

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**HCT-00-CR-SC-0301 OF 2010**

**UGANDA.....**  
**PROSECUTOR**

**VERSUS**

**OCHWO LASTON .....**  
**ACCUSED**

**Before: Hon. Lady Justice Monica K. Mugenyi**

**JUDGMENT**

The accused, Laston Ochwo, was indicted for the offence of aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act. The brief facts giving rise to this indictment are that on 4<sup>th</sup> April 2009 the accused allegedly performed a sexual act on a one Nyakecho Agnes, a girl below the age of 14 years at Kigoowa village, Kampala District. The accused denied the charges and pleaded not guilty thereto.

The ingredients that constitute the offence in issue presently are first, the performance of a sexual act upon the alleged victim and, secondly, the victim should have been under 14 years old at the time. It is well settled law that the burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. Furthermore, the prosecution is required to prove all the ingredients of the alleged

offence, as well as the accused's participation therein beyond reasonable doubt. See **Woolmington vs. DPP (1993) AC 462**, **Okale vs. Republic (1965) EA 55** and **Miller vs. Minister of Pensions [1947] 2 All ER 372 at 373**.

In the present case Police Forms 3 and 24 were admitted in evidence as Exh. P1 and P2 respectively pursuant to a Memorandum of Agreed Facts dated 5<sup>th</sup> March 2012. Exh. P1 reported that the victim was 'less than 15 years old' and had been subjected to a recent sexual act. This admitted evidence does establish the fact that a sexual act was performed on the victim. However, given that the date of this document was not very legible, the said document does not shed light on whether or not the sexual act that was performed on the victim is the one in issue presently. Further, Exh. P1 falls short on proof of the victim's age. A medical finding that the victim was under 15 years of age would not prove to the required standard that she was under 14 years of age as by law prescribed. I therefore find that the medical evidence contained in Exh. P1 does not prove either ingredient of the present offence to the required standard and revert to the oral evidence for a determination of the same.

Given that the victim's age is in issue I propose to commence with a determination thereof prior to consideration of the ingredient of a sexual act, which I shall address concurrently with the alleged participation of the accused.

PW1 (the complainant) testified that her daughter (PW2) was 10 years old at the time of the present trial but 7 years old at the time she (PW2) was defiled. At trial PW2 testified that she was 10 years old. This would place her at 7 years old at the time of the alleged defilement in 2009. The accused did not question PW2's age. In submissions learned Defence Counsel simply contended that the entry of 'less than 15 years' rather than an

approximate age rendered the medical report too weak to be relied upon. I quite agree with learned defence counsel on this point. Nonetheless, court did have opportunity to observe the victim at trial and noted that, while she was a fairly big bodied child, she did appear to be under 14 years old at the time. Therefore she would certainly have been under 14 years old 3 years ago when the alleged defilement occurred. I am satisfied, therefore that PW2 was under 14 years at the time of her defilement and do find that the prosecution has proved this ingredient of aggravated defilement beyond reasonable doubt.

On the question of the alleged sexual act, as well as the accused's participation therein, PW2 testified that she was defiled by the accused on the night of 4<sup>th</sup> April 2009. She stated that the accused lay on top of her and put something inside her. She further testified that at the material time the accused lived in her parents' home where she too lived, and had lived with her family for about 7 months. The witness testified on oath pursuant to the findings of a *voire dire* test. PW1, on her part, testified that on the night in question she returned to her home from visiting relations upcountry and, upon opening the door to the house, saw the accused running out of the room where PW2 was sleeping. Upon entering the room she found the child soaked in semen and later observed some semen around her private parts. On the other hand, the accused gave sworn evidence in which he denied all the allegations against him and attributed the present proceedings to a grudge that PW1 held against him. He conceded that he was present in the house where the defilement allegedly took place on the night in question, and contended that while the victim (PW2) would ordinarily have had no reason to tell lies on oath against him she could have done so in support of her mother's allegedly vendetta-laden agenda.

Section 129(4)(a) of the Penal Code defines a sexual act to include penetration of a person's sexual organ by another sexual organ however slight the penetration. In the present case the issue of penetration, as well as the purported identification of the accused were attested to by PW2, a child of tender years. I therefore propose to address myself to the legal position on child evidence and the evidence of a single identification witness prior to an evaluation of PW2's evidence.

Section 40(3) of the Trial on Indictment Act states as follows on the question of child evidence:

**"... where evidence admitted by virtue of this subsection is given on behalf of the prosecution, 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."**

The import of the foregoing statutory provision would appear to be that generally the evidence of a child prosecution witness requires corroboration before being relied upon for a conviction. See also **Francisco Matovu vs. R (1961) EA 260** (Court of Appeal).

