THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0044 OF 2005; HELD AT KYENJOJO

UGANDA ……..……... PROSECUTOR

VERSUS

YEREMIYA BATAMBA ...…… ACCUSED

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

JUDGMENT

The accused herein, Yeremiya Batamba, stands indicted for the offence of defilement, in contravention of sections 129 (3) and 4(a) of the Penal Code Act; as amended. The particulars of the offence states that on the 4th day of June 2004, at Isunga village, in the Kyenjojo District, he had unlawful sexual intercourse with one Atuhaire Yunise; a girl under the age of 14 years. Court read out and explained the charge to the accused, who responded that he had understood; but he pleaded not guilty. Accordingly, the Court entered a plea of not guilty; and the accused stood trial. It was the duty of the prosecution to prove, beyond reasonable doubt, each of the following three ingredients of the offence of defilement, for the accused to be convicted as charged. These ingredients are namely, that: –

(i) The alleged victim was subjected to sexual intercourse.

(ii) The victim was below 18 years of age at the time the sexual intercourse complained of was perpetrated.

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

The prosecution called 6 (six) witnesses to prove its case. PW1 – Dr. Mucunguzi, of Kyegegwa Health Sub District Centre, examined both the victim and the accused. His medical report and appendix thereto were admitted in evidence as agreed facts, and marked CE2(a) and CE2(b)

respectively, in accordance with the provisions of section 66 (3) of the Trial on Indictment Act, which 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; …"

PW2 – Atuhaire Yunise, was the alleged victim of the defilement for which the accused has stood trial. PW3 – Ahimbisibwe Rogers, is brother to the victim of the defilement in issue, and son of the accused. PW4 – Nakati Judith, a nurse was first to examine the victim after the complaint that she had been defiled by the accused. PW5 – Mutume Joram, the LC1 of the area to whom the victim first made a report of the defilement. PW6 – No. 27179 P.C. Gobson Onama recorded statements; and visited the scene of crime.

For proof of any alleged sexual intercourse, the prosecution has to prove that there was carnal knowledge of the victim. In the matter before me then, the prosecution was under duty to prove that there was penetration of PW3's vagina. As was held in ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), penetration will have taken place, however slight it may have been; and it would amount to proof of carnal knowledge. The prosecution has a duty to adduce evidence, which proves beyond reasonable doubt that the alleged sexual assault did occur. As was held in ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995***, this may be established either by direct or circumstantial evidence. Furthermore, the victim's own evidence usually offers the best proof of penetration. Medical evidence and, or other evidence may be called in corroboration.

In ***Abbas Kimuli vs. Uganda; C.A. Crim. Appeal No. 210 of 2002*** (unreported), the Court followed the decision in ***Hussein Bassita*** (supra), and reiterated that while the doctor's report is desirable for proof of sexual offence, it is not mandatory. In ***Kibale Isoma vs Uganda, S.C. Cr. Appeal No. 21 of 1998 [1999]1 E.A. 148*** the Supreme Court approved of the decision in ***Chila & Anor vs Republic [1967] E.A. 72*** at 77, and held it to be *'still good law in Uganda'*. In the ***Chila*** case, the trial judge's finding was that the complainant was a truthful witness; and then without either warning the assessors or himself of the need to look for corroboration of the complainant's evidence, which would implicate the accused, he convicted the accused. The Court of Appeal for

East Africa upheld the conviction; and stated that in East Africa, the law with regard to corroboration in sexual offences was that: –

> *"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 the matter before me, the alleged victim – PW2, turned out to be a hostile witness when called by the prosecution. After first testifying that the accused had subjected her to sexual intercourse, she then turned round and testified that she had conspired with her brother who was 15 years then, to frame their father (the accused) so that he could stop mistreating them. They agreed to tell their grandmother (mother to the accused) that the accused had done something bad, and since everybody knew the accused was a drunkard, he would be arrested and their mother whom he had forced out of their home would come back. At this stage, the Court Clerk noticed a woman carrying a baby gesturing to the witness. Court warned against interference with Court witnesses, as this was an attempt to defeat the course of justice; and there would be dire consequences for it.

