THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

CRIMINAL APPEAL NO.15/1997

B E T W E E N

BADRU MWINDU :: APPELLANT

- VERSUS -

UGANDA :: RESPONDENT

(Appeal from Conviction and Sentence of the Court of Appeal of Uganda Kampala (before S.T. MANYINDO DCJ., G.M. OKELLO J.A., & TWINOMUJUNI J.A.) DATED 21/11/1997 in Criminal Case No.1 of 1997)

CORAM: WAMBUZI, C.J., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., KIKONYOGO J.S.C.

REASONS FOR THE JUDGEMENT:

We dismissed this second appeal on the 16th April, 1998 and reserved our reasons which we now give.

The brief facts giving rise to this appeal are as follows:

Badru Mwindu, the appellant, was convicted by the High Court sitting at Jinja of defilement contrary to sec. 123 (1) of the Penal Code and was sentenced to twelve (12) years imprisonment. The case against the appellant was that as a boda boda man he was hired on 11/3/94 by Winfred Isabirye (PW 4) to take her two daughters to school as her usual transporter did not turn up. The two girls were Gill Nabirye, the victim of the assault, aged about 5 years and her sister Winnie Namusoke, aged about 8 years. The two went to different schools and were duly dropped there by the appellant on a bicycle.

Although the appellant was not expected to collect the children from school, he went to Winfred's place of work later that morning and offered to collect the children and was allowed to do so. The appellant collected Gill first, took her to his home ravaged her and then collected the second child and took the two to their home.

The appellant appealed to the Court of Appeal against conviction and sentence. The Court upheld the conviction and sentence and dismissed the appeal. The appellant has now appealed to this Court against the decision of the Court of Appeal on the sole ground which he amended to read that,

> *"The lower appellate court erred in law and in fact in confirming the conviction of the appellant on insufficient evidence."*

Before dealing with the merits of the appeal, we would like first to deal with the right of appeal of the appellant. Section 5 of the Judicature Statute, 1996 provides as follows:

> *"An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as are prescribed by the Constitution, this statute or any other law".*

Mr. Emoru, who appeared for the appellant, was asked by the Court under which of those provisions the appeal was preferred to which he answered: under section 6 (1) (a) of the Judicature Statute. This provision reads as follows:

> *"(1) In criminal matters, in the case of an offence punishable by a sentence of death, an appeal shall lie to the Supreme Court as follows -*
>
> *(a) where the Court of Appeal has confirmed a conviction and sentence of death passed by the High Court, the accused may appeal as of right to the Supreme Court on a matter of law or mixed law and fact; ......"*

Although the offence of which the appellant was convicted is "punishable by a sentence of death" the appellant was not sentenced to death nor did the Court of Appeal confirm any sentence of death. So quite clearly in our view, and Counsel conceded, the appellant had no right of appeal under section 6 (1) (a) and quite clearly also, the remaining paragraphs of the sub section which deal with acquittals do not apply to the appellant who was in fact convicted by the High Court.

Sub-section (2) of section 6 provides as follows;

> *"(2) Sub-section (1) shall apply with necessary modifications to an appeal to the Supreme Court from a conviction and sentence or acquittal in the case of an offence not punishable by a sentence of death, in respect of convictions and acquittals by the High Court and the Court of Appeal; except that in such case, an appeal shall only lie on a matter of law only."*

On the face of it since defilement, the offence of which the appellant was convicted is "punishable by a sentence of death" there would be no right of appeal conferred under that sub-section either as the sub-section relates to offenses "not punishable by a sentence of death".

If that literal interpretation is placed on sub-section (2) of section 6, however it would result into this absurd situation: whilst in the case of offenses not punishable by a sentence of death, such as indecent assault of a girl under the age of 18 years contrary to section 122 of the Penal Code, there would be a right of appeal to this court under that sub-section, there would be no such right under the sub-section in respect of graver offenses punishable by the sentence of death such as defilement, if a lesser sentence is imposed and/or confirmed. We do not think that this could have been the intention of the legislature. We are unable to see any rationale that would justify such discrimination. However, reading sub-sections (1) and (2) of section 6 together we are convinced that what was intended was to limit the scope of appeal on a second appeal but to make it a little broader in cases where the sentence of death is involved than in other cases. Thus in the former, appeal may be on a point of law or of mixed law and fact while in the latter it may be on a point of law only. In the circumstances and doing the best we can to give meaningful interpretation to the provisions we hold that

the expression "not punishable by a sentence of death" in sub-section (2) of section 6 must be read as "not punished by a sentence of death". That way, there would be a right of appeal in offenses punishable by death but in respect of which the death penalty has, for some reason or other, not been passed.

