THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

HCT – 05 – CR – CSC – No.0125 - 2008

UGANDA ……...…… PROSECUTOR

Versus

TURYAMUREEBA SILVANO ……...…. ACCUSED

BEFORE: HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The accused person TURYAMUREEBA SILVANO is indicted for defilement contrary to Section 129(1) of the Penal Code Act. It is alleged that on 6/7/2007 at Rwerere B Village in Kanungu District he had sexual intercourse with Nuwabine Fiona a girl under the age of 18 years.

He pleaded not guilty to the indictment.

In a case of defilement, the prosecution must prove:

(i) Age of the complainant;

(ii) Act of sexual intercourse;

(iii) Accused's alleged participation.

As regards age, the victim said that she did not know how old she is. She is in Primary one.

The admitted evidence of Dr. Zepher Turyabirira is that she was aged 6 years old in July 2007 when he examined her. Two years later, on 19/11/2009 when her mother Teopista Nyiramugisha testified, she said that she (the victim) is seven years old, though she does not know the year when she was born.

I saw her as she testified. She is definitely below 18 years of age.

As regards the alleged sexual act, in order to prove a charge of defilement, it must be shown that the accused person had sexual intercourse with the victim.

In sexual offences, the evidence of the victim of the offence is always very essential as she is the one who experiences the sexual act constituting the offence and is the one most suited to describe to court the nature of the experience.

In the instant case, the victim testified as PW3. Her evidence is that her abuser removed her knickers and her dress, grabbed her hand and put her on the bed. That he also removed his trousers and shirt and proceeded to put his penis into her vagina.

According to her, he kept telling her not to cry, that he would give her Shs.200= for doughnut. Her evidence is that she cried and this attracted her sibling Lucky to bang the door. She cried because of pain in her private parts.

She gave unsworn evidence. By that fact it requires corroboration as a matter of law under Section 40 (3) of the Trial on Indictments Act. Her unsworn evidence alone cannot establish the fact of sexual intercourse and accused's participation, however truthful she may have sounded to court.

See: **Christopher Kizito Vs Uganda Crim. Appeal**. (**S.C) No.18 of 1993.**

I have already indicated that she was medically examined on 7/7/2007. Although the Doctor indicated that there were signs of penetration, he said that the hymen was not ruptured. He saw inflammations around the private parts which were of recent. The inflammations appear to have been in form of abrasions around the minora (labia) and the inner parts of the labia majora.

The Doctor did not appear as a witness since his testimony was admitted in terms of Section 66 (1) of the Trial on Indictments Act.

This court is alive to the fact that in law to constitute an act of sexual intercourse, there must have been penetration of a penis into the vagina of the victim, however slight. The level of penetration required is the slightest penetration. The penis need not have entered the vagina. It is not necessary that the hymen be ruptured in the process. It is sufficient if the evidence adduced by the prosecution shows that there was entry of the male sexual organ into the labia or vulva.

In the instant cases, the Doctor did not appear in person to assist court on the degree of penetration. If he had appeared, he would perhaps have explained to court how, despite the alleged penetration, the hymen of this little girl escaped rapture.

PW3 Christine Nyirampwanze checked her private parts. All she told court is that they had changed colour.

When all this evidence is considered together, I am of the view that it is not enough to lead to an irresistible inference that penetration must have occurred as the doctor observed. It would appear to me that when he used the word **'penetration'**, he was only making an inference from the fact that he was told that a sexual assault had occurred and from the inflammation (redress) of the vagina of the victim. The evidence on record does not rule out the possibility that the accused was still fumbling when his devilish attempt was frustrated by the sudden arrival of the victim's sibling Maniragaba Lucky. In view of

this doubt, I am unable to hold that the evidence before court proves beyond reasonable doubt that sexual penetration took place within the meaning of Section 129 (1) of the Penal Code Act. This means that the offence of defilement cannot stand.

I have, however, considered the evidence of PW4 Maniragaba Lucky. Whereas Lucky is indicated as a **'Sister'** in PW1 Nyaramugisha's statement and as **'she'** in the Summary of the case, Maniragaba Lucky is actually a young boy. It would appear that the person who recorded the statement from her had problems with her Kinyarwanda accent, as indeed did the court at the hearing and as a result made errors in names. Be that as it is, it is the evidence of this witness, himself a child of tender years whose evidence is sworn but had to be received after a voire dire, that he had gone to collect fire from a nearby grand parents' place, and that on returning home he heard Fiona crying in the house where the accused, their porter, was staying. He (accused) had remained at home with Fiona. According to him he banged the door and the accused opened. He was naked. He then dressed up and went away. Fiona was still on the bed, crying.

