

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT GULU**

HCT- 02 – CV – CS – 0026 OF 2004

UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

UBI ISAAC :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: THE HON. MR. JUSTICE AUGUSTUS KANIA:

JUDGMENT

The Accused, Ubi Issac, is indicated for defilement C/S 129(1) of Penal Code Act. The particulars of the offence are that the accused on the 24th day of July 2001 at Yatua village in the Arua District had unlawful sexual intercourse with Angaika Biajo a girl under the age of 18 years. The accused denied the offence and pleaded not guilty.

In our criminal justice system and accused person is presumed to be innocent until he is proved guilty. The burden to establish the guilty of the accused rests on the prosecution and it remains with the prosecution throughout the trial and never shifts onto the accused. To secure the conviction of the accused, the prosecution must prove the guilt of the accused beyond reasonable doubt. Any doubt as to the guilt of the accused must be resolved in favour of the accused leading to his acquittal.

See Woolmington vs DDP (1935 AC 462 and Lubogo & Ors vs Uganda (1967 EA 440

It is also trite that the accused is to be convicted on the strength of the prosecution case but not on the weakness of case for the defence.

See Isreal Epuku S/O. Achietu vs R (1934) 1 EACA 166.

In discharging its duty of proving the guilt of the accused person beyond reasonable doubt, the prosecution is under a duty to prove each and every essential ingredient of the offence with which the accused has been charged. In the case of defilement the essential ingredients the prosecution has to prove are the following:-

- (i) That the complainant was under the age of 18 years at the time of the offence.
- (ii) That there was unlawful sexual intercourse with the complainant.
- (iii) That it was the accused who was responsible for such unlawful sexual intercourse.

With regard to the first ingredient that the complainant was under the age of 18 years at the time of the offence the prosecution relied on the medical evidence of PW1 Driwale Alfred and that of PW2 Maimuna Tiko the mother of the complainant. The Medical evidence comprised in PF3 and its appendix and its appendix duly compiled by PW1 Dr. Driwale Alfred who wound the complainant to be 8 years old at the time of his examination. This medical report was admitted by consent under the provisions of section 66 of the T.I.A and marked P1. PW2 Maimuna Tiko in her testimony put the age of the complainant as being 11 years at the time of the offence.

Apart from the above evidence, the prosecution attempted to call the complainant as a witness. Because she was by appearance a child of tender years far below 18 years I subjected her to a voire dire and from the results, though at the instance of the prosecution, her testimony was not take. From the above evidence, notwithstanding the discrepancy of the age of the complainant by PW1 Dr. Driwale Alfred and PW2 Maimuna Tiko, I find that the complainant was at the time of the offence far below the age of 18 years. The prosecution has proved the first ingredient of the offence of defilement beyond reasonable doubt.

To prove the second ingredient of defilement which is the fact of sexual intercourse with the complainant, the prosecution relied first of all again on the medical evidence by PW1 Dr. Driwale Alfred in exhibit P1 in which PW1 Dr. Driwale Alfred found signs of penetration though the complainant's hymen was not ruptured. He also observed injuries and inflammations around the private parts of the complainant which he concluded to be consistent with force having been

sexually used. The finding of PW1 Dr. Driwale Alfred that the hymen was not ruptured does not at all derogate the finding that there was sexual intercourse with the complainant, because sexual intercourse is complete where there is penetration however slight. The hymen does not need to be ruptured nor does the prosecution need to prove that the ejaculation of the male seed into the female private parts took place. The other piece of the evidence the prosecution relies on to prove the fact of sexual intercourse with the complainant is that of PW3 Likicho Zainabu which was that the fateful day the assailant of the complainant came to their home drunk. He was put to rest in a house and the children of the home including the complainant were asked to remain at home to note where the assailant would go next after waking up. While at her house she was the assailant come out of the house and call the complainant. As soon as the complainant went to him, her assailant locked her and himself in the house and started having sexual intercourse with the complainant at which the later cried. PW3 Likicho Zainabu further testified that she went to her rescue and found the assailant on top of the complainant. She picked a stick and hit the assailant with it in vain attempting to dislodge him but to no avail. She continued making an alarm which was answered and it was one Wawa, one of the people who had answered the alarm that pulled the assailant from on top of the complainant. It is finally the evidence of PW3 Likicho Zainabu that when the assailant was brought to the door he had his trousers down his knees and that there were semen on his penis. She also saw semen in the complainant's vaginal area.

The eye evidence of PW3 Likicho Zainabu who saw the assailant of the complainant having sexual intercourse with her together with the medical evidence of PW1 Dr. Alfred Driwale has in my view proved beyond reasonable doubt that the assailant of the complainant had sexual intercourse with her. The prosecution has therefore proved the fact of sexual intercourse with the complainant beyond reasonable doubt.

