

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

CRIMINAL SESSION CASE NO. 0049 OF 2016

UGANDA=====PROSECUTOR

VERSUS

BAHENA NIKWEBIGABIRWE=====ACCUSED

BEFORE HON. MR. JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was indicted for Aggravated Defilement contrary to Section 129(3) and 4(a) of the Penal Code Act. The prosecution's case is that on the 14th October 2015 at Kanyerere Cell, Kamwezi Sub-County, the accused had sexual intercourse with Asimire Charity, a girl under the age of 14.

The Accused pleaded not guilty to the charge hence the necessity for the Prosecution to adduce evidence in support of all elements of the charge. Prosecution called four witnesses including the victim. The accused did not call any witness.

PW1 was Arinaitwe Edward, a Clinical Officer attached to Kyogo Health Centre 111 who examined the victim and prepared Police Form 3A which was admitted in evidence. He examined the victim on the 14th October 2015 and his findings were that the victim's labia minora was hyperaemic and tender on touch. The hymen was not present and no vaginal discharge was seen. He attributed the injuries to an act of defilement.

PW2 was Tukahirwa Charity, the mother of the accused whose evidence was that she knows the accused as a casual labourer around the village. She had gone to work and the victim had gone to school on the 14th October 2015. She was called back by village mates. She found the victim at the health Centre where she had been taken by neighbors who had been alerted by a one Kiiza about the alleged defilement.

The victim narrated to her that when she came back home from School, the accused came and gave her a half-cake. He then pushed her behind the door before she could eat it and began ravishing her. In the victim's own words the accused removed his 'thing' and put it into her private parts. She was present when the medical examination was done and later proceeded to report the matter to the Police.

PW3 Twinamatsiko Eric is a 15 year old pupil of Kyogo Primary School who gave evidence on oaths. His testimony was that on the 14th October 2015, he was walking back to School with his friend Kiiza. His friend suggested that they branch off to PW2's home to collect the 2000/= Shillings owed to Kiiza by PW2 so that they buy half-cakes. Kiiza went to the house and through the open door saw the accused defiling the victim. He then called PW3 who also witnessed it. According to the witness, the accused left the victim but forgot to zip up and his penis was hanging outside.

The accused offered the two boys 200/= so that they keep quiet about what they had seen but they declined the offer. PW3 told Kiiza to wait for other people passing by to inform them about what they had seen before the accused goes away. The victim was crying and retreated to the bedroom. Later when PW3 was at School, he saw village mates taking the victim to Kyogo Health Centre and the accused to Police.

PW4 was the victim who testified not on oaths after a voir dire inquiry. She was very consistent in her evidence that she knows the accused as Bahena who does casual work around the village who defiled her. She knew him before the incident since he had dug their pit latrine at home. She described what the accused did in the following words;

"He first told me to go behind the door. He used his penis. He put it in my legs and my private parts. I was taken to hospital. I could not walk properly...Eric (PW3) and Kiiza saw him doing it they called village mates and I was taken to hospital He got his penis from his trousers....."

On his part the accused gave a very brief defence to the effect that he did not touch that girl on that day but at 3.00pm he saw village mates coming to arrest him. The Prosecution and the Defence Counsel chose not to make any submissions and that closed the evidence adduced in the trial.

It is trite law that in criminal cases the Prosecution is required to prove all ingredients of the offence charged beyond reasonable doubt and this burden does not shift to the defence all through the trial.

See: Woolmington Vs DPP[1935]AC 462.

In a charge of Aggravated Defilement, the Prosecution is under a duty to prove that the victim is a girl under the age of 14; that a sexual act was performed on her and that is the accused who performed the sexual act on the victim.

PW1 who examined the victim on the 14th October 2015 found her to Be 6 years at the time. His examination report was by agreement of both Counsel admitted into evidence. PW2, the mother of the victim told Court that she was born in 2010. PW4 the victim herself told Court she was 8 years old which discrepancy I do not find as material given her age. It is thus my finding that the Prosecution has beyond reasonable doubt proved that the victim was below the age of 14.

Prosecution has to prove that a sexual act was performed on the victim. The evidence of PW3 Twinamatsiko Eric was not at all challenged at the trial. He and Kiiza saw the accused defiling the victim. He offered them money to keep quiet which they refused. The medical evidence by PW1 is further evidence of a sexual assault on the victim. His conclusion was that the probable cause of the injuries observed on examining the victim was an act of defilement. PW4 the victim narrated to Court the actual act done by the accused. I observed the victim testify, she was consistent and truthful about what happened and I have no reason to doubt her evidence and that of PW3 who saw the accused doing it.

It is thus the finding of this Court that a sexual act was performed on the victim and this element of the offence was beyond reasonable doubt proved by the Prosecution.

The Prosecution alleges that the Accused performed the sexual act on the victim. The accused' defence was that he did not touch that girl on the day in question. The evidence of the victim and that of PW3 place the accused at the victim's home on the day mentioned. The victim knew the accused very well and the offence was committed in her home, a familiar environment and in broad day light. PW3 also knew the accused and saw him long enough when he offered them money to keep their silence as to what they had seen. This was unassailable evidence not distorted in cross examination and it squarely places the accused at the crime scene. I have no doubt in my mind that there could not have been any error in the identification of the accused as the perpetrator of the sexual assault on the victim.

This Court finds that it is the accused who performed the sexual act on the victim and this element of the offence has been proved beyond reasonable doubt.

Section 40(3) of the Trial On Indictments Act requires corroboration of unsworn evidence of a child of tender years before Court can safely convict on it. The victim gave unsworn evidence since Court found her unable to comprehend the meaning and importance of an oath though she is and proved to be intelligent enough to give credible evidence.

PW3, Twinamatsiko Eric saw the accused defile the victim and gave sworn evidence which this Court found credible. PW4 the victim while at Kyogo Health Centre narrated to PW2 her mother how the accused had defiled her. PW2 gave sworn evidence about what the victim told her regarding what the accused did to her. The Medical report admitted in evidence as Exhibit PE1 details the fresh injuries on the victims private parts .This in the assessment of this Court is sufficient corroboration of the unsworn evidence of the victim and it is the finding of this Court that this legal requirement has been sufficiently met through the Prosecution evidence.

It was held by the Supreme Court that a report made to a third party by a victim in a sexual offence where she identifies her assailant to the third party is admissible in evidence. The report by the victim to PW2 falls in the category of such admissible evidence.

See: Criminal Appeal No.17 of 2002. Mayombwe Patrick Vs Uganda.

In view of all the evidence and having found sufficient corroboration of the victim's evidence I find the accused guilty of the offence of aggravated defilement Contrary to Section 129(3)and 4(a) of the Penal Code Act. I convict him accordingly.

Dated at Kabale this 11th day of October 2016.

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MOSES KAZIBWE KAWUMI
JUDGE