

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT THE SESSION AT MASAKA
HCT-06-CR-SC-102 OF 2010

UGANDA :::::::::::::::::::::::::::::::::: PROSECUTION

V E R S U S

KAYINZAAYINEMBABAZI PONISIAN::::::::::::::::::::ACCUSED

BEFORE: HON. MR. JUSTICE ANUP SINGH CHOUDRY

corroboration is not limited to direct evidence of independent witness, ; threat to life can be corroboration as circumstantial evidence; lies told by accused during evidence can be corroboration against him.

JUDGEMENT:-

The accused KAYINZA AYINEMBABAZIPONSIAN indicted with defilement contrary to section 129 (3) and (4) of the Penal Code Act. Prosecution alleges that KAYINZA AYINEMBABAZI PONSIAN on the 8th day of June 2010 at Kabudadunda village in Lybantonde District had unlawful sexual intercourse with NASARI NIGHT who was under 14 years old.

The accused pleaded not guilty and so all the issues came forth requiring the prosecution to prove its case. As a background, prosecution case as got from the evidence of the prosecution witness was as follows:

On 8th June 2010 at about 17:00 hours when the accused who was victim's neighbour, entered the victim's house when she was in bed , grabbed her and defiled her .The victim raised an alarm which attracted people like Rukunze, the neighbour, who found the accused still defiling the victim.

The accused on seeing Rukunze fled; and was seen coming out of the victim's house

The victim was examined on Police Form 3. It was found that the victim's hymen had been ruptured and she suffered bruises on her private parts.

Matters were reported to the police and it was found that the accused was on the run. He was eventually arrested and charged with aggravated defilement- 3 months later.

The accused was medically examined on Police Form 24. He had no injuries and was found to be mentally normal.

For the prosecution to obtain a conviction in this defilement case, it must prove the following:-

- (a) That the girl was below 14 years old.
- (b) That she underwent penetrative sex.
- (c) That it is the accused who did it to her.

The defence have conceded the first two ingredients that is that victim was under 14 years of age and that there was penetrative sex. The issue before this court is therefore whether or not the accused had participated in the offence. I shall briefly deal with the evidence by the parties as tendered:

PW3: is the father of the victim and states that on the 8th June 2010, he had left his daughter Nasasira at home with her brother when he went to the hospital for treatment of one of his children. He returned in the evening at 7pm and found that Nasasira was asleep. The next day in the morning on the 9th June the neighbour Rukunze who witnessed the incident informed PW3 that his daughter was defiled the previous day on 8th June at 5pm. The victim had raised an alarm. On being informed that the victim was defiled PW3 then contacted accused's elder brother Piura, a neighbour and reported the incident to him. The accused agreed to have the victim treated at the hospital on that day. However in the meantime the accused disappeared. The victim was then taken to the hospital by her aunt and found to have been defiled.

PW3 confirmed that the accused was a neighbour and the families had no grudge at all. PW3 was a truthful witness. He endeavoured to resolve the matter with the accuser's brother Pira, but failed because the accused made a run.

PW4: was the victim Night Nasasira. She was 13 at the time of giving evidence on oath. She knew the accused very well as he was a neighbour. She was able to identify the accused in court. The victim confirmed that she was in bed face up and heard someone who entered her room. She was able to identify the accused. She further confirmed that the accused held her legs and put them along his waist. The accused removed his penis and entered her vagina and she started bleeding. The accused also tore her nickers and warned her not to tell anyone otherwise he would cut her. Her father had no grudge with the accused.

The victim confirmed that when she was attacked by evil spirits she would know if she was bewitched. In that case she would always make an alarm but would not know who would have come to her rescue until after she would gain consciousness.

On re-examination the victim confirmed that at the time of sleeping, the accused touched her and she was conscious and that she was not bewitched. She stated that in the evening she was sleeping because she was not well. When her father came she did not disclose that she had been defied because she was afraid. Her evidence could not have been more genuine.

PW5: This is the arresting officer who was chasing the accused after he disappeared, on 9th June 2010. The Local Authority were looking for him and the LC1 was aware of that. PW5 had been tipped off by Muuhaamed and Ssabayi who lead him to the accused's home at 1 am in the morning on the day of arrest. The accused resisted arrest. The accused was arrested on 13th September 2010. PW5's evidence was credible and frank.

