

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0177 OF 2014

UGANDA

PROSECUTOR

VERSUS

AGATIYO GILBERT

ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused in this case is indicted with one count of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*. It is alleged that on the 15th day of December 2012 at Ocea Cluster, Rhino Camp Refugee Settlement in Arua District, the accused had unlawful sexual intercourse with Salonyi Njelosi, a girl under the age of 18 years while he was a person in authority over the said Salonyi Njelosi as her classroom teacher at Ocea Primary School.

The facts as narrated by the prosecution witnesses are briefly that the victim, Salonyi Njelosi, was a 16 year old Congolese refugee and a pupil at Ocea Primary School at Ocea Cluster, Rhino Camp Refugee Settlement in Arua District where the accused was a school teacher. On 28th February 2013, she was taken by one of her female teachers to Ocea Health Centre II on suspicion that she was pregnant. At the health centre, she was medically examined by PW2 (Tamara Khadija) a health worker in that camp, who confirmed that she was eight weeks pregnant. The victim confided in PW2 that the accused was responsible for the pregnancy. Her father, now deceased, was informed about this discovery. The accused was arrested and he, together with the girl, was taken to Arua Central Police Station. The girl was examined by a police surgeon at Arua Police Health Centre III, PW1 (Dr. Ambayo Richard), on 4th March 2013 who confirmed that she was 16 years old and was pregnant. The accused was charged with the

offence of Aggravated Defilement and later committed to the High Court for trial where he denied the indictment.

In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller Vs Minister of Pensions* [1947] 2 ALL ER 372).

For the accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim was below 18 years of age.
2. That a sexual act was performed on the victim.
3. That it is the accused who performed the sexual act on the victim.
4. The accused is a parent or guardian of or a person in authority over the victim.

The most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child (See *Uganda v Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*). The victim did not testify in this case. She was reported to have gone missing soon after witness summons were served on her. The Court was however presented with the oral testimony of PW2 (Tamara Khadija) a health worker in that camp, who knew her to be a primary school pupil at Ocea Primary School. PW3 (Driwale Fulukas) a social worker in the same camp also knew her to be a primary school pupil at Ocea Primary School. PW4 (Susan Aseru) a police officer by then, recorded a statement from the victim on 1st March 2013 (three months after the date of the alleged offence) in which she stated she was 16 years old at the time and a primary

school pupil at Ocea Primary School. None of those witnesses verified the age of the victim. The only evidence available is that of PW1 (Dr. Ambayo Richard) who examined the victim on 4th March 2013 (three months after the day the offence is alleged to have been committed). His report, exhibit P.E.1 (P.F.3A) certified his findings that the victim was 16 years at the date of examination. He came to this conclusion based on the level of the girl's physical development and dentition. This evidence was admitted during the preliminary hearing. Counsel for the accused did not contest this ingredient in her final submissions. On basis of that medical examination, I am satisfied that the prosecution has proved beyond reasonable doubt that Salonyi Njelosi was a girl under the age of 18 years by 15th December 2012.

The next ingredient requires proof that at the time the act was committed, the accused was a person in authority over the victim. The allegation is that the accused was a teacher at Ocea Primary School and the victim his pupil in the same school at the time the offence is alleged to have been committed. No evidence of his official employment records were presented by the prosecution which instead sought to rely on the testimony of PW2 (Tamara Khadija) a health worker in that camp, who knew the accused to be a teacher in the school since her own children went to the same school. She also knew the victim to be a primary school pupil at Ocea Primary School at the time. PW3 (Driwale Fulukas) a social worker in the same camp also knew the accused to be a teacher and the victim a primary school pupil at Ocea Primary School. In his unsworn statement, although the accused denied having known the victim at all let alone being a pupil in the school, he admitted that before his arrest, he was a teacher at Ocea Primary School and resided in the school Teachers' Quarters. Counsel for the accused contest this during cross-examination of the prosecution witness but did not in his final submissions. It is not necessary to prove that the accused knew the victim to have been a pupil in the school. I am satisfied that the prosecution has proved this ingredient beyond reasonable doubt i.e. that at the time of the offence, the accused was a person in authority over the victim, as one of the teachers in that school.

