THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0084 OF 2005; HELD AT KYENJOJO

UGANDA ……..……... PROSECUTOR

VERSUS

KAGANDO SAMSON …….. ACCUSED

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

JUDGMENT

Kagando Samson, hereinafter referred to as the accused, 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 that on the 19th day of August 2004, at Rukurukuru 'B' village, Nyankwanzi Sub County, in the Kyenjojo District, the accused had unlawful sexual intercourse with Kyalisima Evasi a girl under the age of 18 years.

His response to the charge, which he said he understood, when it was read out and explained to him by Court, was a plea of not guilty; for which this trial followed. For a charge of defilement such as this to stand, the prosecution must discharge the burden which lies on it to prove beyond reasonable doubt, each of the three ingredients that constitute the offence; namely that:-

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

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

(iii) The accused participated in perpetrating the sexual intercourse referred to in (i) and (ii) above.

In the instant case, with the view to discharge that burden of proof, the prosecution adduced evidence from the following witnesses; to wit:-

(i) Kenema Idah – PW1; a local council official who examined the victim of the defilement.

(ii) No. 18199 Detective Constable Robert Nterebuki - PW2; a police officer who investigated the offence and recorded the statements of the victim, PW1, the LC1 Chairman of the village, and others.

(iii) Kyomukama James - PW3; Chairman of the local council of the area where the alleged crime took place.

For proof of the occurrence of sexual intercourse, all that the prosecution needed to do was establish 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 ***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."*

Earlier in the proceedings in the instant case, I had conducted a preliminary inquiry in accordance with the provisions of section 66 of the Trial on Indictments Act; and a number of documents and facts were admitted in evidence by consent. To prove that the sexual intercourse alleged did occur, it was the evidence of PW1, PW2, PW3, and the statements of the victim and her paternal aunt Busingye Kedress adduced by PW2 in accordance not with the provisions of section 30 but instead sections 33, 60, 61, 62 (e), 63, and 135 of the Evidence Act; and as well, the admitted facts alluded to above, which the prosecution relied on.

In her statement to the police – exhibited as PE2 - the victim narrated how the accused, had taken her to a location behind his house with tall elephant grass, beguiling her into believing that it was there that she would find better firewood; but instead he lifted her put her down, removed her knickers, lowered his trousers, and pulled out his protruding penis and inserted it in her vagina.

She felt pain at this forcible act of sexual intercourse which he perpetrated on her, ending with an ejaculation in her vagina. She immediately reported the matter to her paternal aunt, and later went with her uncle called Safari together with other people and showed them the scene where she had been sexually assaulted.

In handling evidence adduced by the victim of sexual assault, it is always safer for Court to look out for evidence in corroboration. In ***Chila & Anor. vs. Republic [1967]E.A. 72*** at 77, the Court of Appeal for Eastern Africa stated as follows regarding the law on corroboration in sexual cases in East Africa:-

> *'The Judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no warning is given, then the conviction will normally be set aside, unless the appellate court is satisfied that there has been no failure of justice' ".*

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 with approval, and held that decision as 'still good law in Uganda'. And as pointed out in the ***Hussein Bassita*** case above, such corroboration may be by direct or circumstantial evidence. It is therefore to the other evidence which I must look before making up my mind whether the evidence on record proves the occurrence of the sexual intercourse alleged.

Busingye Kedress, the paternal aunt and guardian of the victim recorded a statement with the police – exhibited as PE3 – admitted in evidence as secondary evidence in which she stated that on the fateful day she had sent the victim to fetch firewood from where she had come back crying; stating that the accused had lured her into tall elephant grass and subjected her to sexual intercourse. She (the aunt) then informed one Aida Kenema – PW1, who examined and confirmed that indeed the victim had been defiled.

PW3 testified in Court that he had, received complaint from the victim about the defilement, and the victim had taken him together with the police to the scene of the crime some 100 metres from the house of the accused; and the scene consisted of overgrown elephant grass; some of which had been flattened. PW2 investigated the case; and visited the scene of the alleged crime. The sketch plan of the scene of the crime which he drew, and his self recorded police statement

regarding his investigation and findings, were admitted by consent as stated above; and exhibited as CE3 and CE4 respectively.

