THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA)

AT KAMPALA

CRIMINAL APPEAL NUMBER 168 OF 2009

5 **BYARUGABA LOZIO……………………… …………………APPELLANT**

VERSUS

UGANDA ……………………………………………………… RESPONDENT

10 **CORAM:**

HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA

15 *[An appeal against Judgment in Criminal Session Case No. 50 of 2005 At the High Court of Uganda sitting at Masaka Judgment delivered on 18th August 2009 by Hon. Lady Justice Jane Kiggundu, J)*

20 **JUDGMENT OF THE COURT**

This is an appeal against the Judgment of the High Court of Uganda at Masaka, by Hon lady Justice Jane Kiggundu J, dated 18th August 2009 in Masaka High Court Criminal Case No. 50 of 2005, in which 25 the appellant was convicted of the offence of defilement contrary to **Section 129(1)** of the Penal Code Act and sentenced to 14 years imprisonment.

This appeal is against both conviction and sentence. The appellant sets out the grounds of appeal, in his memorandum of appeal as follows;-

5 ***(1) The learned trial judge erred in law and fact when she failed to adequately evaluate prosecution evidence to adequate scrutiny, occasioning a miscarriage of justice.***

10 ***a. Wrongly convicted Appellant basing on defective indictment***

b. Wrongly convicted Appellant without evidence of named complainant Salifa Nabunya

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c. Wrongly convicted Appellant without evidence of a police investigating officer.

d. Wrongly found Appellant guilty of defilement

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e. Wrongly Sentenced Appellant to a harsh sentence of imprisonment for 14 years.

The appellant was represented by **Mr. Henry Seth Rukundo** on
25 State brief while the respondent was represented by **Ms. Rose Tumuhaise** Principal State Attorney with the Directorate of Public Prosecutions. The appellant was present in Court.

It was contended by Mr. Rukundo that the learned trial Judge erred in law and in fact when she convicted the appellant on a
30 defective indictment. That the indictment was defective in so far

as it did not set out the particulars of the offence for which he was indicated.

In reply to this ground learned counsel for the respondent submitted that the particulars of the offence were set out in the indictment. She conceded that instead of the indictment indicating that the appellant had defiled the victim a girl under the age of 18 years, it stated that the appellant had had unlawful carnal knowledge of the victim. Learned counsel submitted that the above was a minor error that did not render the indictment defective and did not occasion any miscarriage of justice. She went on to submit that the act of defilement was proved. She asked court to dismiss this ground.

On the second ground counsel for the appellant submitted that the learned trial Judge erred when she convicted the appellant on weak prosecution evidence. He submitted that the prosecution had failed to call the victim of defilement to testify. He submitted that in sexual offences, the victim ought to appear in court, as a witness. As a result counsel submitted the prosecution had failed to prove the case beyond reasonable doubt. He cited the case of **Bashir Sali vs Uganda, Criminal Appeal No. 40 of 2003** (Supreme Court).

In reply to this ground Ms. Tumuhaise contended that the evidence adduced in court by the prosecution witnesses sufficiently proved the case beyond reasonable doubt. There was eye witness evidence and the evidence of a medical doctor. The

appellant had been found in the act of defiling the respondent. She cited **Section 133** of the Evidence Act which provides that no particular number of witnesses are required to prove any particular fact.

5 She submitted that even in the absence of the evidence of both the victim and the investigating officer, the prosecution had proved its case beyond reasonable doubt. She cited the case of ***Basita Hussein vs Uganda (Supreme Court Criminal Appeal No. 35 of 1995)*** which was relied upon by the learned trial Judge
10 for the proposition that sexual intercourse or penetration may be proved by direct or circumstantial evidence. Counsel further submitted that the evidence of the key witness was corroborated and was sufficient to sustain a conviction.

Learned counsel explained that the reason the victim did not
15 testify was because she was epileptic and her condition could not allow her to testify in court.

On the 4th ground Mr. Rukundo submitted that the learned trial Judge erred in law and in fact when she convicted the appellant on the basis of uncorroborated evidence of a child of tender age.

20 He submitted that PW4 Swabila Nansereko was 12 years at the time she testified in court. That her evidence therefore required corroboration. That her testimony was also contradictory, when she stated that she had not seen the appellant lift the victim in cross examination.

He submitted that the medical report did not corroborate the evidence of PW4 as the medical report was only in respect of a case of assault and not that of defilement.

He submitted that the medical examination report does not tally
5 with the memorandum of agreed facts. Whereas the memorandum of agreed facts are in respect of a case of defilement the medical report indicates that the victim was examined in respect of a reported case of assault.

Learned counsel submitted that the learned trial Judge should
10 have convicted the appellant for indecent assault and not defilement.

Ms. Tumuhaise in reply submitted that the evidence on record clearly shows that the appellant was properly convicted of the offence of defilement and that the evidence adduced by the
15 prosecution was sufficient to sustain the charge.

She prayed for the dismissal of this appeal.

In the alternative, counsel for the appellant submitted that a sentence of 14 years imprisonment was harsh and manifestly excessive in the circumstances of this case. He asked court to
20 reduce it.

The respondent's counsel opposed the reduction of sentence and submitted that taking into account the fact that the maximum penalty for defilement is death, a sentence of 14 years

imprisonment is neither harsh nor manifestly excessive. She asked court to uphold it.

We have listened carefully to both counsel and also considered the evidence on record and the authorities cited to us.

