**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**CRIMINAL SESSION CASE No.0077 OF 2004**

**UGANDA …….....**

**PROSECUTOR**

*VERSUS*

**TUMUHIMBISE ERIC …….....**

**ACCUSED**

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

**JUDGMENT**

In this case, Tumuhimbise Eric faces indictment on a single count of defilement c/s 129(1) of the Penal Code Act. The particulars of the offence are that on the 13th May 2003, at Ryaruhinda village in the Kyenjojo District, the accused had unlawful sexual intercourse with one Ninsiima Evas a girl under the age of 18 years. The accused denied the charge that had been read and explained to him; and which, he had stated, he understood. A plea of 'Not guilty' was accordingly entered and the Court proceeded to conduct a full trial.

For the indictment as presented to stand, the prosecution must prove, beyond reasonable doubt, each of the following three ingredients of the offence of defilement; namely that:-

(i) Someone had sexual intercourse with the girl named in the indictment.

(ii) The said girl was below the age of 18 years.

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

The prosecution, in a bid to discharge that burden of proving the guilt of the accused as charged, presented four witnesses in Court. These were Dr. William Mucunguzi – PW1, the medical officer who examined the victim of the alleged defilement; David Tumwesigye – PW2, the father

of the victim; Loy Arinaitwe – PW3, the sister of the victim; and Tukahirwa Elivason – PW4, the grandmother of the victim.

Regarding the first ingredient of the offence, that of perpetration of sexual intercourse with the victim named in the indictment, (PW3) in a calm, firm, and persuasive manner, testified that on the fateful day she found the accused having sexual intercourse with her younger sister, Evas Ninsiima the victim, on her grand mother's (PW4's) bed. He was lying on top of her. She immediately ran to and alerted her father – PW2 about the defilement. Over the years, the Courts have reiterated, and re-echoed the need to exercise caution in dealing with the evidence of complainants in sexual offences before founding any conviction on the strength of such evidence.

In the case of ***Kibale Isoma vs. Uganda, S.C. Crim. Appeal No. 21 of 1998 [1999]1 E.A. 148,*** the Supreme Court followed with approval, and held as 'still good law in Uganda', the decision in ***Chila & Anor. vs. Republic [1967]E.A. 72*** at 77, where the Court of Appeal for Eastern Africa had stated that:-

> *"The law in East Africa on corroboration in sexual cases is as follows:*
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> *'The Judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no warning is given, then the conviction will normally be set aside, unless the appellate court is satisfied that there has been no failure of justice' ".*

In keeping with the authorities above, I did warn the lady and gentleman assessors, as I do caution myself now, of the danger of acting on the uncorroborated evidence of PW3, despite her having testified on oath as an adult; and of the need, as a matter of prudent practice developed over the years, and which has attained the force of law, to look for such evidence that would corroborate this witness' evidence; but nevertheless that this Court can found a conviction basing itself on her uncorroborated evidence; once it is satisfied that she has been a witness of truth.

PW1 - the doctor, established that indeed the victim's hymen had been ruptured; and the time he approximated for this, matched the time the accused was alleged to have defiled the victim. He was unequivocal that the injury he saw had been caused by nothing else but forceful sexual

contact; and flatly rejected any suggestion that a finger could or might have caused such injury. This was therefore corroboration of PW3's testimony on the sexual intercourse.

Both PW2 - the father of the victim, and PW4 – the grand mother of the victim, who examined the victim immediately after the deed, testified that they found the victim bleeding, and the bed and beddings had been soiled with blood. PW2 found the victim in a state of distress, as she was crying. They both established from the said examinations that the victim had indeed been defiled. These two witnesses, too, corroborated the testimony of PW3 regarding the defilement. The law is that for proof of sexual intercourse all that is required is for the prosecution to establish that there was penetration of the vagina. In the case of ***Hussein Bassita vs Uganda; S.C. Crim. Appeal No. 35 of 1995,*** the Supreme Court of Uganda stated as follows:-

> *"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 prosecution does not have to prove that the victim was either ravaged or any such thing. The law, as stated in ***Adamu Mubiru – vs. – Uganda; C.A. Crim. Appeal No. 47 of 97*** (unreported), is that however slight the penetration may be, it will suffice to sustain a conviction for the offence of defilement. Since in the instant case PW3's evidence, regarding penetration, at best, only amounted to circumstantial evidence, Court had to look for other independent evidence to establish beyond reasonable doubt that in deed there had been penetration. The evidence adduced by PW1 - the doctor, that the victim's hymen had been ruptured, is by itself incontrovertible proof of penetration, and offers such corroboration.