The last ingredient to be proved is the fact that the victim was subjected to a sexual act. One of the definitions of a sexual act under section 129 (7) of *the Penal Code Act* is penetration of the vagina, however slight, of any person by a sexual organ. Prosecution has not presented direct

evidence of a sexual act. It has instead relied on the circumstantial evidence of the medical examination of the condition of the victim's genitalia, the pregnancy and subsequent birth of a child by the victim. PW2 (Tamara Khadija) a health worker in that camp, examined the victim on 28th February 2013 and confirmed she was eight weeks pregnant. PW3 (Driwale Fulukas), a social worker in the same camp, also saw the physical signs of the pregnancy by the girl's apparent lack of concentration in class. PW4 (Susan Aseru) a police officer by then, recorded a statement from the victim on 1st March 2013 (three months after the date of the alleged offence) in which she admitted being pregnant as a result of a sexual act.. PW1 (Dr. Ambayo Richard) examined the victim on 4th March 2013 (three months after the day the offence is alleged to have been committed) and found she had a ruptured hymen with old tears which were consistent with defilement. His report, exhibit P.E.1 (P.F.3A) certified his findings and the fact that the urine test was positive for pregnancy. This evidence rules out the possibility that the girl became pregnant by any means other than sexual intercourse. Counsel for the accused did not contest this ingredient as well during the trial since he did not subject any of these witnesses to cross-examination on that fact and neither did he do so in his final submissions. I am satisfied that the prosecution has proved beyond reasonable doubt that Salonyi Njelosi was subjected to an act of sexual intercourse while still under the age of eighteen years.

The prosecution is required to prove beyond reasonable doubt that it is the accused that performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. There is no direct evidence of the victim or any other eye witness. It was explained to court by PW4 (Susan Eseru) that the victim had disappeared from her home after receipt of witness summons, on the morning she was supposed to testify in court. Against an objection raised by counsel for the accused, the police statement of the victim was admitted in evidence under section 30 (j) of the *Evidence Act*, since the criminal session was left with one week to come to its conclusion and the attendance of the victim could not be procured without unreasonable delay, as one of the exceptions to the rule against hearsay. It is crucial to observe that the Act does not require all possible steps to have been taken in finding the witness but rather all reasonable steps. The Act does not require perfection, such as would be expected by conduct of a thorough search, but reasonableness.

In *R v Ndolo (1926) 10 KLR 11*, the court considered the meaning of “cannot be found” in connection with S. 33 of the *India Evidence Act* and Section 34 of *Kenya Evidence Act* where the language is identical to our section 30 of the *Evidence Act*. Here the witness left his place of employment and was not served with a summons for the date of the trial. The trial was adjourned and assistance from the Registration Department was of no avail, as his movements could not be traced. It was contended that his deposition should be read. The defence argued that had the prosecution taken reasonable steps to discover his whereabouts in preparation for the first date of hearing he would have been available. The court held that the words “cannot be found” refer to the time when the witness is sought to attend the trial, and do not refer to the state of affairs at some earlier period. There was no question as to whether the search had been a diligent one, and the words appear to imply that such a diligent search should be required before the condition is held to have been fulfilled.

In the case before me, checks had been made at the place with which the witness has a contemporary connection, and contact made with a known relative with whom she would have been reasonably expected to be in touch, with no success. Within the circumstances of the time frame of the session and this case, I was satisfied that reasonable enquiries had been made at a place where the witness has a contemporary connection and with a person who could be reasonably expected to be in contact with her, to no avail.

Paragraphs (a) - (j) of s 30 of the *Evidence Act*, Cap 6 are in *pari materia* with paragraphs (1) - (8) of s 32 of the *Indian Evidence Act*, 1872 (Act No.1 of 1872) which provides as follows;

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant:- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:--

Or is made by several persons and expresses feelings relevant to matter in question.

