant zipping up his trousers as he walked away from the scene. The victim then confirmed to PW2 and PW3 that the appellant had defiled her.

The appellant was arrested the following day by Lawrence Kasule, PW4. The witness handed the appellant to the authorities and he was subsequently charged accordingly. At the trial in 1999, the victim said that she was 16 years old. When Dr. Kulabako Nyombi Richard, PW5, examined her on 11.3.96, only three days after the incident, he found her to be of the apparent age of 16 years old. By that time she was still bleeding from the vagina. Her hymen had been ruptured. She had also some bruises around the "introitus" that is around the lining of the vagina. The injuries were about three days old. According to the doctor there was reasonable penetration of the vagina.

In his unsworn statement, the appellant denied the allegations against him. He, however, conceded that on the night in question he was with PW1 and PW2. He had gone there to drink local waragi (enguli) as he frequently did. He said that after the complainant had served him with waragi, she asked him to sing for them, which he did. Thereafter, the complainant asked him to show them his penis, which he refused. The complainant again asked him to spend a night with them but he refused. In view of these developments, the appellant said that he got annoyed and assaulted the complainant for having teased him a lot. When PW3 and some boys in the neighbourhood responded to the alarm raised by PW1 and PW2, the appellant left the place. He was arrested the following day by PW4 on the allegation that he had defiled the complainant the previous night.

The learned trial Judge rejected the appellant's defence and convicted him on the strength of the prosecution case. He now appeals on three grounds, namely:-

“i. That the learned trial Judge erred in law and fact in holding that prosecution had proved beyond reasonable doubt that the appellant had participated in the alleged sexual intercourse with the victim.

ii. ***That the learned Judge erred in law and fact when he found that there was proof beyond reasonable doubt that the complainant was under the age of 18 years.***

iii. ***That the sentence of 12 years imprisonment was manifestly harsh and excessive given the circumstances of the case and alleged commission of the offence.”***

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Mr. Charles Oboth Owor learned Counsel for the appellant, argued ground 2 of appeal first. It was his contention that no direct evidence was adduced regarding the age of the complainant. He argued that on 11.3.96, only three days after the alleged offence, the complainant told the doctor, PW5, who examined her that she was 16 years old. The doctor relied on that information and found that she was 16 years old at the time. At the trial in 1999, three years after the medical examination, the complainant maintained that she was still 16 years old. It was the contention of the learned Counsel that the victim told a lie about her age because her age could not be static since he alleged commission of the offence in 1996 up to the time when the trial commenced in 1999. The evidence of the complainant in this regard, in his view, has contradicted that of the doctor on the same point.

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The learned Counsel submitted, therefore, that there is doubt about the age of the complainant which doubt should have been resolved in favour of the appellant by the learned trial Judge. He submitted that this issue should have been properly resolved if the parents of the victim testified about her age. Her uncle, PW4, was not sure about her age either; he simply said that the complainant was under eighteen years old without evidence to that effect. In the premises, learned Counsel submitted that it couldn’t be said with certainty, therefore, that the complainant was under the age of eighteen years when the offence was committed.

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Mr. Vincent Okwanga, Senior State Attorney submitted that there is overwhelming evidence on record to show that the complainant was under the age of eighteen years at the time when she was defiled. He argued that the complainant's evidence on this point was not challenged and even that of the doctor who examined her three days after the incident was admitted in evidence under section 64 of the Trial on Indictments Decree. The uncle of the victim, PW4, testified to the effect that his daughter who was older than the complainant when the offence was committed, was under eighteen years old at the time and his evidence in this regard was not controverted. The learned Counsel concluded on this point by submitting that even at
10 the trial, the learned trial Judge and assessors rightly observed and found that the victim was still under eighteen years old. According to Counsel, ground 2 of appeal on this point must therefore fail.

Upon an indictment for defilement, the age of the girl must be strictly proved. In the instant case the complainant put her age to be 16 years at the time she was defiled. Her evidence in this regard was not challenged. The doctor, PW5, who examined her three days after the incident, found as a fact that the girl was 16 years old at the time. The medical report was admitted in evidence under section 64 of the Trial on Indictments Decree. The uncle of the complainant, PW4, put her age below
20 18 years old. The trial Judge and the assessors found as a fact that the complainant was below the age of 18 years. They were entitled to make that finding of fact. The victim, in our view, was under 18 years old at the time she was defiled. Accordingly, ground 2 fails.

