THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

SESSION CASE NO. 0039 OF 2010

UGANDA :::::::::::::::::::: PROSECUTOR

=VERSUS=

CWINYAAI VALENTINO :::::::::::::::::::: ACCUSED

JUDGMENT

BEFORE HON. JUSTICE NYANZI YASIN

Representation

Ms Adubango Harriet (RSA) for State

Mr. Madira Jimmy for Accused

Assessors

1. Mr. Buatre Hoffins
2. Mr. Abiriga James

Court Clerk

Mr. Canrach Emmanuel

The accused is indicted for aggravated defilement contrary to section 129 (3) and (4) (a) of Penal Code Act. The particulars are that the accused, Cwinyaai Valentino on the 6th day of October 2009 at Tengo village, Nebbi District did unlawfully have sexual intercourse with Asedorwoth Oliver aged 7 years, a girl under age of 14 years.

In all criminal cases an accused person is presumed innocent until proved or pleads guilty. See Article 28(3) (a) of the constitution of the Republic of Uganda. The accused pleaded not guilty. The burden of proof rests upon the prosecution, throughout the trial, to prove both the charge and the ingredients thereof beyond reasonable doubt. See Woolmington –vs- DPP [1935] AC 462, Okeletho Richard =vs- Uganda Sc. Crim. App. No. 26 of 1995.

In an offence of aggravated defilement contrary to section 129 (3) and (4) (a) of the Penal Code the prosecution must proved beyond reasonable doubt each and every one of the following ingredients:-

1. There was unlawful sexual intercourse with the victim.
2. The victim was at the time of the alleged sexual intercourse under the age of 14 years.
3. The accused person was the one who had the unlawful sexual intercourse with the victim.

The prosecution adduced the evidence of 5 witnesses. That is Okello Nicholas (PW1), a Medical Clinical worker at Nebbi Hospital, Angeyango Grace (PW3), paternal aunt of the victim, Ocwowum Wilbert (PW4),

Onyuthi Biajo (PW5), Secretary of defence LC1 Ngeo village. The accused relied on his own unsworn statement.

The age of the victim was not contested by the defence. The victim at her testimony stated that she is 10 years old. In her testimony PW3 stated that the victim is a daughter of her brother Bididong Witson. That she is aged 9 years and the witness had been with her for 5 years. The victim was examined on police form 3 and its appendix (Exh, P1A and 1B) on 8th October 2009 by Dr. Mawage Havuna. The report was tendered in evidence e.g. PW1 who knew and had worked with Dr. Mawage Haruna since 2008 at Nebbi Hospital and was conversant with his handwriting and signature.
The doctor's findings were that the girl was 7 years old. That puts her age, at the time of her testimony at 9 years. Due to her apparent tender age I conducted a voice dire before receiving her unsworn testimony with the above evidence I find that the prosecution has proved the ingredient of age beyond reasonable doubt.

The defence attributed the ingredient of unlawful sexual intercourse and the participation of the accused. The law an proof of sexual intercourse was stated of the Supreme Court in BASITA HUSSEIN =VS= UGANDA S.C.CRIM.APPEAL No. 35 of 2995 as follows;-

> ***"The act of sexual intercourse a penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved eg the victim's own evidence and corroborated by medical or other evidence. Through describle it is not a hand and first rule that the victim's evidence and medical evidence must always be addressed in every case of defilement of prove sexual intercourse or penetration.***

Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".

To prove sexual intercourse the prosecution relied on the evidence of victim (PW2), PW4 and the medical report. Abedirwoth Oliver, in her testimony stated that the accused caught her under the cassava plantation of one Oyer. She stated:

"..........he caught me and carried me on his chest. He put me down and started removing his trousers and told me to remove my petty-coat. I was wearing a petty-coat and blouse. I removed the petty-coat. He removed his thing and inserted it into mine. He used his penis and inserted it into my vagina".

