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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT GULU.

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Coram Hon Justice L.E. Mukasa-Kikonyogo, DCJ

Hon Justice A. Twinomujuni, JA

Hon Justice A.S. Nshimye, JA

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CRIMINAL APPEAL NO. 163/2004

GERINGA FLAMINGO ::::::::::::::::::::::::::::::: APPELLANT

VS

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

JUDGMENT OF THE COURT

This is an appeal against conviction and sentence of 18 years imprisonment. The
25 appellant was tried and convicted by the High Court sitting in Adjumani on 8/12/2003
of the charge of defilement c/s 123 of the Penal Code Act.

The following were the brief facts of the case.

On 20/8/2001 at around 5:00pm at Pavuraga village Adjumani District, the appellant
30 was seen by P.W.3, holding the victim a small girl of about 5 years and leading her to
his house. The house of the witness was next to that of the appellant.

In less than 10 minutes, the small girl was heard crying. P.W.3 went to find out, and
found the door and window of the appellant's house open and entered. When he asked
35 the appellant what was wrong, and he merely laughed at him. He noticed that water
had flashed on the floor. The head of the girl was wet. The appellant was wearing
only a trouser on which water had also been splashed. When the witness asked, the
girl told P.W.3 that the appellant wanted to dip her head into a basin of water and at

the same time held her by the throat. Secondly he wanted to hit her on the head with an axe.

5 The witness noticed a scratch on her face. The witness rescued her by taking her out and handed her to her grandfather. The appellant was arrested and taken to Adjumani police where a case of attempted defilement was reported, but the police recorded a case of assault. Later on after examination by a doctor after 7 days, he discovered that defilement had been committed on her a week earlier. The appellant was indicted for defilement, convicted and sentenced as aforesaid, hence this appeal.

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There were two grounds of appeal, however the learned counsel Mr. Donge Sylvester who appeared for the appellant on state brief abandoned the 2nd ground of appeal on sentence. His main attack of the learned judge's judgment was on his evaluation of the prosecution's evidence because the case was entirely based on circumstantial evidence. He submitted that since the victim did not testify the law required some other cogent evidence to be adduced before the trial court could convict. In his view the circumstances the learned judge gave that led to the conviction did not constitute such required cogent evidence which in the result watered down the circumstantial evidence. Counsel pointed out that the victim only complained of attempts by the appellant to deep her head in a basin of water and to hit her head with an axe and not defilement. The defilement which was discovered 7days later does not point to his client. Further counsel argued that the pants the doctor referred to in his report as having been torn to threads were strange. The prosecution did not explain who took them to the doctor and they were not exhibit.

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Therefore in his view, had the learned trial judge properly looked at all the evidence, he would have come to a different decision. He asked us to allow the appeal, quash the conviction and set aside the sentence.

30 In reply learned counsel Tumuhaise Rose a Principal State Attorney who appeared for the State opposed the appeal and supported the conviction of the learned trial judge. She submitted that out of the three ingredients that had to be proved, the first two namely, the age of the complainant and that she was defiled are not in dispute.

Only participation of the appellant was in dispute by the appellant. In her submission, the prosecution proved that the appellant took the victim to his house and crying was heard from there.

5 There was evidence that the appellant attempted to deep the victim's head in a basin of water and to hit her head with an axe. 7 days later the doctor found that she was actually defiled and the injuries were a week old which tally well with the day the appellant dragged the victim to his house. She prayed that the appeal be dismissed, conviction be sustained.

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After having heard both counsel and having read and re-evaluated the evidence on record, we find merit in the complaint by counsel of the appellant.

P.W.3 was the first person to respond to the victim's crying and is the one who
15 rescued her from the house of the appellant before handing her to her immediate relative. Apart from the complaint that the appellant attempted to drawn her head in a basin of water and that he attempted to hit her head with an axe, she did not complain to P.W.3 that the appellant had defiled or attempted to defile her. None of the prosecution's witnesses who testified said so either. The case was first registered as an
20 assault case which later was amended to defilement on the basis of the medical report which came 7 days later. We find that the doctor's report remained hanging and of no value in absence of some other cogent evidence to link the appellant to the defilement.

With all due respect we think the learned trial judge erred in finding that the
25 prosecution had proved its case against the appellant on this sketchy circumstantial evidence. It would therefore be unsafe to allow the conviction against the appellant to stand. It is quashed and the sentence of 18 years imprisonment is set aside

We order his immediate release unless he is held on some other lawful orders.
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Dated at Gulu this 2nd of June 2010.

L.E.M MUKASA KIKONYOGO

DEPUTY CHIEF JUSTICE

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**AMOS TWINOMUJUNI
JUSTICE OF APPEAL**

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**A.S. NSHIMYE
JUSTICE OF APPEAL**