

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA - NAKAWA CENTRAL CIRCUIT
CRIMINAL SESSION HELD IN MPIGI CHIEF MAGISTRATES COURT
CRIMINAL SESSION NO. 75 OF 2012

UGANDA

=====PROSECUTION

VERSUS

BAMIGWA ERIA =====
ACCUSED

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

R U L I N G

At the closure of the Prosecution case, Counsel Francis Gumisiriza indicated to Court that he would submit on a no case to answer. He did this orally, and State opted not to make any submissions. The Accused was charged with the offence of Aggravated Defilement contrary to Section 129(3), (4), (a), & (c) of the Penal Code Act Cap 120.

Briefly, the Prosecution case was that on 24th April 2011, while at Ggolo Village Mpigi District, Bamigwa Eria (the Accused) performed a sexual act on Muhindo Betty, a girl aged 10 months who was under his guardianship. **Nassolo Grace (PW2)** testified that she lived in the same house with the Accused and victim's mother. PW2's testimony was that Accused was cohabiting with the victim's mother (Masika Jane). Further, the Accused was not the father of the victim although, the victim was staying with her mother. Therefore, the baby was under the guardianship of the Accused. PW2 testified that on the day in question, she went to the Disco hall

with one Maureen Nakalema. PW2, inquired from the Accused's wife whom she was going to leave the child with but the victim's mother responded that she did not care they had to go. Upon return from the Disco, PW2 testified that when they returned, she slept. The following day early in the morning, PW2 heard the child crying. She subsequently saw the child's mother insert some leaves in the child's private parts. An examination of the child's private parts by one **Nababi Teddy** (PW3), a health worker in *Ggolo* village, revealed that the child had been defiled. The Accused was arrested and later prosecuted for the offence of Aggravated Defilement against Muhindo Betty. Prosecution called a total of 3 witnesses. The victim's mother (Masika Jane) was not called as a witness since her whereabouts were not known.

Submissions of Counsel

Counsel Gumisiriza submissions cited the authority of ***Bhatt vs. Republic [1957]1 EA 332***, which defines a *prima facie* case. In that case, a *prima facie* case was defined as one which a reasonable Tribunal, properly directing its mind on the law and evidence would convict if no explanation is offered by the Defence. Counsel pointed out the fact that Prosecution called only two (2) oral witnesses; to wit, PW1 and PW2. The parties also agreed upon the evidence of the Medical Doctor. It was Counsel's submission that the two witness failed to place the Accused person at the scene of Crime. Counsel Gumisiriza referred Court to the testimony of ***Nassolo Grace (PW1)***. Counsel observed that PW1 went with the victim's mother to the Disco Hall and left the victim of 10 months unattended to. Further Counsel noted that in PW1's testimony, she repeatedly stated that the child's mother was negligent. PW2 also testified that the Accused was not at home when the child was defiled. Furthermore, Counsel Gumisiriza submitted that ***Nababi Teddy (PW2)***, who examined the victim could not ascertain who had defiled the child and her evidence was only corroborative of the fact that the mother of the victim was negligent. In conclusion, Counsel Gumisiriza contends that Prosecution failed to place the Accused at the scene of crime

and that there is no *prima facie* case made out against the Accused. Therefore, the Accused should be discharged of the offence of Aggravated Defilement.

I have paid due considerations to the evidence on record and submissions of Counsel for the Accused. This Court is mandated to make a Ruling on a *prima facie* case after the closure of Prosecution case. In ***Bhatt vs. Republic [1957] EA 332*** a "*prima facie*" case was defined as one on which a reasonable Tribunal properly directing its mind on the law and evidence would convict if no explanation is offered.

According to the facts, the Accused was charged with the offence of Aggravated Defilement contrary to ***Section 129 (3), (4), (a), & (c) of the Penal Code Act***. In order for Prosecution to sustain a conviction on the above mentioned offence, it must prove the following ingredients:-

- a) That the victim was below the age of 14 years at the time the offence was allegedly committed
- b) That there was performance of a sexual act upon the victim
- c) That the accused performed that sexual act upon the victim
- d) That the person is in a position of authority.

With that brief, I will now consider whether Prosecution made out a *prima facie* case and in order to determine this, I will dwell on the various elements of this offence as charged in the case.

Whether the victim was below 14 years old.

Under ***Section 129 (3) (4) (a) Penal Code Amendment Act, 2007*** stipulates that the requisite age to be below 14 years. Therefore, Prosecution must adduce evidence to show that the victim was below 14 years.

It is trite law that the age of the child may be proved by production of the birth certificate, by relying on expert medical evidence, evidence of any other person who has knowledge about the victim's age such as the victim herself, parents or by ordinary observation by Court.

