THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

FORT PORTAL HOLDEN AT MASINDI

CRIMINAL HIGH COURT SESSION NO. 37 OF 2003

UGANDA :: PROSECUTOR

VERSUS

ASIIMWE EDISON :::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE LAMECK MUKASA:

JUDGMENT:

The accused Asiimwe Edison is charged with defilement contrary to section 129 (1) of the Penal Code Act (Cap 120 Laws of Uganda 2000). The particulars of the offence are that the accused on 24th February 2001 at Kiguhya village Masindi District unlawfully had sexual intercourse with the Nsekanabo Harriet a girl under the age of 18 years.

The accused pleaded not guilty to the charge. He was represented by Mr. Willy Lubega. The prosecution was conducted by the Resident State Attorney Masindi Mr. Angozosi Serwadda.

In all criminal cases an accused person is presumed innocent until proved or pleads guilty. See Article 28 (3) (a) of the Constitution. The burden of proof rests upon the prosecution, throughout the trial, to prove both the charge and the ingredients thereof beyond reasonable doubt. This burden does not shift to the accused. See Woolmington v/s DPP (1935) AC462, Oketcho Richard vs. Uganda Supreme Court Criminal Appeal No. 26 of 1995 (Supreme Court of Uganda Certified Criminal Judgments 1996 – 2000 page 148).

In an offence of defilement contrary to section 129 (1) of the Penal Code Act the prosecution must prove beyond reasonable doubt each and every one of the following ingredients:-

1. That there was unlawful sexual intercourse with the victim.

2. That the victim was at the time of the alleged sexual intercourse a girl under the age of 18 years.

3. That the accused person was the male who had the unlawful sexual intercourse with the victim.

The defence did not contest the age of the victim Nsekanabo Harriet. The evidence of PW1 (the victim), PW2 (The medical Doctor who examined the victim), PW3 (the mother of the victim) and PW4 (the victims father) left no doubt that the victim was under the age of 18 years at the commission of the alleged offence. The sexual intercourse complained of is alleged to have taken place on 24th February 2001. At the time of trial PW1, PW3 and PW4 stated that the victim was 12 years old, born on 6th May 1992 according to PW3. Dr. Abiriga Jino (PW2) who examined the victim on 25th February 2001 put her age at 9 years. Both counsels, the assessors and myself are agreed that the victim was visibly below the age of 18 years. See Rev Recorder of Grimsby Exparte v/s Pulser (1951) 2 All ER 889. Due to her tender age I conducted a voire dire before receiving her testimony. I therefore find that the prosecution has proved the ingredient of age beyond reasonable doubt.

The defence contested the ingredient of unlawful sexual intercourse and the participation of the accused. The law with regard to sexual intercourse as stated in

the Supreme Court case of Basita Hussein v/s Uganda Supreme Court Criminal Appeal No. 35 of 1995 is as follows:-

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victims own evidence and corroborated by medical or other evidence. Though desirable it is not a hand and first rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration …….. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."

To prove sexual intercourse the prosecution relied on the testimony of PW1 (the victim) PW2, PW3, PW4 and PW5. The victim testified that on the material day while at her grand fathers house the assailant came and asked her to carry for him a bunch of banana. That the bunch was too heavy for her and she refused to carry it. The assailant then asked her to go with him so that he buys her biscuits. The victim accepted to go with him and on the way the assailant led her into Joseph Kabagambe's banana plantation. While there the assailant broke tree leaves on which he made the victim lie down while facing upwards. The victim testified that

the assailant removed her knickers and inserted his penis into her vagina. That she felt pain but she could not make noise because the assailant had blocked her mouth with grass.

PW3 Mbehwereze Evers, the mother of the victim, testified that while in the house she heard one of her children crying. When she came out into the courtyard to find out she saw her daughter, the victim, who was approaching home crying. That when she asked her she revealed her ordeal to her. When the witness examined the victim she saw a whitish fluid mixed with blood flowing from the victims private parts down her legs. That the victim was walking with her legs spread apart. PW4 Mwesige Charles, the victims father, testified that the victim told him that she was feeling pain in her lower parts of the body and he personally observed that the victim was in pain. PW5 Katogole Joseph, the L.CI Defence Secretary, testified that when he saw the victim after receiving the report of the case, the victim was worried and crying.

Such state and distressed condition of the victim as testified to by the above three witnesses provides corroboration of the victims testimony with regard to sexual intercourse. In Abasi Kibazo vs. Uganda (1965) EA 507 the Justices of Appeal upheld the trial judges finding that in sexual offences the distressed condition of

the complaint is capable of amounting to corroboration of the complaints evidence depending upon the circumstances and the evidence.

The victim was examined on 25th February 2001 by Dr. Abiriga Jino, PW2. He testified that his findings were that there were signs of penetration, the victims hymen had been recently raptured, there were injuries or inflammation on the vulva (covering of the vagina). That the injuries were consistent with force having been used sexually. The witness tendered in evidence his report on PF3 as exhibit P1.

In his submission Mr. Lubega Submitted that the Doctors findings contradicted the testimony of PW3 in that the doctor did not find any sperms or blood clots in the victims private parts in view of PW3's testimony that the victims private parts had not been washed before the medical examination. The law is that to establish sexual intercourse the prosecution does not need to establish the rapture of the hymen or actual emission of sperms as the very slightest penetration of the hymen will do. This position of the law is stated in Archbold Criminal Pleading, Evidence and Practice 36th Ed Para 2879 as follows:-

> "To constitute the offence of rape there must be penetration. But any, even the slightest penetration will be sufficient. Where a penetration was proved

but not of such depth as to injure the hymen still it was held to be sufficient to constitute the crime of rape. Proof of the rapture of the hymen is unnecessary. It is now unnecessary to prove actual emission of the seed. Sexual intercourse is deemed complete upon proof of penetration."

I am of the considered opinion that the above position of the law is equally applicable to the crime of defilement. See also: Hisebary Laws of England 4th Ed. Vol. II page 653 para 1228, Uganda v/s Stephen Mulengera (1996) KALR 140, Dan Mubiru v/s. Uganda Court of Appeal Criminal Appeal No: 47 of 1996, Uganda v/s Ocero George (1996) 11 KALR 98

The accused's counsel further argued that given the victims age as compared to the accused's age, who was about 23 years at the time of the alleged sexual intercourse, had there been sexual intercourse the consequential injuries would have been more grave than those sustained by the victim. It is my considered opinion that due to the age of the victim full penetration was made difficult for the assailant who must have been packing lest he is find in the act. The doctor's findings indicate that there was penetration sufficient to constitute sexual intercourse. I therefore find the victims testimony further corroborated by the

medical evidence. I find that the prosecution has proved beyond reasonable doubt that there was sexual intercourse.

