THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 0083 OF 2006

UGANDA::PROSECUTOR

VERSUS

ASANI SIRAJI:::ACCUSED

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

The accused is indicted for the offence of defilement contrary to s. 129 (1) of the Penal Code Act. It was stated in the indictment that on the 27th day of February 2004 at Nsinda village in Mayuge District, Asani Siraji had unlawful carnal knowledge of Loy Kadondi, a girl under the age of 18 years. The accused pleaded not guilty to the indictment and the prosecution called 4 witnesses to prove its case. The accused affirmed and gave evidence in his defence.

The prosecution case was that on the 27th day of February 2004 Loy Kadondi (the complainant) was at home in Nsinda village, Wainha sub-county in Mayuge district. Yeseri Magino, her father who testified as PW2, had left her at home alone. Her mother Esther Kahendeke (PW3) was also away attending a funeral at her parent's home in Namutumba. The accused went to the complainant's home and found her removing beddings to the house. After establishing that there was no one else at home with the child the accused put a polythene sheet on the ground and asked the complainant to lie

down on it. He promised that he would buy her chapati (a pancake). The complainant who was then only four years old obliged. The accused removed her knickers and proceeded to defile her.

Magino (PW2) happened to come back home while the accused was still defiling the child and he heard her crying. When PW2 approached the accused got off the girl and run to the back of PW2's house. PW2 called after him and the accused came back. PW2 confronted the accused about defiling the child but the accused denied that he had done anything to the child. When PW2 asked the child, the child told him that Siraji had been lying on top of her. He then entered the house, lit a lamp and inspected the child and found that her knickers had been removed and she had fresh semen on her thighs.

PW2 reported the matter to the LC1 Chairman Cosmas Wako (PW4) who forwarded the matter to the police. Accused had also been arrested and taken to PW4's home. When the PW4 confronted the accused about the incident, accused confessed that he defiled the girl but also added that he did not know what came over him; accused asked for forgiveness. Accused was the same night taken to Buluba Police Post where he was re-arrested. He was later transferred to Mayuge Police Station and indicted for the offence.

On his part, the accused denied that he committed the offence. He testified that on the day that he was arrested, he was asleep in his house at his Aunt Rose's house. That at about 9.00 p.m. in the night a group of people went to the house and arrested him. The accused testified that on the fateful day, he attended to his employer Isakwa's cattle from 7.00 a.m. till late. That on the same day Magino gave him work to do but he did not go to PW2's home; accused denied ever having gone to PW2's on any other occasion.

All through the trial the burden to prove the offence is on the prosecution and it never shifts onto the accused to prove his innocence. When an accused person pleads not guilty to the offence charged he puts each and every essential ingredient that constitutes that offence in issue. Therefore, to secure a verdict of guilty the prosecution must prove each

ingredient beyond reasonable doubt. If any doubt arises, it should be resolved in favour of the accused person. The accused is to be convicted on the strength of the prosecution case and not on the weakness of his defence.

In a case of defilement like this one, the prosecution must prove all the ingredients that constitute the offence of defilement beyond reasonable doubt. The ingredients are that:

i. The victim was below the age of 18 years
ii. There was penetrative sex, and finally
iii. That the accused was responsible for the act.

Regarding the age of the victim, the prosecution relied on the evidence of the complainant who gave unsworn evidence. She stated that at the time the incident occurred she was four years old and had not yet started going to school. PW2 her father testified that she was 8 years going onto nine years on the day she appeared to give evidence in court. This would mean she was four years at the time the incident occurred. , Esther Kahendeke (PW3) was the mother of the victim. She too testified that the child was eight years old at the time of the trial. There is therefore no doubt that the victim was below the age of 18 years and I find that the prosecution proved the first ingredient beyond reasonable doubt.

As to whether there was penetrative sex, the complainant who testified as PW1 told court that the accused came to her home in the evening when she was taking the bedding into the house. Having established there was no one else at home with her the accused put a piece of polythene sheet on the ground and asked her to lie down on it. He promised that he would buy her *chapati* (a pancake). She complied with the accused's request. The accused removed her knickers and proceeded to defile her. PW1 did not mince words, she told court in her mother toungue what the accused did to her, meaning that he had sexual intercourse with her.

