THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL CRIMINAL SESSION CASE No.0090 OF 2005; HELD AT KYENJOJO

UGANDA ……..……... PROSECUTOR

VERSUS

AGABA RICHARD …… ACCUSED

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

JUDGMENT

The accused herein, Agaba Richard, stood trial in this Court indicted for the offence of defilement, in contravention of section 129 (1) of the Penal Code Act. In the particulars of the offence, it was stated that on the 3rd day of October 2004, at Kasamba village, Hima Parish, Bugaki Sub County, in the Kyenjojo District, he had unlawful sexual intercourse with one Kemigisha Rose; a girl under the age of 18 years. The charge was read out and explained to the accused; to which his response was that he had understood; but pleaded not guilty. The Court then 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, if the accused was to be convicted as charged. These ingredients are namely, that:-

(i) A girl was subjected to sexual intercourse.

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

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

The prosecution, in a bid to discharge the burden of proof that lay on it in this case, adduced evidence from 5 (five) witnesses; PW1 - the medical officer who examined the accused; and PW2 – Dr. Waiswa Musa Kasadha who examined the victim; and whose reports were exhibited by consent as CE1 and CE2 respectively, after I conducted a preliminary hearing in accordance with section 66 of the Trial on Indictments Act; PW3 – Kemigisha Rose, the victim of the defilement in issue; PW4 – Nyangoma Sylvia, former wife of the accused and aunt to the victim; PW5 – Timanyire Charles, father to the victim and formerly brother in law to the accused.

For proof of any alleged sexual intercourse, the prosecution has to prove that there was carnal knowledge of the victim by the accused. In the instant case then, what the prosecution was under duty to prove was 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 occurred, however slight it may have been; and it would suffice to sustain a conviction for the offence of defilement. That required proof of penetration, as was decided in ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995***, may be established either by direct or circumstantial evidence; and further, it is usually the victim's own evidence that offers the best proof of penetration; and then medical evidence and, or other evidence may offer corroboration.

What is required, the Court pointed out, is for the prosecution to adduce evidence which proves beyond reasonable doubt that the alleged sexual assault did occur. In ***Abbas Kimuli vs. Uganda; C.A. Crim. Appeal No. 210 of 2002*** (unreported), the Court cited the decision in ***Hussein Bassita*** (supra), with approval, and reiterated that for proof of sexual offence, the doctor's report is desirable, but 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 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 found the complainant 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 before him. The Court of Appeal for East Africa declining to quash the conviction 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 her testimony, the victim – PW3, gave direct evidence regarding what had transpired that night. She had woken up in the night to realise that someone was having sexual intercourse with her from behind. The person had put his penis in her vagina from the rear position. A couple of days later she began emitting a foul smell, and was walking with difficulty, as she was in pain. PW4 – gave testimony on how on realising that PW3 was walking badly and was smelly, established from her that she had been defiled. She, and her daughter, then examined the victim and found that her vagina had widened and it was smelly. She took the victim to a nurse who also established that the victim had been spoilt - and that this meant the victim had been forced to have sexual intercourse, which was something beyond her age.

PW5 – the father of the girl-victim established from her that the accused had defiled her; and took the girl to hospital. The medical report herein above referred to, made by Dr. Waiswa Musa Kasadha of Kyenjojo Health Centre IV; and exhibited in Court by consent as aforesaid, established that the hymen of the girl was ruptured, and that this was likely to have been done long before the date of examination. The examination did not reveal any injuries around the victim's private parts. The provisions of section 66 (3) of the Trial on Indictment Act 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; …"

The victim – PW3, gave her testimony in a clear and straight forward manner; and was firm in the face of a barrage of exacting cross examination by Augustine Kayonga, learned counsel for the accused. Her clarity in presentation and straight forwardness notwithstanding, her evidence with regard to the allegation of sexual intercourse should preferably be corroborated before it can safely form the basis for finding the accused guilty as charged and convicted.

The evidence on record discloses that the requisite corroboration has in fact been provided by the circumstantial evidence of PW2 contained in the medical report of Dr Waiswa Kasadha Musa

aforesaid, and that of PW4, both of whom made physical examination of the victim's private parts, and established that indeed there was manifestation that the victim had been subjected to sexual intercourse. The authority in ***Sebuliba Haruna vs. Uganda – C.A. Crim. Appeal No. 54 of 2002***, is that where a mature woman carries out examination on the private parts of the victim, and establishes evidence of sexual intercourse, such finding is as good as medical evidence.

Regarding the age of the victim at the time of the defilement complained of, the testimonies of PW5 her father, PW4 – her paternal aunt, and the victim herself was that she was 11 years of age when she was defiled in 2004; and was at the time of the trial 15 years. The medical report placed her age at the time of the alleged defilement as 11 years. Therefore although no birth certificate was produced in Court, the age of the victim was conclusively established by a combination of the admissible evidence laid out above.

Had there been none of 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 below the age of 18 years. Proof that the victim was, at the time of the defilement, below the age of 18 (eighteen) years, has been established beyond reasonable doubt.

On the issue of the identity of the person who subjected the victim herein to sexual intercourse that night, it is the evidence of the victim, and that of PW4 which the prosecution relied on for proof. 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**.** Owing to the fact that proof of the participation of the accused in this case rests on evidence of identification, despite by a couple of witnesses, 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 lies in relying on identification evidence; and urged 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 to exercise care; and that this applies both in cases of single and multiple identification witnesses; and further 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 the Court gave for the exercise of such care is that the witness or witnesses, though appearing persuasive, could in fact be mistaken. Their Lordships then, in a passage which was cited with approval by the Supreme Court in the ***Bogere*** case (supra), 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 this 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 make it clear in the mind of 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."

