THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT ARUA

CASE NO: HCT-00-CR-SC-0023 OF 2003

UGANDA ::: PROSECUTOR

VERSUS

WANICAN ALEX :: ACCUSED

BEFORE: HON. MR JUSTICE AUGUSTUS KANIA

JUDGMENT:-

The accused Wanican Alex is indicted for defilement contrary to section 132 (1) of the Penal Code Act. The particulars of the offence are that the accused on the 29th day of October 2001 at Kpelekthe village in Nebbi District had unlawful sexual intercourse with Lillian Wangwic a girl under the age of 18 years. The accused pleaded not guilty.

The case for the prosecution briefly stated is that on the 29th day of October 2001 when people were attending a funeral, the accused asked the complainant to accompany him and pick coffee from his father's coffee plantation. Hardly had they picked the coffee when the accused grabbed the complainant, threw her down removed her knickers and forcibly had sexual intercourse with her.

After the accused had had sexual intercourse with the complainant she went back to the venue of the funeral and reported to her mother that she had been defiled by the accused. The accused was promptly arrested by the LC III chairman taken to Paidha Police Station where he was rearrested and subsequently charged with defilement.

The accused who made an unsworn statement stated that on the 29th day of October 2001 at 6.00p.m. he was arrested in Paidha Town when it was raining. He was taken to Paidha Police Station

where he was detained for two days, then transferred to Nebbi Police Station and eventually taken to court charged and then remanded. He denied any knowledge of the allegations against him.

In our criminal justice system an accused person is presumed innocent until he is proved guilty. With the exception of a few statutory offences, of which defilement is not one, the burden of proof to establish the guilt of the accused lies on the preservation. This burden resides with the prosecution throughout and at no stage does it shift onto the accused who has no duty to prove his innocence. Before the accused can be convicted the prosecution must prove the guilt of such accused person beyond reasonable doubt. Any doubt as to the guilt of the accused must be resolved in favour of the accused resulting in his acquittal. See **Woolmington Vs DPP [1935] ALL ER 463.**

When the accused person has pleaded not guilty he is thereby putting aside each and every essential ingredient of the offence with which he is charged. To secure a conviction the prosecution is under a duty to prove beyond reasonable doubt every such essential ingredient of the offence the accused is charged with.

It is also a cardinal principle of our essential justice system that an accused person is to be convicted on the strength of the case for the prosecution but not on the weakness of the case for the defence. **See Israel Epuku s/o Achuku Vs R [1934] 1 EACA 166.**

The essential ingredients of the offence of defilement which the prosecution has the burden of proving beyond reasonable doubt are the following:-

1. That the complainant was under the age of 18 years at the time of the offence.

2. That there was unlawful sexual intercourse with the complainant.

3. That the accused is responsible for such unlawful sexual intercourse with the complainant.

To prove the first ingredient which is that the complainant was under the age of 18 years at the time of the offence, the prosecution relied on the medical report contained in Police Form 3, compiled by PW1 Dr Opar and tendered under the provisions of section 64 of the Trial on Indictments Decree and marked P1. In it PW1 Dr Opar found the complainant to be aged 11 years when he conducted the examination on her. PW4 Wangwic Lillian who is the complainant who gave an unsworn evidence gave her age at the time of hr testimony at 12 years which puts her age at the time of the offence at 11 years. The prosecution also relied on the evidence of the mother of the complainant PW5 Gerose Atimango to prove the first ingredient of this offence. Her evidence was that at the time of her testimony the complainant

was aged 12 years thus like the complainant putting her age at 11 years at the time of the offence. I also had the opportunity to observe the complainant when she testified in court and because I considered her a child of tender years I subjected her to a voire dire. All in all I found the complainant to be a girl far below the age of 18 years. The defence did not dispute the fact that complainant was under the age of 18 years at the time of the offence. Mr Lubwa learned counsel for the accused in fact conceded that the prosecution has proved this ingredient beyond reasonable doubt. With the above-undisputed evidence of the age of the complainant, I find that the prosecution has proved beyond reasonable doubt the complainant was under the age of 18 years at the time of the offence.

With regard to the second ingredient which is that there was sexual intercourse with the complainant, the prosecution adduced the evidence of PW1 Dr Opar, PW4 Wangwic Lillian, PW5, Gerose Atimango and PW6 Bellington Cekecan. The evidence of

PW1 Dr Opar is that contained in PF3 duly completed by him. In it PW1 Dr Opar found the hymen of the complainant to have been recently ruptured and injuries and inflammations around her private parts, which he found to be consistent with force having been sexually used. The testimony of PW4 Wangwic Lillian who is the complainant is that on the 29th October 2001 when people were attending a funeral at their home, her assailant asked her to accompany him to his father's coffee plantation and help him harvest coffee. Once in the coffee plantation he grabbed her, threw her down, removed her knickers and forcibly had sexual intercourse with her. It was also her evidence that as her assailant had sexual intercourse with her she felt pain in her private parts. That somebody had sexual intercourse with the complainant was not at all contested. It was instead conceded to by the defence. In the light of the evidence on record I find that the prosecution has proved beyond reasonable doubt the second ingredient of defilement which is that there was unlawful sexual intercourse with the complainant.

To prove the participation of the accused in the commission of this offence, the prosecution relied on the evidence of PW4 Wangwic Lillian primarily. She testified that on the 29th October 2001 there was a funeral at their home. At 2.00p.m. the accused invited her to go with him to pick coffee in his father's coffee plantation. On reaching the plantation the complainant and the accused picked some coffee then suddenly the accused grabbed the complainant, lifted her to his shoulders, held her neck tightly, then threw her to the ground. The accused then proceeded to remove her clothes and generally to undress her and had sexual intercourse with her. It was her evidence that she felt a lot of pain when the accused was having sexual intercourse with her.

On whether the accused was known to her before this offence, PW4 Wangwic Lillian testified that the accused was well known to her because he is a neighbour in the village. She also knew him

to be the son of Ongona, married to Berocan and that his children are Yotung and Kwicwiny.

This incident having happened during broad day light at about 2.00p.m. and the accused being a neighbour to the witness, there s no chance that there was mistaken identity and so I find the complainant positively identified the accused as that assailant who had unlawful sexual intercourse with the complainant on the 29th day of October 2001.

The above eye witness evidence that implicates the accused in the commission of this offence is that of PW4 Wangwic Lillian a child of tender years which was given not on oath. Section 38 (3) of the Trial on Indictments Decree provides that where a child of tender years gives evidence not upon oath on behalf of the prosecution, such evidence should not be acted on to convict an accused person in the absence of corroboration. The said section in full reads as follows:-

"38 (3) where, in any proceedings any child of tender years called as a witness does not, on the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof implicating him"

PW4 Wangwic Lillian was such a witness and her evidence. The evidence of such a witness which requires corroboration the thing to do now is to seek for other evidence corroborating the evidence

of PW4 Lillian Wangwic on the participation of the accused in the commission of the offence.

Other evidence which tends to loud corroboration of the accused by committing the offence is that if PW5 Gerose Atimango and PW6 Billington Cekecan the evidence of the two witnesses is identical in content. It is briefly that when both of them were attending a funeral the accused approached the complainant and asked her to accompany him and to help him pick coffee. Then the accused and the complainant left. Soon thereafter the complainant came back to the venue of the funeral crying and alleged that the accused had had sexual intercourse with her. This is complimented by the evidence of PW1 Opar which is that on examining the complainant he found her to have been recently defiled.

This evidence is circumstantial in nature. It is trite that circumstantial evidence is as good as direct evidence if not below

in that it can prove a fact with mathematical accuracy. It is also trite that to act on it and base a conviction on it. It must be such that it excludes every hypothesis of the innocence of the accused and irresistibly points to his guilt See **Andrea Obonyo & Others Vs R [1962] EA 542.** Because a conviction can be based on circumstantial evidence alone, it is also capable of corroborating other evidence which needs corroboration.

The circumstances in the above circumstantial evidence on which the prosecution relies to implicate the accused in the commission of this offence are that the accused went with the complainant to a coffee plantation. No sooner had the two gone than the complainant came back crying and alleged that she had been defiled by the accused. When she was taken to PW1 Dr Opar for a medical examination she was found to have been recently defiled. The prosecution contends that this set of facts shows that the complainant could only have been defiled by the accused.

