THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CR-CS-0012/1999

UGANDA ………………………………………………………………………......PROSECUTOR

VERSUS

WALYAMBOGA KAZIMINI ……...………………………………………………ACCUSED

BEFORE HON.MR.JUSTICE D.N.MANIRAGUHA

JUDGMENT

The accused person is indicted for defilement C/S. 123 (1) of the Penal Code Act, and the particulars are that "Walyamboga Kazimini, on the 25th day of October, 1998 at Lukonje village in the Mbale District, unlawfully had sexual intercourse with Polina Bwayilisa a girl under the age of 18 years."

On arraignment the accused denied the charge and so the prosecution bears the burden of proving each ingredient of the offence

See: - R-vs-Sims (1946) 1 KB, 531.

The burden never shifts from the prosecution who must prove the charge beyond reasonable doubt.

Serugo -vs- Uganda (1978) H.C.B.1. Leonard Ariseth -vs- Republic (1963) E.A.20.

The court should not convict an accused person on the weakness of his defence or on mere suspicion but on the strength of the prosecution case.

Ismael Epaku S/o Achietu -vs- R. (1934) 1 E.A.C.A. 166.

1. unlawful sexual intercourse with a girl.
2. that the girl was below 18 years at the time of the offence, and
3. that the accused person was the one responsible.

In an endeavour to establish the offence, the prosecution led the evidence of five witnesses who included the girl victim Polina Bwayilisa (P.W.3) and her mother Margret Namataka (P.W.2).

On the first ingredient the prosecution adduced the evidence of Bwayilisa Polina to prove that there was unlawful sexual intercourse with her. In her sworn testimony she photographically and vividly described her ordeal with a man she mentioned as Stephene Mugonyi whom she pointed at as the one in the dock-the accused.

She stated that on that day (25.10.98) she met the man at 10:00 a.m. in a garden as she went to the place-banana plantation to collect food. The man got hold of her and threw her down. He removed her knickers, got his male sexual organ and inserted it into her doing bad things to her. She explained that he had sexual intercourse with her.

After that sexual assault on her she went home at around 11:00 a.m. and immediately reported to her mother who checked her private parts and found there blood and what she called “water.’ The mother called people and they came.

P.W.2 Margret Namataka did tell court how she sent her daughter to the banana plantation to collect food but she returned without it. She told her as to how she had been sexually intercoursed by the accused-”Mugonyi” in the plantation. The mother checked the girls private parts and found there blood whereas there were “sperms” on her half petty and her clothes were dirty.

In these circumstances court has heard the evidence of the victim which is direct evidence, and the same is sufficiently corroborated by her distressed condition (as she came back crying) as well as the mother’s own observations of the girl’s clothes and private parts.

In my opinion this is sufficient evidence to prove the act of unlawful sexual intercourse. It was rightly conceded by the defence Counsel.

On the second ingredient the evidence of the mother is that she produced this girl in August 1987 on a Tuesday. In cross-examination she explained as her Birth Certificate got destroyed in their house which caught fire.

The girl herself appeared in court and clearly stated that her age is now 15 years, so at the time of this incident she was thirteen years old. Doctor Netuwa Emmanuel who examined her on 29.10.98 found her to be of the age of 13 years at that time. Defence counsel has conceded this. I am satisfied on evidence that the girl was below 18 years at the time as even I had the chance to see her in court and came up with my own opinion of her age.

Considering the third ingredient of participation by the accused person, the prosecution adduced the direct evidence of the girl (P.W.3) to establish that it was the accused person and no one else responsible for the act. This has been denied by the accused and vehemently contested by the defence counsel.

The accused person was offered his chance to defend himself, and in his testimony he only gave evidence as to the events of 26.10.98 when he was arrested by one Joseph Malenge from the place where he had gone to attend a meeting of people with disabilities. This was on a Monday. He never talked about his whereabouts and his movements on 25.10.98 when the defilement took place. He called the evidence of one witness in his support. This was one Paskali Gibone. It is him who gave court some evidence on the accused's movements pertaining to 25.10.98 around 10:00-11:00 a.m when the offence was allegedly committed.

On the other hand, the prosecution led the evidence of Polina Bwayilisa the victim herself. This is what has been described thus: -

> "Normally in sexual offences the evidence of the victim is the best on the issue of penetration and even of identification."

Badru Mwidu-vs-Uganda (1994-95) H.C.B.11.

Polina Bwayilisa in her sworn in testimony in court vividly described how she was attacked in the banana plantation by a man she called Mugonyi Stephene. She pointed at the accused person as that man who had sexual intercourse with her. She stated that he had a panga at that time and threatened her with it before grabbing her and throwing her down, then having sexual intercourse with her. Further, she told court that she had known him for a long time as she was born when he

was there. (I presume she meant she knew him from early childhood). She however said he had no other name apart from Mugonyi Stephene. She said he lives about 30metres from their home.

Concerning the names of the accused, there is evidence on record to show that he is known as Mugonyi, as well as Kanzimini Walyamboga. P.W.2 Margret Namataka calls him Kanzimini Mugonyi whereas P.W.4 Benjamin Mayoka, the L.C.I chairperson calls him Kanzimini Walyamboga. But in cross-examination he confirmed that people also call him Mugonyi. So this girl was right to say he was Mugonyi and pointed at him in the dock. From her long time knowledge of him and seeing that the offence took place during broad day light the possibility of mistaken identity is ruled out. The confusion in names is explained by the use of many names by the accused.

Addressing myself to the issue of corroboration, it is our law that there is need for corroboration in sexual offences.

Thus in <u>Chila & Another -vs- Republic (1967) E.A, 722</u> it was stated as follows:

> "The Judge should warn the Assessors and himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful."

