

UGANDA / JUDGMENT

Katende Mohammed v Uganda

[2003] UGSC 42 (16 December 2003)

[2003] UGSC 42

COURT

Supreme Court of Uganda

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 {\cs33\b\fl\insrsid72020\charrsid72020 [CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA
 AND KANYEIHAMBA, JJ. S. C]

\cs40\b\i\fl\super\insrsid72020\charrsid72020 th}\cs40\b\i\fl\insrsid72020\charrsid72020 June, 2001 in Criminal Appeal No.82 of 2000]

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June, 2003, we heard this appeal and dismissed it for lack of merit. We promised to give reasons in support of our decision. We now give the reasons.

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\par }\pard \s18\qj \li0\ri0\sb230\sl360\slmult1\widctlpar\faauto\rin0\lin0\itap0\pararsid72020 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 In the High Court, Katende Mohammed, the appellant was indicted for defilement contrary to section 12

3 (1) of the Penal Code. He was duly tried, convicted and sentenced to imprisonment for ten years.

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It was the case for prosecution that on 29/6/1998, at Kiwasa village in Luwero District, the appellant defiled Nabasanda Efrance, a girl under the age of 18 years.

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{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 Evidence adduced at the trial was that by 29/8/1998,}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 Efrance Nabasanda (PW1), the victim of defilement, was}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020

age 7 years old. She lived with her parents at Kiwasa{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 village. The appellant was a neighbour.
 Namaganda,}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }}

\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 (PW2) the mother of Nabasanda, left
 the latter at home}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020

with other young children, while taking her youngest}
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 child to hospital. The appellant called
 Nabasanda and}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 asked her to accompany him to a
 banana plantation to}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020

pick mangoes. She agreed. Upon reaching the banana}
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 plantation, the appellant grabbed
 Nabasanda tore her}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }}

\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 knickers and defiled her after which he
 warned her not}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020

to tell anyone about the defilement. Nabasanda left}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 the banana plantation crying. She met
 her mother and}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }}

\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 reported that the appellant had defiled
 her. She was}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 crying and blee

ding. A report was made to L. C.}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 officials and the appellant was
 eventually arrested,}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }}

\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 charged, and prosecuted and convicted.}
 {\cs35\fl\insrsid72020 }{\cs35\fl\expnd-2\expndtw-10\insrsid72020 He }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 was}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

\cs35\fl\expnd-2\expndtw-10\insrsid72020 }
 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 sentenced to ten years imprisonment.
 His appeal to the Court of Appeal was dismissed. He appealed to this Cou

rt and set out three grounds of appeal in his memorandum. His counsel, Mr. Sekabojja, abandoned the second ground of appeal and argued grounds 1 and 3 together.

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The complaint in the first ground was that the Court of Appeal erred in uph

olding the appellant's conviction because there was no sufficient corroboration of Nabasanda's evidence. The complaint in the last ground was that the Court of Appeal erred in upholding the conviction when the offence of defilement was not proved beyond r

e

asonable doubt. Mr. Sekabojja contended that there was not sufficient evidence to prove defilement beyond reasonable doubt. That there was no corroboration of Nabasanda's evidence. Mr. Elubu, Principal State Attorney, submitted that the distressed conditi
 on of Nabasanda, i.e., crying and bleeding, corroborated her evidence.

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 {\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 Section 38 (3) of the TID, 1970 reads as follows.

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 \f2\fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033
 {\cs34\b\if1\insrsid72020\charrsid72020 "Where in any proceedings, any child of tender years}{
 \cs34\b\if1\insrsid72020 called as a witness }\cs34\b\if1\insrsid72020\charrsid72020 does}
 {\cs34\b\if1\insrsid72020 }\cs34\b\if1\insrsid72020\charrsid72020 not}
 {\cs34\b\if1\insrsid72020 , }\cs34\b\if1\insrsid72020\charrsid72020 understand}{

the nature of
 an oath, his evidence may be received though

not given upon oath, if, he is

posed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth:

Provided that where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in supp

ort thereof implicating him."

Although by use of the expression "shall not be liable to conviction", the legislature does not seem to completely forbid conviction, it is clearly trite that no conviction of an accused can be based on the uncorroborated evid

ence of a child of tender years who testifies without swearing. Moreover this case has its peculiar features. The victim of the defilement, Nabasanda, appears to have been a very intelligent girl and an impressive witness. Part of her evidence runs as fol

lows: -

"I don't know when I first saw accused. I have seen accused for two years. A year has five months. I saw accused at Kiwaza near our home. He is not born in Kiwaza. I don't know his parents. He fetched water for Kiwanuka, our neighbour. It is a sho

rt distance between Kiwanuka's and out home. He worked for Kiwanuka for a long time. He used to pass our home on a bicycle carrying jerrycans. He spoke to me -three times. He told me that we go for mangoes all the three times. I went the first time and he

did bad things to me and I did not oblige the next times. He did so at 1.00 p.m. My mother had gone to hospital. Mulongo told me to go and fetch water for him. On my way from the well,

the accused called me from the home of Kiwanuka. I went to him. He threw me down and slept on

me. He tore my nicker. When he slept on me I felt bad blood came. He slept on me in our

coffee plantation. I

I left the banana

plantation. He did not give me the mangoes. I told my mother when I found her at home. I

told her Katende had defiled me. Mother took me to the hospital Kamila, I was examined by doctor who is a midwife. She examined my private parts"

From the foregoing there is no doubt that the witness

was possessed of intelligence and narrated accurately

what happened. Indeed from the answers she gave in the

Voire Dire, we do not appreciate why the trial judge

declined to swear her. Whatever the case, there is a

very important feature in her evidence on record. For}

{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 whatever reason not given on the record, Nabasanda was}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 not cross-examined.}

{\cs35\fl\insrsid72020\charrsid72020 \tab }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 Yet her evidence fully}{

\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 incriminated the appellant as the person who forcefully}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }{

\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 had sexual intercourse with her.}

{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 In normal}{

\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

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circumstances, her evidence, which was unchallenged, would have not required corroboration since it had fully implicated the appellant in the commission of the crime. But because of S.38 (3), the evidence needs corrob

oration. In this case, there was corroboration.

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{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 Nabasanda met her mother (PW2) immediately after the}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }{

\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 offence. She was in a distressed condition which}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 included crying and bleeding.}{

\cs35\fl\insrsid72020 }{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 These conditions}{\cs35\fl\expnd-2\expndtw-10\insrsid72020 }

{\cs35\fl\expnd-2\expndtw-10\insrsid72020\charrsid72020 corroborated her evidence as to the matter

of defilement. Then she reported to her mother that it was the appellant who had defiled her. By virtue of section 155 of the Evidence Act, her statement to her mother corroborates her testimony about the identity of her defiler. S.155 reads as follow

s:

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In order to corroborate the testimony of a witness, any former statement made by such a witness relating to the same fact, at or about the time when the fact took place, or before authority legally competent to investigate the fact, may be proved.

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iew of these provisions, we think that the evidence of Nabasanda was corroborated and, therefore, although the trial judge misdirected himself by holding that there was no corroboration, his judgment and that of the Court of Appeal upholding his decision,

are supportable on the ground that Nabasanda's evidence which fully incriminate the appellant was corroborated. On corroboration by previous statement. See }

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egoing reasons we dismissed the appeal. }{\cs35\fl\expnd-2\expndtw-10\insrsid72020

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