THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT TORORO

CRIMINAL SESSION NO. HCT-04-CR-SC-0157-2013
CRB NO. 0609/2012

UGANDA :::::::::::::::::: PROSECUTOR
VERSUS
WACHA LIVINGSTONE HARVEY ::::::::::::::: ACCUSED

BEFORE: HIS LORDSHIP HON. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused is charged of aggravated defilement contrary to section 129 (3) (4) (a) of the Penal Code Act.

Accused denied the charge.

The burden of proof is upon the prosecution as per the case of ***Woolmington v. DPP (1935) AC 462***.

The ingredients for proof in the charge are:

(i) Age of the victim.
(ii) Unlawful sexual intercourse.
(iii) Accused committed the offence.

The prosecution in order to prove its case assembled evidence of seven witnesses, alongside PE.1 (P.24) and PE.2 (PF.3A), PE.3, PE.4 and PE.5 (PE.3- T-shirt), (PE.4- Nicker), (PE.5 Exhibit slip).
The defence was by DW.1 (accused), DW.2 and DW.3.
According to PW.1 the victim was examined on 27.4.2012 and found with a raptured hymen which had healed. He explained the fact that healing happens within 3 to 7 days in circumstances as those encountered by PW.2.

PW.2 Awino Patience (victim) said accused defiled her, on a day she was with her friends Pearl and Esther, she described the accused as a neighbour who defiled her twice. The third time when he wanted to do it, she refused and informed the house girl, and later informed her father, who arranged for the arrest of the accused.

PW.3 Nagudi Joyce confirmed that on the fateful day the accused gave them sweets and he remained with PW.2. When they returned PW.2 was crying and she told them that the accused had defiled her.

PW.4 Esther Awori also confirmed the incident as narrated by PW.2. PW.5 Oboth Film was told of the defilement details by his daughter the victim (PW.2). PW.6 DCPL Makoha acting on information from PW.3 carried out the arrest of accused and recovered the exhibits of a T-shirt, vest and the knickers of the victim. PW.7 was Sgt Emokor Luke who kept the exhibits.

Accused through DW.1, DW.2 and DW.3 set up an alibi.

Does the evidence prove the ingredients of the offence?
Defence contests the evidence under ingredient 3 and 4. The defence claims it does not prove the accused's participation and it does not prove that he was a person under authority over the victim.

Prosecution on the other hand argued that this was proved.
The charge on record however did not cover the section referred to by defence in their submissions above.
Only participation is therefore in issue as of defence submission.

1. Age

The evidence of PW.2, coupled with PF 3A, (PE.1) and PW.2 (victim) and PW.5, all testify to the age of the victim as being below 14 years. This ingredient was therefore proved.

2. Sexual Intercourse

Evidence of PW.1, PW.2, and PF.3A (PE.1), shows that the victim was sexually assaulted. In ***Uganda v. Nicholas Okello (1984) HCB 22*.**

Age of the child is proved beyond reasonable doubt by either producing a birth certificate, calling evidence of any of the parents, or any other person who knows the age of the girl to prove the date of birth.

In the case of ***Bassita Hussain v. Uganda Civil Appeal 35 of 1995***, the Supreme Court held that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victim's own evidence corroborated by medical evidence or other evidence.

From the above cases it is safe to find that evidence of the victim, and evidence of PF. 3A (EX.1) and evidence of PW.5, are sufficient proof that sexual intercourse was performed on the victim.

3. Participation of the Accused

The defence contested accused's participation.

Defence raised the fact in the evidence fell short of the necessary corroboration of the victim's evidence rendering it unreliable. Counsel argued basing on the case of ***Herbert Turyakira v. State (1995) III KALR 35*** which held that, that evidence of tender children needs corroboration.

Evidence of a child requiring corroboration cannot be corroborated by evidence which also requires corroboration.

She concluded that PW.2's evidence could not be corroborated by PW.3 and PW.4 who were also children of tender years.

Defence also faulted the medical evidence as being inconclusive. The evidence of PW.6 CPL Makoha was found lacking for being an opinion not based on any expertise. Defence therefore argued that all that evidence has problems and cannot be relied on in corroboration.

Defence found further problems in PW.6 Makoha's evidence regarding the exhibits especially the knicker since no DNA tests were conducted on it.

Defence also challenged PW.6's evidence of the interaction with accused at police which she argues was not proper for violating rules for confession statements.

Finally defence invited court to believe the defence case and hold in favour of the accused.

I have carefully gone over the arguments above and the response thereto by the State counsel. I do make the following observations.

The position on the law regarding corroboration of evidence is that it is only intended to ensure that courts take caution not to convict on evidence which is less than the required standard of proof.

All evidence is tested for truthfulness, consistency, reliability and correctness. Evidence of young children is tested to ensure that the child is telling the truth.

A singe identifying witness is tested to ensure correctness of his/her testimony regarding detail, accuracy, reliability, mistake, and concoction.

