IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HOHOE, HELD ON THURSDAY THE 30TH DAY OF MARCH 2023 BEFORE HIS LORDSHIP JUSTICE AYITEY ARMAH-TETTEH

NO. F17/7/2023

SAMUEL NTEM DZIBORDI - APPELLANT

VRS

THE REPUBLIC - RESPONDENT

APPELLANT : PRESENT

COUNSEL MR. THEOPHILUS DZIMEGA FOR THE APPELLANT PRESENT

MR. ANTHONY GHATTIE FOR THE RESPONDENT ABSENT

JUDGMENT

The appellant, Samuel Ntem Dzigbordi, appeals against the conviction and sentence imposed on him on 22 September 2020. The Circuit Court , Kpando presided over by His Honour Nana Brew imposed a sentence of 10 years imprisonment on appellant, having convicted appellant after trial on defilement of a child under 16 years.

I have read the submissions of Counsel for both Appellant and Respondent and I will allow the appeal to the extent that the conviction and sentence of 10 years for defilement is set aside and substituted with a conviction of Indecent Assault and a sentence of eighteen(18) months imprisonment .These are the reasons for coming to that conclusion.

The appellant was charged on one count as follows:

STATEMENT OF OFFENCE

Defilement: contrary to section 101 of the criminal offences Act 29/60 as amended by section 11 of act 554

PARTICULARS OF OFFENCE

Samuel Ntem Dzigbordi @ CARPON: Aged 22: commercial rider: on the 28th day of June 2020 at about 2.00 pm at Alavanyo Agorxoe in Kpando Circuit and within the jurisdiction of this court, you carnally know one MARY NTEM ATTAWA.

The Appellant pleaded not guilty to the charge when he was arraigned before the Court on 4 September 2020. After a full trial, he was convicted and sentenced to 10 years IHL.

It is against this conviction and sentence that the appellant has appealed to this Court for redress. Pursuant to an order for extension of time within which to appeal, the Appellant on 19 January 2023 filed a Notice of Appeal (which should have a Petition since this is a criminal case). The ground of appeal as found in the Notice of Appeal are as follows:

1. That the conviction and sentence of the Appellant is wrong in law as the honourable judge erred in holding that an allegation of insertion of finger into the vagina of the victim amounts to defilement.
2. The conviction and sentence cannot be supported by the evidence on record.

Briefly, the facts of the case are as follows: The victim aged 7 is a kindergarten- two pupil at Alavanyo Agorxoe Basic School. The appellant is a 22 year old commercial motor rider residing in the same town. The appellant is related to the victim but resides in a separate house with his stepmother. On 28 June 2020 at about 2.00 pm, the complainant who is the mother of the victim sent her to appellant's stepmother who sells foot wears to collect a new pair of slippers she had ordered from the market. The victim on reaching met only the appellant in the house. The appellant lured her into a room under the pretext of

helping her to locate the said stepmother and there, he inserted his finger into her vagina. Afterwards he gave her 50 pesewas to buy sweet and told her not to disclose the ordeal to anybody. On 30 June 2020 the complainant detected a change in the victim's walking and her vagina swollen. She questioned the victim and he said it ws the appellant who inserted his finger in her vagina. A medical form was issued to the complainant and after a medical examination, the medical form was endorsed indicating that, the victim's hymen was broken due to the ordeal. A complaint was made, and the appellant was arrested.

It is trite law, that an appeal constitutes a re-hearing especially when the Appellant comes under the omnibus ground of appeal that the judgment is against the weight of evidence (in a criminal case it is that the verdict cannot be support by the evidence on record), and what the re-hearing means is that the appellate court is to evaluate the evidence and assess all documentary evidence and case law and come to its own conclusion. This court being an appellate one in this matter, is therefore entitled to look at the entire evidence and come to its own conclusion on both the facts and law.

In **Agyeiwaa v. P & T Corporation** [2007-2008] 2 SCGLR 985, the Supreme Court per Wood C J said at 989 as thus:

> The well-established rule of law is that an appeal is by rehearing, and an appellate court is therefore entitled to look at the entire evidence and come to the conclusion on both the facts and the law.