Under section 129 (1) of the Penal Code to constitute the office of defilement such sexual intercourse must have been unlawful. In Smith and Hogan Criminal Law 8th Ed. Page 478 "unlawful sexual intercourse" is defined to be sexual intercourse outside marriage. In her testimony the victim stated that she is 12 years old, pupil in P.5 at Kigwoya Primary School. She was still staying with her parents, a fact testified to by PW3 and PW4, the victim's mother and father respectively. Further the marriage age in Uganda is 18 years and above. The victim was not married and any sexual intercourse with her was outside marriage, thus unlawful. I accordingly find that the prosecution has proved beyond reasonable doubt that there was unlawful sexual intercourse with the victim Nsekanabo Harriet.

The last ingredient is whether the accused was the one who had the unlawful sexual intercourse with Nsekanabo Harriet. The prosecution's only evidence on this ingredient is that of the victim PW1. She testified that on the material day the accused found her at her grandfather's home. He asked her to go with him so that he buys her biscuits. That on the way the accused took her into Joseph Kabagambe's banana plantation where the accused made her to lie down, removed her knickers and had sexual intercourse with her. I warned the assessors, as I now

wash myself, of the danger to act on the uncorroborated testimony of the victim, in the first place being the testimony of a complainant in a sexual offence and secondly being the testimony of a single identifying witness. In both cases such evidence must be corroborated by either independent direct or circumstantial evidence free of contradictions.

In Chila and Anor v/s R (1967) EA 722 it was held:

> "The Law in East Africa on corroboration in sexual cases is as follows:-
>
> The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complaint, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, the conviction will normally be set aside unless the appellant court is satisfied that there has been no failure of justice".

See also Charles Katende vs. Uganda (1971) 2 ULR10. With regard to identification by a single identifying witness it was held in Abdulla Bin Wendo & Another vs. R (1953) 20 EACA 186 that:-

> "The testimony of a single witness regarding identification must be tested with the greatest care. The need for caution is even greater where it is known that the conditions favouring correct identification were difficult. What is needed before convicting is other evidence pointing to the guilt of the accused."

I accordingly cautioned the assessor, as I now caution myself, to safeguard against a conviction based on mistaken or erroneous identification of the accused person. The test here is whether the evidence of the identifying witness can be accepted as free from the possibility of error and whether it is truthful. Guidelines to be followed by court when dealing with the evidence of identifying eye-witness were extensively discussed by the Supreme Court in Bogere Moses & Another vs. Uganda S.C. Criminal Appeal No. 1 of 1997 (The Supreme Court of Uganda certified Criminal Judgments 1996 – 2000 page 185), wherein a number of leading authorities were discussed. The Supreme Court held:-

> "The starting point is that court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult and warn itself of the possibility of

mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence as a whole, namely the evidence, if any, of the factors favouring co

rrect identification together with those rendering it difficult. It is trite law that no piece of evidence should be weighed except in relation to all the rest of the evidence ……".

In Nabulere and others v/s Uganda (1979) HCB 77 the court set down the factors that should be considered when determing as to whether or not a witness has positively identified an accused person. The first factor is whether there was light, that is as to visibility. The victim, PW1 testified that when the accused came to her grand father's home and went away with her and eventually defiled her it was in the after noon during day time around 4.00 p.m. The victims testimony in this regard is corroborated by the testimony of her mother PW3. She testified that on that day she came back home from a party at around 5.30 p.m. That on arrival she entered the house and immediately heard a child crying. She came out to see who was crying and she saw the victim who reveal her ordeal to her. By 5.30 p.m. the

victim had already been defiled, therefore the incident took place in broad day light.

The second factor is whether the witness knew the accused before or he was a complete stranger. It is the victim's testimony that the accused person was her village mate whom she had seen on the village for a long time, the accused was at family friend and used to come to see them a their home. The victims testimony is corroborated by both PW3 and PW4, the victim's parents, who testified that the accused is a village mate, that before the incident he was a family friend and used to come to their home. Therefore the accused was not a stranger to the victim. The accused in his defence admits that he was a resident of the same village with the victim and knew her.

The third factor is whether the witness had sufficient time to look at the accused or whether she only had a fleeting glance. According to the victim the accused found the victim and her sister at her grandfather's home called Abel. The accused got a bunch of banana from her grandfather. The accused asked her to carry the bunch for him but it was too big for her and she refused to carry it. Then the accused asked her to go with him so that he buys her biscuits. They moved together and on the way the accused took her

to Joseph Kabagambe's banana plantation where the accused defiled the victim. After which the accused held the victim by the hand and led her to Kyamanywa's shop where he bough for her biscuits and the two parted.

The last fact is closeness of the witness to the accused at the time of commission of the offence. The above evidence shows that the witness was familiar to the accused person, was at all time in close actual contact with the accused and had sufficient time to identify the accused whom she knew before and during day time. All the evidence put together leave no doubt as to the victims ability to positively identify the accused.

The accused in his defence testified that on 24th February 2001 in the afternoon he had gone to Kinyara to sell his products as a blacksmith. That he left Kinyara at around 6.00 p.m. The accused thus put up a defence of an Alibi.

In Mushikoma Watete alias Peter Wakhokha & 3 others vs. Uganda S.C. Crim. Appeal No: 10 of 2000 (ISCD) (CRIM) 1996 of 2000 page 22) their Lordships the justices stated:

> “The defence of alibi is set up when an accused person, wishing to show that he could not have committed the offence charged, asserts that at the time the offence was committed he was in a different place from the scene of the crime. The law is well settled, that an accused person who puts forward an alibi as an answer to the charge against him, does not assume any burden of proving that answer. The burden remains on the prosecution to prove that the accused was at the scene of crime and not at the different place where he claims to have been.
>
> This emanates from the general principle propounded in the well known decision of the House of Lords in Woolming vs. D.P.P. (1935) ac 462 to the effect that, with the exception of the defence of insanity and some other statutory defences which are not relevant here, no burden rests on an accused person to establish his defence. That is true if the defence of alibi also. An accused person does not have any burden to prove his alibi.

Needless to say, However, that for the prosecution to negative it and more so for the court to consider it as the defence, the alibi has to be put forward as the answer to the charge.”

The accused in his testimony does not state the time at which he left his home village Kiguruya where the offence was committed for Kinyara. Nor does he state the time when he arrived at Kinyara. Instead the accused gives time when he left Kinyara and arrived back home – that is that he left Kinyara at 6.00 p.m. and arrived home at 9.00 p.m. The prosecution evidence on record shows that the offence was committed around 4.00 p.m, according to the victim PW1. Further it is her testimony that after the accused had bought her biscuits he left her to go home and he went to his home. The accused movements thereafter are unknown. He could the same afternoon have proceeded to Kinyara after the incident. In R Chemulon Wero Olango (1937) 4 EACA 46 it was stated:

> "The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the inputed act."

I find the accused evidence short of satisfying that burden in that he has not accounted for the time within which the accepted offence was committed.

