

IN THE HIGH COURT OF UGANDA HOLDEN AT RUKUNGIRI

IN THE REPUBLIC OF UGANDA

CRIMINAL CASE NO.034 OF 2014

UGANDA

PROSECUTOR

VERSUS

TUMUSIIME ROBERT

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT.

The Accused was arraigned for Aggravated Defilement contrary to Section 129(3) and 4(a) of the Penal Code Act. It is alleged that on the 2nd August 2014, the accused performed a sexual act with Atuhaire Julian, a girl under the age of fourteen years.

Agreed in evidence under Section 66 of the Trial on Indictments Act were Police Form 24a dated 13th August 2014 which is the report of the medical examination of the Accused who was found to be 33 years at the time and of normal mental health. Medical Slip number 12 from Echo Clinic at Rukungiri with results showing that the Accused was HIV negative as at 9th August 2014 was also admitted in evidence.

All other aspects of the charge were not admitted and hence the Prosecution had to call evidence in proof of all the ingredients. The Prosecution called four witnesses and the Accused called two witnesses besides his own evidence.

PW1 Atuhaire Julian is the victim who according to evidence on record was eight years at the time she testified in Court. A voirdire inquiry was conducted to ascertain if she appreciated the nature and implications of an oath. She could not appreciate what an oath is and its implications but was found to be sufficiently intelligent to tell her story. She gave evidence but not on oaths. The witness told Court that she was a pupil in Primary One at Modern Primary School at Rukungiri where the Accused served a canteen operator in 2014. She related to Court that she used to go to the canteen to obtain edibles since her mother had deposited some money with the Accused but on the 2nd August 2014, the accused removed her clothes and “*raped me in the anus*” though she pointed at her vagina while testifying in

Court. That the Accused cleaned her with a handkerchief after the defilement and she felt bad and cried. The victim told Court that she thereafter went and told Rachael, a girl in Primary Seven who used to care for her and that they called her father who on the day the school closed took her to hospital and later her mother took her to different hospitals. She further told Court that she felt bad because other pupils were talking about her that the Accused '*raped*' her.

The victim in cross examination confirmed she was taken to three hospitals including one she was taken to by the head teacher and that the incident happened while other pupils were outside class. She confirmed telling only Rachael and no other person about the incident and denied that Rachael used to send her for double portions of edibles from the canteen against the arrangement between her mother and the Accused. The victim told Court that she reported what happened to her to her father when she got holidays and to her mother who came home from nursing school after two days. She was not consistent about what was done to her in the various hospital save for remembering being injected with a syringe on the finger and the fact that her father was present at one of the hospitals.

PW2 Rachael Kamugisha was a pupil at the same school with PW1 assigned by the mother to take care of her. PW2 identified the Accused as the canteen operator at the school in 2014 and that she heard from other girls at School that PW1 had contact with the Accused. She forced PW1 to confirm the allegation and that PW1 told her that the Accused used to put her on the stool in the canteen and rape her before giving her eats and would warn her not to tell anybody. That from then she would inquire from PW1 whenever she went to the canteen and later told the school head girl who advised her to tell PW1 to report to the Senior Woman teacher who eventually told the Head master. PW2 told Court that on the day the school closed for holidays, the Head master called them and they narrated to him what had happened. PW2 did not personally witness the Accused defiling the victim.

PW3 Mashazi Geoffrey is the father to the Accused whose testimony was that on the 8th August 2014 she went to collect PW1 from School as the school was closing for holidays. PW3 was told that PW1 had already gone home and he went home wondering who had dropped her home. PW1 told him how she was "raped" at school pointing at her vagina. PW3 called a Police woman he knew who advised him to go and first find out from school. The School Headmaster confirmed that they had known of the allegation and had taken PW1 to Rugarama Health Centre for medical examination which did not confirm the

allegation and further that they could not immediately inform him as it would dent the reputation of the school.