Additional evidence of penetration was adduced by PW4 - the grand mother of the victim. Being a grand mother, hence a mature woman, her findings upon examination of the private parts of the victim, that she had been defiled, it has been held in ***Sebuliba Haruna vs. Uganda; C.A. Crim. Appeal No. 54 of 2002***, that it is as good as medical evidence. This holding is buttressed by the

decision in ***Abbas Kimuli vs. Uganda; C.A. Crim. Appeal No. 210 of 2002*** (unreported), where, on corroboration, the Court held that:-

> *"We further observe that in cases of this nature, doctor's report is desirable but it is not mandatory. Corroboration is also desirable but not mandatory (**Bassita Hussain** case followed)".*

As for the ingredient of age of the victim at the time she was defiled, all the four prosecution witnesses place the age of the victim under 18 years. Both PW2, and PW4 - father and grand mother of the victim, respectively - gave the age of the victim as having been 6 years then; and that she is, even now, only 11 years. Further evidence came from PW3, the eldest sister of the victim, who is herself only 14 years now. Hence, five years ago, when her younger sister was defiled, she was just 9 years of age; meaning her sister was under 9 years of age then; and even at the time of this trial, still below 14 years of age. The medical report by PW1 professionally corroborated the aforesaid evidence by placing the age of the victim at 6 years in 2003, when she was defiled.

Proof of the age of a witness or victim can be made through a variety of admissible evidence, inclusive of birth certificate. Any one who knows the child well may offer evidence that can help determine the child's age; see ***R. vs. Cox (1898) 1 Q.B. 179,*** a case in which the age of the child was established through the evidence given by the headmistress of a school earlier attended by the child's elder sister. On the other hand, Court can, through general observation of the child, and common sense, resolve the question whether a particular person is a child or not; see ***R. vs. Recorder of Grimsby Ex parte Purser [1951] 2 All E.R. 889***).

The Court, in the instant case, was not able to see the victim for the reason that she is reportedly a victim of mental disability – a condition she already suffered even at the time she was allegedly defiled. Nonetheless, and even in the absence of evidence from the parents and the medical evidence, this Court was still able to establish, having looked at the victim's elder sister – PW3, that the victim was, and still is, a girl below the age of 18 years. The need for proof of age by any other means should only arise when, from the victim's or witness' appearance, the Court can not safely determine the age of such victim or witness for purposes of resolving whether or not the girl in issue falls within the statutorily prohibited age bracket; as per the authority in ***R. vs. Turner [1910] 1 K.B. 346***.

Concerning the identity of the perpetrator of the unlawful sexual intercourse complained of, the only direct evidence on the matter is that of PW3; not herself the victim. The victim, Elivas Ninsiima, could not be brought to Court reportedly due to the great difficulty this would entail; as she suffers from a grave mental disability. Her failure to attend Court however has not at all imperilled the prosecution case.

On the authority of the celebrated case of ***Abudala Nabulere & Ors. vs. Uganda - C.A. Crim. Appeal No. 9 of 1978, [1979] H.C.B. 77,*** at p. 80, for proof of any assertion, or claim, there is no need for plurality of witnesses, or some formula based on numerical strength; but rather on the cogency of the evidence adduced, and the credibility hence reliability of the witnesses. Indeed, a single witness can adduce evidence of greater evidential value than a dozen witnesses could. Furthermore, Court can, on the evidence available, find an accused person guilty of the offence of defilement as charged, notwithstanding that the victim of that offence has not testified before it.

PW3 testified that she knows the accused as a relative with whom, at the time of the alleged defilement, she lived together in the same homestead. PW2, PW4, and the accused himself, corroborated this. It was PW3's evidence that she saw the accused enter PW4's house sometime in the morning of the fateful day. She followed the accused there only to find him ***'****in flagrante delicto'*, subjecting the victim in this indictment to sexual intercourse; whereupon she rushed to report the matter to her parents who were in the garden nearby. The evidence of the participation of the accused is, here, dependent on identification; and by a single witness.

I have therefore to treat that evidence with caution, and have warned the assessors accordingly; as was advised in ***Roria vs. Republic [1967] E.A. 583,*** and cited with approval 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 inherent in identification evidence; and advised court to first satisfy itself that in all the circumstances it is safe to act on such evidence.

In the ***Abudala Nabulere case*** (supra), and which was approved by the Supreme Court in the ***Bogere*** case (supra), the Court re-echoed the need for the exercise of care, regardless of whether it was with respect to a single or multiple identification witnesses; and that the judge should warn himself and the assessors on the need for caution as the witness or witnesses however persuasive could after all be mistaken.

As their Lordships pointed out:

> *"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…..*
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> *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. 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 reaffirmed that the trial Court must satisfy itself that there is no error in identification, or that it is not a case of mistaken identity.

