THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0029 OF 2004

UGANDA …… PROSECUTOR

VERSUS

MUKUNDANE ERIAB …….. ACCUSED

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

JUDGMENT

Mukundane Eriab, the accused herein, was indicted on two counts of defilement c/s 123(1) of the Penal Code Act. The particulars of the offences as set out in the said counts of the indictment were, respectively, that, on the 6th day of December 2002, at Kibimba 'B' Cell, in the Kabarole District, the accused had sexual intercourse with Kabagenyi Shakila, and Katusabe Doreen; both of whom were girls below the age of 18 years. The accused pleaded not guilty to each of the charges in both counts read and explained to him by Court. A trial then ensued.

The prosecution called evidence, this being its duty to do so, in order to discharge the burden of proving the guilt of the accused as charged; a pre – requisite for Court to find that, on the evidence, the accused is guilty and accordingly convict him. For the charge of defilement to stand, the prosecution must prove, beyond reasonable doubt, each of the following three ingredients, to wit, that: –

(i) Someone had sexual intercourse with a girl.
(ii) The said girl was below the age of 18 years.
(iii) The person who had the sexual intercourse with the said girl was the accused.

To this end, the prosecution called the evidence of three witnesses, namely:

(i) Jackson Mugarura (PW1) - the medical officer who examined the victims of the alleged defilement the girl victim.

(ii) Beatrice Kisembo (PW2) - the victims' guardian.

(iii) Kabagenyi Shakila (PW3) - the younger of the two victims of the defilement the accused is indicted for.

On the issue of the occurrence of sexual intercourse, the victim herself (PW3), still manifestly a child of tender years, six years after the event, gave her evidence on oath after I had carried out a *voire dire*, and was satisfied that she was not only seized of sufficient intelligence, but also clearly understood the meaning of an oath, and the duty of telling the truth. In a very straight forward manner, and without contradicting herself even in cross examination, she gave a vivid account of what had transpired on that fateful day stated in the charge. She recalled how, on that day during broad day light, the accused had lured both of them – her sister Katusabe Doreen and herself – to a banana plantation, whereat he had subjected both of them, in turn, to sexual intercourse.

Section 40(1) 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.

Clause (3) of that section provides as follows: –

(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.

There is a long list of authorities on how Court should treat the evidence of a child of tender years, sworn or unsworn. The case of ***Ndyayakwa & Ors vs Uganda; (C.A. Crim Appeal No. 2 of 1977) [1978] H.C.B. 181*** authoritatively held as follows, 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. Although there is no legal requirement for corroboration where the child has been sworn or affirmed, as a rule of practice, the trial judge should warn himself and the assessors of the danger of acting on the uncorroborated evidence of a child of tender years before acting on it.

The rule of practice to advert to the danger of acting on the uncorroborated evidence of children of tender years is peremptory and failure to comply with it will normally be fatal to conviction except in the most exceptional circumstances where the court finds that there was no miscarriage of justice under s. 137 of the Trial on Indictments Decree. ***Maganga Msigara vs. Republic [1965] E.A. 471.***

Per Curiam, the Court stated that: –

"The Common law rule that the sworn testimony of a child ought to be approached with caution and that a trial judge must warn himself and the assessors of the risk of acting upon the uncorroborated evidence of such a child is the result of accumulated experience of courts of law reflecting accepted general knowledge of the ways of the world, which have shown that it is unwise to found settled conclusions on the evidence of children.

Through experience, it has been found that owing to immaturity, or perhaps lively imaginative gifts, there is sometimes no true appreciation by such children of the gulf that separates truth from falsehood. It is, therefore, sound policy to have rules of law or practice which are designed to avert the peril that findings of guilt may be insecurely based."

