THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: **HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.**

HON. JUSTICE S.G. ENGWAU, JA

HON. JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO.139 OF 2001

TWEHANGANE ALFRED::::::::::::APPELLANT

VERSUS

UGANDA::::::::::::::::::::::::::::::::RESPONDENT

(An appeal from the conviction and sentence of the High Court of Uganda sitting at Kampala(*Zehurikize, Ag. J) *dated the 6/11/2001 in Criminal Session Case No.206 of 2000)

JUDGMENT OF THE COURT

This is an appeal against conviction and sentence. The appellant, Twehangane Alfred, was charged with **Defilement** contrary to **section123(1) of the Penal Code Act.** It was alleged in the particulars of the indictment that on an unknown date between the 1st April and 25th May 1999, at Mengo Kisenyi hill zone, in Kampala District, the appellant had unlawful carnal Knowledge of **LINDA KANSIIME** a girl under 18 years.

The facts, which led to the prosecution of the appellant, are that he was a resident of Mengo Kisenyi and a neighbour to the home of the complainant (P.W.1). On dates that were unknown the complainant together with her brother Ruhinda Junior were invited by the appellant to visit him. When they entered the house, the appellant sent Ruhinda to the balcony to play. He took the complainant to his bedroom and had sex with her. He gave her water to wash after which she called her brother and they went home. She did not report the matter to her parents. The appellant, apparently, threatened her with death. On

the second occasion, the appellant found the children playing outside. This time round they were with Rita Nangobi (P.W.6).He invited them to visit him, which they did. He again sent Ruhinda and P.W 6 to go and play at the balcony. He took the complainant to the bedroom and defiled her. He again gave her water to bathe. After this ordeal, she called her brother and P.W.6 and they went home. Again she did not tell her parents or her friends. On or about the 24/25th May, the father of the complainant, P.W 5 found her with the appellant and the latter was holding her hand.P.W 5 wondered how her children had become familiar with strangers. He took her daughter home and interrogated her. She revealed how she had visited the appellant on two occasions and how she was defiled. The matter was reported to Old Kampala Police Station. The appellant was arrested and later charged in court.

The complainant was taken for medical examination to Dr. Barungi (P.W 3) on the 27th May 1999. He examined her and made a report (exhibit P.1).

At his trial, the appellant denied the offence and claimed that the charge was a frame up through his estranged wife whom he caught red-handed committing adultery. He also stated that he used to leave his home in the morning at 7.30 and return in the evening at 7.30 or thereabouts. His defence was rejected by the trial Judge who found him guilty as charged and sentenced him to six years imprisonment- hence this appeal.

The memorandum of appeal contains the following six grounds namely that:-

1. **The learned trial Judge erred in fact and law when he failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong decision that the appellant had defiled Kansiime Linda.**
2. **The learned trial Judge erred in fact and law when he failed to properly evaluate the contradictions in the statement P.W 1made to police and her evidence in court, and also the contradictions in the testimonies of all prosecution witnesses which were major and pointing to deliberate falsehood and hence came to a wrong decision.**

3. **The learned trial Judge erred when he failed to carry out a *voire dire* properly and sufficiently and hence admitted the sworn evidence of P.W 1 and P.W. 6, which was totally wrong and hence came to a wrong decision.**
4. **The trial Judge erred when he failed to properly sum up the law and evidence to the assessors which occasioned a miscarriage of justice.**
5. **The learned trial Judge erred when he rejected the appellant's sworn evidence which clearly pointed out that the offence was planted against him as pointed out especially by the contradictions in the testimonies of prosecution witnesses.**
6. **The trial Judge erred when he sentenced the appellant to 6 years, which was excessive in the circumstances of the case.**

It was the appellant's prayer that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set free. In the alternative, but without prejudice, a lesser sentence be substituted.

Mr Maxim Mutabingwa, who appeared for the appellant submitted on all the grounds. He argued grounds 2 and 5 together and grounds 1,3,4 and 6 separately. In submitting on the second and fifth grounds counsel complained that the testimony of P.W.1 contradicts her police statement (exhibit D.1) and also contradicts the testimony of the other witnesses. Counsel pointed out that in her police statement the witness does not state any date or dates when she went to the home of the appellant. She told the police that she did not know any dates. In her evidence in court, she testified that she went to the appellant's home on the 2/5/99 and went back two weeks later on the 21/5/99. Under cross-examination, she stated that it was her mother (P.W.2) who reminded her of the dates. Counsel wondered how P.W.2 could remind her daughter about the dates when she did not know when her daughter was defiled.

The second contradiction that counsel pointed out was that P.W.1 stated in her statement to police that when she was first called by the appellant she was coming from school, and yet in her evidence in court, she stated that it was in the month of May, in the evening and she had come from school and she had already changed her clothes.

