THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HOLDEN AT IGANGA

CRIMINAL SESSION CASE NO. 079 OF 2018

UGANDA……..…….. PROSECUTOR

VERSUS

MUGOYA ABU ...…….. ACCUSED

JUDGMENT

BEFORE HONOURABLE JUSTICE EVA. K. LUSWATA

The accused **MUGOYA ABU** was on an unspecified date indicted of the offence of aggravated defilement contrary to **sections 129 (1) (3)** and **(4) (a)** of the **Penal Code Act Cap. 120LOU**. The particulars of the indictment are briefly that on 1/07/2017**, MUGOYA ABU** in Kasongoire village in Nankoma Sub county Bugiri District performed a sexual act with Kagoya Hajara,(hereinafter referred to as the child), a girl aged 3 years.

The accused denied the offence and a plea of not guilty was recorded on 7/9/2020. He was represented by Counsel Asiimwe Anthony, while the state was represented by Nabende David. The state presented four witnesses, and the accused gave a sworn statement but did not call any other witness.

The prosecution case is that on 1/07/2020 about 11:00am the child and her mother Kubinji Hadijh were in their home when the accused arrived and proceeded to the back of the house. He then called the child to collect fire from the kitchen and take it to him to light a cigarette, which the child did. Soon thereafter, Kubinji heard the child crying behind the house and on rushing there to investigate, she found the accused having sexual intercourse with the child. That on seeing Kubinji, the accused got up

from the child and run away. Mugoya Karim the victim's father who was alerted, returned to the home and rushed the victim to Bugiri hospital and thereafter the matter was reported at Namuganza police post.

The accused offered an outright denial to the offence, stating that he was nowhere near the crime scene when the offence is alleged to have been committed.

The law

The age old accepted principle in criminal proceedings under our law is that the state must prove the charge beyond all reasonable doubt. Thus the indictment will yield a conviction only on the strength of the prosecution case and not because of any weakness in the accused's defence who in fact has no obligation to prove his innocence. (See **Ssekitoleko V Uganda [1967] EA 531**). According to **Woolmington Vs DPP (1935) AC 462**, the degree of proof expected, must be one that carries a high degree of probability or, beyond reasonable doubt. **Richard Card in his book 'Criminal Law' 13th Ed., at pg 96-97** while analyzing the principle laid down **Woolimington** opinied that *"if at the end of the case, there is reasonable doubt created by the evidence given by either the prosecution or accused, as to the commission of the offence (with malicious intention), the prosecution has not made out its case".* Thus, evidence expected of the prosecution must be so strong as to leave only remote probability of the accused's innocence.

For the accused to be convicted of aggravated defilement, the prosecution must prove each of the following essential ingredients to the above standard;

1. That the child victim was below 14 years of age.
2. That a sexual act was performed on the child victim.
3. That it is the accused who performed the sexual act on the child victim.

PW3 Kagoya Hajarah was presented as a key witness. Having conducted *voire dire* proceedings, I made a finding that she was unable to appreciate the nature or

importance of the oath. She gave evidence but did not swear or affirm before giving her testimony. This was in line with **Section 40 (3)** of the **Trial on indictment Act** which allows an unsworn statement of a witness to be entered on record on condition that I would only consider a conviction after warning myself or the assessors of the danger of convicting upon her evidence as a minor in the absence of corroboration. See for example **Kibageny Arap Kolil v R (1959)EA 92 – 93.**

None the less, I allowed defence counsel to subject PW3 to cross examination. This is also in line with the decision of the Supreme Court in her decision of **Sula versus Uganda [2001] 2 EA 556 at pages 560-563** (followed in **Kiiza v Uganda (CRIMINAL APPEAL NO. 0102 OF 2008) [2014] UGCA 19 (18 June 2014).** The learned Justices observed that:

"There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined…. "Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of the oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his /her evidence"

Proof of age

The prosecution is mandated to prove that the child was at the material time below the age of 14 years. Age can be proved by the production of her birth Certificate, testimony of her parents, or the Court's own observation by her common sense assessement. See for example, **Uganda V Kagoro Godfrey H.C. Crim Session Case No.141 of 2002**.

