THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MBALE

HCT-04-CR-SC 0046/2000

UGANDA …………………………………………………………………………PROSECUTOR

VERUS

ODOI GIRIFASIO ……..…………………………………………………………ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE RUGADYA-ATWOKI

JUDGEMENT

The accused Odoi Girifasio was indicted for defilement contrary to section 123 (1) of the Penal Code Act. It was alleged that on 16.5.1999, at Apokor village in Tororo District, the accused had unlawful sexual intercourse with Kevina Isilo who was then below the age of 18 years.

The accused denied the offence. The prosecution therefore had to prove the charges against him. In a criminal offence, the burden to prove the charge lies on the prosecution. It so remains throughout the trial except in a few statutory offences, and defilement is not one of them. Each ingredient which constitutes an essential element of the offence must be proved. The standard of proof is one beyond reasonable doubt See *Sulaiman Katusabe v Uganda S.C CR. App No.* 7 *of 1991*. *Bogere Moses and Another v Uganda S.C CR. App No 1/97 (both unreported) and Sekitoleko v Uganda [1967] E.A 531*.

In an indictment for defilement, the prosecution must prove the following ingredients.

1. that the girl victim was below the age of 18 years on the material day;
2. that she was on that material day involved in an act of sexual intercourse, and
3. that the accused person is the one who carried out the act of sexual intercourse complained of.

The prosecution produced a total of six witnesses in the attempt to prove the indictment. The accused gave a sworn statement but called no witnesses.

It was the prosecution case that on 16.5.1999 at about 11. 00 Am., Isilo Kevina was coming from church. The accused, whom she knew very well, was holding cassava. He called her to come for some. He was in a millet garden. Isilo Kevina went to him, and he grabbed her neck, and tore her pants. He started having sexual intercourse with her. She raised an alarm, and accused's sister in law- Mary Athieno came. The accused ran away and left her crying. He was chased and arrested later. Isilo Kevina felt a lot of pain in her private parts. She had not had sexual intercourse prior to this incident.

Athieno Mary was the only eyewitness to testify. She said she was called by one Peace to come and see what accused was doing. She moved to the scene and challenged the accused, who had removed his trousers and was having sexual intercourse with Isilo Kevina. Immediately, she raised an alarm and both the accused and Isilo Kevina ran away. Peace had apparently witnessed the incident before going to call PW6, Mary Athieno to also come and witness the same.

Federika Amusugutu is the mother of Kevina. She was informed that her daughter, Kevina who was 10 years old then had been caught with the accused as she was returning from church. She moved to the scene immediately, and found Kevina lying on the ground. The accused had been arrested and a mob was beating him up. She proceeded to clean up Kevina who was full of sand. She observed blood in Kevina's private parts. She found that Kevina's pants had been torn.

The L.C.I Chairperson of the area Mr. Obuin Elgenio- PW3 came and took the accused to the police where PW2 D/C Baraza George re-arrested him.

Dr. Kidaga, on 16.5.1999 at about 3.00 p.m. examined Kevina Isilo. He found her to be aged between 10-12 years. Her hymen was ruptured. But he could not ascertain the exact date of the hymen rapture. What he did determine was that the hymen had ruptured at least seven days prior to the examination. He did not discover any signs of recent sexual intercourse and he said if anything had taken place within the preceding 24 hours, he would have noticed. He found no injuries on Kevina's body or on her private parts. He could not make any specific conclusion about the cause of rapture of the hymen. He however did conclude that Kevina Isilo was not

strong enough to put up resistance. The doctor's examination report on Kevina was admitted in evidence: as was his report of examination of the accused which he carried out on 22.5.1999. He found the accused to be of sound mental disposition.

