

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0015 OF 2012

UGANDA PROSECUTOR

VERSUS

JOSEPH BALUKU ACCUSED

Before: Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The accused, Joseph Baluku, was indicted for the offence of aggravated defilement contrary to section 129(3) and (4) (a) of the Penal Code Act. The brief facts giving rise to this indictment are that on or about 30th May 2011 at Nakulabye Zone 4 in Kampala District the accused allegedly performed a sexual act on a one Robinah Nakanyike, then aged 11 years. The accused denied the charges.

At the preliminary hearing that preceded trial the prosecution and defence agreed to the admission of PF24 in evidence, namely, a report of a medical examination undertaken upon the accused person which reported him to have been approximately 18 years old and of sound mental disposition at the time he was examined, about 1 day after the alleged defilement had taken place. The Prosecution called 3 witnesses – the auntie of the victim (PW1), the victim herself (PW2) and the medical doctor who examined the victim after the alleged incident (PW3). The Defence presented the accused (DW1), his father (DW2) and a relative (DW3) as witnesses. PW1 testified to circumstances that purport to incriminate the accused, while PW2 identified the accused as the person responsible for her defilement. On the other hand, the accused gave

sworn evidence absolving himself of responsibility for the victim's defilement, and attributing the present prosecution to a grudge against him by PW1. In turn, DW2 attested to the accused's age, while DW3 sought to create an alibi in respect of the accused's whereabouts on the date in question.

It is well settled law that the burden of proof in criminal proceedings lies squarely with the Prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. Furthermore, the prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's participation therein beyond reasonable doubt. See **Woolmington vs. DPP (1993) AC 462** and **Okale vs. Republic (1965) EA 55**.

The standard of proof required of the prosecution does not entail proof to absolute certainty. The prosecution's evidence should be of such standard as leaves no other logical explanation to be derived from the facts save that the accused committed the crime, thereby rebutting such accused person's presumption of innocence. If a trial judge has no doubt as to the accused's guilt, or if his/ her only doubts are *unreasonable* doubts, then the prosecution has discharged its burden of proof. It does not mean that no doubt exists as to the accused's guilt; it only means that the court entertains no *reasonable* doubt given the evidence adduced before it.

It is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. Further, inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case; save where there is a perception that they were deliberate untruths. See **Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969** and **Sarapio Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989**.

The ingredients that constitute the offence of aggravated defilement are first, the performance of a sexual act upon the alleged victim and, secondly, the victim should have been under 14 years

old at the time. Section 129(7)(a) of the Penal Code Act defines a sexual act to include ‘the penetration of the vagina, mouth or anus, however slightly, of any person by a sexual organ.’

In the present case a medical examination report in respect of the victim was admitted on the record as Exh. P2. It established that the victim (PW2) was 11 years at the time of examination (shortly after the alleged defilement), had been subjected to a recent sexual act and indeed her hymen had been ruptured about 1 day prior to the examination. This evidence was reiterated by PW3, the doctor that undertook the examination of the victim. He maintained this position under cross examination. Under cross examination, however, the victim did appear to contradict the findings of the medical examination in so far as she attested to the sexual act under consideration presently not being her first sexual encounter. She had earlier made the same assertion in a police statement she made on 31st May 2011 and admitted on the record as Exh. D2. It was argued by the defence that PW3’s medical findings were in disparity with the victim’s evidence which, in learned counsel’s view, suggested that PW3 did not examine the victim.

The testimony of an expert is likely to carry more weight, and more readily relate to an ultimate issue than that of an ordinary witness. See ‘**Cross & Tapper on Evidence**, **Butterworths, 1995, 8th Edition, p.557** In the present case the evidence that contradicts that of the medical expert came from the victim of the sexual encounters herself and not any ordinary witness. In her statement she stated that she had had a prior sexual encounter with her brother 3 years prior to the date of the statement. This would place her at about 8 years at the time. An 8 year old child is quite a young child whose perception would be susceptible to a fairly overactive imagination that young children are prone to. An 8 year old child’s perception of what amounts to sexual activity is quite subjective. Given that PW2 referred to the earlier sexual encounter when making a statement on the latter act could suggest that she equated the experience of both sexual acts. It does not negate the incidence of the act in issue presently but simply categorises them both as sexual acts. However, under cross examination the same witness stated that she did not remember what happened to her in P.2 when the earlier sexual act allegedly occurred; before stating that she only told the police that she had been defiled by her brother had not told them when it happened. Her apparent confusion about the earlier sexual incident would be quite typical of any child trying to recall an incident that happened when she was much younger. Conversely, PW3 stated quite categorically under cross examination that it was possible for

someone to engage in what they deemed to be a sexual act and the hymen remains intact if penetration did not occur. This would explain the contradiction in the prosecution evidence under consideration presently and thus reconcile the prosecution evidence. Indeed throughout his testimony, PW3 very ably and cogently explained his findings in Exh. P2. Consequently, on this issue I do attach more weight to the expert medical evidence as stipulated in Exh. P2 than PW2's oral testimony. I am satisfied that the prosecution has proved the incidence of a sexual act beyond reasonable doubt.

