

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE

CRIMINAL CASE NO.0122 OF 2015

UGANDA

PROSECUTOR

VERSUS

TWESHIMYE DEUS

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

Tweshimye Deus was charged with Aggravated Defilement contrary to Sections 129(3) and 4(a) of the Penal Code Act. The Prosecution contends that on the 18th April 2014 at Mboha Cell in Kanungu District the accused performed a sexual act with Ahumuza Megan a girl below the age of 14 years.

The Prosecution and the Defence agreed to admit in evidence the medical report on the examination of the Accused at Kanungu Health Centre on the 23rd April 2014. The Accused was at the time reported to be 18 years of age and of normal mental status.

The Prosecution called five witnesses while the Accused did not call any witness.

PW1 Augustine Kalajja examined the victim at Kanungu Health Centre on the 24th April 2014 and found her to be four years of age. The victim had bruises in the medial aspect of the upper right thigh, the hymen was intact and he saw no sign of injury to the vulva and labia. He attributed the injuries to a blunt object and further reported that the victim was on medication for post exposure prevention of HIV. When examined in Court, PW1 insisted the injury could not have been occasioned by a penis and that the bruises were about 15 centimeters from the vagina. His suggestion was that a stick could have been used to cause the injuries which he claimed were more than 7 days old and healing.

PW2 Ndyamuhaki Leah, the victim's mother told Court that she left the victim at home with the Accused to go to the garden and on return she found the victim not walking properly. She asked the victim who told her that the Accused had put something in her when he called her into his room and made her sleep on his bed. The victim's knickers were also torn but it was

not exhibited in Court. PW2 told Court that she examined the victim and saw a watery substance which was whitish and sticky flowing out of the vagina and that she was bleeding. The victim's father later came and the accused was taken to Police and the victim was taken to Bwindi Health Centre and subsequently Kanungu Health Centre. She further told Court that the victim's genitals were swollen the following morning.

PW3 Agaba Moses is the victim's father who came back home when he heard PW2 making an alarm that the Accused had defiled the victim. He claims to have seen sperms on the victim's private parts and bruises on the thighs. He arrested the accused together with the Local Council Defence secretary and took him to Kyeshero Police Post. When he asked the victim, she narrated that the accused put her on his bed and lay on top of her and confirmed that PW2 had examined the victim too before he came back home.

PW4 the victim gave evidence not on oaths. She identified the Accused as Deus who stays at their home and who called her into his house and put a thing into her and that she bled and cried. PW4 pointed at her vagina as the part of the body the accused put his thing. She told Court that she told PW2 and PW3 about it later when they came home. She further told Court in cross examination that she got bruises on the part the accused put his thing and that the accused removed her knickers and slept on the bed with her.

PW5 Inspector Kifaka Michael was deployed at Kanungu Police station in 2014 when the Officer in charge of Investigations instructed him to record a Charge and Caution statement from the Accused. His testimony was that the accused confessed to what he had done and requested for forgiveness so that the matter is resolved at Police. He attributed all what happened to the influence of Satan. The statement was recorded in Runyankore-Rukiga language and was read back to the Accused. The witness told Court that he had not asked the Accused the language he was more comfortable using when recording the statement he admitted.

DW1 Tweshimye Deus denied sexually assaulting the victim but acknowledged knowing her since he had spent one year with the family in the same homestead. He told Court that he had lent 180,000/= to PW3 who was meant to pay it back on the day the accused was arrested on allegations that he had defiled the victim. He denied the contents of the Charge and Caution statement claiming that all he told Police was that PW3 owed him money and that the statement was not read back to him before he thumb marked it. He confirmed to Court that

they used the Rukiga language at home where he had worked for over 12 months and was a friend to the members of the family.

Counsel for the Prosecution and the Accused opted not to make submissions and invited Court to make a decision on the basis of the evidence on record.

The prosecution carries the burden to prove all ingredients of the offence beyond reasonable doubt and this does not shift all through the trial. The Law further provides that a conviction must be based on the strength of the evidence adduced by the Prosecution and not on the weakness of the evidence brought by the accused person.

To secure a conviction on a charge of Aggravated defilement, the Prosecution is required to prove the following ingredients;

- i) That the victim was below 14 years old at the time the offence was allegedly committed.
- ii) That a sexual act was performed on the victim and;
- iii) That it is the accused who performed the sexual act on the victim.

The report on the examination of the victim indicates that she was 4 years on the 24th April 2014. PW2 and PW3 told Court that the victim was 6 years at the time they both gave evidence in Court and I observed her during the trial. It is not in doubt that the victim was below the age of 14 at the time the offence was allegedly committed on the 18th April 2014. This ingredient of the offence is proved beyond reasonable doubt.

