THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CRIMINAL CASE NUMBER 0010 OF 2013

UGANDA PROSECUTOR

VERSUS

TUMUHEKI JOAN ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT.

The accused is charged with Aggravated Defilement Contrary to Section 129(3) and (4) of the Penal Code Act. The Prosecution contends that on the 5th August 2012 at Nyinasunzu Village,Rubaya SubCounty,Kabale District he had unlawful sexual intercourse with Tumuranze Enid, a girl under the age of 14.

At the commencement of the trial the parties agreed to the admission in evidence of form PF24 as evidence that the accused was medically examined on the 14th August 2012 and found to be mentally competent .Form PF3 being the evidence of a medical examination carried out on the victim at Kabale Hospital on the 6th August 2012 was also admitted in evidence.The exhibits were admitted under Section 66 of the Trial On Indictments Act as part of the evidence on record.

Prosecution called three witnesses to prove its case.

PW2 Arinaitwe Edward is a Clinical Officer who was working at Rubaya Health Centre 1V. On the 6th August 2012 he carried out a medical examination on the victim .His findings were that the victim was 12 years and looked depressed. There was tenderness on the vulva and vaginal walls and the hymen had been raptured some time back. The injuries were consistent with force having been used. The injuries were about 2 days old. He concluded that there were signs of penetration but classified the injuries as "*bodily harm*". He stated that the injuries were consistent with forced sex on the victim.

The victim's mother Nyamarembo Millicent testified as PW3.She confirmed knowing the accused as a village mate and the victim as her daughter born on the 15th May 2000. On the 5th August 2012 the victim went to harvest vegetables and came back at about 5.00pm crying claiming that the accused had defiled her. She reported to the Village Local Council Chairman who asked her for money and she refused to give him any. The Chairman came to her home the following morning and begged for forgiveness claiming that he had been drunk when he asked for money from the witness the previous evening. He begged her not to take the case to Police as the Accused's grandfather was willing to give her a sheep. She declined the offer and took the case to Rubaya Police from where she was referred to the Health Centre.

The victim testified as PW4.She gave evidence on oath since she was 16 years at the time. Her testimony was that on the 5th August 2012, she went to harvest vegetables at 3.00pm.On the way back she met the accused who tore her knickers and defiled her. The accused had a knife and threatened to cut her if she resisted. He ran away with her knickers after defiling her. On reaching home she told her mother who went to the Village Chairman who asked for money. She confirmed that the Chairman came to their home the following day claiming he would handle the case. The mother declined and they went to the Sub County from where they were referred to Police.

In cross examination, the victim stated that there was no other person when the accused defiled her for about ten minutes and that she went home immediately after the incident. She told Court that she was taken to the hospital by her mother and a female Police Officer who stayed outside the room when the Medical Officer carried out the examination.

The accused told Court he was at home on the 5th August 2012 and left home for a football match at 1.00pm.He claimed he did not see the victim at all on that day but had in the past met the victim and her brother carrying stolen maize .That the victim and her brother ran away when he raised an alarm and the case was reported to the Local Council but he did not know how it was resolved. He attributed the present case to a grudge arising from that incident. He did not deny knowing the victim but denied ever having sexual intercourse with her. In a Police statement the accused made on the 13th August 2012, he admitted he had ever had sex with the victim in the past. The statement which he acknowledged having signed was tendered in evidence by the Prosecution.

DW2 was Boaz March the District Councilor for Rubaya Sub County .His evidence was that he was with the accused on the 5th August 2012 from 1.00pm.They went together for a football match at Rukure Primary School which is 20 kilometres away from their village .The match ended at 5.00pm and they stayed at a local trading centre up to 8.00pm.

The witness told Court of a grudge between the accused and the complainant because the accused once found the victim carrying stolen maize and the Complainant was ordered to pay a fine of Shillings 500,000/=.The accused told Court he did not know how this case was resolved.

The witness told Court in cross examination that the Police has never called him to make a statement and that on the day they went for the football match they walked 40 kilometres to and from Rukure.

Counsel for the accused opted not to make any submissions in this case.The Prosecution invited Court to convict the accused on the available evidence of the positive identification of the accused. The victim it was argued knows the accused and the offence took place in broad day light. It was further submitted that the report of the incident to the mother serves to corroborate the victim’s evidence in Court .Prosecution further argued that the admission of the accused having had sex with the victim before served to show he had made it a habit to defile the victim and that the alleged grudge with PW3 was an afterthought which Court should disregard.

The offence of Aggravated Defilement carries three ingredients which the Prosecution must prove beyond reasonable doubt. This burden does not shift from the Prosecution even in cases like the present one in which the accused has among other defences raised an alibi.