Be that as it may, in the case of **Mukasa Everisto vs Uganda Criminal Appeal No 43 of 2000** (Supreme Court), it was held that evidence of a child of tender years that was given on oath did not necessarily require corroboration. Further, in the later case of **Private Wepukhulu Nyunguli vs Uganda Crim. App. No. 21 of 2001** (Supreme Court) it was held that '**normally in sexual offences the victim's evidence is the best proof of penetration and identification.**'

In the present case, PW2 gave evidence on oath therefore this evidence would not necessarily require corroboration. In addition to being a child witness, PW2 was the victim of the alleged aggravated defilement. Her evidence was quite explicit on the issue of penetration. She testified that something was placed in her vagina on the night of 4<sup>th</sup> April 2009. As the victim of that sexual act who testified on oath and was subjected to the rigours of cross examination, PW2's evidence is indeed the best proof of penetration and need not require corroboration in order to secure a conviction. I am therefore satisfied that the prosecution has proved the fact of penetration beyond reasonable doubt. Given that the age of the victim thereof was earlier hereinabove found to be under 14 years of age, I do find that the prosecution has proved the offence of aggravated defilement contrary to section 129(3) and (4)(a) beyond reasonable doubt.

The question then is whether or not the accused was responsible for or did participate in the proven aggravated defilement. It is trite law that court can convict on the evidence of a single identification witness, such as PW2, albeit 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. See **Abdala Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978** and **Christopher Byagonza vs Uganda Crim. Appeal No. 25 of 1997**.

I am, therefore, mindful of the need for caution (and do so caution myself) before I rely on PW2's identification evidence for a conviction. Although, as expounded in **Private Wepukhulu Nyunguli vs Uganda** (supra), the victim's evidence is the best proof of identification in sexual offences such evidence should, in

my view, be subjected to the test of correct identification to ascertain its accuracy. 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 did not testify to the source of light that was available to her for identification purposes or the length of time the accused was under her observation. While this court takes cognisance of the fact that a sexual act such as has been proved in the present case does occur with very close proximity between a victim and his/ her assailant, in the absence of evidence on the lighting that was available and the length of time such assailant was under scrutiny the accuracy of the purported identification is compromised. I therefore find that the direct evidence adduced by PW2 did not prove the alleged participation of the accused beyond reasonable doubt.

Be that as it may, it is trite law that since many crimes are committed in secrecy, it is inevitable that in a criminal trial, direct proof of guilt is often lacking and a great deal of the evidence is indirect and circumstantial. In the absence of evidence directly proving the facts in issue, the defendant may even be convicted solely on circumstantial evidence. See Halsbury’s Laws of England (2006) p. 744.

Further, in the case of **Mureeba Janet & Others vs Uganda Crim. Appeal No. 13 of 2003** (Supreme Court), their Lordships cited with approval the decision in **R. vs Kipkering Arap Koske & Another (1949) 16 EACA 135**, where it was held that ‘**in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt.**’

In the present case, it was the evidence of PW1 that she saw the accused running away from the room where PW2 was sleeping; she then found PW2 soaked in semen and later observed semen around the child’s private parts. The same witness testified that PW2 told her that while she (PW1) went to seek the help of the neighbours the accused cleaned off some of the semen on the child. PW2 also attested to this action by the accused in her evidence. The accused, on his part, conceded to having been at the scene of crime on the night in question. In my view, in so far as it attested to the accused having been at the scene of crime and his attempt to erase evidence of the sexual act performed on PW2, the foregoing circumstantial evidence does point to the culpability of the accused in the present case; is incompatible with the innocence of the accused, and incapable of explanation on any other reasonable hypothesis than that of guilt.

Before I take leave of this issue I shall address the inconsistencies in the prosecution evidence that were highlighted by learned Defence Counsel. He contended that the name ‘Sida’ that PW2 attributed to her defiler was not the accused’s name and therefore another person not the accused was responsible for her defilement. With due respect to learned Counsel, the name she referred him by notwithstanding, at the trial PW2 clearly identified the accused as the person she attributed that

name to. The accused himself also conceded that he had heard people calling him 'Sida' even though it was not his name.

In the final result, I am satisfied that the prosecution has proved the offence of aggravated defilement against the accused – Laston Ochwo beyond reasonable doubt. I find the accused guilty of aggravated defilement contrary to section 129(3) and (4) (a) of the Penal Code Act, and do convict him of the offence as charged.

**Monica K. Mugenyi**  
**Judge**

19<sup>th</sup> March, 2012