THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CRIMINAL SESSION CASE No. 06 OF 2000

UGANDA…… PROSECUTOR

-VERSUS-

SAFARI JACKSON SEBOMANA ALIAS KINWA…….ACCUSED

24/5/2000.

BEFORE: HON MR JUSTICE V.R.K. RWAMISAZI-KAGABA

JUDGMENT:

Jackson Safari alias Sebomana who I shall refer to as the accused in the rest of my judgment is indicted for the offence of defilement contrary to section 123 (1) of the Penal Code Act. It is stated in the indictment that Safari Jackson alias Sebomana on the 6th day of August 198 at Gasoro village, in Kisoro District did unlawful and carnally know Kangabe Winfred, a girl below the age of 18 years.

The accused pleaded not guilty to the indictment and was represented at his trial by Mr Rwaheru while the prosecution was conducted by Mr. William Byansi, the resident State Attorney of Kabale.

The case for the prosecution rested on eight witnesses, six who had their evidence admitted under section 64 of the Trial on Indictments Decree.

In brief, the story is that on 6 August 1998, Agnes Nkundwanabaki (PW2) and mother to the complainant – (PW1) went to cultivate in her garden some distance from her home. She left the victim home with instructions that the victim should take to her some manure.

The victim was on her way to her mother's garden when she was accosted by the accused who she knew by the home where accused stayed. It was about 2.00p.m. The accused offered to assist her in carrying the manure. The victim declined the offer. Then the accused grabbed her, threw her down, pulled off her knickers and then pushed his penis into her vagina as he lay on top of her. She felt a lot of pain in her vagina.

The accused who had a Panga, threatened to cut her if she raised an alarm.

After the sexual act, there was blood in the victim's vagina and on the grass where she had been lying while being sexually abused.

The victim proceeded to her mother to whom she reported that a many carrying a panga and a stem of a tree had raped her.

Unable to walk and feeling pain in her private parts, her mother carried her and they went to report to the chairperson. Bamushaaka Alex (Admitted No.3). Bamushaaka saw the victim weeping and was walking with difficulties.

The same (PW2) had earlier reported to a neighbour Yona Muhawe (admitted No.2) that her daughter Winfred had just been raped by Safari and she wanted to have Safari arrested. Muhawe went to where Safari stayed by he was nowhere to be seen.

They chairman then directed Ndezimana Stephen (alias Muzei) (admitted No.4) to arrest Safari. Ndezimana arrested Safari and delivered him to Kisoro Police Station. The scene of crime was visited by D/CPL Basasa Vian (admitted No.5) who drew a sketch of the scene (Exhibit P.2).

The victim was examined on P.F 3 by Dr Ndangizimana of Mutolere Hospital on the 15/8/98 (admitted as No.1).

The victim according to his finding, was 9 years old, her hymen had been ruptured about 10 days back and her vagina had been penetrated. He noticed blood and some discharge in her vaginal canal. His report was exhibited as exhibit P.1.

The accused was also examined by George Halera, (a Clinical Officer of Kisoro Hospital (admitted as No.6) on the 11/8/1998. The accused was found to be 19 years old, had no injuries and was mentally normal.

The accused stated on oath that he never defiled the victim, he did not know the small girl and did not leave his home that day as he had a headache. He denied knowing Haguma Agnes (PW2). But later he stated there was a case between his wife and PW2 when the latter's goats strayed over their garden and PW2 was fined Shs.30, 000/= which was received by the accused's wife.

In a criminal case like this one the burden of proving every ingredient of the offence lies on the prosecution. The accused had no burden to prove his innocence. This burden never shifts except in a few statutory exception but this is none of those exceptions. The prosecution must succeed on the basis of its strength and not on the weakness of the defence. In case of any doubt, that doubt must be resolved in favour of the accused.

See

1.Wamongo and others Vs Uganda [1976] HCB 74.

2. Sekitoleko Vs Uganda [1967] EA 531.

Secondly, in every sexual offence, court must look and find corroboration of the complainant's testimony before a conviction can be returned against the accused.

See:

1. ***Chila and Another Vs Republic [19670 EA 722.***

2. R Vs Baskervile [1916] 2 KB 658.

3. Jackson Kitutu Vs Uganda [1976] HCB 8.

Lastly, the testimony of the victim requires corroboration as it was not given on oath by virtue of her tender age.

See:

1.*Patrick Akol Vs Uganda Criminal Appeal No. 23/1992 (SC).*

2. R Vs Campbell [1956] 2 ALL ER 272.

I warned myself as well as the assessors on all these three aspects of the law before proceeding to analyse the evidence in support of each element in the indictment.

I also addressed the assessors as I do to myself that this case depends on a single identifying witness who is a child of tender age and the approach to such evidence.

The offence with which the accused is charged consists of three elements which the prosecution must prove beyond reasonable doubt namely:-

a) That the victim was under the age of 18 years when she was sexually abused.

b) There was sexual intercourse upon her.

c) It is the accused named in the indictment who had sexual intercourse with her.

On the first element of age,

Counsel for the accused conceded that the victim was under the age of 18 years on the 6/8/1998. For record purposes, I will add, the age of the victim was testified upon by her mother who stated the victim was 10 years and Doctor Ndagizimana who put her age at 9 years on the 15/8/1998. Lastly the victim's appearance, when she appeared in court leaves no doubt that the girl was a minor, of tender age and clearly under the age of 18 years.

Similarly, counsel for the accused conceded that there was sexual intercourse on the victim, Winfred Kangabe. But it was also testified upon by Winfred Kangabe, that the

accused pushed his penis into her vagina, she felt pain and the grass around and her dress were blood-stained. (It is a pity the dress was not exhibited in court.