He gave evidence on oath, after satisfying my self that he understood the nature of being truthful.

The sworn evidence of a child need not as a matter of law be corroborated but there is need to warn the assessors that there is danger in acting on uncorroborated evidence of a child of tender years but court may do if it is convinced that the child is telling the truth. The corroboration that would be required in such a case is not the sort of evidence required to support the victim's evidence in this case. Any evidence would be sufficient, direct or circumstantial. In the instant case, I have found the sort of evidence required to corroborate PW4 Maniragaba's in accused's disappearance from that home that evening. He had been left in charge of the children in the absence of both parents. However, after PW4 had found him in the house with Fiona who had been crying, he quickly dressed up and disappeared. From the evidence of PW3 Nyirampwanze, he was arrested from a neighbouring village where he had apparently got a job. His act of disappearance from

the area soon after the communication of an offence was not conduct of an innocent man. He was running away from a problem he had just caused.

At the hearing the accused denied the offence. He insinuated that PW1 Nyiramugisha must have influenced the victim to implicate him because her husband, Zirateganya, had cleared him of any wrong doing. He, however, then contradicted himself that Zirateganya was influential in doing so because of unpaid dues and his claim that he (the accused) had caused disappearance of his bicycle.

I found his evidence of grudge inconsistent, cheap, incredible and a fabrication. I doubt that such a grudge existed. Even if it did, which I doubt, it is difficult to see how PW3 Nuwabine and PW4 Maniragaba could have been made part of the plot to implicate him. PW3 was merely about 5 years old. She is the one who cried and attracted the attention of her sibling PW4. Her parents were away and when they returned, they were told about the incident and thereafter the hunt for the accused ensued.

It is unimaginable how the grudge could have been the cause of inflammations in her private parts. She was too small, in my view to be motivated by any grudge between accused and her parents to make the allegations. Even at that age, I doubt whether she would be coached to tell a lie and do so consistently.

In the result, I am convinced that PW4 Maniragaba's evidence is truthful. It corroborates PW3 Nuwabine's evidence that the person who unlawfully tampered with her private parts was the accused. On the basis of this finding, accused's defence of denial must fail and it fails. I make a finding that the accused sexually assaulted the victim Nuwabine Fiona a girl who was then about 5 years old. This type of sexual assault is called, in light of the evidence which I have found credible, attempted defilement. The offence is provided for in Section 129 (2) of the Penal Code Act. Under this law, any person who attempts to have unlawful sexual intercourse with a girl under the age of 18 years is guilty of an offence.

On conviction, such a person is liable to imprisonment for eighteen years.

From the evidence on record, though I am not satisfied that penetration occurred, I am satisfied that the accused had completed all the necessary preparations by removing her and his clothes, making her lie on his bed, and bruising her sexual parts in an attempt to have sexual intercourse with her. In these circumstances, I would find him not guilty of defilement as indicted but guilty of the offence of attempted defilement contrary to Section 129 (2) of the Penal Code Act.

Both assessors in a joint opinion invited me to convict him as indicted. They were of the view that an act of sexual intercourse was proved beyond reasonable. I agree with them generally but only differ from them with regard to the aspect of occurrence of sexual intercourse which, for the reasons advanced above, I consider not to have been proved to the required standard of proof. In view of that conclusion, I acquit the accused of the offence of defilement contrary to Section 129 (1) of the Penal Code Act and instead convict him of a lesser offence of an attempt to perform a sexual act with a person below the age of 18 years contrary to Section 129 (2) of the Penal Code Act in accordance with Section 87 of the Trial on Indictments Act.

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YORAKAMU BAMWINE

JUDGE

26/11/2009

26/11/2009: **Accused** present

Waligo Emmy for state

Ndimbirwe for accused

Assessors present

Court: Judgment delivered.

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YORAKAMU BAMWINE
JUDGE
26/11/2009

Mr. Waligo: No previous conviction known to us. But he made an attempt to defile a young child left in his case.

The convict was a man of 28 years. But he attempted to defile a girl of 6 years. These are aggravating factors. Give him a punitive punishment.

Mr. Ndimbirwe: He was 28 years at time of offence. Be considerate and lenient so that he does not spend long time behind bars. That will make him worse. He has been on remand for 2 years and some few months.

Convict: I have heart problem. I collapse once in a while. My father died. Allow me to go and I assist family members.

Court: He is a first offender. However, he made an attempt to introduce sex to a young girl who had been left under care. He has been on remand for 2 years. The offence he

committed attracts a sentence of 18 years on conviction. Doing the best I can, I consider a sentence of six (6) years adequate punishment for the offence he committed. He is so sentenced.

Right of appeal explained.

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YORAKAMU BAMWINE

JUDGE

26/11/2009