THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA

CRIMINAL APPEAL NO.88/2002

KALYEGIRA BENARD::APPELLANT.

VERSUS

UGANDA::RESPONDENT.

(Arising from Criminal Session Case No. 73 of 2001 the Judgement of Eldad Mwangusha, Judge at Fort-portal High Court).

CORAM:

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE C.N.B. KITUMBA, JA.
HON. JUSTICE S.B.K. KAVUMA, JA

JUDGEMENT OF THE COURT.

This appeal is against conviction and sentence.

The appellant, Bernard Kalyegira, was indicted and convicted by the High Court at Fort-portal for the offence of defilement contrary to section 123 of the Penal Code Act (Chapter 120). He was sentenced to 12 years imprisonment. Hence this appeal.

The background facts were that on or about the 27th May 2000, at Futi, Butangwa village, Karambi sub-county, Kabarole District, when the victim, then aged 7 years, was returning home from

school, the appellant who was following behind caught up with her. He grabbed her and dragged her to a nearby banana plantation where, he threw her down, pulled off her underwear and had sexual intercourse with her. She felt a lot of pain.

As the appellant lay on top of the victim, he was seen and recognized by two other school children, Mutegeki Joseph Pw3 and Baseimana Betrice Pw4, who were going down the same path.

When the victim returned home she feared to inform her mother, Harriet Night, Pw1, of what had happened to her. However on 29th May, Pw1 noticed that the victim was walking awkwardly. On examining the victim's private parts, Pw1, detected a pus discharge. The victim then related to her mother what the appellant had done to her. Pw1 reported the matter to the Local Council authorities, whereupon the appellant was arrested and handed over to Karambi Police Post. The medical examination confirmed that the victim had been defiled.

At the trial, the appellant gave an unsworn statement setting up an alibi, which the learned Judge rejected and convicted him as charged.

The Memorandum of appeal comprises seven ground, namely;-

“1. The learned Judge erred in law and fact when he failed to correctly evaluate the appellant’s evidence.

2. **That the learned trial Judge erred in law and fact in relying on prosecution evidence which was full of contradictions and discrepancies and went ahead to convict the appellant.**

3. **That the learned trial Judge misdirected himself in fact and law when he relied on circumstantial evidence to reach his decision to convict the appellant.**

4. **The learned trial Judge erred in fact and law when he convicted the appellant using uncorroborated evidence of prosecution witnesses.**

5. **The learned trial Judge erred in law and fact when he held the appellant guilty of defilement.**

6. **The learned trial Judge misdirected himself when he relied on the weakness of the defence case as the basis of his decision to convict the appellant.**

7. **The trial Judge erred in law when he allowed the trial to proceed without the assessors being sworn in.”**

Mr. Robert Tumwine, learned counsel, for the appellant decided to argue grounds 3, 4 and 5 together, abandoning the rest.

Arguing grounds 3,4 and 5, Mr. Tumwine pointed out that the learned Judge relied on circumstantial evidence, which was not corroborated and found the appellant guilty. In his view when the victim testified that the appellant was found on top of her, this was circumstantial evidence, which was not corroborated by medical evidence to show penetration. He asserted that the medical evidence adduced was lacking, in that respect. It merely showed that her private parts were tender but that there was no penetration. He submitted that the vulva inflammation caused by rubbing as indicated by the medical report was circumstantial evidence of bodily contact and the Judge should have interpreted it in favour of the appellant and convicted the appellant of indecent assault.

Mr. Tumwine further pointed out that the learned Judge considered the fact that since the appellant was a porter in the banana plantation where the victim said she was defiled, it was possible that it was the appellant who had defiled her. He contended that the learned Judge ought to have given the benefit of this doubt to the appellant.

In reply Ms Jane Okuo learned Senior State Attorney prayed court to dismiss the appeal for lack of merit. She submitted that circumstantial evidence, which is capable of standing by itself, does not have to be corroborated. Be that as it may, the learned trial Judge relied on direct evidence by eyewitnesses. The victim's evidence was therefore ably corroborated by other evidence. She pointed out that there was evidence of penetration, however slight it was and coupled with the pus discharge, it was enough to show there had been penetration.