PW3 told the Headmaster to call the Accused who came and denied the accusations. PW3 took the Accused to Police which referred PW1 to a Police Doctor who examined her and confirmed that she had been defiled. PW3 later on the 9th August 2014 took the Accused for an Aids test at ECHO Clinic and the results proved he was not infected. A Urinalysis was conducted at the same clinic the results of which showed that PW1 had pus cells in her urine. The witness told Court he could not trust the results the School got from Rugarama on the 4th August 2014 because as a parent of PW1 he had not been notified and he was not present during the examination on PW1. He further said that the School belonged to a Reverend yet the Health Centre was run by the Diocese. This in his view implied that there could have been collusion so as to protect the reputation of the School as the Headmaster had indicated in their discussion on 8th August 2014.

When further cross examined, PW3 told Court that he was referred to the Police Doctor by the Police Officer he had earlier called and she did not escort them to the clinic located within the Police building. He told Court he trusted the results from the Police Doctor's examination and that PW1 had to be examined at Echo Clinic because the Doctors there said they could not prescribe medicine without doing their own examination. In his evidence he told Court that PW1 told him that she had been defiled in the school canteen in the same week the school closed for holidays but denied that PW2 ever called him about the incident. PW3 however agreed that it would have been better to liaise with the school in investigating the case further and denied that he demanded money from the school as compensation for what happened to PW1.

PW4 Dr. Musiimenta Emmanuel examined PW1 on the 8th August 2014 and identified and exhibited Police Form 3a with the results of his examination. The crucial aspect of the medical findings was that the Accused had;

“ Abdominal pain, normal mental status, no head, neck or chest injuries and the arms and legs were not injured .The genitals had a ruptured hymen, rugged edges with healing signs ,laceration on the vaginal vault and walls .No injuries on the buttocks and anus.” PW4 concluded that the possible cause of the observed injuries was” *penetrative sexual assault on the victim.*”

PW4 told Court that on account of the age of PW1 he referred her for further scanning of the abdomen and specialist attention by a gynecologist. PW4 was emphatic that he had not been biased by the history given by PW1 who claimed to have been defiled on the 2nd August 2014 which was six days before the examination.

PW4 was shown the results of the medical examination on PW1 by Rugarama Health Centre where she had been taken by the School and he disputed the findings. The pertinent part of the report he disputes is couched in the following words;

‘The above mentioned was brought by the matron for being raped. On examination, no bruises found in and outside the vagina as a sign of forced rape and on vaginal examination, the opening just admits a tip of a finger showing no sign of penetration. Though the girl firmly tells she was raped by a canteen man when he called her to give her a phone.’ By Ruth.

The basis for PW4 disputing the results above was that as a requirement the author should have shown his/her qualifications and full names. The use of the term “*rape*’ was in his opinion also contradictory. He further observed that the finding that the vagina could admit part of a finger would be compatible given the age of the victim but the whole report was a contradiction about not finding bruises *in* the vagina which could admit only a tip of a finger. PW4 wondered how the author could have seen that there were no bruises! PW4 further questioned the format of the report as not consistent with medico-legal reports.

DW1 Dr. Atukunda Medard was called to identify and exhibit the medical report generated by Rugarama Health Centre on the 4th August 2014. He identified the author as an enrolled nurse in charge of the Maternity section with whom he had worked for one year. According to DW1, the conclusion that there was no sign of penetration in the report was dependable as it was based on the nurse having found no bruises and ruptured hymen. DW1 guided Court that in sexual offences, the best medical examination results are obtained within the first five days from the incident but explained that the author of the report could have given better evidence to Court.

The author of the report was then said to be working at a medical facility in Kanungu which is 50 kilometers away from Court. The witness confirmed to Court that Ruth had the requisite experience to carry out the examination she did although it should have been him to do it as the Medical Officer. DW1’s proof that the examination was carried out were the hospital

letterhead, handwriting and signature of the author. He could not tell Court if Ruth was alone or with other people while conducting the examination.

