

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

**HCT-05-CR-CS-0100-2002**

**UGANDA .....PROSECUTOR**

**-VS-**

**NYAKAJUNGA ESAU .....ACCUSED**

**BEFORE: THE HON. JUSTICE P. K. MUGAMBA**

**JUDGMENT**

The accused, Nyakajunga Esau, is indicted for the offence of defilement, contrary to sections 129 (1) of the Penal Code Act.

Four witnesses were called by the prosecution. The victim was PW1, Dr. Mihayo Plasidi PW2, Justina Mugizi PW3, Barungira Joy PW4 and No. 19199 P. C. Mutabazi Patrick was PW5. Medical evidence on Police Form 24 was admitted and the form received as exhibit P 1. Accused gave a sworn statement in his defence but called no witnesses.

In brief the prosecution case is as follows. At about 4 p.m. on March 2001 the accused who was paternal uncle to the victim found the victim, then 10 years old, at her home in the company of several younger siblings. Accused carried the victim to a derelict house in the neighbourhood and there proceeded to have unlawful carnal knowledge of her. PW3 the mother of the victim returned from a mission to buy flour several hours later. She found the victim at home having pain in her abdomen and in both her thighs. PW3 sent the victim on an errand to buy some milk. Upon her return from the errand the victim went and lay in bed in pain. It was then she told PW3 that she had had sexual intercourse with accused. Thereupon PW3 went to the home of PW4, her neighbour, and requested her to accompany her to her house in order to examine the victim. PW4 examined the victim but found no signs of the victim having had sexual intercourse. PW4 advised PW3 to report the matter to local committee authorities so that the victim could be subjected to medical examination. From the local committee PW3 secured a letter which she took to Police at Nyeihanga Police Post next morning. From Nyeihanga Police Post she got

Police Form 3 and with it she went with the victim to Mbarara University Teaching Hospital for necessary examination. After examination she returned Police Form 3 to Police. Meanwhile accused was arrested and later taken to Mbarara Police Station.

In his defence accused stated that at the time of the alleged offence he was not near the scene of crime.

The prosecution bears the burden of proving the case against the accused person beyond reasonable doubt. In so doing it must prove all the ingredients of the offence of defilement which are:

- (i) that the victim was at the time less than 18 years of age;
- (ii) that the victim had sexual intercourse at the time alleged;
- (iii) that the accused participated in the crime alleged.

In order to ascertain the age of the accused person the best evidence is a birth certificate. However, where this is not available evidence of a person acquainted with the child's age will be accepted. Evidence from medical examination will also be accepted as well as impressions of the person's age from observation. In the case at hand the mother of the victim, PW3, testified that in the year 2004 when the girl testified she was 13 years old. Medical evidence on exhibit P.2 shows that in March 2001 the girl was 10 years old. She appeared in court and was of tender age. The defence did not contest the age of the child. I am satisfied therefore that the prosecution has proved the first ingredient beyond reasonable doubt.

The second ingredient is whether there was sexual intercourse on the occasion alleged. The victim testified as PW 1. Her evidence was given unsworn because she was a child of tender age. It was her evidence and her evidence alone that directly stated that she had sexual intercourse on the occasion. The evidence of a child of tender years .which is given unsworn requires corroboration. According to PW4, when she examined the victim she found no sign of sexual intercourse such as a ruptured hymen or semen. Medical evidence was received as exhibit P.2. It shows the victim's hymen was not ruptured at the time of examination. Doctor Mihayo (PW2) testified that there was a bit of bruising of the vestibule and that he had noted that as a sign of force having been sexually used. During cross-examination, however, the same doctor said that the bruising was a work of friction and that he could not rule out the injuries being a result other

than of sexual intercourse. It was his finding however that the bruising was less than two days old. From the evidence available I do not find that the prosecution has proved beyond reasonable doubt that the victim had sexual intercourse on the occasion alleged.

The prosecution must also prove that the accused participated in the crime. The victim testified that accused had sexual intercourse with her. There is need for her evidence to be corroborated as hers was given unsworn. None of the witnesses who testified witnessed the accused commit the offence. In his defence accused stated that at the time of the alleged offence, at 4 p.m., he was at a quarry extracting sand. He said he had gone to the quarry at 8 a.m. and did not return to the locality until 7 p.m. on the day in question. When an accused person sets up an alibi as his defence he bears no responsibility to prove it. The prosecution must disprove the alibi by adducing evidence which places the accused squarely at the scene of crime.

See: Watete alias Wakhoka & 3 others - vs- Uganda [1998 – 2000] HCB. 7

In this case the prosecution has not disproved the alibi set up by accused. In the result this ingredient also has not been proved beyond reasonable doubt.

The gentlemen assessors have given me their opinion which is joint. They advise me to acquit the accused. For the reasons I have given in the course of this judgment I agree with that opinion.

Accused is found not guilty and is accordingly acquitted.

P.K. Mugamba

Judge

23<sup>rd</sup> March 04