THE REPUBLICOF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE G.M. OKELLO, JA.
HON. JUSTICE A. TWINOMUJUNI, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO. 54 OF 2002

SEBULIBA HARUNA :::::::::::::::::::::::::::::::: APPELLANT

Versus

UGANDA :: RESPONDENT

[Appeal from the judgment of the High Court at Kampala (Sebutinde, J.) dated 30/4/2002 in Criminal session Case No. 273 of 2000]

JUDGMENT OF THE COURT

The appellant, Sebuliba Haruna, was indicted for defilement contrary to section 123 (1) of the Penal Code Act. He was convicted and was sentenced to twelve years imprisonment.

The prosecution case as accepted by the learned trial judge was as follows: The victim of the defilement who testified at the trial as PW2, was a young girl, aged four years at the time of the offence. She lived at Kinyogoga village Luwero District with her aunt, Joyce Kasujja, PW1. The appellant was the immediate neighbour of PW1. On the 31st of May 1998 at around 4.00 p.m. PW2 was outside playing with her playmates. The appellant asked her to go to his house to get sweets. When PW2 entered the appellant's house he locked her inside and had sexual intercourse with her. One of PW2's playmates informed PW1 that the appellant had locked PW2 inside the house. PW1 responded immediately

by going to the appellant's house. She found the door shut. When she peeped through a big hole which was on the wall, she saw the appellant fastening his trousers. PW2 was seated next to him on the floor and was crying. When the appellant heard PW1 inquiring about her niece, he tried to escape through the rear door. PW1 apprehended him, while raising an alarm. Soon afterwards Corporal Boniface Nuwamanya, PW3, who was in charge of Kinyogoga Police Post arrived at the scene. He arrested the appellant. On 4/6/1998, PW1 was medically examined by Dr. Lukoda at Kasana Health Centre. He found that her hymen was ruptured. The vulva was swollen and there were inflammations on her private parts. In his opinion all the injuries were consistent with forceful sexual intercourse having taken place. The appellant was later indicted for defilement.

In his defence which he gave on oath, the appellant totally denied the offence and pleaded alibi. He also stated that the case was a frame up by PW1 who had a grudge against him.

The learned trial judge believed the prosecution case, rejected the appellant's defence and convicted him.

The appellant has appealed to this court on six grounds namely:-

1. **The learned trial judge erred in law and fact in relying on evidence from witnesses who had grudges against the Appellant.**
2. **The learned trial judge erred in law and fact when she rejected the appellant's defence.**

3. **The learned trial judge erred in law and fact in relying on the Prosecution evidence which was full of lies, contradictions and inconsistencies.**

4. **The learned trial judge erred in law and fact when she failed to implement the provisions of the Children Statute.**

5. **The learned trial judge erred in law and fact when she failed judicially evaluate the evidence before her thereby coming to a wrong decision.**

6. **The learned trial judge passed a wrong sentence that was unnecessarily harsh, and did not take into consideration the fact that the appellant was a minor at the time of commission of the offence.**

Ms. Scola Nafuna, learned counsel for the appellant, argued grounds 1, 2, 3 and 5 together. We shall handle the grounds in the same order.

On grounds 1, 2, 3, and 5 counsel for the appellant's complaint was that the learned trial judge failed to evaluate the evidence properly with regard to grudges, inconsistencies in PW1's evidence.

On grudges, counsel submitted that there was a grudge between the appellant and PW1. Mr. Kasujja, the husband of PW1, had borrowed fifty thousand shillings from him and had not repaid that debt. According to counsel, that constituted a motive for PW1 to tell lies against the appellant. Counsel criticised the learned trial judge for having failed to seriously consider the issue of the grudge and called it an after thought.

In reply Ms. Alice Komuhangi, learned Senior State Attorney, supported the learned trial judge's holding on the alleged grudge. She submitted that in her evidence in chief and in cross examination PW1 stated that she knew the appellant and they were on good terms. The appellant did not cross examine PW1 about the grudge. Besides, the appellant did not talk about grudges when he was testifying in his defence. Counsel reasoned that the grudge was indeed an afterthought. It was concocted by the appellant when he was examined by the court because he had run out of ideas.

We note that in her judgement, the learned trial judge considered the issue of the alleged grudge between Mr. Kasujja, the husband of PW1 and the appellant. She took into account the fact that Mr. Kasujja was present when the appellant was arrested. However, he did not come to court to testify against the appellant. In her view, it was strange for one who had engineered the framing of the appellant not to testify so as to ensure that the appellant is put away so that repayment of the loan is avoided. The learned trial judge also found that neither the appellant nor his counsel raised the matter of the grudge in cross examination of PW1.

