THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0047 OF 2004

UGANDA ……………………………………………………........................... PROSECUTOR

VERSUS

KIIZA SAMUEL ......…………………………………….. ACCUSED

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

JUDGMENT

Kiiza Samuel, herein referred to as the accused, stands indicted for the offence of defilement, c/s 123(1) of the Penal Code Act. The particulars of the offence in the indictment alleges that on the 17th day of March 2003, at Kibasi village, Hakibale Sub County, in the Kabarole District, the accused had sexual intercourse with a girl under the age of 18 years.

In response to the charge read out and explained to him by Court, which he said he understood, the accused pleaded not guilty. This then led to his trial and this resultant judgment. For the charge of defilement to stand, the prosecution must prove, beyond reasonable doubt, each of the following three ingredients; to wit, 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 order to discharge the burden of proof as indicated above, the prosecution called a number of witnesses; namely:-

(i) Jackson Mugarura - PW1 - the medical clinical officer who examined the victim of the defilement herein, and also examined the accused;

(ii) Margaret Kabasinguzi - PW2 – the mother of the victim;

(iii) Alice Mwesige - PW3 – a local council leader of the area where the alleged crime took place; and

(iv) Nsungwa Rosemary - PW4 – the victim of the alleged defilement herself.

For proof of the sexual intercourse allegedly perpetrated on the victim - PW4, the prosecution relied on the evidence adduced by all its witnesses who testified in Court. The victim – PW4 herself, testified. She is manifestly still a child of tender years. I had to first conduct a *voire dire;* and upon satisfying myself that she was clearly intelligent, knew about God and understood the duty of telling the truth, I allowed her to give her testimony; but not on oath. She gave a clear account of what had transpired between her and the accused on the day the crime was alleged to have been committed.

She testified, narrating that on the material day she was playing with her mates at her parents' home; and that her mother - PW2 was also at home. The accused came and lured her away with the promise that he was going to buy her bread. He instead took her to his house in the neighbouring homestead and made her lie down in the sitting room; and then he lay on top of her and perpetrated sexual intercourse with her. She stated that she was injured and there was something in her private parts as blood was flowing out of there. She further revealed that the accused had, on three other occasions prior to this one, had sexual intercourse with her; but that she had not informed her parents about these, out of fear.

Section 40 of the Trial on Indictments Act provides that:-

(1) Every witness in a criminal cause or matter before the High Court shall be examined upon oath, and the court shall have full power and authority to administer the usual oath.

(3) Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this sub section is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.

The manner Courts should treat evidence of a child of tender years, sworn or unsworn, has been developed by Courts over the years; and is now settled. There is a fairly long list of authorities on the matter. The case of ***Ndyayakwa & Ors vs Uganda, C.A. Crim. Appeal No. 2 of 1977; [1978] H.C.B. 181,*** one such authority, held that no conviction can be based on the unsworn evidence of a child of tender years unless, as a matter of law, such evidence is corroborated by some other material evidence implicating the accused.

In the case of ***Muhirwe Simon vs. Uganda – S.C. Crim. Appeal No. 38 of 1995,*** the Court clarified and re-affirmed that corroboration is required as a matter of law only if evidence is received not on oath from a child of tender years who, in the opinion of the Court, is possessed of sufficient intelligence to justify the reception of the evidence; and who understands the duty of speaking the truth. I did warn the gentlemen assessors, as I do to myself now, of the need, as a matter of law, to look for evidence that would corroborate that of this child, in view of the fact that she has given an unsworn testimony.

This child witness, although understandably shy about mention of sex, gave her testimony with clarity, and in an unmistakable manner. It was evident that she was genuine and reliable. She remained steadfast even when confronted with serious cross examination. She was clearly a witness of truth. Nonetheless, basing on the proposition of the law contained in the authorities cited above, there is need to look, in the other evidence adduced before this Court, for such material as would corroborate that adduced by this victim – PW4; and to this, I now turn.

Margaret Kabasinguzi – PW2, the mother of the victim, testified that she had earlier been informed by the other kids playing with PW4 that the accused was taking her away; and had asked the other kids to tell PW4 to come back home. About an hour later when she learnt that PW4 had not come back, she became concerned due to the rampancy of child abduction at the time. She went in search of her, quarrelling aloud, and heard PW4 cry from inside the closed house of the accused. The accused then opened the door and sent the victim out of the house; and offered an explanation that the victim had been playing with an exercise book in the sitting room.