The third contradiction that counsel complained about was that P.W.1 testified that when the appellant first called her, she was with her brother playing within the fence of her father's house and she went with him alone. P.W.6 on the other hand testified that when the appellant first called them they were playing under a *muvule* tree. She, further, stated that they were not at the complainant's house. This witness also claimed that they went the three of them. The other contradiction was that P.W.1 testified that where they were playing there was a saloon, but P.W.2 and P.W.5 stated that there was no saloon at the material time. The saloon was put there one year later after the appellant was in prison.

The other material contradiction pointed out by counsel was that P.W.5 testified that in the evening of 24/25th May, he found his daughter standing on the verandah of the appellant's house and the appellant was holding her daughter's hand. P.W.1 on the other hand testified that she and her brother found their father talking with the appellant. It was counsel's contention that the contradictions are many and major. He complained that the trial Judge was wrong to ignore them and yet according to him they point to deliberate untruthfulness.

On the part of the prosecution, the learned Principal State Attorney supported the trial Judge for ignoring the contradictions because they were minor, as they did not go to the root of the case.

The duty of the first appellate court is now settled. It is to reconsider and evaluate the evidence and come to its own conclusions. In so doing, it should subject the evidence to fresh and exhaustive scrutiny: see **Pandya vR [1957] EA 335**;**Selle Associated Motors Boat Co [1968] EA123**; **Bogere &Another vs Uganda Criminal Appeal No.1/97**(S.C) and **Kifamunte Henry vs Uganda Crimina Appeal No.10/97** (S.C.) both unreported. In **Selle's** case, Sir Clement de Lestang V.P.(as he then was) lucidly stated the principles upon which a first appellate court should act at page 126 as follows:

"Briefly put, they are that this court must reconsider the evidence evaluate it itself and draw its own conclusion though it should bear in mind that it has neither seen or heard the witness and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally **(Abdul Hammed Saif v Ali Mohammed Sholan (1955) 22EACA 270.**" We shall bear the above principles in mind when considering the facts of this appeal.

With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. Therefore the court should consider the broad aspect of the case when weighing evidence. Contradictions in the testimony of witnesses on material points should not be overlooked as they seriously affect the value of their evidence.

Using the above principles as a guide, we shall consider the evidence as a whole bearing in mind that the trial Judge was in a better position than ourselves to judge the demeanour of witnesses who appeared before him.

The only witness who implicated the appellant was P.W 1.She was a child of tender age. She was aged 11 years at the time of the trial in 2001.This means that she was about 9 years when she was allegedly defiled. Her testimony was therefore crucial if a conviction was to be based on it. The contradictions that were highlighted by counsel for the appellant have caused us considerable concern. In her evidence in court, she stated that she was defiled twice on dates she could not remember very well.P.W.7 who was a police officer in charge of investigating the case, testified that P.W.1 told her that she was defiled three times and she could not remember the dates. Again in her evidence, she stated that

the first time she visited the appellant's home, she was with her brother Ruhinda Junior but P.W.6 testified that she too was with them. This witness also testified that the appellant threatened her with death if she told anyone about what had happened but she claimed that she agreed to visit the appellant a second time because he promised to give her 1,000 shillings.

Against this evidence, the appellant maintained that he was framed. He testified that he used to leave his house in the morning at 7.30 and return in the evening at 7.30.He also complained that when he was arrested, the police did not tell him the date or dates when he was alleged to have committed the offence.

In dealing with the testimony of P.W.1 the trial Judge was of the view that she was a truthful witness. He said:

"P.W.1, when she gave her evidence was around 11 years old. She gave her evidence in a straight forward manner. Despite the lenghty and rigorous cross-examination she maintained the coherence of her story. She impressed me as truthful witness. That of P.W.6 corroborated her testimony a girl of 8 years. She was also quite straightforward in her evidence. She impressed me as an innocent young girl who was telling court what she knew. She said she went to the accused's home twice as opposed to P.W.1 who mentions her only when she went there on the second occasion. Counsel for the accused argued that that this was a material discrepancy, which should not be ignored. I do not find this discrepancy as material. It was minor and was not intended to mislead court. It should be noted that these were children who often played together as they neighbours and friends. They were giving evidence two years after the incident. What was important is that they went to the accused's home. Some would go up to play at the balcony as P.W.1 went into the accused's house. It is not material as to how many times each of them might have gone there. In fact if they had been so exact on dates and time they visited the accused one would have suspect some kind of coaching each of the two children witnesses told court what she could remember."