It was an agreed fact that the victim was born on 16/12/2013 and her birth certificate confirming that fact was admitted without contest and marked **PEX.1.** The prosecution evidence is that the offence was committed on 1/7/2017, which would

make the child three years and seven months at the material time. That evidence would tally with **(PW4)** Dr. Anthony Wamasyuwu's observation in the child's PF3A, **(PEX 3),** that the child under examination was a toddler. There was no contest to those facts. Indeed I did observe the child in Court. Her physical appearance and mannerisms were that of a child of tender years, possibly six years.

10] Therefore, the State did prove beyond reasonable doubt that the child was a girl below the age of 14 years.

Proof of a sexual act

One of the definitions of a sexual act under **section 129 (7)** of the **Penal Code Act** is *"penetration of the vagina, however slight by the sexual organ of another or unlawful use of any object or organ on another person's sexual organ".* Proof of penetration is normally established by the victim's evidence, medical evidence and any other congent evidence (**See Remigious Kiwanuka Vs Uganda SC Crim Appeal NO. 41 of 1995** (unreported). I emphasize that the slightest penetration is enough to prove the ingredient.

PW3 was the principle witness presented to prove the act of sexual intercourse. She testified that the accused whom she referred to as Baaba Abu (meaning father or uncle) had sexual intercourse with her in the bathroom shelter of her mother while she was lying down. She narrated that the accused who was dressed, first removed his trouser before the act. She was specifically asked to describe what the accused did to her. With the help of a male doll she pointed first at its knee, and then its penis which she stated he inserted into her private parts, which she pointed to. She continued that as the accused had sexual intercourse with her she saw what she described as "the anus", something hard and solid. She also stated that she saw fluids in her private parts, fluids that she observed came from the accused. That she also felt something in her body and that she cried out but did not know why she did so.

That evidence was corroborated **PW1 Kubingi** the child's mother who testified that after the accused went behind the house, he called out to the child to bring him fire to light his cigarette. That the child went into the kitchen, picked a glowing stick of fire and took it to him but did not return to the front of the house. That after about one hour she heard Hajara crying from behind the house towards the bathroom and that when the cries persisted, she decided to go and investigate the cause of her distress. When she reached behind the house, she saw the accused on top of the child defiling her. That he then jumped up from the child exclaiming "sister *in law* forgive me" and immediately started to run away. Kubingi continued that she raised an alarm that attracted other village mates who pursued the accused, who run away.

Kubingi continued that when asked what had happened, the child could not talk properly but she made out a few words that *"father: there there"* while she was pointing in the area of her private parts. That she removed the child's clothes and observed that the accused had ejaculated on her daughter and the seminal fluids were visible around her private parts. That there was no sign of penetration or bleeding but semen could be seen on the child's legs and thighs; a confirmation of the defilement. PW2 added to that testimony by testifying that he responded to the alarm and on asking the child what the problem was, she answered "*Baaba Abu"* at the same time pointing at her private parts/vagina.

PW1's evidence was to the effect that the accused ejaculated on her daughter but did not penetrate. However, PW4 who examined the child on 02/7/2017, and recorded his findings in the **PF3A (Exhibit PEX3)** at the Bugiri Main Hospital, corroborated the child's testimony and confirmed the facts of a sexual act on the victim. The medical report indicated that the victim's genitals had hyperemia and the hymen was raptured. That the cause of the injury was a superficial injury to the external genitals and penetration.

I accordingly find that this ingredient has been proved by the prosecution beyond reasonable doubt.

Proof of participation

The prosecution is also required to prove that it is the accused that performed the sexual act on the victim. There should be credible direct or circumstantial evidence placing the accused at the scene of crime as the perpetrator of the offence. **See Uganda v Fualwak (Criminal Sessions Case NO. 0085 of 2015) [2018] UGHCCRD 110 (10 May 2018).**

PW3 testified that she had taken fire from her mother's kitchen to "Baaba Abu" (paternal uncle) who had sexual intercourse with her in the bath room shelter of her mother, as she was lying down. The child was consistent that it was the accused who slept on her and defiled. Her first report to both PW1 and PW2 was that it was "Baaba Abu" who had done things to her, (as she pointed to her private parts).

