THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0047 OF 2004

UGANDA :: PROSECUTOR

VERSUS

BYARYGABA VENANSIO::::::::::::::::::::::::::::::::::::

ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused, Byarugaba Vanansio Alias Benon, was indicted for defilement contrary to section 129 (1) of the Penal Code Act. The particulars of the indictment alleged that the accused on 8th day of April 2003 at Butogota in Kanungu District had unlawfully sexual intercourse with Kemigisha Brina, a girl under the age of 18 years.

The background facts of the case are that on the 9th April 2003 at Butogota Upper Cell in Kanungu District one Kemigisha Brina the victim herein was sent by her mother Asiimwe Evas to go and have her hair cut by the accused from his saloon. The victim reached the saloon and her hair was done. Thereafter the accused lifted the victim on his thighs removed her knickers and forcefully had sexual intercourse with her whereupon she felt a lot of pain and cried. Thereafter the accused gave her shs.100. The victim reported the incident to her mother who examined her immediately and reported the matter to the police. The accused was arrested and charged accordingly.

On arraignment the accused pleaded not guilty. By that plea, the accused had put in issue all the essential elements of the offence charged. That clearly meant that each and every element of the offence charged had to be proved beyond reasonable doubt before a meaningful conviction can be secured against the accused person.

Defilement under section 129 (1) of the Penal Code Act has three ingredients, namely:-

(1) That the girl victim was a girl below 18 years old during the time of the alleged offence;

(2) That the victim experienced sexual intercourse in that connection there is need to proved penetration of the assailant's penis into the complainant's vagina or private parts ;

(3) That it was the accused who had unlawful sexual intercourse with the girl victim: **See Katende Ahamada Vs Uganda, Court of Appeal Criminal Appeal No. 2 of 2002** (unreported).

It must be emphasized that the burden of proving all the above ingredients lies on the prosecution. The accused does not bear the burden of proving his innocence. He is presumed innocent until proved guilty. Even in the light of his weakest defence, the accused is entitled to a conviction only on the strength of the prosecution evidence. Where there is doubt in the minds of the court, the accused should be acquitted. The case in point is

Oketcho Richard Vs Uganda; Supreme Court Criminal Appeal No. 26 of 1995.

In a bid to discharge that burden of proof cast on it by law the prosecution called the evidence of four witnesses: There was evidence of Asiimwe Evas (PW1) who was the victim's mother to whom the victim made the first report. There was the evidence of Maria Mpoora Turyamureeba (PW2) who was the victim's grandmother, to whom PW1 reported the incident. She testified that she examined the victim's private parts wherein she saw semen all over. The victim was crying and her private parts were swollen. She organized boys who arrested the accused. The victim Kemigisha Brina (PW4) also testified in court. In brief she stated that on the fateful day she had been sent by her mother (PW1) to the accused to have her hair cut from his saloon. After cutting her hair the accused unzipped his trousers and had sexual intercourse with her whereupon she felt a lot of pain. The accused thereafter gave her 100/. She reported the incident to her mother (PW1) who examined her private parts before she took her for medical examinations.

The prosecution further relied on the medical evidence of Dr Kalyesubula Kibuuka, medical officer of Kinkizi West Health Sub-District who examined the victim on police form 3. This evidence was admitted during the preliminary hearing. Police Form 24 in which the accused was examined by Dr Sebudde was also admitted during the same hearing.

The accused on his part gave sworn evidence in his defence and raised the defence of alibi, grudge and total denial.

As far as the first ingredient is concerned, the prosecution relied on the medical evidence of the doctor who examined the victim on 8/4/2003 and established that she was 5 years old. Evidence of Asiimwe Evas (PW1) who was the victim's mother was to the effect that the victim was born in 1996. Mpoore Turyamureeba (PW2) who was the victim's grandmother also added her voice on the victim's age. She estimated her current age as between 7-8 years. The victim herself gave her age at 9 years. She told court that she was in primary two. She appeared remarkably young

and the defence did not doubt that. In the premises, I do conclude that the victim was below 18 years during the time of the alleged offence.

As for the second ingredient relating to sexual intercourse, what is necessary is proof that there was penetration of the victim's vagina with the man's penis, however slight even if the hymen is not ruptured. Furthermore it is not even necessary that there should be ejaculation: See **Katende Ahamada Vs Uganda, Court of Appeal Criminal Appeal No. 2 of 2002** (unreported).

The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. It may be proved by the victim's own evidence and corroborated by medical or other evidence: See **Bassita Hussein Vs Uganda; Supreme Court Criminal Appeal No. 35 of 1995** (unreported). It is trite law that in sexual offences the evidence of the victim is normally the best evidence but in its absence any cogent evidence would suffice: See **Omuroni Francis Vs Uganda** (Supra).

In the instant case, there was direct evidence from the victim herself who told court that on the fateful day she had sexual intercourse with a man from a saloon where she had gone to cut her hair. That piece of evidence was corroborated by the medical evidence of the doctor who examined the victim on 8/4/2003 and found that she had signs of penetration and her hymen was ruptured fresh. The victim also had injuries, which were fresh, and hardly six hours ago. There was further corroboration in the evidence of Asiimwe (PW1) and Mpoore (PW2) who were the victim's mother and grandmother who examined the victim's private parts and concluded that she had been sexually abused. Both witnesses saw semen in the victim's private parts. They also found that her private parts were swollen.

It is now trite law that evidence of physical examination of the victim's private parts by parents or relatives is very vital in proving penetration.

Another valuable piece of evidence was the distressed condition of the girl victim. She went home crying and appeared very sad.

This evidence also corroborated the victim's evidence that she had been intercoursed: See **Sam Butera Vs Uganda; Supreme Court Criminal Appeal No. 21 of 1994.**

With the above overwhelming evidence I do agree with both assessors that the prosecution has proved beyond all reasonable doubt that the girl victim did experience sexual intercourse.

This leads me to the most vital ingredient which is the identity of the person who participated in the unlawful sexual intercourse.

The prosecution relied on the victim's evidence that on the fateful day she was at the accused's saloon where she was sent by her mother to have her hair cut. After cutting her hair the accused carried her on his thighs, unzipped his trousers and had sexual intercourse with her whereupon she felt pain and cried. After finishing the accused gave her 100/=. She reported the matter immediately to her mother. Asiimwe Evas (PW1) testified that on the fateful day she had sent the victim to have her hair cut from the accused's saloon, which was nearby. After 30 minutes the

victim came back crying and immediately informed her that the accused had had sexual intercourse with her.

The accused on his part raised the defence of grudge, alibi and total denial. He testified that the grudge was because Asiimwe Evas (PW1) had failed to buy land, which he later sold to another person. Those are the formidable defences in our criminal justice system if believed.

In the instant case the accused was a barber who was well known in the village. The victim knew the accused very well and that was not her first time to go to the saloon to have her hair cut. The accused was a close neighbour. Immediately after the incident the victim reported to her mother (PW1) that the accused had had sexual intercourse with her after the haircut. That report clearly corroborated the victim's evidence on the participation of the accused. A case in point is **Omuroni Francis Vs Uganda** (Supra) where it was held that information by the victim in sexual offence to a third party about the identity of her assailant is relevant and admissible evidence. The victim was emphatic that

after the act the accused gave her shs.100/= and that she reported the incident immediately to her mother. She told court during cross-examination that she was alone with the accused who closed the door after cutting her hair and proceeded to defile her. That the accused discharged something white on her thighs. With the above evidence the defence of grudge alibi and even total denial could not be believable. The victim had nothing to do with the grudge between the accused and her mother, if at all. The defences were merely afterthought, which the accused designed to confuse court. Accordingly I agree with both assessors and conclude that the prosecution has proved all the ingredients of the offence beyond all reasonable doubt and do find the accused guilty as charged. He is convicted accordingly.

RUBBY AWERI OPIO

JUDGE

3/9/2005.

14/9/2005:-

Accused present.

Twinomuhwezi present for the state.

Ndimbirwe present for the accused on state brief.

Judgment read in open court.

Twinomuhwezi:-

No previous record. Treat him as first offender. This is a serious offence. It carries maximum of death sentence. The offence is rampant here. The convict had access to young girls. He should be kept away. I pray for a deterrent sentence.

Ndimbirwe:-

He has been on remand since 2003. That period be considered. We pray for leniency. He is first offender. He was at that time just 24 years old. He is still useful to society.

SENTENCE:

This is a very serious offence, which entails maximum of death sentence. The offence is on the rise and there is a public outcry against it especially due to AIDS. The offence is more aggravated by the age of the victim. She was said to be 5 years old at that time while the accused was 24 years old. Whatsoever convinced the convict to run for the victim is beyond human imagination. In fact the victim was fit to be his child. Because of those circumstances this court will take a very serious view of this offence to deter the likes of the accused.

Court will also consider the fact that the accused is first offender and that he has spent long on remand. However sentence must be reciprocal to the offence. In sum total the accused is sentenced to 15 (fifteen years) imprisonment considering the age

of the victim. The sentence takes consideration of the fact that he has been in custody since 2003. Otherwise he should have deserved 17 years.

Right of Appeal explained.

RUBBY AWERI OPIO

JUDGE

14/9/2005.