THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0398 OF 2010

UGANDA ……
PROSECUTOR

VERSUS

KAKOOZA ABDU ALIAS KIYAGA ……
ACCUSED

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI

Criminal law – aggravated defilement – ingredients of aggravated defilement

Evidence – single identifying witness – whether a witness aged 5 years can be a credible single identifying witness – evidence – circumstances favouring correct identification – evidence – child of tender years – whether a child of tender years can be a credible witness – evidence voire dire.

The accused was indicted of aggravated defilement of a child of 5 years. The accused is said to have defiled the victim several times and infected her with gonorrhoea. The accused was convicted of the offence of aggravated defilement.

JUDGMENT

The facts of this case are that a one Kakooza Abdu alias Kiyaga, is accused of having defiled a 5 year old girl – Sumaya Mugisha on various occasions in the year 2009. The accused pleaded 'not guilty' to the charge of aggravated defilement.

To constitute an offence of aggravated defilement the following ingredients should be proved:

a. A sexual act was performed on the victim.

b. The victim was under 14 years of age when the sexual act was performed.

The burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution. Notwithstanding the defences available to an accused person, the primary responsibility to prove the allegations against such a person remains with the Prosecution.

The Prosecution in this case is required to prove each ingredient that constitutes the offence of aggravated defilement beyond reasonable doubt. I must reiterate that proof beyond **reasonable** doubt is not synonymous with proof beyond **any shadow of doubt**. In the event of reasonable doubt, such doubt must be decided in favour of the accused and a verdict of acquittal returned.

In that regard, inconsistencies or contradictions in the evidence of prosecution witnesses which are major and go to the root of the case must be resolved in favour of the accused, but where they are minor they should be ignored, save for instances where there is a perception that they are deliberate and intended to mislead court.

I shall now revert to an evaluation of the evidence that was adduced before this court. I shall evaluate this evidence in its totality.

Exh. P.1 was admitted in evidence for the Prosecution under the Memorandum of Agreed Facts dated 8th December 2010 that was duly signed by the Accused, Defence Counsel and State Counsel. Exh. P.1 is a medical examination report captured on Police Form 3, and in respect of a medical examination undertaken on the victim on or about the 21st August 2009. This evidence establishes that the victim – Sumaya Mugisha engaged in a sexual act about 2 - 3 days prior to the date of the report; was 5 years

old at the time she engaged in the sexual act, and therefore was a victim of aggravated defilement within the meaning of section 129(3) and (4)(a) of the Penal Code Act. This evidence is not disputed by the accused.

I therefore find that the incidence of the aggravated defilement of PW2 - the victim in this case, has been proved beyond reasonable doubt by the Prosecution.

Having established that the victim did suffer aggravated defilement on the date in question, the issue then is whether or not it was indeed the accused person who occasioned the said offence upon her. Tied up with this, is the question as to whether or not the accused was properly identified by the victim or indeed any other witness present at the scene of crime.

The only witness that was present at the scene of the crime in this case and could possibly have identified the perpetrator of the offence in question is the victim herself – PW2. She did testify to having so identified the accused. She stated that she knew the accused prior to her attack. She knew him by the name of Kiyaga. Prior to her testimony, PW1 had testified that the accused was indeed the family driver, resident at his home, and responsible for ferrying his children to and from school. DW1 (the accused) also confirms in his testimony that he lived at PW1's residence in Zzana and was employed as a driver ferrying PW1's children to school. I find no reason to disbelieve the totality of this evidence. I am satisfied that PW2 did indeed know the accused prior to the defilement.

PW2 categorically identifies the accused as her attacker on the day she was defiled. She states that while she was sleeping the accused carried her from her room to the garage and defiled her. She initially refers to the accused's private parts as a stick which he put inside her, but later states that he put his private part in hers.

On the other hand, the accused gave evidence absolving himself of responsibility for the victim's defilement. In a nutshell, the accused's testimony sought to attribute the present criminal proceedings to a grudge held by the complainant (PW1) over the accused's termination of his employment with the former.

The question then is whether PW2's identification of her attacker is credible enough to place him at the scene of crime, and rule out the possibility of

mistaken identity or indeed a grudge-laden fabrication of criminal proceedings, as the accused would like this court to believe.

The identification of the accused in this case hinges on the testimony of a single witness, who also happens to be a very young child. Before I address the issue of a single identifying witness, I shall address the issue of child evidence.

