THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0125 OF 2003

UGANDA :: PROSECUTOR

VERSUS

KIIZA BOSCO :: ACCUSED

BEFORE: THE HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused, Bizimana Kiiza Bosco was indicted for defilement contrary to sections 123 and 124 of the Penal Code Act. The particulars of the offence alleged that the accused on the 27th day of July 2002 at Kameme village, in Kanungu District, had unlawful sexual intercourse with Mpirirwe Judith.

The salient features of the case are as follows:- On the 27th day of July 2002 at about 6.00p.m. the victim went to fetch water, the

accused approached her, grabbed her, tore her clothes and knickers and forcefully had sexual intercourse with her.

The victim tried to make an alarm but the accused held her mouth. He overpowered her and had sexual intercourse with her for about 30 minutes whereupon she felt a lot of pain. After that she escaped and ran while making an alarm which was answered by someone she did not know. The matter was reported to the victim's grandfather who in turn reported to the area local council chairman who mobilized and arrested the accused. Hence the charge.

Upon arraignment, the accused denied the charge thereby putting in issue all the essential elements of the alleged offence.

It is trite law that the prosecution must prove beyond all reasonable doubt each and every essential ingredients of the offence charged before any meaningful conviction can be secured. An accused does not bear the duty to prove his innocence since he is presumed innocent until proved guilty or

until he has pleaded guilty. This has been the law since the decision in **Woolmington Vs DPP [1935] AC 462.** The above principles were further captured under Article 28 (3) (a) of our 1995 constitution of Uganda: See also **Oketcho Richard Vs Uganda; Supreme Court Criminal Appeal No. 26 of 1995** (unreported).

The essential elements requiring proof beyond reasonable doubt in the offence of defilement are:-

(a) that the victim was at the time of the alleged commission of the offence below the age of 18 years;

(b) that there was unlawful sexual intercourse with the victim. In that connection sexual intercourse is signified by proof of penetration however slight of the assailant's penis into victim's vagina or sexual organ.

(c) That it was none other than the accused who was the assailant: **Bassita Hussain Vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995** (unreported).

To prove the above ingredients the prosecution called the evidence of the following witnesses: Judith Mpirirwe (PW1) who was the victim; No. 19363 D/Constable Bernard Turyasingura (PW2) who visited the scene of crime in the company of the victim and drew sketch plan thereof. He also retrieved a torn knickers and skirt from the victim and exhibited them;

Shiraz Mucungwe (PW3) who responded to the victim's alarm. The victim told him that the accused had forceful sexual intercourse with her. He saw the accused following the victim but the accused later disappeared upon realizing that he had been discovered;

Mirika Bansekuyi (PW4) testified that the victim was her grand daughter. She testified that the victim reported to her that the accused had assaulted her sexually. She was shabby and had scratch marks on her body. Her clothes were torn. She examined the victim's private parts where she found blood clots. She handed the victim to her grandmother who went to the local authorities who later arrested the accused.

The prosecution further relied on evidence which were admitted during preliminary hearing under section 66 of Trial on Indictments Act. These were birth certificate of the victim, medical examination report of the victim and the statement of No. 29433 P.C. Aguta who was the arresting officer.

The accused on the other hand made a sworn defence and relied on the defence of alibi and grudge. The grudge was that the victim's grandfather had accused him falsely of stealing his money from Zaire.

Whether the victim was a girl below 18 years, the prosecution contended that she was. The prosecution relied on the victim's testimony. The victim testified that she was 19 years old and that she was born in 1986. The prosecution relied also on the medical report of Dr Birungi who had examined the victim on 28/7/2002 from Kambuga Hospital. That medical evidence established that the victim was in her mid 15. Lastly there was the evidence of

victim's grandmother (PW4) who testified that the victim was 18 years old and that she was defiled when she was 15 years old.

In **Francis Omuroni Vs Uganda Court of Appeal Criminal Appeal No. 2 of 2000** it was held inter alia, that in defilement cases medical evidence is paramount in determining the age of the victim and that the doctor is the only person who could professionally determine the age, in the absence of any other evidence, like a birth certificate etc.

In the instant case the medical examination report of Dr Birungi which established the victim's age at 15 was not discredited. In fact it was admitted under a memorandum filed under section 66 of the Trial on Indictments Act. The law has since been that once a fact or a document is admitted or agreed upon in a memorandum filed under section 66 of the Trial on Indictments Act it is deemed to be proved: See **Abasi Kanyike Vs Uganda; Supreme Court Criminal Appeal No. 34 of 1989** (unreported).

In addition to the medical evidence, the prosecution further relied on the victim's birth certificate which was also admitted under a memorandum filed under section 66 of the Trial on Indictment Act. That certificate established that the victim was born on 15/10/1986. When the above pieces of evidence are considered together with that of the victim's grandmother, it becomes overwhelmingly clear that the girl victim was a girl below 18 years at the time of the alleged commission of the offence. It was in appreciation of the above evidence that the defence did concede that the girl victim was below 18 years.

In regard to whether the girl victim experienced sexual intercourse, all that was needed is to prove that she was penetrated however slight. Even proof of rupture is not necessary. It is also not necessary to prove actual emission of seed. It is also trite law that normally in sexual offences, the evidence of the victim is the best evidence on the issue of penetration and even identification. Of course other cogent evidence may suffice to prove such facts in the absence of that

best evidence. The case in point is **Omuroni Francis Vs Uganda** (supra).

