THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 78/2002

MUGISHA ROBERT :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision in Criminal Session Case No. 176 of 2000 in the High Court of Uganda at Fort Portal before the Hon. Justice E. Mwangusya dated 29th May 2002)

CORAM:

HON JUSTICE G.M. OKELLO, JA
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE S.G. ENGWAU, JA

JUDGEMENT OF THE COURT

This appeal is against conviction and sentence. The appellant, Mugisha Robert, was indicted for the offence of defilement contrary to Section 129(1) of the Penal Code Act. He was tried by the High Court at Fort Portal, convicted and sentenced to 8 years imprisonment.

The facts were as follows. The appellant lived with the family of his uncle, Peter and Jane Kaganda. Two other girls, Jane Kisembo, the victim (PW3) and Daphne Kaunde (PW4) also lived but in a separate room from that occupied by the appellant. During the month of August 1999, the appellant used to sneak out to the girls' room, take out the victim (PW3) to his room where he would have sex with her. This he used to do on several occasions, though the victim could not remember how many times it was. However, each time they had sex the appellant would give her Shs. 200 – 500/=.

When all this was going on, Jane Kaganda, PW5 overheard the victim quarrelling with the other girls about money. PW5 asked the victim where she had got the money from which she was quarrelling about. When the victim kept mum, PW5 threatened to burn her lips if she did not disclose the source of that money. The victim then revealed that it was the money she was getting from the appellant which he was paying her each time they had sex.

PW5 was shocked and summoned the victim's mother for a family meeting. The appellant, however, kept

quiet during the meeting after which he quietly went to his room and tried to hang himself using a wire. He was rescued by Kaganda who on hearing some commotion in the room went and cut the wire. When the appellant fell down he was arrested and handed over to the Police.

At his trial the appellant denied the offence. He pleaded a grudge with PW5 which the learned Judge rejected.

This appeal is on two grounds, namely:

"1. That the learned trial Judge erred in law and fact when he failed to evaluate the evidence.

2. That the learned trial Judge erred in law and fact when he passed a harsh and excessive sentence against the appellant in the circumstances."

Concerning ground I, Ms V Murangira, learned counsel, argued that the learned judge failed to consider that the charge had been fabricated against the appellant because of bad blood in the family. This led to the summoning of the meeting, which was attended by Semelesi Kaborangira (DW2) and Jackson Mayanja (DW3) amongst others. Learned counsel argued that

had the learned Judge evaluated the evidence he should have found that PW5, who had a grudge against the appellant, was at the centre of fabricating this story against the appellant. PW5 did not want the appellant to stay in her home.

Ms Murangira further pointed out that it was never proved beyond reasonable doubt that the victim's hymen had been ruptured through sexual intercourse, as there were so many ways in which a hymen could be ruptured. In her view, the medical report was not conclusive as to the sexual act. She further singled out one Jack Kaiso who used to stay in the same room as the appellant but who was never called to testify as to what might have been taking place in their room. This was such a material witness, she submitted, that his absence created some doubt. This is why PW5 threatened to burn the victim if she declined to tell a lie and frame a case against the appellant.

Learned counsel prayed Court to allow this ground of appeal.

In the alternative, Ms Murangira submitted that should ground I fail, she prayed for a reduction of the sentence

to five (5) years, so that the appellant could be set free. She reasoned that the victim was 10 years old at the time while the appellant was 23 and a maternal uncle to the victim. She prayed court to allow the appeal.

Mr. Simon Semalemba, learned Principal State Attorney (P/SA), submitted that the evaluation of the evidence by the learned trial judge was properly done. He was alive to the grudge existing in the family. However, it was not PW5 who had initiated the meeting on her own volition as suggested by Ms Murangira. It was the issue of the money, given to the victim and the subsequent discovery that the appellant who was a close blood relative was having sex with the victim, which prompted her to summon the victim's mother. Learned P/SA asserted that the fact that the appellant kept quiet throughout the meeting, after which he tried to take his own life rendered his guilt apparent and evident. It is the shame he felt that made him decide to do away with himself.

Regarding the issue of the victim's hymen, medical evidence established beyond doubt that it had been ruptured only 5-6 days previously. He submitted that

there was no merit in the appeal and prayed Court to dismiss it.

*The learned Judge observed:**"The accused raised two issues why Jane Kaganda was against him. The first issue was that she had misappropriated his Shs. 20,000/= which his relatives had contributed towards his education. The second issue was that she was talking ill against him for having impregnated a girl on the village and she had vowed that if the girl had been her daughter she would have had the accused imprisoned. The issue of the money was resolved during the meeting and it was shared between them. There is no evidence that Jane Kaganda followed up the case of the village girl that the accused had made pregnant. It was also resolved in this same meeting that the accused would leave the Kaganda's home in three months and so it was a question of time that he would leave Jane Kaganda in peace. Lastly it was not Jane Kaganda who initiated this case against the accused. It was the loss of money that the accused had been giving to the victim that triggered off the entire investigation that culminated into the girl's revelation of what had been going on. So I reject the defence story that the case against the accused was fabricated. In*

any case there is no question that the sexual intercourse was fabricated because medical evidence confirmed it and there is no question that the accused was the culprit because of the frequency of the act and the money that used to go with it."

It is apparent from the foregoing that the learned trial judge exhaustively scrutinised and evaluated all the evidence before him. We are in complete agreement with his findings, and cannot fault him in any way.

Ground I is thus disallowed.

Submitting on ground 2, Mr. Semalemba asserted that the sentence was not excessive, considering the circumstances of the offence. The appellant was a brother to the father of the victim. Thus sexual relationship was a deplorable breach of trust on part of the appellant. In counsel's view, the sentence of 8 years was not harsh especially as the learned judge had considered the remand period. The sentence was in fact lenient because the offence carries a maximum sentence of death.

This Court can only interfere with the trial Judge's discretion in passing a sentence when the sentence is shown to be illegal, harsh or excessive or if it is inordinately too low under the circumstances of the case.

We agree with the learned judge that the appellant abused the hospitality of the Kagandas who had looked after him for over ten years. Worse still he introduced the little girl into early sexual escapades when he was her uncle.

It is our opinion that the sentence of 8 years is not excessive in the circumstances of the case. This ground of appeal also fails.

Consequently we find that the appeal is devoid of any merit. It is accordingly dismissed forthwith.

Dated at Kampala this 22nd day of July 2007.

HON JUSTICE G.M. OKELLO

JUSTICE OF APPEAL

HON JUSTICE A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

HON JUSTICE S.G. ENGWAU
JUSTICE OF APPEAL