

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

5 **CORAM: HON. JUSTICE C.N.B KITUMBA, JA.**
HON. JUSTICE C.K. BYAMUGISHA, JA.
HON. JUSTICE S.B. KAVUMA, JA.

CRIMINAL APPEAL No.287 OF 2002

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CHANCE DAVID **APPELLANT**

VERSUS

15 **UGANDA** **RESPONDENT**

[Appeal from the conviction and sentence by the High Court of Uganda sitting at Fort-portal (Mwangusya J) in Criminal Session Case No. 3 of 2002 dated 18/6/2002]

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JUDGEMENT OF THE COURT

This is an appeal from the conviction for defilement contrary to section 129 (1) of the Penal Code Act.

The prosecution case as accepted by the learned trial judge is as follows: The complainant, Pw3, was a young girl aged four years. She had gone for a visit at the home of her uncle one
25 Kaizire William who was a resident of Kajungira village, Kyarusizi sub-county, Kyenjojo District. The appellant was a porter of her uncle, and lived in the same home.

On 2nd October, 1999, the victim was left at home with a baby by Tusiima Margaret Atwooki, Dw3, the wife of the uncle. When she was in bed trying to make the baby sleep, the appellant came, removed her knickers and defiled her. The complainant told the appellant to leave her
30 alone but he refused. When Dw3 returned from the well, the appellant stopped defiling the complainant and left. The complainant told Dw3 that the appellant had defiled her but Dw3 ignored her report.

On 3/10/1999, Mbabazi Beatrice, Pw2, who is the complainant's mother went to see her daughter at the home of the uncle where she had gone for a visit. Pw2 found her daughter sick. She told the uncle to take her to her father Mugabe John, Pw1 at Rwenzori Highlands Tea Estate, where he was working. Later on, Pw2 was called to the clinic to find out what was wrong with her daughter. When she was bathing her, she complained of pain in her private parts. When the mother asked her what was wrong she told her that the appellant had removed her knickers and defiled her. Pw1 took her to Fort-portal Hospital where she was examined by a clinical officer Rwabeera Stephen, Pw5. The examination revealed that her hymen had been ruptured and there were bruises and inflammation of the external parts of the vagina, which confirmed that she had been defiled. The appellant was arrested and charged with defilement.

In his defence, the appellant totally denied the offence. He stated that he was being framed by Mugabe John, Pw1, the father of the complainant. He stated that Pw1 was his co-worker at the home of Mwesigye Patrick, D3. Pw1 stole their employer's wheel barrow and the appellant reported him.

In consequence of that, Pw1 vowed to put the appellant in trouble. He called three other witnesses in his defence.

The learned trial judge rejected his defence, believed the prosecution case, convicted the appellant as indicted and sentenced him to 12 years imprisonment.

The appellant being dissatisfied with the decision of the learned trial judge has filed his appeal to this court on the following grounds; -

1. **That the learned trial judge erred in law and fact when he failed to evaluate the evidence on record and wrongly convicted the appellant.**
2. **That the learned trial judge erred in law and in fact when he passed an excessive sentence in the circumstances.**

He prayed court to allow the appeal, quash the conviction, acquit the appellant and set aside the sentence.

On ground 1, Mrs. Vennie Kasande Murangira, learned counsel for the appellant, complained that the learned trial judge did not properly evaluate the evidence. She submitted that there were grave inconsistencies and contradictions in the prosecution evidence but the learned judge did not at all consider them. She argued that Pw1 testified that when he was bathing the

complainant he saw pus oozing out of her private parts and she was swollen all over the body. She told him that the appellant had taken her to Atwoki's house removed her knickers and defiled her. When Atwooki returned, she interrupted the appellant who was defiling her and he run away. She argued that this testimony is very different from that of the complainant
5 Pw3 and her mother Pw2.

Mbabazi Beatrice, Pw2, testified that when she went to see her daughter, the complainant, she found her sick and was swollen on the face and on the legs. She told her uncle to take her to her father, Pw1 at Rwenzori Highlands Tea Estates, where he was working. She was summoned at the clinic to find out what was wrong with her daughter. When she was bathing
10 her she complained of pain in her private parts. She asked her what was the matter and her answered was that she had been defiled by the appellant while she was in bed trying to put the baby to sleep.