Before I take leave of this issue, it was also argued by the defence that PW1's oral evidence contradicted her police statement as to the incidence of the sexual act in issue. I have had occasion to read through the statement, and do agree that the witness made an assertion to the accused having wanted to defile PW2. However, PW1 did maintain in her oral evidence that what she had narrated in court was what she had told the police. I am aware that the diligence with which police statements are recorded leaves a lot to be desired. Be that as it may, I must reiterate that this court premises its finding on the incidence of a sexual act on independent expert medical evidence contained in exhibit P2 and attested to by PW3, and not on the impugned evidence of PW1 on this issue.

Exhibit P2 did also establish that the victim was approximately 11 years at the time she was examined, 1 day after the sexual act. This finding was corroborated by the victim's oral evidence in which she testified that presently, 2 years after the medical examination was done, she was 13 years. This evidence was never contested by the defence. I therefore find that the prosecution has proved beyond reasonable doubt that the present victim was less than 14 years when she was subjected to the proven sexual act. In the result, I find that the prosecution has proved the offence of aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act beyond reasonable doubt.

The question then is whether or not the accused was responsible for or did participate in the proven aggravated defilement. PW1 testified that the victim told her that the accused person had defiled her. PW2 reiterated the accused person's responsibility for her defilement in her own evidence. The accused person, however, denied defiling the victim and insinuated that the charges against him arose from a quarrel he had had with PW1 following which she allegedly threatened to deal with him. Further, DW3 testified that at the material time the defilement was

alleged to have occurred he was with the accused and they were not at the scene of crime. The identification of the accused person in this case largely hinges on the evidence of a single identification witness; the victim in this case, who also happens to be a child.

The law relating to a single identifying witness is that court can convict on such evidence after warning itself and the assessors of the special need for caution before convicting on reliance of the correctness of the identification. The reason for special need for caution is that there is a possibility that the witness might be mistaken. See **Christopher Byagonza vs Uganda Crim. Appeal No. 25 of 1997** and **Abdala Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978**. Indeed in **John Katuramu vs. Uganda Criminal Appeal No. 2 of 1998** it was held:

“The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should warn itself of the danger of possibility of mistaken identity in such case. This is particularly important where there are factors which present difficulties for identification at the material time. The court must in every such case examine the testimony of the single witness with greatest care and where possible look for corroborating or other supportive evidence. ... If after warning itself and scrutinising the evidence the court finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity.” (*emphasis mine*)

Further, it is fairly well recognised that though corroboration of evidence is not essential in law, in practice it is always looked for. See **Katumba James vs. Uganda Criminal Appeal No. 45 of 1999 (SC)**, **Remegius Kiwanuka vs. Uganda Criminal Appeal No. 41 of 1995 (SC)**, and **Chila & Another vs. R (1967) EA 722**.

Section 40(3) of the TIA provides for a prosecution child witness' evidence that is not given on oath to be corroborated before it can be relied upon for a conviction. For ease of reference the section reads:

“Where in any proceedings any child of tender years called as a witness does not, in the opinion of court, understand the nature of an oath, his or her evidence may be received, though not given on oath, if, in the opinion of court, he or she is possessed

of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection 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.”

Be that as it may, in the case of Mukasa Everisto vs Uganda Criminal Appeal No 43 of 2000 (SC), it was held that evidence of a child of tender years that was given on oath did not necessarily require corroboration.

It is also trite law that the victim’s evidence is the best proof of identification in sexual offences. See Private Wepukhulu Nyunguli vs Uganda Crim. App. No. 21 of 2001 (SC). The test of correct identification was explicitly outlined in Abdala Nabulere & Another vs Uganda (supra) as follows:

“The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced. The poorer the quality, the greater the danger.”

In the present case a *voire dire* undertaken by this court did establish that PW2 understood the nature of an oath. She did therefore give evidence on oath. On that basis, her evidence would not necessarily require corroboration. However, given that she is the sole identification witness this court is duly mindful of the danger of mistaken identity and the special need for caution before convicting the accused on reliance of her identification evidence. Therefore, although this court does recognise that the victim’s evidence is the best proof of identification in sexual offences, PW2’s evidence shall be duly scrutinised for cogent proof of identification and corroboration of her evidence shall be sought. Such caution is particularly important given the alibi presented by the defence.

