THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0154 OF 2004; HELD AT KYENJOJO

UGANDA ……..……... PROSECUTOR

VERSUS

BANGYI YOWERI ……. ACCUSED

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

In this case, the accused - Bangyi Yoweri, has been tried by this Court upon having been indicted for the offence of defilement, in contravention of section 129 (1) of the Penal Code Act. It was set out in the particulars of the offence, that on the 7th day of November 2003, at Kitoma village, Mirambi Parish, Kyarusozi Sub County, in the Kyenjojo District, the accused had unlawful sexual intercourse with one Kiiza Alice; a girl under the age of 18 years. Court read out and explained the charge to the accused, whose response was that he had understood it; but pleaded not guilty. The Court then entered a plea of not guilty; followed by this trial.

The prosecution was under duty to prove beyond reasonable doubt, each of the ingredients that constitute the offence of defilement, if the accused is to be convicted as charged. These ingredients are namely, that:-

(i) There was an act of sexual intercourse.

(ii) The said act of sexual intercourse was with a girl below 18 years of age.

(iii) The accused participated in perpetrating the said sexual intercourse.

The prosecution, called 5 (five) witnesses with the view to discharge the burden of proof that lay on it to prove the guilt of the accused as charged. These were:-

(i) PW1 – Dr Arinaitwe of Kyarusozi Health Unit, who examined the victim.

(ii) PW2 – Dr. Waiswa Musa Kasadha who examined the accused.
PW3 – Kimarweki Dinavensi, who found the accused defiling PW4.

(iii) PW4 – the victim herself.

(iv) PW5 – Kaijanabyo Peter, uncle and guardian of the victim.

The reports in (i) and (ii) above were, in the course of a preliminary hearing I carried out in accordance with the provisions of section 66 of the Trial on Indictments Act, admitted and exhibited by consent and marked CE1 and CE2 respectively.

In order to establish that the sexual intercourse complained of occurred, the prosecution was under duty to adduce evidence to prove that there was carnal knowledge of the victim. It is penetration of the vagina of the victim which, as was held in ***Adamu Mubiru vs. Uganda; C.A. Crim. Appeal No. 47 of 1997***, the prosecution was under duty to prove. Proof of such penetration will have been established, however slight it may have been; and would suffice to found a conviction for the offence of defilement. Penetration may, as was decided in ***Hussein Bassita vs. Uganda; S.C. Crim. Appeal No. 35 of 1995***, be proved either by direct or circumstantial evidence. What the prosecution need do, the Court pointed out, is to prove by evidence beyond reasonable doubt, that there was carnal knowledge of the victim.

In seeking to establish this proof, it is usually the victim's inculpatory evidence of penetration which is the best proof. Other forms of proof, such as medical or other evidence in support may provide corroboration. In ***Abbas Kimuli vs. Uganda; C.A. Crim. Appeal No. 210 of 2002*** (unreported), the Court followed the decision in ***Hussein Bassita*** (supra), and reiterated that medical evidence for proof of sexual assault, while desirable, is however not mandatory. It is a rule that the Court needs to look for other evidence that corroborates the evidence of the complainant, before reaching a finding of guilt of the accused; and to warn the assessors of that requisite need.

In ***Chila & Anor vs Republic [1967] E.A. 72,*** the trial judge had neither warned the assessors nor himself of the need to look for corroboration of the complainant's evidence implicating the accused; instead he convicted the accused upon his making a finding that the complainant had been a witness of truth. On appeal the conviction was upheld; and the Court of appeal laid down the law in East Africa with regard to proof of sexual offences as follows:-

> *"The Judge should warn the assessors and himself of the danger of acting on the 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. If no warning is given, then the conviction will normally be set aside, unless the appellate court is satisfied that there has been no failure of justice".*

The Supreme Court of Uganda, in ***Kibale Isoma vs Uganda, S.C. Crim. Appeal No. 21 of 1998 [1999]1 E.A. 148,*** followed the rule laid down in the ***Chila*** case (supra); and affirmed that the said rule is: ***'still good law in Uganda'.*** For proof of the commission of the alleged defilement in the case before me, the prosecution relied on the evidence adduced in Court by PW1, PW3, PW4, and PW5. The victim was manifestly still a child of tender years when she appeared in Court; and accordingly, I had to establish her age at the time of the trial herein; which I found was only 13 years. I had therefore to conduct a *voire dire* in compliance with the provisions of section 40 of the Trial on Indictments Act, which are that:-

(1) Every witness in a criminal cause or matter before the High Court shall be examined upon oath, and the court shall have full power and authority to administer the usual oath.

(3) Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this sub section is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.

