

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT KAMPALA**

**CORAM: HON. LADY JUSTICE L.E.M MUKASA-KJKONYOGO, DCJ.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA.**

CRIMINAL APPEAL NO. 134 OF 1999

NYANZI MAHULISIO =====APPELLANT

Versus

UGANDA =====RESPONDENT

(Appeal against conviction and sentence for the offence of defilement
by the High Court at Mubende (Bamwine Ag. J as he then was)
dated 19.11.99 in Criminal Session case No. 572 of 1999).

JUDGMENT OF THE COURT.

This appeal is against both the conviction and sentence for the offence of defilement, contrary to section **123 (1) of the Penal Code Act**. The particulars of the offence were that on 4.4.99 at Buswabwera village in Mubende district, the appellant defiled one Nayebale Joseline, PW2, a girl below the age of 18 years.

The brief facts of the case were that on 4.4.99 PW2 abandoned her father's cattle which strayed and ate people's crops. The cattle returned home on their own. The father beat her up and as a result she took sanctuary in the appellant's house. The appellant was a village mate whom she knew before. At night the appellant defiled her in a bush near his house.

As the girl was missing, the father, Livingstone Nsereko (PW3), reported the matter to the Local Defence Unit of the area and the Headmaster of Buswabwera Primary School, one Manzi Moses

(PW4). Manzi Moses, PW4, discovered from the register that the girl was not attending her class and learnt from a co-worker of the appellant that the girl was staying with the appellant as a wife. On 12.4.99 Manzi, PW4, inquired from the appellant the whereabouts of the girl and the appellant promised to produce her later but did not. On 16.4.99 at around 9 p.m. Manzi found the girl in the company of the appellant. He arrested the girl but the appellant ran away. He chased the appellant and subsequently arrested him from his home as he was preparing to flee.

Manzi, PW4, thereafter took the appellant and the girl to Busoba Police Post. No. 23768 P.C Mukundane Julius, PW5, who was on duty at the time, rearrested the appellant on the same day. On 19.4.99 at Mubende Hospital, Dr. Wabona George William, PW1, whose medical report was admitted in evidence under section 64 of the Trial on Indictments Decree, examined the victim and found that she was aged about 11 years. There were signs of penetration in that her hymen had recently ruptured and there were injuries on the hyperemic introitus (inflammation around the private parts). After investigations the appellant was charged with the offence.

In his defence, the appellant denied having committed the offence although he knew the girl before. He said that the girl stayed at the home of his employer where he had a hut in the same homestead. The learned trial judge rejected his defence and convicted him as charged.

Though there were 3 grounds of appeal, the 3rd ground was abandoned, leaving grounds 1 and 2 namely:

1. The learned trial Judge erred in law when he held that there was corroboration which was necessary in the evidence of PW4 and PW5 whereas not.

2. The evidence of PW4 and PW5 was contradictory in material particulars.

The two grounds were argued together. Mr. Joseph Zagyenda, learned Counsel for appellant, conceded that evidence of a child of tender age requires corroboration as a matter of practice but contended that the evidence of Manzi Moses, PW4, and that of P. C. Mukundane Julius, PW5, on which the learned trial judge relied upon to corroborate the girl's evidence in fact did not corroborate the girl's evidence. According to Zagyenda the incident happened on 4.4.99. The evidence of PW4 shows that he found the girl with the appellant on 16.4.99. He arrested the girl

and the appellant ran away. He followed the appellant whom he found preparing to flee from the area and arrested him on the same day. This is corroborated by PW5. But according to PW2 she ran away from home on 4.4.99 and she spent a night with the appellant who had sex with her. After the sex, she saw blood and went home and reported to her mother who treated her with warm water. The appellant was arrested the following day, which would put the day of arrest either on 5.4.99 or 6.4.9. It was the contention of Zagyenda that the girl's evidence that the appellant was arrested either on 5/4/99 or 6/4/99 was not corroborated by PW4 and PW5.

On his part, Mr. Vincent Okwanga, learned Senior State Attorney concurred with the appellant's Counsel that the girl in the instant case was sexually abused on 4.4.99. On the identity of the person who sexually abused her, the complainant pin-pointed the appellant as her defiler. Mr. Okwanga submitted, therefore, that the girl's evidence on this point was corroborated by the evidence of the Headmaster and L.D.U of the area, PW4. In his view, the arrest of the girl by PW4 in the company of the appellant corroborated the girl's evidence regarding the identity of the defiler.

We find no merit in the argument of Mr. Zagyenda. What required corroboration were the act of defilement and the identity of the assailant but not the date of arrest. The evidence of PW4 was that he found the victim in company of the appellant and arrested her while the appellant ran away. The conduct of the appellant in running away when PW4 found him with the victim and his attempt to flee from the area was not, in the circumstances of the case, consistent with that of an innocent person.

Mr. Okwanga further submitted rightly, in our view, that the girl testified that the appellant used to have sexual intercourse with her in diverse places in the bush near his home. According to the evidence of the girl, the appellant told her that if they had sex in the house they would be found and arrested. The girl showed PW5 diverse places where they had slept and had sex. P.C. Mukundane Julius, PW5, who visited the scene saw such places and that piece of evidence, in our view, also corroborated the evidence of the girl that it was the appellant who defiled her.

As regards contradictions in the evidence of PW4 and PW5, if any, Mr. Okwanga submitted that they were minor due to lapse of time and not a deliberate lie, to court. We agree.

In the result, this appeal is devoid of merit. It is accordingly dismissed.

Dated at Kampala this 18th day of December 2001.

L.E.M.MUKASA-KIKONYOGO

DEPUTY CHIEF JUSTICE

J.P. BERKO

JUSTICE OF APPEAL

S.G. ENGWAU

JUSTICE OF APPEAL