The complaint in the first ground relates to the identity of the person who had defiled the complainant. Mr. Oboth Owor submitted that according to the evidence on record it was not the appellant who defiled the girl. His reasons were that the complainant never told anybody about the incident at the earliest opportunity. According to PW2, she never even told the mother of what had happened to her.
30 PW4, her uncle, also said that the complainant never told him anything regarding the incident. He only learnt about the matter from other people. The learned counsel submitted therefore that the implication of the appellant later was an afterthought because the complainant did not want to implicate the boys who answered the alarm who could have possibly done the act. He argued that the conduct of the complainant

in this regard cast a doubt concerning the identity of the person who might have defiled her. This doubt, in his view, should have been resolved in favour of the appellant.

On the other hand Mr. Okwanga submitted that there is overwhelming evidence to show that it was the appellant and no one else who defiled the complainant. He said that the evidence of the victim is that when she was in the house eating supper with her sister, PW2, the appellant asked for food, but when he was refused food, he blew the tadoba light, grabbed and defiled her. Mr. Okwanga submitted that the complainant was not challenged on this piece of evidence. He said that instead her evidence was corroborated by that of the doctor who examined her three days after the incident. The doctor found her vaginal walls bruised, hymen ruptured and she was bleeding as a result. The learned Counsel submitted further that the appellant had put himself at the scene of crime because he admitted having assaulted the complainant allegedly for teasing him. Both PW2 and PW3 saw the appellant zip his trousers and this evidence, according to Counsel, corroborates that of PW1 that he had unlawful sexual intercourse with her. That is why he had locked himself and the complainant in the house.

The act that the complainant was actually defiled is not in dispute. The issue here concerns evidence of identification of whoever defiled the girl on the day in question. PW1, PW2, PW3 and PW4 knew the appellant before the incident. He used to fetch water for people in the village including the family of the victim. PW1 and PW2 saw the appellant enter the house with the help of a tadoba light. He took sometime talking to them before grabbing the girls. PW2 escaped in the process but the appellant remained locked in the house with the victim. He only opened the door on the orders of PW3 and her husband. Both PW2 and PW3 saw him zip his trousers while going away. There was moonlight, which aided PW2 and PW3 in recognising the appellant. We think that in these circumstances, conditions were favourable for correct identification. There was no mistaken identity of the appellant by PW1, PW2 and PW3. Like the trial Judge we find that it was the appellant who defiled the girl. Ground 1 of appeal also fails.

The third ground of appeal relates to sentence. The learned Counsel for appellant submitted that a sentence of 12 years' imprisonment, though not illegal, is manifestly harsh and excessive in the circumstances of the case. He conceded though that the trial Judge had considered all the mitigating factors but argued that he had imposed a harsh sentence. Counsel prayed that this court should exercise its discretion and reduce the sentence from 12 years to 7 years as this court did in Adam Mubiru v Uganda, Criminal Appeal No. MM 47 of 1996; Twinamasiko Eric v. Uganda, Crim. App. No. 2/97 and Sembusi Badru v. Uganda, Crim. App. No. 12/96.

10 The learned Counsel for the State submitted that the sentence of 12 years' imprisonment meted out by the trial Judge is lawful and not harsh or excessive as stated by the Counsel for appellant. He said that the learned Judge had considered all the mitigating factors before passing the sentence. The appellant who was working at the home of the complainant had abused the trust placed on him; namely, protecting his employer's children against danger.

We agree with both Counsel that the sentence of 12 years' imprisonment is legal bearing in mind that the maximum sentence for defilement is death. We think that the learned trial Judge rightly considered the mitigating factors before passing the 20 sentence. Each case must be considered on its own merit and upon the circumstances under which an offence was committed. The authorities cited by Counsel for the appellant are not helpful, in our view, to the appellant's case. Cases of defilement call for deterrent sentences. We see no merit in this ground of appeal.

In the result, the appeal is dismissed.

Dated at Kampala this.....5th ....day of ......June........2000.

30 **S.T. Manyindo**

Deputy Chief Justice.

J.P. Berko

Justice of Appeal.

S.G. Engwau

Justice of Appeal.