THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

[CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND KANYEIHAMBA, JJ.S.C]

CRIMINAL APPEAL No.32 OF 2001

BETWEEN

KATENDE MOHAMMED …….. APPELLANT

AND

UGANDA …….. RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo ,DCJ, Kato and Kitumba, JJ.A) dated 4th June, 2001 in Criminal Appeal No.82 of 2000]

REASONS FOR THE JUDGMENT OF THE COURT

On 26th June, 2003, we heard this appeal and dismissed it for lack of merit. We promised to give reasons in support of our decision. We now give the reasons.

In the High Court, Katende Mohammed, the appellant was indicted for defilement contrary to section 123 (1) of the Penal Code. He was duly tried, convicted and sentenced to imprisonment for ten years.

It was the case for prosecution that on 29/6/1998, at Kiwasa village in Luwero District, the appellant defiled Nabasanda Efrance, a girl under the age of 18 years.

Evidence adduced at the trial was that by 29/8/1998, Efrance Nabasanda (PW1), the victim of defilement, was age 7 years old. She lived with her parents at Kiwasa village. The appellant was a neighbour. Namaganda, (PW2) the mother of Nabasanda, left the latter at home with other young children, while taking her youngest child to hospital. The appellant called Nabasanda and asked her to accompany him to a banana plantation to pick mangoes. She agreed. Upon reaching the banana plantation, the appellant grabbed Nabasanda tore her knickers and defiled her after which he warned her not to tell anyone about the defilement. Nabasanda left the banana plantation crying. She met her mother and reported that the appellant had defiled her. She was crying and bleeding. A report was made to L.C. officials and the appellant was eventually arrested, charged, and prosecuted and convicted. He was sentenced to ten years imprisonment. His appeal to the Court of Appeal was dismissed. He appealed to this Court and set out three grounds of appeal in his memorandum. His counsel, Mr. Sekabojja, abandoned the second ground of appeal and argued grounds 1 and 3 together.

The complaint in the first ground was that the Court of Appeal erred in upholding the appellant's conviction because there was no sufficient corroboration of Nabasanda's evidence. The complaint in the last ground was that the Court of Appeal erred in upholding the conviction when the offence of defilement was not proved beyond reasonable doubt. Mr. Sekabojja contended that there was not sufficient evidence to prove defilement beyond reasonable doubt. That there was no corroboration of Nabasanda's evidence. Mr. Elubu, Principal State Attorney, submitted that the distressed condition of Nabasanda, i.e., crying and bleeding, corroborated her evidence.

Section 38 (3) of the TID, 1970 reads as follows.

> ***"Where in any proceedings, any child of tender years called as a witness does not, understand the nature of an oath, his evidence may be received though***

not given upon oath, if....., he is posed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: Provided that where 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 other material evidence in support thereof implicating him."

Although by use of the expression "shall not be liable to conviction", the legislature does not seem to completely forbid conviction, it is clearly trite that no conviction of an accused can be based on the uncorroborated evidence of a child of tender years who testifies without swearing. Moreover this case has its peculiar features. The victim of the defilement, Nabasanda, appears to have been a very intelligent girl and an impressive witness. Part of her evidence runs as follows: -

"I don't know when I first saw accused. I have seen accused for two years. A year has five months. I saw accused at Kiwaza near our home. He is not born in Kiwaza. I don't know his parents. He fetched water for Kiwanuka, our neighbour. It is a short distance between Kiwanuka's and out home. He worked for Kiwanuka for a long time. He used to pass our home on a bicycle carrying jerrycans. He spoke to me -three times. He told me that we go for mangoes all the three times. I went the first time and he did bad things to me and I did not oblige the next times. He did so at 1.00 p.m. My mother had gone to hospital. Mulongo told me to go and fetch water for him. On my way from the well, the accused called me from the home of Kiwanuka. I went to him. He threw me down and slept on me. He tore my nicker. When he slept on me I felt bad blood came. He slept on me in our coffee plantation. I left the banana plantation. He did not give me the mangoes. I told my mother when I found her at home. I told her Katende had defiled me. Mother took me to the hospital Kamila, I was examined by doctor who is a midwife. She examined my private parts"

From the foregoing there is no doubt that the witness was possessed of intelligence and narrated accurately what happened. Indeed from the answers she gave in the Voire Dire, we do not appreciate why the trial judge declined to swear her. Whatever the case, there is a very important feature in her evidence on record. For whatever reason not given on the record, Nabasanda was not cross-examined. Yet her evidence fully incriminated the appellant as the person who forcefully had sexual intercourse with her. In normal circumstances, her evidence, which was unchallenged, would have not required corroboration since it had fully implicated the appellant in the commission of the crime. But because of S.38 (3), the evidence needs corroboration. In this case, there was corroboration.

Nabasanda met her mother (PW2) immediately after the offence. She was in a distressed condition which included crying and bleeding. These conditions corroborated her evidence as to the matter of defilement. Then she reported to her mother that it was the appellant who had defiled her. By virtue of section 155 of the Evidence Act, her statement to her mother corroborates her testimony about the identity of her defiler. S.155 reads as follows:

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

In view of these provisions, we think that the evidence of Nabasanda was corroborated and, therefore, although the trial judge misdirected himself by holding that there was no corroboration, his judgment and that of the Court of Appeal upholding his decision, are supportable on the ground that Nabasanda's evidence which fully incriminate the appellant was corroborated. On corroboration by previous statement. See **Ndaula J. Vs Uganda** - Criminal Appeal 22 of 2000 (SC) (unreported).

For the foregoing reasons we dismissed the appeal.

Dated at Mengo this 17th Day of December 2003.

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT