

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HCT-11 -CR-CSC 95/2011

CRB 3044/2010

UGANDA::PROSECUTOR

VERSUS

TWIJUKYE AGGREY ::::::::::::::::::::::::::::::::::::::ACCUSED

BEFORE HON. MR. JUSTICE J.W.KWESIGA

JUDGMENT

The Accused person, Aggrey Twijukye is indicted for Aggravated Defilement contrary to

Section 129 (3) and (4)

(a) of the Penal Code Act. It is alleged that on the 28th day of November 2010 at Rwakizamba village, Kamuganguzi Sub County, in Kabale District, he performed a sexual act with Ainembabazi Sarah, a girl under the age of 14 years.

The Accused person was represented by Mr. Twikirize Timothy, on state brief and Mr. Arajab Arinaitwe appeared for the State. The Accused person denied the allegations. The Accused is presumed to be innocent until he is proved guilty or until he pleads guilty as provided by Article 28 of The Constitution of The Republic of Uganda.

The burden of proof falls upon the prosecution who must prove that the offence was committed and was committed by the Accused person. The offence of Aggravated Defilement has the following engredients that must be proved by the state:-

1. That the victim is a girl aged below 14 years.

2. That the girl was subjected to a sexual act.
3. That the Accused was properly identified as the culprit.

At the commencement of the case the Accused person objected to proposed agreed facts by the Advocates and the state proceeded to prove each element of the offence. The facts of the case shall be brought out by the mammary of the evidence given by each witness.

P.W 1 Mr. Moses Isiagi, a Clinical Officer attached to Kabale Referral Hospital, testified that on 29th November, 2010 he examined Sarah Ainembabazi. She was about 10 years old, she had a ruptured hymen and other inflammations around her private parts. He could not determine the age of the injuries from their appearances. The medical report was admitted as Prosecution Exhibit P.E 1 under cross-examination he suggested that the rupture of the hymen could have been caused by a penis or any other object or force due to exercise such as jumping or sexual force.

P.W 3 Tumwesigye Justus, told court that on 28th November, 2010 he found the Accused sleeping with Sarah in the garden. At 4:00 p.m he saw the Accused and the victim moving into trees and he recognised the Accused from about 20 metres distance. That he found the Accused on top of the victim.

P.W 4 Agaba Barnard, the father of the victim told court she is 10 years old. On 28th November, 2010 while at home he hard alarm and the child was crying. He responded and found Sarah crying and the Accused held by PW 3 Tumwesigye Justus. The girl was crying and unable to walk. The Accused and the victim were taken to Police.

P.W 5 Korigamba Florence, the victim's mother immediately after defilement she looked at the girl's private parts. The private parts were wet and had blood. The girl told her that a man grabbed her from the compound and took her to the trees and defiled her.

AINEMBABAZI SARAH P.W 6 was unable to testify. She was reported to have suffered paralysis which affected her ability to talk. She failed to testify. The prosecution closed its case at this stage.

In Defence, the Accused person denied. He told court he spent the whole day at the church and went home at 1:00 p.m. He stated that PW 1 Tumwesigye Justus, who raised alarm has a grudge with him over the Accused person's wife. He stated he did not know the victim, he never went to the home of the victim on that day.

DW 1 Norah Mpiriirwe, over 60 years old, mother of the Accused, stated that she lives with the Accused. She confirmed the Accused had complained that people were disturbing his marriage. D.W. 2 Twebaze Emily, 39 years old woman, Accused person's sister. That on the day in question she was in church with the Accuse person from 10:00 a.m up to 3:00 p.m and went home together. This witness confirmed the Accused person was mentally retarded. This closed the Defence.

P.W 2 Appollo Twinebaha a Senior Psychiatric Officer, examined the Accused person on 1st December, 2010, three day after the arrest. The Accused person had many injuries on the shoulder, on the arm and right knee, and certified him to be insane. This court noted

that throughout the trial the

Accused person appeared emotionless until the time of defence when he appeared to firmly state that he was arrested and beaten because of the conflict over his wife. This defence emerged that the victim's father had an affair with the Accused person's wife and this is the motive for fabricating the offence and have the Accused beaten and charged.