In accordance with the facts, Prosecution case was that Muhindo Betty (victim) was 10 months old at the time of the incidence. Both **PW2** and **PW3** confirmed that the victim was 10 months at the time of the incidence. Additionally, this evidence was corroborated by the medical Report dated 29th April 2011 made by **Dr. S. Ssali Emma (PW1)** a medical Officer at Nkozi Hospital and admitted as an Exhibit (P.Exh.1) in this case by the consent of the parties as revealed that that the victim was 10 months old at the time of the incidence.

Therefore, Prosecution's evidence as adduced I respect of this element was sufficient to show that the victim was below 14 years at the time of the incidence.

Whether the victim experienced a sexual act.

The Penal Code Act defines 'sexual act' as the penetration of the victim's vagina by a male sexual organ or penetration by an object, however, slight. A sexual Organ under the Act means a vagina or a penis.

Prosecution relied upon the medical evidence of Dr. Emma S. Ssali (PW1) through a Memorandum of Agreed Facts pursuant to Section 66 of the T.I.A. According to the Report, the victim's hymen had been recently ruptured about 5 days ago; there were signs of penetration, and the victim had injuries and inflammations around her private parts. Furthermore, the injuries were consistent with force having been used sexually. In addition, he also observed that there was a perennial tear about 5 days old and a wound oozing with pus.

There was the testimony of **Nassolo Grace (PW2)** who stated that, on the 24th April 2011, she was asked by one Maureen Nakalema to escort her to the Disco Hall. However, PW2 told Nakalema that she was not feeling well and could not walk properly. PW2 testified further that, after some deliberation, she agreed to go with Maureen Nakalema to the Disco Hall. It was PW2's testimony that Maureen Nakalema went only with Eriya's wife who is also (the victim's mother). A question arose between the trio about child's custody whilst the three would be away with the child's mother insisted that PW2 goes to the Disco Hall to wit the duo went to Lwalalo.

Additionally PW2 testified that it was on the following morning that she heard the child crying to wit PW2 suggested to the victim's mother to get up and give the child some tea. But that she subsequently saw the victim's mother inserting some leaves in the child's private parts. PW2 called Maureen and informed her of what she had seen. Later PW2 informed her mother Anna Maria Nakate about it who went and called Mama Nalwanga. Mama Nalwanga examined the child's private parts in presence of PW2 and others and declared that the child had been defiled.

PW3 (Nababi Teddy) a health worker in Ggolo Village testified that she knew the victim Muhindo Betty as the baby to Masika Jane a wife to the Accused. That on the 24th April 2011 at about 12:00PM while at her at home, the Accused's mother *Mukyala* Nakate went to see her. *Mukyala* Nakate informed PW3 that her daughter-in-law's child had a problem and since it was one of her responsibilities PW3 rushed to Accused's home. At the Accused's home, PW3 examined the child's private parts and discovered that it had wounds. It was her evidence that the wound extended from the vagina to the anal orifice. Further, that the child was later taken to the Nkozi Health Centre.

From the foregoing evidence the issue whether a sexual act was performed on Muhindo Betty is answered in the affirmative.

In accordance with the facts, unfortunately, it was not possible for Prosecution to call the victim herself to testify. However, what is on the file is the Medical Report that proves penetration of the victim's vagina. And the wounds in the victim's private parts were consistent with the use of force. This was an admitted fact by consent of all parties. Further, the medical report was corroborated by the testimonies of PW2 and PW3 who acknowledged that they saw the injuries in the victim's private parts which were consistent with a sexual act having performed on her. In **Adamu Mubiru vs. Uganda Cr. Appeal No. 47 of 1997** also cited in **Private Wepukulu Nyunguli vs. Uganda Supreme Court Criminal Appeal No. 21 of 2001** both decisions are to the effect that the slightest penetration would suffice.

Therefore, in accordance with the facts, I find that Prosecution managed to prove the ingredient. This issue is answered in the affirmative.

Participation of the Accused.

The question for determination now is whether the Accused defiled the child Muhindo Betty. This calls for either direct or circumstantial evidence of participation by Bamigwa Eria. I already stated that in sexual offences, the evidence of the victim is paramount. This is because the victim had the opportunity to see the Accused at close range. **See Private Wepukulu Nyunguli vs Uganda supra**

However Prosecution case was based upon circumstantial evidence of participation of the Accused person. The question is whether this evidence squarely placed the Accused at the scene of crime.

In ***Simon Musoke vs. R [1958] EA 775*** it was held that in a case depending exclusively on circumstantial evidence, the Judge must find before deciding upon a conviction that the exculpatory facts were incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Further, that, it is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference. Additionally, in ***Mugoya vs. Uganda (1999) 1 EA 202*** Court held that the nature of corroboration that was required was evidence which confirmed in some material particular not only that the crime had been committed but also that the Accused had committed it.