The defence on the other hand consisted of the sworn testimony of the accused. He testified that he is a sickly and lame 63 years old man; who walks with the aid of a clutch. On 16.5.1999, he was at home where he had spent 11 days without going out due to his ailment. On the material day, at about 2.00 p.m. one Omyokori called him to come and meet someone. On going, four people surrounded him, and grabbed his clutch which they used to beat him up; on allegations that he had defiled a small kid. That kid, Kevina was eventually brought and she was asked repeatedly whether he, the accused had defiled her On the third questioning, and with a lot of harassment from her uncle, Kevina eventually stated that accused had had sexual intercourse with her. He proposed that they carry out a physical examination on her, but the mob refused. Instead they dragged him under torture to the police station. He said that PW6- Mary Athieno came to testify against him because there was a land dispute between him and her husband generally and the Komolo clan people, as he himself was of another tribe. They did not like him, and Athieno's husband had even sold his land. Just as he was planning to sue for his land, they framed up this charge against him in order to put him out of circulation. He denied offering maize to Kevina earlier that day. He insisted that the land in dispute was his. It was not just given to him by those who wanted to grab it, just because he was not of their Komolo tribe. That was the defence case.

Under provisions of Section 38 (3) of the trial on Indictments Decree, where evidence of a child of tender years is given not on oath for the prosecution, it must be corroborated by other independent evidence before a conviction can be founded on such evidence. A child of tender years has been held to be one who is below the age of 14 years. See *Patrick Akol v Uganda S.C. Cr. App No 23/1992.*

In the instant case the girl victim Kevina silo was said to be 10 years old and she gave her testimony after a voire dire, not on oath. Her evidence therefore, as a matter of law requires corroboration.

It has become the practice of this court that in sexual offences, the evidence of a prosecutrix ought to be corroborated by independent evidence before a conviction is grounded on such evidence. The court and assessors must warn themselves of the danger of basing a conviction on the uncorroborated testimony of the complainant in a sexual offence. But after such warning, the court could proceed to convict, even in the absence of such corroboration, if it is satisfied that the complainants evidence is truthful. See *Remegious Kiwanuka v Uganda (supra)* and *Chila and Another v Rep* [1967] E.A 722.

Corroboration evidence is independent evidence which points to the guilt of the accused. See: *Sam Buteera v Uganda S.C Cr. App No 21/1994 (unreported)* and the cases cited therein.

In this case therefore, there is need for corroboration evidence both as a matter of practice, and in law.

With regard to the ingredient of age of the victim, Kevina Isilo being under 18 years; this was conceded by the defence, and I will not therefore waste any more time on it. It is therefore proved beyond reasonable doubt by the prosecution that Kevina Isilo was, on 16.5.1999 a girl below the age of 18 years.

The prosecution must also prove that there was an act of sexual inte5course involving the girl/ victim. Prosecution sought to rely in proof of this ingredient, on the testimony of Kevina Isilo, who testified that accused had sexual intercourse with her. Athieno Mary also testified, or as it were corroborated the testimony of Kevina. She said that she came up to, and found accused top of Kevina, having removed his trousers. The other evidence in corroboration would be that of Kevina's mother, who testified that when she got a report that her daughter had been caught with the accused, she rushed to the scene and found Kevina lying down. She was full of sand and her pants were torn. *In Safari Innocent v Uganda* S.C Cr. App No 20/1995 (unreported), it was held that evidence of corroboration in a defilement case could include medical evidence, the fact of the complainant's torn knickers, her distressed condition, the medical evidence that her hymen was torn, accused's conduct including his confession to, and begging for mercy from the complainant's mother, and his disappearance from his home immediately after the incident, It is

to be noted that the above is not an exhaustive list, nor must all of the above be shown to exist before a conviction can be entered.