DW2 Tumusiime Robert, the accused, confirmed that he had an arrangement to provide eats to the victim through monetary deposits made by the mother and that on the 2nd August 2014, he served the victim at lunch time and in the evening with other pupils. DW2 denied defiling the victim since it was a Saturday when other pupils and teachers were within the school compound and further denied the allegations that PW2 called PW3 which PW3 himself denied in Court. His version of evidence was that he first learnt of the allegations from one of the pupils who mentioned that PW2 and her friends were planning to report her but did not substantiate. DW2 later heard from the school matron about the alleged defilement and he told her to make her own inquiries.

DW2 confirmed to Court that on the 8th August 2014 the Headmaster allowed him to go to Police with PW3 and he was detained and later examined at Echo Clinic in the presence of a Policeman .He told Court that while in the car going to Police PW1, the victim narrated to her father how DW2 had defiled her .DW2 denied any previous allegations of defilement against him for the seven years he had worked at the school and confirmed that he at times allowed the victim use his phone to talk to her parents. His justification for the accusation was that PW2, Rachael wanted to spoil his name but he could not tell Court the motive for such a ploy.

DW3 Kobusingye Scholar the school matron told Court that the victim told her that she was defiled by the Accused and she shared the information with the Senior Woman teacher but found that the victim had already informed her and she was advised to report to the school headmaster. Her further evidence was that it was about two days to the end of the school term and the Headmaster instructed her to take the victim to Rugarama Health Centre where sick pupils are normally taken. She found all the Doctors gone and nurse, Ruth, examined the victim in her presence after the victim had narrated what had happened to her. DW3 told Court that she received the original copy of the medical report which showed the victim had not been defiled and passed it on to the school Headmaster. She did not know of any prior allegations about the Accused. The witness denied concealing any information to protect the reputation of the school but hinted that PW3 had gone to local radios spoiling the school name and the employees.

During cross examination, DW3 told Court that the girls in the victim's dormitory told her about what had happened and the victim confirmed it whereupon she examined her. The victim told DW3 that the accused had cleaned her afterwards but she still had pain in the lower part of the abdomen. DW3 denied that PW2 Rachel confirmed the allegation but this was evident in the Police statement she made and which was admitted in evidence for the Prosecution. The witness however denied telling Police that the victim had first called her mother using a phone offered by the Accused. She was emphatic that she had wanted a Doctor to examine the victim and that the school headmaster had agreed to that so that final confirmation of the nurse's findings is obtained but the school closed for holidays before that was done.

The prosecution was criticized in submissions for failing to prove all the ingredients of the offence save for the age of the victim. Counsel pointed out that the contradictions in the evidence of the victim and that of PW2 wondering whether indeed PW2 came to the victim's rescue and whether this was a case of repeated defilement. The denial by PW3 that he received no call from PW2 and the purported hijacking of the investigations from Police by PW3 were pointed out and especially the failure by the Prosecution to introduce in evidence the results of the probable defilement from Echo Clinic. Only the Urinalysis results were exhibited. Counsel alluded to a possible collusion between PW3 and PW4 implying the results by the latter were designed to aid PW3 in making financial demands on the school. The failure to call the Investigating Officer in the case was also attacked and Court was invited to adversely construe this against the Prosecution as an attempt to conceal information.

Prosecution maintained that all the ingredients of the offence were proved. The age of the victim was not contested, the victim narrated how the defilement on her was carried out by the accused and how the subsequent reports to PW2, PW3 and DW3 amounted to corroboration of the victim's evidence. It was further submitted that the report by PW4 amply confirms penetration. Counsel for the Prosecution pointed out there was no mistaken identification by the victim as she knew the accused well and wondered why the school panicked to take the victim to hospital before informing the parents. Prosecution questioned why the nursing officer who examined the victim could not be called in Court yet she was only 50 kilometers away from Court and invited Court to construe this as an effort to conceal the truth. Counsel concluded there was an intention to conceal the truth in the interest of protecting the reputation of the school employing the Accused. Prosecution on the other hand

submitted that PW3 as a responsible parent involved Police which the school had failed to do. Prosecution justified the absence of the Investigating Officer from Court as she had no relevance given the nature of evidence adduced by other witnesses.

