

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KABALE**

**HCT-11-CSC-34 OF 2011**

**KAB- 00- CR- AA 85 OF 2010**

**CRB 1954/2009**

**UGANDA**

**VERSUS**

**TURYASIIMA ROGERS BAM ::::::::::::::::::::::::::::::::::::::ACCUSED**

**BEFORE HON. MR. JUSTICE J.W. KWESIGA**

**JUDGMENT**

The Accused person known as Turyasiima Rogers Brian alias Akiri Mungura, is indicted for Aggravated Defilement contrary to Sections 129 (3) and (4) (a) of the Penal Code Act. It is alleged that on 11<sup>th</sup> July, 2009 at Biran Village Bubare, Kabale District, the Accused had sexual intercourse with **KATUSHABE SUZAN** a girl under the age of 14 years. Mr. Murumba appeared for the Accused person on State brief while Mr. Arinaitwe Rajab RSA appeared for the State. The Accused person pleaded not guilty and the State proceeded to prove the case against the Accused person. It is the duty of the Prosecution to prove the case as a whole against the Accused person and the standard of proof must be beyond reasonable doubt. The State must prove that the victim in this case was aged below 14 years, she was subjected to a sexual Act and that the Accused person performed the Sexual Act. The facts of this case will be disclosed by the summary of the testimony of each

witness given below:-

PW 3 Twongyerekushaba PRowia told court that Katushabe (Victim) is her daughter born on 4<sup>th</sup> May 2003 which makes her 8 years old at the time of testimony. On the evening of 11<sup>th</sup> July, 2009 the victim, Suzan told her that she had pain in her private parts and on looking at the private parts, she found bruises in the private parts and the girl disclosed that the Accused person took her in the banana plantation and slept on her on banana leaves. She reported the matter to the Accused person's grandmother, the LC I Chairman and the Police who referred her for medical examinations. Dr. Robert Mayeko (PW 1) examined the girl and made the following findings:-

The child was 6 years old (2009) and she had bruised labia and bruised and ruptured hymen. The injuries were consistent with sexual assault. He examined the girl on 15<sup>th</sup> July, 2009. He estimated the injuries to have been 4 days old. The medical report was admitted as Prosecution exhibit **PE 1.**

P.W .4 Katushabe Suzan, 8 years old gave evidence not on oath. She told court that Mungura held her arm, took her to the banana plantation, slept on top of her and put something into her and told her not to say anything. She answered court's question that she had pain in her private parts so she told her mother. The child evidence of the sexual act was corroborated by her mother's evidence. The mother saw swollen sexual parts of the child. The medical evidence gives a detailed observation of a bruised clitoris and ruptured

hymen.

In my view this is adequate corroboration. Section 40 (3) of Trial on indictments Act provides for a situation where evidence is admitted from a child of tender years who does not understand the nature of an oath

**that “.....he Accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof imprecating him or her.”**

It must be noted that it is possible to prove that an offence was committed and yet fail to prove that it was committed by the Accused person. It appears to me that evidence in corroboration of the identity or participation of the culprit is crucial.

The Supreme Court of Uganda considered and settled this issue in Remigious Kiwanuka Vs Uganda Criminal Appeal No. 41 of 1993. It was

held that “It is settled Law in sexual offences thought corroboration of the prosecution evidence is not essential in Law, it is, in practice looked for, and it is the established practice to warn the Assessors against the

danger of acting upon un corroborated testimony. This rule of practice applies with the same force even in a case where there is no dispute that a sexual offence has been committed and the question is one of identity only.” The justices of the Supreme Court were dealing with evidence in proof of defilement as a whole, in the instant case corroboration

becomes even more desirable in view of the victim's tender years and in-ability to give her evidence on oath. Section 10 of Oaths Act (Cap 19) states "*No person shall be convicted or judgment given upon the uncorroborated evidence of a person who shall have given his or her evidence without oath or affirmation.*" In the instant case the two Assessors were guided on the requirement of the law that requires independent evidence to support the evidence of the child of tender years who could not given evidence on oath. Their view is that participation was proved because the Accused and the victim were relatives and they knew each other very well and the offence was committed during the day. I agree with the Assessors that conditions favouring correct identification existed and were proved by the prosecution. However, Section 40 (3) of TIA and in **Senvondo Umar Vs Uganda Cr. Appeal No. 267 of 2002.** The learned Justices of Appeal held that no amount of self warning or warning of the Assessor can justify convicting an accused on the un sworn evidence of a single identifying witness of a child of tender years. In view of the above position settled by the court of Appeal plus the Law stated in Section 10 of the Oaths Act and Section 40 (3) of the Trial on Indictments Act, despite the fact that I am convinced that the victim properly identified the assailant, the Law does not give me any discretion to convict the Accused person. The Court of Appeal of Uganda in the case of Senyondo (Supra) relied on **R. VS Campbell (1956) 2 All E..R 272 where Lord Goddard stated:-** "To sum up, the un sworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of un sworn children the judge must stop the case. It makes no difference whether the child's evidence relates to an assault to him or herself or to any

other charge, for example, where an un sworn child says that he saw the accused person steal an article. The sworn evidence of a child not as a matter of Law be corroborated, but a jury should be warned not that they must find corroboration but that there is a risk in acting on un corroborated evidence of young boys or girls though they may do so if convicted the witness is telling the truth.....The

*evidence of an un sworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given."* The victim Katushabe (PW 4) aged 8 years gave impressive account of how she was defiled and the fact that she knew the Accused, her cousin, with whom she lived and had defilement was during day light.

This witness remains a sole un sworn identifying witness whose identification evidence was not corroborated. The Law requires me to acquit the Accused person which I hereby do.

**J.W. KWESIGA  
JUDGE  
5-9-2011**

**Read in the presence of :-**

The Accused person.

Mr. Murumba for Accused on State brief.

Mr. Arinaitwe Rajab Resident State Attorney for State. Mr.

Turyamubona Milton - Court Clerk.