

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

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**CRIMINAL APPEAL NO. 78/2002**

**MUGISHA ROBERT ::::::::::::::::::::::::::::::: APPELLANT**

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**VERSUS**

**UGANDA ::::::::::::::::::::::::::::::: RESPONDENT**

**(Appeal from the decision in Criminal Session Case No. 176  
of 2000 in the High Court of Uganda at Fort Portal before the  
Hon. Justice E. Mwangusya dated 29<sup>th</sup> May 2002)**

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**CORAM:**

**HON JUSTICE G.M. OKELLO, JA  
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA  
HON. JUSTICE S.G. ENGWAU, JA**

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**JUDGEMENT OF THE COURT**

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This appeal is against conviction and sentence. The  
appellant, Mugisha Robert, was indicted for the offence of  
defilement contrary to Section 129(1) of the Penal Code  
Act. He was tried by the High Court at Fort Portal,  
convicted and sentenced to 8 years imprisonment.

The facts were as follows. The appellant lived with the family of his uncle, Peter and Jane Kaganda. Two other girls, Jane Kisembo, the victim (PW3) and Daphne Kaunde (PW4) also lived but in a separate room from that occupied by the appellant. During the month of August 1999, the appellant used to sneak out to the girls' room, take out the victim (PW3) to his room where he would have sex with her. This he used to do on several occasions, though the victim could not remember how many times it was. However, each time they had sex the appellant would give her Shs. 200 – 500/=.

When all this was going on, Jane Kaganda, PW5 overheard the victim quarrelling with the other girls about money. PW5 asked the victim where she had got the money from which she was quarrelling about. When the victim kept mum, PW5 threatened to burn her lips if she did not disclose the source of that money. The victim then revealed that it was the money she was getting from the appellant which he was paying her each time they had sex.

PW5 was shocked and summoned the victim's mother for a family meeting. The appellant, however, kept quiet during the meeting after which he quietly went to his

room and tried to hang himself using a wire. He was rescued by Kaganda who on hearing some commotion in the room went and cut the wire. When the appellant fell down he was arrested and handed over to the Police.

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At his trial the appellant denied the offence. He pleaded a grudge with PW5 which the learned Judge rejected.

This appeal is on two grounds, namely:

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**“1. That the learned trial Judge erred in law and fact when he failed to evaluate the evidence.**

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**2. That the learned trial Judge erred in law and fact when he passed a harsh and excessive sentence against the appellant in the circumstances.”**

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Concerning ground I, Ms V Murangira, learned counsel, argued that the learned judge failed to consider that the charge had been fabricated against the appellant because of bad blood in the family. This led to the summoning of the meeting, which was attended by Semelesi Kaborangira (DW2) and Jackson Mayanja (DW3) amongst others. Learned counsel argued that had the learned Judge evaluated the evidence he should have found that PW5, who had a grudge against the appellant, was at the

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centre of fabricating this story against the appellant. PW5 did not want the appellant to stay in her home.

Ms Murangira further pointed out that it was never  
5 proved beyond reasonable doubt that the victim's hymen  
had been ruptured through sexual intercourse, as there  
were so many ways in which a hymen could be ruptured.  
In her view, the medical report was not conclusive as to  
the sexual act. She further singled out one Jack Kaiso  
10 who used to stay in the same room as the appellant but  
who was never called to testify as to what might have  
been taking place in their room. This was such a material  
witness, she submitted, that his absence created some  
doubt. This is why PW5 threatened to burn the victim if  
15 she declined to tell a lie and frame a case against the  
appellant.

Learned counsel prayed Court to allow this ground of  
appeal.

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In the alternative, Ms Murangira submitted that should  
ground I fail, she prayed for a reduction of the sentence  
to five (5) years, so that the appellant could be set free.  
She reasoned that the victim was 10 years old at the time

while the appellant was 23 and a maternal uncle to the victim. She prayed court to allow the appeal.

Mr. Simon Semalemba, learned Principal State Attorney  
5 (P/SA), submitted that the evaluation of the evidence by  
the learned trial judge was properly done. He was alive to  
the grudge existing in the family. However, it was not  
PW5 who had initiated the meeting on her own volition  
as suggested by Ms Murangira. It was the issue of the  
10 money, given to the victim and the subsequent discovery  
that the appellant who was a close blood relative was  
having sex with the victim, which prompted her to  
summon the victim's mother. Learned P/SA asserted  
that the fact that the appellant kept quiet throughout the  
15 meeting, after which he tried to take his own life  
rendered his guilt apparent and evident. It is the shame  
he felt that made him decide to do away with himself.

Regarding the issue of the victim's hymen, medical  
20 evidence established beyond doubt that it had been  
ruptured only 5-6 days previously. He submitted that  
there was no merit in the appeal and prayed Court to  
dismiss it.

The learned Judge observed: ***“The accused raised two issues why Jane Kaganda was against him. The first issue was that she had misappropriated his Shs. 20,000/= which his relatives had contributed towards his education. The second issue was that she was talking ill against him for having impregnated a girl on the village and she had vowed that if the girl had been her daughter she would have had the accused imprisoned. The issue of the money was resolved during the meeting and it was shared between them. There is no evidence that Jane Kaganda followed up the case of the village girl that the accused had made pregnant. It was also resolved in this same meeting that the accused would leave the Kaganda’s home in three months and so it was a question of time that he would leave Jane Kaganda in peace. Lastly it was not Jane Kaganda who initiated this case against the accused. It was the loss of money that the accused had been giving to the victim that triggered off the entire investigation that culminated into the girl’s revelation of what had been going on. So I reject the defence story that the case against the accused was fabricated. In any case there is no question that the sexual intercourse was fabricated because medical evidence confirmed it and there is no question that the accused was the culprit*”**

***because of the frequency of the act and the money that used to go with it.”***

It is apparent from the foregoing that the learned trial  
5 judge exhaustively scrutinised and evaluated all the  
evidence before him. We are in complete agreement with  
his findings, and cannot fault him in any way.

Ground I is thus disallowed.

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Submitting on ground 2, Mr. Semalemba asserted that  
the sentence was not excessive, considering the  
circumstances of the offence. The appellant was a  
brother to the father of the victim. Thus sexual  
15 relationship was a deplorable breach of trust on part of  
the appellant. In counsel's view, the sentence of 8 years  
was not harsh especially as the learned judge had  
considered the remand period. The sentence was in fact  
lenient because the offence carries a maximum sentence  
20 of death.

This Court can only interfere with the trial Judge's  
discretion in passing a sentence when the sentence is  
shown to be illegal, harsh or excessive or if it is  
25 inordinately too low under the circumstances of the case.

We agree with the learned judge that the appellant abused the hospitality of the Kagandas who had looked after him for over ten years. Worse still he introduced the  
5 little girl into early sexual escapades when he was her uncle.

It is our opinion that the sentence of 8 years is not excessive in the circumstances of the case. This ground  
10 of appeal also fails.

Consequently we find that the appeal is devoid of any merit. It is accordingly dismissed forthwith.

Dated at Kampala this 22<sup>nd</sup> day of July 2007.

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**HON JUSTICE G.M. OKELLO**

**JUSTICE OF APPEAL**

**HON JUSTICE A.E.N. MPAGI-BAHIGEINE**

**JUSTICE OF APPEAL**

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**HON JUSTICE S.G. ENGWAU**

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