See also the case of **Owusu Domena v. Amoah** [2015-2016] 1 SCGLR 790 where the Supreme Court per Benin JSC held as follows:

> 'Where the appeal was based on the omnibus ground that the judgment was against the weight of evidence, both factual and legal arguments would help advance or facilitate determination of factual matters.'

Again, when the appellant comes under the omnibus ground, he should be able to point out the evidence if applied to his case he would have been successful or evidence that were attributed to him that made him lose the case or made him fail to win.

Thus in **Akufo -Addo v. Catheline** (1992) 1 GLR 377, the Apex Court of the land had this to say on the allegation that a judgment is against the weight of evidence.

> That whenever an appeal is based on the omnibus ground that the judgment is against the weight of evidence, the appellate court has jurisdiction to examine the totality of evidence before it and come to its own decision on the admitted and undisputed facts. Thus, when an appellant complains that the judgment is against the weight of evidence, he is implying that there are pieces of evidence on record which, if applied properly or correctly, could have changed the decision in his favour or certain pieces of evidence have been wrongly applied against him. The onus in such an instance is on the appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against.

The issues that in my view arise in this appeal is whether or not the appellant had carnal knowledge of the victim, and this defiled her.

I will deal with the two grounds of appeal together.

THE OFFENCE OF DEFILEMENT

INGREDIENTS OF OFFENCE

Section 101 of Act 29/60 (supra) reads:

(1) For the purposes of this act, defilement is the natural or unnatural carnal knowledge of a child under sixteen years of age.

(2) A person who naturally or unnaturally carnally knows a child under sixteen years of age, whether with or without consent, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than seven (7) years and not more than twenty-five (25) years.

From the above provisions, the ingredients of the offence defilement are :

1. That the victim was under the age of sixteen (16) years at the time of the act.
2. That someone has had natural or unnatural carnal knowledge of the victim herein.
3. That it was the accused who had natural or unnatural carnal knowledge of the victim and;

See Republic v. Yeboah [1968] GLR 248-256 per Baidoo J.
For the prosecution to secure conviction it has to prove all the three ingredients beyond reasonable doubt.

From the facts the victim is 7 years and a kindergarten -two pupil. The age of the victim was not an issue during the trial. Under cross examination of the victim, PW1, the appellant did not challenge or contradict the age of the victim. And under cross examination of the appellant when the age of the victim was put to him, he did not deny it. This is what ensued under cross examination:

Q. I put it to you that the girl is 7 years old.

A. I don't know her age.

Having failed to deny the age of the victim, the appellant would be deemed to have admitted the age of the victim as 7 years. In my view the prosecution was able to prove that the victim was under the age of sixteen years and the trial judge was right as he found at page 8 of the proceedings that the victim was 7 years when the incident occurred.

The next ingredient of the offence is whether someone had carnal knowledge of the victim.

Section 99 of Act 29/60 (supra) provides what will constitute carnal knowledge or unnatural carnal knowledge and it provides as follows:

> When on the trial of a person for a criminal offence punishable under this act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge is complete on proof of the least degree of penetration.

In **Gligah & Atiso v. The Republic** [2010] SCGLR 870 the Supreme Court had the opportunity to define carnal knowledge:

> Carnal knowledge is the penetration of **a woman's vagina by a man's penis**. It does not really matter how deep or how little the penis went into the vagina. So long as there was some penetration beyond what is known as brush work, penetration would be deemed to have occurred and carnal knowledge taken to have been completed.(**Emphasis mine**)

The victim, PW1 in her evidence testified that the appellant inserted his fingers in vagina.

> I met the accused in the house then he told me that I should accompany to a room to call his said stepmother then I followed. In the room, he inserted his finger into my vagina through the side of my panty.