In the case of ***Katende Ahamad vs Uganda; SC Cr. Appeal No 6 of 2004*** (unreported), where the child of tender years had given evidence on oath, the Court held that the proviso to section 38 (3) of the Trial on Indictments Decree – [now section 40 (3) of the Trial on Indictments Act] – was inapplicable in the sense that corroboration of the evidence of this witness was not obligatory. Her evidence on oath was sufficient to found a conviction. The same position had been stated in the case of ***Twinomuwhezi Leuben vs Uganda; SC Crim. Appeal No. 40 of 1995*** (unreported)

where the Court held that since in that case the child witness had given sworn evidence, corroboration of the evidence was not a legal necessity under section 38 (3) of the Trial on Indictments Decree; (now section 40(3) of the Trial on Indictments Act).

The Court, in the case of ***Abbas Kimuli vs Uganda C.A Cr. Appeal No. 210 of 2002*** (unreported), held, on corroboration, 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)****"*.

In ***Kibale Isoma vs Uganda, S.C. Cr. 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 holding in ***Chila & Anor vs Republic [1967] E.A. 72*** at 77, where the trial judge had believed the complainant to be a truthful witness and had convicted the appellants; but had neither warned the assessors nor himself of the need to look for corroboration of the complainant's evidence, implicating the accused; and the Court of Appeal for East Africa had stated that: –

> *"The law in East Africa on corroboration in sexual cases is as follows:*
>
> *'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'"*.

Beatrice Kisembo – (PW2) who was, at the time, the guardian of both victims, and is still so for PW3, testified that when she learnt of the incident four days after the alleged event, she examined the private parts of each of the two girls and found that, indeed, the two had been defiled; with the elder one, Doreen Katusabe, having suffered greater injury. It has been held in ***Sebuliba Haruna vs Uganda – C.A. Crim Appeal No. 54 of 2002*** that findings by a mature woman, of evidence of sexual intercourse, upon examination of the private parts of the victim is as good as medical evidence.

The medical officer, PW1, who examined the victims about a week after the event, gave medical reports in which his findings were that both victims' hymens had been ruptured *"less than one week (6 days) ago"*; and their vulva/vagina introituses were inflamed. He concluded that in each case, the injury was consistent with force having been sexually used, and asserting that *"something should have been forced into vulva"*. In cross examination by counsel for the accused, PW1 opined that the injury could have been caused by a finger, a stone, or a penis.

The medical examination reports adduced in evidence, while not stating conclusively that the injuries found on the victims was from penis intrusion, nevertheless does not rule out human penis as the cause of such injuries. In fact in cross examination, the medical officer – PW1 lists penis intrusion as one of the possible causes. Considered then in the light of the evidence of PW3 which positively asserts that her injuries were from contact with human penis, this medical evidence is relevant, and of considerable weight and evidential value.

It is the law, as stated in ***Adamu Mubiru - vs - Uganda (Court of Appeal Cr. Appeal No. 47/97)*** (unreported), that 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. Cr. 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."*

I did warn the gentlemen assessors, a matter to which I am myself now alive, of the danger in acting on the uncorroborated evidence of this child witness; and of the need, as a matter of prudent practice which has acquired the force of law, to look for evidence that would corroborate that of this child, notwithstanding that she has given her testimony upon affirmation; but that, nevertheless, this Court can found a conviction solely on this affirmed evidence of the child albeit its remaining uncorroborated, once the Court is satisfied that she has been a witness of truth.

The child witness gave her affirmed testimony with ease, candidness, clarity, and without any hesitation. The cross examination she was subjected to by defence counsel did not in any way shake her testimony. She did impress me as a witness of truth. I fully believe her. Had corroboration been mandatory in the circumstance of this case, I would still have found that in the findings of PW2 – the guardian of the two child victims who examined their private parts, and established that they had indeed been defiled. The report of the doctor, in so far as it does not rule out the human penis as the cause of the injury on the victims' private parts, was circumstantial evidence of a material particular, and went to support the assertion of the victim.

On the ingredient of age of the victims at the time of their victimisation, PW2 the guardian of the victims, during her testimony in Court, gave their respective age as having been 6 (six) years for Shakila Kabagenyi, and 7 (seven) for Doreen Katusabe, at the time of commission of the defilement. The medical reports aforesaid, independently corroborate this. PW3 herself put her age at 11 (eleven) years at the date of testifying in Court; meaning that five years before, when the crime was committed, she was 6 years. She stated that she is now a pupil of primary 3 at Mountains of the Moon Primary School, Fort Portal.