The cases of ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda Crim Appeal no. 41 of 1995,*** held that where the incident takes place during broad day light, and the perpetrator is fully known to the witness, the conditions for proper identification is favourable, and excludes or reduces the possibility of error, or mistaken identity.

This Court was faced with a situation where the evidence of identification adduced was not by the victim of the criminal act, whose inculpatory evidence of identification would have been the best evidence, as decided in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997****;* but instead, by PW3 who was however an eye witness to the act. However, that notwithstanding, and because PW3 was an eye witness, I hold the view that in the circumstance of this case, where PW3, though herself not the victim, offered direct evidence as proof of the crime, she having caught the accused *'in flagrante delicto'* in the sex act, her evidence deserves to be treated with

the same force, and accorded the same evidential value with evidence the victim would have given; and I accordingly do so.

PW3 gave her testimony in a straight, clear, and matter of fact manner. She did not falter even during cross examination. I found her to be a witness of truth. Her evidence in this regard was amply corroborated by the circumstantial evidence of PW2 - the father of the victim, and PW4 - the paternal aunt of the accused. PW2 testified that, earlier that morning, when he went to till the land, he had left the accused at home. PW4 testified that she had, that morning, left the accused in her house sleeping in the sitting room; while the victim was in the same house, sleeping on her (PW4's) bed.

For his part, the accused, in an unsworn statement asserted that he is a victim of a frame up by PW2 - the father of the victim, who retains his (accused's) share of money earned from work they had carried out together; and which PW2 had now decided to defraud him of. He set up an alibi; stating that on the day of the alleged defilement, PW2 and others came and arrested him from another home within the village, where he had sojourned for the night on his way to the home of PW2 to collect his moiety as had earlier been agreed between himself and PW2. He stated that PW4 - his paternal aunt, was aware of the discord between PW2 and him and had, without success, attempted some sort of mediation.

In the light of the evidence adduced by the prosecution witnesses, this defence position can not stand. The alibi set up by the accused does not hold water. It is a baseless defence which must be rejected. PW4, whom the accused relied upon as having mediated between him and PW2, categorically rejected this allegation as being untrue. She went further to state that PW2 had never carried out any contract work with the accused, as alleged; and that in fact, this could not have been so, as PW2 was not a contract worker but a family man who survived on tilling his land.

In the circumstance of this case, the evidence of PW4 is crucial and of enormous evidential value. She is the one with whom the accused had emigrated from Rwimi in Kabarole, to settle with PW2 in Kyenjojo. She was his foster mother of sorts, sharing her residential house with him like a child. It is unthinkable that she could ever have been part of any scheme, if indeed there was one at all, to frame her own child as it were, for whatever reason. The accused pleaded her name

in defence, knowing that she could not be complicit in any diabolical conspiracy against him. She therefore must have told Court the truth.

Counsel for the defence put up a determined assault on the prosecution case. The main thrust of his attack was on the credibility of prosecution witnesses generally; accusing them of contradictions, inconsistencies, exaggerations, and deliberate falsehoods in their testimonies. He attacked the testimony of PW2 and PW4 who asserted that they had found the victim bleeding, with blood all over the place; and yet PW1 - the doctor had explained that the reddening he had seen on the victim and which he had entered in his report, following the examination he had carried out on the victim, could not have caused any bleeding, as the victim's skin was not broken.

Admittedly the two witnesses might have seen more blood than what was actually there. But the doctor's explanation about the inflammation he had seen not causing any bleeding seems to me, on the evidence, to be only half the story. He confirmed rupture of the hymen. One then wonders whether this rupture was not a breaking of that body part, capable of resulting in or being accompanied by bleeding. Be it as it may, that is neither here nor there; given, as pointed out above, that it plays no part in the proof of the offence as charged.

Even if it is conceded that two witnesses went into hyperbole, and used superlatives in their description of the state of the victim as they found her when they came home upon receiving report that she had been ravaged, of what consequence is this on the case? People react differently to mind boggling or tragic events. The defilement of a mere kid of six years would test the nerve of any parent; and this rather hyped account of the state of the victim must be seen in this context.

What is important, however, is that proof of defilement is not determined by any amount of blood flow that results from the act. All that is required for proof of defilement is penetration; however slight. The evidence adduced, and which the Court has accepted, is that penetration was proved, not owing to the blood flow, but from the rupture of the hymen; and the other observation of the private parts of the victim by the elderly witnesses. The issue of blood flow, even if it was grossly exaggerated, did not go to the root of the case.