The Victim never said the appellant inserted his penis into her vagina. Indeed PW2 also testified that when she questioned the victim about her swollen vagina and the abnormality in her manner of walking, the victim told her that the appellant inserted his finger into her vagina. This evidence was not challenged though by the appellant when he cross examined the victim. The Appellant inserting his hand into the vagina of the victim does not satisfy the definition of carnal knowledge as defined by section 99 and explained by the Supreme Court in the **Gligah & Atiso v. The Republic**.(Supra)

From the decisional authorities, in a criminal case the prosecution is to prove each essential ingredient of the offence an accused person is charged with. And the prove is proof beyond any reasonable doubt. If a prosecution is unable to prove one out of several essential ingredients of an offence, the accused person must be acquitted of the offence charged.

In **Frimpong alias Iboman v The Republic (2012) 1** SCGLR 297 at 313 DOSTE JSC had this to say:

> 'All is well known, it is trite law that in criminal cases, the duty on the prosecution is to prove the allegations against the appellant beyond all reasonable doubt. ***The prosecution have a duty to prove the essential ingredients of the offence*** with which the appellant and the others have been charged beyond any reasonable doubt. The burden of proof remains on the prosecution throughout and it is only after a prima facie case has been established, i.e a story sufficient enough to link the appellant and others to the commission of the offences charged that the appellant, therein accused is called upon to give his side of the story.' ***Emphasis*** .

In the case of **The Republic** v **Francis Ike Uyanwune** (2013)58 GMJ 162 at 177 **ADJEI J.A** at page 177 had this to say on the subject:

> "The law is that an accused person is presumed innocent until his guilt is proved beyond reasonable doubt and it the **duty of this court to satisfy itself that all the ingredients of the offence of defrauding by false pretences contrary to section 131 of the criminal offences Act, 1960 were proved**....." (***Emphasis mine)***

In the instant appeal, one of the essential ingredients of the offence of defilement of a female under 16 years contrary to section 101 of Act 29 as amended by Act 554 was not proved by the prosecution. The prosecution failed to establish that the appellant had natural or unnatural carnal knowledge of the victim.

To the extent that the prosecution was unable to establish that appellant had carnal knowledge of the victim, the trial Judge was wrong in holding that the appellant defiled the victim.

Even though the evidence adduced at the trial by the prosecution did not support the charge of defilement, the trial Judge had the authority to consider whether the evidence led by the prosecution supports any lessor offence pursuant to section 154(2) and 159(1) of Criminal and other Offences Procedure Act, 1960 (Act 30) as eloquently argued by learned Counsel for the Respondent.

Section 154(2)

> Where a person is charged with an offence and facts are proved which reduce it to a lesser offence, that person may be convicted of the lesser offence although not charged with it.

Section 159(1)

> Where a person is charged with rape, unnatural knowledge or defilement and the original charge is not proved, that person may be convicted of the lesser offence of indecent assault although not charged with that offence.

The facts as established by the prosecution proved that the appellant rather inserted his finger into the vagina of the victim and his conduct rather satisfies the offence of indecent assault which is a lesser offence to the charge of defilement.

INDECENT ASSAULT

Section 103 of Act 30

(1) A person who indecently assaults another person commits a misdemeanour and is liable on conviction to a term of imprisonment of not less than six months.

(2) A person commits the criminal offence of indecent assault, without the consent of the other person-

(a) forcibly makes a sexual bodily contact with the other person: or

(b) sexually violates the body of the other person, in the manner not amounting to carnal knowledge or unnatural carnal knowledge.

The punishment for a person convicted of indecent assault under section 103 is punishable to a term of imprisonment not less than 6 months and not more than 3 years. This is lesser than the punishment for defilement which is a term of imprisonment not less than 7 years and not more than 25 years. The offence of indecent assault is therefore a lesser offence to the offence of Defilement.

In conclusion, set aside the conviction and sentence of the appellant for defilement and find him guilty of Indecent Assault. I convict him accordingly and sentence him to eighteen (18) months imprisonment. The sentence is to take effect from the date he was convicted and started serving the sentence imposed by the Circuit Court.

(SGD.)

AYITEY ARMAH-TETTEH, J

(JUSTICE OF THE HIGH COURT)