Performance of a sexual act on the victim was denied by the Accused who however did not deny that he was at home with the victim at the time the offence was allegedly committed. PW2 and PW3 confirmed examining the victim and saw bruises, blood and a whitish sticky substance on her private parts. There was however contradiction in their evidence as to whether the blood was from the victim's vagina or from the fresh bruises on the upper thigh. PW1 who compiled the medical report on the 24th April 2014 confirmed the bruises were in the process of healing and confirmed that the hymen was intact. In his opinion there was no penetration since the hymen was intact and the bruises could have been caused by a blunt object like a stick or hands to open the thighs.

I agree with the opinion of PW1 in respect of the possible cause of the bruises but not on the assertion regarding penetration. A sexual Act is well defined in the Penal Code Act as the penetration of the vagina, mouth or anus, *however slight*, of any person by a sexual organ. I do not think the accused merely invited the victim to open her thighs forcefully as evidenced by the injuries. The observed whitish sticky substance on her vagina must have resulted from penetration and I must add that the rapture of the hymen is not the sole evidence of penetration. Any slight penetration of the vagina is sufficient to sustain a conviction in a sexual offence. It is thus the finding of this Court that there is satisfactory evidence of a sexual act having been performed on the victim.

See: Uganda Vs John Kiiza [1994—95] HCB 19

The accused denied sexually assaulting the victim and there was no direct evidence from any of the witnesses. The victim was however very firm and consistent in her evidence that it is the accused who invited her to his room and made her sleep on his bed. The victim and the accused had stayed in the same homestead for over 12 months and there was no suggestion that there could have been any error in identifying the accused by the victim. The act was allegedly committed in the morning hours, in an environment the victim was familiar with and by a person she knew and by the nature of the act itself, the two must have been close to each other. It is my finding that there were favorable factors for identifying the accused by the victim who was the sole identifying witness in this case.

The accused in his defence suggested that he was framed by PW3 because the latter owed him 180,000/=. This was not at all put to PW3 in cross examination and I consider it as an afterthought. It is such an important piece of evidence that the Accused should have introduced when PW3 was giving his evidence in Court. I do not believe this defence which in any case was not substantiated with supporting evidence. I find satisfactory evidence to support the ingredient of participation of the accused in performing a sexual act on the victim.

The confession statement by the Accused was retracted. He told Court that he speaks Kifumbira and not Rukiga much as he can hear it. He further told Court that the statement was not read back to him and it does not contain what he told Police about the debt owed him by PW3. PW4 however insisted that the accused was speaking Rukiga when he was brought to him for recording the statement. PW4 told Court he is a Munyankole from Rukungiri District.

All through the trial, the Accused who was ably represented by Counsel on state brief followed the proceedings conducted in English and interpreted in Rukiga. When the accused was called upon to defend himself is when he claimed he required an interpreter for Kifumbira and Court provided one as requested. It is trite Law that a repudiated confession calls for added corroboration if Court is to base its conviction on the same. I give the accused the benefit of doubt regarding the language in which the confession was recorded in this case. The statement itself does not indicate that it was read back to the accused and PW5 confirmed to Court that he did not ask the accused the language he was most conversant with before recording the statement. I disregard the confession statement inter alia for those reasons.

A careful reading of the charge and caution statement attributed to the accused also shows that it does not amount to a confession in Law. **The Black's Law Dictionary, 6th Centennial Edition (1891—1991)** defines a confession as;

“A voluntary statement made by a person charged with the commission of a crime or misdemeanor communicated to another person wherein he acknowledges himself to be guilty of the offence charged, and discloses the circumstances of the act or the share and participation which he had in it.”

The impugned confession does not meet the above criteria. The accused is merely recorded to have stated that he sought forgiveness and the matter be resolved at the Police station and not in Court as he was tempted by Satan. It does not state the offence committed, the circumstances in which it was committed. It is merely a plea for forgiveness and therefore does not amount to a confession in Law and for that reason too i disregard it as credible evidence.

In **Twinamatsiko Eric Vs Uganda CA Crim.App.N. 2 /1997** it was held;

“A statement is not a confession unless it is sufficient by itself to justify conviction of the person making it of the offence with which he is charged.”

Also see; PC Mulawa Ben & Anor Vs Uganda SC Crim.App.3 of 1993.

I find the evidence of PW1, PW2, PW3 and the victim herself sufficient to sustain the charge of Aggravated defilement brought against the Accused without reliance on the charge and caution statement i have disregarded. The victim gave evidence not on oath and section 40 of

the Evidence Act requires that her evidence be corroborated before a conviction is founded on it. I find the corroboration in the Medical evidence on record. The observations made by PW1 and PW2 relating to the condition of the victim soon after the incident and the immediate reports she made to them implicating the accused as the perpetrator of the sexual act on her.

I am mindful of the need to caution myself before convicting on the evidence of the victim as the sole identifying witness and I duly cautioned the Assessors who advised me to convict the Accused. For the reasons given in this judgment, I am fully convinced that the evidence on record points to the guilt of the accused. I find him guilty of Aggravated defilement and I duly convict him.

Moses Kazibwe Kawumi

Judge

23rd January 2017.