I have examined the evidence adduced in respect of the first and second element of the offence. From the testimony of the parents of the girl and the medical evidence, there is no doubt left in my mind, the alleged victim is below 14 years and therefore she was a girl below the age of 14 years in 2010 when the offence is said to have been committed.

The performance of a sexual act can be proved by direct evidence giving particulars of what took place and can also be inferred from circumstantial evidence surrounding the victim at the time of the offence.

The best witness in cases of sexual offences is always the victim because she is a witness that would have experienced the commission of the offence. However, in absence of the testimony of the victim which can be for different reasons such as, the victim not being traced at the time of the trial, the victim having been rendered unable to testify or even being too young to say anything, where there is other cogent evidence to prove the sexual act, a conviction can be sustained. In the instant case the victim was totally unable to testify. Surprisingly the mother testified she had described what happened to her. The offence was committed on 28th November, 2010. The medical examination was on 29th

November, 2010, the following day. The Victim's mother told court that on 28th November, 2010 the girl was bleeding from her private parts, however, the medical examination did not establish how old the injuries were. It is not conceivable that injuries which were bleeding on 28th November, 2010 could not be detected as fresh injuries on 29th November, 2010. this evidence has been examined together with the testimony of Mr. Isiagi that the injuries could have been caused by any other abrasion. The rapture of the hymen was not conclusively attributed to a sexual act as recent as one day. Tumwesigye Justus testified that he found the Accused on top of the victim. Agaba's evidence is that the child could hardly walk due to defilement suggesting that she had been injured, this has not been corroborated by the medical evidence. I have examined the Accused person's ALIBI it is not water light, the Accused person is a man with mental disorder and I have given him the benefit of doubt, he only remembers that he had been in church with his sister most of the day, this was confirmed although he did not give full account of the days hours. I have examined the defence of denial and the explanation that the case was fabricated by the victim's father due to the conflict over the Accused person's wife.

Once a grudge is raised as the explanation to the motive of fabricating evidence, the grudge must be examined and where it creates doubts in the prosecution case, the Accused person shall be entitled to the benefit of the doubt. It was common knowledge between DW 1 and DW 2 that the Accused person's marriage was being disturbed by

men who included the complainant. This must be evaluated with the fact that the Accused person said he did not know the victim and the victim failed to identify or recognise the Accused in the dock as a person she had ever seen. I have given due consideration to the prosecution contention that if the grudge put up by the defence if genuinely existed it should have been put to the prosecution witness. That it should be dismissed as an afterthought. I appreciate this argument, however this could be the weakness of legal representation that carried out cross-examination. What is important is that throughout the trial the Accused denied participation. The Accused person can only be convicted on the strength of the prosecution case and not the weakness of the Accused person's defence or lack of defence. It must be kept in mind that the Accused person has the option to keep silent and he would be entitled to acquittal if the prosecution evidence does not prove the case as a whole beyond reasonable doubt. The assessor's view is that the Accused person is guilty and should be convicted. I do not find it safe to convict the Accused person on the strength of Tumwesigye and Agaba's evidence they are witnesses who had another purpose to serve. Tumwesigye is a nephew to Agaba, the Accused person's arrest is not clear. He stated he never was in their home. There is no clear evidence of his arrest. No local council official that came to the scene, the Chairman only came to witness a man already arrested, beaten by Agaba and Tumwesigye. The traumatized girl who described the event to the mother should have had the capacity to identify the

Accused person as her assailant. The Accused person is a mental patient whom I can not fault for not being able to clearly where he was arrested and beaten from. I am not able to follow the Assessors advice to convict the Accused person. The participation of the Accused person has not been proved beyond reasonable doubt, I Acquit the Accused.

J.W. KWESIGA JUDGE 6-9-2011