THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL CASE NO 0564 OF 2016

UGANDA ---------- PROSECUTOR

VERSUS

NSUBUGA ISMAEL ---------- ACCUSED

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

Nsubuga Ismael, the Accused before court was indicted for aggravated defilement contrary to Section 129 (3) and (4) (b) of the Penal Code Act.

The case for the Prosecution is that on the 22nd day of July, 2013 at Lusanja Village, Kiteezi Parish, Nangabo Sub County in Wakiso District, the Accused performed a sexual act on Nabakka Melisa, a girl then aged five years.

The Accused pleaded not guilty of the charge.

The prosecution called five witnesses in a bid to prove the case against the Accused person. That is, the Doctor who examined the victim, the mother of the victim, the victim, the Aunt and the Police Officer who investigated the case.

In cases of aggravated defilement, the following ingredients of the offence must be proved beyond reasonable doubt if the charge against the Accused person is to be sustained.

1) An unlawful sexual act occurred.

2) The victim was below fourteen years at the time of the offence.

3) It is the Accused person who performed the unlawful sexual act.

4) The offender was infected with the Human Immunodeficiency Virus (HIV).

In determining this case, I wish to bear in mind from the outset, the Constitutional presumption of innocence of the Accused person until he is proven guilty or pleads guilty.

Further that, it is not the Accused person to prove his innocence, but that he needs to only raise a defence that may raise doubt in the mind of the court. The burden remains on the Prosecution to disprove that defence.

The burden of proof is accordingly on the Prosecution, to prove all the ingredients of the offence beyond all reasonable doubt. The burden never shifts except in some exceptional cases set down by law- See **Woolmington vs. Director of Public Prosecutions [1935] AC 322.**

It is up to the court to evaluate the evidence of both the Prosecution and the defence and determine whether the burden and standard of proof have been discharged by the Prosecution.

The ingredients of the offence will be dealt with one by one in this case.

Whether there was an unlawful sexual act committed.

The Prosecution relied upon the evidence of PW1, the doctor, PW3 the victim, PW2 her mother and her Aunt PW4.

The victim gave evidence to the effect that she could not recall the date, but that the Accused who was working for her father in a business house in their compound where books were made performed a sexual act on her. That it was evening time when she had returned form school. The Accused gave his telephone to Carol the house maid. Carol went behind the house to make a call. The Accused then called the victim and told her he was going to give her sweets. He took her inside the working place and locked the door. They went to the second room of the house, and he told her to remove he knicker, which she did. He then opened the zip of the shorts and told her to lie down on the floor. He also then lay down and pushed his penis into her vagina.

She could not recall how long the act took but that she felt pain. That after the act, the Accused inserted a stick into her vagina warning her not to tell her parents. But that if they asked her, she should tell them that a stick pierced her. After that, he opened the door, gave her a drink

of Shs.500/- (Safi). The victim could not recall what happened to her knicker.

During the voir dire, court found that the victim did not understand the nature of an oath, but that she was possessed of sufficient intelligence and knew the duty to tell the truth.

Considering the principles established by decided cases, the evidence of the victim required corroboration. Refer to **Uganda vs. Rukahikayo John Cr. Case No. 260/79** – where it was stated that*, "in a sexual offence, the court must find corroboration of the complainants testimony on all the ingredients".*

This corroboration is required as a matter of Judicial caution and practice.

Taking into consideration the definition of sexual act under S.129 (7) (a) of the Penal Code Act, that is *"penetration of the vagina, mouth or anus however slight of any person by a sexual organ"* and S.129 (7) (b) Penal Code Act as *"unlawful use of any object or organ by a person on another person's sexual organ",* there would have been sufficient corroboration of the victim's evidence in the evidence of PW1, the Doctor who examined the victim on 23.07.13. He found that the hymen was recently ruptured. The signs of recent penetration were between three to five days. And that the victim had hyperaemia on the vulva, **but no abnormal discharge**.

Hyperaemia, the doctor explained refers to the color changes which make the area red. And that the hyperaemia was caused by blunt trauma.

This is because *"proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence".* – See **Uganda vs. Okuku Cr. App 0095/17** Justice Mubiru and *"the slightest penetration is enough to prove the ingredient"*- Refer to **Remegius Kiwanuka vs. Uganda SCCA 45/95.**

However, in the circumstances of the present case, there are contradictions arising from what would otherwise have been other cogent evidence, creating doubt in the evidence of the victim and of the Doctor PW1.

PW2 Namuddu Harriet, the mother of the victim was away in Nairobi for about three days, during the period when the offence is alleged to have been committed.

When she returned home on 22.07.13, she was informed by PW4 that she (PW4) had found knickers with blood stains and a yellowish substance. PW2 looked at the knickers and saw the stains. When she asked the victim what had happened to her, the victim said **"nothing".** But that when PW2 examined the victim's genitals, she found pus like yellowish substances.

The victim was then taken to a clinic at Mpererwe, but the Doctor advised them to go to the main hospital, as he suspected the girl had been used.

PW2 together with her husband took the victim to Nsambya Hospital. The doctor examined the victim and told her parents that she had been defiled. He gave them a prescription and advised them to report to Police. The medical form given to the parents of the victim was put on record for identification purposes as P_1D_1, pending the summoning of the doctor said to have examined the victim, to appear and tender it in evidence. The doctor was never summoned as a witness. The medical form could not therefore be relied upon to prove that a sexual act was performed against the victim.