- (8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

The following are given as illustrations;

- (g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.
- (h) The question is, what the cause of the wreck of a ship was. A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.
- (n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libelous character. The remarks of a crowd of spectators on these points may be proved.

The principle for having the eight exceptions to the hearsay rule is explained in *Sarkar on Evidence (1990, Reprint) at p 370*, quoting from *Wigmore (ss 1420-1422)* as follows:

The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous: it may be sufficiently clear, in that instance, that the statement offered is free from the risk, of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment -for example, by reason of the death of the declarant, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of

these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exceptions.

To be noted too, is that the principle of impeaching and discrediting or corroborating the declarant of a dying declaration is recognised by a statutory provision and in fact extends to all declarants of statements made admissible under ss 32 and 33 of the Evidence Act 1950 as s 158 of the Evidence Act 1950 provides that 'whenever any statement relevant under ss 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.' In my view, the weight and degree of credit to be attached to a statement by a declarant under para (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the court draw a 'jaundiced view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a mandatory sentence of death on conviction on the charge.'"

It is a principle of common law that hearsay evidence which is incapable of being tested by cross-examination to determine its veracity is not admissible to determine the guilt of an accused person. These provisions are statutory exceptions to the common law rule that the accused in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence (see *R v Davis [2008] 1 AC 1128*). Since they constitute a departure from the general rule there is need for adequate safeguards for the rights of the accused. One of those is the requirement that all reasonable steps must have been taken to secure the attendance of the witness, of which this court was duly satisfied before the statement was admitted.

Despite the statutory provision permitting such statements to be admitted which otherwise would have been excluded, that possibility should not obscure the fact that the admission of statements under the section is not ideal and any evidence so admitted is not regarded as the best evidence. The evidence of a witness given orally in person in court, on oath or affirmation, so that he or she may be cross-examined and his or her demeanour under interrogation evaluated by the court, has always been regarded as the best evidence. It is for that reason that as another safeguard, statements received under these exceptions are considered by courts to be of low probative value. If low probative value is given to a piece of evidence then it becomes a worthless piece of evidence independently when applying the beyond reasonable test. It is therefore not used as a substantive piece evidence but only for purposes of corroboration of some material evidence, it may carry some probative value to show nexus. Anything less will be abhorrent to notion of justice and fair play. When it is a witness police statement and is introduced by the prosecution as substantive evidence without calling the maker, especially where it is used to establish a substantive element of the offence, the integrity of administration of criminal justice will be compromised.

Bearing the above mentioned principles in mind, I have to determine whether there is some material evidence that can be corroborated by the victim's police statement. I have considered the disclosure made in confidence to PW2 (Tamara Khadija) a health worker in that camp that the accused was responsible for the pregnancy. I have also considered the evidence of PW3 (Driwale Fulukas), a social worker in the same camp who said that the victim pointed out the accused to him as the person responsible for the pregnancy. The only other evidence was the claim by PW3 that his supervisor found the victim at the home of the accused. On the other hand, the accused denied any involvement. He stated in his unsworn statement that he does not know the victim. Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions.

In absence of the victim and the supervisor of PW3 to testify in person about those facts, the evidence as narrated by both witnesses is hearsay and violates the provisions of s 59 of the *Evidence Act* which requires that oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. It is for that reason that *Seru Bernard v Uganda C.A. Crim. Appeal No, 277 of 2009*,

the Court of Appeal decided that the only witnesses that could have testified to the fact of sexual intercourse were the victim and her mother who would also be liable to cross examination. The Police Officers who recorded their statements were not qualified to testify about the sexual act because they knew nothing about it and quite predictably none of them was cross examined about their testimony. I am fortified further in this view by the decision in *Junga v R* [1952] AC 480 (PC) where the accused was charged and convicted with the offence of being armed with the intent to commit a felony. The police witness gave evidence at the trial, saying that they had been told by a police informer of the alleged attempted offence. The informer was not called to give evidence and his identify was not revealed. The accused was convicted. On appeal it was held that the trial magistrate had before him hearsay evidence of a very damaging kind. Without the hearsay evidence the court below could not have found the necessary intent to commit a felony and that being the case the Court of Appeal allowed the appeal against conviction.

Similarly in this case, I have disregarded all evidence relating to the victim having revealed who the perpetrator of the offence was and that relating to the victim having been found at the home of the accused since it offends the rule against hearsay. It appears to me in this case, that the victim was found at one point after the hearing of the case had started, she having been found, was warned for court but proved difficult to convince to attend, she failed to attend and thereafter disappeared. The prosecution did not seek to invoke the coercive power of the Court to compel the attendance of the witness it found to be reluctant, while she was still available, but instead sought to rely on her police statement after she disappeared.

I have considered the decision in *Mayombwe Patrick v Uganda C. A. Crim. Appeal No.17 of 2002* where it was held 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. Although the court decided that such evidence is admissible, it did not hold that on its own, it is evidence capable of sustaining a conviction. It is my considered opinion that such evidence can only corroborate other credible evidence. I am also aware that failure by the victim to testify is in itself not fatal to the prosecution case (See *Patrick Akol v Uganda, S.C. Cr. Appeal No. 23 of 1992*). However in such cases, such failure is not fatal only if there is other cogent evidence pointing irresistibly to the accused as the defiler.

For example in *Nfutimukiza Isaya v Uganda C.A. Crim. Appeal No.41 of 1999*, although the victim did not testify, the appellant was last seen with the victim when she was walking with a normal gait as they entered the plantation. A few minutes later when the victim emerged from the plantation she was walking with an awkward gait and her skirt was wet on the rear. This aroused her sister's suspicion that she might have been defiled. That suspicion was confirmed by their mother and the doctor who examined the victim. Similarly in *Uganda v Orem H.C. Crim. Session Case No. 459 of 2010*, although the victim did not testify, her police statement, tendered in evidence by the police officer who recorded it, was used to corroborate the evidence of a witness to the effect that she found the accused person and the victim red handed having sex.

In the case before me, there is no direct or circumstantial evidence other cogent evidence pointing irresistibly to or showing that it is the accused that had sexual intercourse with the victim, leading to her pregnancy. I am faced rather with weak evidence of reports made to third parties which evidence is sought to be corroborated by the police statement of the victim. The witness when making her statement spoke Kiswahili. There was no Swahili version of the statement recorded and the interpreter was never called as a witness to verify the accuracy of the content of the English version. In *R v Gutasi s/o Wamagale (1936) 14 EACA 232*, the court noted that the statement made by the appellant (Ex.P.1) to Mr. Harwich, Superintendent of Police, was admitted, although the two interpreters who had carried out a double interpretation were not called as witnesses. Without their evidence this statement was strictly inadmissible since Mr. Harwich could only speak to have taken down what he was told by the second interpreter. Although the statement considered in that appeal was a charge and caution statement of the accused, failure to call the interpreter in the case before me would in my view equally weaken the veracity of the content and renders it unsafe to be relied on as corroborative evidence.

My assessment of evidence relating to this ingredient is that what the prosecution seeks to rely on is hearsay of a very damaging kind. There is no independent direct or circumstantial or other cogent evidence pointing irresistibly to the accused as the defiler but rather a collection of what would otherwise be corroborative evidence. Such evidence cannot stand on its own to sustain a conviction. In the absence of substantive evidence, reliance on evidence of the quality I have evaluated above in order to establish a substantive element of the offence such as this, would in my view be an affront on the integrity of administration of criminal justice and the fairness of

this trial will be compromised. It is unsafe to convict on the basis of such evidence. The evidence available is incapable of proving this ingredient beyond reasonable doubt.

In the final result, in agreement with the joint opinion of both assessors, I find that the prosecution has not proved the case against the accused beyond reasonable doubt and therefore find the accused not guilty. I hereby acquit him of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*. He should be set free forthwith unless he is being held for other lawful reasons. I so order.

Dated at Arua this 23rd day of August, 2016.

Stephen Mubiru

Judge.