That when he put his penis in her vagina she felt pain. That after the incident she find difficult in walking. When being cross examined she stated:

"It is true he put his penis in my vagina. I saw him. He did not use his penis to touch my vagina. He inserted it into my vagina. When he inserted his penis and was lying down and he was lying on me. I felt pain. The pain was in my waist, back, lower abdomen, my stomach. He lay on my chest".

Clearly what the victim explains was an act of sexual intercourse upon her. However evidence being in a sexual offence requires corroboration. In **Chila & Anor. –Vs- DR [1967] EA 722** it was held

"The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is

> ***given, the conviction will normally be set aside unless the appellant court is satisfied that there has been no failure of justice".***

See also **Charles Katode –Vs- Uganda [1971] 2 ULR 10.**

Further section 40 (3) of the trial an indictment Act stimulates:-

> ***"Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not give an oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but when evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable if be convicted unless the evidence is corroborated by some other natural evidence in support thereof implicating him or her".*** **(Emphasis added)**

The above provision was considered in **Patrick Akol –Vs- Uganda S.C.CRIM.Appeal No. 123 of 1992** where the Supreme Court cited with approval the opinion of Lord Goddard in **R –Vs- Campbell [1956] 2 All ER** 272 in which he summed up the law at page 276 as follows:

> ***"To sum up, the sworn evidence of a child must be corroborated by unsworn evidence if the only evidence implicating the accused is that of unsworn children the Judge must stop the case. It makes no difference whether the child's evidence relates to an assault on him or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not as a matter of law be corroborated, but a ......should be warned not that they must find***

> ***corroboration but that there is a rash in acting in the uncorroborated evidence of young boy or girls though they do so if convinced the witness is telling the truth, and this walking should also be given where a young boy or girl is called to corroborate evidence either of another child, sworn or unsworn, or if an adult. The child can amount to corroboration sworn evidence though a particularly careful warning should in that case be given".***

After testimony Abedirwoth Oliver was 9 years old. There is no statutory interpretation to a "**child of tender years**". However in **Nyando Muhamed =Vs= Uganda CA crim. App No. 198 of 2004** the Court of Appeal stated:

> ***"The expression of a child of tender years" is not defined by the above Act. However a number of decisions of this court and other courts in the Eastern African region have defined the expression "child of tender years" it means any age or apparent age of under 14 years, in the absence of any special circumstance.***
>
> *See* ***Mukisa Deogratius –Vs- Uganda Supreme Court Cr. Appeal No. 21/1993, Kibagency Arap Kolil =Vs= R [1959] EA 92".***

It would appear the legislature in creating an offence of aggravated defilement under section. 129 (3) and (4) (a) of the Penal Code Act where the person against whom the offence is committed is below the age of fourteen years intended to make a provision of this class of child, children of tender years.

I warned the assessors and so warn myself of the need for corroboration of the victim's evidence by some other material evidence. The prosecution relied on the evidence of PW3, Angeyago Tracy. She testified that when she came back she was told by her husband, Ocwowum Wilbert (PW4) that the victim had told him on their return from guarding the garden against monkeys that while in the garden the accused had put the victim down on the ground, caught her and slept with her. That next thing, before the local council meeting, when asked to narrate what had happened to her, the victim told the gathering that the accused picked her, took her into Oyar's garden, threw her down, removed his sexual organ and inserted it into hers.

Mr. Madira Jimmy, counsel for the accused argued that these are the independent evidence as required by section 40 (3) of the Trial on Indictments Act. He submitted that PW3 and PW4's testimonies did not provide the required corroboration since it was evidence of what they had been told by the victim. Counsel cited **Ssenyodo Vinan -Vs- Uganda CA Crim. Appeal No. 267 of 2002.**

The learned trial Judge in the above case relied on the sole unsworn of a child of tender years to convict the appellant. The learned Judge had found corroboration of the evidence of identification of the appellant in the evidence of the child's mother and father who had not seen the appellant defile victim but had stated what that child had told them. The Court of Appeal while citing section 40 (3) of the Trial on indictment Act held that the unsworn evidence of the sole identifying witness, who was a child of tender age, against the appellant was never corroborated.

