THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0065 OF 2005; HELD AT KYENJOJO

UGANDA ……..……... PROSECUTOR

VERSUS

TINKAMANYIRE JOHN ……. ACCUSED

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

JUDGMENT

Tinkamanyire John, the accused herein, was indicted for the offence of defilement, in contravention of section 129 (1) of the Penal Code Act; and the particulars of the offence states that on the 29th day of July 2005, at Kyakasura village, in the Kyenjojo District, the accused had sexual intercourse with one Mbabazi Janet; a girl under the age of 18 years.

The accused responded to the charge which was read out and explained to him; and which he had understood, with a plea of innocence. A plea of not guilty was therefore entered by Court and, as a result, the accused stood this trial. The prosecution had the burden to prove, beyond reasonable doubt, each of the following three ingredients of the offence of defilement, for that charge to stand. These are, namely that:-

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

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

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

In its endeavour to discharge the burden of proof that lay on it to prove the guilt of the accused, the prosecution called two witnesses:-

(i) Eviola Tibamwenda – PW1, the paternal grandmother of the victim in the charge.

(ii) Mbabazi Janet – PW2, the alleged victim of the offence charged.

I had earlier conducted a preliminary hearing in accordance with the provisions of section 66 of the Trial on Indictments Act, and by consent, the parties had admitted the medical examination report made with regard to the victim, and the appendix thereto; and the police statement of the arresting police officer.

For proof of the sexual intercourse the victim - PW2 was allegedly subjected to, the prosecution relied on the testimonies of PW1, and PW2; and as well, the medical report aforesaid. To establish that the sexual intercourse alleged in the indictment did occur, what the prosecution must prove is the fact of penetration of PW2's vagina; and on the authority of ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), however slight that penetration may be, it will sustain a conviction for the offence of defilement.

In ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995***, the Supreme Court of Uganda clarified that proof of penetration may be established by direct or circumstantial evidence; and further that the victim's own evidence is the usual means by which proof of penetration is established; and then corroborated by medical evidence and, or other evidence. The Court pointed out that all that the prosecution need do to prove its case is to adduce evidence that suffices to prove the allegation of sexual assault beyond reasonable doubt.

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 in cases of sexual offence, the doctor's report while desirable, is not mandatory.

The victim – PW2, in her testimony, gave direct evidence regarding what had happened between the accused and her, five years before this trial. It was her testimony that on that material day, the accused grabbed her by the hand, and although she told him to leave her as she did not want to play, he lifted her and carried her to his bed; then:

> *"He removed his trousers and also removed my knickers. I raised an alarm. When I did so, he told me that he would stab me. He got a panga and a spear. I then kept quiet. He then did to me the things old people do. He put his penis in my vagina. I felt pain. I saw blood*

coming from my private parts and on my knickers. … When I got up I could only walk with difficulties. … The blood was on the bed and the dress. … The knickers became bloodstained after I put it on. "

PW1, grandmother to the victim, testified that on the day in issue, she had seen her grandchild PW2 go to the home of the accused; and when she did not return and PW1 followed her, calling out her name. When there was no response she opened the door of the house of the accused; and there, inside, found the accused, naked, having sexual intercourse with her grand-daughter - PW2, on the bed. She pulled the victim out of the bed. PW3, the wife to the LC1 Chairman of the village where this incident took place, examined the victim when she was brought to her, and found that there was blood in her private parts which was also swollen.

The report of the medical examination on the victim, was made by Dr. Waisswa Musa Kasadha of Kyenjojo Health Centre IV; and exhibited in Court by consent, together with its appendix, and marked **CE1** and **CE2** respectively. This report revealed that there was penetration as PW2's hymen had been ruptured at the position of 9 o'clock; and this had been done as recently as 72 (seventy two) hours prior to the examination. The examination established, just as PW3 had done, that there were injuries around the vulva of the victim consistent with forceful sexual encounter. 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 - PW2, gave her evidence in a plain and articulate manner; and, at the close of which, the defence counsel had nothing to cross - examine her on. Despite her clarity and persuasiveness with regard to the allegation of sexual intercourse, her evidence has to be corroborated before it can safely be made the basis of a possible conviction. This corroboration has in fact satisfactorily been provided by the direct evidence of PW1 who found the accused in flagrante delicto committing the sexual intercourse complained of.