It is trite law that in Criminal cases the Prosecution bears the burden of proving its case beyond reasonable doubt and the burden does not shift upon the accused except in very few circumstances where statutory Law specifically provides so. This does not however mean that it is proof beyond any shadow of doubt but that the Prosecution case must be strong, reflecting a high degree of possibility that the Accused committed the offence in question.

See: Woolmington Vs DPP (1935) AC 462; Miller Vs Minister Of Pensions (1947) 2 All ER 372; Bigirwa Edward Vs Uganda Crim. App.27 of 1992

The Prosecution in the instant case has the duty to prove that the victim was under fourteen years of age at the time the alleged offence was committed; that a sexual act was performed on the victim and that it is the Accused who performed the sexual act on the victim.

As to whether the victim was below the age of fourteen, Court had the opportunity to observe the victim giving her testimony, had occasion to study the medical reports submitted by both the prosecution and defence counsel and heard from PW3 the father and DW3 the school matron. All the evidence confirmed that the victim was six years in Primary One at the time the alleged defilement took place. It has been held before that the best evidence of age is a birth certificate however in its absence, the evidence of a person such as a close relative who is well acquainted with the victim is admissible. PW3 and DW3 were well acquainted with the victim. This element is proved beyond reasonable doubt

See; Uganda Vs Enock Babumpabura Crim. Case 135 of 1992.

Proof of a sexual act having been performed on the victim was a point of serious contention precipitated by the suspicion and mistrust between the School Authorities and PW3, the father of the victim. This was founded on the accusations that the School was concealing evidence to protect its reputation and on the allegation that PW3 had a motive of extorting money from the School. I need to observe that no evidence of any nature was brought to Court indicating a financial demand on the School made by PW3. The allegation came through a question asked in cross examination.

Evidence of sexual intercourse is usually proved by the victim's own evidence and corroborated by medical evidence or other evidence which must be sufficient to prove the fact beyond any doubt if any Court has to rely on it to convict.

See: Hussein Bassita Vs Uganda SCCA 35 of 1995.

There was the evidence of the nursing officer at Rugarama Health Centre who on the 4th August 2014 concluded that there had been no penetration of the victim's private parts. This was contradicted by the evidence of PW4, Dr. Musiimenta Emmanuel whose findings in the 8th August 2014 examination confirmed forceful penetrative sexual assault on the victim. The only agreed issues by the two Medical Experts in Court was that the possibility of the victim's vagina allowing in a tip of a finger was plausible on account of age and that the best evidence of a sexual assault is obtained within the first five days.

This Court had no opportunity to observe and examine the Nurse named Ruth who carried out the original medical examination allegedly in the presence of DW3.DW1, Dr. Atukunda Medard told Court that much as he did not doubt the competence of that Nurse to carry out an examination of the kind she did, it would have been him a Medical Officer to do it. He further could not confirm how the examination was done save for the evidence of the Health Facility letterhead, hand writing and signature of the Nurse called Ruth.

On the other hand Court had the opportunity of observing PW4, Dr.Musiimenta Emmanuel who explained the procedure he used in arriving at his conclusion and justified why he referred the victim for further tests. His evidence relating to the findings was subjected to cross examination and i wish to observe that his report made on the sixth day from the date of alleged defilement resonates with the finding of the "*healing rugged edges*" in the report. The symptom of the pain in the lower abdomen reported by the victim to DW3 on the 2nd August 2014 and mentioned in the Police statement exhibited in Court was further echoed in the report by Dr.Musiimenta in the report he made on the 8th August 2014.These two observations in my finding corroborate the evidence of the occurrence of a sexual act on the victim. I believed the evidence of PW4 in the circumstances since Nurse Ruth could not be availed to be examined on how she carried out the examination to support her disputed findings.