Further the defence of an alibi should be disclosed at the earliest possible opportunity. See Festo Androa Asenua & Another vs Uganda S.C. Crim. Appeal No: 1 of 1998 (1 SCD (CRIM) 1996/2000 page 91:) When cross-examined as to why he in his statement to the police recorded on 1st March 2001 he never mentioned about being at Kinyara but that he had only stated that he was drinking beer with his colleagues the accused only stated:

> "I might have so stated because of fear and torture, otherwise I do not drink."

The accused did not raise the alibi at the earliest possible opportunity. I found the victim, though young, a straight forward and truthful witness and her testimony squarely put the accused at the scene of crime at the material time. I believe the victims testimony and reject the accuseds testimony on the alibi.

In further defence the accused testified that the charges were fabrications against him because of the grudge between him and the victims family. He testified that since 1995, PW4 the victims further has been chasing the accused from his Kibaija. He testified that he was occupying a Kibanja on the land of the Basiitta clan to which PW4 belongs and was the accused's maternal uncle. However, PW4 was

not cross-examined about any dispute over land between him and the accused. PW3, the wife of PW4, and PW5, the defence secretary L.C.I. who were cross-examined about the alleged dispute denied any existence of any such dispute. According to PW5, PW4 belonged to the Babitto clan. PW3 testified that their kibanja was neighbouring that of the Basiita clan on which was the accuseds land and she testified that there was no land dispute between PW4 and the Basiitta clan. In his testimony and during cross-examination the accused was confused as to his clan. In examination in chief he said he was of the Basiitta clan, the same clan as his mother, then in cross-examination he said he belonged to the Mubwijwa clan and when pressed further he admitted that he knows that he is not a Musiitta. The accused impressed me as a good lier. I accept the testimony of the prosecution witnesses that there is no land dispute between the victims family and the accused.

The accused further testified that in 1997, PW3 (the victim's mother) had gone to the accused's house and injured the accuseds newly born baby's embrical code. That the accused reported the matter to the L.C.1 Executives, including PW5, and that the accused had since never gone back to the victim's parents home. PW3 was not cross-examined about that incident. PW4 and PW5 who were cross-examined about it denied the occurrence of such an incident. To the contrary all the prosecution witnesses PW1, PW3, PW4 and PW5 testified that before the

commission of this offence PW4 and the accused were friends. PW1 testified that the accused was a family friend who before the incident used to visit their home twice a week on average. PW3 testified that before the incident relationship between the accused and their family was good. That the accused used to come to their home so frequently that she cannot count how many times he had visited their home. PW4 testified that the accused's home was his home and they used to visit each others home frequently.

I believe that prosecution witnesses evidence as to the relationship between the accused and the victim's family before this incident. More still the accused accepted that there was no grudge between him and PW5 therefore no reason why he should have given evidence against him. I therefore reject the accused's story of a grudge between him and the victim's family. It was a lie calculated to conceal the truth from court. I find that the prosecution has proved beyond reasonable doubt that the accused had unlawful sexual intercourse with Nsekanabo Harriet on 24th February 2001.

In agreement with the gentleman and lady assessor who in their joint opinion advised me to find the accused guilty I find the accused guilty of the offence of

defilement contrary to section 129 (1) of the Penal Code Act as indicted and he is accordingly convicted.

Lameck Mukasa

AG. JUDGE

22/4/2004

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA IN FORT PORTAL

HOLDEN AT MASINDI

CRIMINAL CASE NO: 37 OF 2003

UGANDA :: PROSECUTOR

VERSUS

ASIIMWE EDISON :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. JUSTICE LAMECK N. MUKASA:

RECORD OF PROCEEDINGS:

12/01/2004

Mr. Serwadda Angozozi – RSA.

Mr. Lubega Willy for the accused.

Asiimwe Edison accused present.

Mr. Byenkya Joseph – clerk/interpreter.

Mr. Serwadda:

Suggest 13/1/2004.

Mr. Lubega:

Okay.

Court:

Fixed for plea and hearing on 13/1/2004. Accused further remanded.

Lameck N. Mukasa

JUDGE

12/1/2004

13/1/2004

Mr. Serwadda Resident State Attorney for State.

Mr. Lubega for accused.

Accused present.

Mr. Byenkya Joseph – Clerk/Interpreter.

Court:

Charge read and explained to the accused in Lunyoro.

Court:

Have you heard and understood the charge?

Accused:

I have heard but I do not know the charge.

Court:

P.N.G. entered.

Mr. Serwadda:

There are no preliminary matters agreed and I have the witnesses in it.

Court:

The following assessors are appointed:-

1. Ms. Kabyanga Tabitha aged 57 years retired nurse, Bukyajo, Masindi Town Council.

2. Mr. Ephraim Kiiza aged 58 years farmer. Kisanga village, Miirya Parish Masindi District

Do you have any objection to any of them.

Accused:

I have no objection.

Court:

Assessors sworn in.

Court;

Let hearing commence.

PW1:

NSEKANABO HARRIET states, I am 12 years old. I stay Kigurya Kyetegya, Nirye sub-county Masindi District. I am studying at Kigurya Primary School in P.5. I am protestant. I go to church. I do not receive holy communion. I have heard about Jesus. He is our Savour from sins like adultery. Telling lies is a sin. You repent if you do not want to tell lies. I know what an oath is. To swear in the name of God. To stop from abusing people and other bad things.

Court:

I find that the witness understands the nature of an oath she can therefore be sworn in.

Lameck N. Mukasa

JUDGE

Court:

Witness sworn and states:-

Mr. Serwadda:

I have one witness a Doctor who has come and has limited time because he is very busy at hospital. I request that this witness is stood down and the Doctor's evidence received first.

Court:

Let this witness stand down and the Doctor's evidence be received first.

PW2:

DR. ABIRIGA JINO Catholic sworn and states:-

I am 33 years old, stay at Masindi Hospital, Masindi Town Council. I am Medical Officer attached to Masindi Hospital. I hold Bachelor of Medicine and Bachelor of Surgery Mbarara University in 1999. Have been in practice for 4 years. I have in that period been doing some work for police like examining victims in assault case, defilement case, including postmortem. I have handled about 10 defilement cases. The police comes with the victim and a police form which fill my findings. This document is familiar to me. It is Police Form 3. I filled it. It is in respect of Nsekanabo Harriet. My findings were that I examined Nsekanabo Harriet a complainant in a defilement case sent to me 25/2/2001. The following were my findings:-

- She was 9 years old.

- There was sign of penetration. The hymen was raptured. The rapture was recent.

- There was injuries or inflammation around the private parts on the valva (covering of the vagina).

To me the injuries were consistent with the force used sexually.

- There were no injuries on the thighs and elbows.
- The girl was not strong enough to put force or resistance.

I signed and stamped it with the Hospital stamp on 25/2/2001.

Mr. Serwadda:

I apply to tender in the medical report on victim as exhibit.

Mr. Lubega:

No objections.

Court:

Police Form 3 in respect of Nskekanabo Harriet dated 25/1/2001 received as exhibit P1.

