

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
KABALE 00-CR-CO-0039 OF 2014

UGANDA

PROSECUTOR

VERSUS

KAHIRIITA NERBERT

ACCUSED.

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused, Kahiriita Nerbert was indicted for Aggravated Defilement contrary to Section 129(3) and 4(a) of the Penal Code Act. It is alleged that on the 9th April 2014, the accused performed a sexual act on Orishaba Editor, a girl below 14 years at Kabisha Cell, Kyenyi Parish, Muko Sub-County, in the present day Ndoorwa District.

The Accused pleaded not guilty to the charge and put up an alibi as a defence. He further claimed that the allegations against him are due to a grudge between him and the victim's grandfather to whom he refused to sell a piece of land.

To secure a conviction in a case of Aggravated Defilement, the Prosecution must 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 shoulders the burden to prove all the ingredients of the offence beyond reasonable doubt and this burden does not shift throughout the proceedings. Any doubt must be resolved in favor of the accused by way of an acquittal.

See: **Woolmington Vs DPP {1935} AC 462.**

It is also pertinent to note that this Court can only convict the Accused on the strength of the Prosecution evidence and not on the weakness of the evidence given by the Accused.

The Prosecution and the Defence Counsel admitted in evidence Police Form 3 and Police Form 24 which were exhibited as PE1 and PE2 respectively. In exhibit PE1, a Clinical Officer at Kabale Referral Hospital examined the victim on the 22nd April 2014. The victim was stated to be” *“9 years of age in a fair physical condition with an inflated vaginal orifice and with a ruptured torn hymen on the left lateral aspect probably caused by a blunt object.”* The victim was found to be HIV negative. It has been held before, that in sexual offences, the degree of penetration required is the slightest penetration and that even proof of the rupture of the hymen is not necessary.

See: Adamu Mubiru Vs Uganda Crim Appeal No.47 of 1997.

The Accused was on the 11th April 2014 examined by a Senior Psychiatric Officer at Kabale Regional Referral Hospital who compiled Exhibit PE2. He was found to be 56 years and of normal mental status at the time of the medical examination.

Under Section 66 of the Trial On Indictments Act the admitted exhibits provide the necessary proof that the victim was under 14 years at the time the alleged offence was committed and that a sexual act was performed on her. I therefore find that these two ingredients have been proved by the Prosecution

See: Abasi Kanyike Vs Uganda.SCCA 34/1989.

The Prosecution called three witnesses to prove its case. PW3 Thursday Owen, the Victim’s father told Court that in the evening of the 9th April 2014 he was at Rwina trading centre when his wife PW4 came and told her that the victim had been defiled by the Accused. They went to the Village Local Council Chairman who together with the Chairman of Persons with Disability in the Village arrested the Accused and took him to the Police at Muko Sub-County Headquarters where he was detained. They were told to report back on the 10th April 2014 for a document forwarding the case to Kabale Police Station.

In cross examination he stated that they went to Kabale Police after about five days from the date of receipt of the referral letter. He claimed to have seen the Accused at the local trading centre at about 10.00am on the 9th April 2014 and later in the evening when they were drinking together at the Trading Centre.

The Victim testified as PW4. On account of her age, Court conducted a Voir Dire test to establish whether she understands the nature of an oath and whether she is possessed of

sufficient intelligence to give credible evidence. She claimed to be 10 years in Primary two at a local School. She told Court she does not know what an oath is, does not know what it means to tell the truth or to tell lies but that all she knows is that if one tells lies she is beaten. The witness knew the names of both her parents, the name of her village and the fact that she was then at Kabale town. Court found that she was possessed of sufficient intelligence to give credible evidence but not on oaths.

Her testimony was that the Accused was their neighbor at Kabisha village, she identified him in Court as Kahiriita and that while harvesting millet near his home on the 9th April 2014 at about 1.00pm, the Accused called her to help him light a fire in his kitchen. The Accused defiled her in the kitchen and promised to give her a half-cake. She thereafter ran away and reported to her mother when she returned from a meeting in the evening. I observed the witness giving her testimony and when answering all questions, she readily gave answers, appeared and sounded truthful though there were some contradictions in her testimony.

Tushemerirwe Novence, the victim's mother testified as PW5. She confirmed the Accused is their neighbor at Kabisha Village. She returned from a meeting at about 7.30pm on the 9th April 2014 and PW4 told her that the Accused had defiled her. That she went and confirmed the allegation from their neighbour Sayuni before telling PW3 who looked for the Village leaders who then arrested the Accused from the Trading Centre. They proceeded to Muko Sub County where the accused was arrested.

The Accused admitted knowing PW4 as a daughter of his neighbours PW3 and PW5. His evidence was that on the 9th April 2014 at about 1.00pm, he was at Rwobutare trading centre which is about two kilometers from his home. He left at 8.00am to participate in community work which ended at 11.00am. He claimed he thereafter took a bath at a well near the Trading Centre and proceeded to his brother in law's bar to help him sell bushera. At 6.00pm he claims he briefly went home for money to buy meat and then came back to Rwobutare. He began drinking until he was arrested at about 9.00 pm. The Accused claimed PW3 and PW5 have a grudge against him for refusing to sell a piece of land to PW5's father.