With respect, while we agree that a trial Judge is in a better position to determine whether a witness is telling the truth, such decision is arrived at after evaluating the evidence as a whole. The trial Judge did not consider the defence of the appellant especially his claim that he used to leave his house early in the morning and return late in the evening. There was also no evaluation of the evidence of P.W.1and the evidence of the other witnesses and the contradictions that were highlighted before us. It was his duty to do so in order to arrive at the truth.

It is obvious to us that the appellant raised the defence of alibi. The defence seems to have been ignored by the trial Judge when he was considering and evaluating the evidence of P.W.1.and P.W.6.The date and the time when the appellant was alleged to have committed the offence ought to have been proved by the prosecution. In the **Bogere** case (supra) the Supreme Court gave guidelines as to what the prosecution has to prove in cases where an accused person raises the defence of alibi. The Court said:

"***What amounts to putting an accused to putting an accused person at the scene of crime? We think the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduce (sic) evidence showing that the accused was at the scene of crime, and the accused not only denies it, but also adduces evidence showing that the accused was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per see the other version is unsustainable."***

In the instant appeal, the trial Judge did not consider the defence of the appellant. He accepted that P.W.1.and 6 were truthful witnesses. These were children of tender age whose evidence needed corroboration as a matter of practice.P.W.1 was a complainant in a sexual offence whose evidence also needed corroboration to confirm in material

particular not only that the offence was committed but that the appellant committed it. We think it was a misdirection on the part of the trial Judge to find as he did that P.W.6's evidence corroborated that of P.W.1.Testimony that requires corroboration cannot in our view provide corroboration.Furthemore, the testimony of P.W.1,2, and that of the appellant indicate to us that the area where the offence is alleged to have been committed, people live close to each other mostly in one-roomed houses popularly known as *mizigo.*P.W.6 in her testimony stated that when the appellant called them a second time, there was an adult person called Patu. She was not called as a witness.The absence of her evidence or the evidence of any other person who might have seen the children either going with the appellant to his house or coming out of his house leaves the prosecution evidence weak.Such people would have provided the necessary corroboration.

We find some merit in the submission of counsel for the appellant that the contradictions in the evidence adduced by the prosecution cannot be explained. They affected the value of the testimony given by the witnesses.
In our view the contradictions point to deliberate untruthfulness. Grounds two and five will succeed.

Ground one complained that the learned trial Judge did not properly evaluate the evidence and came to the wrong conclusion that the appellant had defiled the complainant. In submitting on this ground counsel for the appellant stated that there was no sufficient evidence to prove that sexual intercourse had taken place. Referring to the testimony of P.W.3, counsel pointed out that it does not tell us what caused the tear. He cited to us a decision of the Supreme Court in the case of **Akol vs Uganda Criminal Appeal No.23/92**(unreported) in which it was held that medical evidence could not afford corroboration if it is inconclusive with regard to whether penetration was by a male organ or a finger. It was his submission that corroborative evidence was needed in this case. He pointed out quite rightly in our view that the complainant did not tell anyone. He contended that if she had been threatened as she claimed, she would not have gone back a second time.

While responding to the above submissions, counsel for the respondent contended that there was overwhelming evidence that sexual intercourse occurred. He relied on the testimony of P.W.1 and P.W 6. The latter witness stated that P.W.1 came out of the appellant's room with red eyes.

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be raptured. The authorities such as **Kibale Ishuma vsUganda Criminal Appeal No 21/98**(S.C.) and **Mugoya vs Uganda Criminal Appeal No.8/99** (S.C.) both unreported the Supreme Court held that in sexual offences, corroboration of the complainant's evidence implicating the accused person is a requirement for a conviction of the accused. In **Mugoya's** case the Court defined corroboration evidence as being evidence which affects the accused by connecting him with the crime, confirming in some material particulars not only the evidence that the crime was committed but that the accused committed it.

In the matter now before us, we have already stated that the complainant was the only witness to the alleged offence. As a matter of practice, her evidence has to be corroborated. We have already pointed out that the learned trial Judge found corroboration of her evidence, in the testimony of P.W.6. He also found corroboration in the testimony of her parents to whom, to use the words of the Judge "she confessed her sexual relations with the accused".

The issue is whether he was wrong to do so. In order to resolve the issue, we shall look at the evidence of the doctor. He had been summoned to give his expert opinion as to whether a sexual act took place or not. He examined the complainant and found that the hymen had a small tear. The tear was consistent with previous penetration. The witness was not asked either during examination in chief or cross-examination whether the penetration was by a male sex organ. It not always necessary to prove sexual intercourse by medical evidence. The testimony of the complainant together with some corroborative evidence would suffice. In our view the testimony of the doctor should have ruled out penetration by any other object other than a male sex organ.The number of times that the complainant is alleged to have been defiled was more that once. On all those occasions

the complainant who was a small girl is alleged to have felt little or no pain at all.In the circumstances it is our view that medical evidence would have indicated more than just a small tear. We have found that the testimony of the complainant contradicted the testimony of other witnesses. The evidence, which was relied upon by the trial Judge as providing corroborative evidence, was in our view insufficient. The revelation of the complainant to her parents did not amount to corroboration.She was interrogated by her parents or at least one of them. The testimony of P.W.6 needed corroboration and such could not corroborate the testimony of P.W.1.We agree with the submission of counsel for the appellant that the learned trial Judge was wrong to find that the prosecution proved beyond reasonable doubt that the complainant was defiled. This ground will also succeed.

