THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

HCT – 05 – CR – CSC – No.0127 - 2008

UGANDA …… PROSECUTOR

Versus

KATSIGAIRE APOLLO …… ACCUSED

BEFORE: HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The accused person KASIGAIRE APOLLO is indicted for Defilement contrary to Section 129 (1) of the Penal Code Act. It is alleged that on the 28th day of October, 2005 at Rwesigiri Village in Rukungiri District he had unlawful sexual intercourse with KYARITUHA MERABU a girl under 18 years of age.

He pleaded not guilty to the indictment.

The substance of the prosecution case against him is that the victim was at the time of defilement three years old; that on 28/10/2005 the accused called her to his house to pick a pawpaw and while in the house had sexual intercourse with her.

That later in the day, around 4:00pm, the mother of the victim found her in pain and on asking her she disclosed that the accused had forced her into sex. The matter is said to have been reported to the area chairman before whom the accused admitted the offence.

The accused admits that he was at home on 28/10/2005 but denies ever having sexual intercourse with the victim as alleged or ever making the alleged admission of guilt.

In a case of defilement the prosecution must prove that:

(i) the complainant was a girl below the age of 18 years;

(ii) she was involved in an act of sexual intercourse;

(iii) the accused participated in the offence.

As regards the complainant's age, she said she was aged 7 years when she testified. Her mother, Hope Kikabareeta, said that she was born on 9/8/2002, implying that at the time of the alleged defilement in October 2005, she was three years old. The Medical report on her puts her age at three years in 2005. The defence has not raised any dispute as to her age.
In these circumstances, I make a factual finding that she was definitely below 18 years in 2005.

I now turn to the alleged sexual act and accused's alleged participation.

In order to prove a charge of defilement, it must be shown that the accused person had sexual intercourse with the victim. It is, however, not necessary that full sexual intercourse should have taken place. It will be enough if there is evidence showing that some penetration of the male sexual organ into the victim's vagina took place.

It has been repeatedly held in our superior courts that in sexual offences, the slightest penetration will do to constitute the offence. Whatever the degree of penetration, there must be evidence of it.

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. Court found her too young to testify on oath. She therefore made a plain statement in which she said that her assailant, the accused, took her to his bed and had sex with her, after removing her knickers first. At her age, she used a crude term for sex in this part of Uganda. She said she felt pain in her private parts. Given that she gave unsworn evidence, it requires corroboration as a matter of law under Section. 40 (3) of the Trial on Indictments Act. Otherwise the complainant's unsworn evidence alone cannot establish the fact of sexual intercourse and accused's participation, however truthful she may have been.

See: **Christopher Kizito Vs Uganda Crim. Appeal No.81 of 1993 (S.C).**

This does not mean, of course, that sexual offences cannot be proved in the absence of the victims's evidence.

If there is cogent evidence, direct of circumstantial, that a sexual act must have taken place and there are no co-existent facts to suggest otherwise, a trial court can, after warning itself of the danger of convicting in absence of the victim's evidence, still ago ahead and convict on that evidence.

In the instant case, the complainant was examined by PW5 Dr. Rutahigwa on 01/11/2005. She had minor bruises at the vulva, according to the Doctor, and he graded it as harm and likely to have been attempted defilement.

According to him, she had no signs of penetration. However, the hymen was ruptured. He would not tell how long it had ruptured but it was likely to have been due to a natural process. The injuries he saw around her private parts were less than a week old.

In further testimony to court, PW5 said that he saw the bruises outside the introitus (opening of the vagina). The lining of the entrance was smooth. In his view, it could not have allowed the penis to enter without being injured. He told the parents that something could have happened but there was no direct entry into the vagina.

According to him, if entry had occurred, he would have seen injuries in the vagina, not on the vulva.

Earlier on, PW1 Hope Kikabareeta, the mother, had herself checked her private parts. She noted on examination that she was swollen. She did so a day after the alleged act of sexual intercourse. From her evidence, her observation of swelling was consistent with the Doctor's finding of bruises on the vulva and hence the classification of the injury as harm. What she saw was not evidence of penetration.

I do not think that the combined evidence of the victim and that of her mother is enough to lead to an irresistible inference that penetration must have occurred. Their evidence does not rule out the possibility that the man may have fumbled his way to the vulva and stopped there.

In these circumstances, the evidence on record falls short of proof beyond reasonable doubt that an act of sexual intercourse occurred within the meaning of Section 129 (1) of the Penal Code Act. What the evidence on record proves beyond reasonable doubt is a man's attempt to perform a sexual act with the victim, an offence termed attempted defilement.

The second ingredient of the offence has not been proved.

As to accused's participation in the commission of the offence which has been proved, the direct evidence available implicating the accused is only that of the complainant. She knew the accused very well not only as a village-mate but also as a neighbour.

The offence took place during the day according to the complainant. At her age, she remained consistent ever since that it is the accused who sexually molested her. I would find no reason to disbelieve her testimony. I must say that she impressed me as a truthful witness. However, this being a sexual offence, and her evidence being unsworn, it requires corroboration as a matter of law. Her unsworn evidence alone can not establish the fact that it is the accused who committed the offence against her, however truthful she might have been.