The victim was a minor and the single identifying witness in this case. It is the agreed position of the Law that Court can convict on the evidence of a single identifying witness but after warning itself and the assessors of the need to be cautious before convicting on such evidence. The import of this provision is that there could be a possibility of mistaken identity of the alleged aggressor which can only be ruled out through subjecting the evidence to the

test of proper identification. I duly cautioned the Assessors and I hereby caution myself about this crucial aspect of the law on identification.

See; Bogere & Anor Vs Uganda. SCCA No.1 of 1997: A bdalla Nabulere & Anor Vs Uganda. Crim Appeal No.9 of 1978.

The Victim knew the accused as a neighbor and he admitted to this fact. His evidence was that the victim calls him grand father. The alleged offence is said to have been committed at 1.00pm in bright day light. These factors in my opinion rule out any possibility of a mistaken identification of the accused by the Victim.

See: Remegious Kiwanuka Vs Uganda Criminal Appeal No.41 of 1995.

The Accused claimed to have spent the day doing community work and selling bushera at Rwobutare which is two kilometers away from his home. PW3 confirms he saw the Accused at 10.00am at Rwiimi trading centre and also later in the evening when they had a drink together. My finding above is that the accused was positively identified by the victim during the commission of the crime and his claim to an alibi accordingly fails.

See; Alfred Bombo Vs Uganda Supreme Court Crim. Appeal No.28 of 1994.

PW4 is a minor who did not give evidence on oaths much as she was consistent and appeared truthful in Court. The Law requires corroboration of her evidence by the Prosecution. In reference to unsworn evidence of Children of tender years, Section 40(3) of the Trial On Indictments Act provides that:

“ Where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.”

The two Assessors were guided on the law on utmost caution before relying on the evidence of a single identifying witness and the requirement of independent evidence to corroborate the evidence of a child who did not testify on oaths. Their opinion was that since PW4 knew the Accused and medical evidence had proven the fact of the sexual act having been performed on her, there was sufficient evidence to convict.

I was urged by the Prosecution to convict on the evidence of PW4 since she knew the Accused and immediately reported the fact of the sexual act to her mother when she returned in the evening. This in the opinion of the Prosecution was sufficient corroboration.

It was submitted for the accused that the Prosecution evidence did not place him at the crime scene at the alleged time of the commission of the offence. I was urged to consider the time between the commission of the alleged offence and when she told her mother, the time the medical examination was done and the fact that the medical report that did not show the probable period the alleged sexual act could have been committed.

It is not disputed that the victim informed her mother of the sexual assault on her *immediately she came back home*. The mother's sworn evidence to the effect was not challenged in cross examination. It was held by the Court Of Appeal that a report made to a third party by a victim in a sexual offence where she identifies her assailant to a third party is admissible in evidence.

See; Mayombwe Patrick Vs Uganda.Crim Appeal No.17 of 2002.

The medical examination of the victim was conducted on the 22nd April 2014 and the report was admitted in evidence. The victim's narration as to what happened on the fateful day brings out the graphic details in the following words:

“ She was called by their neighbor at around 6.00pm to help him to make fire in his kitchen. On reaching the kitchen he carried her on his laps and entered her vagina, shook his penis in her vagina. She felt pain and urinated there and then she ran away.”As to the mental status of the victim at the time of the examination, the finding was that she was ***‘alert, calm not crying but appeared depressed’***

The immediate report of the sexual assault to the mother on her return home combined with the narrative to the medical officer by the victim herself sufficiently corroborate her unsworn evidence in Court. I do not find merit in the argument that the delayed medical examination and the failure to state the likely period the sexual assault could have occurred as vitiating factors in view of the evidence above.

I noticed the victim's parents giving evidence in Court, they narrated how they had to acquire the referral letter from the Police at Muko Sub-County to Kabale Police which then referred them to the Hospital. They both talked about going to Kabale Hospital after four to

six days from the date of the acquisition of the referral letter. The victim herself narrated how the incident took place at 1.00pm in Court which contradicts with the 6.00pm assertion to the medical officer. I do not however find these to be major inconsistencies pointing to deliberate untruthfulness more so from a child of the victim's age.

The accused claimed the victim's parents had a grudge against him because he refused to sell a piece of land to the victim's grandfather. He told Court how he was drinking with the Victim's father on the day he was arrested. I find these two assertions inconsistent. It is uncommon to share drinks with a person who has a grudge against you to the extent that he frames you of having sexually assaulted his daughter. I disbelieve this version of evidence as a deliberate after thought and I dismiss it.

In view of all the evidence given and the need to take special precaution to convict on the evidence of a minor who was the single identifying witness, the only conclusion I draw is that the accused committed the offence he was indicted for. I agree with the opinion of the Assessors to convict the accused and I hereby convict him.

MOSES KAZIBWE KAWUMI

JUDGE

24th /09/2016.