PW2 testified further, denying that she had sexual intercourse with her father; and claimed that in fact the first time she had sex was on the 13th March 2008 with her present husband. Owing to her having turned hostile witness, the Court allowed the prosecution to cross–examine her. She admitted her signature on the police statement (***exhibit PE1***), and testified that she told police that the accused removed her half petty and knickers by force and they got torn; and told her that if she refused, he would kill her. She however denied that she told police that the accused pushed his penis into her vagina. She admitted telling the police that when the pressure was too much she started crying. She explained that this pressure was when the accused asked her to touch his penis; and when she did so, she jumped and made an alarm.

She denied that the accused put his penis in her vagina; and maintained that the allegation of defilement was false, and that she wanted the accused to come back home from jail. PW3 – Ahimbisibwe Rogers, her brother, testified in corroboration of the evidence by PW2 that they had conspired to have the accused (their father) arrested; and that the night before this conspiracy, he

had heard the accused with whom they slept in the same room, saying to someone he did not know, that 'if you say it I will kill you.' Because he was a hostile witness too, he was subjected to cross–examination by the prosecution. He identified his signature on the police statement exhibited as PE2; and admitted telling the police that the accused had laid them in bed, and put PW2 alone, and that he woke up and found PW2 crying calling his name, after which the accused told her to stop or else he would kill her.

He testified that he did not know where his sister was calling his name from the bedroom; and that in the morning, his sister told him a plan of how she had been defiled at night; that their father had defiled her the whole night. He then went and told their grandmother, and wrote a letter to their mother that the accused had defiled his sister. She however denied that they ever hatched a plan with her sister to have their father arrested; and asserted that if his sister said so, then she was a liar. She told Court that in the morning when his sister was narrating the incident of defilement to him, she cried towards the end of the narration. PW4 – Nakati Judith, a nurse, was first to examine PW2 who had been taken to her by the LC1 Chairperson of the area, on the allegation that PW2 had been defiled by her own father.

She examined her and established that she appeared to have indulged in sexual intercourse regularly, as her private parts had been widened. PW2 told her that she had been used by her father; but she did not understand what this meant. She then referred PW2 to be handled by a medical doctor. PW5 – Mutume Joram, the LC1 of the area, testified that PW2 reported to him that the accused had defiled her. She came with her brother PW3, and grandmother; and the grandmother told him that the children had complained to her that the accused had defiled PW2 that night. He took her to a nurse, and then to the police at Hapuyo fifteen miles away. He testified that PW2 and PW3 told him that the accused had defiled PW2 from the children's bed. He also informed Court that he is not related to the accused in any way.

PW6 – No. 27179 P.C. Gobson Onama recorded statements from the witnesses. He testified that PW5 came with yellow knickers (exhibited as PE3), which had stains looking like semen at the bottom. He testified further that the children's grandmother had stated that her son had threatened them with a spear and panga after the incident to kill them if they revealed what had happened. He told Court that PW2 had stated that the accused had removed her knickers and the petty, and had intercourse with her, ejaculating once. He identified the victim's statement, which he recorded (***exhibit PE2***). At the close of the prosecution case, the defence contended that there

was no case for the accused to answer, as the prosecution case did not establish a prima facie case to require the accused to make his defence.

However, I chose to put the accused on his defence; as I am satisfied that a prima facie case has been established. Despite the victim and her brother turning hostile, there is a strong pointer in the contradictions that are manifest from their testimonies. They do not agree on the allegation that there was a conspiracy to allege that the accused defiled PW2 so as to have him arrested. The evidence by PW2 that she first had sexual encounter in 2008 cannot be true in the light of the evidence by the nurse and doctor in 2004 that she was already sexually active. As was succinctly put in the celebrated case of ***Bhatt vs R. [1957] E.A. 332,*** a prima facie case is established, where the prosecution evidence is such that a reasonable tribunal might convict the accused, if there is no response to the evidence against him or her.