I did duly warn the assessors of this in my summing up to them and I do proceed to warn myself that presently it is a settled rule of practice that in sexual offences the court has to look for corroborative evidence to both the fact of identification of the person alleged to have defiled the girl and the act of defilement itself.

<u>George Bangirana vs- Uganda (1975) H.C.B.361.</u>

What is required is the corroboration should be sufficient to afford sort of independent or unimpeachable evidence to show that the child is speaking the truth with regard to the particular accused person she seeks to implicate. That there is some material evidence tending to connect the accused with the offence. Such corroboration need not be by direct evidence.

Circumstantial evidence implicating the accused person can be corroboration, so also a fabricated lie in appropriate circumstances

Turning to the evidence on record on this issue as regards corroboration, there is the evidence of the mother that this girl came back crying and immediately reported to her. She was distressed. The girl told her that the accused (Mugonyi Stephene) had had forcible sexual intercourse with her.

On observation the mother saw semen on the petty coat and blood in her private parts. The mother did in court identify the accused as the man reported to her by her daughter.

In fact the best corroborative evidence was provided by no other person than the sole witness of the accused.

D.W.I Paskali Gibone who was correctly described by the defence Counsel as “a truthful witness” did inform court that he was with the accused in the banana plantation at around 10:00 a.m. on 25/10/98. That he was cutting banana fibres to use in thatching his house. The two talked to each other and were one and a half meters apart. So he must have recognized the accused.

In cross-examination he revealed that the accused person was using a panga to cut the banana fibres. They talked to each other for two minutes and parted at around 10:15 a.m. and he did not see where the accused went from there. He could not account for the accused’s movements thereafter.

Coincidentally this is the exact time the girl was coming from home and was in their plantation to collect food. She met the attacker who had a panga and he sexually assaulted her. She could not have made up the story of a panga, which is confirmed by this witness that the accused had a panga. So her evidence is credible and corroborated. The accused was in the vicinity of the scene of crime at that time and had the chance of possibly having sexual intercourse with this girl after he had just parted with his witness.

As pointed out above, the accused did not speak about his movements on 25.10.98, but the evidence of his own witness clearly puts him at the scene of the crime, and the girl's evidence finally pins him down to the commission of this offence.

Before I can conclude this case, I must examine the evidence of Doctor Netuwa Emmanuel in light of the last part of Mr. Mwambu's, learned counsel for the defence, had to say about these findings.

That the doctor found no signs of a struggle on the girl's body yet the mother described the scene as if there had been resistance and a big struggle having taken place. That her clothes were soiled and dirty.

I have considered this apparent contradiction but taken it as minor in that it was explained in the girl's evidence. She stated that the attacker had a panga with which he threatened her. Then he grabbed her and threw her down and had sexual intercourse with her. The mother may have exaggerated her observations at the scene. But she explained that for her it looked like there had been a big struggle, a place where people had slept.

The girl did tell court that when he threw her down as she made noise the accused would try to cover her mouth. This may explain the size of the area where this took place as some movement must have taken place in trying to cover her mouth and defile her.

However the girl did not say that she struggled with him nor offered sufficient or any resistance as would leave visible marks on her body to be seen four days later. This may explain why the doctor did not find any.

As for the rupture of the hymen, the doctor stated that if the rupture had taken place in a week's time he would have been able to tell the time. That it had been ruptured long ago, and not recent.

But it was not the prosecution's case that by that day the girl was a Virgo intacta, nor was it put to her in cross-examination. So the hymen could have been ruptured long ago but this would not lessen the guilt of anybody who had unlawful sexual intercourse with her so long as she was below 18 years.

As for the doctor finding no injuries consistent with force having been used, the assailant having so frightened the girl with a panga could have had easy access to her as she stated that her only reaction was to try and raise an alarm, which was being muffled by the accused.

As for the girl's clothes being soiled, D.W.I told court that it had rained. So the likelihood of the girl's clothes getting soiled cannot be ruled out. But it would not necessarily follow that the clothes of Walyamboga should also have been soiled when his witness saw him. Their seeing each other, looking at the sequence of events, has in fact been established to have been before the incident.

On the issue of the accused being disabled, this does not persuade me that thus he could not defile. This is a man who could go to the banana plantation and cut banana fibres unaided. The next day he walked to the meeting of the other disabled. Such disability did not amount to inability to defile. I reject this insinuation. I inference.

Having analyzed the evidence as above, I have no doubt whatsoever, that the accused person was the person who defiled Polina Bwayilisa. The prosecution has proved the case beyond reasonable doubt and the accused deserves a conviction.

In agreement with the opinions given by both lady and gentlemen assessors that the accused be found guilty and convicted as indicted, I do find Walyamboga Kazimini guilty and convict him of defilement C/S. 123 (1) of the Penal Code Act.

COURT: - Sentence on Reasons.

The accused person is treated as a first offender. He has been on remand since 3/1 1/98 and it is submitted on his behalf that he is sorry and repentant. Court has been asked to consider his family and that his age is 70 years nearing his life's end, so he should be allowed to go home till that occurs. The actual age should be sixty-seven years from the charge sheet.

I have considered all the above and more especially his age. But that did not stop him from committing the offence and he should have borne it in mind before indulging in the sexual act with a girl of thirteen years fit to be his granddaughter.

Hoping that he has learnt from the period of remand and that he is sincere in his repentance, looking at his age and disability. I would have considered a sentence of imprisonment that would befit the offence to be ten years in custody, but the one that befits the offender in this case is six years in custody which the accused deserves.

Considering that he has been on remand since 3/11/98 (2 years and five months) he shall serve 3 years and seven months. I pass that sentence.

R/A within 14 days is explained.

Accused is committed.

D.N.MANIRAGUHA
JUDGE
9.4.2001