The complainant testified that when the accused lay on top of her she felt a lot of pain in her private parts. She also testified that after sometime, water came out of the accused and poured onto the polythene sheet. On clarification by court, the complainant informed court that after the accused lay on top of her water also came out of her private parts and fell onto the polythene sheet on which she was lying. Further that she cried out because of the pain but the accused told her not to cry; he promised that he would buy her chapatti. Further evidence was from PW2 who testified that as he was coming back home from the neighbours where he had gone to make a telephone call, he heard the complainant crying and saying *"Siraji, get off me."*

Though a medical examination of the victim was carried out, report of the results were not produced in court because Dr. Kaudha who examined the victim could not be found to give evidence. Ms. Monica Birungi for the accused submitted that the evidence of a child of tender years should not be relied on to convict except where there is other independent evidence which corroborates it. She relied on s.40 of the Trial on Indictment Act.

It is important to note that though she did not take an oath, the complainant gave very clear evidence, which was not even shaken in cross-examination. Though with caution, this court could use it to convict the accused. However, there was other independent evidence of penetration other than the medical report. When PW2 made a report of the crime at PW4's home, there were some residents of the village there, including women. According to PW4, the women present examined the child and they found semen around her private parts. They confirmed to the PW4 that the child had been defiled.

Further evidence is in the testimony of PW3. PW3 testified that when she returned from the funeral from whence she was summoned when the incident occurred, she observed that the child walked with difficulty. She was advised to nurse the child's private parts with a solution of salt and tea in warm water. This is treatment that is locally administered to women for injuries sustained in childbirth. PW3 testified that when she

applied this warm compress to the child's private parts, the child did not want to be touched; she complained that she felt a lot of pain. PW3 testified that she did this for some time until the child recovered from her injuries.

Ms Birungi challenged the evidence of PW3; she submitted that her evidence could not be used to corroborate that of the victim because there had been no medical evidence to show that the victim had wounds in her private parts. The law on penetration is that the best evidence on this is that of the victim herself. This was held in the case of **Badru Mwidu v. Uganda [1994-1995] HCB at 11.** PW1, the victim testified that the accused lay on top of her after he had removed her knickers. And that when he did so she felt a lot of pain and after sometime, she felt water from the accused flow onto her private parts. It is true that the act of sexual intercourse is proved by penetration but the evidence to corroborate that of the victim, if necessary is not always medical evidence. In **Hussein Bassita v. Uganda, Supreme Court Criminal Appeal No. 35 of 1995**, it was held that,

> *"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Through desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt."*

Following the above decision of the court, I find that the evidence of PW1 and PW3 put together establish the fact of penetration without a doubt.

The evidence of PW2 is also important in establishing whether sexual intercourse occurred or not. PW2 testified that when he returned, he found the victim crying and it is this that drew attention to the fact that she had experienced something that was not usual

for a child. In **Abasi Kibazo vs. Uganda (1965) EA 507,** the Justices of Appeal upheld the trial judge's finding that in sexual offences the distressed condition of the complainant is capable of amounting to corroboration of the complainant's evidence depending upon the circumstances.

Counsel's complaint that there was no medical evidence would go to the fact that it is medical evidence that usually establishes that the hymen had been ruptured or recently ruptured, and how deep or slight the penetration was, whether seed was emitted by the assailant or not and other technical evidence. It is however not the correct position in law that medical evidence must be adduced. The law is that to establish sexual intercourse the prosecution does not need to establish the rapture of the hymen or actual emission of sperms as the very slightest penetration of the hymen will do. This is stated in **Archibold's Criminal Pleading, Evidence and Practice 36th Edition, para 2879** as follows:-

> *"To constitute the offence of rape there must be penetration. But any, even the slightest penetration will be sufficient. Where a penetration was proved but not of such depth as to injure the hymen still it was held to be sufficient to constitute the crime of rape. Proof of the rapture of the hymen is unnecessary. It is now unnecessary to prove actual emission of the seed. Sexual intercourse is deemed complete upon proof of penetration."*

The test given in Archibold's can safely be applied in cases of defilement as well. I therefore find that the evidence adduced by PW1, PW2 and PW3 was sufficient to prove that there was penetration. The prosecution has therefore proved the second ingredient beyond reasonable doubt.

I now turn to the issue whether it was the accused that defiled the complainant and I will address it in view of the accused's alibi that he was all along at his place of work and that he did not know the complainant. I will also address Ms. Birungi's proposition that PW2

framed up the facts in order to avoid paying the accused his dues. Further that the semen found on the accused's trousers was not proved to have been his by medical evidence.

