

IN THE HIGH COURT OF UGANDA AT SOROTI

CRIMINAL SESSION CASE NO. 36 OF 2015.

UGANDA V GAIJOK ISREAL

JUDGMENT

BEFORE HON. LADY JUSTICE H. WOLAYO

The accused person was indicted for aggravated defilement c/s 129(3) (4) (a) of the Penal Code Act. It is alleged that the accused person on 20th March, 2015 at Goshen Nursery and primary school performed a sexual act with Akiteng Celestine a girl aged seven years.

Prosecution was led by Mr. Noah Kunya SSA assisted by Seera Rhita Becky SA. The accused person was represented by Mr. Philip Opio on private brief.

Assessors were Engwedu Washington and Amoding Florence.

Both Counsel filed written submissions that i have carefully considered.

The prosecution had a duty to prove the following elements of aggravated defilement:

1. That the victim was below 14 years
2. Performance of a sexual act
3. Participation.

Proof of age

This was proved through medical evidence, and PW2 Adyang Catherine mother of the victim who confirmed Akiteng Celestine was aged seven years old. Akiteng also testified in court and i observed she was of apparent age of seven years . The state therefore proved beyond reasonable doubt that the victim in this case was below 18 years.

Performance of a sexual act

Prosecution relied on evidence of PW1 Akiteng , PW2 Adyang Catherine , PW3 Dr. Rubanza and PW4 Mr. Sangadi Justine , principal clinical officer.

According to PW1 Akiteng, who gave unsworn evidence as i did not find her of sufficient intelligence to understand the importance of taking the oath, she was raped by the accused person who found her in the toilet, removed his shorts and raped her. In cross examination, her evidence was she was raped in the bathroom of upper primary but when asked by court, she said she was raped in the toilets of lower primary (P1 to P3) within the school compound . In re-examination, her evidence was she was alone in the toilet at lunch time where she had gone for a short call when she was raped by the accused person in the toilet. Apparently, other pupils were playing when she was in the toilet.

According to Akiteng, she felt much pain when the accused raped her. After raping her, he put on his clothes and left while she went to the headmaster to report who caned the accused person. According to Akiteng, when the bell rang for end of classes, she ran to the school van and went home and told her mother she had blood in her pants.

According to PW2 Adyang when Akiteng returned home between 5 and 6 pm on 20.3.2015, she told her she had blood in her pants. PW2 examined her daughter and observed blood in her pants and on her dress. She then took her to her sister Night who also examined the girl.

The evidence of Adyang is that Akiteng refused to disclose what had caused the bleeding. It was while the pair was on their way to the police station Akiteng told her that she had gone to ease herself from the bathroom and on her way back to the classroom, a boy carried her back to the urinals, removed his pair of shorts, placed her on the floor, removed her shorts and inserted his sexual organ in her sexual organ gagging her in the process.

In her evidence, Akiteng failed to give the details of inserting a sexual organ in her private parts. I note from submissions of both counsel that they heard otherwise. My record is silent on this crucial point. Even after probing by counsel for the state to get her to describe exactly what the accused did to her, her evidence was the accused person removed his shorts and ‘raped’ her after which, he went away and she wore her pants and went to the headmaster after which the accused was caned.

It was after she was shown diagrams of male and female sexual organs that she pointed to the male sexual organ as what was inserted in the female sexual organ.

The evidence of PW2 further is that when Akiteng mentioned she had blood in her pants on her return from school between 5 and 6 pm, she examined her together with her sister Night

who advised the girl should not be cleaned yet. PW2 observed there was blood in the girl's private parts, pair of shorts and dress. In answer to court, her evidence was she did not see any semen.

Evidence of a child of tender years not given on oath requires corroboration as a matter of law. Section 40(3) of the TIA refers.

An analysis of the evidence of daughter and mother reveals that Akiteng was not certain of the location of the rape. She was not certain if it was urinals or toilets which words she used interchangeably. Counsel for the state submitted that this was a minor inconsistency as the witness was a child of tender years. However, the fact that the incident allegedly happened at lunch time when children are out of class makes it imperative that there is certainty in the location especially when she testifies that there were no other pupils in the toilets or urinals at the time. Further, the location is critical because Akiteng told her mother she was carried by the accused to the toilet of lower primary located inside school compound or the urinals of upper primary located outside the school compound.