The approach Courts should take, regarding sworn or unsworn evidence of a child of tender years, is now settled. There is a sizeable corpus of authorities on this. In ***Ndyayakwa & Ors vs***

Uganda, C.A. Crim. Appeal No. 2 of 1977; [1978] H.C.B. 181, one such authority, the Court pointed out that no conviction can be based on the unsworn evidence of a child of tender years unless, as a matter of law, there is corroboration of such evidence by some other material evidence implicating the accused. In ***Muhirwe Simon vs. Uganda – S.C. Crim. Appeal No. 38 of 1995,*** the Court made it clear that corroboration is required as a matter of law only if evidence is adduced, not on oath, by a child of tender years; who in the opinion of the Court however manifests sufficient intelligence, and understands the duty of speaking the truth; in which case the reception of his or her evidence is justified.

In the instant case, after conducting the *voire dire;* and upon satisfying myself that she was an intelligent girl who knew about God and clearly understood the duty of telling the truth, I allowed her to give her testimony; but not on oath. She gave her testimony in a plain, unmistakably clear and persuasive manner; and her evidence flowed freely. Her account of what had transpired between her and the accused on the day the crime was alleged to have been committed, was vivid; and revealed that the accused had, that day, during the day time, lured her onto his bed in the kitchen; with the promise that he would give her a jack fruit. And that:

> *"When we lay on the bed, he Yoweri pulled his penis and put in my vagina and I felt pain. I cried and Dina came and found him on me, and then he got off me."*

She stood firm during cross examination; and greatly impressed me. Nonetheless, owing to the legal requirement set out above, there is need to ascertain from the testimonies made before this Court, whether there is any evidence that corroborates hers. I did warn the gentlemen assessors that this is a necessary legal requirement; and I am myself fully alive to it. The victim stated that PW3 found them in the kitchen when the accused was subjecting her to sexual intercourse.

PW3, for her part, testified that this incident had happened at around 3.00 p.m. of a Friday, on a date she could not recall. She had gone to her sister's home and, from the courtyard, had heard the cry of a child in pain emanating from the kitchen; and, naturally concerned, she had pushed the door open, only to find there the accused having sexual intercourse with PW4. She described the scene as follows:

"The accused was on top of the child who was lying on her back. He was naked. The child was putting on a dress which had been pulled up. When he saw me, he jumped off the child and went off."

PW5 who had been incapacitated by an accident, and was bed ridden in the main house at the time, testified that on the 7th of November 2003, around 2.30 to 3.00 p.m., he had heard his orphaned niece – PW4, who was already under his guardianship then, cry out calling the name of the accused. Later, he tried to find out from her why she was crying, and she told him that the accused had hurt her. Because he had no reason to suspect any foul play, he only urged her to keep quiet, and did not pursue the matter further.

Dr. Arinaitwe who examined the victim three days later, made a report pointing out that the victim's hymen had been recently slightly ruptured; and that there were inflammations around the private parts less than four days old, and consistent with force having been used sexually. He also found plenty of foul smelling discharge from the victim's private parts. There is therefore sufficient corroboration of the assertion by the victim that she was defiled. PW3 who found the victim being subjected to this despicable deed has provided direct evidence on the matter.

The medical report is circumstantial evidence which persuasively places the date of the injuries found on the victim, perfectly within the time frame which matches that which was disclosed by the direct evidence adduced by the victim and PW3. Further evidence, albeit circumstantial, is from PW5 who, on account of his incapacitation, could not come out of the house to establish why his daughter - the victim - was crying out, and naming the accused. The defence has quite rightly conceded that the prosecution has incontrovertibly discharged its duty, beyond reasonable doubt, with regard to the first ingredient of the offence charged; namely that PW4 was indeed defiled.

Regarding the age of the victim when she was defiled, the medical report - CE1- made by PW1, evidence by PW4 herself, and PW5 were that she was 7 years of age then. In the circumstances of this case however, owing to the fact that it was self evident when the victim appeared before me in Court that - six years after the deed complained of - she was still a child of tender years, there was really no need to apply any other means of proof to establish what her age was at the time she was defiled. Her appearance alone spoke volumes about her age; and convincingly established that she was, even at the time of the trial still far, far below 18 years of age. The

prosecution has proved beyond reasonable doubt that the victim was, when she was defiled, and still is, as of the time of this trial, below the age of 18 (eighteen) years.

For proof of the identity of the person who committed the defilement herein the prosecution again relied on the direct evidence adduced by the victim herself, that of PW3, and the circumstantial evidence presented by PW5. In a situation such as this, it is the inculpatory evidence of identification adduced by the victim of the criminal act, as decided in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** which is the best evidence**.** Because proof of the participation of the accused in this case depends on evidence of identification, I have to treat that evidence with caution, notwithstanding that two identifying witnesses offer direct evidence in this matter; and this is in accordance with the advice in ***Roria vs. Republic [1967] E.A. 583;*** and followed in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***; and a host of other authorities on the matter.