The complainant testified that the accused found her alone at home on the evening in question. She testified that she knew the accused because he had been to their home before, she was sure the accused lived nearby. The witness also testified that when the accused approached her it was still daylight; there was therefore sufficient light to identify him. The above facts put the accused at the scene of the crime. The evidence discussed above regarding the fact that he had sexual intercourse with her leaves no doubt that PW1 saw and was able to identify her assailant.

Counsel for the accused submitted that the complainant's evidence required corroboration as is provided for by s.40 of the TIA. In this case, PW2 testified that he found the accused at his home crying. When he approached the home, the accused run away from where he had been lying on top of the complainant and retreated behind the house. PW2 summoned him and he returned. When asked what he had done to the child, the accused's response was that he had done. Further confrontation led to the accused unzipping his trousers to prove his innocence. Fortunately, this act provided PW2 with corroboration of PW1's story that the accused had sexual intercourse with her. He found fresh semen on his trousers. PW2 had also found semen on the thighs of the complainant when he examined her. He thus called for help and the accused was arrested and together with the complainant taken to the home of PW4, Cosmas Wako the LC1 Chairman.

The fact that the semen on the accused's trousers was not examined to establish whether it matched that on the child's thighs is not fatal to the prosecution case. The circumstances in which the accused was found, his behaviour after he was discovered, put together with the report of the complainant to PW2 corroborated each other. They could lead to no other logical conclusion than that the accused had sexual intercourse with the complainant. I therefore find that the lack of medical tests did not in any way detract from the cogency of the prosecution evidence.

In addition to the above, PW4 testified that when PW2 related what had happened to the child, there were some women at his home who examined the child. The women reported that they found semen around her private parts and confirmed that it was true that the child had been defiled. PW4 then interrogated the accused. The accused told him that it was true that he had lain with the child and that he did not know what had come over him. The accused asked for forgiveness.

Ms Birungi for the accused submitted that his confession to PW4 cannot be admitted as such by this court because it was not made to a police officer of the rank of AIP or a magistrate. This shall be taken together with the fact that the accused denied that he made the confession. In reply, Mr. Niyonzima cited the case of **Festo Adroa Asenua & Kakooza Joseph Denis v. Uganda, Supreme Court Criminal Appeal No. 1 of 1998**, in which the Supreme Court held that a confession made before a native doctor could be admitted in evidence as admission of an offence.

The law relating to retracted/repudiated confessions was reviewed by the Supreme Court in **Matovu Musa Kassim v. Uganda, SC Criminal Appeal No, 27 of 2002** where the accused had retracted a confession that he made immediately after arrest because he alleged it was not made voluntarily. It was held, affirming the decision in **Tuwamoi v. Uganda [1967] EA 84** that:

> "A *trial court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering*

all the material points and surrounding circumstances that the confession cannot but be true."

I have reviewed all the evidence as given by PW1, PW2 and PW4. I have no doubt that the events as related by the four witnesses can lead to no other conclusion than that the confession cannot but be true.

The accused gave evidence on his behalf in defence. He stated that on that day at about 9.00 p.m. he was asleep in his house at his Aunt Rose's place when he was arrested. The accused testified that on the fateful day, he attended to Isakwa's cattle from 7.00 a.m. till late. That on the same day Magino (PW2) gave him work to do but he did not go to PW2's home; accused denied ever having gone to PW2's on any other occasion. Though he testified that he knew Magino well because he was his friend and Magino's brother was married to his aunt, he also wanted court to believe that he did not see Magino when he testified in court. He also denied that he had seen the complainant when she testified in court.

In effect, his defence was a blanket denial in which he tried as much as possible to distance himself from Magino, his home and the complainant. The accused also told lies when he stated that he had not seen Magino in court and that he had never gone to his home, ever. Given the evidence of PW1 and PW2, there is no doubt that the accused was at PW2's home on the night that the complainant was defiled. He also saw PW1 and PW2 in court and his denial of that fact means he told lies to court. It has been held that deliberate lies told to court discredit the accused. They can also be used to infer guilt. In the end result, I find that the prosecution has proved the third ingredient beyond reasonable doubt.

The assessors in this case gave a joint opinion in which they advised me to convict the accused and I am in agreement with them. I accordingly convict the accused of defilement as indicted.

Irene Mulyagonja Kakooza

JUDGE

21/08/08