See also **Bassita Hussain Vs Uganda Supreme Court Criminal Appeal No. 35 of 1995** (unreported).

In the instant case, the victim herself testified that on the fateful day which was 27/7/2002 she went to fetch water from a spring and while there someone grabbed by force, tore her knickers and had forceful sexual intercourse with her which lasted 30 minutes whereupon she felt a lot of pain. The doctor who examined the victim on 28/7/2002 also confirmed that she had signs of penetration. Her hymen had ruptured less than 16 hours of the examination and she was still bleeding from her private parts. The above pieces of evidence were corroborated by the of the victim's grandmother (PW4) who stated that the victim returned from the well while crying and narrated to her ordeal, she examined her private parts and found therein blood clots.

From the above evidence I have no hesitation that the victim did experience sexual intercourse. I do agree with the testimony of PW3 and PW4 that the victim was highly distressed by the experience she was subjected to. Although she was very composed during her testimony, I saw tears rolling down her eyes as she narrated her story. For the above reasons I agree with both assessors that this ingredient has also been proved beyond all reasonable doubt.

In regard to the identity of the person who participated in the offence, the prosecution relied mainly on the victim's evidence (PW1) and that of Shiraz Mucungwe (PW3). The accused relied on the defence of alibi and grudge.

The victim (PW1) testified that on the fateful day the accused who was very well known to her got her at a well where she had gone to fetch water. The accused grabbed her and tore her knickers and dress and forcefully had sexual intercourse with her for about 30 minutes from 6.00p.m. The above evidence was corroborated by circumstantial testimony of Shiraz Mucungwe (PW3) who

testified that at about 7.00p.m. he heard an alarm from the direction of the well and ran in answer thereto. He met the victim being followed by the accused. He tried to apprehend the accused but he ran away.

I noted the demenour of the victim. She impressed me as a truthful witness who narrated her ordeal calmly although in tears. She knew the accused very well and the offence took place at 6.00p.m. when there was still natural light. The incident took about 30 minutes. Sexual intercourse is normally initiated face to face. There was therefore favourable conditions for proper and unmistaken identity: See **Isaya Bakimu Vs Uganda; Supreme Court Criminal Appeal No. 24 of 1989** (unreported).

The victim's evidence was corroborated by the evidence of (PW3) who answered her alarm and got the accused in the company of the victim as she was narrating to him what the accused had done to her. According to PW4 the victim further reported to her that the accused was the one who had forcefully ravished her. In **Francis Omuroni Vs Uganda; Court of Appeal Criminal**

Appeal No. 2 of 2000 it was held inter alia that in sexual offence any information by a complaint to a third party as to the identity of her assailant is relevant and admissible. In that context I find the testimonies of PW3 and PW4 very relevant. When considered together with the evidence of the complainant, they clearly rule out the defence of alibi and grudge raised by the accused. The accused was clearly at the scene but he was merely trying to wriggle out of this mess. The grudge was a mere afterthought unless it was from either the victim PW1 and the persons the victim reported the incident to i.e. either PW3 or PW4.

However Mr Mashiruru whom the accused said had begrudged him was fifth party to whom the incident was reported to and it was reported to by the victim's grandmother.

For the above reasons I rule that the defence raised by the accused were merely to mislead court. The prosecution has therefore proved this case beyond reasonable doubt.

I must say at this juncture that during the middle of this trial one gentlemen assessor allegedly messed himself up and was arrested and charged with defilement of a school girl. The trial accordingly ended up with only one assessor. After carefully summing up he advised that the accused be found guilty. I am in full agreement and do hereby find the accused guilty and convict him accordingly.

RUBBY AWERI OPIO

JUDGE

1/9/2005.

14/9/2005:-

Accused present.

Twinomuhwezi for the state.

Ndimbirwe present for the accused for Tibaijuka.

Judgment read in open court.

Twinomuhwezi:-

He has no previous record. He is charged with a serious offence with maximum of death sentence. Defilement cases are rampant here. There is a public out cry. He has been on remand since August 2002. Let him be given an appropriate sentence to deter others. I so pray.

Ndimbirwe:-

This is a serious offence. I pray court to be considerate. He has spent along time on remand. We pray for leniency. Crimes differ in weight. The victim was 15 years. She was more or less approaching marriage age. The girl was not very young. We so pray.

SENTENCE:-

It is true this is a very serious offence. It entails maximum of death sentence. This offence has attracted public outcry and it is on the increase. The law of defilement was meant to protect girl child from having sexual intercourse prematurely because of numerous reasons - among them is health. Below 18 years a girl

child is not yet ready biologically and psychologically for sexual intercourse. Even socially ad culturally she is not yet ready. So even if the girl victim was 15 she was still a child to be protected equally.

Moreover the circumstances under which this offence was committed were aggravated by the fact that the girl was forced into the act. There was no form of negotiation (albeit illegal). So this offence could have even been rape if the victim had been of consent age. For the above reasons this court will take a very serious view of this offence. The act of the convict did traumatize the victim so much. She was crying as she was telling her story. This court will however consider the fact that the accused has no previous record. He has been in custody since 2002. so I shall not impose the maximum death sentence.

The convict is a young man in mid 20's. He should be given a chance to reform and live as a useful citizen. For the above reasons the accused is sentenced to ten (10) years imprisonment.

The sentence takes consideration that he has been in custody since 2002 otherwise he should have been in for 15 years.

Right of appeal explained.

RUBBY AWERI OPIO

JUDGE

14/9/2005.