Upon this interpretation an appeal to this Court under sub-section (2) of section 6 of Judicature Statute lies only on a matter of law. Accordingly Mr. Emoru further amended his ground of appeal to the effect that the lower appellate court erred in law in confirming the appellant's conviction on insufficient evidence. Learned counsel repeated the submissions made in the High Court and also in the Court of Appeal, namely, that failure of Gill Nabirye to testify was fatal to the prosecution case and that the possibility of another boda boda man committing the offence had not been ruled out. Before us learned counsel raised for the first time, and without any authority to support counsel's argument that the semen found in Gill's private parts was not matched with the appellant's semen. In learned counsel's submission, the evidence in this case indicated that Gill had been defiled but did not prove beyond reasonable doubt that the appellant committed the offence.

We found no merit in any of the submissions made for the appellant. Both the High Court and the first appellate court dealt with all the issues raised before us, except the issue of matching semen which was made without any authority to support the evidential nature of such an examination. In dealing with the other issues, the Court of Appeal said:

> *"It is clear to us from the record that the prosecution case rested entirely on circumstantial evidence. The victim did not testify as she was out of the country with her father for treatment following that attack on her. The point raised in this Appeal is that in the absence of the victim's evidence, there was no evidence which connects the appellant with the commission of the offence. This raises the question whether the circumstantial evidence relied on was enough to support the trial Judge's conclusion.*
>
> *The court is of course, bound to re-examine exhaustively all the evidence on record in order to determine the question whether the evidence is enough to sustain a conviction. See Okeno v R (1972) E.A. 32 at page 36.*
>
> *In our view, the circumstantial evidence amply justified the trial Judge's conclusion that the appellant was the person who defiled the victim. The circumstantial evidence was;*

(1) that the appellant was hired and he took the victim and her sister to school.

(2) that though he was not supposed to collect the victim from school, the appellant later approached the mother of the victim and offered to pick the victim from school. He was allowed to do so.

(3) that the appellant collected the victim from school at 12.00 noon. He himself admitted that in his sworn evidence in his defence.

(4) that the appellant brought the victim home when she was in a distress disposition - she was actually crying.

(5) that the victim immediately complained to the house-girl (PW 4) who received her from the appellant against the appellant, that the boda-boda man had "sat on her".

(6) that when the house-girl confronted him as to what had happened to the child, the appellant replied merely that the victim was only stubborn and that he had found her even crying in school.

(7) that the house-girl (PW 4) soon confirmed the victim's complaint of pain in her lower abdomen when she discovered that the victim's knickers were blood stained.

(8) that the house-girl (PW 4) later identified the appellant in court as the boda-boda man against whom the victim had complained.

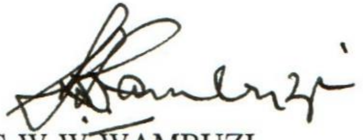
(9) that the appellant later in his sworn evidence in his defence gave different explanation regarding the cause of the distressed disposition of the victim. He explained that the victim was crying because she had slipped from the carrier of the bicycle though that he had grabbed her legs and prevented her from falling down.

The trial Judge and the Assessors rejected the appellant's denial. In our view, the appellant's denial was quite rightly rejected. The above circumstantial evidence irresistibly point to the appellant as the person who defiled the victim. The argument by Mr. Akampurira that there could have been an unknown boda-boda man who might have gone to the school, collected the victim, defiled her and then returned her to the school before the appellant had collected her at 12.00 noon of 11/3/94 is far fetched and untenable in view of the above evidence."

We have no doubt in our minds that the first appellate court on a re-evaluation of the evidence was satisfied that the offence had been proved beyond reasonable doubt. Not a single item of the evidence so evaluated has been faulted before us.

We observe that there are two pieces of evidence which the trial court relied on but were not mentioned by the Court of Appeal. First there was the evidence of James Zikusoka (PW 2) to the effect that on examination of Gill on the day of the attack, he found spermatozoa and puss cells in her vagina. The second piece of evidence is that of Gill's mother, Winfred Isabirye (PW 4), to the effect that on the day of the assault Gill violently resisted examination of her private parts by a doctor Mpata because of pain. It is unfortunate that this doctor was not called to testify but Winfred's evidence regarding the examination which she witnessed was not in any way discredited. Both these pieces of evidence further support the case against the appellant not only that the girl was defiled but also, in view of the fact that at the material time she was in his care, that it was he who defiled her. In our view there was more than ample evidence to justify the conviction. For those reasons we dismissed the appeal against conviction.

Dated at Mengo this 28th day of April, 1998.

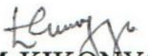


S W W WAMBUZI
CHIEF JUSTICE

J W N TSEKOOKO
JUSTICE OF SUPREME COURT

A N KAROKORA
JUSTICE OF SUPREME COURT

J A MULENGA
JUSTICE OF SUPREME COURT



L E M KIKONYOGO
JUSTICE OF SUPREME COURT