THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.***

HON. JUSTICE A.TWINOMUJUNI, JA.

HON. JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO.40/03

BETWEEN

SENYONDO WILSON ::::::::::::::::::::::APPELLANT

AND

UGANDA::RESPONDENT

[Appeal from the judgment and sentence of Central High Court Circuit sitting at Mpigi (*Akiiki- Kizza J*) dated25th February 03 in HCCSC No. 484/01]

JUDGMENT OF THE COURT

The appellant was indicted for the offence of defilement contrary to section 129(1) of the Penal Code Act.

It was alleged by the prosecution that on 31st December 1999 at Geranga Village in Entebbe Sub-district, the appellant did unlawfully and carnally know Nakazzi Topista, a girl under the age of 18 years.

At the trial, the appellant denied the indictment. He was acquitted of the offence of defilement and instead he was convicted of a minor and cognate offence of indecent assault. He was sentenced to 12 years imprisonment-hence this appeal.

The case for the prosecution was that the appellant shared a house with the father of the victim, Nkwanga Wilson (P.W.2). On the day in question at about 8 p.m Nkwanga left home

to go to a nearby shop. He left his daughter then aged about three years at home with the appellant. At about 10 p.m he returned and found the appellant coming out of the bedroom where the young girl was sleeping. He became suspicious. On entering the bedroom he found the knickers of the victim removed and put beside her bed. He exchanged some words with the appellant who denied having defiled the victim.

At about 2 a. m. the victim was taken to a nurse for examination. She found semen in the victim's private parts. In the morning she examined her again and found that there was no penetration. Later the victim was taken to Entebbe Hospital for medical examination. The matter was reported to the authorities and the appellant was arrested and charged.

In his unsworn statement given at the trial, the appellant denied the allegations. He stated that the victim was examined and nothing was found in her private parts. The learned trial judge believed the prosecution evidence but found that no penetrative sex had occurred. He convicted the appellant of indecent assault and sentenced him to 12 years imprisonment.

The memorandum of appeal filed on his behalf had one ground namely that the learned trial judge erred in law and fact when he failed to adequately evaluate the evidence and thus came to a wrong decision that the evidence could sustain a charge of indecent assault.
Ms Luswata-Kawuma represented the appellant on state brief while Mr Kaamuli Principal State Attorney represented the respondent.

In her submissions, Ms Luswata-Kawuma stated that the charge of indecent assault cannot be sustained. She pointed out that the circumstances surrounding the assault must be capable of being considered by a right –minded person as being indecent. She further stated that the prosecution had to prove the participation of the appellant and an assault which is indecent. The victim was not called as a witness and no other person witnessed the assault, learned counsel submitted. She submitted that PW1 was the first to examine the victim and yet she was not a nurse and her experience was not stated and she did not give useful information. She further pointed out that the victim was taken to Entebbe Hospital for medical examination but the medical report was deliberately withheld by the prosecution. She cited the case of ***Oketcho Richard v Uganda- SCCA No.26/95*** in which the Supreme Court had occasion to consider failure by the prosecution to call medical evidence when a complainant had been medically examined. Learned counsel claimed that if medical evidence had been adduced, it would have been adverse to the prosecution case.

In reply Mr Kaamuli did not agree. He submitted that when PW 2 returned home he met the appellant coming out of his (the witness) room and the knickers of the victim had been removed. Counsel further stated that when PW2 questioned the appellant what he was doing in his bedroom he never gave any account. It was his submission that when the victim was examined by a nurse she found semen and inflammation in her private parts.

On medical evidence, the learned State Attorney stated that the prosecution did not withhold it deliberately because the evidence of PW1 and PW2 established that there was indecent assault.

On the sentence imposed, he submitted that it was proper.

Section 128 of the Penal Code Act provides for indecent assault. It reads:

"(1) Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years with or without corporal punishment.

(2) It shall be no defence to a charge of indecent assault on a girl under the age of eighteen years to prove that she consented to the act of indecency.

(3)Any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl, or intrudes upon the privacy of such woman or girl, commits a misdemeanor and is liable to imprisonment for one year."

The word indecent assault is not defined under the Penal Code Act. Osborn's Concise Law Dictionary 8th Edition defines indecency as an act which is "offensive to public decency and morality". The same dictionary defines indecent assault "as an assault (or battery) accompanied by circumstances of indecency."

In the case of ***DPP V Rogers [1943] 2 ALL ER 834*** Lord Goddard ***said:***

"Before you can find a man guilty of an indecent assault, you have to find that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency."

In another case of ***R.v Court [1987]1 All ER 120*** the court held that the essential element of an indecent assault was that the accused knew or was reckless about the existence of circumstances which were indecent, in the sense of contravening standards of decent behaviour in relation to sexual modesty or privacy.

This means that in order for an accused person to be convicted of indecent assault, the prosecution must prove an act which is accompanied by utterances suggestive of sexual intercourse.

In the appeal now before us, there was no evidence of what the appellant did since the alleged incident was not witnessed by anybody. The victim did not testify and her father did not ask her any questions.

PW 1 who was the first to examine the victim stated in her evidence of what she found:

"I examined the child's vagina and I found that the private parts were full of semen and it was slippery. I did not see anything else.

The following day I examined her again and found her private parts inflamed. It appears there was no penetration. This inflammation was about one month old."

The qualification of this witness as a nurse was not established by the prosecution. In her examination in chief she stated that she was a nurse. In cross-examination she stated that she did not get the nursing certificate. The learned judge in convicting the appellant based himself on the testimony of this witness. He said:

"I now turn to the unlawful nature of the sexual act. In order for the act to be unlawful, there must be have been penetration. PW1 who examined the victim stated that he saw no sign of penetration. What she saw was semen in the victim's private parts and there was some inflammation, but this was old, i.e about 1 month old, which could not have been caused that day.

In the circumstances and in full agreement with both assessors, I find that the state has not proved the unlawful sexual act involving the victim that material day. I accordingly acquit him of defilement, but I find him guilty of indecent assault c/s 122(1) of the Penal Code Act and he is accordingly convicted of the same."

The presence of semen in the victim's private parts suggests that there was penetration and ejaculation. The victim was examined at Entebbe Hospital. Although the summary of the case stated that the report would be produced in evidence at the trial, however, it was not produced. We think that failure by the prosecution to adduce this piece of evidence left the

case against the appellant very weak. We have serious doubts whether any assault indecent in nature took place as the learned judge found. In the circumstances it will be unsafe to allow the conviction to stand.

We allow the appeal, quash the conviction and set aside the sentence and order for the immediate release of the appellant unless he is otherwise lawfully held,

Dated at Kampala this 15th day of December 2009

L.E.M. Mukasa-Kikonyogo

Deputy Chief Justice

A. Twinomujuni

Justice of Appeal

C.K.Byamugisha

Justice of Appeal