THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0033 OF 2006; HELD AT KYENJOJO

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

VERSUS

BYARUHANGA TOM}

BENON MUSOMA }……………………………………………………………………….. ACCUSED

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

JUDGMENT

Byaruhanga Tom and Benon Musoma, herein referred to respectively as A1, and A2; and collectively as the accused, were indicted for the offence of defilement, in contravention of section 129 (1) of the Penal Code Act. In the particulars of the offence as contained in the indictment, it was alleged that on the 1st day of May 2005, at Kasunga village, in the Kyenjojo District, the accused had unlawful sexual intercourse with one Kemigisa Mary a girl under the age of 18 years. In response to the charge read out and explained to each of them by Court, which they both said they had understood, the accused each pleaded not guilty; and this culminated in this trial.

In any charge of the offence of defilement, the prosecution is under duty to prove, beyond reasonable doubt, each of the following three ingredients; namely that:

(i) The victim named in the indictment had sexual intercourse.

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

(iii) It was the accused who perpetrated the said sexual intercourse.

In an endeavour to discharge the burden of proof that lay on it, the prosecution produced evidence from the following witnesses:-

(i) Kemigisha Mary - PW1; the victim of the defilement complained of;
(ii) Dr. Ruhweza Wilfred – PW2; the medical officer who examined and made a report on the condition of the victim of the defilement herein;
(iii) No. 9338 Corporal Muhindo Pascal – PW3; a police officer who investigated the crime.

The evidence the prosecution relied on to prove the occurrence of the sexual intercourse alleged were adduced by the victim – PW1 herself, PW2, and the secondary evidence adduced by PW3. For proof of defilement, the prosecution need only establish that penetration of the girl's vagina took place. As decided in ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997*** (unreported), even only a slight penetration will suffice to 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 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, PW1 was explicit in her testimony on what had happened to her in the hands of the accused the evening and night she claimed the two defiled her. She narrated that she was from church in the evening of that fateful day, when A1 pulled her into a house - which she later learnt belonged to A2 – and thereat, threw her on a bed, inserted his penis into her vagina and subjected her to forceful sexual intercourse against her resistance; and from which she felt pain, and cried.

A2 who came later and spent the whole night with her, also removed her knickers and, against her objection, subjected her to sexual intercourse three times on the floor; and she was injured. She reported the matter to Mary Kezabu, and later to her parents. PW2, who carried out the

medical examination on the victim – PW1 three days after the alleged defilement, corroborated her evidence by attesting, as evidenced in the medical reports - exhibits PE1 (a) and PE1 (b) - to having found injury on her private parts. He found the victim with swollen bleeding labia; and her hymen had been ruptured less than a week before.

Further corroborative evidence was from the police statement of one Mary Kezabu, adduced by PW3 as secondary evidence under sections 33, 60, 61, 62 (e), 63, and 135 of the Evidence Act. She had seen the victim being forced into a house in the evening; and upon checking, had established that this was PW1, whom she knew was the daughter of the L.C.1 Chairman. A1 had that evening requested her to bail him out as A2 had levied a fine of shs. 5000/= on A1 for soiling A2's bed sheets in the act of sexual intercourse with PW1.

She had then unsuccessfully tried to rescue PW1 from A2's custody. The following morning A2 had brought PW1 to her pleading with her to cover up the previous night's mischief by bearing false witness that PW1 had instead slept at her home with her sister; a request which she turned down flat. PW1 had then taken her aside and reported that A2 had also defiled her throughout the night.

The incriminating circumstance she found the accused and PW1 in, and the plea by the accused that she should bail A1 out for soiling A2's bed, for which A2 had detained PW1; and the plea by A2 the following morning that she cover him up by the false claim that PW1 had slept at her place, were in fact pleas of admission of their having defiled PW1. Hence, in accordance with the authority of ***Muhirwe Simon vs. Uganda – S.C. Crim. Appeal No. 38 of 1995,*** such admission amounted to corroboration of the evidence of PW1 the victim. From the above, it is clear that proof of defilement has been established.

With regard to the age of the victim – PW1, her evidence, and of PW2, as contained in the medical report PE1 (b) are clear that she was 12 years at the time she was defiled. She gave her age at the time of testifying, as being 16 years; and this conforms to the claim that she was 12 years four years ago when she was defiled. It is now settled that in the absence of a birth certificate, the age of a child can be established by any other admissible evidence. The parents of the child were not available to testify. However the medical evidence was persuasive on the matter.

I myself could see that the victim was still, even at the time of testifying in Court, a child of tender years. Visual observation and common sense, as held in ***R. vs. Recorder of Grimsby Ex parte Purser [1951] 2 All E.R. 889***, can also establish the age bracket of the child. The victim in this case before me, was - both at the time of the defilement, and that of adducing evidence in Court - below the statutory 18 years of age. The defence did rightly concede that this ingredient of the offence had been established.

Regarding the identity of the perpetrators of the unlawful sexual intercourse the victim - PW1 was subjected to, the law is well stated in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** that it is the inculpatory evidence of identification adduced by the victim of the criminal act which offers the best evidence. In the instant case, the defilers were strangers to the victim. Therefore the best inculpatory evidence of identification is that of Mary Kezabu who knew the accused well. She had that fateful night pleaded with the accused, albeit unsuccessfully, to release their victim – PW1.

