THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0124 OF 2004; HELD AT KYENJOJO

UGANDA ……..……... PROSECUTOR

VERSUS

MUGISA CHRISTOPHER …… ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

Mugisa Christopher, the accused in this case, was indicted for the offence of defilement, in contravention of section 129 (1) of the Penal Code Act. The particulars of the offence, stated that on the 20th day of August 2003, at Kijanamigando village, Bigodi parish, Mpara Sub-County, in the Kyenjojo District, the accused unlawfully had sexual intercourse with his daughter Tusiime Teopista; a girl under the age of 18 years.

In response to the indictment which was read out and explained to him by Court, the accused said he had understood it; but he pleaded not guilty, and a trial was then conducted. It was the duty of the prosecution to prove, beyond reasonable doubt, each of the following three ingredients of the offence of defilement, in order that the accused be found guilty; and convicted.

These ingredients are:-

(i) Fact of sexual intercourse with the girl named in the indictment.

(ii) The girl was below the age of 18 years when the sexual intercourse was committed.

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

Two witnesses were produced in Court by the prosecution for the establishment of the offence charged. These witnesses were:-

(i) Inspector of Police (IP) Munyagi Sylvester – PW1; a police officer who investigated the crime and recorded a confession statement from the accused.

(ii) No. 16602 Corporal Mafabi Bernard – PW2; a police officer who investigate the crime, recorded statements from witnesses, and made a sketch plan of the scene of the crime.

Earlier in the proceedings, I had conducted a preliminary inquiry in accordance with the provisions of section 66 of the Trial on Indictments Act, and the following agreed facts and documents admitted in evidence by consent:

(i) The victim, Tusiime Teopista, is a daughter of the accused.

(ii) The accused was examined by a doctor, and report exhibited as CE2. He was found to be of apparent normal state of mind.

(iii) The victim was examined by a medical officer, and report was exhibited as CE3. The findings were that: she was 14 years of age, her hymen had been ruptured long before the date of examination, and signs of vaginal candidiasis were discernible.

(iv) The police statement by one Nchobore Robert was tendered in as CE3.

(v) The police statement of No. 29741 P.C. Opio Rashid was tendered in as CE4.

For the prosecution to prove the allegation of sexual intercourse, it must adduce evidence that there was penetration of the girl's vagina. And as was held in ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), the slightest penetration of the vagina would suffice to establish that sexual intercourse occurred; and sustain a conviction. In ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995***, the Supreme Court of Uganda explained further that:-

"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 victim herein was not available to testify before me. It was established that she could not be traced despite all effort to do so. However PW2 had recorded the police statements of the victim and her mother; and he tendered them in Court under sections 33, 60, 61, 62 (e), 63, and 135 of the Evidence Act. The victim narrated in her statement - exhibit PE3 - that her father, the accused, had from the garden where she was harvesting maize, persuaded her to go to the bush; and then:

"On arrival to the bush, he told me to remove the knicker. I removed it then he made [me] lie down then he entered my thighs then he started fucking me. So it was after the game when I was putting on my knicker, my mother saw us and I took a different direction and my father also took a different direction and this was the fifth time my father had been fucking me.

From there I informed my stepmother and then grandmother. "

The complainant, mother of the victim stated to police – exhibit PE2 – that she caught the accused and the victim in the bush when the victim was putting on her knickers and the accused was dusting his trousers; and upon seeing her they both fled and she straight away knew that they had been having sexual intercourse. The victim later confessed to her that the accused had already had sex with her five times.

While the best evidence to prove guilt of an accused is the inculpatory evidence adduced by the victim, yet according to ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997***, even in the absence of the victim's evidence any other cogent evidence would serve the purpose. In that case, the victim of the sexual assault was not available in Court. The Court accepted as admissible, evidence from the person to whom she had first reported the matter; and disallowed defence counsel's contention that such evidence was hearsay evidence.

In cases of sexual assault, ***Chila & Anor vs. Republic [1967] E.A. 722,*** laid down the rule requiring that the evidence of the complainant be corroborated; and in this regard, that the trial

judge should warn the assessors and himself, of the danger that lies in acting on the uncorroborated testimony of a complainant; and further that Court should look for other evidence that implicates the accused, and so corroborates that of the victim. The Court nevertheless pointed out that notwithstanding that there may be no corroborative evidence, as long as the warning above has been sounded, the trial Court may convict upon being satisfied that the complainant is a truthful witness.