Lameck N. Mukasa

JUDGE

Cross Examination by Mr. Lubega:

I have been is service for about 4 years. I have written about 10 such reports. There is no space on the form where the size of the injuries should be indicated. Whether a girl is about 9 years and the attacker is about 25 years can walk immediately thereafter. If the force used is excessive the girl could develop dislocation of hip joints and in such case it qould be painful for her to walk but where there is no big force used there could be just a small injury of the valva and the victim can walk. In No. 9 I wrote "nil" because in No: 7 they were asking about injuries on the thigh legs and elbows but there were none so I wrote "Nil". I did not consider the injuries period in respect of No. 5.

- There were no sperms in the vaginal area. Injuries in No. 5 were around the valva at the entrance of the vagina. That would show that the injury at the vagina was as a result of sexual penetration.

Mr. Serwadda in re examination:

I had seen the injuries at the private parts but in No. 4 I stated that hymen was raptured but recent, that means it was fresh. I wrote "Nil" in No. 9 because I throught it was only applicable to No. 7. There being no sperms could be because the private parts might have been washed. Another explanation could be that I did

no do laboratory testing to examine the fluids inside the vagina. Not every sexual intercourse end up into an ejaculation.

PW1: Recalled and states:

I know the accused. He is Asiimwe Edison. He resides in our village. I have seen him in the village for a long time. The accused told me that I should carry for him a buch of banana. I was at my grand father's home. He asked me to carry the buch of banana from my grand father's home to the accused's home. He had got the banana from my grand father called Abel. I do not know the time of the day but it was during the day. It was in the afternoon. In did not carry the banana. I did not carry the banana because it was too heavy. When I refused he took me to the banana platation of Joseph Kabagambe who is the father of my friends. He took me there saying he was going to buy me biscuits. The accused broke tree leaves. He made me lie down facing up wards. He then rape me. I had my knickers on. He removed my knickers. He put his penis in my vagina. I felt pain. He put grass in my month so that I do not make noise. It was around 4.00 p.m. when he had sexual intercourse with me. After having sexual intercourse he took me and bought for me biscuits at Kyamanywa's shops. After giving me the biscuits I went back home. The accused also went to his home. At home I informed colleagues that I had been raped by Asiimwe Edison. He is the one in court. I told by father

and my mother. My father is the Mwesige Charles and my mother is Mbehwereze Evas. They (my mother) took me to the chairman, called Kwawya Patrick to report the accused. Asiimwe for having raped me. The chairman forwarded us to the police at Masindi. My statement was recorded. I was refered for medical examination to Dr. Abiriga who examined me.

Cross Examination by Lubega:

When the accused asked me to carry the bunch of banana I was with my sister called Jolly. She was about 13 years. She is older than me. We were only two. She also heard when accused was asking me to carry the bunch of banana. When we were going to buy biscuits we left Jolly at home. Jolly was not aware where we were going. She saw us going. That is when I was going with the accused when the accused told me that he was going to buy me biscuits Jolly was present. The accused told that let us go and I buy you biscuits at the home of my grand father. I left home with the accused going with him to buy for me biscuits. I sleep in the home of my father. My father's home and that of my grand father are on the same kibanja. The accused's home is …..pg23 in this same kibanja. Yes the accused used to come to our home. He used to come and see us. The accused's home is a long distance from our home but on the same village. There is a kibanja in between the accused's home and ours. The kibanja in between is that of my grand

father. The accused does not reside on my grand fathers kibanja Joseph Kabagambe's banana plantation is in Kyetegya village. It is not near our home. It is near the home of the accused. It is not between my grandfather kibanja and that of the accused. Kabagambe's banana plantation is near Kyamanywa's kibanja. Kabagambe's banana plantation is on Kabagambe's kibanja. I have a relationship with the accused. He is a family friend. I have no blood relationship with the accused. Before this incident the accused had not bought anything for me. He could come about 2 times to our home a week on average. The accused has a misundertanding with my family. Before this incident the accused and my family were in good talking terms.

When he put me down and had sexual intercourse with me I struggled. I did not receive any buises in the struggle. I did not make an alarm he put grass in my mouth to stop me from shouting. After the incident I continued with him to the shop. I was fearing him. I did not run away because he was holding me. Yes we met people on the way. I can not recall their names. I did not tell them what had happened to me. The Kabagambe's banana plantation is a short distance from the road. He spent about one hour lying on me. All that time I was struggling.

Re: examination:

I also stay at Kyetegya. It is called Kigunya Kyetegya. I was staying in the same village with the accused. Kabagambe was staying on a neighbouring village. My father's home is on my grand father's kibanja. The Kibanja neighbouring my grand father is that of Padiri, and Nyamijumbi. The accused is not a neighbour. Kabagambe is also not a neighbour. Kabagambe's land is not near Kyamanywa's land. The place where he had sexual intercourse with me is a short distance from the road. If someone is passing by the road he could see what was happening at the place where he had sexual intercourse with me. It is a small path in the village. I was not injured during the sexual intercourse. I did not have any injuries in my private parts. I felt pain in the course of the sexual intercourse. I have spent about 2 hours in the witness box. I spent about one hour with the accused while he was having sexual intercourse with me. I know the length of an hour properly.

PW3:

MBEHWEREZE EVERS Protestant sworn and states: I am 35 years old. I stay at Kyetegya – village, Kibunya parish, Miriya sub-county Masindi District. I am a peasant farmer. I know Nsekamako Harriet. She is my daughter. She is now aged 12 years. She was born on 16/5/1992. I have a birth certificate but it is at home. The accused is Asiimwe Edision at times he calls himself Edward. He is my village mate at Kyetegya village. When I was married to that village in 1984 I found him in that village. His home is about …..pg30 here up to the police to my

home. Between the accused's home and our home have there is only one Kibanja of the Basita clan. I know Kabagambe. I do not know Kyamanywa Joseph. On 24/2/2001 was a Saturday. On that day I was invited to a party. I left the children at home and went for the party. The children were Ayebale Jesca then aged 14 years, Harriet Nsekanabo then aged 9 years, Katusabe Jolly then aged 13 years, Scovia Kurihira then aged 4 years. At that time my husband was not present. He had gone to the party before me. Then we came back at around 5.30 p.m. I went home. On arrival I entered the house. When I entered I heard a child crying. I asked as to who was crying. I went out of the house and got hold of Harriet Nsekamabo who was crying. I asked her why she was crying. This was approaching 6.00 p.m. When I asked her she told me that Asiimwe had raped her. She told me that it was near the ant hill in the banana plantation of Kabagambe. I knew the plantation. Between the platation and our house is only my father in laws Kibanja. Kabagambe is a maternal uncle to the accused and they were on the same kibanja of the Basitta family. I got shocked when she told me that she had been raped. I got hold of the child and took her to the chairman. In her private she had sleepery fluid and blood. She was in pain and could not walk properly. She could walk with her legs spread apart. I saw the fluid as it was running down her legs it was fluid of poplaish mixed with blood. I did not touch her private parts but I told

her to squat and I observed her private parts. I saw fluid whitish following down mixed with blood.