From my observation PW3 was manifestly a child of tender years; thus leading to my conducting the *voire dire* before admitting her evidence. The authorities are that the age of a child can, in the absence of birth certificate, be proved by any admissible evidence. Such evidence can be by those who had known the child – (see ***R. vs Cox (1898) 1 Q.B. 179*****,** where the age of the child was determined by the evidence of the headmistress of the school which the child's elder sister had attended. Age can also be determined by observation and common sense (see ***R. vs Recorder of Grimsby Ex parte Purser [1951] 2 All E.R. 889***).

When however, as in the instant case, it is obvious and clearly manifest that the victim is below the age of 18 years, there is no need to indulge in further exercise in proof of age. It is only where from the victim's appearance the Court can not determine the age of such victim with regard to the permissible age that evidence is required to prove the age; [see ***R. vs Turner [1910] 1 K.B. 346***]. In the instant case Mr Musana, counsel for the defence, in his final submissions, quite rightly, graciously conceded that in deed the prosecution had discharged the burden of proof with regard to age of the victims being below 18 years; thus putting the issue to rest.

As to the identity of the person who perpetrated the sexual intercourse complained of, the only direct evidence on the matter is that of PW3 – one of the victims. The other victim, Doreen Katusabe, Court was told, could not be traced as her father, a soldier, had taken her away and their where about was unknown. Nonetheless it is settled law that there is no need for plurality of witnesses in order to prove the commission of a crime, for Court to found a conviction. Furthermore, it is not mandatory that a victim must testify before Court before it can find an accused guilty of the offence charged.

PW3 was clear in her evidence that she knows the accused who was a village mate. She identified him easily in Court. PW2 – the guardian of PW3 –testified that the accused was, before his arrest and arraignment in Court, a resident of her village. The accused himself corroborated this evidence of familiarity when he revealed in Court, in his testimony that he resided only a kilometre away from the residence of PW2. PW3 testified that the accused came to their home at high noon and lured her with her sister Doreen Katusabe away from home, to a distant banana plantation, purportedly to cut banana fibre for the house which he (accused) had allegedly come to construct for them.

She further testified that, in the banana plantation, the accused had sexual intercourse with both of them, in turn. He first had sexual intercourse with Doreen Katusabe the elder girl, in the lying – down position. After this, he turned on PW3 with whom he had sexual intercourse in a kneeling position. Then finally, he had another turn with Doreen Katusabe. In dealing with evidence of identification as is the case here, the case of ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** is authority for the proposition that the inculpatory evidence of identification adduced by the victim of the criminal act is the best evidence.

The Supreme Court of Uganda pointed out in ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** *and* ***Remigious Kiwanuka vs. Uganda Crim Appeal No. 41 of 1995,*** that 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. Because proof of the participation of the accused herein is dependent solely on evidence of identification, and of a single witness, I have to treat that evidence with caution as was advised in ***Roria vs. Republic [1967] E.A. 583,*** where, in a passage at p. 584, and which was reproduced by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997;*** the Court had stated that: –

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords… 'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of the ten – if they are as many as ten – it is on a question of identity' …

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."

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. It stated that: –

"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. 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. The Court went on to say that: –

"In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."

The ***Bogere*** case (supra), approved the decision of the Court in ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47;*** where it was held, that there is need to look for other supporting evidence if the conditions favouring identification are difficult. This 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."*

In the case before me now, as was advised by the Supreme Court of Uganda in the ***Isaya Bikumu*** and the ***Remigious Kiwanuka*** cases (supra), conditions for correct identification were all in place, namely: broad daylight, the perpetrator was well known to the victims, and he wantonly took his time sexually abusing the poor little girls in turn. Nonetheless, and in keeping with the authority in the ***Kibale Isoma*** case (supra), I warned the gentlemen assessors of the need to look for evidence corroborating that of the complainant implicating the accused, as there was a danger in acting on such uncorroborated evidence; but that, nonetheless, conviction could be founded on this evidence alone, as long as Court was satisfied of the truthfulness of the child witness.