Counsel argued that Pw5 on medically examining the complainant he did not see any infection or pus oozing out of private parts. The complainant and Pw5 did not testify about
15 the swelling on the face or on the legs. The appellant's counsel criticized the learned judge for failing to consider the defence of a grudge which had been raised, by the appellant in his defence. Counsel contended that if the learned judge had properly evaluated the evidence, he would have acquitted the appellant.

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Ms Calorine Nabasa, learned Principal Sate Attorney, for the respondent opposed the appeal and supported the conviction and sentence. She submitted that the complainant knew very well her defiler. She submitted that the contradictions, which were pointed out by appellant's counsel were minor and did not go to the root of the case. She submitted that Pw1 and Pw2
25 saw the complainant on 3/10/1999 when the offence was committed on the previous day. Counsel explained that the complainant Pw3, did not talk about the swellings because she was too young.

Under **Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions**, we are empowered on appeal from the High Court in its original jurisdiction to reappraise the
30 evidence and draw inferences of fact. We have to take into account that we neither saw nor heard the witnesses testifying during the trial. See **Pandya vs R [1957] E.A. 33, Bogere Moses & Another vs Uganda Criminal Appeal No. 1 of 1997 SC.**

Counsel for the appellant has complained about evaluation of evidence especially the learned trial judge's failure to consider what, in counsel's view, were contradictions and inconsistencies. Regarding the place where the complainant was defiled, we do not take it to be a major contradiction. She was defiled inside Atwooki's house. It does not matter that she told Pw1 that the appellant took her to Atwooki's house and defiled her, whereas she told Pw2 that the appellant found her inside Atwooki's house. This witness was a very young child and the difference in narrating her ordeal to the two parents is not surprising. Similarly, whether it is Pw1 or Pw2 who bathed the complainant, it is no contradiction at all. The complainant is a small girl and could have been bathed both by her father and her mother at different times.

We appreciate the submission by the Principal State Attorney that the complainant being so young did not testify that she was swollen. Pw5 medically examined the complainant on 13/10/1999, whereas her parents had seen her on 3/10/1999.

Appellant's counsel's complaint that the judge did not consider the appellant's defence of a grudge between him and the complainant's father is not justified. The judge observed that, Mwesigye Patrick, Dw2, whose wheel barrow the complainant's father is alleged to have stolen, testified that Pw1 had never worked for him and the witness had never lost a wheel barrow. Additionally on our part, we find that Dw4, John Magezi, who was brought by the defence to prove the grudge between the appellant and Pw1, stated that he did not know any other dispute between the appellant and Pw1, apart from this defilement case. Tumusiime Margaret Atwooki, Dw3, testified that the complainant, while she was with their family, fell sick and her husband took her to Rwenzori Highlands Tea Estates where he used to work. She bathed the complainant on the day of the alleged defilement but she did not complain of anything. In cross examination she said; -

"I used to leave Sylvia with the baby whenever I went for my chores. I used to leave her with Chance. Sylvia never told me anything about Chance"

It is obvious to this court that the complainant was defiled when Dw3 had left her at home with the appellant. This was in her family setting and Dw3 was all out to hush up the offence. That is why she did not take any action when the complainant told her that she had been defiled by the appellant.

In his judgment, the learned trial judge found that the complainant reported to Dw3 that the appellant had defiled her but her report was ignored. She did not insist any further because of

her age. When her mother came, the victim was able to report the defilement to her. The judge believed the testimony of the complainant that it was the appellant who defiled her. We find no reason to fault him.

Ground 1 is devoid of merit and fails.

5 We consider ground 2 in which the appellant's counsel complained that the sentence of 12 years imprisonment was too harsh in the circumstances. The Principal State Attorney urged this court to uphold the sentence because the complainant was only four years at the time she was defied.

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We have considered the circumstances of the case. This is a case of aggravated defilement and the appellant was liable to a maximum sentence of death. He defiled the complainant who was only four years old. The trial court took into account all the mitigating circumstances before passing it. The sentence of twelve years imprisonment was is, in our
15 view, on the lower side and we find no justifiable reason to decrease it. Ground 2 is accordingly dismissed.

In the result, the whole appeal is dismissed.

Dated this 11th day of September 2009.

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C.N.B. KITUMBA

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JUSTICE OF APPEAL

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C.K. BYAMUGISHA

JUSTICE OF APPEAL

S.B.K. KAVUMA
JUSTICE OF APPEAL