THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA AND KATO,J.J.S.C).

CRIMINAL APPEAL No.7 OF 2002

BETWEEN

KABWISO ISSA.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal from the Judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ, Okello and Mpagi - Bahigeine, JJA) dated 20th December, 2001 in Criminal Appeal No.81 of 2000)

JUDGMENT OF THE COURT

This is a second appeal arising from the decision of the Court of Appeal which confirmed the conviction by the High Court of the appellant for the offence of defilement C/S 123(1) of the Penal Code Act.

It was the case for the Prosecution in the High Court that on 9/12/1995, at Bukasa Village, Zirobwe, Luwero District, the appellant - Kabwiso Issa defiled Bazara Suzan (PW2), a girl under the age of 18 years.

The facts accepted by the courts below are simple. The appellant was employed as a herds man and lived in the home of Mukiibi Karoli (PW3), the father of the victim of the defilement. On 9/12/1995 at 8.30 a.m. Mukiibi asked Bazara to accompany the appellant to tend cattle in a

swamp called Namuraga Plain. The swamp is 6 miles away. The two took out the cattle to the plain at 10.00 a.m. While in the plain the appellant teased Bazara to the effect that he would give her 25 strokes on her buttocks for insulting him. He then gave her one stroke, got hold of Bazara, threw her to the ground and defiled her. Because of pain, Bazara cried out. She bled and as a result blood stains remained where she had been defiled. She ran home and reported the defilement to her father. The father and Budalla, a neighbour, went to the scene accompanied by Bazara. The appellant was found in the vicinity of the scene of the crime and when confronted with Bazara's complaint, he denied defiling her. PW.2 took her father and Budalla to the scene where the group saw fresh blood stains on the ground. When PW.2, her father and Budalla returned to where appellant was left tending cattle, they realised that the appellant had disappeared. PW3 drove the cattle home before he reported the incident to Zirobwe Police Post. In the evening of the same day, the appellant reported to PW3's home and apologised to PW3 for having defiled Bazara.

Subsequently, PW.2 was examined by medical personnel who confirmed that she had been defiled. The appellant was arrested and charged with the offence of defilement. At the trial, the appellant gave unsworn brief statement in his defence. He simply said that he remembered some of the events of 9/12/1995 but did not mention them. He claimed that prior to that date, he had worked for PW3 for four months for which PW3 had failed to pay him his wages amounting to 80,000/= and because of that, PW3 had planted this case on him. The assessors rejected this story. So did the

2 learned trial judge who convicted the appellant and sentenced him to 15 years imprisonment. The appellant appealed to the Court of Appeal which dismissed the appeal. He has now appealed to us. The appeal is based on two grounds:

The first ground of appeal is couched this way by Mr. Bwengye, counsel for the appellant:

> ***The learned Justices of the Court of Appeal erred in law when they confirmed the appellant's conviction of defilement and sentence of 15 years imprisonment basing on verbal confession purportedly made by the appellant to the complainant's (victim's) father, PW3, whereas the trial judge did not consider this confession as corroborative material necessary to support conviction of the appellant, thus occasioning a miscarriage of justice.***

Clearly this ground offends Rule 81(1) of the Rules of this Court in that it is argumentative and narrative. Be that as it may, Mr. Bwengye contended that in convicting the appellant the trial judge did not rely on the appellant's confession to PW.3 yet the Court of Appeal relied on it; that S.25 of the Evidence Act prohibits admissibility in evidence of this kind of confession and he cited **Kataiha Deo Vs. Uganda** Criminal Appeal No. 129 of 2001 (C.A) (unreported) in support. Mr. Wagona, Principal State Attorney, supported the decisions of the Courts below, contending that apart from the confession there was other cogent evidence to support the conviction. We do not quite appreciate Mr. Bwengye's submission that the trial judge never relied on appellant's confession to convict him whereas the Court of Appeal relied on it. In our opinion there is nothing wrong in the course adopted by the Court of Appeal. Mr. Bwengye did not give any reasons for his strange view that section 25 of Evidence Act forbids admission in evidence of appellant's confession to the father of the complainant. The section reads. ***"A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person, and to all the circumstances, to have been caused by any violence, force, threats, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made".***

Kataiha's case (supra), itself a decision of the Court of Appeal, is clearly distinguishable on many aspects but the relevant one is that there, the appellant's confession was excluded because members of the Local Defence Unit (LDUs) extracted it after tying up the appellant Kataiha and threatened him with a gun.

In this case, there was overwhelming evidence against the appellant. He had been in the company of Bazara when they went out to tend cattle. After he ravished Bazara, she reported this to her father who went to the scene and found the appellant nearby. After PW3 confronted the appellant with Bazara's report instead of responding properly, the appellant first fled the scene abandoning cattle in the field but only to return in the evening and confess his sin to PW.3, the father of the victim.

In our opinion, and with respect to Mr. Bwengye, there is nothing in the provisions of section 25, which in this case would prohibit admissibility of the appellant's verbal confession to PW.3. The Court of Appeal was fully entitled to treat the said confession as evidence that corroborative of the complainant's testimony. Even if the trial judge did not directly refer to the confession, he

treated the conduct of the appellant at the scene when he ran away as conduct inconsistent with his innocence. Therefore ground one of the appeal must fail for lack of merit.

The complaint in the second ground is that the trial Judge did not follow the provisions of Clause (8) of Article 23 of the Constitution when he sentenced the appellant to 15 years. Mr. Bwengye asked us to reduce the sentence to 7 years. On the other hand, Mr. Wagona, quite properly in our view, conceded that the words which the learned trial judge used when imposing the sentence of imprisonment are ambiguous. When imposing the sentence the learned trial judge expressed himself this way -

".....he is sentenced to 15 years imprisonment. The period he has been on remand shall be taken into account against the whole sentence"

In the Court of Appeal, the complaint against the sentence was that it was excessive. That Court did not agree. The complaint before us, in effect, is that it is unlawful in that it contravenes Clause (8) of Article 23 of the Constitution. The Clause states: -

"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment"

This court has on a number of occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. In the appeal before us it is not clear how the period from 9/12/95 to 29/9/2000(5 years) spent on remand "will be taken into account against the whole sentence" of 15 years. It appears the judge meant that the sentence commenced from 9/12/95. This would be absurd because a trial court can not sentence a person before conviction. We accordingly allow ground two.

For the foregoing reasons, the appeal against conviction is dismissed while the appeal against sentence is allowed. The sentence of 15 years imposed by the trial judge is set aside.

We think that the trial judge intended to sentence the appellant to imprisonment for ten (10) years. This period will run from 29/9/2000, the date the trial judge imposed the 15 years sentence.

We understand that prison authorities experience difficulties in determining remission periods in cases where convicts are sentenced in terms similar to the words used by the trial judge in this case. We would therefore give the following guidelines to trial courts. When sentencing a person to imprisonment a trial judge or magistrate should say-

"Taking into account the period of.....years (months or weeks whichever is applicable) which the accused has already spent in remand, I now sentence the accused to a term of....., years (months or weeks, as the case may be)"

In such an event the sentence imposed shall be definite and be treated as excluding the period spent in custody on remand.

We direct that this judgment be circulated to all courts, prosecutors and prison authorities for guidance.

Dated at Mengo this 27th day of October 2003.

A.H.O. ODER
JUSTICE OF SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF SUPREME COURT

A.N. KAROKORA
JUSTICE OF SUPREME COURT

G.W. KANYEIHAMBA
JUSTICE OF SUPREME COURT

C.M. KATO
JUSTICE OF SUPREME COURT