THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0130 OF 2005; HELD AT KYENJOJO

UGANDA ……..……... PROSECUTOR

VERSUS

SERU BERNARD …… ACCUSED

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

JUDGMENT

Seru Bernard, the accused herein, was indicted for the offence of defilement, c/s 129 (1) of the Penal Code Act. It was alleged in the particulars of the offence, which Court read out and explained to him, that on the 15th day of January 2005, at Katembe village, Mwaro Parish, Katooke Sub County, in the Kyenjojo District, the accused had unlawful sexual intercourse with one Katusiime Doreen; a girl under the age of 18 years.

The accused responded with a denial; and therefore this trial had to be conducted. The burden was on the prosecution throughout this trial to prove, by evidence, each of the following three ingredients of the offence of defilement, if the accused was to be convicted; these are that:-

(i) Sexual intercourse was perpetrated on the girl named in the indictment.

(ii) The said girl was below the age of 18 years at the time of the said sexual intercourse.

(iii) The accused participated in perpetrating the sexual intercourse referred to herein.

In a bid to discharge the aforesaid burden, the prosecution adduced evidence in Court from the following persons: –

(i) No. 24969 P.C. Isingoma Frank – PW1; a police officer who recorded a statement from the victim's mother.

(ii) Barzana Geoffrey – PW2; the Chairman L.C. 1 of the area at the time the alleged offence took place; and arrested the accused.

(iii) Kisembo Mugisa David – PW3; a nursing assistant – cum – laboratory technician familiar with the hand writing of Senior Nursing Officer Rwiragira Annet, who examined the victim and made a record thereon.

(iv) Akugizibwe Mutabazi Edwins – PW4; a clinical officer acquainted with the hand – writing of Dr Waiswa Musa Kasadha who examined and made a report on the accused.

(v) No. 23221 D/C. Kambere Samuel; a police officer who recorded the statement of the victim.

To prove that indeed the alleged sexual intercourse took place, what is required of the prosecution is evidence of penetration of the girl's vagina; and as it was held in ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), however slight that penetration was, it is enough proof of 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 clarified that proof of sexual intercourse or penetration may either be established by direct or circumstantial evidence; and that it is usually the victim whose evidence is presented, and then medical evidence or other evidence is adduced to corroborate it.

The Court clarified further that, despite its desirability, it is not a hard and fast rule requiring the victim's evidence or medical evidence to be adduced in every trial for the offence of defilement. All that the prosecution need do is present any admissible evidence that would sufficiently prove the case against the accused beyond reasonable doubt.

In the instant case before me, it was the evidence of the victim, and that of her mother; both admitted in Court in accordance with the provisions of sections 33, 60, 61, 62 (e), 63, and 135 of the Evidence Act, which the prosecution relied upon. It was established to the satisfaction of the Court that the victim and her mother had long since migrated to an unknown place. Indeed Court insisted on their being traced; and it was only when all frantic effort at doing so yielded nothing, that recourse was had, to the provisions of the law above on admission of secondary evidence.

In her police statement – exhibited as PE4 – the victim, a primary school girl, revealed that during the school holidays they were then in, the accused had on an earlier date forcibly subjected her to sexual intercourse; but because the accused had threatened her with dire consequences, she had not informed her parents. On this second time, which was on Saturday 15th January 2005, at around 2.00 p.m., the accused found her at home alone cooking in the kitchen; and, upon establishing that there was no one else at home, the accused threw her down, and he then:

> *"… pulled out his penis and pushed it into my vagina immediately he removed my knicker. … When he grabbed me down he pushed his penis into my vagina and I felt pain seriously till I felt some fluids he poured into me."*

She continued further; stating that:

> *"This was his (Seru) second time to defile me. There was a day within those holidays that Seru came at home … got me there and pulled me into the kitchen and intercourse me from there. … That day I did not feel any pain like this recent one."*

For her part the victim's mother stated to police in her statement – exhibit PE1 – that on the material date herein she had returned home only to find the victim walking with a bad limp; and on inquiring from her, the victim told her that the accused had defiled her in the kitchen earlier in the day. PW2, to whom an immediate report of this matter was made, testified that the victim told him that the accused had had sexual intercourse with her.

The medical reports – PE2 (a) and PE2 (b) – on record, revealed that the victim, who was examined three days after the alleged defilement, had bruises on her vulva, vagina, and thighs; and that this was evidence of deep penetration, consistent with forcible sexual intercourse. The injury was classified as harm. The examination also revealed that the victim's hymen had been ruptured about a month before the date of the said examination. The evidence of the victim's mother, that of PW2, and as well that of the medical officer who examined her, clearly provide the requisite corroboration and proof of the claim by the victim that indeed she suffered forcible sexual intercourse.