PW2 testified that at about 7.00 pm some time in 2011, while at home, as she was returning chicken to the chicken house she saw the accused and thought he was going to the pit latrine

which was near the chicken house. He, however, came towards her and, as she tried to bypass him, he pulled her down and defiled her. She testified that she knew the accused as a neighbour who had lived in the same homestead she and PW1 lived in for about 1 year. Under cross examination PW2 testified that it was not very bright at the time she was defiled but was bright enough to identify people close nearby. PW1, on the other hand, testified that past 6.00 pm on 30th November 2011 she had asked PW2 to return the chicken to the chicken house behind the house but later heard her screaming for help; she found PW2 crying and saw the accused person running away from the chicken house area towards his room with an open trouser zip; the child ran to her and told her that the accused person had defiled her.

On his part, the accused person testified that he spent 30th May 2011 in Nsambya, only returning home at 8.00 pm in the company of DW3, who subsequently left at 8.30 pm. He denied seeing either PW1 or PW2 that night. He testified in considerable detail about a problem he had had with PW2; the problem entailed complaints by PW2 about the accused's visitors whom she accused of urinating in her bathroom, as well as an incident about 3 days before his arrest when she complained about water that was splashing from a tap and they exchanged some bitter words whereupon she warned him that something would happen to him. Finally, the accused testified that he was arrested on 31st May 2011 at 10.00 pm but under cross examination stated that he was arrested on 30th May 2011. DW3, in turn, testified that he was with the accused person between 10.00 am – 8.00 pm in Nsambya on the day the former was arrested, and at 8.00 pm proceeded with the accused to the latter's home in Nakulabye. Under cross examination the witness stated that he and the accused had, in fact, left Nsambya at 7.00 pm on the day of the arrest. DW3 further stated that they did not find anybody at the accused's home; that there were people in some of the rooms in the homestead; that he was a first-time visitor in Kampala from Kasese; had been at Bukoto for only 3 days; had been taken to Nsambya by his host, from where he proceeded to Nakulabye with the accused; did not know the name of the area in Bukoto where his host lived; but he was able to find his way from the accused's home in Nakulabye back to his host's home by directing the boda boda rider that he hired because in the 3 days he had been in Kampala his host had taken him round Bukoto area.

I have carefully evaluated the totality of the evidence on the issue of identification. I find PW2's evidence reasonably credible and cogent. Her evidence depicts a victim who was very familiar

with her accoster, having lived in the same homestead as him for close to 1 year. This was not contested by the accused person who did testify to having lived in that homestead for about 7 months. On the night in question PW2 first saw the accused person at a distance and assumed he was going to the pit latrine that was near the chicken house where she was. When he came towards her she attempted to by-pass him but he threw her down and defiled her. Clearly she had seen the accused both at a distance and at close range, and can reasonably be deemed to have had sufficient time to have ascertained his identity. He did not attack her suddenly and flee thereafter giving her no time to identify her attacker; rather there was some passage of time between the time she first saw him, when he came closer to her and when he subsequently defiled her. Although she did admit that it was quite late in the evening and the lighting was not very bright, she did testify that she was able to see someone close to her. It was her evidence that the accused came close enough to her for her to attempt to by-pass him. I find it reasonable to deduce from this evidence that he was close enough and well known enough to her to render an accurate identification of him. PW2's evidence was corroborated by PW1 who attested to requesting her to return the chicken to the chicken house on the evening of 30th May 2011 whereupon she later heard PW2 screaming for help. PW1 testified that when she ran to PW2's rescue she saw the accused running from the chicken house with an open zip trouser.

It was argued for the defence that there were inconsistencies in the prosecution evidence with regard to whether PW1 responded to PW2's alarm or PW2 went to her; the precise time the defilement occurred – whether it was 6.30 or 7.00 pm, and whether the defilement happened inside or outside the chicken house. With respect, I find the cited inconsistencies quite minor given that they do not go to the root of the prosecution case. Both witnesses provided estimations and not the specific time of the defilement. PW1 testified that **'it was in the evening past 6pm'** while PW2 stated that **'it was around 7:00 p.m.'** Whether the time in question was 6.30 or 7.00 pm the net effect of this evidence is that the defilement took place late in the evening but not in the night. Time is not of essence in a defilement charge, its only relevance being with regard to the visibility of the lighting available for purposes of identification of the suspect. In the present case PW2 clearly stated that the lighting available was bright enough for the identification of people at close range. As to who went to whom following the incident, PW1 testified that she run towards PW2 and the child also run to her while PW2 testified that she ran to PW1. It would appear to me that they both moved towards each other, PW2 probably faster

than PW1, and met each other at some point. This, too, does not appear to me to be an issue that goes to the root of a defilement case. On the question of where exactly the defilement took place, I would disregard the evidence of PW1 because she was not an eye witness to the incident, only coming to the scene after the event.

