THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0083 OF 2004

UGANDA ……..……... PROSECUTOR

VERSUS

BAZIRAKE JOHN ……. ACCUSED

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

The accused herein, Bazirake John, has been indicted for the offence of defilement, in contravention of section 123(1) of the Penal Code Act. In the particulars of the offence, as set out in the indictment, it is stated that on the 25th day of May 2003, at Nyamicucu village, Bufunjo Sub County, in the Kyenjojo District, the accused had sexual intercourse with one Abigaba Joventa; a girl under the age of 18 years. The charge was read out and explained to the accused; to which his response was that he had understood the same, but he pleaded not guilty. As a result, the accused stood a full blown trial.

The prosecution has the burden to prove, beyond reasonable doubt, each of the following three ingredients of the offence of defilement, for that charge to stand. These are namely that:-

(i) The girl named in the indictment was subjected to sexual intercourse.

(ii) The said girl was below the age of 18 years at the time of the sexual intercourse.

(iii) It was the accused who perpetrated the sexual intercourse referred to in (i) and (ii) above.

To prove its case the prosecution called three witnesses; namely: Teopista Kemitari – PW1, the mother of the alleged victim; Joventa Abigaba – PW2, herself the alleged victim of the offence charged; and Cornelius Atukwase – PW3, the brother of the alleged victim. By consent, and in

accordance with section 66 of the Trial on Indictments Act, the parties admitted the medical report on the examination made on the victim. All this was in a bid to discharge the burden of proof that lay on it as indicated above.

In seeking to prove that the victim PW2 had been subjected to sexual intercourse, the prosecution relied on the evidence adduced in Court by PW1, PW2, and PW3; and also the medical report aforesaid. It was manifest when she appeared in Court that the victim – PW2, was a child of tender years. I was therefore compelled to conduct a *voire dire.* I was able to satisfy myself therefrom that she was possessed of sufficient intelligence, knew about God, and understood the duty of telling the truth; after which I then permitted her to give an unsworn testimony. In her testimony, she gave direct evidence by narrating what had happened between her and the accused on that day with regard to the alleged crime.

She testified that on that day she was at home playing with other children when the accused who prior to that day had been in the habit of calling her his wife, carried her and took her to the kitchen. The accused closed the door of the kitchen, blocked it with a stone, gave her sweet mint popularly called *'pepsi'*, and then subjected her to sexual intercourse on a polythene sheet; and at this act of sexual intercourse, she felt pain in her private parts. Section 40 of the Trial on Indictments Act provides that:-

(1) Every witness in a criminal cause or matter before the High Court shall be examined upon oath, and the court shall have full power and authority to administer the usual oath.

(3) 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 given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this sub section 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 approach a Court must take with regard to evidence of a child of tender years, sworn or unsworn, is now settled. There is a corpus of authorities that have decided the matter; and as it was decided in one such case, ***Ndyayakwa & Ors vs Uganda, C.A. Crim. Appeal No. 2 of 1977;***

[1978] H.C.B. 181, it is that no conviction can be based on the unsworn evidence of a child of tender years unless, as a matter of law, such evidence is corroborated by some other material evidence implicating the accused.

The case of ***Muhirwe Simon vs. Uganda – S.C. Crim. Appeal No. 38 of 1995,*** re-affirmed the need for corroboration; and clarified that corroboration is required as a matter of law - hence mandatory - only where the child of tender years gives unsworn testimony which is admitted when the Court, after carrying out a *voire dire* to justify the reception of the evidence, forms the opinion that the child is possessed of sufficient intelligence, and understands the duty of speaking the truth.

In the instant case then I warned the gentlemen assessors, as I do to myself now, of the need, as a matter of law, to look for evidence that would go to corroborate the unsworn testimony of this child. This child witness was reported to be suffering from high fever, and it was manifest in the course of her testimony. She was thus understandably rather slow in giving her narrative, and in her responses. Nevertheless, she testified with clarity and apparent truthfulness. She was evidently a genuine and reliable witness; and was not shaken by cross examination. That not withstanding, due to the mandatory need for corroboration of her evidence before any conviction can be founded on it, Court is under duty to ascertain whether such corroborative evidence in fact exists.

