THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0015 OF 2005; HELD AT KYENJOJO

UGANDA ……..……... PROSECUTOR

VERSUS

KAYABALE BENON ……. ACCUSED

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

JUDGMENT

Kyakabale Benon, herein after referred to as the accused, stood trial indicted for the offence of defilement, c/s 129 (1) of the Penal Code Act. The particulars of the offence, which Court read out and explained to him, stated that on the 24th day of February 2004, at Kasaba 'B' village, Kyarusozi Sub County, in the Kyenjojo District, the accused had unlawful sexual intercourse with one Kyokuhaire Irene; a girl under the age of 18 years.

The accused who stated that he had understood the charge denied it; with the result that this trial became necessary. The burden lay on the prosecution throughout the trial, to prove the guilt of the accused as charged; and this the prosecution was under duty to achieve by adducing evidence establishing, beyond reasonable doubt, each of the following three ingredients of the offence of defilement, namely that:-

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

(ii) The said girl victim was below the age of 18 years when subjected to the said sexual intercourse.

(iii) The accused participated in subjecting the said girl to the said sexual intercourse.

The prosecution sought to discharge the burden lying on it; and adduced evidence in Court from the five witnesses named herein below:-

(i) Kyokuheire Irene – PW1; the victim of the defilement complained of.

(ii) James Masasi – PW2; father of the victim, and to whom the victim first reported the sexual assault.

(iii) Demetria Nyiragaju – PW3; grandmother of the victim who examined the victim's private parts and discerned evidence of sexual assault.

(iv) Akugizibwe Mutabazi Edwins – PW4; a clinical officer acquainted with the hand - writing of Dr Arinaitwe Moses who examined and made a report on the victim. No. 23221 D/C. Kambere Samuel; a police officer who recorded the statement of the victim.

For proof of any sexual intercourse alleged, the prosecution has to adduce evidence of penetration of the girl's vagina; and the authority in ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), is that penetration need not be deep; as however slight it may be it suffices to prove 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 went further to state that proof of penetration may either be through direct or circumstantial evidence; and added that it is usually the victim's evidence which is relied on, and then medical evidence or other evidence is adduced for corroboration.

The Court clarified further that, while desirable, it is not mandatory that the victim's or medical evidence be adduced in every trial to prove the offence of defilement; as long as the prosecution presents admissible evidence sufficient to prove the case against the accused beyond reasonable doubt. As for the instant case before me, the evidence from the victim's testimony in Court was that on the material day a stranger had pounced upon her from the neighbourhood of her home, put her down under a jack fruit tree, tied her up with banana fibre, removed her knickers and then his own trousers, and then inserted his penis in her vagina and had sex with her for some time.

She was injured in the process and blood flowed from her vagina. The assailant threatened to cut her if she resisted. When he had finished, she raised an alarm while crying and her father came to her rescue. On seeing her father, her assailant fled. She told her grandmother as well of the defilement; and the grandmother examined her private parts. She was also examined from the hospital. For proof of sexual offences it was laid down in ***Chila & Anor vs. Republic [1967] E.A. 722,*** that there is need to corroborate the evidence of the complainant; and that the trial judge

should warn the assessors and himself, that its dangerous to act on the uncorroborated evidence of a complainant; and that there is need to look for evidence that would implicate the accused and so corroborate that of the complainant.

The Court made it clear that even in the absence of such corroborative evidence the Court may, after sounding out the warning above, nevertheless convict as long as it is convinced that the complainant's testimony is truthful. The Court further warned that if a conviction is entered without such warning, then it stands the risk of being set aside on appeal, unless it is clear that no failure of justice has resulted from the failure to warn.

In ***Kibale Isoma vs Uganda, S.C. Crim. Appeal No. 21 of 1998, [1999]1 E.A. 148*** the Supreme Court upheld the decision in the ***Chila*** case (supra), and stated that it is: *'… still good law in Uganda.'* On the strength of that holding then, I warned the lady assessors in the instant case, and now remind myself, that it is not safe to act on the uncorroborated evidence of the complainant PW1; and that there is need to look for other evidence in corroboration of that of the complainant.

It was PW2 who, from his and the victim's testimonies, first responded to the cries of and alarm sounded by the victim - PW1 who told him, while crying, that she had been defiled. PW3 examined the victim's private parts and testified that she had responded to the alarm sounded by PW2, and upon reaching there she found PW1 crying; and upon lifting her dress found blood flowing from her private parts. The victim told her that she had been defiled.

The medical report – PE1, made by Dr. Arinaitwe Moses who had examined the victim - PW1 within 24 hours of the alleged defilement, had findings showing that: there had been penetration of the victim's vagina as her hymen had been ruptured at the forchet aspect less than 24 hours before the examination, and that there was also edema around the private parts; with an inflammatory exudates, meaning that fluid was exuding from the injuries. The doctor opined that these were injuries consistent with the victim having been subjected to forcible sexual intercourse. The evidence adduced by PW2, PW3, and the medical findings admitted in evidence have clearly provided that other evidence required for corroboration of the victim's claim that indeed she suffered forcible sexual intercourse.