As regard to the fact of sexual intercourse PW3 stated that when she received the information she took the victim inside the house and examined her private parts. That she found her thigh were bruised and had dried up whitish semen. After she observed that the victim had difficult in walking sect. 59 of the Evidence Act provides:

> ***"Oral evidence must, in all cases whatever, be direct, that is to say______***
>
> ***If it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it;..........."***

What PW3 explains above is what she saw, in addition to what the victim had told her and PW4. I agree with Ms Adubango, counsel for the state, there is no way semen would have come onto the victim's thighs other than by way of an act of sexual intercourse. In the premises I find that PW3's guide on examining the victim corroborate her testimony on sexual intercourse.

The prosecution further relied on the medical findings that there was evidence of slight penetration, foramen of hymen was raised in climate. When, in cross-examination PW1, a medical clinical worker, was asked to explain what was meant in the report by the finding:

> "***Foramen of is raised in dianet".***

He explained that it was the membrane of the hymen which was raised but not torn. That there could be penetration which does not lead to the rapture of the hymen. That the hymen's thickness is very tiny and covers the lining of the vagina. That penetration which does not rapture the hymen would be widened. The valve (mivalaus which close the vagina. He further explained

that the valve and labia are parts of the vagina as they are all part of the female organ.

Mr. Madira for the accused strongly submitted that the medical findings were not consistent with sexual intercourse but may be an attempt to have sexual intercourse since there was no rapture of the hymen.

The law is that to establish sexual intercourse the prosecution does not need to establish the rapture of the hymen or actual omission of ....as the very slightest penetration of the vagina will do. This point is stated in **Archibold General pleadings Evidence and practice 36th edition Page 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 rapture the hymen still it was held to be sufficient to constitute the crime of rape. Proof of the rapture of the hymen is necessary. It is now necessary to prove actual omission of the seed. Sexual intercourse is deemed complete upon proof of penetration".

See also **Halsbury's Laws of England 4th Ed. Vol. II page 653, Uganda =Vs= Stephen Mubesha [1996] KALR 140, Dan Mubiru =Vs= Uganda C.A. Crim. Appeal No. 46 of 1996.** In **Uganda =Vs= Asiimwe Edison HCT CR Sess. Case No. 37 of 2003.**

I held that the above point of the law is equally applicable to the crime of defilement.

I find further corroboration of the victim's evidence that she was subjected to sexual intercourse in the medical evidence, Exhibit P1B. I accordingly find that the prosecution has proved to the required standard the ingredient of sexual intercourse.

The last ingredient is whether the accused was the one who had the unlawful sexual intercourse with Adediworth Oliver. In her testimony she stated that she had a problem with the accused when caught her. That he caught her under the cassava plantation of Oyer. That he got her from the garden when she had gone with Billy and Nyasawin to guard their parent's maize fields from Monkeys. The accused sent them to get maize from Oyer's garden. Then he told Billy and Nyasawoho to remain making fire and told her to go with him to get the maize. That while there the accused sexually assaulted her. He warned her that he will beat her if she even shouted. After the sexual intercourse he told her to come again to the garden to harvest maize and eat pawpaws. That he left her when Billy had quietly come over and found them in the act whereupon the accused ran.
This Billy, who the victim says is a boy young than her, did not testify.

There was no evidence of any other witness who saw the accused commit the defilement. In **Abdulla Bin Wendo & Anor. =Vs= R [1953] 20 EACA** 186 it was held:

> ***"The testimony of a single witness regarding identification must be tested with the greatest care. The need for caution is even greater where it is known that the conditions following correct identification were difficult. What is needed before coming as other evidence pointing to the guilt of the accused".***

The test is whether the evidence of the identifying witness can be accepted as free for the possibility of error and whether it is truthful.