The law is now settled that an omission or a neglect to challenge the evidence in chief on a material point by cross examination would lead to an inference that the evidence is accepted subject to its being assailed as inherently incredible or palpably untrue. See **Sawabiri and Another Vs Uganda S.C Criminal Appeal No. 5 of 1990.**

We are of the view that the learned trial judge properly evaluated the evidence of the alleged grudge and came to the right conclusion that it was untrue and rejected it.

We now consider other criticisms concerning PW1's evidence. It was appellant's counsel's contention that the learned trial judge should not have believed PW1's evidence because it was inconsistent. She submitted that PW1 testified that on the day the appellant was arrested, the victim was taken to Kinyogoga Trading Centre Clinic and was medically examined. However, the medical report, exhibit P1, shows that the injuries were a few days old. Counsel submitted that if PW2 had been examined on the day she was defiled, the medical report would not have shown that the injuries were a few days old. She submitted that this contradiction in PW1's evidence showed that her evidence was concocted.

Learned Senior State Attorney disagreed. She submitted that there was no inconsistency in PW1's evidence. PW1 testified that she took the victim to Kinyogoga Trading Centre Clinic where she was advised that they could not handle such cases. She was advised to take the victim to a government hospital. She sent for the victim's father who later took her to hospital.

We have examined the testimony of PW1 as contained in the record of proceedings. She testified that on the day of the incident, she took the victim to Kinyogoga Trading Centre Clinic for medical examination but the staff told her that they could not handle such cases. They advised her to take her to a government hospital. She sent for the victim's father to come and attend to his daughter. The father arrived two days after the incident. She accompanied the victim and her father to Kinyogoga Police Post. She left them there and did not know whether the victim was taken to a government hospital or not.

PW2 was defiled on 31/5/1998. The father came two days afterwards and started attending to his daughter. The date shown on the medical report is 4/6/1998. The medical report states that the injuries were a few days old. We do not find PW1's evidence inconsistent in any way.

The appellant's counsel criticised the judge for believing the evidence of PW1 that she saw semen and blood in the victim's private parts whereas she was not a doctor. We think that this criticism is not justified. PW1 was a mature woman. She was requested by PW3 to examine PW2's private parts and she complied. As a mature woman she did not have to be a medical doctor to recognise the blood and what looked like semen in a child's virgina.

Grounds 1, 2, 3 and 5 are devoid of merit and fail.

We consider grounds 4 and 6 which are an appeal against sentence. Submitting on both grounds, counsel contended that the appellant was a child at the time he committed the offence. The appellant testified that he was 19 years at the time of trial. She reasoned that at the time of the offence he was 17 years old. According to section 94 of the Children Act, (Cap 59) he should not have been sentenced to imprisonment for more than three years. She criticised the learned trial judge when passing sentence for saying that the appellant exposed the victim to HIV and other sexually transmitted diseases. Counsel argued that there was no evidence that the appellant had any sexually transmitted disease.

Ms. Komuhangi disagreed. She submitted that the Children Act applied to an accused person at the time of trial but not at the time of commission of the offence. The appellant was over 18 years of age and was,

therefore, not a child. The sentence of twelve years imprisonment, which was passed against the appellant, was not illegal.

We note that the prosecution did not adduce any evidence, medical or otherwise to prove the age of the appellant. On 5th March 2002, when the appellant gave his defence, he said that he was 19 years old. The offence was committed on 31st May, 1998. That meant that the appellant was about 15 years old when he committed the offence.

We wish to point out that reformation of the offender is one of the aims of sentencing which a trial judge should take it into account when passing sentence. In the instant case the learned trial judge appears not to have considered whether the appellant was a person who was likely to amend his behaviour or not. She did not consider the fact that the appellant was a young offender who was capable of reforming.

In **Kabatere Steve v Uganda** Criminal Appeal No. 123 of 2001 the appellant was convicted of defilement. He was 18 years old at the time he committed the offence. The court reduced the sentence of 10 years imprisonment to 5 years on the ground that the convict was a young offender who would not be reformed by a long period of imprisonment. In the instant the appellant was a child of 15 years when he committed the offence, We are inclined to follow the principle applied in **Kabatere Steve** (supra).

Accordingly, we dismiss the appeal against conviction and allow the appeal against sentence. We set aside the sentence of twelve years imprisonment and substitute it with a sentence of five years imprisonment.

Dated at Kampala this 20th day of JULY 2004.

G,M, Okello
JUSTICE OF APPEAL

A. Twinomujuni
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL