

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

HCT-CR-11-CSC-071/2011

CRIMINAL CASE RUK. 00-CR-CSC-289/2010
CRB 960 /2010

UGANDA ::: PROSECUTOR

VERSUS

KAMALI MILTON RODGERS:::ACCUSED

BEFORE HON. MR. JUSTICE J.W KWESIGA

JUDGMENT

KAMALI MILTON ROGERS is indicted for aggravated defilement contrary to Section 129 (3) (b) of the Penal Code Act. The particulars of the offence state that on 26th May, 2010 at Rwempanga Cell in Rukungiri District performed a sexual act with Naturinda Diana a girl under the age of 14 years. The Accused person denied the allegations leaving the whole burden of proof upon the prosecution. The Prosecution must prove beyond reasonable doubt that Naturinda Diana was aged below 14 years, she was subjected to a sexual act and that the Accused person committed the offence. I will summarise the adduced evidence and the facts of the case will come out.

PW 1 Tweheyo Sylvia, the mother of the said victim testified that the girl is 9 years old. She was born in 2001 and in 2010 was 8 years old. On 26th May, 2010, she left children, including the victim at home and went to the garden. She returned at 6:00 p.m and a child, called Pius a child of very tender age told her that a man came home and defiled Diana Naturinda. PW 1 found the girl with swollen private parts. On inquiry one Philip Bwengye (Not called as a witness) told her that he saw KAMALI running from the home. On this information the Accused was arrested.

PW 4 Pius Wamukama, a very young child failed to give any evidence. He could not remember anything that PW 1 had attributed to him. PW 2 Kankiriho Charles, LC 1 Chairman traced and arrested the Accused person on information given by the complainant. Under cross-examination he told court that the Accused person was not liked in the village. He arrested the Accused, put him together with other men at 9:00 p.m and using a torch the victim identified the Accused.

PW 3 Diana Naturinda, 9 years old, a child of tender age, was unable to take oath and she gave unsworn evidence. She said she had ever seen the Accused at her home, he came and defiled her in the chair. He was lying on top of her. That Pius (PW 4) was looking at her while she was being defiled. She had never seen this man before the incident, that she identified him after the arrest. Medical evidence, the report made by Dr. Mugarura, presented by PW 5 Dr. Musiimenta Emmanuel shows that the child's hymen was intact. However the private parts had general swelling. The Doctor concluded that there had been sexual intercourse.

In DEFENCE, the Accused denied participation. He told court that PHILLIP BWENGYE had been his brother-in-law in a failed marriage and had threatened him in the following words: *"You have denied me as your brother-in-law, are you going to deny the child you produced in our home? I will do something to you, you will see it."* That night, Phillip Bwengye came with other men, forced him to open the house at 11:00 p.m, demanded for money from him which he did not give. They arrested him took him to Nyarushanje Police Post where they fabricated against him the defilement charges. The State decided not to cross-examine him and left the whole defence story un challenged. It was settled that moment the evidence adduced by a party is not challenged in cross-examination it creates a presumption that the part that was supposed to cross-examine him accepts his evidence as true. At the close of the trial, the prosecution decided not to make any submissions which would possibly have offered an attack on the defence's validity. However absence of submissions

cannot be used against the prosecution case or the Defence case when the party opts not to submit. Cases are determined by evidence adduced and not submissions. Submissions are meant to guide the trial court on what to consider and to persuade the court on what position to take based on the Evidence. Ultimately evaluation of evidence and determining the issues is the duty of the trial court. I have been greatly assisted by the position settled by the Supreme court in the case of *Bwine Wycliffe* where the Supreme Court in the case of **Bwire Wycliffe & another Vs Uganda. Criminal Appeal 12 of 2002** quoted with approval its earlier holding in **James Sowabiri & another Vs Uganda Cr. Appeal 5 of 1990 that:-**

“Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. Therefore an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to it being assailed as inherently or palpably incredible.”

It is clear that the Accused persons evidence that Bwengye Philip was behind his arrest and charging over false claim stands not challenged. It in fact corroborated by the complainants evidence that it is this Phillip Bwengye who stated that he saw the Accused coming from the home of the complainant when the offence was alleged to have been committed. The evidence of the victim is not corroborated as required by section 40 (3) of Trial on Indictments Act. See: **Senyondo Umar Vs Uganda Criminal Appeal No. 267 of 2002, (CA) Patric Akol Vs Uganda Cr. Appeal 123 of 1992. (Supreme Court) and Kibagenyi Arapkolil Vs R. [1959] E.A 49.**

Lord Goddard in *R. Vs Campbell* (1956) 2. All E.R.R. 272 summed up the law as follows:-

“To sum-up the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the Accused is that of unsworn children the Judge must stop the case. It makes no difference whether the

child's evidence relates to an assault on him or herself or to any other charge, for example, where unsworn child says that he saw the Accused steal an article. The sworn evidence of a child need not as a matter of Law be corroborated..... The evidence of unsworn child can amount to corroboration of sworn evidence though a particularly careful warning in that case be given."

In Uganda, in addition to the several decided cases, this position is provided for in statutory Law namely Section 40 (3) of Trial on Indictments Act.

"5.40 (3) where in any proceedings any child of tender years in call as a witness....., but where evidence admitted by virtue of this sub-section is given on behalf of the Prosecution, the Accused shall not be liable to conviction unless the evidence is corroborated by some other material evidence in support thereof implicating him or her." Therefore the evidence of the victim PW 3 Naturinda, was very weak and un-reliable on its own and it is not corroborated and cannot be a basis of a conviction. The Accused person's Defence evidence stands un challenged and credible. The joint opinion of the assessors did not address the fact that there was need for corroborative evidence as I have discussed above. I have been unable to follow their advice to convict. Accused person is hereby Acquitted.

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J.W. KWESIGA
JUDGE
13/12/2012

In the presence of:-

Mr. Baguma Batson – RSA for the State.

Mr. Twikirize Timothy – for Accused on State Brief.

M/S Ampeire Everlyne – Court Clerk.