

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT TORORO**

HCT-04-CR-SC-282/2002

UGANDA.....PROSECUTIONS

VRS

WERE FRANK.....ACCUSED

BEFORE THE HON. LADY JUSTICE FAITH MWONDHA

RULING

The accused person was indicted on a charge of defilement c/s 123(1) of the Penal Code Act. It was alleged that the accused Were Frank between the 7th February and 6th May 202 at Bulubi village in Busia District unlawfully had sexual intercourse with Zainabu Barasa a girl under the age of 18 years.

In all criminal cases always the burden is on the prosecution to prove the case beyond reasonable doubt to bring the guilt of the accused person home.

In a defilement case there are three ingredients to be proved beyond reasonable doubt:-

1. That the victim was under 18 years of age.
2. That she experienced unlawfully sexual intercourse.
3. That it's the accused who participated in the unlawful sexual intercourse.

At the close of the prosecution case Counsel for the accused made a submission of no case to answer. He argued that the evidence of the prosecution established that ingredient 2 and 3 were established but that the first ingredient of the victim being under 18 years of age had not. He said that PWI's evidence was inconsistent as she said that she was told by her mother that she was

born on 22/2/1986 but later she admitted that she told the accused that she was 19 years and again later said that she was not sure of her age as she had never seen her Birth Certificate. He argued that PW2's evidence was not truthful and therefore not reliable because he was denying obvious things. The father said that he lost the Birth Certificate of the victim. Then he said that PW3 medical report was based on what PW2 told him he never made any independent examination.

After careful perusal of the evidence as given by the prosecution, "a prima facie case is one on which a reasonable tribunal properly directing its mind on the law and evidence could convict if no explanation is offered."

In paragraph "H" a quotation from Prof. Glanville L. Williams in his text book on Criminal Law [1953] at page 695 it was said among others...that at this state, "it's the duty of the Judge to decide whether there is any reasonable evidence for the jury and to withdraw the case if he/she considers that there is none." The question the Judge has to decide is whether there is any reasonable evidence on which the jury can reasonably find that the fact is proved.

In this case it was very crucial that the age of the victim was proved. PW1 was doubtful of her age because she said she had never seen her Birth Certificate though she told Court that she was 17 years. Its true that her inconsistencies were explained as she told Court she wanted to get married to the accused and that is why she lied that she was 19 years of age.

The explanations have to be properly made not just making explanations improperly. The victim was repeatedly contradicting herself which made the explanations not to be proper. This case on her testimony that she was making deliberate lies and could not be considered minor.

PW2 told Court that the first time she disappeared and came back. She lied to him that, she had gone to see her mother. That when PW2 inquired from her mother he was told that she was not there. This also cast doubt on my mind that, she was telling a lot of deliberate lies hence the cause of inconsistencies.

The father PW2 testified that she was born on 22nd February 1986 at 9:00a.m in the village. That he had a Birth Certificate which was stolen together with the properties which were robbed of

him. He said that he made a report at Busia Police but that the Birth Certificate was not listed as one of the stolen items. PW2 had divorced the mother of the victim but he was still in contact with her, since he told Court that he found out from her if the victim had been to her place. There is no reason why the mother didn't come to Court to testify about the age of her daughter.

Since there was no Birth Certificate. This was a deliberate omission by the father of the victim, that I just could believe him outright, that the child was born as he stated to be conclusive authority on the date of birth of the victim. The medical evidence fell too short of corroboration of PW2's testimony in regard to the age of the victim. PW3 the doctor who purported to examine the victim, did it with Busia Police Station, it lasted between 8-10 minutes because he was merely asking PW2 about the history of the victim.

PW2 had an interest in the matter and whatever PW2 told PW3 is what was put on the medical form as far as the age was concerned. When I looked at the medical form, the doctor stated that the victim was 16 years but in Court on oath he said she was estimated to be 16 years. When he was questioned further, he said that the parent of the victim showed him a baptism card which stated the date of birth. This showed that even PW3's evidence about age could not be relied upon. The victim was Zainab a Muslim. How could the parent of Zainab by the name of Salim Baraza produce a baptism card to assist the doctor come to a logical conclusion as to the date of birth? As an afterthought, he said that he carried out dentilation. The fact of dentilation was too farfetched because of the time he bought it in.

It was therefore obvious that the age couldn't be ascertained by PW3 either. Since the first ingredient of whether the victim was under the age of 18 years was not established, the rest of the two ingredients fell by the way side. My receiving on the above foregoing is that, the sexual intercourse becomes unlawful under defilement because the victim is under 18 years of age. If she is above 18 years it becomes unlawful, carnal knowledge without consent of the woman or girl and the accused would be charged with rape c/s 117 of the Penal Code Act.

As such I find that there is no reasonable evidence on which the Assessors can find that the fact is proved. Accordingly there is no prima facie case to require the accused to give his defence. I

find him not guilty and he is acquitted under S.71 (1) of the T.I.D. He should be released and set free unless if he is being held on other lawful charges.

F. MWONDHA

JUDGE

27/3/2003