The Court further warned that a conviction entered without the warning above, risks being set aside on appeal, except where no failure of justice was occasioned by the failure to warn. The rule laid down above is, according to the decision in ***Kibale Isoma vs Uganda, S.C. Crim. Appeal No. 21 of 1998, [1999]1 E.A. 148,*** *'… still good law in Uganda.'* I therefore accordingly warned the gentlemen assessors; and am, myself, alert to this that there is danger of acting on the uncorroborated evidence of the victim; and am aware of the need to look for other evidence corroborating that of the complainant.

Here, since it has not been possible to avail the victim to testify in Court, there is even greater need to look out for evidence in corroboration. The report she made to the police was admissible and actually already admitted evidence in corroboration. Further and better evidence in corroboration herein was the confession evidence of the accused; which was admitted after Court was satisfied that he could not challenge it as he had attempted to do at the trial.

There was no allegation that the confession had been procured either by threat of harm or actual harm to the accused; or by any form of inducement relating to some benefit to accrue to him; which is the mischief legislated against in sections 23, and 24 of the Evidence Act. The accused instead sought to assert that he had not understood the police documents he had appended his signature to. PW1 who had recorded the confession statements gave an account of the circumstances leading to the confession. He testified that he had recorded the statements in both English and Rutooro the language in which the accused was fluent; and then caused the accused to sign both statements.

In the statements – PE1 and PE2 – the accused confessed that he had indeed subjected the victim, his own daughter, to sexual intercourse; but he blamed it all on his wife who, he complained, had nagged him from time to time and denied him sex, urging him to go and sleep with his daughter instead. He claimed that as a consequence of this harassment, he went ahead and had sexual

intercourse with his daughter – the victim – but that it was not that he had intended to, but due to annoyance by his wife! Having admitted this piece of evidence as having been given by the accused, and of his own volition, there is no need to look for any other evidence in support of the prosecution case. It is the best evidence in the circumstance, of the sexual assault complained of.

It is in the confession evidence that the accused admits too, that the victim was below the threshold for permissible sex; meaning she was below the age of 18 years. The police statement by the victim placed her age at 14 years then. The medical report admitted in evidence as agreed fact also placed her age at 14 years then. The defence conceded proof by the prosecution that the girl victim was then below the statutory age of 18 years of age; and that she indeed been subjected to sexual intercourse. I am also in agreement; hence find that the first two ingredients of the offence were persuasively established by evidence beyond reasonable doubt.

The evidence adduced above also conclusively resolves the issue of the participation of the accused in the defilement of the victim. In ***Badru Mwindu*** (supra), the Court held that failure of the victim of the crime to give evidence in Court is not necessarily fatal to the prosecution case. The oft quoted passage from that decision, as was reproduced by the High Court in the case of ***Uganda vs. Mugisha Afranco; Criminal Session Case No. 69 of 1999***, is that:-

> *"… where there is sufficient and cogent evidence to support a conviction, the trial court is entitled to act on such evidence notwithstanding the absence of the victim's evidence. … whereas normally in sexual offences the evidence of the victim is the best evidence on issues of penetration and even identification, other cogent evidence can suffice to prove such facts in the absence of that best evidence. So identification of an accused is one of the facts that can be proved without testimony of a victim of defilement. …*
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> *Another point taken by counsel for the appellant was that the evidence of PW4 to whom the victim in that case had first reported was hearsay. We do not agree. The evidence of a complaint by the victim of a sexual offence is admissible. "*

In his unsworn testimony, the accused denied the charge stressing that he was a newly arrived immigrant in the area, and had no garden there; meaning that the allegation that he had gone to the garden with the victim was false. He contended that he was a victim of a frame up because his wife had in his absence disappeared with his money and household properties; and that the LC1

Chairman of the village only arrested him because he (accused) had failed to raise money to pay the Chairman for the demarcation of his recently acquired land in the area.

The law is that confession evidence has to be corroborated. Because I have accepted that the accused's confession was willingly and freely given, I reject the alibi and denial he has put forward in his defence as totally false and useless. The accused is merely making a futile about – turn. This fabricated alibi is evidence in corroboration of his evidence of confession. The evidence containing the report the victim made to the police as appears in her police statement referred to above, are further corroboration of this confession statement.

I am one with the lady and gentleman assessors in their opinion advising me to find that the accused is guilty. The prosecution has certainly proved, beyond reasonable doubt, all the ingredients of the offence the accused stood indicted for; and so I find him guilty as charged, and for which reason I hereby convict him.

Chigamoy Owiny – Dollo
RESIDENT JUDGE, FORT PORTAL
05 – 06 – 2009