THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0096 OF 2004; HELD AT KYENJOJO

UGANDA ……

PROSECUTOR

VERSUS

BANGAMUHE ……

ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

Bangamuhe, the accused herein, was indicted for the offence of defilement, in contravention of section 123(1) of the Penal Code Act. The particulars of the offence, were that on the 15th day of July 2003, at Mparo B zone, Kyarusozi Sub-County, in the Kyenjojo District, the accused had unlawful sexual intercourse with one Abigaba Majembere Sylveria; a girl under the age of 14 years. The accused said he had understood the charge which was read out and explained to him; but he pleaded not guilty. This trial then had to be conducted.

It is incumbent on the prosecution to prove, beyond reasonable doubt, each of the following three ingredients of the offence of defilement, if the accused is to be found guilty and convicted. These are namely that:-

(i) Sexual intercourse with the girl named in the indictment.

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

(iii) It was the accused who subjected the girl above to the sexual intercourse referred to in (i) above.

The prosecution called five witnesses in an endeavour to establish proof of the offence charged. These witnesses were:-

(i) Dr. Waiswa Kasadha – PW1, the medical doctor who examined the accused; and whose report was admitted in evidence by consent, and marked CE1.

(ii) Dr. Hajusu Tirasi – PW2, the medical doctor who examined the victim; and whose report was admitted in evidence by consent, and marked CE2.

(iii) Orishaba Michael – PW3, a neighbour of the accused who received the first report of the defilement

(iv) Isidoro Rukansungirwa – PW4, Chairman LC1 of the village of both the accused and victim.

(v) No. 24284 D/C Mwesigwa Patrick – PW5, a police officer who investigated the crime.

For proof of the alleged sexual intercourse, what was required of the prosecution was evidence that there was penetration of the girl's vagina. It was held in ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), even only a slight penetration of the vagina would suffice to sustain a conviction for 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 stated as under:-

> *"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."*

In the instant case before me, the victim of the alleged offence did not testify in Court. PW3 and PW4, to whom she had made the first reports of the defilement, stated that she was taken back to Rwanda by her parents. However this does not in any way prejudice the prosecution case. In ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997***, the Court pointed out that while the inculpatory evidence adduced by the victim is the best evidence, yet in the absence of such evidence any other cogent evidence would do.

In that case, the victim of the sexual assault was 5 years of age; and was, at the time of the trial, outside the country undergoing treatment. The Court accepted as cogent, evidence from the

person to whom the victim had first reported her ordeal; stating clearly that, contrary to defence contention, this was not hearsay but admissible evidence. In the instant case before me, the victim's version of events that transpired between the accused and her was adduced in Court by PW5 who had recorded her police statement. That statement was tendered, by PW5, and admitted in evidence in accordance with the provisions of sections 33, 60, 61, 62 (e), 63, and 135 of the Evidence Act.

In her police statement she narrated to PW5 how the accused, her uncle, with whom she was staying alone, had led her into having sexual intercourse with him. She stated that the accused instructed her to sleep in his bed; and that she did so, and that the accused then used to come on top of her when she was naked he used to put his penis in her vagina. He had been doing this several times until on 15th July 2003 around 7.00 p.m. when he came home drunk and subjected her to the sexual intercourse from which she felt pain in her private parts and then she reported the matter to PW3.

The law with regard to sexual offences as laid down in ***Chila & Anor vs. Republic [1967] E.A. 722,*** is that the evidence of the complainant needs to be corroborated; and that the trial judge should warn the assessors and himself, of the danger of acting on the uncorroborated testimony of a complainant; and of the need to look for such evidence as would implicate the accused in a material particular, and thereby corroborate that of the complainant.

The Court however clarified that even in the absence of such corroborative evidence, after sounding out the warning above, the Court may nevertheless convict if it is satisfied that the complainant is a witness of truth. The Court further warned that if a conviction is entered without such warning, then it may be set aside on appeal, unless no failure of justice has in fact been occasioned thereby.

In ***Kibale Isoma vs Uganda, S.C. Crim. Appeal No. 21 of 1998, [1999]1 E.A. 148*** the Supreme Court followed the ***Chila*** case (supra), and held the decision therein as: *'… still good law in Uganda.'* In keeping with that advice, I warned the gentlemen assessors, as I am myself alive to, of the danger of acting on the uncorroborated evidence of the complainant PW1; and of the need to look for other evidence corroborating that of the complainant. I pointed out that there is here an added necessity to look out for evidence in corroboration, due to the fact that it was not

possible to secure the attendance of the complainant to testify in Court; hence her testimony was not subjected to cross examination.

The other evidence in corroboration is to be gathered from the testimonies of PW2, PW3, PW4, and PW5. It was to PW3 that the victim first made a report, on the morning after the defilement. The victim was crying while narrating the incident to him. He took the victim to the village elder, and then to the Chairman LC1. PW4's testimony regarding the victim's report to him matched and corroborated the testimony of PW3. He saw the victim walking badly and referred her to a nurse. He further testified that when the accused, upon arrest by the witness, denied the allegation against him, the victim told him in his face that he had indeed subjected her to forcible sexual intercourse.