PW3 revealed that in a bid to ensure that they would not talk about the incident, the accused used both the inducement of money, and the threat of dire consequences for them should they reveal to any one what he had done to them. Indeed, the two victims did not report their ordeal to any one immediately; and the matter would probably not have come to light if PW3 had not, in the course of her sisterly quarrel with her cousin – the other victim – and unaware that they were being overheard, threatened to reveal that the cousin had had sex with the accused; thereby inadvertently incriminating themselves of the deed for which they were apparently obliging their defiler's demand to keep mum.

Fortunately for justice, and entirely unknown to the two victims, a relative, who happened to be in the vicinity of their altercation, had chance–heard this shocking disclosure. In the light of the defence case alleging that all his tribulation here in, is a consequence of his having rejected to continue with a love affair he had enjoyed with PW2 – the guardian of the victims; thereby blaming PW2 of being behind his arrest and standing trial, by framing him up, it is important to dwell on this aspect of the prosecution evidence.

In effect, the accused is saying that it is PW2 who has manipulated the victims to bear false witness against him, in fulfilment of the threat of revenge she had earlier declared. The revelation made by PW3, not for the benefit of, but rather oblivious of the presence of a third party, and in the belief that it was safe to do so, is relevant and important for its cogency and reliability. It is of great evidential value. It is this chance discovery which enabled PW2 to learn from a third party, of the tragedy that had befallen her children a few days before. This revelation led her to examine the victims' private parts and establish from the injuries there, that truly they had been defiled. This then triggered the chain of events that has resulted in the accused standing trial today.

If indeed this was a frame up by PW2, as alleged, it would not make sense that it took her as long as almost one week to report the deed causing the injuries to the authorities; a period which would have reduced the quality of evidence of the injuries. Further, she would not have waited for another person to discover the state of the victims, report to her, upon which she would then take the matter up with the authorities as was the case here. The accused himself offers evidence suggesting that his relationship with PW2 was not bad despite his having rejected her demands for continuation of their love affair. He states in evidence that when he lost a child, PW2 was one of the people who came to condole with his family.

I find that the defence of grudge raised by the accused person does not hold water. It is a lame attempt by the accused person to extricate himself now that he is confronted with the moment of reckoning with the long arm of the law. I am in full agreement with the gentlemen assessors that this last ingredient, like the first two, has also been proved by the prosecution beyond reasonable doubt; with the result that I find the accused person guilty of the offence of defilement on each of the counts, as charged. I therefore, accordingly, convict him on each count.

Chigamoy Owiny - Dollo
JUDGE
29 – 08 – 2008

Mr. Musana for the accused.
Ms. Kabajungu for the State.
Accused in Court for judgment.
Clerk – Irumba Atwoki.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo.
Judge.
29/08/2008

Ms. Kabajungu: Convict is first offender. There is no evidence of earlier conviction. However, due to the circumstances of the case (victims being children of tender years – 6 and 7 years who were left in the care of the convict who instead committed the gross act of defilement), the prosecution prays for the maximum sentence. The convict has been on remand for six years as he was remanded on 13th December 2002.

Mr. Musana: The convict is a first offender so cannot get the death sentence. He has been remanded for six years and this is to be taken into account in sentencing. He is 54 years and has 9 children to look after. The welfare of the children should be taken into consideration. He says he

suffers from various ailments including liver and heart problems. We pray for leniency from Court.

Court: The offences for which the convict was found guilty and convicted attract the death sentence. This was a repugnant deed that is wholly inexcusable. The two victims were for all intents and purposes grandchildren of the convict who deserved grandfatherly love and care from the convict. In turning the two victims into his sex objects the convict committed one of the most objectionable crimes. The sentence handed down in a case such as this must be deterrent and send out a clear signal that such acts will always be countered by the due process.

The convict has spent 6 (six) years on remand. Giving allowance for this period of remand, I sentence him to 15 (fifteen) years in prison for each of the two counts of defilement. Sentence is to run concurrently. Right of appeal is explained.

Chigamoy Owiny – Dollo
Judge.
29/08/2008