I have considered the evidence of PW2 Zirihihi Gad, the victim's father. According to him, he (accused) was asked by the area chairman to confirm the girl's story that he had played sex with her. He started shaking and kept quiet. Apparently considering this as guilty conduct, the chairman tied him up and led him to the police.

It is the evidence of this witness that at some trading centre, on their way to police, the accused called him aside and told him he wanted to have the matter resolved locally, without involving the police. That he asked him whether it was true that he had had sex with the child and he said it was true. That he asked him why he could have done that and he said that he had been tempted by the devil. The witness advised him to seek the chairman's intervention but upon doing so the chairman advised him that this was a police case. Hence the charge and trial. PW4 Tugumisirize Gad, the area chairman, did confirm this to court. According to him, on the way to the police, accused and PW2 Zirihihi asked him for some discussion. He allowed them to go and talk. They went aside. Then Kasigaire went to him again and told him that he had been tempted by the devil that he should agree and they resolve the matter. He refused.

In noted the demeanour of PW2 Zirihihi and PW4 Tugumisirize as they testified. None of them gave me the impression that he was peddling lies against the accused. They both sounded truthful. I have therefore seen no reason to disbelieve their evidence. I have accordingly accepted it.

In his sworn defence the accused raised the issue of a grudge between him and the Zirihihi family. He cited an example where one Muhimbise's child died and accused's wife was suspected to have bewitched the said child at the urging of Zirihihi's wife, PW1 Hope. DW2 Katarihwa alluded to the said grudge, only that for him he talked of illness of Muhimbise's child, not death. DW2 also introduced a new matter, PW1 Hope's alleged refusal to present the victim for examination of her private parts by the elderly women who were present at the meeting at PW2 Zirihihi's home. The accused had not alluded to that in his testimony.

No such evidence of the alleged grudge was ever put to PW1 Hope, PW2 Gad, and PW4 Tugumisirize, as they were testifying. They therefore had no opportunity to comment on it or rebut it. And even if such a grudge existed, which I doubt, I fail to see how it would motivate the little girl to implicate the accused. I would have thought differently if it was PW1 Hope or PW2 Gad complaining and not the child. She mentioned to her mother that she had pain in her private parts, her mother took the matter lightly at first but when the pain intensified and she again told her about it, she decided to look in her private parts where she noticed some suspicious swelling. She was taken for medical examination which proved interference with her private parts. The Doctor saw signs of injury and came to the conclusion that there was an attempt to defile her. This evidence alone proves that her complaint of pain in her vagina to her mother was not unfounded.

Medical evidence has proved it. In these circumstances, one fails to see how the alleged grudge ties in with this proved injury to her vagina.

This was in my view a fabricated grudge. I have found it not only baseless but incredible. I have therefore rejected it. Notwithstanding the fact that an accused cannot be convicted upon the weakness of his defence, a fabricated grudge like this one renders support to the victim's of identification. It makes the inference of guilt stronger and is corroborative of her evidence. The admission of guilt to PW2 Zirihihi and to a person in authority, PW4 Tugumisirize, is further evidence of corroboration to the victim's evidence.

The accused's denial has been successfully destroyed by the prosecution credible evidence. I have, therefore, rejected it.

The two assessors, Mr. Kinderesire Nathan and Ms. Beth Rwentaro, have recommended that because of the inconclusive evidence on the essential element of sexual intercourse, the accused be found guilty of an attemp to defile the girl or indecent assault. I'm in full agreement with their opinion. For reasons I have already given above, the evidence on record supports a charge of an attempt to perform a sexual act with a person below the age of 18 years. For the reasons stated above, I acquit him of the offence of defilement but convict him 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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YOROKAMU BAMWINE
JUDGE
26/11/2009

26/11/2009 **Accused** present.

Arthur Ndimbirwe for accused.

Martin Rukundo for accused

Assessors present.

Court: Judgment delivered

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YOROKAMU BAMWINE

JUDGE

26/11/2009

Mr.Rukundo: The convict is a first offender. However, the offence with which he is charged is serious. It is rampant in the country. He does not seem to be remorseful. The girl he attempted to defile was under age. For the above reasons, I submit that no lenience is deserved by accused. I pray for a deterrent sentence.

Mr. Ndimbirwe: None is incapable of reform. Considering time convict has been on remand, it is enough for him to reflect on his conduct. I would pray for leniency so that he is given chance to live more abiding life. He is a first offender, be lenient.

Convict: This is now my 4th year. My brother and his wife died. They left me orphans. I have 3 children. My wife cannot look after them, especially since she is a step-mother. I would request for sentence that allows me to go and look after them so that they in future become good citizens and help government.

Court – Sentence - Reasons.

All these are good reasons. However, they are weighed down by the nature of the offence he committed. A man with such family responsibility should not be the one to indulge in acts of sexual intercourse with toddlers. He can not be seen to be one concerned with own children when he is a danger to those of others. I would have been of a different view if he had raised this on a plea of guilty, not after a full hearing.

Offence he committed attracts sentence of 18 years. He has been on remand for 4 years. A sentence of five (5) years would meet the ends of justice. I impose it.

Right of appeal explained.

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YOROKAMU BAMWINE

JUDGE

26/11/2009