The third ground of appeal complained that the trial Judge failed to carry out a *voice dire* properly. Counsel pointed out that the *voire dire* left a lot to be desired. He relied on the case of **Akol** (supra) where the procedure to be followed was laid down. He concluded his submission by stating that P.W.1 and 6 should have given unsworn evidence, which would have required corroboration under **section 38(3)** of the **Trial on Indictments Decree.**

Counsel for the prosecution supported the trial Judge.He maintained that the manner of how the trial Judge conducted the *voire dire* cannot be faulted.

The manner and circumstances under which the provisions of the above section is to be applied as laid down in **Akol's** case is that the trial Judge has a duty before receiving the evidence of a child of tender age to discover whether such a child understands the nature of an oath. If the trial court is satisfied that the child understands the nature of an oath, then the trial court must satisfy itself that the child is of sufficient intelligence to justify the receiving of his or her evidence and that he understands the duty of speaking the truth.In the case of **Kibangenyi Arap Kolil vs R [1959] EA92** laid down some guide lines as regards the nature of investigations. At page 95 the court said:

"***The investigation should precede the swearing and the evidence and should be directed to the particular question whether the child understands the nature of an oath rather than the question of his general intelligence."***

It is apparent from the decided cases that not every child called as a witness has to undergo this type of questioning.The section talks about "any child of tender years" and this expression is not statutorily defined.But in the case we have referred to above, it was held that the expression refers to any child of any age or apparent age of under fourteen years.

In the matter now before us, the record of the proceedings in respect of P.W.1and P.W.6 indicate that the learned trial Judge was alive to the fact that both witnesses were children of tender age. He conducted a *voire dire* and he satisfied himself that they both understood the nature of an oath. Since the law does not lay down any format as to how the questioning ought to be conducted, we agree with the submission of learned counsel for the prosecution that manner of conducting the *voire dire* cannot be faulted.This ground will fail.

The fourth ground of appeal complained that the learned trial Judge failed to sum up the evidence to the assessors and in particular the contradictions and the inconsistencies therein.In submitting on this ground, counsel for the appellant pointed out that the summing –up notes were too sketchy and did not elaborate the defence evidence to the assessors.He further pointed out that the assessors were not properly guided and they deferred in their opinion and yet the trial Judge did not give any reasons as to why he did not agree with one of them.

Counsel for the prosecution supported the manner the trial Judge summed up the case to the assessors and found no fault with it. We have looked at the record of the proceedings and the summing –up notes to the assessors.While we agree that the trial Judge did not highlight the contradictions in the prosecution's evidence as he ought to have done, we do not consider that failure to do so, caused a miscarriage of justice.The trial Judge was not bound to accept the opinion of the assessors. This ground of appeal will also fail.

The last ground concerned sentence.The complaint is that it is harsh and excessive in the circumstances of the case.Counsel for the appellant submitted that the victim was not affected by the alleged defilement. He pointed out that she never reported the matter to anyone, she was not depressed and she continued attending school normally.He suggested a sentence of two years.The prosecution supported the sentence imposed by the trial Judge.

The law is now settled that when court is determining the sentence to be imposed, it is exercising its discretion. Normally an appellatte court will not interfere with such discretion unless it is satisfied that the trial court acted on wrong principles or that the sentence is illegal, low, or manifestly excessive as to amount to a miscarriage of justice.

In the instant appeal, the trial Judge gave reasons for the sentence he imposed. We see nothing inherently wrong with them. We would not have interfered with it.This ground of appeal would have failed.

For the reasons we have endeavoured to give, the conviction of the appellant for the offence of defilement cannot be allowed to stand.The prosecution did not prove beyond reasonable doubt the indictment it preferred against him. The conviction would be quashed and the sentence is hereby set aside. We order for his immediate release from custody unless there are other lawful charges against him.

Dated at Kampala this 18th day of February 2003.

L.E.M.Mukasa-Kikonyogo

DEPUTY CHIEF JUSTICE

S.G.Engwau

JUSTICE OF APPEAL

C.K.Byamugisha

JUSTICE OF APPEAL