In the sketch plan, the witness points out knee marks he found at the scene. The medical examination made by Dr. Olowo of Kagadi hospital, and whose report thereon was admitted by consent and exhibited as CE2, established that the victim had minor injuries at the inner vulva consistent with force having been used sexually; and that the injuries had been sustained that very day of the examination. Further evidence in corroboration was meant to be from PW1 who had inspected the victim's private parts soon after the event.

Court was however constrained to declare her a hostile witness as it turned out that her testimony in Court was in direct contradiction of what it was alleged she had stated in her police statement at the time the alleged defilement had occurred; and for this reason, the State counsel had to subject her to a barrage of questions in cross examination. In Court she testified that when she examined the victim on the day of the alleged defilement, she found that the victim had no injuries on her private parts; and that it was evident that she had already had sexual encounter on previous occasions.

She was then confronted with her police statement in which she was recorded to have stated what was not only inconsistent with, but expressly controverted her Court testimony - something she denied having made – namely that she had found evidence of recent sexual intercourse in the victim's private parts. It then became necessary to call the police officer who had recorded her statement. This officer, PW2 tendered PW1's police statement and it was exhibited as PE1; and in which PW1 gave an account of events as had been narrated to her by the victim; and she stated further that:

> *"I decided to see or look at her vagina. I saw some sperms flowing out in dots. There was some inflammation on labia majora or the mouth of the vagina."*

It is this portion of her statement showing that she had seen evidence of very recent sexual intercourse that PW1, now at the trial, denied having made. The Courts have pronounced themselves on how a trial Court should handle such a situation as this. The Court of Appeal for Eastern Africa advised in ***Rex vs. Shaban bin Donaldi (1940) 7 E.A.C.A. 60;*** as follows:

"We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness, evidence of details of such report (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial.

Such evidence usually proves most valuable, sometimes as corroboration of the evidence of the witness under section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognise at the time, or an article which is not really his."

This passage was reproduced with approval by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs Uganda; S. C. Crim. Appeal No 1 of 1997***, where the Supreme Court of Uganda pointed out the similarity between the provisions of the Tanganyika Evidence Act referred to in the ***Shaban bin Donaldi*** case (supra), and section 155 of our Evidence Act (now section 156 in the Laws of Uganda 2000 Revised Edn.) whose wording is as follows:-

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved."

In ***Kella vs Republic [1967] E. A. 809*** at p. 813, a case that dealt with the issue of identification evidence, Court restated the importance of upholding that practice of reference to earlier statements on the same subject matter; and observed that:-

"The desirability for this practice would apply with special force to a case of this nature where the decision depends upon the identification of the accused person some two and a half years after the incident happened. The police must in their investigation have taken statements from both the principal witnesses Halima and Jerevasio. In her evidence Hallima states that she gave the statement the following day naming the two appellants.
If this statement had been produced and she had in fact identified both appellants by name the day after the incident, this would have considerably strengthened her testimony; but if this portion of her evidence was untrue, then it would have the opposite effect and have made her testimony of little value."

In the Editorial note to the case of ***Thairu s/o Muhoro & Others (1954) 21 E.A.C.A. 187***; where the Court dealt with the importance of making reference to previous statements made by a prosecution witness, where it is intended to discredit such witness, it was stated at p. 187, thus:-

> *"(1) The passage from the judgment of the Court of appeal (Whitley, P., Gray, C.J., and Thacker, J.) in Criminal Appeals 124 and 125 of 1945 to which reference is made in the judgment, reads as follows:-*
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> > *'since there would seem to be some uncertainty as to the proper procedure to follow when it is sought to cross examine a Crown witness on a previous statement with a view to discrediting him, we state our views shortly as follows: When the witness gives his evidence, the defence should call for the earlier statement recorded by the police. The defence are entitled to see this statement and to cross-examine the witness on any apparent discrepancies. The person who recorded the earlier statement should then be called to prove and put in as an exhibit the statement.*
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> > *But that does not make what is said in the statement, substantive evidence in the trial. Its only purpose and value is to show that on a previous occasion, the witness has said something different from what he has said in evidence at the trial, which fact may lead the Court to feel that his evidence at the trial is unworthy of belief.'*

The essence of the authorities cited above is that statements made by witnesses at or about the time the event in issue took place, are of importance; as the matter would still be fresh in such witness' mind. When in Court later, such a witness contradicts the earlier statement then it raises the issue of credibility. If the earlier statement is proved to have been freely given, it would greatly diminish the weight of such witness' testimony in Court; notwithstanding that the earlier statement was not given on oath. This is precisely the position here.