See: Uganda Vs Oring.HCCS 434 of 1994.

The elements to be proved by the Prosecution are; that the victim was under the age of 14 at the time the alleged offence took place; that a sexual act was performed on the victim and that it was the accused who performed the sexual act on her. I will now proceed to consider the evidence adduced in support of each of the elements.

The age of the accused was stated to be 12 at the time of the medical examination confirmed in the report admitted in evidence.PW3 the complainant told Court that the victim was born on the 5th May 2000 and the victim told Court at the trial that she is 16 years. This evidence satisfactorily proves that the victim was below the age of 14 when the alleged defilement took place on the 5th August 2012.It is therefore my finding that this element of the offence has been proved by the Prosecution beyond reasonable doubt.

Proof of a sexual act can be through direct or circumstantial evidence.PW2 examined the victim on the 6th August 2012.His findings indicated that the victim sustained bruises on the vulva and vaginal walls which were consistent with force having been used. The victim's hymen had however been ruptured long before. The injuries were estimated to have been inflicted about two days before the medical examination.

The victim herself testified to the defilement and narrated how the accused tore her knickers and threatened her with a knife if she resisted. It is the finding of this Court that a sexual act was performed on the victim as outlined in the medical report by PW2.Penetration which underlies the description of a sexual act in Section 129(7)(a) of the Penal Code Act was proved to the required standard.

In R vs Marsden (1891) 2 QB 149 it was held;

" It is now unnecessary to prove actual emission of seed. Sexual Intercourse is deemed complete upon proof of penetration only."

The Prosecution has the duty to prove that the accused performed the sexual act on the victim. The accused raised an alibi in his defense and it is the duty of the Prosecution to prove through evidence that he was with the victim on the alleged day and time.

The victim claimed she was sent to harvest vegetables at about 3.00pm and was defiled on her return from the garden. She reported to her mother at about 5.00pm.The accused and DW2 told Court they were 20 kilometres away from the village on the day in question from 1.00pm to 8.00pm.In his Plain statement to Police however, the accused stated that:

" on the 5th August 2012 at 17.00 hours(5.00pm) when I was going to Rwakaremba to buy soap.I was with Medard we then saw the victim in the garden of Senya stealing Irish potatoes .Medard warned her to stop stealing and we then proceeded to the trading centre."

I find this a grave contradiction in the evidence of the accused as contrasted to the version given by the victim and PW2.The accused could not have been at Rukuri 20 kilometres away from 1.00pm to 8.00pm and at the same time be with Medard at 5.00pm of the same day!

The victim knew the accused very well and the offence was committed during the day which eliminated any mistakes in identifying him as the assailant. In his statement to Police which he did not deny the accused stated as follows:

"I put it clear that on that day I did not fuck Enid Tumuranze but I recall that on another day I cannot recall exactly,I found her stealing our maize and I also fucked her."

It is the finding of this Court that the evidence of PW2 and the victim squarely placed the accused at Nyinasunzu village and not at Rukuri playing or watching football as alleged by DW2.The alleged alibi is destroyed by the evidence of PW2 and the victim and indeed by the report the accused himself made to Police. It is now established that once a person has been positively identified at the scene of crime the alibi crumbles.

See; Uganda Vs Dusman Sabuni [1981]HCB 1

The victim knew the accused, the offence took place during the day, the act of defilement lasted about 10 minutes and being a sexual act, the victim and the accused were near each other. All these factors ruled out any errors in identifying the accused by the victim.

In Uganda Vs Rurahukayo John,Criminal Case 260 of 1979 it was held *that*

" In sexual offences, the court must find corroboration of the complainant's testimony on all ingredients. This corroboration is required as a matter of judicial caution and practice "

In Hassan Bassita Vs Uganda SCCA 035 OF 1995 it was held:

"Corroboration in sexual offences may be deduced from direct and/or circumstantial evidence. It may be provided by the victim's own evidence and/or corroborated by medical evidence."

I find the victim's evidence sufficiently corroborated by the medical evidence which placed the injuries sustained by the victim to two days before the examination .The immediate report to PW2 just after the offence was committed and the distressed condition of the victim who went home crying after the defilement further corroborate the evidence of the victim.

See:Kibazo Vs Uganda {1965} EA 507 at 510.

In view of the above evidence i find comfort in basing a conviction on the evidence of the victim as the sole identifying witness. I find the accused guilty of the offence of Aggravated defilement contrary to Sections 129(3) and 4(a) of the Penal Code Act the act took about as charged and I accordingly convict him.

MOSES KAZIBWE KAWUMI

JUDGE

19th October 2016.