

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENDO

(CORAM: TSEKOOKO, KAROKORA, MULENGA,
KANYEIHAMBA AND MUKASA-KIKONYOGO, J.J.S.C)

CRIMINAL APPEAL NO. 23 OF 2000

BETWEEN

KITEMA JOHNAPPELLANT

A N D

UGANDARESPONDENT

*(Appeal from the Judgment of the Court of Appeal (Manyindo, D.C.J.
Twinomujuni and Kitumba, J.J.A). dated 5th June, 2000 and
arising from the Judgment of the High Court at Mbarara
(Mukanza, J.) in Criminal Session case No. 23/99, dated 9/8/96).*

JUDGMENT OF THE COURT

This is an appeal from the judgment of the Court of Appeal confirming the conviction and sentence of the appellant by the High Court for defilement, contrary to Section 123 (1) of the Penal Code Act. John Kitema, the appellant, was tried and convicted by the High Court on an indictment that charged him with an offence of defilement. He was sentenced to 10 years imprisonment. His appeal to the Court of Appeal was dismissed, hence this appeal.

The evidence as accepted by the learned trial judge was that one Allen Tumwebaze, PW2, the victim, a girl under the age of 18 years at the

time of the commission of the offence, was defiled. On 15th November, 1992, Tumwebaze, accompanied by her cousin, Jennifer Tumukwasire went to the home of the appellant to demand payment of Shs. 1200 from him for having weeded his banana plantation. The appellant invited the two girls into his home and while the three were there, it started raining, whereupon the two girls decided to return to their own home. The appellant allowed Jennifer Tumukwasire to return home alone but forcibly detained Tumwebaze and proceeded to defile her.

Tumukwasire was not called to give evidence for reasons explained by both Bernad Ntanda, PW3, her father, and Joven Kyaharebire, PW5, her aunt and mother of Tumwebaze. They explained that Tumukwasire had been sick and died before the case came to trial.

Be that as it may, it was the prosecution's evidence that the appellant locked Tumwebaze inside his house and defiled her, not once but three times in that night. The victim made an alarm which was not answered by anyone. Her cousin reported her detention and defilement to Ntanda that same night around 9.00 p.m. In the morning of the following day, Tumwebaze returned to the home of her uncle, Ntanda, and reported that she had been defiled by the appellant. She was treated with hot water by the wife of her uncle to whom she referred as mother. The defilement was reported to the local authorities and to the police as a result of which the appellant was later arrested and charged.

Tumwebaze was medically examined by Dr. George Waswa, PW1. Dr. Waswa found that she was under the age of 18 years, and that whereas there were no tears or scratches on the vagina or recent tears of the hymen, the victim had a dark spot on the urethral meatus which was caused by forced entrance into the vagina. The appellant denied the offence and testified that he had been framed by Bernad Ntanda

because of a grudge between the two of them. The learned trial judge accepted the evidence of the prosecution and disbelieved that of the defence and convicted the appellant. The appellant appealed to the Court of Appeal which dismissed the appeal. The appellant appealed to this court on two grounds. At the commencement of the hearing, ground 2 was amended with leave of court. The grounds amended were as follows:

- 1- The learned Justices of Appeal erred in law when they found that the trial judge was justified in believing the complainant as a truthful witness and that there was sufficient corroborative evidence in support of her evidence.
- 2- The learned Justices of Appeal erred in law when they failed to reappraise the evidence as a whole in order to come to their own conclusion as a first appellate court.

During the course of his submissions, counsel for the appellant, Mr. Mubiru, abandoned ground 1 and made submissions only on ground 2 of the appeal. He contended that as a first appellate court, the Court of Appeal failed to appraise all the evidence in this case so as to come to its own conclusion. Counsel submitted that the evidence relating to the age of Tumwebaze and to whether or not there had been sexual intercourse had not been reevaluated by the learned Justices of Appeal. He further contended that there were various contradictions in the evidence which were serious and both the trial court and the Court of Appeal had ignored them. It was Mr. Mubiru's further contention that the act of defilement had not been corroborated and therefore the trial court and the Court of Appeal erred in law in finding that there had been corroboration. Counsel for the appellant cited the case of Sanga V.R. (1971), E.A. 539, in support of his submissions.

For the Respondent, Mr. Vincent Wagana, Senior State Attorney, supported the decisions and reasoning of the courts below. He contended that, inspite of some inconsistencies, there was sufficient evidence that Tumwebaze was not only below the age of 18 years but had been defiled as well. Mr. Wagana contended that the trial judge and the Justices of Appeal had adequately evaluated the evidence and were right in their conclusions. On the issue of the victim's age, he submitted that the doctor's evidence corroborated the assertion that Tumwebaze was below the age of 18 years. On that account, counsel distinguished the decision in **SANGA's** case (*supra*). He also submitted that there was sufficient evidence on defilement which was corroborated by the testimony of the doctor who examined Tumwebaze some four days after the offence was committed.

The minor contradictions raised by learned counsel for the appellant were adequately dealt with by both the trial judge and the learned Justices of Appeal. We are satisfied that the two courts evaluated the evidence and came to the right conclusion when they decided that Tumwebaze was under 18 years of age at the time of the offence. With regard to the act of defilement, there were some inconsistencies in the evidence which the courts below ought to have considered but which they appear not to have adverted to. Although Tumwebaze, testifies that before the defilement she had not had sex with any other man, and that during defilement she sustained injuries, the evidence from the medical examination, carried out several days after the incident, showed that the tears in her hymen were more than a month old and were already healed, and that the dark spot found on the urethral meatus was not caused at the same time as the tears. Secondly, although Bernad Ntanda, testified in examination in chief that he was informed of the defilement at 9 p.m.

in the night of the incident, in cross examination he said he received information the morning after.

After considering these inconsistencies with the rest of the evidence, however, we are satisfied that even if the Court of Appeal had expressly considered them, it would have come to the same conclusion. We think that the omission to do so did not amount to a failure in its duty to reevaluate the evidence. Accordingly, we find no merit in ground 2 of the appeal. It fails, and the appeal is dismissed.

DATED AT MENGO THIS 15th DAY OF August 2001


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


L.E.M. MUKASA-KIKONYOGO

JUSTICE OF THE SUPREME COURT