5 From the onset we must state that every memorandum of appeal is required to comply with the provisions of **Rule 66(2)** of the Rules of this Court. That Rule requires that every memorandum of appeal sets forth concisely and under distinct heads, numbered consecutively, without argument or narrative the grounds of 10 objection to the decision appealed from.

In this case, the memorandum of appeal has only one very general ground and below it has "sub-grounds". Clearly the memorandum of appeal as set out in this case offends **Rule 66(2)** of the Rules of this Court and ought to have been struck 15 out. We have however decided not to strike it out since it was not objected to by counsel for the respondent and in the interest of justice taking into account the provisions of **Article 126 (2) (e)** of the Constitution.

We shall consider "the sub-grounds" a, b, c, d and e as if each of 20 them was a separate and distinct ground of appeal.

This being a first appellate court we are enjoined to reappraise all the evidence and to come up with our own conclusion on all matters of law and fact. This is a requirement of the law under **Rule 30(1) (a)** of the Rules of this Court. See also ***Pandya vs. R.***

(1957) E.A. 336, Bogere Moses versus Uganda (Supreme Court Criminal Appeal No. 1 of 1997), and ***Henry Kifamunte Vs Uganda (Supreme Court Criminal Appeal No. 10/1997***,

We shall proceed to do so.

The appellant contends that he was wrongly convicted on a defective charge sheet which did not contain the particular of the offence.

We have looked at the indictment, it sets out both the statement of the offence and the particulars of the offence. What is missing is the heading 'PARTICULARS OF OFFENCE, but the particulars are there and are set out as follows;-

> ***"Byarugaba Lozio on 2nd day of November 2004, at Luzinga Samali Village in Masaka District had unlawful carnal knowledge of SALIFA NABUNYA a girl under the age of 18 years"***

The fact that the particulars stated that the appellant had carnal knowledge of the victim instead of stating that he had defiled the victims did not change the particulars of the offence of defilement in any material way.

Section 22 of the Trial On Indictments Act (Cap 23) states as follows;-

> ***22 "Every indictment shall contain and shall be sufficient if it contains a statement of the***

specific offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of
5 ***the offence charged."***

We find that the indictment in this case complied with the above provisions of the law.

Ground one has no merit and it is hereby dismissed.

On ground 2, the appellant contends that the learned trial Judge
10 erred when she convicted him without the evidence of the complainant.

The undisputed evidence on record is that the victim Salifa Nabunya was epileptic and mentally retarded, she had been traumatized by the sexual assault and was unable to testify in
15 court.

The evidence adduced by PW4 the victim's 12 year old sister was to the effect that she found the appellant on top of the victim in an act of defiling her. In her examination in chief she stated as follows;-

20 ***"Lozio (appellant) was lying on top of Nabunya. I run to the neighbours to tell them. The neighbours arrived when the accused was coming from the toilet. This was around 6pm. It was not***

my first time to see him. I always see her tendering cattle.”

This evidence is corroborated by that of PW3 the mother of the victim who also knew the appellant well. When she was told about
5 the incident she checked the victim’s private parts and saw blood and some white liquid. **Exhibit PEx2**, which is Police Form 3a medical examination form of the victim was admitted by consent at the trial. The examination was conducted on 4/11/2004 two days after the incident by Dr. Buzalibira who found that there was
10 penetration of the victim’s vagina, the hymen was ruptured, and the rupture was fresh.

That there was inflammation around the victim’s private parts. The doctor concluded that the injuries were consistent with sexual assault.

15 We find that the evidence adduced by the prosecution was sufficient to sustain the charge of defilement. The learned Judge correctly found so, and we uphold her finding.

There is no legal requirement that a victim of sexual crime or any other crime must testify before a court. It may be desirable but it
20 is not mandatory. Many victims of sexual assault are too young to testify, some may be as young as a few months old.

We find no merit whatsoever in this ground and we dismiss it accordingly.

For the same reason we dismiss ground 3, in which the appellant faults the learned Judge for having convicted the appellant without the evidence of the Police investigating officer.

As to ground 4 we have already held above that the evidence on record was sufficient to sustain a charge of defilement against the appellant.

This ground also fails.

The last ground which ought to have been set out in the alternative is in respect of sentence. It was contended for the appellant that a sentence of 14 years imprisonment is manifestly harsh and excessive. The instances in which this court as an appellate court can interfere with a sentence have long been settled by the Supreme Court of Uganda and this court.

In the case of **Kiwalabye Bernard vs Uganda; Criminal Appeal No. 143 of 2001,** the Supreme Court set out the principles in which an appellate Court my interfere with sentence as follows;-

> *"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or*

where the sentence imposed is wrong in principle"

See:- also **Semakula Yosam vs Uganda (Criminal Appeal No. 322 of 2009) Court of Appeal, Ssemanda Christopher and another vs Uganda (Court of Appeal Criminal Appeal No. 77 of 2010**) (Unreported) among others.

Taking into account the fact that the maximum sentence the trial court could have imposed upon the appellant for the offence of defilement is death, we do not consider 14 years imprisonment to be manifestly harsh or excessive in the circumstances of this case.

We therefore see no reason whatsoever to interfere with the sentence imposed by the learned trial Judge.

We accordingly uphold it.

This appeal therefore fails and is accordingly dismissed.

Dated at **Kampala** this **3rd** day of **December** 2014.

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HON. MR. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. MR. JUSTICE F.M.S EGONDA NTENDE
JUSTICE OF APPEAL