In **Bogere Moses of Awor =Vs= Uganda SC Cri. Appeal No. 1 of 1997.** The Supreme Court held:

> ***"The starting point is that court ought to satisfy itself for the evidence whether the factors under which the identification is claimed to have been made were or were not difficult and warned itself of the possibility of mistaken identify. The court then proceeds to evaluate the evidence cautiously so that it does not convict or upheld a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence as a whole, name the evidence, if any, if the factors favouring correct identification together with those ....it difficult. It is trite law that no piece of evidence should be verified except in relation to all the rest of the evidence".***

The factors to consider are:-

a) Light as to visibility.
b) Prior knowledge of the accused by the witness.
c) Time spent by the witness when looking at the accused.
d) Closeness of the witness to the accused at the time of commission of the offence.
e) Any other circumstance which helped the witness to identify the accused.

See **Nabulere & Anor =Vs= Uganda [1979] HCB 77**.

Abediwroth Oliver's testimony is that she knew the accused as Valentino. She had been seeing him before at the foot of Payere Hill. He described him as an Allewiya. She also used to see him when passing by going to Nyarambe Market and had a garden near to theirs and she used to see him in his garden. So the accused is not a stranger to the witness. It is her testimony that they had gone to guard the fields in the evening. That the incident happened during day time. Therefore the visibility was clear. That the accused walked with her into Oyer's garden, carried her on his chest then put her down and sexually assaulted her. Her testimony shows that they spent reasonable time together and close to each other. I find such conditions favourable to correct, unmistaken identification.

I have already herein stated the requirement for corroboration of the victim's evidence in sexual offence. I have also considered the particular statutory requirement for corroboration by some other material evidence in support of the evidence of a child of tender age implicating an accused person. There was no evidence adduced of any other witness who saw the accused commit the defilement. Therefore the victim was the sole identifying witness, so her testimony in that regard must be tested with the greatest care and needed corroboration by other evidence pointing to the guilt of the accused.

The other would be eye witness, Billy, did not testify, I wonder why. The wording of section 40 (3) of the Trial on Indictments Act is strict in the requirement for corroboration of the unsworn evidence of a child of tender age. It states:

> ***“..........the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her”.***

Lord Goddard while considering a similar provision in R =Vs= Campbell (supra) stated:

> ***“.............the unsworn evidence of a child must be corroborated by sworn evidence if the only evidence implicating the accused is that of unsworn children the judge must stop the case”.***

The requirement is so strict. In emphasis of such strictness the court of Appeal in Ssenyodo Vinan =Vs= Uganda (supra) held:

> ***“..........no amount of self warning or warning of the assessors can justify convicting an accused on the unsworn evidence of a single identifying witness of a child of tender years”.***

The prosecution sought to rely on the testimony of PW3 that when the accused ....by the LC1 official, after being led to the scene of crime by victim, the accused answered that he had been moved by Satan. PW4, Ocwowum Wilbert stated that following his report and local council executive and LC meeting of the village of about fifty people was held. When at the meeting the chairperson directed the Secretary for Defence to take the accused to police, the witness testified that the accused turned to him and said:

“My cousin it is Satan who attempted me to commit the offence”.

That the accused then asked the elders to have the matter settled there in the meeting.

PW5, Onyath Biajo, the secretary for defence testified that following the report of the case, he on the instruction of the chairperson arrested the accused and took him to a village meeting. That when first asked at the meeting the accused said that the child was telling lies. When after visiting the scene of crime, the chairperson directed the matter to be forwarded to police, the accused pleaded that he was betrayed by Satan.

