

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CRIMINAL SESSION CASE NO.0062 OF 2015

UGANDA

PROSECUTOR

VERSUS

BAGIRA JULIUS

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was indicted for Aggravated Defilement contrary to Section 129(3) and (4) of the Penal Code Act. It is alleged that on the 12th September 2014 at Kanyantegye Village, Rwamucucu Sub County, Mparo County, Kabale District, he performed a sexual act with a one Kesande Edinah.

The Prosecution called six witnesses in support of the indictment.

Mr.Isiagi Moses, PW2 is a Medical Clinical Officer attached to Kabale Regional Referral Hospital. His evidence was that on the 18th September 2014 at Kabale Hospital, he examined the victim .She had been referred to the hospital by Kabale Police Station. His opinion was that the victim was 7 ½ years at the time of the examination. She was alert, calm and not crying but had a torn hymen and there was inflammation on the anterior **forcette** and swelling with pain in her genitals. He concluded that the probable cause of the injuries was a blunt object.

He stated in cross examination that in his opinion the injuries on the victim had been inflicted on her four or five days before the Medical examination. He claimed not to be aware of any other report pertaining to the victim. His report was by consent of both the Prosecution and Counsel for the accused admitted in evidence.

Akatusiima Medius was PW3.She is the mother of the victim. Her testimony was that on the 12th September 2014 she went with the victim to dig in the garden of a one Giladina who was in the garden with them. That at about 12.00 noon Giladina sent the victim to pick a bag from her house. The accused person was to give her the bag. The victim brought the bag

after a long time and they continued digging until 5.00pm when they retired home. She warmed water to bathe the Children including the victim who then told her that she had pain in her private parts. She narrated how the Accused had defiled her when she went to collect the bag from Giladina's house.

The witness examined her. She was bleeding with torn private parts. She went to the Village Local Council Chairman Tumuheirwe Richard who advised her to take the victim to Mparo Health Centre where the victim was examined and given tablets but referred to Kabale Hospital.

She told Court that the Accused is a brother to Giladina and their houses are in the same compound which is about 300 metres away from where they were digging on that day. During cross examination, she insisted that she reported to the Village Chairman at about 7.00pm on the day the offence was allegedly committed. She narrated how she had been called by the Accused's relatives and Tumuheirwe the Village Chairman for money to take the victim to Hospital. She was not given the money but they tried to force her to sign a document the contents of which she did not understand since she does not know how to read.

The witness denied inflicting the pain on the victim herself in order to frame the accused because as a village Crime Preventer, he had been assigned to arrest her brother in Law who had been accused of theft. She narrated to Court how she had left the village as her house was razed down by people she does not know after the defilement incident.

PW4 was Giladina Tindibakira who is a sister to the accused and a friend to PW3. She confirmed that on the 14th September 2014, she was in her garden with PW3 and the victim. At about 11.00am the accused's wife came to the garden and told her that the Village Chairman's wife wanted the bag in her house. She told the victim to go with her to pick the bag but the accused's wife left first. That the victim brought a different bag and she was sent back for the proper one which she took to the Chairman's home which is about 500 metres away from the garden. She came back and stayed in the garden with them until they retired home at about 5.00pm. She told Court that she did not know where the accused was at the time and could not emphatically state the time when she sent the victim to pick the bag.

In cross examination, the witness told Court she did not notice anything abnormal about the victim. That the victim went twice to her home and that she went alone on both occasions. Her version was that PW3 had framed the accused because he was about to arrest her brother

in law .She agreed to have participated in the village meeting that opposed the arrest of the accused on grounds that he did not defile the victim.

PW5 was the victim. Court found her sufficiently intelligent to give credible evidence but was not sworn since she could not appreciate the importance of an oath. She told Court that she is seven years old and in Primary One at Katungi Primary School. She identified the accused as Bagira who used to stay in their village but no longer stays there. She said Bagira is not a good man because he defiled her at PW4's house by "*putting his thing into me and put it back into his trouser after that.*" She pointed at her private parts when asked where the accused put his "*thing.*" She told Court she did not tell her mother until they reached home in the evening.

The witness told Court in cross examination that she was defiled twice by the accused when sent to pick the bag from PW4's house. She told Court that the accused did it when sitting on a chair and she was standing near him. She confirmed that on both occasions she went alone and that she did not speak to the accused's wife on that day. She further told Court that it was the accused who gave her the bag. She confirmed that a Doctor at Kabale Hospital examined her.

PW6 was Antambire Evidence who is a Clinical Officer attached to Mparo Health Centre who was the first medical officer to examine the victim. She made clinical notes indicating the victim had a swollen labia majora .The hymen was not seen and she was not bleeding at the time. She administered medication for the swelling and referred the victim to the Laboratory for further tests the results of which showed the victim had a Urinary tract infection but had no HIV.

In cross examination the witness told Court that she saw no discharge or semen in the victim's private parts and that the hymen was not freshly ruptured but the swelling was fresh and tender.