Of particular interest is the medical finding that the victim's hymen had been ruptured about a month before. This was of great evidential value as it neatly corroborated the disclosure by the

victim that the defilement for which the accused was standing trial had been the second one in a row; as he had, prior to this one, but within the same school holiday she was then in, defiled her in the same kitchen.

This corroboration is a manifestation that the victim is a reliable and credible witness. She then must have told the truth about being defiled on those two occasions. It must have been for these reasons that the defence saw no point in contesting proof of sexual intercourse as an ingredient.

As for the age of the victim at the time she was defiled, no birth certificate was produced in Court in proof thereof. Nevertheless, the law is that proof of age can be established by other admissible evidence. In the instant case there is the assertion by the victim and her mother that she was then 10 (ten) years of age; and was a primary school girl in class 3 (three). The medical report also placed her age at 10 (years); thereby corroborating the age given by the victim and her mother.

PW5 – the police officer who recorded the victim's statement testified that she was a primary school girl. All this provided persuasive proof that the victim then was far below the age of 18 years required for one to engage in permissible sexual intercourse. It must therefore have been on this account that the defence graciously found this, as well, an ingredient well established by the prosecution and conceded it.

To prove the participation of the accused in the commission of the offence for which he has been indicted, the prosecution relied on the evidence adduced by the victim, her mother, and PW2. The law, as it was held in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** is that the best evidence for proof that an accused is the perpetrator is the inculpatory evidence of identification adduced by the victim. With regard to the present case, the evidence of the victim is that the accused, who was well known to her, had defiled her twice within a period of one month or so; and that both acts of defilement had taken place during broad daylight.

The accused had each of those times held a conversation with the victim before sexually assaulting her; and then after the deed he had threatened her with unpleasant consequences should she divulge what he had done to her, to anyone. PW2 testified that the accused and the complainants herein lived only 200 metres from each other. Evidence of identification has got to be treated with caution in keeping with the advice in ***Roria vs. Republic [1967] E.A. 583.***

This authority has consistently been followed in several cases; some of the leading ones being: ***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.***

In all these cases, the Courts have reiterated the rule regarding approach to evidence of identification. This being the warning of the danger of relying on identification evidence; and the advice that any Court faced with such a situation must first satisfy itself that in all the circumstances it is safe to act on such evidence. In the ***Nabulere*** and ***Bogere*** cases (supra), the Supreme Court pointed out that whether the evidence of identification was by one or more witnesses, the need for care remained the same.

It urged that the judge must always in such a situation, warn himself and the assessors of the need for caution; pointing out that a witness or witnesses who are persuasive may turn out to have been mistaken; and therefore:

> *"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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> …..
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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 the ***George William Kalyesubula*** case, the Supreme Court re echoed the need to test the evidence of an identifying witness with the greatest care. In ***Moses Kasana*** and ***Bogere*** cases

(supra), both Courts emphasised that the trial Court must always satisfy itself that there is no error in identification, or mistaken identity.

The Supreme Court advised 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,*** that in a situation where the identification in issue is made during broad day light, and by someone fully known to the witness; then the conditions for proper identification are favourable, and would exclude any possibility of error, or mistaken identity. The matter before me now falls within this category.

The accused, who gave an unsworn statement in Court, confirmed that he was a member of the same village with the complainants. He however denied having defiled the victim as he, so he contended, never left his home that material day; from morning till bedtime. I must consider this defence of alibi, which in any case, the accused was under no obligation to prove, in the light of the prosecution evidence and rule of law regarding evidence of identification as brought out above.

There is no evidence that there was any enmity, grudge, or dispute of any form between the accused and the complainants. Barring a case of mistaken identity or error in identification by the victim, there is only minimal possibility that the identification by the victim, of the accused as the villain who had, twice, wantonly defiled her could have been incorrect. However, in view of her long and close familiarity with the accused, and the daytime condition under which the identification was made, I do not see how the victim could have made any error in identification, or that this could have been a case of mistaken identity. I am satisfied that the prosecution has negatived the alibi raised, and placed the accused at the scene of the crime.

Therefore it is my well considered finding, and in this regard I am in full agreement with the gentlemen assessors, that the prosecution has proved, beyond reasonable doubt, all the ingredients of the offence for which the accused has been indicted, and has stood trial in this Court; hence, I find the accused person guilty as charged; and in consequence of which, I hereby accordingly convict him.

Chigamoy Owiny - Dollo

JUDGE

27/05/2009