Ms Adubango, for the state, argued that such conduct of the accused admitting the offence before the meeting when there was no apparent threat on him provided the required corroboration of the child's unsworn evidence. In ***Nyando Muhendo =Vs= Uganda*** (supra) tender age children had testified that after the commission of the offence, the accused fled the scene. Another witness (PW4) testified in that case that when he followed the accused to his home after hearing that he had fled, the brother of the accused informed him that the accused had just come home running through the bush. The learned trial Judge found that the accused's act of fleeing the scene of crime and running to his home through the bush and immediately leaving his home was incompatible with his innocence and in fact corroborated the evidence of two tender age children that it was the accused who had sexual intercourse with the culprit. The Court Of Appeal upheld the Judge's finding.

The accused in his unsworn state stated that there was a long standing dispute between her and Angemayo Grace (PW3), the victim's paternal aunt

over the boundary between his and her field. As to the events of the date in issue the accused stated that while in his field two children called out to him that their colleague had picked his maize which was not yet ready. He called them to go over to him. When they came over to him the two pointed out the girl who had picked the maize. That he threatened them that he was going to take the maize and report to the local council. Whereby the girl threw herself down and started rolling on the ground while crying. He raised her up and told them to go back to guard their garden and warned them not to do it again.

The accused further stated that three woman examined the victim at the village meeting and found no evidence of sexual intercourse with her. That despite that finding PW3 asked to be compensated by five goats which the chairperson reduced to two goats. That he refused since he had not had sexual intercourse with the girl. He insisted on being taken to the police and for a medical examination with the girl.

Counsel for the state further argued that by the accused's own statement he had put himself at the scene of the crime thereby corroborating the victim's testimony that he was her defiler.

With due respect to counsel, it does not always follow that by being at the scene of crime or admitting being there is prove or admission of that persons commission of the offence. In this case it is the victim's sole version as against the accused's version. It is trite that except in a few exceptional and or statutory case the burden of proof in criminal matters never shifts to the accused. There is no burden upon the accused to prove his innocence. This

was clearly stated by the house of holds in **Woolmington =Vs= DPP** (supra):-

> ***"..........it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not the prisoner (accused) to establish his quilt just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner (accused) which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while prosecution must prove the guilt of the prisoner(accused) there is no such burden laid on the prisoner(accused) to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bond to satisfy the judge of his innocence".***

This position of the law has been followed in a wealth of cases by our courts. The accused statement that the victim threw herself down and rolled on the ground is not corroborated by the medical finding that she had healing bruises on the shoulder, bladder and upper back along the mid-line which were about five days old. She could have sustained the injuries when she threw herself down and rolled on the ground. The accused says he lifted her up may be thereby carrying her on his chest as victim states. The accused admits there were discussions to an amicable settlement of the dispute he however states that he objected to compensating the victim's aunt. As to the alleged statement of the accused that he had stated that he was tempted by Satan, if the prosecution evidence is to be believed in this regard, it cannot be held to have been voluntary and truthful. It is prosecution's evidence that it was made after the accused's arrest and at a big meeting of about 50 people and after the decision to take him to police. I agree with

Ms. Adubango that taking a suspect to the police is a normal procedure which the accused should have complied with without fear. However the issue is whether being taken to the police had negative effect to the accused's free exercise of his mind. The prosecution did not prove so. Further the alleged admission and proposal and settlement was for what? For defilement accusation as per the prosecutor's case or could have been for confronting or interfering with PW3's children's freedom when in their garden, as per the accused's version.

There is doubt and it is trite that any doubt in the prosecutor's case must be settled in favour of the accused.

In view of all the above I am unable to agree with the opinion of gentlemen assessors and contrary to their finding and advice, I find that the prosecution has failed to prove beyond reasonable doubt that the accused person was the one who had the unlawful sexual intercourse with the victim. I accordingly find the accused, Cwinyai Valentino not guilty and he is accordingly acquitted and set free unless liable to be held in custody on other charges.

LAMECK .N. MUKASA

JUDGE

7/11/2011