With regard to the participation of the accused in the commission of this offence the prosecution relies primarily on the eye witness evidence of PW3 Zainabu Likicho which is to the effect that the fateful day the accused who she later came to know as Ubi went to their home drunk. It was then decided that he should be taken into the house of Ajaa to have a rest. The young children of that home were asked to remain around so that they could monitor where the

accused would go next when he woke up. It is the evidence of PW3 Zainabu Likicho that she at one time saw the accused come out of the house and call the complainant to him. As soon as the complainant went to him, the accused locked himself and the complainant in the house by bolting the door from inside and started defiling the complainant. The complainant was shouting in the house and the witness ran to her rescue only to find the accused on top of the complainant having sexual intercourse with her. She testified that the complainant was now crying very loudly and she decided to make an alarm. She pushed the door open, found the accused still on top of the complainant having sexual intercourse with her so she picked a stick and hit the accused with it. When people eventually answered the alarm they found the accused still lying on top of the complainant and it was one Wawa who eventually pulled the accused away from on top of the complainant. It was also PW3 Zainabu Likicho's evidence that when the accused was pulled to the door, his trousers were down his knees and there was semen on his penis. Likewise there was semen in the vaginal area of the complainant.

Though PW3 Zainabu Likicho had not known the accused before she is certain that the accused is the very man who had come to their home drunk and was given a house to rest in. He later saw the accused call the complainant and locking himself with her in the house. On hearing the cries of the complainant she rushed to the scene only to find the accused on top of the complainant having sexual intercourse with her. There is no possibility that PW3 Zainabu Likicho could be mistaken in her identification of the accused since the offence was committed during broad day light and the witness found the accused red handed defiling the complainant. And from the evidence of PW3 Zainabu Likicho from the time the accused was arrested in the act, he did not leave her presence until when he was taken to the Division headquarters. The accused himself does not deny that he is the one who was arrested because of the alarm made by PW3 Zainabu Likicho thus eliminating the possibility that there was mistaken identity. From the above I find that the prosecution has proved beyond reasonable doubt that the accused participated in the commission of this offence.

The accused made a sworn statement denying the offence. He however admitted that the fateful day he was at the home where the incident happened. He came to that home and met some friends with whom they started drinking a local potent gin known as "nguli" and it was all

along him buying the drink. He had come with Shs.15,000/= which he put in his pocket. When PW3 Zainabu Likicho realized that he was getting very drunk, she took him into a house to rest. On waking up he found the Shs.15,000 in his pocket had been removed. When he questioned PW3 Zainabu Likicho whom he suspected of stealing his money she accused him of defiling the victim and that is how he came to be arrested for defiling the victim.

When PW3 Zainabu Likicho testified that she saw the accused call the victim into the house where he was sleeping and when the victim went to him the accused bolted the door from inside and she went to find the accused having sexual intercourse with the victim on hearing the cries of the victim, the accused did not challenge this evidence in cross-examination. The natural inference from this is that the accused accepted this evidence as the truth. Nor did he contest the evidence that when he was arrested he had his trousers at his knees. This story is even more corroborated by the fact that when the victim was taken for medical examination after the incident she was found to have been defiled. I find the defence of the accused that PW3 Zainabu Likicho framed him up because she had stolen his money a pure figment of his imagination. There is no conceivable reason why PW3 Zainabu Likicho would frame the accused of having defiled the victim if the accused had a quarrel with the witness. Strangely enough the medical examination of the victim proved that indeed the victim had been defiled. The line of defence adopted by the accused is rejected in toto as a desperate last ditch attempt to save his skin.

The prosecution having proved beyond reasonable doubt all the essential ingredients of the offence of defilement and in agreement with the opinion of both Assessors, I find the accused Ubi Isaac guilty of the defilement of Angaika Biajo C/S 129 of the Penal Code Act and convict him accordingly.

AUGUSTUS KANIA

JUDGE

27.05.2004

R.A. Explained.

Judgment read in the presence of

Accellam – RSA

Mr. Lubwa – for the accused

Mr. Boyi – Court/Clerk

The accused in court.

AUGUSTUS KANIA

JUDGE

27.05.2004

Later at 4.45

Court as before

Mr. Accellam

The accused was indicted for defilement; the offence was committed on 24.07.2001. Defilement is a very serious offence which affects the victims adversely – the victim in this case was seen – she was 8 years at the time of this offence. The accused was 59 years old. The circumstances of this offence are very grave because the victim was fit to be his grandchild. I pray for a severe sentence.

Mr. Lubwa – The convict is a first offender aged 62 years. He had been on remand since 06.09.2001 to date. The offence is indeed grave. He prays that the court takes into account his age and exercises some leniency.

AUGUSTUS KANIA

JUDGE

27.05.2004

Court – Sentence and Reasons for the same.

Defilement is a serious offence with the death penalty as its maximum sentence. It is also serious for the reason that it is destructive to the girl child subjecting her to indignity humiliation, physical and psychological trauma and pain. In this age of the deadly HIV pandemic it makes the girl child the most vulnerable victim. To stop these hazards from afflicting the girl child deterrent and preventive measures must be used including permanently isolating the likes of the accused by passing long custodial sentences. This offence is very much more aggravated because of the age difference between the victim and the assailants. People of the age of the accused are known to have grand children so he could as well have been a great grand father to the victim. The circumstances call for a stringent sentence.

The accused is a first offender and an old man though his conduct unfortunately does not match his age. All the same these factors call for some degree of leniency. The accused has also besides been on remand for 2 years 9 months and 18 days which I am obliged under the constitution of Uganda, to take into account however give particular consideration to the age of the accused.

Having considered all the circumstances of the commission of this offence and particularly the age of the accused and taking into account the 2 years 9 months and 18 days he has been on remand, I sentence the accused to 10 years imprisonment.

AUGUSTUS KANIA

JUDGE

27.05.2004