THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 222 OF 2003

5 **BUKENYA JOSEPH ::: APPELLANT**

VERSUS

UGANDA :: RESPONDENT

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CORAM: HON JUSTICE L.E.M MUKASA-KIKONYOGO, DCJ
HON JUSTICE A.E.N MPAGI-BAHIGEINE, JA
HON JUSTICE C.K. BYAMUGISHA, JA

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JUDGEMENT OF THE COURT.
(Appeal arising from the decision in the High Court, (C. Okello, J) dated 21/11/03 in High Court Criminal Session Case No. 148/2001 at Mpigi).

20 The appeal is against conviction and sentence for defilement contrary to **Section 123(1)** of the Penal Code Act.

On 21-11-03 the appellant Bukenya Joseph was convicted as charged and sentenced to life imprisonment.

25 The facts were that on 22nd September 2000, at Luzira village, Mpigi District, the appellant aged about 65years had unlawful sexual intercourse with the victim (name withheld) then aged 6years. The appellant denied the offence setting up an alibi and frame up which the learned trial judge rejected. She found:

> *"Apart from alibi defence, other possible defences open to the possibility of a case having been fabricated against the accused. This defence is very remote considering the weight of evidence pointing to the accused as the offender. I believe the victim's evidence, corroborated by among others, Paul Sozi, a grand son of the accused who defiled Bena Nakabugo.*
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> *I also believe that the little girl who testified in this Court against the accused as Bena Nakabugo the victim of this offence. It is the same girl whom the accused met in the company of her mother on the 23-9-00 as the accused was on his way to surrender to Kabulasoke Police. The two assessors who assisted me with this trial had no reservations regarding the guilt of the accused. Like*

them, I have no doubt whatsoever that the accused is guilty of defilement contrary to Section 123(1) of the Penal Code Act and he is accordingly so convicted".

The appeal is on 4 grounds, namely that:

1. **The learned trial judge erred in fact and law when she failed to properly evaluate the evidence on record and came to a wrong decision.**
2. **The learned trial erred in fact and law when she accepted and relied upon the evidence of PW2 (Paul Sozi) without carrying out a voir dire.**
3. **The learned trial judge erred in fact and law when she held that there was sufficient evidence to corroborate the evidence of the victim and hence wrongly convicted the appellant of the offence.**
4. **The learned trial judge erred in fact and law when she sentenced the appellant to life imprisonment, which was harsh and excessive under the circumstances.**

The appellant prayed Court to quash the conviction and set aside the sentence. Alternatively to substitute a lesser sentence.

Mr. Maxim Mutabingwa learned counsel for the appellant argued grounds 1, 2 and 3 together on ground that they related to evaluation and insufficiency of the evidence. He submitted that the learned judge did not sufficiently evaluate the evidence otherwise he would have found that corroboration of the victim's evidence was lacking and therefore would not have convicted the appellant. He asserted that **Section 40(3)** of the Trial on Indictments Act was mandatory. The judge failed to comply with it. She erroneously relied on the evidence of Paul Sozi (PW2) a child of tender years as of 14 to corroborate the victim's unsworn evidence without first conducting a voir dire a requirement under **Section 40(3**) Trial on Indictment Act.
After finding the victim to be an impressive witness she found her evidence corroborated by that of Paul Sozi who had noticed and observed her 'walking like a duck' after having been defiled. The judge found this situation to have been confirmed by the medical evidence that her hymen had been freshly ruptured.

Learned counsel contended that there was no independent evidence implicating the appellant. The appellant's defence was an alibi that he was digging in the garden. The child fabricated the entire story moreover she was not from village and therefore he could not have defile her.

5 However, the victim just happened to be in his village at the time of the incident.

Mr. Mutabingwa submitted that there was no evidence to connect the appellant with the offence. Most importantly the appellant only voluntarily gave himself up to Police on learning he was being looked for. This is not conduct of a guilty person.

10 Furthermore the appellant was never medically examined. The victim was found to have contracted a venereal disease.

Exhibit P1.

Under the circumstances the learned trial judge failed to exhaustively re-appraise the

15 evidence before convicting the appellant on insufficient evidence.

For the Respondent, Mr. James Odumbi learned Senior Principal State Attorney supported both the conviction and sentence. Citing **John Baptist Kibuuka v Uganda, SCCA No. 15 of 1995,** he asserted that the witness Paul Sozi (PW2) who was aged 14

20 years at the trial was not a child of tender years so as to require a voir dire under **Section 40(3**) T.I.A. learned counsel submitted that the trial judge did not err. There was sufficient evidence before her on which to base a conviction.