The other evidence that undermines Akiteng's testimony that she was defiled is what she told her mother Adyang. Both Akiteng and her mother Adyang are in agreement that the initial report was there was blood in her pants. There was no mention of defilement until much later.

In cross examination, Akiteng's evidence was that she told her mother the name of the boy but that she had now forgotten his name. Adyang PW2 did not disclose this vital piece of evidence in her testimony.

Adyang's testimony was Akiteng told her she met a boy who was a pupil in the school in a bathroom where she had gone to ease herself. That on her way back to the classroom, a boy carried her back to the urinals, removed his shorts removed his sexual organ and inserted it in her private parts.

I see two different versions of what happened to Akiteng. Her version is she had gone to ease herself when she was grabbed by the accused who proceeded to defile her after removing his shorts. In cross examination, she mentions vaguely that the accused person carried her to the bathroom. Her mother's version is Akiteng finds a boy in the urinals, then she leaves for the classroom. On the way to the classroom, she meets the accused person who carries her back to the urinals and defiles her.

The uncertainty in the location of the alleged defilement; Akiteng's failure to give details of how the defilement happened yet she was a very fluent witness; the absence of corroboration by Adyang on what happened that material day in light of the different versions of the circumstances under which Akiteng was defiled; the initial report by Akiteng to her mother that there was blood in her pants and the belated report to her mother that she was defiled leads to the irresistible conclusion that it is highly likely none of the events as narrated by either witness took place.

Young girls are prone to imagine things. Because she felt duty bound to explain the presence of blood in her pants, she had to pin the blame on someone.

Akiteng never wavered from her statement that she was aged four years. When asked by court, she said it is her mother who told her to say she was four years old.

These rigid positions on age and the use of the word 'rape' moreover in English cast considerable doubt on the veracity of her testimony.

The definitive finding i can make at this point is that on 20.3.2015 when she returned from school, there was blood in Akiteng's private parts ; the pants and dress that i observed for myself in court. The pants, dress and police exhibit slip were exhibited as Pexhs 1, 2 and 3 respectively. I was able to observe that while the dress had a patch of blood on the front part of the dress, there was a smaller patch on the back side of the dress. I would have expected that the back side of the dress would have had the larger patch for the obvious reason that she sat in class that afternoon and the bleeding would have seeped through the pant to the back side of the dress. Instead the blood is on the front side of the dress. The pant had dark red substance that could be blood about two and half centimetre in diameter that stretched some 10 centimetres in length.

Medical evidence

Prosecution relied on medical evidence as corroboration of performance of a sexual act.

According to PW3 Dr. Rubanza, he examined Akiteng on 22.3.2015 and noted a mass originating above the opening of the urethra extending to the posterior aspect of the vaginal opening. He observed that the hymen was intact and the swelling was a tumour. He observed that the bleeding from the centre of the tumour could have been caused by an erect penis or a

finger. The wound was about 24 to 48 hours old and there were no signs of penetration. Apparently, penetration could not take place because of the tumour. The findings of PW3 were contained in PF3 that was exhibited as Pexh. 4

In cross examination, the evidence of the witness is that even scratching could cause the tumour to bleed.

Prosecution also called Mr. Sangadi PW4 a principal clinical officer who came to present findings of Dr. Namonyo who examined Akiteng on 20.3.2015. These findings were contained in a medical form from Owen medical clinic and titled 'treatment /diagnosis'. Dr. Namonyo found that Akiteng was partly soiled with fresh blood from a perforated hymen as recorded in Pexh. 6

The cause of this perforated hymen is not documented in Pexh. 6.

When the witness PW4 was asked the difference between a perforated hymen and a ruptured hymen, his response was there was none.

The principle on contested expert opinion is that the medical officer who carried out the examination should appear to defend his findings unless it is impossible to secure his attendance. This principle is restated by **Richard May in Criminal Evidence, third edition, Sweet & Maxwell (1996)** . The author goes further to say, where the evidence is disputed,

‘ it is difficult to see how it will be possible to properly controvert the statements in the report unless the maker gives oral evidence and is cross examined ‘ . Page 172.

