THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE G.M. OKELLO, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.
HON. JUSTICE S.B.K. KAVUMA, JA.

CRIMINAL APPEAL NO. 287 OF 2003

ZUNGU DENIS ::APPELLANT

VERSUS

UGANDA :: RESPONENT

[Appeal from the judgement of the High Court at Mbale (Mwondha, J.) dated 24-7-2003 in Criminal Session Case No. 209 of 2003]

REASONS FOR THE JUDGEMENT OF THE COURT

This is an appeal from the judgement of the High Court whereby the appellant was convicted of defilement contrary to section 123 (1) of the Penal Code Act and was sentenced to 20 years imprisonment. On 6th February 2007 we heard the appeal, and allowed it, but reserved our reasons which, we now give.

The prosecution case was that on the 3rd day of August 2002 at Nakisule village in Pallisa District, Zungu Denis, the appellant, had unlawful sexual intercourse with the complainant who was below the age of 18 years. On the material day, there was a last funeral rites ceremony at the village. When Nakoma Margaret, PW2, was going towards the latrine at around 3.00 pm, she saw the appellant having sexual intercourse with the complainant. They were in a banana plantation. The complainant's dress had been pushed up and she was holding her knickers in her hands. The appellant had removed his trousers and they were on the ground. The witness raised an alarm, which was answered by others. The appellant was arrested, taken to the Local Council authorities from where he was forwarded to the police. He was charged with the offence of defilement. PW2 further testified that the victim had told her that the appellant had defiled her and given her two hundred shillings. The victim gave

unsworn testimony in which she said that she did not know the appellant and had never seen him before the trial in the High Court. According to the medical report that had been admitted in evidence under section 64 of the Trial on Indictment Act, the doctor found that the complainant was not strong enough to put up a resistance. There was penetration though the hymen had not been ruptured.

In his defence, the appellant totally denied the offence. The learned trial judge believed the prosecution case, rejected the appellant's defence and convicted him as charged.

Dissatisfied with the judgement of the High Court the appellant filed his appeal to this court on the following grounds.

> **"1. The learned trial judge erred in law and fact in failing to direct the jury on the standard of proof thus occasioning a miscarriage of justice.**
>
> **2. The learned trial judge erred in law and fact when she failed to vigorously evaluate the evidence on record and thus erroneously finding the accused guilt of the offence of defilement.**
>
> **3. The learned trial judge erred in law and fact in failing to direct the jury and herself to approach the child's evidence with caution in the circumstances of the case.**
>
> **4. The learned trial judge erred in law and fact alluding to the weaknesses of the defence case and thereby seemed to illegally shift the evidential burden upon the appellant.**
>
> **5. The learned trial judge erred in law and fact when she sentenced the appellant to twenty years imprisonment (Life imprisonment)."**

Mr. Hassan Kamba, learned counsel for the appellant, argued all grounds separately beginning with ground 2. We shall handle grounds 2, 3 and 4 together as they are interrelated and concern the evaluation of the evidence. On grounds 2,3, and 4, counsel's complaint was that the learned trial judge did not properly evaluate the evidence. Counsel submitted that the prosecution evidence did not prove that sexual intercourse had taken place. According to counsel, PW2 did not see the appellant having sexual intercourse with the complainant. Besides, medical evidence did not

prove that the complainant was defiled. He argued further that the complainant's evidence was valueless. Counsel criticised the learned judge for basing the conviction on the weakness of the defence rather than the strength of the prosecution case.

Mr. Ahimbisibwe Harrison, learned Senior State Attorney, disagreed. He supported the trial judge's finding that PW2 saw the appellant committing the offence. It was broad day light and she must have seen what was happening. He submitted that medical evidence supported her testimony. In counsel's view, the prosecution evidence was sufficient to warrant the appellant's conviction.

We note that the evidence to implicate the appellant was that of PW2. PW2 testified that she saw the appellant in the banana plantation lying on top of the complainant. He was having sexual intercourse with her. The appellant had removed his trousers and the victim's dress was pushed up and her knickers were in her hands. The witness was about 10 metres from the place where the appellant and the victim were. In our view, it is unbelievable that PW2 who was about 10 metres away from where the appellant and the complainant were could see them having sex. In our view, although it was daytime, that action could not have been observed from that far. Besides, the scene was in a banana plantation. We accept Mr. Kamba's submission that medical evidence did not prove that sexual intercourse had taken place. According to the medical evidence, the complainant's hymen was not ruptured and there were no injuries on her thighs, elbows or back. The report stated that there were signs of penetration but the doctor did not indicate to court what those signs were. We are, therefore, unable to know the basis of the doctor's opinion. An expert opinion as it is must be based on scientific grounds. We can not base ourselves on a baseless opinion. The complainant's unsworn testimony in court was as follows:

> **"I am Betty Nakoma Eluzabeth. I don't know my age. I go to school. I am in P.1 at Kakoma Primary School. I have seen him but I have never seen him. That's all."**

There was no cross-examination of this witness. In our opinion, the complainant's evidence did not at all connect the appellant to the offence. PW2's testimony to the

effect that the appellant gave the complainant two hundred shillings is hearsay. With due respect, the learned trial judge, should not have relied on it.

The submission by appellant's counsel that the learned trial judge based the appellant's conviction on the weakness of the defence case rather than the strength of the prosecution case is well taken. We have anxiously perused the record as indicated above and we find that there is no evidence to prove that the offence was committed by the appellant. It is obvious from the judgement that the learned trial judge, with due respect, concluded that the appellant was guilty of defilement based on the weakness of the defence. For example, the learned judge found that the appellant was a liar because he stated on oath that he had forgotten the name of PW3 who took him to the last funeral rites function.

It is trite law that the prosecution has a duty to prove the case against the accused beyond reasonable doubt. The learned judge properly stated that principle at the beginning of her judgement and in her direction to the assessors but did not, with due respect, apply it to the instant appeal.

It was for the foregoing reasons that we allowed the appeal.

Dated at Kampala this 23rd day of March 2007.

G.M. Okello
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL

S.B.K. Kavuma
JUSTICE OF APPEAL