The chairman is called Kwamya Patrick. When we went to the chairman it was already after 6.00 p.m. He told me it was late. That our claim would be entained next morning after seeing the defence secretary Katongole Joseph. During the night I informed my husband. Early in the morning at around 6.00 a.m. the chairman and secretary for defence came to our home. The chairman and secretary for defence went to the accused's home. When they came back my husband took the child to the police. When the chairman and secretary for defence returned, they did not come with Asiimwe. I did not go to the police. A statement was recorded from by the police at my home. The accused used to come to our home. I cannot tell how many times. He used to come home. The relation between my family and the accused was not bad. We stay in the sane village with Kabagambe.

Cross Examination by Mr. Lubega:

There is no land dispute between the Basiita family and that of my husband. I am not related to the accused. There is no police post in our village. When I reported to the chairman and secretary for defence they assisted us the following day. They went to the accused's home. They wanted the accused to take the child to hospital

together with the defence secretary. They found the accused at his home. They gave a letter to my husband forwarding him to the police. Yes I returned from the party at around 5.30 p.m. When I arrived home I straight went inside the house. I heard the girl crying when she was about to arrive in the court yard. She found me at home. It was around 6.30 p.m. The chairman told me not to wash her private parts. I did not wash her from the time she had been raped. Up to the time she was taken to hospital I had not washed her private parts. As she approach I saw her walking with her legs apart. I got hold of her when she had already arrived in the court yard. I saw the fluids run down her private parts while squarting. I did not touch her private parts. Yes I have neighbours I informed then. I first informed Kyamanywa Patrick, Sarah Mbabazi who are my nearest neighbours. By my understanding this was the first encounter for my daughter to have sexual intercourse.

Re: Examination:

I did not go with the chairman and defence secretary to the accused's home. I remained at home. They did not come back with the accused. Yes they told me what had happened at the accused's home. They had found him home. I did not ask them why they did not come with hin. When I heard a person crying it was around 6.30 p.m. Before the incident Harriet ised to bath herself. She did not bath

herself that night. I stayed with her to ensure that she did not bath herself that day. I looked at Harriet's private parts. After finding about the incident I went to the chairman first. She told me that he had been assaulted that very day when I had gone for the party.

PW4 Mwesige Charles:

Protestant sworn and states:-

I am 38 years. I reside at Kyetegye Kigurya, Kigurya Parish, Mirya sub-county Masindi District. I am a peasant farmer. I know Nsekanabo Harriet. She is my daughter. She is 12 years now. I do not recall when she was born unless I check in my records. I know the accused. He is Asiimwe Edison alias Edward. I have known him since his childhood. He is my village mate. He has grown up in the village. He used to come to home because he was my friend. My home is near the road. He could at times branch to my home even when he would be passing by.

On 24/2/2001 at around 8.00 p.m. I came back home from a party which I had been attending that day. My wife Mbehwereze told me that we have had a problem. That Asiimwe had rape Nsehanabo. She told me that she had already reported to the chairman who had promised to come together with the defence secretary the following morning to arrest Asiimwe. The following morning at 6.00 a.m. Kwanya

Patrick (chairman) and Katengole (Defence Secretary) came to my home. I went with them to the Accused's home to arrest him for having raped a young girl.

The chairman called him out. The accused came out and chairman ordered him to sit down which he did. When asked by the chairman whether he was aware of the mistake he had done. He responded that he remembered asked forgiveness and immediately ran away. The chairman called him back. Asiimwe came back. The chairman told Asiimwe to sit down. When he heard that the chairman was going to write a letter introducing us to the police and hospital to check the child, he got up and ran away. After the accused had run away the chairman decided to give me a letter to introduce me to the police. The chairman decided that if he has run away let us report to higher authorities. The chairman gave me a letter and I took the child to the police. I took the child to Masindi Police Station where I was given a letter forwarding the child to a Doctor. I took her to Dr. Abitiga. The Doctor examined her and confirmed that she had been raped. I made a statement at the Police. A statement was also recorded from my daughter. Accused was arrested on 25/2/2001 by chairman, Defence secretary and me. He was arrested from his home at around 6.30 p.m.

Cross Examination by Mr. Lubenga:

When we went to his home the first time we did not expect to settle the matter. We had not gone there to settle the matter but to arrest him. We found him at his home. We woke him up and he came out. He was ordered by the chairman to sit down and he sat. We were three men. When he was asked by the chairman about the raping of the child he ran away. The accused was my friend indeed. We were staying together, used to hold discussions with him, we used to visit each other. I do not recall anything which happened between my wife and the accused's wife when she produced their first born. I do not know that my wife went to the accused's home and caused injury to their child's (baby's) embrical code. I have never assaulted the accused. We have never appeared before the L.C for a dispute between my family and the accused's family. I do not recall when I last saw the accused at home. I did not examine the child when I was told she had been defiled. Because I was not a doctor. I did not manage to examine her. I am a responsible parent. I was very much annoyed so I did not check the child. I value life. If I find my child sick I make sure he is treated. This child's incident was beyond my ability. I have no blood relationship with the accused.

Re examination:

I have never received a report from the accused that my wife had injured his baby's embrecal code and I did not hear it from anybody. Before this incident I was on

good terms with the accused. I cannot recall how many days before the incident he had been at my home. I used to visit him and he used to visit me. When I saw the child she was in pain. She told me that she was feeling pain in her lower parts.

PW5:

KATONGOLE JOSEPH Catholic sworn and states:-

I am 63 years old. I reside at Kyetegya village, Kiburya parish. Miry a sub-county, Masindi District. I am defence secretary LCI. I know the accused. He is Edison Asiimwe. He is my village mate. I know Mwesige Charles. He is also a village mate. I know his family. I know why the accused is in court. On 24/2/2001 it was a Saturday at around 6.30 p.m. Evers Mbehwereze, the wife of Mwesige Charles came at my home and reported that her child called Harriet Nsekanabo had been defiled. I asked her whether the chairman was aware. She said that he was aware. She told me that the chairman will not handle the matter alone because it was late approaching 7.00 p.m I went to the chairman. We agreed with the chairman that we arrest Asiimwe the following morning for the offence he had committed of defiling the girl. I saw Nsekanabo Harriet. I did not examine her as I was not a doctor. She was worried and crying when I saw her. After agreeing with the chairman I went to and saw Nsehanabo that very evening. In the morning at around 6.00 a.m. I went with the chairman and the father of the child to arrest the accused. Chairman called Asiimwe out. When he came out we asked

him whether he knew the mistake he had committed the previous day. He accepted having defiled the child and pleaded for forgiveness. The chairman asked him to sit down and told him he was under arrest. He started running towards the bush. We did not chess him. We wanted to pursuade him to come back. He was called back by the chairman and he walked back. The chairman told him to sit down and discuss the matter. He feared and run away completely. We did not chase him because we did not know what was there where he had run to.