PW2 inquired from the child what she and the accused had been doing in the house. The child told her that the accused had been lying on top of her in the sitting room. On learning of this, PW2 examined the child's private parts and observed that there was, on her thighs, some slippery fluids looking like semen. Upon this finding, PW2 promptly reported the case to PW3 – a local

leader whom she found in the company of another woman. The two also examined the child's private parts and confirmed to PW2 that they had found evidence of sexual intercourse. Together, PW2 and the aforesaid woman leader then reported the matter to the Secretary for Defence of their village – Kibasi LC1 – who went and arrested the accused.

The accused admitted before the Secretary for Defence, in the presence of PW2, that he had perpetrated sexual intercourse with PW4. In the ***Muhirwe Simon*** case cited above, where evidence was adduced that the accused had admitted to the mother of the victim that he had committed the defilement for which he was charged, Court held that the admission amounted to sufficient corroboration of the evidence of the child witness. Following from that holding then, the admission the accused made to the Secretary of Defence, in the instant case, of his having defiled the victim – PW4, was sufficient corroboration of PW4's unsworn evidence.

Alice Mwesige - PW3, the Secretary of Finance of the village testified and confirmed that on the day in issue, PW2 together with her daughter – PW4, found her at her home; and that PW2 reported to her that the accused had defiled PW4. Together with the other women, she examined the private parts of PW4, and found some watery mucus like fluid, looking like semen, on her thighs; and it was still fresh. The victim – PW4 was limping. Due to the seriousness of the matter, she took PW2 and PW4 to the Secretary for Defence.

Jackson Mugarura – PW1, the medical clinical officer who examined the victim the day after the alleged defilement, testified that he had found that the victim's hymen had been ruptured more than a week before the date of that medical examination; and further that, from his observation of the victim's private parts, she had been subjected to habitual sex, rendering it not possible for him to determine whether she had had sex the previous day; which is the day, it is alleged in the indictment, the accused defiled PW4.

Proof of sexual intercourse need not depend on medical evidence. 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. It therefore follows that in the instant case, the findings – made by PW2, and PW3 together with the other women, all mature women, upon examination of PW4 – that sexual intercourse was perpetrated on PW4, provided sufficient

corroboration of the evidence of PW4 – the victim who testified that the accused had defiled her on the day contained in the indictment.

On the other hand PW1, the medical officer, found that the victim's vulva and vagina were both pink with no sign of tenderness on touch; and that this was suggestive of habitual sex. In cross examination, and with reference to his finding No. 5 in the medical report – '*prosecution exhibit PE1'* – PW1 stated as follows:

> *"I did not find inflammation on the private parts of the victim. This was not uncommon as there are many types of sexual inter course. And also this showed that the vulva had been habitually used and had tried to accommodate whatever had been used on it and, therefore, due to this, if the victim had had sex the previous day, I would not have been able to physically verify it."*

In the rape case of ***Kibazo vs. Uganda - C.A. Crim. Appeal No. 189 of 1964; [1965] E. A. 507,*** at p. 511, Sir SAMUEL QUASHIE - IDUN, P.; who read the judgment of the Court observed, on the contention that the bruises on the complainant had resulted from forceful sexual intercourse, that such bruises do occur even to women who have given consent to sexual intercourse, as this depends:

> *"…the size of the male organ and the manner in which intercourse takes place."*

The point is that evidence of bruises, or the absence of it, per se, does not amount to much in the proof of sexual intercourse; as the manner the sexual intercourse was performed would determine such result.

This could well explain why, in the instant case, PW1 in his medical examination of PW4, found no inflammation on the complainant's private parts. Admittedly, the medical evidence on record does not directly corroborate the evidence of the victim - PW4, that defilement had taken place the previous day; which is the alleged deed for which the accused has been indicted. Nonetheless, it does provide corroboration of PW4's evidence that she had been subjected to sexual intercourse on other occasions prior to the one perpetrated on the date for which the accused is standing trial.

That aspect of the medical finding is of great evidential value. It proves that PW4 is a dependable witness of truth with regard to her testimony that she had been defiled on three earlier occasions. Hence, when she asserts that on those other occasions it was also the accused who had defiled her, this Court would have no reason to disbelieve her. Similarly, when she is found with the accused in the incriminating circumstance stated herein, and she asserts that the accused had also just defiled her; which is the offence for which the accused is indicted, I would find no reason to disbelieve her in the light of the impression she has already made on this Court.