PW2 further stated that, the matter was reported to Kiteezi Police. The next day, the victim was taken to the Police Surgeon at Wandegeya; the Doctor examined the victim but did not tell the parents of the victim his findings. That he just gave them the form to take back to Police.

But as already indicated in this judgment, the Doctor PW1 did not find any abnormal discharge in the victim's genitals nor any indication that a stick had been inserted in the genitals.

This was contrary to PW2's evidence that a stick had been inserted into the victim's genitals and that there was pus like substance coming there from.

PW4 Nansubuga Sharon, the Auntie of the victim, told court that the sexual act against the victim took place between 18.07.13 – 22.07.13. When she returned from work that evening 6.30pm and saw the victim's

blood stained knicker, **she did no do or say anything**. Until she claims she found the second knicker. But even then she did not inform the father of the victim! She claims that she checked the victim's private parts and noticed that they had widened and there was creamish pus like substance coming from there. That although the victim was in pain, PW4 waited until the evening of 22.07.13, when PW2 returned home and was informed. The victim was taken to Mpererwe Clinic and from there to Nsambya.

PW1 the Police Doctor never found any abnormal discharge in the victim's genitals thereby belieing the evidence of PW2 and PW4.

Court is also left to wonder why PW4 would remain silent for about five days, after suspecting that such a grave offence had been committed against PW3, when the father of the victim was around. She instead opted to wait for PW2.

The knickers said to have had blood and pus stains were never exhibited. Court was instead told that they had been washed by the house maid.

Would not PW4 have been interested in preserving the knickers to support her allegations against the Accused person?

The gaps and inconsistencies in the Prosecution evidence raise doubt in the Prosecution case which the law says have to be resolved in favor of the Accused person.

The next ingredient to determine is **whether the victim was below fourteen years of age at the time of the offence**.

This ingredient was not disputed by the defence. Exhibit P_1 the Doctor's evidence indicates that at the time of the offence, the victim wad five years of age, considering her physical appearance. At the time of hearing the case, she was stated to be nine years of age.

This evidence which was not disputed proves the second ingredient of the offence to the required standard.

Therefore this court finds as a fact that, at the time the offence was allegedly committed against the victim, she was five years of age.

The next ingredient to determine is **whether it is the Accused person who performed the unlawful sexual act on the victim.**

From the evidence available, there was no other eye witness to the alleged offence except the victim. She was five years of age at the time of the offence, and while she told court that it was the Accused who had sexual intercourse with her and there after inserted a stick in her vagina, for reasons already indicated in this judgment there is a lot of doubt as regards the evidence of sexual intercourse having taken place.

And as stated earlier in this judgment, the Accused vehemently denied performing any sexual act on the alleged victim, right from the time he made his police statement. He contended that, the charges were made up against him as a result of a misunderstanding he had with PW2 concerning the business that he was doing for husband of PW2, the mother of the alleged victim.

It is trite law that where an Accused raises a defence, it is still for the Prosecution to prove beyond all reasonable doubt that none-the-less; the offence was still committed by the Accused person.

In addition to the contradictions, the Prosecution already pointed out in this case, the place where the alleged offence is alleged to have been committed by the Accused person, was also not proved by the Prosecution.

PW2 the alleged victim contradicted herself in this respect. In her evidence she stayed that the offence was committed in a room, inside the office premises, yet in the statement to Police, it is said to have been committed on them verandah on the porch. The witness could not recall what had happened to her panties.

PW4 the Auntie of the victim who is alleged to have found the blood stained knickers was not consistent in her evidence as to where she found them. Either were in the bedroom or on the verandah.

PW5 the Police Officer who visited the alleged scene and drew the sketch map of the place, indicated the place of the commission of the offence as at the entrance to the office premises.

The offence is alleged to have taken place in broad day light. And the evidence of these witnesses is belied by the evidence of the witnesses

for the defence, who were co-workers of the Accused person at the home of the father of the alleged victim. They informed court that they were all working on the date in question and insisted that the offence could not have taken place, and more so on the verandah when they could see what was happening outside when they were inside the office. Plus that, some of the work was also done at the verandah on the porch.

The various contradictions and inconsistencies in the evidence of the Prosecution raise doubt in the case as they were never explained and accordingly result in the evidence of the Prosecution being rejected.

The last ingredient is whether the offender was infected with HIV.

According to the evidence of PW1 the Doctor, the HIV test carried out on the Accused person was positive. That is, the Accussed was infected with HIV.

However, this was disproved by the evidence of the Accused person himself, who provided results of an HIV test indicating that he was HIV negative. This may explain why the Prosecution did not bother to pursue this ingredient of the offence against the Accused person. And which further throws doubt on the evidence of the Prosecution.

For all those reasons and in agreement with the Assessors' opinion, this court finds that the Prosecution failed to prove the case against the Accused person beyond all reasonable doubt.

He is accordingly acquitted of the charge and is hereby set free forthwith, unless otherwise held on other legal charges.

FLAVIA SENOGA ANGLIN
JUDGE
29.08.18