PW3 testified that on the day named in the indictment, he was at home with his siblings; when at around 5.00 p.m. the accused, who was drunk, came and asked him (PW3) to prepare some food for him (the accused). A short while later, he (PW3) came out of the house and noticed that the accused and the victim PW2 were nowhere to be seen. He checked in the kitchen where the accused used to sleep and, finding it closed and blocked from inside, he pushed it and found PW2 lying down facing up while the accused was lying on top of her in flagrante delicto having sexual intercourse with PW2. He then rushed to the trading centre nearby to call his mum – PW1.

PW1 testified that she was called from the trading centre by PW3, who reported to her that he had found the accused sexually assaulting PW2 in the kitchen at home. She rushed home and found both the accused and the victim still lying on the polythene sheet in the kitchen. The victim was naked as her knickers were thrown aside on the floor; and as for the accused, the zip of his pants was open and his fully erect penis was sticking out. She demanded to know from the accused

what it was he was doing in the kitchen with PW2. The accused replied that he was playing with her; upon which, PW1 and the other women who had accompanied her, arrested him and took him to the authorities.

When PW1 was questioning the accused, PW2 escaped from the room, and only came back home upon receiving the assurance that nothing bad would happen to her on her return. Later, after overcoming her fear, she opened up to her mother - PW1, and confessed that the accused had defiled her. PW1 however did not, herself, effectively examine PW2. The medical examination carried out three days later, while it established that there was no rupture of the hymen, nevertheless established that around the private parts of the victim, there were signs of inflammation, pain and foul smelling discharge; it gave the opinion that this was a sign of venereal disease.

Corroboration of the testimony of PW2 is therefore manifest from the direct evidence of PW3, and the circumstantial evidence adduced by PW1 who found the accused and the victim in such an incriminating position on the polythene sheet in the kitchen floor; and as well, the medical report exhibited herein by consent. I do find both PW1 and PW3 to be witnesses of truth. The medical report certainly corroborates the occurrence of sexual intercourse when it attests to the evidence of foul smelling discharge from the vagina. The provisions of section 66 (3) of the Trial on Indictments Act are as follows:

> *"Any fact or document admitted or agreed (whether the fact or document is mentioned in the summary of evidence or not) in a memorandum under this section shall be deemed to have been duly proved; …"*

Although the medical report states that there were no injuries consistent with force having sexually been used, a matter which defence counsel sought to make an issue out of as evidence going contrary to the allegation that the victim – PW2 had been defiled, that aspect of the report, in my mind, does not negate the very strong evidence contained in that very medical report itself, pointing to proof that the victim had indeed been subjected to sexual intercourse. Such evidence is apparent from the signs of inflammation noticed on the private parts of the victim, foul smelling discharge from her vagina, and the pain she reported around her private parts.

In the rape case of ***Kibazo vs. Uganda - C.A. Crim. Appeal No. 189 of 1964; [1965] E. A. 507,*** at p. 511; in a judgment of the Court read by Sir SAMUEL QUASHIE - IDUN, P.; the Court, deciding on the contention that the bruises on the complainant was as a result of forceful non consensual sexual intercourse, observed that such bruises do occur even to women who have given consent to sexual intercourse, depending on:

> *"…the size of the male organ and the manner in which intercourse takes place."*

The point relevant here is that evidence of bruises, or the absence of it as in the instant case, by itself, does not amount to much in the proof, or otherwise, of sexual intercourse; as the manner the sexual intercourse was performed would determine such result. All that the prosecution need to prove is that there was penetration of the girl's vagina; and as it was held in ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), however slight the penetration may be, it will suffice to sustain a conviction for the offence of defilement. In the case of ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995***, the Supreme Court of Uganda stated as under:-