The chairman wrote a letter referring the father of the child to the police. The accused was arrested at 6.30 p.m on Sunday 25/2/2001 by me the chairman and father of the child. He was arrested from his home where we found him sited in his house. We took him to Masindi Police station.

Cross Examination by Mr. Lubenga:

The accused has a wife. He has children. I know two children. The third one died while the accused was in prison. Accused has never reported any case before the L.C against the victim's father. At times he is said to belong at a Mabwijwa clan but I do not know Charles Mwesigwe belongs to the Babitto clan. I am a member of the Makurungo clan. Accused and Charles were friends. The mother of the

accused belongs to the Basutta clan. I do not know any conflict within the basiitta clan. Accused's home is located on the land of the basiitta clan.

Mbehwereze reported to me at around 6.30 p.m. My home is not far from the accused's home. We the L.C's have time within which we work. We work up to 6.00 p.m. Cases differ, there case where you can wait and others where you cannot wait for day time.

Re examination:

The accused calls himself a Mubwijwa clan member.

Mr. Sewadda:

With evidence on record I close my prosecution case.

Mr. Lubenga:

I do not intend to make a submission of no case to answer.

Court:

I have considered the prosecutions evidence on record and I have found it sufficient to establish a prima facie case against the accused and to warrant him being put on his defence and I so order.

Lameck N. Mukasa

JUDGE

13/1/2004

Court:

Accused informed of his right to make a statement, give sworn evidence, to call witness or keep quiet.

Accused:

I have no witnesses to call. But I will give sworn evidence.

Court:

Adjourned to 14/1/2004 at 8.30 a.m for the defence case. Accused further remanded.

Lameck N. Mukasa

JUDGE

13/1/2004

14/1/2004

Mr. Serwadda Resident State Attorney for State.

Mr. Lubega for accused.

Accused present.

Both Assessors present.

Mr. Byenkya Joseph clerk.interpreter.

Asiimwe Edison (Accused) DWI:

Catholic sworn and states:-

I am 25 years. I reside at Kigura, Mirya sub-county, Masindi District. I am a blacksmith at Kigurya. I know Nsekanabo Harriet. She is a daughter of my uncle (maternal). My uncle is Charles Mwesige. We reside on the same village. On that

day 24/2/2001 I was not with Nsekanabo Harriet. I never came in contact with her. I did not that day go to their home. Since 1997 I have never gone to their home. Because in 1997 in December 23rd the wife of that uncle of mine called Nbehwereze Evers came at my home. She found when my wife had delivered our first born. She requested to carry the baby. When carrying the baby she caused injury to the embrical code of the child. Since then I feared to go to their home. When I was still young we were in good terms with my uncle's family. When I grew up they started chasing me from their land. The first time was in 1995 when I had not yet married. I stay in the same homestead with the uncle. The land is for my grand father called Abel Byenkya. He is still alive. He is the father to my mother. I grew up on that land with my mother. I built there because that is where I grew with my mother. She is still alive. She is called Nambozi Gorreti. Where its built was any mothers portion. My mother left the place and went to be married to another man also at Kigurya – Kyetega.

In 1995 it was my uncle Mwesige who was chasing me from the land.

When Mbehwereze injured my child's code I reported to the vice-chairperson. I was told that I should wait and when the child dies they will arrest that person. The vice-chairman is called Patrick Kyamanywa. The vice chairman told me to go

to the secretary for defence. I went there. The defence secretary was Katogole Joseph, who appeared as prosecution witnesses. He referred me to the chairman. In the end I was not assisted. Katogole Joseph is a son of my maternal aunt. He does not reside on the same land but is a neighbour.

In 1995 when I was chased from the land I reported to the chairman but still I was not assisted.

In the afternoon of 24/2/2001 I was not at home. I had gone to Kinyara to sell my products. I left there at 6.00 p.m. and arrived home at 9.00 p.m. That night I did not receive any report against me. I received a report at 4.00 a.m. from Katongole Joseph. I told them that I knew nothing of the claim. The report was about defiling a child. He then left. He came back at 4.00 p.m. For the first time he came with Charles Mwesige. Second time also came with Charles Mwesige and it was this time that I was arrested. I was all this time at my home, that day. I belong to the basiitta clan. Charles Mwesige is also aMNusiitta. I do not know Katongole's clan.

I was arrested without knowing anything. I have a family. I have one wife and children were three but one died while I was in prison.

Cross Examination by Mr. Serwadda:

I belong to the Mubwijwa clan. My mother is the one who knows my clan. He who said that I belong to Mubwijwa clan was right because he might be knowing my father. My mother is a Musiitta. Mwesige Charles is a Musiitta. One can not be of the same clan with his mother. I do not belong to the same clan with my mother. I grew up among that homestead of the basiitta. I know I am not a Musiitta. (Counsel puts to the witness that he told court lies when he said he is a musiitta).

I know the young girl called Nsekanabo Harriet. I do not know her age because I am not her parent. I have children. I saw her in court. She did not appear to be above 18 years. I know her since she was born. She knows me because she is a daughter of my maternal uncle. I have no grudge with her, may be with her parents. Because I am in disagreement with my uncles since they started chasing me from the land. The child whose embrical code was injured was taken to hospital and treated and is still alive. She intended to injure my child. It was a bad act. She came to my home. I was also at home. I did not arrest her because she run away. I went to the defence secretary vice chairman and chairman while crying that Mbehwereze had injured my child. It was a very serious case that is

why I reported. When the L.C's did not help me I took the child to hospital. I did not report to the police. It is 6 miles from my home to the police station. I took the child to Kihebere clinic at Kamundini 2½ miles from my home. In 2001 my house was on the Basiitta land. I know Kabagambe he is also my maternal uncle. His home is close to mine. He has a banana plantation. My home as from here to the post office from his home. It is near. I went to the vice chairman first who referred me to the defence secretary. I was arrested by the chairman together with Mwesige and the secretary for defence. They told me why they were arresting me. That I had defiled a child on 24/2/2001 called Nsekanabe Harriet. The chairman L.C 1 was not my enemy. He is a good man. I told the chairman that on that day 24/2/2001 I had gone to Kinyara and they left me at home. So they did not arrest me. That day I had gone to sell my products at Kinyara. I have regular customers at Kinyara. The customers are my friends because they give me money. I have friends in Kigurya. I made a statement at the police. I signed the statement. I made it at Masindi Polist Station. I do not remember the date. It was not read back to me. I might have signed it. I knew some English how why to speak but I do not know how to read. I studied up to P.2. There is my signature on this document. (Charge and caution statement recorded 1/3/2004 from the accused). I did not tell the police as appears in the statement that on that day 24/2/2001 that I was drinking local brew with colleagues. I do not drink beer. I did not so state to

the police. I might have so stated because of fear and torture otherwise I do not drink. (Avoids to answer the question why he did not inform the police in his statement that he was at Kinyara that afternoon).

I stated that in the statement that when the chairman, defence secretary and Mwesige came I first run away but that was not true. I stated so to save myself from being tortured.