The other evidence in support of the claim by the girl about the sexual intercourse is in the medical report on the victim by PW2. He found that her hymen had been ruptured, and there were bruises and swelling around the vulva; and all these were three days old, thus matching the time the defilement is alleged to have been committed. He also found discharge of pus from her vaginal orifice.

The evidence adduced by the prosecution in proof of the age of the girl is contained in her aforesaid police statement in which she stated she was 10 years at the time. The medical evidence aforesaid also put her age at 10 years. Since the defence conceded that the prosecution had proved beyond reasonable doubt that the girl victim was then 10 years of age; and had been subjected to sexual intercourse, I am in agreement; and therefore find that the first two ingredients of the offence charged stand conclusively proved.

On the issue of whether it was accused who defiled the victim, the admitted statement of the victim is clear that the accused with whom she was staying alone had directed her to sleep on his bed from which she had on more than one occasion, subjected her to sexual intercourse. She reported that the last time the accused had come back home drunk and subjected her to sexual intercourse which caused her pain and made her report the matter. In treating evidence of identification the legal position, as decided in the ***Badru Mwindu*** case (supra), is that the inculpatory evidence of identification adduced by the victim of the criminal act, is the best evidence**.**

However failure by the victim of the crime to testify in Court does not necessarily render the prosecution case fatal. In a passage from the decision in that case, and this was reproduced by the High Court in the case of ***Uganda vs. Mugisha Afranco; Criminal Session Case No. 69 of 1999***, the Court of Appeal had this to say:-

> *"… 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. … 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. "*

Proof of the participation of the accused herein was hinged on evidence of identification, by the victim, derived from the testimonies of the witnesses to whom she had reported the matter. Evidence of identification has to be treated with caution, and I did warn the assessors accordingly, in accordance with the advice in ***Roria vs. Republic [1967] E.A. 583,*** an authority which has been followed by the Supreme Court of Uganda in ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77; Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997;*** where both Courts pointed out that it is not safe to rely on identification evidence, as it is fraught with danger; and urged a trial Court to first satisfy itself that in all the circumstances it is safe to act on such evidence.

The position has emphasised by the Court in its decisions in the ***Nabulere*** and ***Bogere*** cases above, is that the need to exercise care, is applicable regardless of whether it is a case involving a single or multiple identification witnesses; and that the judge has to always warn himself and the assessors of the particular need to exercise caution before convicting an accused on such evidence; and that this is so because the witness or witnesses may appear persuasive but could turn out to have been mistaken. To avoid such an eventuality, the trial judge is under duty to closely examine the circumstances under which the identification was made. The factors to consider are: the length of time the witness and the accused took together, the distance between

them, the availability of light, and the familiarity between the witness and the accused. These factors determine the quality of evidence of identification. The Court in both decisions stated that

> *"If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger…..*
>
> *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, while re echoing the need to test evidence of an identifying witness with the greatest care, stated that when the conditions favouring identification are difficult, then the Court has to look for supporting evidence pointing 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), the Courts clarified that the supporting evidence may be either direct or circumstantial. What is required is that Court must be satisfied that there is no error in identification, or case of mistaken identity. In the ***Bogere*** case (supra), the Court clarified further 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."*

In the case before me now, the victim lived with the accused as a parent. They both knew each other fully. The sexual assault on her by the accused followed express and clear verbal directive by the accused that she should sleep on his bed; which she complied with. The conditions for correct identification were certainly favourable, and any possibility of error, or mistaken identity was greatly diminished.

In his unsworn testimony, the accused denied knowledge of the victim altogether. He asserted that he was living with other people but not the victim herein. He intimated that he was the subject of a frame up as at the police station PW4 was whispering to the police to write down a purported statement which he was forced to sign. On the other hand PW3, and PW4 are emphatic that at the time of the alleged defilement, the accused who was a village mate – neighbour to PW3 for 13 years, and a subject of PW4 – was not living with anyone else apart from the victim to whom he was a guardian.

Further to this, PW3 found the accused hiding some 100 metres away in the bush behind his house; and this could not have been due to his having evaded community work that day since there was no policy or practice of arresting defaulters. The attempt by the accused, upon selling his land, to compromise PW4 to abandon the pursuit of this case was quite telling. In the light of the prosecution evidence I reject the testimony of the accused, as wholly worthless. The accused is simply denying what the prosecution has, by evidence established. There was no grudge, dispute, or misunderstanding of any sort between the witnesses and him.

I fully concur with the gentlemen assessors in their opinion to me that the prosecution has proved, beyond reasonable doubt, each and every ingredient of the offence of defilement for which the accused has stood this trial; hence, I find him guilty as charged, and accordingly, convict him.

Chigamoy Owiny – Dollo
JUDGE
05/06/2009