I therefore reject the testimony of PW4 Mr. Sangadi whose role was to present findings of Dr. Nomonyo in Pexh. 6 but which findings were not subjected to cross examination by the defence as the said doctor Namonyo did not appear to defend his findings even after several adjournments to accommodate his busy schedule. Pexh. 6 is therefore of very little or no value at all.

That leaves me with the findings Dr. Rubanza the police surgeon that Akiteng had a tumour that required medical attention. His conclusion was that the bleeding tumour could have been caused by an erect penis or a finger .

If Akiteng was raped as she alleges, there would have been penetration from the sexual organ however slight but none was found by Dr. Rubanza PW3 . An intact hymen is not

necessarily synonymous with penetration. Pexh. 4 in particular mentions that the victim had a pathological condition that required attention of a gynaecologist.

The defence called Dr. Ekunait DW.4 of Soroti Regional hospital and Owen medical centre respectively. A specialist in reproductive systems, and women's genitalia, he examined Akiteng on Dexh.1 , a PF 3 form, on 21.3.2015, a day after the alleged defilement. He found that her general condition was normal, she was not in pain, she was smiling and not depressed. It was his evidence that children who have been defiled are traumatised and do not want a doctor touch the private parts for fear of a repeat incident. That the children also experience pain.

On examining her genitalia, he found a growth within the vagina which was not a normal growth. He did not see any tears or abrasions. Dr. Ekunait diagnosed the growth as a caruncle usually found in girls and bleeds when scratched. He found that the hymen was intact and he referred her for further management, a recommendation that was taken up as the child was later brought for medical treatment.

DW4 found no signs of penetration. He used a special light to examine the girl in the presence of her parents and the girl and and police officers.

He also examined the accused person and found no sign of sexual activity. He observed that the accused was big and if he had defiled Akiteng, he would have tore her.

In cross examination, the prosecution suggested that DW.4 was biased because he declared the accused innocent in Pexh.7. The response of DW.4 was that he was being truthful. As a specialist in women genitalia, he had come across such cases where parents of the girl jump to conclusions that the girl had been defiled whereas not. In her submissions, counsel for the state argued that Dr. Ekunait believed himself to be the alpha and omega of the medical profession yet Dr. Namonyo had more experience in examination of defilement victims.

Unfortunately, state counsel reported several times that Dr. Namonyo was too busy to appear in person to present his findings. His failure to appear to defend his findings means court will go with the expert testimonies of doctors who testified in court.

According to **Halsbury's Laws of England fourth edition, vol. 11 para. 445**, an opinion of an expert is relevant as to issues within the knowledge of the expert acquired by special

training. Accordingly, a medical doctor can support his findings by referring to a profession or practice with which he is familiar , just as DW4 did.

The evidence of DW4 Dr. Ekunait was that the caruncle bleeds a lot which explains the blood in the pants and on her dress , and that she could have used the dress to wipe herself hence the bigger patch of blood on the front part of the dress as opposed to the back side.

Of course, the role of the expert is to present his findings and leave the judge to determine its probative value or relevance. Dr. Ekunait had no reason expressing an opinion that the accused person was innocent. That is for the court to determine. Nevertheless, those comments on Pexh. 7 do not detract from his credibility as a specialist in women's genitalia nor his medical findings. Pexh. 7 is the PF 24 on which Dr. Ekunait examined the accused person.

An evaluation of PW. 3 Dr. Rubanza's evidence and that of DW.4 Dr. Ekunait shows that the two doctors compliment each other. Both found an unusual bleeding tumour or growth in the girl's vagina and both found the hymen intact.

The bleeding of the wound on the tumour even if caused by a penis does not amount to penetration. The blood in the pants and the patches of a substance that could be blood on the front part of the dress are synonymous with a pathological condition and not sexual penetration. Indeed none of the doctors saw semen and neither is there any on the pant exhibited in court.