The accused testified as DW1.His evidence was that he had been framed by the victim's family because as a crime preventer in the village, he had been assigned to arrest PW2's brother in law for theft. His further evidence was that on the day in question he went to cut stakes for his climbing beans and knew nothing about the defilement allegation. In cross examination, he told Court that the defilement case was filed after the arrest of PW2's brother in law and that it was another team of crime preventers that arrested him. He told Court how

the complainant had asked for forgiveness for falsely accusing him of defiling her daughter and the Village Community had fined her for it.

DW2 was Twimukye Florence who claimed to have been in the garden with PW2 and PW3 on the 12th September 2014. Her evidence was that at about 11.00am, the Chairman's wife came for a bag from PW4 and that she had earlier sent the accused's wife for the same bag. PW4 sent the victim for the bag, she brought a different one and was sent back to pick the correct bag. Her evidence was that the victim took the bag to the Chairman's home which is about 500 metres away. They continued digging up to 1.00pm after which the victim was sent home to graze goats. She observed nothing abnormal on the victim.

In cross examination she confirmed she did not know where the accused was and that the accused's wife left before the victim went to pick the bag.

DW3 was Tumuheirwe Richard the village Local Council Chairman. He told Court how he had instructed the accused to arrest PW3's brother in law but on the 12th September 2014, PW3 complained about the accused having defiled her daughter. He sent PW3 to the Health Centre where the victim was examined and later she came back asking to be reconciled with the community because according to the nurse at Mparo the accused had not defiled the victim. She was fined 200,000/= which she did not pay but went to Police. He attributed the case to a grudge between the accused and the PW3's family. In cross examination he told Court that PW3 was to pay a fine of 200,000/= to the accused and another 200,000/= to the Community. The witness tried to introduce as evidence a letter dated 11th September 2014 authorizing the accused and two others to arrest PW3's brother in law which was not admitted as an exhibit since it was a photocopy.

The accused's wife testified as DW4. Her evidence was that on the 12th September 2014 she told PW4 about the bag at about 11.00am. The victim was sent for the bag which she handed over and later came back for the proper bag to take to the Chairman's wife. Her evidence was that the accused was not at home and she attributes the case to a grudge because the accused had been instructed to arrest PW3's brother in law.

DW5 was Kemigisha Pascavia who claimed PW3 had sought reconciliation with the community for falsely accusing the accused of defilement because the medical report from the Mparo Health Center had not confirmed it. That PW3 paid 200,000/= of the 400,000/= which the Community spent on drinking soda and bushera. She told Court that after the

village meeting she and PW3 met a one Kyomugabe who advised PW3 not to pay the fine but apply herbs in the victim's private parts and then pinch them before proceeding to hospital. That Kyomugabe asked for 20,000/= for her wise counsel. The witness did not see PW3 pay the money or doing what she had been advised to do. She claims she narrated what she had heard to DW3.

In his submissions Counsel for the accused pointed out the contradictions in the Prosecution evidence specifically the finding of blood from the victim's private parts by PW3 yet

PW6 did not find such when conducting her examination on the victim. He further submitted that there were contradictions in the medical reports by PW6 and PW2. His argument was that PW2's finding of a "freshly ruptured hymen" after 5 days did not rhyme with the findings of PW6 who stated it was not freshly ruptured.

Counsel invited Court to disregard the medical evidence as unreliable. Counsel criticized PW4 for telling Court she was defiled twice yet the people who were with her saw nothing abnormal.

He invited Court to believe DW4 who claimed to have passed on the bag to PW4 on both occasions. He pointed out that the Prosecution had failed to discredit the alibi put up by the accused since no independent evidence was led to show he was at home on the day he is alleged to have defiled the victim. He attributed the accusation to a grudge resulting from the instructions the accused had got to arrest PW3'S brother in law.

The Prosecution invited Court to believe the victim who vividly narrated to Court what happened to her. It was further submitted that her testimony was corroborated by PW3's evidence given on oath and that the sequence of events does not point to a calculated frame up of the accused. Counsel argued there was no contradiction in the two medical reports by PW2 and PW6 and invited Court to believe the one by the more experienced of the two medical witnesses in case of any doubt by Court.

He submitted that PW3 and PW4 were family friends working together in the garden and the victim was a common visitor in PW4'compound. That the offence was committed in broad day light which placed the accused at the scene of the alleged crime. He invited Court to ignore the contradictions in witness evidence since they were not material to the case.

The Prosecution has the burden to prove ; that the victim was under the age of 14 at the time the offence was committed; that a sexual act was performed on her and that it was the accused who performed the sexual act with the victim.

The Prosecution is required to prove all these elements beyond reasonable doubt in order to secure a conviction. Any doubt in the prosecution evidence must be resolved in favor of the accused through an acquittal.

See: Miller Vs Minister Of Pensions {1947}2 ALL ER 372.

At the commencement of the hearing, the Prosecution and Counsel for the accused agreed to admit the report on the examination of the victim by PW2 and the clinical notes made by PW6 on the first examination of the victim.

The victim was found to be 7 ½ years by PW2 who examined her and the medical report admitted in evidence supports that finding. I therefore find this ingredient of the offence proved by the Prosecution beyond reasonable doubt.