In both the ***Roria*** and the ***Bogere*** cases, the Courts warned of the danger inherent in placing reliance on identification evidence; and strongly advised that Court must first be clear in its mind that in all the circumstances, it is safe to found a conviction on such evidence alone. In ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77;*** the Court echoed the need for care; and stressed that this need is applicable whether it is a case of single or multiple identification witnesses; and further that in both cases, the judge must warn himself and the assessors, of that need for caution before reaching a decision based on such evidence. The fear expressed by the Court, necessitating the aforesaid need, is that the witness or witnesses, even when they appear convincing, could in fact be mistaken.

Their Lordships then advised, in a passage which the Supreme Court cited with approval in the ***Bogere*** case (supra), as follows:

> *"The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger…..*

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

In ***George William Kalyesubula vs. Uganda, S.C. Crim. Appeal No. 16 of 1997,*** the Supreme Court reaffirmed the need to test with the greatest care the evidence of an identifying witness; and that this is particularly so, when the conditions for correct identification are poor. In such a case, it advised, the proper course of action is for the Court to take is to look for other evidence which supports that of identification, and which points to the guilt of the accused. In ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47;*** and the ***Bogere*** case (supra), Court made a clarification that the other evidence can be either direct or circumstantial. What is important is that the evidence in support should satisfy the trial Court that any possibility of error in identification, or mistaken identity, is minimised or ruled out altogether. The Court stated in the ***Bogere*** case (supra), as follows:-

"We have to point out that the supportive evidence required need not be that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences ***(See George William Kalyesubula vs. Uganda*** *(supra)). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose."*

The victim and PW3 gave direct visual evidence as pointed out above. The accused was well known to the prosecution witnesses as an employee in that home. This fact he himself corroborated by his testimony. The direct evidence was supported by the circumstantial evidence from PW5. This circumstantial evidence, because it is accompanied and supported by direct evidence, need not be subjected to the rule laid down in a corpus of authorities such as ***Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480; Tindigwihura Mbahe vs Uganda S.C. Crim Appeal No. 9 of 1987;*** which is, as spelt out in ***Byaruhanga Fodori vs Uganda, S. C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12*** and is now trite law, that:

"… where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See ***S.).***"

Instead, the applicable rule is the one in ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209***, which is that where the case against the accused does not rest wholly on circumstantial evidence, it may nevertheless still be of great value as the other evidence in support; even if the circumstantial evidence is not wholly inconsistent with the innocence of an accused. It is only when circumstantial evidence stands alone that it must be inconsistent with the innocence of the accused, and be incapable of any other reasonable hypothesis than that of guilt; and there must be no co-existing circumstance that would weaken or destroy the inference of guilt.

Since the evidence of identification herein was direct; and was made during broad daylight, the decision in ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda Crim Appeal No. 41 of 1995*** - which are authority for the proposition in law that where the crime complained of is committed during broad day light, by someone fully known to the witness, then the conditions for proper identification would be favourable; and help to reduce or altogether exclude any possibility of error, or mistaken identity - is wholly available to the prosecution. The conditions under which the identification was made were clearly favourable for correct visual identification. Nonetheless I warned the assessors, and hereby also warn myself, about the need for the exercise of caution in receiving such evidence; and basing a conviction thereon.

In his defence, the accused gave evidence on oath. He reiterated his denial of the offence with which he has been indicted. He corroborated the prosecution claim that he had by the time of the incident herein, already stayed in the home of PW5 for six months. He however vehemently denied knowledge of the victim; contending that the victim, whom, he contended, he only saw in Court, was not a member of that family at the time he stayed there. Further, he claimed that in fact contrary to the prosecution case, he never used to sleep in the kitchen; but instead in the main house. Finally, he alleged that he was a victim of a malicious frame up, because of the problem he had with PW5 over his pay.

PW5 had, on the other hand, testified that he had retained the accused's salary at the latter's request; and when he asked for it on the day of the defilement, purporting that he wanted to go to the market, it was surrendered to him; although he never went to the market. In the light of the evidence adduced by the prosecution regarding the identity of the accused as the perpetrator of the defilement in issue; evidence which there is every reason for me to believe, I find the defence put forward by the accused - that the victim did not live in the home of PW5, and that he is being framed by PW5 to deny him his wages - exceedingly ridiculous, and lacking in worth. I hereby roundly reject it. The evidence against him is overwhelming, and uncontroverted.

I am clear in my mind that the prosecution presented cogent evidence from witnesses whom I found reliable as witnesses of truth; and who squarely placed the accused at the scene of the crime. The prosecution has persuasively established that he committed the offence for which he has stood this trial. Therefore, and in full agreement with the opinion of the gentlemen assessors, I am satisfied that the prosecution has proved beyond reasonable doubt, the guilt of the accused; and as a result of which I hereby find him guilty as indicted; and accordingly convict him.

Chigamoy Owiny - Dollo
JUDGE
15/05/2009