IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KATO, *JJ*.S.C. CRIMINAL

APPEAL NO. 21 OF 2001

BETWEEN

WEPUKHULU NYUNGULI::.APPELLANT

AND

UGANDA ::RESPONDENT

(Appeal from the decision of the Court of Appeal (Okello, Berko, Engwau JJ.A.) at Kampala in Criminal Appeal No. 110 of 1999, given on 1st June 2001).

DISSENTING *J*UDGMENT OF MULENGA *J*SC.

I regret that I am unable to sign the judgment of the Court. I respectfully disagree with my learned brothers' decision on the first ground of appeal, specifically on the finding that the ingredient of *"penetration"*, in the charge of defilement, was proved "without doubt". Let me briefly state my reasons.

It is trite law that in arriving at its decision, a court is under duty to take into consideration the evidence as a whole; and to evaluate all the material evidence, on issues that have to be determined. It is an error to selectively consider evidence favouring one side, without any regard for that which is unfavourable. The first appellate court also has a legal obligation to re-evaluate the evidence on record and come to its own conclusion. Failure, on the part of either court, to discharge that obligation, constitutes an error of law. Where the Court of Appeal commits that error, this Court will re-evaluate the evidence and draw the appropriate conclusion. See *Bogere Moses vs Uganda, Criminal Appeal No. 1 of 1997* (S.C.) (unreported).

My considered opinion is that the two counts below failed to discharge their obligations. Upon re-evaluating the evidence, I find reasonable doubt on the issue whether penetration occurred. In her testimony, PW1, the girl victim in the instant case, described the sexual assault on her, but did not directly state that penetration did or did not occur. The prosecution contention, and the lower courts' holding that it did occur, is a deduction from her other evidence, coupled with circumstantial evidence from PW2, the victim's mother, and a report of a medical doctor, produced in evidence as Exh. P2. The testimony of PW2 is that soon after the incident, she noticed that the girl had difficulty keeping her legs together, and upon examining her, she observed bruises on her private parts in addition to whitish smear on the thighs, and wet knickers. Secondly, according to Exh. P2, the doctor examined the girl two days after the incident, and observed that her hymen was raptured, her vaginal meatus (vaginal entrance) was inflamed and she had pus discharge indicating medium infection. Even standing alone, that circumstantial evidence together with PW1's evidence of the assault does not lead to irresistible inference, that penetration, however slight, occurred. But what is more, there is uncontradicted material evidence that the courts below did not take into consideration, which tends to negative the occurrence of penetration during the assault in issue. The substance of the negative evidence is to the effect that throughout the assault-

- ***the girl was wearing her knickers, which were neither removed nor torn;***
- ***she did not feel any pain during the assault, but felt pain after she got up;***
- ***the appellant "poured his water" (ejaculated) in her thighs;***
- ***(PW2) who examined the girl soon after the assault observed dried whitish***
- ***smear on the thighs and wet but not torn knickers no blood.***

On considering the evidence as a whole, two very serious questions stand out unanswered. First, is it probable or indeed possible for a girl of 9 years to be penetrated by an adult man even slightly without feeling pain? She did not feel anything. Secondly, is it probable or even possible for such girl's hymen to rapture without a trace of blood? Pw2 who examined the girl after the assault did not observe any blood. When it is recalled that the burden of proof remains on the

prosecution throughout, these questions raise reasonable doubt on the issue of penetration. On that basis, I am of the view that an essential ingredient of the offence was not proved beyond reasonable doubt.

The facts that were proved beyond reasonable doubt, however, constitute the offence of indecent assault. The appellant ought to have been convicted of the latter offence.

DATED at Mengo this 5th day of March 2003.

J. N. Mulenga,

JUSTICE OF THE SUPREME COURT