The victim's evidence was corroborated by **PW1** who testified that she went behind the house in response to the child's cry. She found the accused on top of the child having sexual intercourse with her. That when she saw them, the accused person jumped off the child and said to her ''sister *in law* forgive me''. PW3 was part of the crowd that pursued the accused.

On the other hand, **PW2** testified that on 1/7/2017 at around 11:00 am he was in the garden near his home then heard an alarm coming from the direction of his home. That he run in response to the alarm and when he reached his home, he was informed by his wife and other natives that the accused had defiled his child. That when he asked the child what the problem was she answered *"Baaba Abu!"* at the same time pointing at her private parts/vagina.

In defence, the accused denied visiting PW1's home on 1/7/2017. He contended that he was between 9:00am and 4:00pm in his home, one mile away attending a function of cementing the grave of their late father. He continued that during that function, at about 1:00pm, PW1 came informed him that the child had been defiled but that she does not know who did it and he specifically denied any involvement. That he was

arrested after five days and first got to know that he was being accused of defilement, on the day he was arrested.

I note that the accused contradicted himself over some material facts. During cross examination, he changed his testimony that PW1 visited his home on the fateful day, after being pressed he changed again to admit she did. Again although he professed to have first known of allegations against him on the day he was arrested, he changed to state that after PW1 confronted him, and he denied involvement, he heard a roar of people stating that *"…….it could be Sheik/ Seka who defiled the girl!*. He denied knowledge of the Sheik refered to, but when questioned by court, admitted that he is the Sheik of Kasongoire. As I will show, his wavering testimony was greatly out paced by the prosecution.

In the case **Abudalla Nabulere & 2 Ors Vs Uganda (CRIMINAL APPEAL NO. 9 OF 1978) [1978] UGSC 5 (5 October 1978);** it was held that the judge should closely look at the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused etc. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger. When the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution.

Having warned myself of the need of great caution, I am convinced that the accused was clearly identified by the victim and **PW1** the mother of the child who came to her rescue. **PW1** and **PW2** were familiar with the accused as a paternal uncle to the victim and older brother to the father of the Victim **PW2**. He was a frequent visitor to their home and PW1 had seen him in their home that day. She was not alarmed when

the child did not return after taking fire to the accused since the two knew each other well. The event in question happened at about 11:00am in broad day light and the possibility of mistaken identity would be eliminated.

There were indeed some contradictions in the prosecution case. It is not clear whether the accused resided with PW1 and PW3 on a permanent basis. What is clear however is that he was a frequent visitor and was present in their home on 1/7/2017. It is also not clear whether the defilement happened within PW1's bathroom shed or outside behind the house. The child testified it was in the bathroom and that is where her father found her but PW1 stated it was on the way to the bathroom. Those contractions were minor since the defilement was proved to have happened. In contrast, the contradictions in the defence were significant and pointed to dishonesty.

Further, the accused's subsequent conduct after the incident was not conduct of an innocent. In the Case of **Isaya Bikumu Vs Uganda Crim Appn. NO. 24 /1989** it was held that the appellant's disappearance provided additional corroborative evidence connecting him to the offence. Also in the case of **R Vs Baskerville (1916) 2KB 658** in court interpreted the accused's disappearance from the village for four years immediately after the incident was sufficient corroboration of his guilt. PW1 testified that when the accused was caught red handed, he run off and was pursued by a crowd. It was this same crowd he must have heard calling out his title of "Sheik". PW2 added that about two weeks after the incident, the accused was arrested in Buterere Bukooli at his mother's place. In view of the past events, it is inconceivable as stated by the accused, that he had only gone to visit his mother.

I find that this ingredient has also been proved beyond reasonable doubt.

I conclude therefore that the prosecution has proved the indictment beyond reasonable doubt and in this, I concur with the assessors in their joint opinion. I proceed to convict the accused accordingly.

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Eva K. Luswata

Judge

Date: 04/02/2021