While at this stage the proof required is not one beyond reasonable doubt, it should nevertheless be such that a tribunal, directing itself to the evidence before it, and applying the law, might convict the accused if there is no answer given by the accused to the evidence adduced against such accused person by the prosecution. Since the burden rested on the prosecution all the time to prove his guilt beyond reasonable doubt, and the accused was under no duty to prove his innocence, he exercised his right to keep silent. He also called no witness in his defence. This will not, in any way, have adverse effect on him, owing to the presumption of innocence he enjoys; and the fact that the burden lies on the prosecution to prove his guilt.

The victim – PW2 first testified that the accused subjected her to sexual intercourse; then all of a sudden, retracted and testified that the accused in fact never pushed his penis in her vagina, but only made her touch his penis. She however admitted telling the police in her statement that her father, the accused, had subjected her to sexual intercourse that fateful night. In the light of the report she and her brother made to their grandmother, LC1 Chairperson, nurse, and police, about the sexual intercourse the accused had subjected her to, I believe that her change of heart was influenced by the woman who was caught by the Court Clerk gesturing to her while she was testifying. Apparently, she was urging her to deny the incident of sexual intercourse, which led Court to warn her to desist from such interference with the course of justice.

Her lie in Court was quite apparent when, against professional medical evidence to the contrary, she claimed that the first time she encountered sexual intercourse was four years later in 2008

with her present husband. It is possible that owing to the taboo and stigma that attaches to sexual intercourse between father and daughter, as was testified to by the Chairperson LC1, the victim merely sought to protect her name and marriage. Her claim that the allegation that the accused sexually ravaged her was a ploy between her and her brother to cause the arrest of the accused and have their mother return home, was denied by her brother. At her age of 13 (thirteen) years then, it is quite unthinkable that she would contrive sexual molestation where there had been none, merely to have her mother back home.

Her earlier report of the sexual intercourse has been corroborated medically; so I can safely discount her turn around in Court as I believe she was indeed subjected to the sexual intercourse she reported on and repeated to a number of persons immediately after the incident. The authority in ***Uganda vs Mugisha Crim. Session case No. 69 of 1999***, that in the absence of the best evidence, other evidence can suffice to prove sexual intercourse, is applicable here where the victim has apparently been compromised. I need to point out that criminal trial is not a private matter between an accused and the victim; where a victim may choose to discontinue or frustrate the trial. It is a matter where an accused is prosecuted for breach of a wrong of public concern; and the victim is merely a witness to see that justice is done.

As for the age of the victim at the time the defilement complained of took place, the victim herself testified that she was 14 years in 2004 when the incident for which the accused is in the dock took place. The medical report, admitted in evidence, placed her age at the time of the alleged defilement at 13 years. Therefore, although no birth certificate was produced in Court, the age of the victim was persuasively established by a combination of the admissible evidence laid out above. Even without the evidence of age of the victim given above, I would still have found that the victim was far below 18 years of age in 2004, given that even at the trial she was evidently around the age of 18 years. It is my finding that the victim was, at the time of the defilement, around the age of 14 (fourteen) years.

With regard to the identity of the person who subjected the victim herein to sexual intercourse that night, this can be gathered from the evidence of the victim and her brother who both testified in Court that they both slept in the same room with the accused at the insistence of the accused. It is the inculpatory evidence of identification adduced by the victim of the criminal act, in a case of this nature, as decided in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** which offers the best evidence**.** This was identification at night when there was no light; hence, it was

audial identification. That being so, I have to treat that evidence with caution, in keeping with the advice in ***Roria vs. Republic [1967] E.A. 583;*** and followed in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997.***

