

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

HCT-05-CR-CO-169-2002

UGANDAPROSECUTOR

VS.

MWINE CALEB..... ACCUSED

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

JUDGMENT

The charge against the accused, Mwine Caleb, is of defilement, contrary to section 129 (1) of the Penal Code Act. Four witnesses were called by the prosecution to prove its case. The victim testified as PW1, Jadres Bamigana, mother of the victim, testified as PW2, the L.C. 1 Chairman George Mushabe was PW3 while Mbarebaki Robert, father of the victim, was PW4. In his defence accused gave a statement on oath in which he denied involvement in the crime. He called his father, Patrick Girimani, as his witness.

The facts of the prosecution case are that at about 2.00 p.m. on 31st May 2001 the victim had gone to fetch water at a well in the company of her younger sister. On the way back they were accosted by the accused, a neighbour, who chased away the younger girl and took the victim to a bush. There he had carnal knowledge of her. The victim felt pain but did not tell anybody about her ordeal immediately because she was afraid. Owing to increased pain the next day she told her mother. PW2 examined the victim and observed some swelling in the girl's private parts. When PW4 returned home PW2 told him what had happened to the victim. Thereafter PW4 had accused arrested and reported the matter to the local chairman and the Police. Accused was eventually detained by Police at Kazo Police Post and later at Mbarara Police Station.

In his defence accused stated on oath that at the time in issue he was in bed nursing a hernia and that he neither left home nor met the victim, it was his evidence he was being framed because

livestock belonging to the father of the victim had on several occasions strayed into the gardens of accused's father. He stated that whenever he complained to the parents of the victim those parents were not showing concern.

It is the duty of the prosecution to prove the case against the accused person beyond reasonable doubt. See *Sekitoleko vs Uganda [1967] EA 531*. Where the charge is that of defilement the following ingredients must be proved to that required standard by the prosecution.

- i. that the prosecutrix was at the time in issue below 18 years of age.
- ii. that the prosecutrix had sexual intercourse on the occasion alleged, and
- iii. that accused participated in the offence.

The best evidence of age is a birth certificate. In the instant case no birth certificate was available in evidence. However other evidence of age is considered by this court where a birth certificate cannot be produced. This will be such as age determined by medical examination of the individual, evidence of a person acquainted with the age of the individual in issue such as a parent and through observation of the individual. Both PW2 and PW4, parents of the victim, testified and told court that at the time of their respective testimonies the girl was 12 years old. She appeared in court as PW 1. She was certainly of tender years and her evidence was received unsworn after a *voire die*. I am satisfied that the prosecution has proved beyond reasonable doubt that in the year 2001 the prosecutrix was below 18 years of age.

The second ingredient the prosecution ought to prove is that the prosecutrix had sexual intercourse on the occasion alleged. It was the evidence of the prosecutrix that she had sexual intercourse on the alleged occasion. Her evidence was given unsworn, she being of tender years. Such evidence requires corroboration by some other independent evidence. PW2 testified that she had examined the girl's private parts and found them swollen. There is no evidence the girl was medically examined. Swelling of the private parts on its own is not necessarily evidence of sexual intercourse. I do not find the prosecution has proved this ingredient beyond reasonable doubt.

Finally the prosecution ought to prove that accused participated in the alleged offence. The only evidence given of accused's involvement is that of the prosecutrix. I have observed earlier that there is a requirement for the evidence of a child of tender years to be corroborated. There is no evidence tending to corroborate the victim's testimony of accused's involvement. Even without need to introduce accused's defence of alibi, which is not disproved, prosecution evidence is not equal to proving this ingredient.

The gentlemen assessors in their joint opinion advised me to find accused not guilty of the charge and to acquit him. For the reasons I have given in the course of this judgment I agree with that opinion. I find accused not guilty and acquit him.

P.K. Mugambwa

JUDGE

12th April 2005