To prove that defilement has taken place, the prosecution need only prove that there was 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 the penetration may be, it will 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."*

Regarding the ingredient on age of the victim at the time of the defilement, the victim gave her age, as being 8 (eight) years at the time she was giving her testimony. PW2 the mother of the victim, during her testimony in Court, gave the same age for the victim as had the victim herself. The medical evidence aforesaid was more detailed; and placed the age of the victim at the time of the examination, which was the day after the defilement, at 3 (three) years, and 11 (eleven) months. Therefore, the victim – PW4 was just under 4 (four) years at the time of the defilement. No one who saw the victim – PW4, in Court, could entertain any doubt that the child was, even at the time of appearing in Court, still below the age of 10 years; leave alone 18 (eighteen).

And it was on account of this that I was compelled to conduct the *voire dire* before admitting her evidence. It is now settled that the age of a child can, in the absence of a birth certificate, as in this case, be proved by any other admissible evidence. Evidence adduced by anyone who had

known the child, can do; see ***R. vs. Cox (1898) 1 Q.B. 179,*** where the Court relied on the evidence of the headmistress of the school which the child's elder sister had attended, to establish the age of the child. Visual observation and common sense can also establish the age bracket of the child; see ***R. vs. Recorder of Grimsby Ex parte Purser [1951] 2 All E.R. 889***.

In this case before me, it was unmistakably manifest and obvious that the victim is way, way below the age of 18 years. It was really superfluous to go into the exercise of proof of age by other means. The need for proof by other means should really only arise where, from the victim's appearance, the Court can not, easily or at all, determine the age of such victim with regard to the statutory age limit, for purposes of the defilement or whatever other purpose; see ***R. vs. Turner [1910] 1 K.B. 346***. Richard Bwiruka, learned defence counsel herein, in his final submissions, graciously conceded that in deed the child – PW4 was clearly a child falling far below the age bracket of 18 (eighteen) years.

As to whether or not it was the accused who perpetrated the sexual intercourse complained of, the law as propounded in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** is that the inculpatory evidence of identification adduced by the victim of the criminal act is the best evidence. The victim – PW4, gave direct evidence of the happenings of that day with regard to the defilement. She was quite candid that the accused, whom she knew very well as their neighbour, came during daytime and carried her away, promising to buy her bread. He instead took her to his house whereat he sexually molested her.

I must add here that the inculpatory evidence of identification in the instant case is not only that of the victim, but also that of PW2 which is equal to, if not of greater persuasive value than that of PW4. PW2 – the mother of the victim who went out in search of her, fearing that she could have fallen victim of abduction, found the accused and her daughter – PW4 behind closed doors in the house of the accused. She narrated in Court how the accused opened the door on hearing PW2 quarrel; and came out with an exercise book, purporting that it was what the victim had been playing with in his sitting room behind the closed doors.

PW4 and PW2 were referring to an immediate neighbour whose home, separated from theirs by a banana plantation, was merely thirty metres away. The accused himself corroborated this fact. Because proof of the participation of the accused herein is dependent on evidence of identification, though by a couple of witnesses, I have to treat that evidence with caution, and

have warned the assessors accordingly; as was advised in ***Roria vs. Republic [1967] E.A. 583,*** and followed by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997;*** where both Courts warned of the danger of relying on identification evidence; and urged court to 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*****;** which was approved by the Supreme Court in the ***Bogere*** case (supra), the Court echoed the need for the exercise of care, whether it is a single, or multiple identification witnesses in issue; and that the judge has to warn himself and the assessors of the need for caution as the witness or witnesses though appearing persuasive could in fact be mistaken. As their Lordships pointed out:

> *"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…..*
>
> *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 reiterated the need to test with the greatest care the evidence of an identifying witness. In ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47;*** and the ***Bogere*** case (supra), it was held that the trial Court should satisfy itself that there is no error in identification, or mistaken identity.

As pointed out in the Supreme Court case of ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** *and* ***Remigious Kiwanuka vs. Uganda Crim. Appeal no. 41 of 1995,*** where the crime complained of is committed during broad day light, by some one fully known to the witness, the conditions for proper identification would be favourable, and serve to exclude any possibility of

error, or mistaken identity. This is precisely the case with the matter before me now. The situation could not have lent itself to the possibility of mistake or error in identification. PW2 offers very strong direct evidence that corroborates the evidence of the victim, by placing the accused at the scene of the crime.