Even in the absence of the blood-stained dress, I find sufficient corroboration of her story in the evidence of Dr Ndagizimana who found she had been penetrated, her hymen was ruptured about ten days back and there was blood and discharge in her vagina. Further corroborative evidence is contained in the evidence of her mother (PW2) who examined the victim when she came to the garden and saw injuries on the private parts, saw blood in her vagina and the victim was crying. The chairman – Bamushaaka also testified that the victim – when they came to report to him was weeping and walking with difficulties.

I find, from the collection of this evidence, that Winfred Kangabe was subjected to sexual intercourse on that day and the same fact has been amply corroborated by the conduct of the victim after the event and the observations of her mother, Bamushaaka and Dr Ndagizimana.

Was it the accused who defiled her? It is a fact that these two aspects in this case which the court must address before deciding on the participation of the accused.

The first, it that the victim gave unsworn statement because of her tender age. Her evidence needs to be corroborated as a matter of law besides the other aspect of its being a sexual offence.

The court tested her in the voire dire proceedings. She was found capable of giving evidence. She understood the concept of telling the truth as against lies though she did not appreciate the idea of the oath.

I listened to her testimony, she was firm and unwavering as to what happened to her on the 6/8/1998. I therefore believe her story and treat her as a truthful witness.

Refer to:- ***Twonomuhwezi Leuben Vs Uganda Criminal Appeal No.40/1995 (S.C).***

I next warned the assessors as I do to myself how the evidence of a singly identifying witness should be approached and need for corroboration in some cases.

This offence was committed in an isolated place where Winfred Kangabe is the sole witness to the event of identification of the suspect.

The law has been stated in several cases to be that the accused can be convicted on the evidence of a single witness, but before doing so, the court must test the evidence of that witness regarding identification especially when the conditions favouring correct identification are difficult so that there is no possibility of any mistaken identity. I am supported in my above statement of the law by the Court of Appeal decision in the case of ***Roria Vs Republic [1967] EA 583 where at P. 584 – Court of Appeal held:***

*"Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is know that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt from which the judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free any possibility of error***".**

See also:

1. ***Uganda Vs George Wilson Ssimbwa Supreme Court Criminal Appeal No. 37/2995.2.***
2. ***Uganda Vs Kaweke Musoke [1981] HCB 12.***

As for the conditions favouring correct identification, these have been described to mean – length of time the suspect was with the victim during the commission of the offence – the distance between the victim and the suspect – the means (source) of light existing – the familiarity of the witness with the accused.

See:- ***Abdalla Nabulere & 2 others Vs Uganda Criminal Appeal No. 9/1978 (Supreme Court).***

The offence in the present case was committed at 2.00p.m., in broad day light and in a banana plantation off the path. The accused held what appeared a benevolent dialogue (offering to assist her with her luggage) before he lifted her to the banana plantation. The accused had a panga and a stem (branch) of a tree.

The victim described the accused by the place where he stayed at Sebahingyi's home to her mother and Alex Bamushaaka and the panga and stem of a tree he was holding.

Kangabe's observation of the accused is strengthened by her identification of the accused at the house of Bamushaaka after the arrest of the accused. She pointed at the accused before Bamushaaka and her mother that it was the accused who had defiled.

The description of the objects the accused had at 2.00p.m. fitted squarely with what PW2 had seen him with at 9.00a.m. on the same day as she went to cultivate.

While the prosecution cannot rely on lies of the accused to bolster its case or to prove the guilt of the accused, court can sometimes find corroboration I the lied told by the accused.

In this regard, I find the accused lies that he did not know the victim and her mother as corroboration of the accused's identity in the commission of the offence.

PW1 stated she knew him as a person who lived near them at Sebahingyi's home. PW2 also said she knew him. But after the accused said he did not know PW1 and PW2, he turned around to say that there was a case four months before his arrest, between him and PW2 over the latter's goats trespass of his gardens/crops. The accused categorically stated that it was his wife who appeared I court on behalf of his family and received the fine of shs.30,000/= from PW2 after the "trial".

From the foregoing story, I find the accused was telling lied and I treat his lies as corroboration of the victim's story as to his identification.

See***: Juma s/o Ramadhani Vs Republic Criminal Appeal No. 1/1973 (EACA).***

I therefore find on the third ingredient that the accused was properly identified by the victim and her testimony has been corroborated by that of PW2 and himself.

Accused has raised the issue of a grudge as a basis for PW2 framing up the case against him. PW2 denied the existence of any grudge and a previous case over goats between her and accused and or his family. Moreover this grudge cannot exist between persons who are unknown to each other since accused denied knowing both PW1 and PW2. I therefore find there was no grudge between accused and PW1. I reject both the story of the accused that he was not the one who defiled the victim. I hold that the prosecution has negatived his alibi and put him squarely at the scene of crime in terms of time and place. In this conclusion I am applying the law relating to the defence alibi.

It is settled law that where the accused persons puts up an alibi as an answer to the charge, he does not assume any burden of proving that answer. If the alibi raises a reasonable doubt as to the guilt of the accused, it is sufficient to secure an acquittal.

See:

(1) Leonard Anitheth Vs Republic [1963] EA 206.

(2) **R Vs Johnson [1961] 2 ALL ER 969.**

(3) **Mohamed Mukasa & Another Supreme Court Criminal Appeal No. 27/1995**

After evaluating all the evidence of the prosecution and the defence, I find that the prosecution has proved its case beyond reasonable doubt on all the elements of the case. I reject the defence as nothing but a park of lies. In coming to his conclusion I have also taken into account the helpful and able submissions of both counsel. Both assessors advised me to convict the accused as charged. In agreement with the opinion of both assessors, I find the accused guilty of the offence of defilement and convict him under section 123 (1) of the Penal Code Act.

V.R. KAGABA

JUDGE

24/5/2000.