The Prosecution is required to prove that a sexual offence was performed on the victim. This was contested by the accused on the basis of the alleged contradictions in the medical evidence. PW3 examined the victim before any medical officer. Her evidence was that the victim was *"bleeding and with torn private parts."* This was at about 7.00pm on the 12th September 2014. PW6 examined the victim on the 13th September 2014 at 12.44am. Her findings were *"swollen labia majora, no bleeding and no hymen."* On his part PW2 who examined the victim on the 18th September 2014 found her with *"a torn hymen and with an inflammation on the anterior forcette and swelling with pain. The probable cause was a blunt object"*

I do not detect any contradictions in the findings by the two Clinical Officers. The victim had no hymen which was confirmed by both medical officers. She had swollen genitals as described in both reports. The swelling was *fresh and tender* according to the evidence of PW6 when questioned by Court. PW2 attributed the injuries to about 4 or 5 days to his examination which was on the 18th September 2014 which was almost the time the alleged defilement occurred.

I also do not find credence in the argument that PW6 had to find the victim bleeding to prove what PW3 could have seen. PW3 examined the victim at about 7.00pm and PW6 examined

her at 12.44am. This in my opinion was enough time for any bleeding to stop. The failure to find the hymen is what is crucial in my opinion as it points to penetration however slight. PW2 graphically detailed what he found and he confirmed this in cross examination. It is thus the finding of this Court that a sexual act was performed on the victim.

The accused attributes his plight to a frame up by the victim's family because he had been detailed to arrest PW3 's brother in law. PW3 and PW4 confirmed they are family friends and that is confirmed by the digging in the same garden on the day of the alleged defilement. DW2 the Village Chairman confirmed that too. He told Court in cross examination that the accused did not arrest PW3's brother in law. This casts doubt on why PW3 would want to revenge on behalf of a brother in law who had not been arrested yet? One also wonders why the scheme was not contrived against all the three persons detailed to arrest the brother in law? It also defeats my understanding how a plan to frame the accused could have been hatched in such a short time. The alleged instructions to arrest were issued on the 11th September 2014 and the letter was in possession of the accused, PW3 and the victim coincidentally worked at PW4's garden up to 6.00pm and the defilement was reported to the Chairman at 7.00pm! When then was this plan that involved the man to be arrested, PW3's father in law and the coaching of the victim on what to say hatched?

I do not find this version of evidence convincing at all and I disbelieve it as an afterthought and a contrived plot by the village mob to silence the victim's mother. The evidence of DW2 and DW5 succinctly pointed to that and it is not surprising that the victim's mother no longer has a home on that village.

On the other hand I found the evidence of the victim convincing. She was a consistent witness who candidly explained to Court how she knows the accused and pointed him out, how he defiled her in PW4's house, and how she narrated the story to PW3 at home. It is not in doubt that she knew the accused, the defilement was in open day light and in a place the victim was familiar with. All these factors reduced any possibility of a mistake in identifying the accused. The proximate time when the defilement could have taken place in the evidence of PW2 buttresses my conviction as to what actually occurred.

In Crim. Appeal No.21 of 2001 Private Wepukhulu Nyunguli Vs Uganda it was held that **“normally in sexual offences the victim's evidence is the best proof of penetration and identification.”**

It is the finding of this Court that the accused defiled the victim and this case is not premised on a grudge between families as alleged by the accused.

The report of the defilement to PW3, her Plain Statement to Police tendered in evidence as DE1, and the medical evidence in the reports of PW2 and PW6 corroborate the victim's evidence in fulfillment of the requirements of Section 40(3) of the Trial On Indictments Act.

It is pertinent to comment on a number of contradictions in the evidence of both the Prosecution and the defense witnesses who were with the victim on the 12th September 2014. PW3 told Court that it was the accused who was meant to give the victim the bag yet PW4's version was that the victim was told to go with the accused's wife to pick the bag. The victim told Court she did not talk to the accused's wife on that day and that it was the accused who gave her the bag. DW2 told Court that the Chairman's wife came to the garden where PW3, PW4 and the victim were digging and no other witness mentioned this to Court. DW2 told Court that after the 1.00pm lunch, the Victim went home to graze goats and the rest remained digging up to 6.00pm which in my opinion reduced the opportunity for PW3, PW4 and DW2 to observe any abnormality on the victim until she reported to the mother at home.

My analysis of all the above is that these contradictions only point to a failed attempt to place DW5 at the scene of the crime which I disbelieve in favor of the victim's evidence. DW5 left before the victim and the witnesses who remained in the garden could not emphatically state whether DW5 and the accused were at home. It is also pertinent to note that the defilement took place in PW4's house, which is different from DW5's home.

In the final result I find that the Prosecution has proved all elements of the offence of aggravated defilement against the accused person to the required standard. I find him guilty of Aggravated Defilement contrary to section 129(3) and (4)(a) of the Penal Code Act, and I convict him of the offence as charged.

MOSES KAZIBWE KAWUMI

JUDGE

13th October 2016.