I agree with the argument advanced by the prosecution that from the circumstances related PW5 Gerose Atimango and PW6 Bellington Cekecan the only interference to draw is that it was the accused who had sexual intercourse with the complainant is that she left the venue of the funeral in the company of the accused and at his invitation to go and help him harvest coffee in the coffee plantation. Soon after they had to the coffee plantation the complainant came back crying and accused, the accused having defiled her. The complainant was then taken for medical examination the following day and PW1 Dr Opar found her to have been recently defiled. From the above circumstances the facts are incompatible with the innocence of the accused and they irresistible point to the guilt of the accused. This circumstantial evidence corroborates the complaiant's unsworn evidence that it was the accused who had unlawful sexual intercourse with her as indeed her evidence on her age has been corroborated by PW1 Dr Opar, PW5 Gerose Atimango and by the common sense

assessment of the court and the fact of unlawful sexual intercourse by the medical evidence of PW1 Dr Opar.

The accused who made an unsworn statement told the court that he was arrested in Paidha town, taken to Paidha Police Station and later transferred to Nebbi where he was taken to court. He denied any knowledge of this offence.

In view of the controverted evidence adduced by the prosecution, the line of defence adopted by the accused is a formal of imagination which is completely inconceivable. I reject it outright.

In the respect the prosecution having proved each and every essential ingredient of defilement beyond reasonable doubt. I find the accused guilty of the defilement of Wangwic Lillian contrary to section 123 (1) of the Penal Code Act and in total agreement with the unanimous opinion of the assessors convict him accordingly.

AUGUSTUS KANIA

JUDGE

11/04/2003.

Right of Appeal explained.

Judgment read in open court in the presence of:-

Mr Odiit – Resident State Attorney.

Mr Lubwa – for the accused.

The accused in court.

Mr Okumu – Alur/English Interpreter.

Mr Boyi – Court/Clerk.

AUGUSTUS KANIA

JUDGE

11/04/2003.

Odiit:-

The convict is aged 22 years and a first offender. He has been on remand since 12/11/2001. At the time of the offence he was a cultivator married with two children. This is a capital offence punishable by up to death. This law was passed to protect the dignity of the girl child. This offence is rampant particularly affecting girls under 12 years. The victim was only 11 years old. She is now a pupil in Pamuchu Primary School P4. This victim has been traumatized both physically and psychologically. The accused was beastly and hestful knowing that he was a married man. Young girls must be protected by a deterrent sentence.

Mr Lubwa:-

It is true the convict is 22 years old and a first offender. He has been on remand for one year and five months and one day. The offence is of a grave nature punishable by death. The convict is married with two children who are totally dependant on him. They are now dependant. In view of these antecedents the convict prays your exercise degree of lenience.

Court:-

The accused is a young man of 22 years who has many years ahead of him to make amends and contribute positively to nation building. He is a first offender and has been on remand for one year, five months and 1 day a period to be taken into account when passing sentence as provided by the constitution of this country. He has a young family of which he is the sole bread winner.

These above antecedents not withstanding defilement is an offence of a capital nature attracting the death sentence as it is maximum sentence. The severalty of sentence was intended by the legislature to protect to protect the girl child from random abuse of her dignity and human rights. It is also intended to protect the said girl child from physical and psychological trauma resulting from sexual abused. In this age of deadly Sexually Transmitted Diseases there is now need to protect the girl child

against things like AIDS and to ensure that their reproductive health is not endangered as can be the case with girls the age of the complainant. To provide the above protection the court has to pass stringent custodial sentences that can keep the likes of the accused away from circulation. This will not only keep them away from mischief but with also send signals to those who intend to behave in like manner.

Taking into account the favourable mitigating antecedent of the accused and the need of protecting the girl child and taking into account the period of one year, five months, one day the accused has already spent on remand, I sentence him to serve a term of 10 (ten) years imprisonment.

AUGUSTUS KANIA

JUDGE

11/04/2003.