With regard to the age of the victim at the time of the alleged defilement, although no birth certificate was produced in Court, there was sufficient admissible evidence in proof of the

assertion that she was below the age of 18 years. The victim herself gave her age at the time of testifying – five years after the event – as being 14 years; and that she was 8 years of age when she was defiled in 2004. Her father, PW2 and her maternal grandmother, PW3 were unfortunately not led to give evidence regarding her age.

This was however not fatal as the medical findings admitted in evidence put her age at the time at 8 years; thus corroborating her evidence on her age. It was also manifest that the victim – PW1 was, even when she testified in Court, far below the age of 18 years below which the offence of defilement falls. I am satisfied, and the defence rightly conceded this, that the victim was within the defilement age bracket when she was subjected to sexual intercourse.

To prove that it was the accused who had perpetrated the sexual intercourse for which he was indicted, it was the direct evidence of the victim, then the circumstantial evidence of her father PW2 which the prosecution relied on. The law, as was decided in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** is that the best evidence that can be relied on for proof of the identity of the perpetrator is the inculpatory evidence for that purpose, adduced by the victim. In the case now before me, the testimony of the victim was that the person who defiled her was a stranger to her. However, when she made the alarm and her father - PW2 responded, the villain was still within the vicinity of the scene of the crime and she identified her to her father.

PW2 who testified that he had come close to and almost grabbed the accused, who however ran away when PW1 pointed at him as her molester, testified that he had, prior to the incident, already known the accused by name for three days as a newly recruited employee of his immediate neighbour on whose land the accused was working and had defiled PW1.

Both PW1 and PW2 gave a detailed description of the clothing of the accused at the time. PW2 testified that the accused fled from his place of employment and it was only when the witness, following the revelation by his neighbour that he had got the accused from Rwenzori Tea Estate, placed a public announcement on radio promising a reward to anyone who could locate the accused, that the manager of the tea estate surrendered him to the police. Court has to approach evidence of identification with caution as was decided in the leading case of ***Roria vs. Republic [1967] E.A. 583.***

This decision has been followed by other cases such as: ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77; Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981 - [1992-93] H.C.B. 47; Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989; Remigious Kiwanuka vs. Uganda Crim Appeal no. 41 of 1995, Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997; George William Kalyesubula vs. Uganda - S.C. Crim. Appeal No. 16 of 1997.*** All the cases cited above have maintained the rule regarding how to deal with evidence of identification.

This rule warns of the danger that exists in relying on identification evidence; and advises that a Court confronted with such a situation needs to first satisfy itself that in the circumstances it is safe to act on such evidence. In the ***Nabulere*** and ***Bogere*** cases (supra), the Supreme Court pointed out that irrespective of whether the evidence of identification is by a single or multiple witnesses, the need to exercise care remains unaffected.

The judge in such a situation, must warn himself and the assessors of the ever present need to exercise caution; and this is because a witness or witnesses may be quite persuasive and yet turn out to have been mistaken; hence:

> *"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."*

The ***George William Kalyesubula*** case, reiterated the need to test the evidence of an identifying witness with the greatest care; and in ***Moses Kasana*** and ***Bogere*** cases (supra), the Courts stressed that the trial Court must always clear its mind that no error in identification, or mistaken identity exists. In 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, the Supreme Court advised that where the identification in issue was made during broad day light, and by someone fully known to the witness; then the conditions for proper identification are considered favourable, and would diminish or exclude any possibility of error, or mistaken identity.

The accused, gave an unsworn testimony in Court, and denied not only knowledge of all the witnesses who appeared in Court, but also of the village in which he is alleged to have defiled PW1. In essence, he was setting up the defence of alibi, which he was under no obligation to prove. He however conceded that he was arrested from Rwenzori Highlands Estate. In the light of the prosecution evidence adduced herein, and considering the rule governing evidence of identification, I have to reject the defence of alibi and denials by the accused as being without merit.

Unless there was a case of mistaken identity or error in identification by the victim and PW2, which, I am satisfied, was not the case here, there would be the most minimal possibility that the multiple identification of the accused in the instant case could have been erroneous. The victim had sufficient time with her assailant that mid morning. After defiling PW1, the accused did not move far but continued with the work he had been carrying, and from which he had come to assault the victim. PW2 had sufficient opportunity to recognise and therefore identify the accused when she pointed at him as her molester.

I find that the prosecution witnesses have been truthful and dependable. They have placed the accused at the scene of the crime. Though PW1 – the victim had not known the accused, she pointed him out, immediately after the deed, to PW2 who knew him. The flight by the accused from PW2, and his eventual desertion of his duties with the neighbour of his victim were strong circumstantial evidence pointing to his guilt. I am satisfied that the prosecution has rendered the alibi raised worthless, and instead placed the accused at the scene of the crime.

For the reasons given above, I am clear in my mind; and do find, in full agreement with the lady assessors, that the prosecution has proved, beyond reasonable doubt, each of the ingredients in the offence which the accused has stood trial for in this Court; and therefore, I find the accused person guilty as charged; and consequently, convict him accordingly.

Chigamoy Owiny - Dollo

JUDGE

05 – 06 – 2009