The learned trial Judge held:-

> ***"On the issue of whether or not there was unlawful sexual intercourse, the defence contention is that according to medical evidence produced by the prosecution, there was only vulval rubbing or intercourse without penetration. According to this Clinical Officer, the hymen was not ruptured. Penetration in sexual offences, is being described in Archibold Criminal Pleading, Evidence Act Practice, 36th Edition paragraph 2879 as follows:-***
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> '**To constitute the offence of Rape there must be penetration. But any, even the slightest, penetration will be sufficient. Where a penetration was proved, but not of such**

depth as to injure the hymen, still it was held to be sufficient to constitute the case of Rape. Proof of the rupture of the hymen is unnecessary ……..'

The above principle are equally applicable to cases of defilement.

In the instant case the victim stated that the accused slept on top of her and defiled her. Two other kids found him on top of her. According to Mr. Mugarura apart from the inflammation of the vulva caused by vulval rubbing or intercourse the one between the vagina and the anus was tender and this was caused by something that was forced into the vagina, so to us there was penetration. But considering the age of the girl, full penetration as would result with rupture of the hymen was not possible. A similar situation arose in the case (sic) of **Dan Mubiru v Uganda (Criminal Appeal No.4 of 1996) (unreported),** where the Court of Appeal, of Uganda stated as follows;-

"We do not accept the argument that because the penetration was not complete there was no penetration to constitute carnal knowledge for it is trite law that the slightest penetration is sufficient".

I respectfully agree. The injuries found by Mr. Mugarura indicate that there was penetration (however slight) that was sufficient to constitute sexual intercourse".

We cannot fault the learned Judge's application of the law to the facts before him.

Apparently Mr. Tumwine did not challenge the issue of the appellant's identity, only the offence of defilement, which he considered, ought to have been substituted with that of indecent assault. There was no question of circumstantial evidence as argued by counsel. All evidence relied on by the learned Judge was direct. The appellant was seen lying on top of the victim by two school children Pw2 and Pw4. This was in a banana plantation in which the appellant worked and not far from the path Pw3 and Pw4 were taking from school. The Medical report EXP1 as indicated above, sufficintetly corroborated the victim's story that she had indeed been defiled and not only indecently assaulted.

Grounds 3,4 and 5 thus fail.

With leave of Court, learned counsel introduced an appeal against sentence. He argued that the 12 years prison term did not depict leniency on the part of the court though the Judge had conceded that the appellant was a first offender and had spent 24 months on remand during which period he had contracted TB and other ailments. Learned counsel prayed court to set aside the conviction and sentence of 12 years and substitute the conviction with one for indecent assault and a sentence, which would result in the appellant's immediate release. He did not cite any cases.

Learned State Attorney opposed any interference with the judge's discretion.

It is trite that sentence is a matter of the discretion of the Judge. An appellate court can only interfere with a Judge's exercise of his discretion on the following grounds where;-

(a) ***It is evident that the trial judge acted on a wrong principle, or,***

(b) ***The trial Judge overlooked some material factors, or,***

(c) ***The sentence is manifestly excessive in circumstances of the case or inordinately too low so as to amount to a miscarriage of justice.***

James s/o Yovan v R (1951) 18 EACA 147, The Learned Judge was informed that the appellant was a first offender, had been on remand for two years. He was suffering from TB and other related ailments.

He took all above into account when passing the 12 years prison term.

Considering the age difference between the appellant aged 39 and his poor health; his victim aged 7 years and the high probability of her contracting AIDs, we cannot interfere with the Judge's discretion. The 12 years prison term is well deserved. It is regrettable that there was no cross-appeal on sentence.

The appeal thus fails in toto and is dismissed forthwith.

Dated at Kampala this 30th day of May 2005.

A.E.N. Mpagi-Bahigeine.
JUSTICE OF APPEAL.

C.N.B. Kitumba.
JUSTICE OF APPEAL.

S.B.K. Kavuma.
JUSTICE OF APPEAL.