I therefore find that there was no penetration and therefore performance of a sexual act could not have taken place. In **Court of Appeal in Kiiza Samuel v U, Court of Appeal Criminal Appeal No. 102 of 2008** the victim was found to have a broken hymen that had been broken long before the alleged sexual act. The victim also testified the accused lay on top of her but did not state whether he inserted his organ into her. Medical evidence was inconclusive on the penetration. The Court held that penetration is an essential element of defilement and the appellant was acquitted of defilement.

The absence of penetration means an indictment of aggravated defilement cannot stand.

This finding ties up with my earlier finding that the testimonies of PW1 Akiteng and PW2 Adyang was at such variance that it is highly unlikely the events as narrated by both

witnesses ever took place. The fact that most of the blood was on the front part of Akiteng's dress supports the opinion by DW4 that she used it to wipe the blood from the bleeding curuncle or tumour, and not that she was defiled.

Participation

According to Akiteng soon after the alleged rape, she went to the headmaster's office to report the accused. She then went to the classroom and pointed out the accused person and he was caned. Yet she reveals in her evidence in chief that she came to know the accused person when the headmaster caned him although she later claims she knew him when he was elected headboy.

Court witness No.1 Ojangor Michael denied receiving a report from Akiteng on 20.3.2015 and he denied caning the accused person as alleged by PW1 Akiteng. He also testified that the girl attended afternoon classes and the class teacher did not report any unusual behaviour or seeing any blood on her dress.

This means there is no corroboration by the headmaster of the report Akiteng allegedly made.

PW 5 PC Eriaku Francis testified that he went with Akiteng and her mother to the school between 6.30 and 7 pm and she pointed out the accused person as her alleged defiler.

As suggested by the defence, Akiteng knew the accused as the head boy and that is possibly the reason she pointed him out.

In defence, the accused made a sworn statement in which he testified that at lunchtime he went to the dormitory with his classmates including Ernest Omeja DW3 to pick odi or paste to add to their food. From the dormitory, he went with his classmates for lunch after which they returned to the classroom. He did not visit the toilet or urinals at lunch time. He is supported by Omeja DW.3 who was with him throughout the lunchtime. His evidence further was that as a Dinka, he was initiated at 13 years during which time boys are socialised in behaviour and told evil spirits will follow them if there is disobedience. He concluded by saying defilement of young girls is uncommon among the Dinka of Southern Sudan. It is not in their culture defile children.

The class teacher of Akiteng DW.2 Imalingat Betty testified that her pupils went for lunch and Akiteng and others at about 1.20 pm. As she hadn't completed her work, DW2 asked her

to complete it after lunch and so by the end of lunch break, she was back in class. According to DW2, Akiteng was not in distress throughout the afternoon classes until she went home. Neither did any of her classmates report any strange behaviour about Akiteng, as young children usually did. Dw 2 did not notice any bleeding. In cross examination, prosecution suggested that the witness did not know all her students and hence her testimony was unreliable.

I found DW.2 a steady and consistent witness.

I find that the defence presented a strong case that shows Akiteng did not report any incident and she behaved normally in the afternoon after lunch time. It also shows the accused with a strong alibi. DW.3 Omeja struck me as a truthful witness and so did Dw.2 Imalingat . In her own evidence in chief, Akiteng testified that after class that day, she ran to the school van which defies logic for a young girl who has just been violated sexually.

Having found that the prosecution case was riddled with contradictions, the consistency in evidence of two doctors who examined Akiteng showing there was no penetration, the finding of a pathological condition that required medical attention, and finally the defence case that casts strong doubts on the prosecution case, i find that the state has failed to prove beyond reasonable doubt the offence indicted.

I am in agreement with the two assessors that the accused person is not guilty. He is acquitted and released from custody unless lawfully held in connection with some other offence.

DATED AT SOROTI THIS 10th DAY OF JUNE 2015.

HON. LADY JUSTICE H. WOLAYO

HON. LADY JUSTICE H. WOLAYO,
JUDGE,
10.6.2015.

10.6.2015:

Accused present.

Opio for the accused.

Sera for the state.

Court Clerk Ecutu.

Court: Judgment read out.

HON. LADY JUSTICE H. WOLAYO,
JUDGE,
10.6.2015.