She had sufficient time to establish the identity of the persons who were with the victim – PW1 in the house that night. A1 appealed to her to raise shs. 5000/= levied by A2 whose bed sheets he (A1) had soiled in the act of sexual intercourse with PW1. The following morning A2 came to her, with PW1, seeking her intervention to bail him out of the serious predicament he was in. On her part PW1 who initially had not known the accused came to know them by name when they were fighting over the issue of the soiled bed sheets and the demand for money before she could be released. She had sufficient time with each of them. She was with A1 from around 6.00 p.m. to 8.00 p.m.

Daylight was still on when A1 forced her into the house. As for A2, she was with him the whole night he detained her and subjected her to forcible sexual intercourse three times. There was light provided by a tadhoba lantern. In the morning A2 took her to Mary Kezabu in his failed pursuit and attempt to solicit the latter's support and falsely explain to PW1's parents that she had spent the night with her sister. PW1 that morning promptly informed Mary Kezabu of the sexual encounter she had gone through with the accused the previous night. She identified the accused the moment they were arrested the day A2 released her.

Although evidence of identification herein is from two witnesses, I must treat their evidence with caution. I did warn the assessors accordingly of that need as was advised in ***Roria vs. Republic***

[1967] E.A. 583, and followed by a host of other decisions, including the Supreme Court decisions in ***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,*** where the Courts have consistently warned of the danger of relying on identification evidence; and the need to test with the greatest care the evidence of an identifying witness; and urging that Court presented with such a situation 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*****;** and followed by the ***Bogere*** case (supra), the Court re-stated the need for Court to exercise care, whether the situation is with regard to a single, or multiple identification witnesses; and that the judge must warn himself and the assessors to exercise caution, as the witness or witnesses could in fact be mistaken although they may be persuasive. The Court stated, and because of its importance, I have to reproduce it in extenso, that:

> *"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 ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47;*** and the ***Bogere*** case (supra), the two Courts advised that the trial Court must satisfy itself that there is no error in identification, or case of mistaken identity. The Supreme Court pointed out in ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda Crim Appeal no. 41 of 1995,*** that conditions for proper identification would be favourable, and serve to exclude any possibility of error, or mistaken identity when the crime complained of is committed during broad day light, and by someone fully known to the witness.

The case before me presented both situations of night time and day time identification; and because the witnesses had sufficient time with the perpetrators, and the lady Mary Kezabo - a neighbour - knew each of them well, the conditions that obtained were favourable for correct identification; and satisfied the requirements in the authorities cited above.

Both accused gave evidence on oath in defence; denying the allegation labelled against each of them. A1 who testified that he was a recent resident in Kasunga Estate by the time of his arrest, entirely denied knowledge of any of the people who have featured in this trial; including A2 his co-accused who he claimed he met for the first time at the police upon their arrest. He stated that he first saw PW1 the victim in Court. He set up the alibi that on the Sunday in issue, he had been at his home the whole day preparing for the week; and did not leave his home up to the night when he went to bed.

He denied making the various revelation attributed to him in a police statement he had allegedly made; as he claimed that he never made any statement to police, but was made to sign a document at the police. A2, for his part, in his sworn testimony, stated that except for Mary Kezabo who was his neighbour, he did not know any of the people whose names have come out in the trial. He stated that on the fateful Sunday he was at home watching T.V. and never met anyone.

He stated further that prior to his arrest, a man had come in the company of the Manager of the estate and asked him for the whereabouts of his daughter; to which his response was that he was ignorant of her. He stated further that he had made a statement to a police officer while in their custody; but that officer did not record it. Instead the officer was reading from a black book and writing it down; after which the officer then produced a cane, and for fear of which he then signed a self incriminating statement that he had defiled a girl.

Then he testified as to what happened when he was transferred to Kyenjojo Police station as follows:

> *"At Kyenjojo Police, three sticks were placed in between my fingers, tied with rubber and then I was told to state exactly what I had stated at Kyakatara. I stated what I had stated at*

Kyakatara. They were writing. At the end I signed the following morning by thumb printing."

He vehemently denied that he ever told police that he had found A1 with a girl in his house; attributing his tribulation to a dirty scheme by those who were jealous of his smartness. A1 who set up the defence of alibi was under no obligation to prove it though. It was incumbent on the prosecution to disprove that alibi, by placing the accused at the scene of the crime. However looked at alongside the prosecution evidence of identification, I find that PW1 was a witness of truth who had no reason or motive to single out and identify the accused - persons who were hitherto unknown to her - as the ones who had sexually molested her.

The evidence given by Mary Kezabo, whom A2 admitted was his neighbour, put the accused at the scene of the crime as perpetrators of the defilement for which they have been charged; and therefore the defence of alibi raised by the accused is flimsy and cannot stand. I am here therefore, and in full agreement with the lady assessors; fully convinced that the prosecution has proved, beyond reasonable doubt, each of the ingredients of the offence for which the accused were indicted. Consequently, I find that both accused are guilty of the offence of defilement as charged; and therefore, convict each of them accordingly.

Chigamoy Owiny – Dollo
JUDGE
27/05/2009