DW3: the defence evidence. DW1 defence was a plain denial that he did not commit the offence. He confirmed that he knew the victim for a long time as he was a neighbour living opposite their house. He further confirmed that he was able to identify the victim in the court and that he had no grudge with her family. He blatantly

denied the evidence given by PW3, PW4, and PW5. He was a compulsive liar. There was no credibility in his evidence; the evidence given was unsworn.

First of all the evidence of PW3 would as a matter of practice requires corroboration for two reasons. Firstly because she is a single identifying witness under difficult circumstances. Secondly because this is a sexual offence. **Jackson Kitutu Vs Uganda [1976] HCB 8.** While however it is necessary to look for corroboration in sexual offence, the court may convict in absence of corroboration if its satisfied that evidence is truthful **Chila & Ano. Vs Republic [1967] EA 722.**

In this instant case, the prosecutor relies heavily on the evidence of PW3 , PW4 and PW5. In her testimony which is not disputed she knew the accused very well. She was able to disclose the identity of the accused both during the incident in broad day light; It was around 5pm on 8th June 2010 when there was sufficient light – and also when she saw her in court without a flicker.

Victim's evidence was truthful.

The State Attorney in her submission says that the victim was on the date of incident, by her own evidence, was well and conscious and capable of recognising the accused.

The State rebutted the accused's evidence that he was arrested three weeks after the incident - PW3 the father who the very day had interface with his brother and the accused when the accused disappeared the very same day only to be found 3 months later.

The accused gave evidence that he was at home and did not run away. This was rebutted by PW5 the arresting officer who stated that he was arrested 3 months later and he resisted arrest. He was arrested at 1pm in the morning and the local authority had stated that he was required by the police. The arrest was facilitated by tip off.

The defence Counsel submits that the victim suffered from witch attacks and was not capable of identifying the accused. That the accused did not run away nor did PW3

ask him to take the victim to the hospital. The Counsel submits that the Accused on being arrested was never explained charges against him as to why he was being arrested although he was given a copy of the charge sheet. There is also submission that the victim does not have supper of 8th June 2010 because she was under attack of evil spirits and that she could not know what was around her. The victim's evidence is that when she is bewitched she does not have supper.

I have examined all the evidence of all the parties and their submissions and I accept the evidence of PW3,4 and PW5 as credible. The evidence of DW1 was a bunch of lies.

I am also persuaded by the submissions of the prosecution counsel and observations by the Assessors that being not well is not an abnormality and missing supper does not mean that one is under evil attacks.

The defence submissions have been rebutted and are unsubstantiated to raise any doubt.

The victim's evidence was truthful. That itself did not require further corroboration but if it did then the threat by the accused on or after the defilement that she shall not disclose the incident to anyone or else he will cut her amounted to subsequent corroboration by the victim. The essential requirements of corroboration is that it must comprise evidence which is independent of the testimony to be corroborated; in other words the complainant cannot corroborate herself.

However corroboration is not limited to direct evidence of independent witness but may be provided by 'a piece of circumstantial evidence which together tend to show that the defendant committed the crime':

The accused threatened the victim on or subsequently after the act and that knowledge was circumstantial evidence which the victim could not possess unless her evidence was truthful; it was a fact independent of her evidence, which supported or confirmed her identification as surely as if she would be cut if she disclosed the accused. **See R v Gerald Craven McInnes (1990) 90 Cr App R 99,**

where a subsequent identification on a video parade corroborated description of accused's clothes and that knowledge of clothes was circumstantial evidence and a fact independent of her evidence which identified the accused's identity.

The evidence given by the accused were blatant lies and corroborated the evidence against him as the court is satisfied that essential ingredients were satisfied namely that the lies were deliberate; they related to the incident; and the motive of the lies was a realisation of guilt and fear of truth; and the statements of the accused in his evidence were shown to be lies by evidence of independent witnesses. **See R v Lucas (1981) 73 Cr App R 199**

The Prosecution have proved beyond reasonable doubt that the accused was well and truly placed at the scene of crime .

Both gentlemen assessors have advised me to find the accused guilty. For the reasons I have given above, the prosecution has proved beyond reasonable doubt that the accused defiled PW3 Nasasira Night .I find him guilty of defilement contrary to section 129 (3) and (4) of the Penal Code and accordingly convict him. I sentence him to 18 years of imprisonment inclusive of period spent on remand.

Right to appeal within 14 days of receipt of the typed judgement explained.



A.S. CHOUDRY

JUDGE

23.02.12