Further corroboration of the victim's evidence is in the evidence of PW3, and the medical report of Dr Waisswa Kasadha Musa, both of who examined the private parts of the victim and found

evidence of injuries freshly sustained, and consistent with forcible sexual intercourse, as pointed out above.

As for the age of the victim at the time of the defilement complained of, no birth certificate was produced in Court. Both the father and mother of the victim are reportedly dead. PW1, the grandmother of the victim was not helpful with regard to the age of the child. She could not tell what her own age was except to say that during the Second World War she was already a child. That notwithstanding, the age of the victim at the material time can still be established by other admissible evidence.

In Court she gave her age as at the time of giving her testimony as 16 years. This would mean she was 11 (eleven) years at the time of the defilement, five years ago. The medical evidence above put the age of the victim as being 11 years at the time of examination five years ago. This corroborates the evidence of age as given by the victim. There is therefore proof beyond reasonable doubt that the victim was, at the time of the defilement complained of, and even now, below the age of 18 (eighteen) years.

On the final ingredient of the offence - that of participation of the accused in the perpetration of the sexual intercourse complained of, PW1 and PW2 both provided direct evidence. The law, as decided in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** is that it is the inculpatory evidence of identification adduced by the victim of the criminal act, which is the best evidence**.** In the case before me now, PW2 – the victim, her grandmother – PW1, and PW3 a village mate all testified that the accused was a neighbour of the victim together with her grandmother, therefore very well known to them all. In fact, the victim grew up believing the accused was her grandfather; for that was how everybody else called him.

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 Supreme Court 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,*** 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; and thereby make it safe to found a conviction thereon even if such evidence is not accompanied by supportive evidence.

The case before me now, manifests conditions that were favourable for correct identification. All the prosecution witnesses and the accused knew one another only too well; they all lived in the same neighbourhood with the accused. The event complained of took place in the late afternoon around 4.00 p.m. The victim stated that the accused asked her to fetch him water; and when she went to pick a jerry can from his house for that purpose that he followed her, grabbed her, and subjected her to sexual intercourse.

This was therefore an encounter in which the victim had sufficient time with the accused as to exclude any possibility of error or mistaken identity. PW1 who found the accused defiling the victim stated that the incident took place around 3.00 p.m. PW3, checked the private parts of the victim that same day at around 5.00 p.m. Therefore, here, the inculpatory evidence of identification made under perfect conditions is not only that of the victim - PW2; but, as well, that of PW1 who equally offers direct evidence against the accused.

The accused gave evidence but not on oath. He corroborated the prosecution evidence that they are neighbours in the village; but denied that he ever defiled PW2. His defence was that this was all a frame up with the intention of snatching from him, his piece of land on which he lived as a neighbour of PW1 and PW2 in the village. When, in cross examination, it was put to PW1 that this case against the accused arose from a conspiracy to dispossess him of his land in the village,

she vehemently denied that the accused owned any land in their area; instead, she said that the plot of land he had built a house on, had been temporarily allocated to him by her own sister.

She revealed that upon her sister's death, the person to whom she bequeathed this property disposed of it; and that this happened when the accused was already in prison. Furthermore, there is the evidence adduced by both PW1 and PW2 that the accused pleaded with PW1 for forgiveness when she caught and berated him for committing such an outrageous act. His flight into hiding in the bush, from where one Kyamulesire, who had responded to the alarm, arrested him is circumstantial evidence further pointing to guilt on his part.

Hence, in the light of the evidence above, I reject the accusation levelled by the accused at PW1 of having framed the accused in this matter, as completely devoid of any worth. The prosecution has certainly placed the accused at the scene of the crime; and has, as well, proved that it was he who committed the detestable act of defiling the then 11 year old victim who, otherwise, fondly called him grandfather.

In the course of final submissions, the defence had quite rightly conceded that the fact of sexual intercourse with a girl under the age of 18 years had been satisfactorily proved; and it was only the identity of the defiler which was in dispute as the accused denied any such participation.

I am however fully in agreement with the opinion of both the lady and gentleman assessors that the prosecution has also proved, beyond reasonable doubt, participation of the accused; this being the last of the ingredients that constitute the offence of defilement for which the accused has stood trial. In consequence, I find him guilty as charged and therefore, accordingly, convict him.

Chigamoy Owiny - Dollo
JUDGE
12/05/2009