

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO.011 OF 2016

UGANDA

PROSECUTOR

VERSUS

NAKATO CHRISTINE

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was indicted for Aggravated defilement contrary to section 129(3) and(4)(a)(c) of the Penal Code Act .It is alleged by the Prosecution that between the months of January 2015 and September 2015,the accused performed a sexual act with Mwesigwa Jeremiah , a boy of five years.

The victim was examined by Dr.Barungi on the 22nd September 2015 and found to be of normal mental status with no injuries on all parts of the body.He was stated to be five years at the time.The accused was examined by a Medical Clinical Officer on the 21st September 2015 and found to be 22 years with a normal mental status and of negative sero status.Medical forms PF3A and PF24A in respect of both the victim and the accused were admitted in evidence by consent of Counsel under Section 66 of the Trial on Indictments Act.

Kisamba Juliet(PW3) who is the victim's mother learnt of the allegations against the accused on the 20th September 2015.Her evidence was that she was told by her daughter Hannah Nalukwago aged 10,who had been told by the victim that the accused used to suckle his penis and then put it into her vagina.It was stated that the accused would then threaten the victim with assault if he revealed to his parents.PW3 invited the victim to their bedroom and he narrated how it used to happen to both parents.The matter was reported to Police and the accused was arrested.According to PW3 the accused used to do it when the other children in the house had gone to school and before the second maid reported for duty.

Detective Sergeant Tovita Alice(PW4) interviewed the victim who allegedly confirmed the assault on him by the accused who used to suckle his penis and insert it in her 'Susu'.PW4 informed Court that she was led to the bedroom which the accused used to occupy and shown the bed on which she used to sleep with the victim.The bedroom is in the main house shared by other family members.

A voir dire examination was conducted and a finding made that the victim then 7 years was possessed of sufficient intelligence to testify but could not appreciate the nature and import of

an oath.He therefore gave evidence but not on oath. The victim identified the accused as “Aunt Christine who used to cook rice at home.” But did not know where she lived at the time.

The victim told Court;-

”when I was going to play with my friends she called me to her bedroom,then she took me to her bed.She put me on top of her. She was lying down.She did not ask me to do anything.I was not in my clothes.She did not touch me.She did bad.She put her susu in mine.She did it herself.She carried me on top of her.She was not in her clothes.She had removed them by herself.Christine had told me not to tell daddy.”

According to the victim,it happened when he had finished bathing and other siblings had gone out to play and that this was the third time it had happened to him The victim further narrated to Court that he had wanted to tell his parents it happened the second time but they came back home late.He told his sister Hannah Nalikwago when it happened the third time.

The accused denied the allegations and stated that she had stayed with PW3’s family for 3 years and 9 months during which time she had cared for a number of boys staying in the house.The accused denied any grudge with any of the family members and told Court that she stayed in the servants’ quarters and not in the main house as alleged by the Prosecution witnesses.

The accused particularly denied sexually assaulting the victim on the 20th September 2015.She stated that she was at home with all other family members but was arrested at 6.00pm by Police who were brought by PW3.A statement was recorded from her after two days in the cells. She claimed to be owed wage arrears of 490,000/= by PW3 and denied receiving a payment of 150,000/= being wage arrears at the Police station as alleged by her employer in Court.

In criminal trials the Prosecution has the duty to prove all ingredients of the offence. The threshold required to prove the case against the accused person is that the proof must be beyond reasonable doubt The standard is said to have been met if evidence is so strong against the accused as to leave only a remote possibility of his innocence in his favour.

The ingredients the Prosecution is required to prove on a charge of Aggravated defilement are that;-

1. The victim was below the age of fourteen at the time the offence was committed.
2. A sexual Act was performed with the victim.
3. The accused performed a sexual act with the victim.

PW3,the victim’s mother told Court that he was born on the 8th August 2010.Police Form 3A admitted in evidence under section 66 of the Trial on Indictments Act stated the victim to have been five years as at the 22nd September 2015.The victim testified as PW5 which gave

Court an opportunity to observe him. He was then a pupil in Primary two aged 7 years. The above constitute sufficient evidence to prove that the victim was below 14 years at the time the offence was allegedly committed.

Under Section 129(7) of the Penal Code Act, a sexual act means (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or (b) the unlawful use of any object or organ by a person on another person's sexual organ. A sexual organ is defined to mean a vagina or a penis.

The only direct evidence of a sexual act in the instant case is that of the victim himself and there is no corroborating medical evidence or other circumstantial evidence adduced by the Prosecution. It has been held by the Supreme Court however, that the best evidence in sexual offences is normally that of the victim since sexual offences normally take place in secrecy.

Private Wephukulu Nyunguli Vs Uganda SCCrim. Appeal No. 21/2001.

Section 40(3) of the Trial on Indictments Act provides that:-

“When in any proceedings any child of tender years called as a witness does not, in the opinion of the Court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the Court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but 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.”

All the Prosecution adduced in Court was the unsworn evidence of the victim who allegedly narrated what the accused is indicted for to Hannah, PW3, PW4. The important consideration is whether mere narration of the allegation to third parties amounts to material evidence to corroborate the victim's evidence. I do not think it does. Corroboration is constituted by independent evidence that tends to connect the accused with the offence.

I find solace in the passage of Viscount Reading C.J in the Baskerville case (supra) when he held;

“ Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him - that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within the class of offences for which corroboration is required by statute.”

**R V Baskerville[1916—17]ALL.E.R 42;Rwalinda John V Uganda CACrim.Appeal
0113/2012.**

In the absence of other material evidence to corroborate the unsworn testimony of the victim, this Court cannot convict the accused. Contrary to the opinion of the assessors, I acquit her of Aggravated defilement unless she is held on any other lawful charge.

.

Moses Kazibwe Kawumi

Judge

30th January 2017.