Section 40 (3) of the Trial on Indictment Act requires a court to determine whether a child being called as a witness understands the nature of an oath, is deemed sufficiently intelligent to render credible evidence or understands the importance of speaking the truth. A voire dire test was conducted prior to the receipt of PW2's evidence. Despite her tender age, PW2 struck me as a brave, intelligent child that understood the importance of telling the truth on oath. She was very articulate in her response to the simple, straightforward questions put to her both during the voire dire test and subsequently during her testimony. Accordingly, I find her evidence quite credible.

The law relating to a single identifying witness, such as the victim in this case (PW2), is that court can convict on such evidence after warning itself and the assessors of the special need for caution before convicting on reliance of the correctness of the identification. The reason for special need for caution is that there is a possibility that the witness might be mistaken. This position was laid down in **Abdala Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978**, and cited with approval in **Christopher Byagonza vs Uganda Crim. Appeal No. 25 of 1997**. I am therefore duly cognisant of the need for special caution in relying on PW2's evidence, the credibility thereof notwithstanding.

However, the law does also recognise that in sexual offences (such as aggravated defilement), the victim's evidence is the best proof of identification of the accused. See **Private Wepukhulu Nyunguli vs Uganda Crim. App. (Supreme Court) No. 21 of 2001**. Nonetheless, the victim's evidence must be carefully subjected to the test of whether or not it is of such good quality as would reasonably negate the possibility of mistaken identity. Particularly so where the victim is the sole identifying witness and is a child, as is the case in the present proceedings.

The test of correct identification was outlined in **Abdala Nabulere & Another vs Uganda** (supra) as follows:

> "**The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced. The poorer the quality, the greater the danger.**"

In the present case, PW2 clearly knew her attacker. In her evidence she states that she was carried from her room where she was having her afternoon nap and defiled in the garage. Therefore the defilement took place during the day with sufficient light available. There has been no suggestion in evidence or at all that the garage was too dark at that hour of the day for PW2 to identify her defiler. Further, the nature of a vaginal sexual act such as the present one is at such close range as would enable the victim identify her defiler.

I reject the suggestion made by defence counsel that PW2 was carried from her room while she was asleep and could not therefore have identified her defiler. Exh. P.1 clearly states that on examination PW2 was found to have hyperaemic (reddened) areas around the hymenal orifice, although the hymen was not raptured. This suggests that the hymen may not have been raptured owing, as State Counsel aptly put it, to the disparity in size of the sexual organs of the defiler and the victim. However, the same disparity in size is bound to have caused the hyperaemia referred to in the medical report, and to my mind could not have gone without sufficient pain or discomfort as would wake up a sleeping or drowsy five-year old child.

I therefore, find that the circumstances surrounding the identification of the accused by PW2 were favourable enough to produce a reasonably accurate identification. I am satisfied that the accused was properly identified by PW2 and placed at the scene of the crime.

I also note that PW2 testified that she was defiled numerous times by the accused so she certainly knew her repeated defiler. This evidence was corroborated by the testimonies of PW1 and PW3 and remained

unchallenged by the defence. PW1 states that in February 2009 owing to their concern over the size of PW2's private parts, they sought medical advice. He stated that they subsequently discovered a discharge from the child's private parts and took her back to the doctor. In December 2009, she was diagnosed with gonorrhoea and, on PW3 asking the child what had happened to her, she indicated that she had been defiled by the accused. PW3 also testified that the child told her that she had been defiled many times by the accused.

I shall now revert to the inconsistencies highlighted by defence counsel. It was submitted that Exh. P.2 did not mention or establish that the accused was the person responsible for PW2's defilement. I note that the Police Form 24 that constitutes Exh P.2 is prescriptive and limited as such to the areas of external injuries, physical examination to determine the accused's age and mental health thereof. It does not entail a full medical examination of the accused.

I do not find the inadequacy of this Police Form to be of such magnitude as would reasonably impeach or negate PW2's identification of the accused. It is a minor omission on a restrictive form that does not impeach the quality of the identification evidence. However, it is my considered view that the relevant public offices should consider revising Police Form 24 to enable a more comprehensive medical examination of accused persons, particularly persons suspected of having committed sexual offences. Certainly it would be most helpful to criminal justice to have suspects undergo a test as elaborate as victims undergo.

Defence counsel also raised the issue of PW2's initial reference to having a stick inserted in her vagina. I note that the witness did subsequently clarify what she meant and her evidence was not challenged in cross examination. In any event, I am cognisant of the child's tender age and therefore perception of the defilement 'instrument'.

In the premises, I find that the prosecution has proved the offence of aggravated defilement against the accused Kakooza Abdu alias Kiyaga beyond reasonable doubt. I find the accused guilty of aggravated defilement contrary to section 129(3) and (4) of the Penal Code Act, and do convict him of the offence as charged.

MONICA K. MUGENYI

JUDGE

11th January, 2011