The victim herself related to Court what happened to her and how it happened naively referring to it as a rape and to her vagina as her anus which in the opinion of this Court were

not unexpected of a naïve and innocent girl of her age. It is also not disputed that there were contradictions in the evidence of the victim and PW2 relating to the first reporting of the incident, whether it was the first time for such to happen to the victim and whether PW3 was informed immediately on phone. I observed both PW1 and PW2 in Court and I never for once formed an opinion that they were untruthful witnesses telling lies to deliberately mislead Court. I attributed the contradictions to the age of the witnesses and the passage of time from the date of the alleged incident and whatever the case, the contradictions were minor and not pointing at deliberate untruthfulness.

See : Tajjar Vs Uganda CA Crim.App 167/1969(EA);Sabuni Vs Uganda {1981}HCB1.

I fail to find any justification in my mind as to how and why a six year old girl could be used to consistently tell a lie against a canteen operator and when the Parents could have contrived such a Plot. I have further failed to reconcile myself to the proposition that PW2 Rachael would want to spoil the name of the Accused as alleged in Court. I have further failed to agree to the suggestion that PW3, a parent of the victim could have contrived such a plot as this to acquire monetary benefit from the school employing the Accused. On the basis of the above evidence and analysis, it is the finding of this Court that a sexual act was performed on the victim on the 2nd August 2014.

PW1, the victim was the only person who testified against the accused as the perpetrator of the sexual act. Other witnesses learnt of it on being told by her. PW2 did not witness the defilement but allegedly learnt of it from other girls before forcing PW1 to explain what happened. DW3 learnt of it from the victim on the same day in the evening and PW3 learnt of it on the 8th August 2014 when the victim went home for holidays.

It is not disputed that the Accused and the victim knew each other well. The Accused confirmed the monetary deposits the victim's mother used to make for her provisions from the school canteen and admitted serving the victim twice on the 2nd August 2014. The Accused was the only Canteen Operator at the School who also admitted allowing the victim contact her parents using his phone. I have warned myself and I am fully satisfied by the evidence on record that there could have been no error in the identification of the accused as the perpetrator of the sexual act on the victim

See; Roria Vs R [1967}EA 583;Bogere Vs Uganda SCCA 1 of 1997

Section 40 of the Trial On Indictments Act requires corroboration of the unsworn evidence of a child witness before Court can base a conviction on it. The victim informed Court that she first reported the sexual act on her to PW2.DW3 told Court and recorded a Police statement confirming that the victim narrated to her what happened on the 2nd August 2014 in the evening and that she had also reported to the Senior woman teacher who happened to be the Victim's class teacher.PW3 told Court that the victim narrated to him what happened on the day the school closed for holidays. The Accused, DW2 confirmed that the victim narrated the events to PW3 while they were in the vehicle moving to the Police station. As I have found here in above, the medical report made on the 8th August 2014 by Dr.Musiimenta confirmed the performance of a sexual act on the victim. The evidence of the reports made by the victim naming the perpetrator and the medical evidence of PW4 fully satisfy the requirements of the above legal provision.

See: Mayombwe Patrick Vs Uganda CA Crim.App.No.17 of 2002.

I do not find fault in the failure by the Prosecution to call the Investigating Officer which is a recommended but not mandatory practice and whatever the case, the Law allows the defense to call any witness named and not called by the Prosecution if his/her evidence is crucial to its case .In the same breath i did not believe that PW4,Dr.Musiimenta was untruthful and connived to issue a false report in aid of the machinations of PW3.The fact that the victim was referred to him by a Police Officer and to a Clinic in the same Police premises despite the absence of a third party in the examination room do not in my view imply connivance. I take it that the presence of a third party in the examination room is intended to safeguard vulnerable victims from possible abuse by unethical examining officers which explains why they must not necessarily be medical experts.

Consequently, I find the Accused guilty of the offence of Aggravated Defilement Contrary to Section 129(3) and 4(a) of the Penal Code Act and I accordingly convict him.

Moses Kazibwe Kawumi

Judge

23rd January 2017.