The accused himself gave evidence on oath. He confirmed that they are neighbours with PW2; and that he knows PW4 – the victim – as the child of PW2, but that he did not know the child's name. He raised an alibi alleging that for the whole of that day he is alleged to have defiled PW4, he had been doing his chore at the butchery of DW2 up till around 5.00 p.m. when he was arrested therefrom by one Paskali, the Defence Secretary. Further, that he only learnt of the allegations of defilement made against him, when the Secretary of Defence who had arrested him took him to the Chairman of the village.

William Kisembo Mukongo – DW2, who had been the employer of the accused before the latter's arrest, gave evidence in defence of the accused. His evidence was that, for the whole of the day in issue, the accused had been at his place of work at the butchery. But he conceded that he could not remember if the accused had gone for lunch that day, since the accused could leave the butchery and go, for example to the toilet, and he – DW2 would not know.

He stated further that the accused could leave the butchery and be away for as long as twenty minutes. When I tried to find from him how long he thought he had stood in the witness box that day, he conceded that he could not tell; and yet he had taken slightly over thirty minutes in the witness box. So DW2's estimation of time, that the accused could leave the butchery for twenty minutes, was not based on his reliance on any time determining instrument like a watch; so his approximation of time could be as wild as what came to his mind. His reference to twenty minutes could really have been any length of time.

Hence, this witness could not throw any doubt on the prosecution case that the accused was in fact at his house at the material time complained of. It was put to this defence witness that he and the accused had given contradictory evidence as to what they were selling at the butchery that day; and on the period the accused had worked for him at the butchery before his arrest – with the accused saying he had worked for 5 (five) years, while DW2 said it had been for 1 (one) year – DW2 confessed that due to the lapse of time – five years – between the day of arrest of the accused and his testifying in Court, one could forget and mix the evidence up.

From this, it would not be unreasonable to state that the witness could also have mixed himself up as to whether, or not, the accused left the place of work at all that day; and more, as to whether the accused could have left the place of work for twenty minutes only, or much longer period. The immediate reaction and response by the accused, when the Secretary of Defence placed him under arrest, was not consistent with innocence. This is what the accused said in his sworn evidence in Court:

> *"Around 5.00 p.m. one Paskali, a Defence Secretary came found me at the butchery and said he had arrested me; that I had a case. He did not tell me what the case was. I asked him what the case was as I had been in my place of work since morning. He told me to wait for the Chairman to come and tell me as he was only following orders."*

Why, if one may inquire, should the accused have jumped into defending himself about his movements for that particular day; neither knowing what the offence for which he was being arrested was, nor when it had taken place? In law, the accused was under no obligation to prove his alibi though. The duty remained with the prosecution to negative that alibi, and instead place the accused at the scene of the crime.

The sum of it all is that the alibi put up by the defence was not water tight; and in view of the prosecution evidence of identification, which put the accused at the scene of the crime as perpetrator of the defilement, the alibi collapses. I am therefore for the reasons contained in my reasoned judgment, in disagreement with the lady assessor; and in full agreement with the gentleman assessor that the prosecution has proved, beyond reasonable doubt, all the ingredients of the offence indicted; with the result that I find the accused person guilty of the offence of defilement as charged. I therefore, accordingly, convict him.

Chigamoy Owiny - Dollo
JUDGE
11- 09 - 2008
MS. Angela Bahenzire holding brief for Richard Bwiruka; for the accused.
Accused in Court for judgment.

Irumba Atwoki – Court Clerk.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo
Judge.
11/09/2008

Mr Ddungu David; state counsel:-
Convict is first offender. No record against him. The victim was only three years and eleven months at the time of the crime. She has been exposed to psychological trauma. Defilement affects morality. Convict to be handed down a custodial sentence to save society. He should be given the maximum sentence provided by law.

Richard Bwiruka (who has now appeared) for the convict:-
Convict is first offender, young and can reform. The punishment should help convict reform but also make the families appreciate that justice is done. Need for lenience. Convict has been on remand for four years; and has certainly reflected on this and is undergoing reform.

Court.
The offence for which the convict awaits sentence is grave and repugnant. It defies reason that a normal adult person like the convict is can think of having sexual intercourse with a child of barely four years. This is behaviour which not even animals are seen to exhibit. No bull would mount a calf; or billy-goat mount a kid; or a male dog mount a puppy. The sentence I am handing down on the convict must send a clear message that this type of behaviour has no place in human society; and must be thwarted firmly and promptly. Having taken care of the period he has spent in jail, the convict is sentenced to 12 (twelve) years imprisonment. Right of appeal against conviction and sentence explained.

Chigamoy Owiny – Dollo

Judge.

11/09/2008