It would appear that PW1 who revealed in Court that the accused is a neighbour, with whom she had grown up, is bent on protecting him now that the victim's family have left the village, and are nowhere to be traced. Her denial of her earlier statement, it is quite apparent, is a blatant lie meant to accomplish that purpose. Be it as it may, just as she is of no value to the prosecution, I find that her denial is of no value to the defence either, as her evidence cannot, due to her lack of veracity, throw any doubt on the prosecution case.

The findings by the police that at the scene of the crime the grass was flattened and there were knee marks; the condition of distress the victim was in - the crying - when she made her first report about her ordeal; and the medical report on her condition clearly pointing to sexual assault; all provided independent direct and circumstantial evidence which convincingly corroborated the claim by the victim that she had been subjected to forcible sexual intercourse.

Regarding the age of the victim when she was defiled, the medical evidence aforesaid placed the age of the victim at the time of the examination, which was the very day of the defilement, at 7 years, and 11. The age of a person can, in the absence of a birth certificate, as in this case, be proved by any other admissible evidence. Medical evidence is certainly a reliable way of establishing age. The victim and her aunt stated to police - PE2and PE3 respectively - that she was 7 years when defiled. I am satisfied that at the time of the defilement, the victim was much, much below the age of 18 years of age.

With regard to the perpetrator of the sexual assault complained of, the law as decided by ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** provides that the inculpatory evidence of identification by the victim of the deed complained of is the most reliant, hence best evidence. That notwithstanding, failure by the victim of the crime to testify in Court does not diminish the legal force or effect of the prosecution case. In a passage from the decision of the Court in the ***Badru Mwindu*** case, which 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 stated thus:-

> *"… 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 in the offence herein is founded on evidence of identification; and by a single witness. I have therefore to treat that evidence with caution, and did warn the assessors to do so; in keeping with the advice 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 that identification evidence poses; and urged Court to first satisfy itself that in all the circumstances of the case, it is safe to act on such evidence.

In ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77*;** a case which the Supreme Court followed in the ***Bogere*** case (supra) and other cases, the Court stressed the need to exercise care, in cases involving either single or multiple identification witnesses; and added that in either situation the judge must warn himself and the assessors of the need for exercise of caution, owing to the fact that the witness or witnesses may appear convincing but could in fact be mistaken. Their Lordships then advised 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 ***George William Kalyesubula vs. Uganda, S.C. Crim. Appeal No. 16 of 1997,*** the Supreme Court re-emphasised that the evidence of an identifying witness need be tested with the greatest care. 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 maintained the emphasis on the need by the trial Court to satisfy itself that the evidence before it is devoid of any error in identification, or case of mistaken identity.

As was made clear in the cases of ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda; S.C. Crim Appeal No. 41 of 1995,*** in a situation involving a crime committed during daytime, and by someone fully known to the witness, this presents conditions favourable for proper identification; and thus minimises or excludes any possibility of error, or mistaken identity. Such was the situation with regard to the case before me now. The offence took place at high noon as it were; and the victim and the accused were neighbours.

The accused himself gave an unsworn statement. He confirmed that they were neighbours with the victim, but denied the allegation that he defiled her. He put forth an alibi stating that for the whole of that day he was at the Catholic Church rendering self help services; and had not seen the victim that day. He wondered where the victim had got the idea to frame him from.

In the light of the prosecution evidence on record, I am persuaded that it was the accused whom the victim clearly identified as her molester. They were neighbours. The offence took place during broad daylight. There was ample time and conversation between the accused and the victim whom he lured into believing he was taking to a place where she would make better harvest of firewood; only to discover that the accused had the most ulterior motive for doing so. The accused himself could not find any other reason for the victim making this allegation against him.

I therefore reject his alibi as a mere fabrication. The prosecution has convincingly placed him at the scene of the crime. I am therefore in full agreement with the opinion of the gentlemen assessors that the prosecution has proved, beyond reasonable doubt, all the ingredients of the offence for which the accused has stood trial; with the result that I find the accused person guilty as charged. I therefore, accordingly, convict him.

Chigamoy Owiny – Dollo

JUDGE

05 – 06 – 2009