Conversely, the defence case on the question of the accused's alleged responsibility for PW2's defilement was premised on the defence of alibi. The defence of alibi hinges on the whereabouts of an accused person during the material time an offence allegedly occurred. To that extent, the time factor is of paramount importance in that defence and does go to the root of the defence case. In the present case, the accused person and DW3 contradicted each other on the time they left Nsambya where they had allegedly spent the whole of 30th May 2011. While the accused person testified that on the day he was arrested they had returned to his home at 8.00 pm; DW3 testified that he was with the accused person at Nsambya between 10.00 am and 8.00 pm on that day. Under cross examination he initially maintained this position then subsequently contradicted himself when he stated quite emphatically that they left Nsambya at 7.00 pm and he was sure of the time because they looked at their watches before they left Nsambya and it was 7.00 pm. That these 2 critical witnesses contradicted each other on such a vital component of their defence raises questions as to the authenticity of the alibi. Indeed, this court found DW3's evidence to be most incredible, particularly with regard to how he found his way back to his host's home in Bukoto from the accused's home in Nakulabye, given that this was his very first time in Kampala and he had only spent 3 days therein. His evidence was neither cogent nor credible. Having discredited DW3's evidence, the accused's alibi remains uncorroborated.

I am mindful of the fact that the burden of prove remains with the prosecution, the alibi presented notwithstanding. In this case, the incredulous alibi presented by the defence did not create sufficient doubt in my mind in respect of the credible and cogent identification evidence. It would appear to me that the alibi was an afterthought intended to derail the course of justice. I find that the prosecution has proved the participation of the accused person in the present offence beyond reasonable doubt.

Before I take leave of this case I wish to address the issue of the accused person's age. During a preliminary hearing held at the commencement of this trial and in accordance with section 66 of the TIA both parties agreed to the admission of PF24 as an agreed document. A memorandum of

agreed facts or documents was duly signed by both counsel, as well as the accused person, and the document was duly admitted on the record as such as Exh. P1. PF24 reported the approximate age of the accused person as approximately 18 years in May 2011. However, at trial the defence appears to have re-opened the issue of the accused person's age as a contentious issue. Both the accused and DW2 contended that at trial the accused was less than 18 years of age. This would render him less than 16 years of age at the time of his medical examination in 2011.

Section 66(3) of the TIA provides as follows on facts or documents admitted or agreed to under a preliminary hearing:

“Any fact or document admitted or agreed (whether the fact is mentioned in the summary of evidence or not) in a memorandum under this section shall be deemed to have been duly proved; but if, during the course of the trial the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.”

In the present case PW3, the doctor that undertook the medical examination in respect of the accused person reported in PF24 that the apparent age of the accused person was 18 years. The witness reiterated the same finding under cross examination. His evidence is reproduced below for ease of reference:

“Yes I am the one who saw him and I found that he was about 18years old, I found that he did not have any recent injuries on his body by then and I found that he was mentally normal and that is all in the PF24.”

Later in his evidence, still under cross examination, the same witness categorically stated that he did not know either the victim or the accused person so he had no interest in trying to do anything for either of them. This court did observe PW3 to be a sincere and credible witness; a medical expert that simply provided a professional service in an objective and impassionate manner. Conversely, it is curious that the defence agreed to the admission of PF24 and later sought to discredit its contents. The accused person's evidence on this issue was self contradictory and unbelievable. DW2's evidence was not corroborated with any documentary

proof by way of a birth certificate or other document that could shed light on the accused's date of birth. Documents admitted as agreed documents stand proved and require no further proof save at the instance of court. In this case, PW3's expert evidence as depicted in both the medical report (Exh. P1) and his oral evidence was, indeed, sufficient *formal* proof of the fact of the accused person's age as required by section 66(3) of the TIA. I am therefore satisfied that the accused person was approximately 18 years in 2011 when he committed the proven aggravated defilement.

In the result, I find that the prosecution has proved the offence of aggravated defilement against the accused, Joseph Baluku, beyond reasonable doubt. In complete agreement with the Lady and Gentleman Assessors, to whom I am grateful, I find the accused guilty of aggravated defilement contrary to section 129(3) and (4) of the Penal Code Act, and do convict him of the offence as charged.

Monica K. Mugenyi

Judge

22nd April, 2013