In any case, several authorities have laid down the principles that should govern Court's approach to contradictions, inconsistencies, and falsities in testimonies of witnesses. In ***Khatijabai Jiwa Hasham v. Zenab d/o Chandu Nansi [1957] E.A. 38,*** at the Court held that a trial judge must take cognizance of any deliberate untruthfulness on a material point; and Connell J., stated at p. 54 that:

> *"A useful test in the assessment of this type of evidence is laid down in* ***FIELD'S INTRODUCTION TO THE LAW OF EVIDENCE,*** *p. 37, quoting* ***NORTON on Evidence****:*
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> > *'The falsehood should be considered in weighing the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But if there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of want of veracity on perhaps some very minor point.' "*

In the case of ***Alfred Tajar v. Uganda, E.A.C.A. Crim. Appeal. No. 167 of 1969*** (unreported), but cited with approval in several cases since, the Court said:

> *"In assessing the evidence of a witness … it is open to a trial Judge to find that a witness has been substantially truthful, even though he lied in some particular respect."*

In ***Gabula Bright Africa vs. Uganda, S.C. Crim. Appeal No. 19 of 1993,*** the Court held that the trial judge was entitled to rely on the portion of the evidence he believed to be true, even if he disbelieved other aspects of the witness' evidence as untrue. Indeed, Court can sever the untruthful part of the testimony from the credible and useful one; see the dissenting judgment of Oder, J.S.C**.** in the case of ***Haji Musa Ssebirumbi vs. Uganda; S.C. Crim. Appeal No. 10 of 1989.***

In the instant case, the said exaggeration of blood flow is an aspect of evidence which can be safely severed from the rest; and it would have no adverse effect on the substantially credible and acceptable prosecution evidence. The discrepancy in the testimonies of the family members regarding the beating the accused is said to have been subjected to is of no consequence at all.

The prosecution is not relying on any admission or confession made by the accused, consequent upon such beating, to bolster up the prosecution case. Had it been so, then it would have been proper and relevant to raise the defence of duress from such beatings. The other discrepancies pointed out by learned counsel are really minor things that can be explained away due to the long period between the event complained of, and this trial – 5 years later; and it would have been surprising if one did not come across them.

Finally, I am unable to agree or find sympathy with defence counsel's contention that the prosecution witnesses were inherently incredible. They did not strike me as being so. Therefore, upon giving due consideration to the totality of the prosecution case as presented, vis-à-vis that of the accused, I am fully satisfied, and am in full agreement with the lady and gentleman assessors, that the prosecution has proved the case against the accused beyond any reasonable doubt; and therefore I find him guilty of the offence of defilement as charged, and accordingly convict him.

**Chigamoy Owiny - Dollo**
**JUDGE**
**02/09/2008**

Cosma Kateeba for the accused.
Ann Kabajungu for the State.
Accused in Court for judgment.
Clerk – Irumba Atwoki.

Judgment delivered in open Court.

**Chigamoy Owiny – Dollo**
**JUDGE**
**02/09/2008**

**Ms. Kabajungu:** The convict spent four years three months and two days on remand. He is a first time offender. He is now 29 years old.however having regard to the circumstances of the case, the victim was six years at the time of the defilement. The victim was found to be suffering from mental retardation, a fact the convict took advantage of. The convict is a relative of the victim. The victim had been left under his care constructively. Defilement cases are rampant. Prosecution prays for a deterrent sentence as an example.

**Cosma Kateeba:** Although the accused has been convicted of a serious crime, the fact that he is a first offender means that he does not deserve a heavy punishment. He is still young and can be reformed in Government Correctional Centre. He is only 27 years which is relatively young. Long custodial sentence may harden him as a criminal. He is repentant of the crime he is convicted of. He is not hardened criminal. So he should not be turned into a criminal. Should be treated with leniency and the 5 years in detention be taken into consideration.

**Court:** The convict herein had committed a grave crime of defilement of a child of only six years of age; someone who for all intent and purposes is his daughter, being his first cousin's daughter. This is exacerbated by the fact that to the knowledge of the convict, the victim was of retarded mental condition. The act of sexual intercourse here was foul and inexplicable. Court is aware that fior this type of offence the convict can be sentenced to death and hanged, due to the concern and outcry the public has expressed regarding sexual abuse of vulnerable children.

At the same time, this Court believes reform is possible for the vast majority of cases of breach of the law. In balancing the demand of the public for deterrence and leaving it open for the convict to learn from his misdeed and pursue a noble lifestyle, this Court will not clamp the ultimate sentence of death. Instead I impose the custodial sentence of 13 (thirteen) years in jail. I would have imposed 18 (eighteen) years, but I have given allowance for the period he has been on remand. This should act as a deterrent for those in society who have sunk beneath animal behaviour to molest innocent and vulnerable children who have no reason to know about sex at the time of their defilement. Right of appeal explained.

**Chigamoy Owiny – Dollo**

**JUDGE**

**02/09/2008**