Both Courts warned of the danger that identification evidence poses; and advised that Court must 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;*** the Court reiterated and stressed the need for the exercise of care; and clarified that this is applicable in both cases of single and multiple identification witnesses. It urged that in either situation, the judge must warn himself and the assessors, as I have here so done, of the special need for exercise of caution before founding a conviction on such evidence. The reason for the exercise of such care is that the witness or witnesses may appear persuasive, but could be mistaken. In a passage, which was cited with approval by the Supreme Court in the ***Bogere*** case (supra), the Court advised as follows:

> *"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 emphasised the need to test with the greatest care the evidence of an identifying witness; and particularly so, when the conditions favouring correct identification are difficult. In such a case, the Court should look for other evidence in support, which points 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), Court clarified that the other evidence may be either direct or circumstantial. What is required is that the other evidence should leave no reasonable doubt in the

mind of the trial Court that there is either no error in identification or mistaken identity, or it is minimal and negligible. 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."*

The acceptable evidence of the victim regarding the identity of her defiler was not visual, but audial identification. She testified that it was at night after the accused had put them to bed when he forced her into sexual intercourse and threatened to kill her if she reported the matter to anyone. Her brother also testified to having heard their father, the accused threaten the victim with death. This, by its nature, is of course circumstantial evidence. There is a body of authorities on how Courts should approach circumstantial evidence; and as the Supreme Court of Uganda stated in ***Byaruhanga Fodori vs. Uganda, S. C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12*** at p. 14 : –

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See* ***S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480****)."*

Further, as is well stated in the case of ***Tindigwihura Mbahe vs Uganda S.C. Crim Appeal No. 9 of 1987,*** circumstantial evidence must be treated with caution, and narrowly examined, because evidence of this kind can easily be fabricated. It is therefore important that before drawing an inference of the accused's guilt from circumstantial evidence, Court should ensure that there is no other co-existing circumstances which would weaken that inference. In addition, as was pointed out in ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209***, at p. 211, even where circumstantial evidence is not entirely inconsistent with the innocence of an accused; the Court may still find it of great value as evidence, which corroborates other evidence. It is only when it stands alone that

circumstantial evidence must strictly be inconsistent with any other reasonable hypothesis than that of guilt; and there must be no co–existing circumstance, that would weaken the inference of guilt.

The conditions under which the identification herein was made were not favourable for correct visual identification. There is thus real need to subject this evidence to serious scrutiny before deciding whether it is safe to found a conviction thereon; and whether there is any other supportive evidence. I warned the gentleman assessor about this need for caution. However, here is a case of identification of the voice of a father by two of his own children who have been with him all the time. The accused was the only adult male in the room where the sexual incident took place that night. The villain clearly threatened the victim with dire consequences if she revealed the sexual molestation to anyone; meaning that the villain knew that the victim knew him. The possibility of mistaken identity is, therefore, quite minimal; if any.

In the light of the evidence adduced by the victim, and her brother, both of whose testimonies I do believe, that there was only one man in the house that night, which was the accused, the circumstantial evidence points to no other person but the accused. The victim and her brother immediately notified their grandmother, the mother of the accused, and consistently named the accused to the Chairman LC1 and nurse, and later the police, as the villain. There is thus sufficient evidence adduced by the prosecution showing that the victim and her brother correctly identified accused as the person who defiled her that fateful night; and then threatened her with death if she revealed the hideous act to anyone. I find the Court's advice in the ***Abudalla Nabulere*** case (supra), quite relevant here where it said: –

> *"If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered."*

The circumstantial evidence adduced in proof of the participation of the accused remains uncontroverted. No reasonable alternative hypothesis, or co–existing circumstance, was even merely suggested, to vitiate, counter, or stand alongside that of the prosecution pointing irresistibly to the participation of the accused. In this case, circumstantial evidence has provided the best evidence in proof of the prosecution case that the accused subjected his own infant daughter to sexual intercourse. Therefore, and in full agreement with the opinion of the lone

gentleman assessor, I am satisfied that the prosecution has proved beyond reasonable doubt, the guilt of the accused as charged; and in consequence of which I convict him.

Chigamoy Owiny – Dollo

JUDGE,

12 – 06 – 2009