I did not in that statement say that on that day I was in Kinyara because I had no freedom to say so.

I made that statement because I was being beaten. What I have told court is not lies. It is not an after though but the truth. We stay together with my maternal uncles and there is a dispute of land because thy chased me away.

Re: Examination:

I do not know my clan. May be my mother knows my clan. I just heard it from the witness who were here that I am of the Mubwijwa clan. Mwesige is my maternal uncle. I am not in position to recall whatever I stated at the police station

in the statement. I do not recall the circumstances in which the statement was recorded from me because I was in pain.

Mr. Lubega:

That is the closure of the defence case.

Court:

Adjourned for submissions on 15/1/2004 at 9.00 a.m. Accused further remanded.

Lameck N. Mukasa

JUDGE

14/1/2004

15/5/2004

Mr. Serwadda for State.

Mr. Lubega for accused.

Accused present.

Both assessors present.

Mr. Byenkya – clerk/interpreter.

Court:

Adjourned for submissions on 27/1/2004 to enable court handle cases where witnesses had traveled to court from far. Accused further remanded.

Lameck N. Mukasa

JUDGE

15/1/2004

27/1/2004

Mr. Serwadda for State.

Mr. Lubega for accused.

Accused present.

Both assessors present.

Mr. Byenkya in clerk.

Submissions:

Mr. Serwadda:

There are 3 ingredients of defilement under section 129 T.I.A:-

1. sexual intercourse with a girl.
2. Girl below 18 years of age.

3. Participation of the accused.

Must be proved beyond reasonable doubt.

On sexual intercourse we have evidence of PW1, the victim, who said on 24/2/2001 in the afternoon a person came took her to banana plantation and had sexual intercourse with her. She described that he put his male organ in her private parts and she felt pain as a result.

To corroborate that is the evidence of PW2, Dr. Abiliga who stated that he examined the victim and found her with a fresh hymen rapture and that she had injury in the valva.

There is the evidence of PW3 the mother of the victim. Who saw the private parts of the victim with blood coming out and some whitish substance.
That evidence taken together proves beyond reasonable doubt that there was sexual intercourse with the victim.

On the age of the victim; PW2 Dr. Abitiga put victims age at 9 years. The victim was seen in the witness box and a voire dire due was conducted. Those taken together prove beyond reasonable doubt that the victim was below 18 years.

As to the participation of the accused. It was the evidence of PW1 that the accused approached her while at her grand father's home in broad day light that accused first told her to carry for him bunch of banana, then later promised to buy her biscuits. He led her to the banana plantations for where he had sexual intercourse with her. She had known the accused before. Incident was in the afternoon. That after the intercourse the accused took her to a stop and bought her biscuits. It is our submission that the victim had a big opportunity of identifying the accused as they were together for a long time, at the movements and during the time of the intercourse.

Further there is the evidence of the conduct of the accused. When the LC's had gone to arrest him, he attempted to run twice. That conduct is not of an innocent person. That evidence taken together with that of the victim proves beyond reasonable doubt that it was in fact the accused who had sexual intercourse with the victim.

With regard to the accused's defence. It contained numerous lies. He deceived court as to his clan first that he was of a Basiitta clan, then of Mubinjwa clan. Those lies make his defence reliable.

He further told court that at the police stated on that he was drunk, drinking with colleagues. He stated that he had told the police so because he was beaten. Then one wonders why he never told the police that on that day he was in Kinyara selling his products.

It is our contention that his defence is an after thought.

If court findings any inconsistence in the prosecutions evidence, it is my submission that they are minor, not going to the root of this case.

If it does not find sufficient corroboration by the victims testimony, it can convict after warning itself and the assessors of the dangers of doing so. It is my prayer that the accused should be found guilty and convicted.

Mr. Lubega:

State was alive on the law on ingredients of defilement. I concede to the fact that state has proved beyond reasonable doubt that the victim was a girl below 18 years.

The other ingredients have not been proved. There was no sexual intercourse according to the evidence. The medical report merely says that he found that there was a recent rapture of the hymen. How recent the rapture was is not stated. It is not even stated that the rapture was fresh.

Also the evidence of the victim is inconsistent with sexual intercourse having taken place. She states that the accused force and spent on her about one hour and all along she was struggling. Given the age of the victim and the age of the accused if any sex did taken place the consequences would have been graver than as reflected from the evidence of the victim herself and that if that medical report.

In cross examination she states “I did not feel any pain.” This is inconsistent with the medical examination report and the evidence of the mother who said that she was feeling pain and not moving well.

The victim’s mother in her evidence says that she ensured that the victim did not bath but that she had seen whitish substance and blood flowing from the victims private parts. This is inconsistent with the medical report which reflected no signs

of sperms or blood clotting around the private parts of the victim. The victim had not bathed so blood clotting would be found in the private part with stains of the white substances which the victim's mother saw:-

I invite court to consider these inconsistencies as major. In her evidence the mother of the victim in her evidence in chief states:

> "When I came from the party I just entered the house. I did not bather about children I heard a child crying and I entered the house".

From the evidence there were no attempts by the victim's parents to take the victim for any treatment yet they all state that they saw her walking in improperly and in particular the mother had seen blood. There no clinical notes on how the victim recovered.

The conduct of the accused after the said offence is consistent with his innocence. He was found at his home by the chairman and vice chairman. He was called out and he came out. He was told to sit and he sat. Then they went away. They came back the second time and did find the accused at home from where he was arrested. If he was guilty of the offence he had ample time to run away but he did not.

On third ingredient I pay court to believe the accuseds alibi that he was in Kinyara selling his products and that there is a grudge between him and the victims family who want to evict him off their land. I pray that the accused be acquitted.

Mr. Serwadda:

About the doctor's finding that the hymen rapture of recent, the victim was examined on 25/2/2001 and the offence is alleged to have taken place on 24/2/2001. The word recent can also mean after one day even 3 days.

About not finding sperms upon examination. The doctor explained in re cross examination the absence of a comment on sperms.

As to the conduct of the accused PW4 and PW5 in examination in chief stated that when they reached the accused place they called him and he came out. After a brief period he took off to some where behind his house. That the chairman called him back. He came back and again after a brief period he took off into the bush. That they went there in the morning but arrested him at 6.00 p.m. in the evening. That conduct is opposed to an innocent person.

As grudge the evidence was of unclear grudges. There was no gist of the grudge. There was no grudge in the evidence of PW4 who stated that they had been close friends.

I repeat my earlier payer.

Court:

Summing up notes read to the assessors.

Court:

Adjourned to 2.15 p.m. for assessor's opinion.

Lameck N. Mukasa

JUDGE

27/1/2004

27/1/2004 At 2.30 p.m.

Parties as before.

Assessors Opinions:

Mr. Kiiza Ephrahim:

This is our joint opinion. According to the evidence on record the prosecution has proved the charge against the accused person beyond reasonable doubt. We advise that the accused be convicted accordingly.