The evidence of the victim regarding the identity of her defiler was not visual, but audial identification. She testified that it was at night after they had all gone to bed when she woke up from sleep only to find someone was having sex with her from behind. She continued to say in the examination in chief as follows:

"He told me not to talk; then he went to his bed. I recognised his voice. … I was sleeping in the same bedroom with my aunt and the accused. … After defiling me he told me to keep quiet; that he was going to give me money the following day."

When asked in cross examination, she said:

"I am sure it was him. He was close by me and saying: 'Kemigisha don't say anything'. "

The victim testified that after telling her not to speak, and that he would the next day give her money, the accused went back to his bed. This is of course circumstantial evidence. This circumstantial evidence has however got to be looked at alongside the fact that there was no case of a break in by anyone. The accused was the only male in the house that night. There is a long line of authorities reiterating the one prescription on how Courts should approach circumstantial evidence; and as the Supreme Court of Uganda spelt out 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 to this, the law as pointed out in ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209***, at p. 211, is that even where circumstantial evidence is not wholly inconsistent with the innocence of an accused; the Court may find it of great value as evidence which corroborates other evidence. It is only when it stands alone that circumstantial evidence must 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 evidence above is audial; hence circumstantial. Therefore, the decision in ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda Crim Appeal No. 41 of 1995,*** which are authority for the proposition, in law, that where the crime complained of is committed during broad day light, by someone fully known to the witness, then the conditions for proper identification would be favourable; and help to reduce or altogether exclude any possibility of error, or mistaken identity, is not available to the prosecution.

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 or not it is safe to found a conviction thereon; with or without any other evidence in support. This need for caution I warned the assessors about. The testimonies of the victim, PW4, and PW5 were that the victim had known the accused for quite some time even before moving over to stay with him. She had by the time of the defilement stayed with the family of the accused, and had been sleeping in the same room with him and wife, for some six months.

This would mean that the victim had become quite familiar with the voice of the accused. Yet, this advantage has got to be looked at against the backdrop that this identification was made by the victim when she had just woken up from sleep, and naturally not so clear minded at the time. Further, evidence of audial identification is usually the weakest type of evidence. Therefore, the inculpatory evidence of identification is not safe to act on alone; and there is then need to look for such evidence as can support the audial identification evidence.

In his defence, the accused gave evidence on oath. He corroborated the prosecution evidence that they were a family and used to sleep in the same room at one stage; but that later, and on the date of the alleged defilement, the victim was no longer sleeping in his room; but shared the other room with one Kabahueza – PW4's daughter. He denied that he ever defiled PW3. He blamed his present ordeal on the said daughter of PW4, who he alleged instigated PW3 to bear false witness against him. The explanation he gave for such malicious design was that at first, he had tried to win the heart of the said daughter of PW4, but later settled on PW4 herself; and the said daughter of PW4 never forgave him.

In the light of the evidence adduced by the victim, and PW4 - the wife of the accused, both of whose testimonies I do believe, I must reject the defence case that the victim and another girl slept in another room from the one the accused and his wife slept. There was only one man in that house; and that was the accused. Hence, in the absence of any evidence that some other man might have committed the heinous deed complained of, the circumstantial evidence pointing to guilt of the accused and thereby corroborating the evidence of the victim is quite strong.

In ***Muhirwe Simon vs. Uganda – S.C. Crim. Appeal No. 38 of 1995***, where credible evidence was adduced that the accused had admitted to the mother of the victim that he had indeed defiled the victim; Court found this to amount to sufficient corroboration of the evidence of the child witness. On this authority then, and because I believe PW4 in the instant case, the admission made by the accused to her, and to the Chairman LC1, that he had defiled the victim herein; upon their separately confronting him, offers independent and sufficient corroboration of the circumstantial evidence of audial identification. His claim that this case is all a scheme by his wife's daughter to get back at him for transferring his love and affection away from her to, and instead settling with her mother, is equally untenable.

The victim was very clear that the first person she notified was her aunt; only that it turned out that the aunt did not hear her complain. In any case, the accused is not apportioning blame on his wife, whom she admitted guilt to, for having taken the matter to police upon learning of the repugnant deed. He only seeks to justify her having testified in Court against him as resulting from her now being married to another man. That marriage – in fact she has merely got a child with another man – only took place long after the accused had already been arrested and remanded awaiting this trial; and was, from the woman's explanation, a result of her having terminated her relationship with the accused due to his repulsive act against her brother's child.

Further to the above, the fabricated alibi put forward by the accused is unacceptable. I have roundly rejected it; and on the authority of the ***Moses Kasana*** case (supra), it is also 'other evidence' in support of the evidence of the victim. Therefore, I find that there is sufficient evidence adduced by the prosecution, and from the defence itself, showing that the accused was correctly identified by the victim as the person who stealthily moved over to her bed that night; and defiled her then went back to his bed after urging her, with a promise of monetary gain, not to mention the incident to anyone. I find the advice of the Court in the ***Abudalla Nabulere*** case (supra), quite proper. It said as follows:-

> *"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 evidence presented for proof of sexual intercourse; and with a girl of merely 10 years was direct, and was adequately corroborated as discussed herein above. 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 the one which now points irresistibly to the guilt of the accused. The prosecution has certainly convincingly established that he committed the offence for which he has been arraigned, and tried in this Court.

This case is a classical instance where circumstantial evidence has provided the very best evidence in proof of the prosecution case. I am therefore, and in full agreement with the opinion of the gentleman assessor, but not so with that of the lady assessor, satisfied that the prosecution has proved beyond reasonable doubt, the guilt of the accused as charged; and in consequence of which I hereby accordingly convict him.

Chigamoy Owiny – Dollo
JUDGE