The bottom line is that such evidence must stand the tests laid down by the law and rules of evidence and practice. Discussing this topic in the case of ***Chila v. Republic (1967) EA 722*** the Judge said:

> "*The Judge should warn the assessors and himself of the danger of action on 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*."

What is crucial is the court to warn itself of this danger, and warn the assessors as well of the danger.

The same guidance is offered in ***Oloo S/S Liad v. R (1960) EA 86*** where court held inter alia:

> "*But even where the evidence of a child of tender years is sworn then although there is no necessity for corroboration as a matter of law a court ought never to convict upon it. If uncorroborated without warning itself and the assessors (if any) of the danger of so doing.....*"

The above arguments were followed by **Hon. J. Karokora** in ***Herbert Turyakira v. State Criminal Appeal 02/95*** (Mbarara), where he held that:-

> "*In view of the absence of corroboration of PW.1's evidence and considering the evidence of PW.1... this is a proper case where conviction could be upheld despite the absence of corroboration without them occasioning same injustice to the appellant....*"

The above arguments seem to be the basis for the decision in ***Charles Atende v. Uganda (1971) 2 UR 16*** where **Justice Mukasa**, held that:

> "*In cases where corroborative evidence was missing, the court had to warn itself of the danger of acting on uncorroborated testimony of the complainant, but having done so the court might convict in the absence of corroboration if satisfied that the complainant was a truthful witness*."

I have laid out the above legal principle to enable me deal correctly with the evidence before me in view of the defence observations.

In summing up to the assessors I drew their attention to the dangers of the evidence before court which needs corroboration. I warned the assessors that the evidence of tender children must be corroborated, but in the event it is not, it can still be believed if it is truthful. I also warned myself of the same dangers given evidence of PW.2, PW.3 and PW.4 who also were children though on oath.

The evidence of PW.2 (victim) was very consistent. Though a young child she was very articulate and when cross-examined remained so consistent. She knew the accused as a neighbour who lived in the same house with them for a long time. They were friends. He was

known by a number of petty names including “Canol”. She was very positive in her identification and did not in any way mistake who the accused was.

PW.2, further upon being defiled immediately informed PW.3 and her friends. There was no break in this chain. When the defilement happened a second time, she again informed the housemaid and later confided in her father PW.5.

The exhibited knickers adds more coherence to the events, as she was able to explain that she removed it after being defiled and placed it under her pillow and when it was taken she had another knickers. She explained further that she did not wash it.

PW.2 further explained what the accused was putting on as a T-Shirt and shorts. The same clothes were seen by PW.3 and PW.4 with accused that day. The same clothes were found with accused when he was arrested.

I therefore find PW.2’s evidence very consistent and I was impressed with her demeanour. She strikes me as truthful and inspite of her tender age she was not broken down by aggressive cross-examination.

Even without corroboration I believe her testimony as truthful. I further find that the evidence of PW.2 and PW.4 was good evidence. They were not contradictory. These witnesses saw accused that day with the victim, and they came back and found her crying. Their evidence was not destroyed by cross-examination. No untruthfulness was detected in it, save the fact that these were children. The rule requiring corroboration of their testimony notwithstanding I find no danger in believing their testimonies which were in any case truthful.
I also found that the evidence of PW.1 (the Doctor) and PEX.1 (PF.3A) was good evidence. The doctor explained that the hymen can rapture and heal. His finding was that PW.2 was defiled about 3-5 days prior to the date of examination which was on the form.

Given all observations by the doctor and the testimonies of PW.2, PW.3 and PW.4, I find a link in all this evidence. When it is taken alongside the exhibit T-shirt, and knicker, it leads me to no other conclusion but to link the accused to the crime.

The above link is further strengthened by evidence of PW.6 CPL Makoha.

Defence counsel argued that this evidence should be ignored since it is not a confession perse. Her argument was that it was not obtained as a charge and caution statement.

My view is that PW.6 gave sworn evidence and testified in court as a witness. He never tendered any charge and caution statement. He only testified to what he saw and heard. Counsel had opportunity to cross examine him and there was nothing that came out as a lie from his testimony. His evidence is therefore admissible to the extent of its truthfulness.

All in all, I do not find merit in arguments from the defence. I find that the evidence on record sufficiently links the accused to the crime.
On the other hand, the defence case did not impress me as truthful. I found that though accused tried to establish an alibi, and indeed tried to call evidence of DW.2 Okot and DW.3 Patrick Achadera, both contradicted themselves on the accused's actual whereabouts at the alleged times. All attempts by the defence to explain accused's whereabouts were effectively destroyed in cross examination.

The defence case could not stand as a complete whole story. As rightly described, it appears to be a calculated pack of lies. When weighed together with prosecution case, the alibi was effectively destroyed by the prosecution.

From the above analysis, I do find that the accused was properly put on the scene of crime. Accused's participation was therefore proved.

The assessors in their joint opinion advised the court to find the accused guilty and convict him. I have found as a result, after carefully analysing all evidence on record that the prosecution has

proved the charge against the accused. He is accordingly found guilty of this charge and is accordingly convicted. I so find.

Henry I. Kawesa

JUDGE

25.2.2015