Ms. Kyabanga Tabisa:

That is our opinion.

Court:

Judgment on 11/2/2004. Accused further remanded.

Lameck N. Mukasa.

JUDGE

27/1/2004

11/2/2004

Mr. Serwadda for state.

Mr. Lubega for accused.

Accused present.

Both assessors present.

Mr. Byenkya – clerk/interpreter.

Court;

Judgment delivered and accused convicted.

Lameck N. Mukasa

JUDGE

22/4/2004

Annoctus:

Mr. Serwadda:

No criminal record of accused person. He is convicted of a serious offence which attracts a maximum sentence of death. The offence is rampant countrywide. I beg court to take into consideration the victim's age of 9 years and accused who was 23 years. The act of the accused indicates that he can be dangerous to young girls.

I therefore pray for a stiff sentence.

Mr. Lubenga:

Accused be treated as a first offender. He has been on remand from March 2001. Has a family with 2 children and a wife. He is the sole bread earner of the family. I pray for lenient sentence.

Accused:

I have my wife and children no body is to look after the family. When I was arrested, I had 3 children one died and I have 2. I do not trust the conditions in which they are. I pray I am released I go and look which after my people.

Court:

Adjourned to 3.00 p.m. for sentencing.

Lameck N. Mukasa

JUDGE

22/4/2004

Sentence and Reason for II:

I agree with counsel for the State that defilement is on the increase. Court take a serious view of the fact that defilement has become one of the leading criminal offence in the country. The convict was a 23 year adult who betrayed the respect

the young victim of only 9 years had in him and intraduced her to sexual intercourse at such an early age. The ordeal the victim went through a will affect her in her future sexual life negatively. People of the accused's character should be kept out of free society for sometime to protect young girls from them.

However I must also considered what has been stated on behalf of the convict in mitigation. The accused is a first offender. Under the provisions of the Constitution must, I consider the period of 3 years and one month the convict has spent on remand.

Considering all the above the convict is sentenced to seven (7) years of imprisonment.

Lameck N. Mukasa

JUDGE

22/4/2004

Court;

You have a right of appeal against conviction and sentence within 14 days.

Lameck Mukasa

JUDGE

22/4/2004

UGANDA VS. ASIIMWE EDISON

CRIMINAL SESSION CASE 37 OF 2003

SUMMING UP NOTES TO ASSESSORS

Charge:

Defilement c/s 129 (1) Penal Code Act carries a maximum sentence of death on conviction.

Ingredients;

1. That there was unlawful sexual intercourse with the victim.
2. That at the time of the alleged sexual intercourse the victim was a girl aged under 18 years.
3. That the accused was the male responsible for the sexual intercourse.

Burden of Proof:

Prosecution must prove beyond reasonable doubt each and everyone if the above ingredients. The burden of proving the guilty of the accused lies with the prosecution throughout the trial and does not shift on the accused. Accused is presumed innocent until proved or pleads guilty.

Proof of the ingredients by the evidence on record:

1. That there was unlawful sexual intercourse.
    - Evidence to prove beyond reasonable doubt that there was the slightest penetration of the male's penis into the victim's vagina is enough. Consider the victim's (PW1) testimony that the assailant made her lie down in a banana plantation, removed her knicker and inserted his penis in her vagina and that she felt pain.
2. That the victim was at the time of the sexual intercourse below 18 years. Consider testimonies of the victim (PW1), PW3 (the Doctor) that at the time of the offence's commission the victim was 9 years born on 6/5/1992 according to PW3. Also base your opnion on your observation of the victim while before court.

3. That the accused was responsible. Consider the evidence of the identifying witness in this case the victim (PW1). Consider her testimony that the incident was around 4.00 p.m. during day time in a banana plantation, accused was known to her as villagemate and friend of the family who was a common visitor at their home and that he collected her from her grandfather's home, walked with her to a banana plantation where she was defiled and then taken to a shop where she was bought biscuits.

Need for Corroboration:

Be warned that there is need for corroboration of the victims evidence by independent evidence for the following reasons:-

1. This is a sexual offence and in all such cases court looks for additional independent evidence rendering it probable that it is reasonably safe to act upon the evidence of the victim.
2. The victim was the single identifying witness. The test here is whether the evidence of the identifying witness can be accepted as free from the possibility of error or mistaken identity. In this regard consider

(i) Whether the witness and the accused knew each other for sometime.

(ii) The time when the alleged offence took place (visibility).

(iii) The place where it took place.

(iv) The length of time the witness spent with the assailant in course of the commission of the offence.

(v) Any other identifying futures which might have helped the witness to identify the assailant.

In considering whether there was corroboration. Consider the testimony of PW2, the doctor who examined the victim as to his findings – that is hymen raptured, inflammations around the valva at the entrance of the vagina consistent with force used sexually as to sexual intercourse. Also PW3 testimony that she observed a slippery milk like fluid mixed with blood flowing from the victims private parts. PW3, PW4 and PW5 testimonies that the victim was in pain, worried, crying and walking with legs apart.

As to the accused participation consider PW3's testimony that PW1 immediately revealed to her that the accused had defiled her. Also PW3, PW4 and PW5 that the accused was a village-mate and a fraud of PW4 and frequent visitor to PW4's home. And PW4 and PW5's testimonies that accused attempted to run away on arrest.

Defence:

The accused's defence was a denied of the offence that he did not have sexual intercourse with the victim. Consider his testimony that in the afternoon of 24/2/2001, the date and time of the alleged incident, he had gone to Kinyara to sell his products. This is a defence of an alibi. In law an accused is not under a duty to pure his alibi. It is the prosecution to disprove the accused's alibi by adducing evidence to the contrary. Further accused raised the defence of a grudge between him and the victims parents. Consider whether there was sufficient evidence of a grudge.

Be warned that any doubt raised in the prosecutions evidence must be resolved in favour of an accused. Weakness in the defence evidence cannot be used to strengthen the prosecutions case. An accused has no duty to prove his defence. The duty is upon the prosecution to disprove the accused's defence.

Lameck N. Mukasa

JUDGE

27/1/2004

LIST OF PROSECUTION WITNESS

PW1:

NSEKANABO HARRIET (victim) – a pupil of Kigulya Primary School and a resident of Kyetegya village Kigulya parish, Miirye Sub-county msd District.

PW2:

DR. ABIRIGA JINO – medical officer attached with Masindi Hospital.

PW3:

Mbehwereze evace mother to victim a resident of Kyetegya village Kigulya parish, Miirye sub-county Masindi District.

PW4:

KATONGOLE JOSEPH – Defence secretary a resident of Kyetegya Kigulya Miirya sub county MSA District.

PW5:

MWESIGE CHARLES – Father to the victim. Address as above.

PROSECUTION CASE CLOED

LIST OF PROSECUTION EXHIBITS:

Medical examination report on police form 3 in respect of the NSEKANABO HARRIET (VICTIM) dated 25/2/2001. Tendered on 13/1/2004.