> *"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt."*

The Court of Appeal for Uganda, cited the case of ***Hussein Bassita*** (supra), with approval, in ***Abbas Kimuli vs. Uganda; C.A. Crim. Appeal No. 210 of 2002*** (unreported), and held as follows:-

> *"We further observe that in cases of this nature, doctor's report is desirable but it is not mandatory. …"*

Although I have found PW2 to be a witness of truth with regard to the allegation of sexual intercourse, her evidence has to be corroborated before it can be made the basis of a possible

conviction. This corroboration has satisfactorily been provided by the direct evidence of PW3 who witnessed the sexual intercourse complained of. In addition to this is the circumstantial evidence adduced by PW1, who found the accused and the victim in a very incriminating situation, and then the medical report; the circumstances of both of which could not be explained by any other reasonable hypothesis other than that sexual intercourse had taken place. There was no co existing circumstance that would negate the inference of sexual intercourse having taken place.

As for the ingredient pertaining to the age of the victim at the time of the defilement, no birth certificate was produced in Court. The age of a child can, in the absence of a birth certificate, as in this case, be proved by any other admissible evidence. The victim gave her age, as being 9 (nine) years when she was giving her testimony in Court; suggesting therefore that she was 4 (four) years at the time of the defilement. PW1, the mother of the victim, during her testimony in Court, put the age of the victim at the time of the trial herein as 9 (nine) years coming to 10 (ten); meaning that she was around 5 (five) years at the time of the alleged defilement.

The medical report put the age of the victim - PW2 at 5 (five) years, at the time of the defilement. From my visual observation and common sense, and in accordance with the holding in ***R. vs. Recorder of Grimsby Ex parte Purser [1951] 2 All E.R. 889***, I had no doubt whatever in my mind that the victim – PW2, was, even on the day she testified in Court - five years after the event complained of herein - still a child of tender years; falling far below the age of 18 (eighteen) years; and necessitating my conducting the *voire dire* referred to herein above. I was satisfied from that observation that she was under - age; and I would have needed no further evidence on the matter.

It is therefore clearly evident that the victim was, without any doubt, far below the age of 18 (eighteen) years in 2003, when this incident complained of occurred. Accordingly then, there was really no need to delve into the task of proving the victim's age by other means. The need for proof by other means could only have arisen if the Court was not able to determine from her appearance that the victim had been below the 18 years statutory age threshold when she was defiled; see ***R. vs. Turner [1910] 1 K.B. 346***. Counsel for the defence saw no use in demanding any further proof of the age of the child. This ingredient was therefore proved beyond any doubt whatever.

On the final ingredient - that of participation of the accused in the perpetration of the sexual intercourse complained of - all the prosecution witnesses provided direct evidence. In treating evidence of identification such as this, the inculpatory evidence of identification adduced by the victim of the criminal act, as decided in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** is the best evidence**.** PW2 – the victim herself as narrated above, gave an account of how the accused, who lived together with them at their home, lured her into the kitchen, and then defiled her.

PW3, the elder brother of the victim caught the accused red handed, around 5.00 p.m. perpetrating this evil deed. PW1, who rushed to the scene around the same time, found the accused and the victim still in the kitchen, behind closed doors, lying on the polythene sheet, each naked. Therefore, here, the inculpatory evidence of identification is not only that of the victim - PW2; but, as well, that of PW1 and PW3 who both offer direct evidence against the accused.

The accused gave unsworn testimony. He corroborated the prosecution evidence that he worked for and lived with the family of PW1. He testified that PW1 owed him money totalling U. shs. 180,000/= (One hundred and eighty thousand only), which he had earned from the services he had rendered her for several months; and that he was arrested on the very day he was due to be paid. He was not told the reason for his arrest, despite his demand to know, until when he was taken to the police. At the police he was told the reason for his arrest was his having committed the offence of defilement; but he denied it as, he said, he had not done such a thing.

Because proof of the participation of the accused herein is dependent on evidence of identification, though by a couple of witnesses, I have to treat that evidence with caution, and have warned the assessors accordingly; as was advised in ***Roria vs. Republic [1967] E.A. 583,*** and followed by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997;*** where both Courts warned of the danger of relying on identification evidence; and urged court to first satisfy itself that in all the circumstances it is safe to act on such evidence.

In ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77;*** in a passage which was also reproduced with approval by the Supreme Court in the ***Bogere*** case (supra), the Court emphasised that the need for the exercise of care, applies whether it is a case of single or multiple identification witnesses; and in each case the judge has to warn himself and the assessors of the

special need for exercise of caution before founding a conviction on such evidence, as the witness or witnesses though appearing persuasive could in fact be mistaken. Their Lordships then advised that:

> *"The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger…..*
>
> *When the quality 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 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."*

In ***George William Kalyesubula vs. Uganda, S.C. Crim. Appeal No. 16 of 1997,*** the Supreme Court reiterated the need to test with the greatest care the evidence of an identifying witness; especially when the conditions favouring identification are difficult; in which case the court should look for supporting evidence pointing to the guilt of the accused. In ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47;*** and the ***Bogere*** case (supra), it was held that the supporting evidence may be direct or circumstantial. All that is important is that it should satisfy the trial Court that there is no error in identification, or mistaken identity. In the ***Bogere*** case (supra), the Court stated as follows:-

> *"We have to point out that the supportive evidence required need not be that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences* ***(See George William Kalyesubula vs. Uganda*** *(supra)). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose."*

As pointed out in the Supreme Court case of ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda Crim Appeal No. 41 of 1995,*** where the crime

complained of is committed during broad day light, by some one fully known to the witness, the conditions for proper identification would be favourable, and serve to exclude any possibility of error, or mistaken identity.

In the case before me now, conditions for correct identification were all in place. All the prosecution witnesses and the accused knew one another only too well; they all lived in the same home with the accused. The accused himself corroborated this fact. The entire incident took place in the after noon during day; and it was the witnesses themselves who arrested the accused and took him to the authorities. In the light of the evidence adduced by the prosecution witnesses, I reject the testimony of the accused, seeking to accuse PW1 of framing him up so as to avoid paying him for services rendered, as entirely unworthy of credit.

I do find that the prosecution has not only placed the accused at the scene of the crime – an ingredient of the offence, proof of which defence counsel did not doubt – but also pinned him down as the one who committed the vile act of defilement of the then five year old PW2, that late after noon, in the kitchen which doubled as his bed room. I am therefore in full agreement with the opinion expressed by both the lady and gentleman assessors that the prosecution has proved, beyond reasonable doubt, each and all of the ingredients of the offence of defilement for which the accused has been indicted; and consequently, I find him guilty as charged. I therefore, accordingly, convict him.

Chigamoy Owiny - Dollo
JUDGE
29/09/2008

Ann Kabajungu for the State.
Bernard Musinguzi, holding brief for Cosma Kateeba, for the accused.
Accused in Court for judgment.
Irumba Atwoki – Clerk of Court.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo
JUDGE
29/09/2008

Ann Kabajungu: Convict is first offender; and has spent five years on remand. He is 32 years old, with a wife and child. The charge is defilement with life imprisonment as maximum penalty. The victim was only 5 (five) years when she was defiled. She was robbed of her innocence. Defilement cases are rampant. A heavy, deterrent custodial sentence should be passed.

Beranrd Musinguzi: The convict prays for lenient sentence. He has spent a long period on remand. This is long time. Convict looks remorseful. He is first offender as far as is known. Has a family to look after. He is still young at 33 years; and can be of use to self, family and society. He prays for leniency in sentencing.

Court: The crime the convict was convicted of is vile, and was an abuse of the hospitality of PW1, the mother of the victim. I take into cognizance that defilement cases, and of children as young as 5 (five) years or thereabout is quite abundant. The sentence imposed must therefore send out a clear message that shattering the innocence of poor girls will be met with the decisive and merciless hand of the law. The convict is therefore, giving allowance for the period he has been on remand, sentenced to 13 (thirteen) years imprisonment.

Chigamoy Owiny – Dollo
JUDGE
29/09/2008