

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.49 OF 1999.

CORAM: HON. MR. JUSTICE G.M. OKELLO, JA.
HON. LADY JUSTICE, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA.

TWEHAMYE ABDUAPPELLANT

VERSUS

UGANDARESPONDENT

[Appeal from a conviction and sentence of the High Court of Uganda at Mpigi (The Hon. Lady Justice C.A. Okello Ag.J.) dated the 24th day of April, 2000, in Crim. Session Case No. 203/97].

JUDGMENT OF THE COURT

This appeal is against both conviction and sentence. The appellant Abdu Twehamye was convicted of defilement c/s 123(1) Penal Code, by the High Court (C.A. Okello J.) at Kampala on 29/4/1999. He was sentenced to seven years imprisonment.

The background is as follows. On 20th September 1996, at Kitemu village, Mpigi District, at around mid-day, the victim, PW3, then aged 7 was taken to the appellant's house by the appellant's wife. (She did not testify.) The appellant was being employed as a shamba-boy by the victim's mother, Irene Kalibala, PW2. The appellant and his wife lived about 300 metres away, in the trading centre. After lunch, both the appellant's wife and the victim took a nap on her bed. After sometime the appellant's wife woke up to go, leaving the victim still asleep. When the wife had left, the appellant came into the room, found the victim asleep and had sexual intercourse with her. The victim woke up and ran to her house where she informed the house girl about her ordeal. (The house girl did not testify). The victim's mother was informed immediately on her

return from work in the evening. On examining the victim's private parts, she found them bruised and the underwear wet with semen. The appellant in the meantime had escaped. A search was mounted and he was traced deep in the village, by his brother Benon Zabasajja, PW4. He was charged with defilement. His defence was that Irene Kalibala framed him up because she owed him money for his wages. The learned judge rejected the defence and convicted him as charged.

The memorandum of appeal comprises two grounds:

“1. The learned Trial Judge erred in law and in fact in convicting the Appellant of the defilement without establishing that the onus of proof and the weight of collaboration evidence relied upon as supporting the third ingredient of the offence, inter alia “that the Appellant was the person who had the unlawful sexual intercourse with the victim” was unsustainable and/or undischarged to the standard required by law, a decision which caused a miscarriage of justice to the Appellant;

2. The Learned Trial Judge erred in law in sentencing the Appellant to 7 years imprisonment for defilement, a decision which was manifestly harsh and excessive, was so premised on a wrongful conviction, with due respect.”

Regarding Ground No. 1, Mr. Peter Nagemi appearing for the appellant, on a state brief, submitted that the conviction was unsustainable as the burden of proof had not been discharged. He pointed out that there was no direct evidence pointing to the appellant as the victim's assailant nor was her story corroborated. He stated that the judge relied on circumstantial evidence which he thought was unsafe.

Ms. Damali Lwanga, Principal State Attorney, supported both the conviction and sentence. She submitted that the learned judge relied on the evidence of Irene Kalibala, Benon Zabasajja and Pc Ote who gave corroborative evidence of PW3's testimony. The learned Principal State Attorney pointed out that the appellant's subsequent conduct and his alibi which was found to be all lies and a sham were all corroborative of the complainant's story.

The learned trial judge held thus:

“In this regard, court has considered the evidence of the accused, that he was arrested from his home, court rejects the accused version of his arrest because of the overwhelming evidence of arrest given by PW2 and PW4, the latter being his brother. Court finds that the accused was not arrested from his house but that of Bujereje where he was hiding from his crime because he had a guilty conscious. Thus plus his defence of arrest in advance of the crime is conclusive evidence of in culpability (sic) incapable of any explanation but guilt and so I treat it.”

The victim reported the incident to her mother, Irene Kalibala immediately she returned from work in the evening. The mother found the private parts bruised and her underclothing wet with semen. The victim named the appellant as her assailant. Furthermore the circumstances under which the appellant was traced by his own brother Benon Zabasajja locked inside somebody else’s house at around 7p.m. and in the absence of the owner of the house was clearly indicative of an attempt to avoid arrest and affords a cogent presumption of guilt. His story in court that he was arrested from his own house at around 3p.m. because of a grudge with the victim’s mother is a blatant lie and would also go to corroborate the complainant’s story under the circumstances of this case. The evidence of the victim, her mother and the appellant’s brother was closely knit, impeccable and pointed to the appellant’s guilt without any doubt.

Mr. Nagemi challenged the joint opinion of the assessors as being fatal to the conviction. He contended that each assessor should have given his own opinion in accordance with Section 81 Trial of Indictments Decree. We think and it is the practice that once both assessors are unanimous in their opinions, a joint opinion would suffice. It would be otherwise if they differed. Ground No. 1 therefore fails.

Mr. Nagemi did not make any submissions on Ground No. 2 concerning the sentence.

We therefore dismiss the appeal. The conviction and sentence passed by the trial Court are upheld.

Dated at Kampala this 19th day of May 2000.

G.M. Okello

Justice of Appeal

A.E.N Mpagi-Bahigeine

Justice of Appeal

S.G. Engwau

Justice of Appeal