Mr. Okwalanga, learned counsel for the accused submitted strongly that the medical evidence was Inconsistent with sexual intercourse having taken place on 16.5.1999 as alleged. This put in very serious doubt the evidence of Kevina and Athieno. Ms Susan Okalany on the other hand contended that even if the doctors' testimony was inconclusive on whether or not sexual intercourse had taken place, court should find from the testimony of Kevina and Mary Athieno, the complainant, and sole eye witness respectively that sexual intercourse had indeed taken place. The learned Resident State Attorney relied on the case of *Albino Ojok v Uganda* (Supra) for the proposition that where the medical evidence was inconclusive, court could rely on the evidence of eye witnesses to prove the act of sexual intercourse. I read that Supreme Court decision carefully- thanks to the learned Resident State Attorney who made a copy of the judgment available to court. That case was about the admissibility of evidence of children of tender years when a voire dire had not been conducted. In the course of the judgment, the court found as follows, 'The doctor concluded that the injuries were consistent with either the use of a finger or the male organ. But although the doctor was unable to state that penetration had only been due to the male organ, nevertheless the court reached the conclusion that the appellant was guilty of the charge (of defilement) because of the evidence of what Judith and Bonny had seen the appellant doing to the child Christine." The evidence of the two young witnesses Judith and Bonny referred to in this case was that they opened the door to the bathroom and found the appellant squatting down having removed his trousers, and holding the young girl across his thighs in the act of penetration. The Supreme Court confirmed the conviction on the strength of the testimony of these two young witnesses.

It has to be pointed out that in that case, the doctor, though inconclusive as to the cause, he was definite about the fact that there had been penetration. The issue was whether it was as a result of sexual intercourse or insertion of a finger; and this is where the testimony of the two young eye witnesses became crucial.

In the case before me, according to Kevina, the complainant, there was sexual intercourse at about 11.00 a.m on 16.5.1999. Mary Athieno said that she witnessed this intercourse, as she

found the accused on top of Kevina, having removed his trousers. At about 2.40 p.m. that same day, the doctor examined Kevina. He found that Kevina's hymen was raptured at least seven days previously. He did not find any signs of recent sexual intercourse. He was quite definite and categorical in that. He said, if any sexual intercourse had taken place within the last 24 hours he would have been able to tell. This case is therefore clearly distinguishable from *Patrick Akol* (supra). In this case according to the Doctor, there was no sexual intercourse as alleged. There were other matters which brought unease to me when dealing with this ingredient. Mary Athieno, the only eye witness stated that when she approached the accused and Kevina, and on challenging the accused, both himself and the girl Kevina ran away. As learned counsel for the defence wondered, why should Kevina have run away yet Mary Athieno obviously had come to her rescue. Would she ran off with her assailant on being availed a respite from her woes. Be that as it may, her mother testified that on being informed that Kevina had been caught with the accused, she rushed to the scene and found Kevina lying down, full of sand. Would a girl who had run away from the place of her distressing agonizing experience immediately return to that scene. One would have thought that she would run to the comfort and safety of her home.

This uncertainty was not made easier by the failure by the prosecution to call as a witness the lady Peace who is said to have witnessed the incident first.

It has been often repeated that the case is not won on the weakness of the defence case, but on the strength of the prosecution evidence. Each ingredient which constitutes an essential element of the offence charged must be proved beyond reasonable doubt. *Woolminqton v D.P.P [1953] A. C 462. Isreal Epuku s/o Achietu V R (1934), EACA 166.*

From the evidence above, I am left in doubt as to whether Kevina Isilo was on 16.5.1999 involved in an act of sexual intercourse. That doubt in me must therefore be resolved in favour of the accused.

Having found as I have hereinabove stated, I do not consider it necessary to proceed with a consideration of the third ingredient. The lady and gentleman assessors in their individual opinions, advised me to acquit the accused. I have no reasons to differ from their advice.

I accordingly find that the prosecution has not proved the charge against the accused beyond reasonable doubt, and I therefore acquit him of the charge of defilement contrary to section 123 (1) of the Penal Code Act.

He is to be set free and at liberty forthwith unless he is held on other lawful charges.

It is so ordered.

RUGADYA-ATWOKI
JUDGE
25.8.2000