THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND KANYIEHAMBA, JJSC)

CRIMINAL APPEAL No.38 OF 2001

BETWEEN

TIBIHIKA JOHNSON …… APPELLANT

AND

UGANDA …… RESPONDENT

[Appeal from the Judgment of the Court of Appeal at Kampala (Kato, Mpagi-Bahigene and Twinomujuni, JJ.A) dated 17th May, 2001 in Criminal Appeal 26 of 2000]

REASONS FOR THE JUDGMENT OF THE COURT

In the High court, the appellant, Tibihika Johnson, was tried for and convicted of the offence of defilement contrary to S.123(1) of the Penal Code Act and he was sentenced to imprisonment for ten years. His appeal to the Court of Appeal was dismissed. He appealed to this Court. On 25/6/2003 we heard the appeal, dismissed it and promised to give reasons in support of our decision. We now give the reasons.

The case for the prosecution was that the appellant and the family of the complainant, Kansiime Restetuta, (PW2) were neighbours and friendly. Prior to the defilement, the two families would visit and assist each other. So Kansiime Restetuta, the victim of defilement, knew the appellant well. On 23/10/1998, the

parents of Kansiime went visiting and asked the appellant to check on their home. Kansiimes' mother, Topista Nabukalu, (PW1), instructed her to prepare lunch which should include green vegetable sauce. As Kansiime was preparing the sauce, the appellant dropped in. He persuaded Kansiime to accompany him to his home to collect mushrooms for preparing better sauce. At his home, the appellant coaxed Kansiime first to enter his living room and later his bedroom to look for mushrooms. While she was in the bedroom, the appellant grabbed her, undressed her and forcefully had sexual intercourse with her while holding her mouth to prevent her from screaming. Gorreti, the wife of the appellant found the appellant in the act of defiling. Kansiime and Gorreti, reported to Topista separately that the appellant had defiled Kansiime. Kansiime was first examined, by a nurse on that day. On 31/10/1998, she was examined by Dr. Guma whose report showed that Kansiime's hymen had been raptured about two weeks before the date of examination.

During the trial, Topista, the mother of Kansiime, gave evidence and testified about the latter's defilement on 23/10/1998 and to the fact that Kansiime was 10 years. She was not cross-examined about the date of defilement and the medical examination of Kansiime. Kansiime herself gave evidence on oath. Her evidence fully incriminated the appellant, though, very surprisingly, she was not cross-examined by counsel for the appellant.

The appellant gave an unsworn statement claiming that he was not at the scene of crime because he had taken his sick wife to Mubende from where he returned on 26/10/1998.

In light of the overwhelming and unchallenged incriminating evidence, the learned trial judge convicted the appellant and sentenced him to 10 years. As we stated earlier, his appeal was dismissed by the Court of Appeal.

In this Court the memorandum of appeal contained two grounds. Mr. Bwengye, counsel for the appellant, argued the first ground and abandoned the 2nd ground which was on sentence. The substance of the ground argued is that the Court of Appeal erred in confirming the appellant's conviction because admission of medical evidence at the trial was irregular. Mr. Bwengye contended that medical evidence was improperly received under section 3 0 of the Evidence Act, and that this caused a miscarriage of justice since Dr. Guma who examined Kansiime did not personally testify.

Dr. Guma who had examined Kansiime did not testify. Instead, a Dr. Muhumuza Eri, who was familiar with the handwriting of Dr. Guma, produced the report authored by Dr. Guma. No reason was given why Dr. Guma did not turn up to testify nor was any law cited at the time Dr. Muhumuza testified, or subsequently, as authority for admission of the report. Other than the claim in the court below, by Mr. Zagyenda, that admission was made under S.30, we do not appreciate how Mr. Bwengye concluded that medical evidence was admitted contrary to section 3 0 of the Evidence Act. We think that the Court of Appeal was misled by Mr. Zagyenda's claim when the court stated that the medical evidence was admitted under S.30. We do not think that Dr. Guma's report was admitted under section 30.

It is our considered opinion that, even if the evidence of Dr. Guma is ignored, as indeed the trial judge did ignore it, because, although he alluded to it while summarising evidence, he did not base the conviction of the appellant on that medical evidence, there was ample evidence proving the guilt of the appellant beyond reasonable doubt. It was Mr. Zagyenda who raised in the Court of Appeal for the first time, the so called improper admission of medical evidence under S.30 of the E.A. We do not appreciate why he referred to that section when it had not been relied on by court during the trial. The Court of Appeal misdirected itself, when it stated that the trial judge had relied on Dr.

Guma's evidence and that, that evidence was admitted under S.3 0 of the Evidence Act.

However, in our opinion the misdirection by the Court of Appeal did not cause any miscarriage of justice whatsoever as contended by Mr. Bwengye.

It was for the foregoing reasons that we found no merit in the appeal which we dismissed.

Dated at Mengo this 27th day of October 2003.

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

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. KANYEHAMBA
JUSTICE OF THE SUPREME COURT