Evidence of participation was adduced through PW2 and PW3. PW2 who lived in the same house together with the Accused and the victim testified that on the 24th April 2011 she was asked by Maureen Nakalema to escort her to the Disco Hall but PW2 informed Maureen Nakalema that she was not feeling well and could not walk properly. Further, PW2 testified that after some deliberation she agreed to go with Maureen Nakalema to the Disco Hall. It was PW2's testimony that the two together with Eriya's wife consulted about whom to leave the child with but the child's mother insisted that PW2 goes to the Disco Hall to wit the duo went to Lwalalo.

Additionally, PW2 testified that they reached the Disco Hall at 08:00 PM and left it at 03:00AM. PW2's testimony was that it was on the following morning that she heard the child crying to wit PW2 suggested to the victim's mother to get up and give the child some tea. PW2 testified that she subsequently saw the victim's mother inserting some leaves in the child's private parts. Further, PW2 informed her mother Anna Maria Nakate about what she had seen. That it was upon this that PW2's mother went and called Mama Nalwanga. Mama Nalwanga examined the child's private parts in presence of

PW2 and others and declared that the child had been defiled. Recall PW2's testimony that Mama Nalwanga went and called the L.C.1 Chairman Mzee Nkangabwa. Mzee Nkangabwa inquired from the Accused what had happened to the child to wit the Accused stated that he also did not know. PW2 testified that the Accused was not present at the time they took tea, he was in Kakungube and PW2 was also not certain whether the Accused spent the night in the house. Additionally, that it was the victim's mother (Eriya's wife) who mentioned that the child had been defiled by the Accused although according to her this was after a while. Further at the Police Post, Lwalali, Saka (the person who arrested the Accused) made the Statement that the Accused defiled the child. It should also be observed that PW2 testified that by the time they went to the Disco Hall the Accused was not at home.

I also noted that PW2 was cagey and gave several answers. She did not seem truthful in her answer to the question whether the Accused spent the night in the house.

Nababi Teddy (PW3) also did not witness the incidence but rather gave evidence about what she heard from other people about the participation of the Accused. PW3 who carried out an examination on the victim testified that she did not get the chance to talk to Jane Masika, the victim's mother about how the child got wounded in her private parts. In furtherance that after four days after the child was taken to the Nkozi Hospital and the Accused was arrested. Pw3 testified that she knew the baby in question and was aware that its mother was not looking after the child very well. In fact PW3 stated that she had intentions of taking the child from her. According to PW3 the child's mother never used to breast feed the child on time and the baby would be left alone at home without anyone to care for her. That in any case even the problem that happened on the day in question was not discovered by the child's mother but rather by other people

I noted that PW3 seemed truthful and composed.

Therefore, from the above, suffice to observe that Prosecution failed to adduce evidence to prove that indeed the Accused person committed the offence. Recall from PW2's evidence that she was not at home on the day of the incidence. In fact, they only noticed the following morning that indeed the child had been defiled. The child's mother who informed **Lwalali Saka**(the person who arrested the Accused) that the Accused committed the offence was not called to give evidence. In fact PW3 testified that the victim's mother never returned to the village after the child was taken to the hospital. I also noted that at the hearing, the State Attorney notified this Court that the Investigating Officer in the matter **D/AIP Bitenhirwe** died in 2013 and the victim's mother left the village together with the victim and their whereabouts were unknown.

Additionally, from the foregoing, although Prosecution managed to prove the 1st two ingredients of the offence of Aggravated Defilement, the ingredient of participation was not proved to the required standard. There is no evidence direct or circumstantial pointing to the fact that the Accused participated in the offence. Suffice to state that a lot of doubt was cast in Prosecution evidence. PW3 state that the child's mother was negligent. In fact according to her, it was other people who realized that the child had been defiled. This fact was also corroborated by PW2 who testified that the child's mother never looked after her properly. Even on the day that is supposedly when the incidence occurred, it is not clear who was left in custody of the child. PW2 testified that when they asked among themselves about whom to leave the child with, the child's mother mentioned to them that they could just leave the child at home. Therefore, I agree with Counsel for the Accused that Prosecution failed to prove a prima facie case against the Accused.

In conclusion, **BAMIGWA ERIA** is accordingly **Acquitted** of the offence of Aggravated Defilement contrary to Sections 129 (3) & (4), (a) & (c). Unless there are other Charges against you, you are hereby set free.

Signed,

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Hon. Lady Justice Elizabeth Ibanda Nahamya

14th May, 2014