25 **Court's findings on Issues 1, 2, and 3**

In **John Baptist Kibuuka v Uganda, SCCA No. 15 of 1995**, a child of tender years was defined as a child of age or apparent age of under fourteen years, in the absence of special circumstances. It is the witness's age at the trial that is material not when the offence took place. Thus the learned judge did not have to conduct a voir dire

30 before receiving and relying on Paul Sozi's evidence for corroboration of the victim's evidence for corroboration of the victim's evidence.

Furthermore the fact that corroboration of the victim's evidence came from Paul Sozi who was a grandson to the appellant carries considerable weight.

The victim was consistent in her information to both Paul Sozi (PW2) and Namutebi, the first people she had come across. She narrated her ordeal to them, how the appellant had lured him to the bush where he had ravished him and prevented him from raising an alarm. The assault took place during broad day light thus eliminating any possibility of mistaken identity.

She referred to the appellant as Jajja (grandpa). She could barely walk properly prompting Paulo Sozi (PW2) to describe her walking style "like that of a duck".

Namutebi her cousin had to ask PW2 to take the victim to her mother (PW3) who was at a landing site, some distance away. Namutebi did not go with her because she would have found it difficult to come back home because of the distance.

On examining the victim her mother (PW3) found blood in her private parts. Her undergarment was soiled with blood. This was confirmed by the medical evidence EX P1. She was taken to a clinic in Kabulasoke.

The law governing corroboration is well established. See **Chila v R (1967) 722; R v Baskerville (1916) 2 KB 658; Jackson Zite v Uganda SCCA No. 19 of 1995 (unreported)**. It is trite that where a child of tender years gives unsworn evidence, that evidence must be corroborated with independent material evidence before a conviction can be based on it. It was stated in R v Chila (supra) that the judge must warn itself of the dangers of conviction of an accused with uncorroborated testimony and may convict in the absence of corroborating evidence if he or she is satisfied that the evidence is truthful.

Section 40(3) of the Trial on Indictment Act states:

> *'Where in any proceedings any child of tender years does not in the opinion of the court understand the nature of an oath his evidence may be received though not on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth.*
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> *Provided that where the evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some material evidence in support thereof implicating him'.*

Section 155 of the Evidence Act defines what is sufficient to corroborate evidence and provides:

> *In order to corroborate the testimony of a witness, any former statement by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.*

Benaleta Nakabugo, the victim informed her mother and Paul Sozi in the actual day she had been defiled that the appellant had defiled her. Both Sozi and the victim's mother testified that the victim had informed them on 22nd September 2010 that the appellant had defiled her. This information supplied by the victim to the two witnesses on the day she was davisted was sufficient to corroborate her evidence.

Thus the conviction was proper. We thus disallow grounds 1, 2, and 3.

Ground No. 4 concerns sentence.

Mr. Mutabingwa argued that the life sentence was excessive in the circumstances of this case. The mitigating factors were not considered nor was the remand period considered. The judge did not mention it.

Learned counsel prayed for sentence to be quashed and in the alternative substitute a lesser sentence so that he can die peacefully at home.

The learned Senior Principal State Attorney supported the conviction and sentence as stated earlier. The Court can only interfere with the sentence if reasons given are untenable. The maximum sentence is death. There are aggravating circumstances in this case.

The disapropriate disparity between the ages of the appellant and that of the victim weigh heavily against any reduction of the sentence. Learned counsel prayed court to disallow this ground.

Court's finding on Issue No. 4.

It is trite that for an appeal against sentence to succeed, the sentence must be illegal or manifestly excessive or inadequate. **R v Mohamed Jamal (1948) 15 EACA 126, Jackson Zita V Uganda SCCA No. 19/1995 (unreported).**

The learned judge gave reasons why a stiff sentence was called for. That the appellant 5 who was aged 70 and married with three wives, could even think of having sex with a 6 year old kid was not only unthinkable but morally repulsive.

The maximum penalty is death.

We think the learned judge properly exercised his discretion.

The sentence of life imprisonment is a deserving deterrent. We consistently dismiss 10 the appeal.

Dated at Kampala this 23rd day of July 2010.

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15 **L.E.M MUKASA-KIKONYOGO**
DEPUTY CHIEF JUSTICE

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20 **A.E.N MPAGI-BAHIGEINE**
JUSTICE OF APPEAL

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25 **C.K. BYAMUGISHA**
JUSTICE OF APPEAL