

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT RUKUNGIRI
CASE NO: HCT-05-CR-SC-0136 OF 2003

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

VERSUS

MWEBAZE WILBER :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused, Mwebaze Wilber, was indicted for defilement contrary to section 129 (1) of the Penal Code Act. The particulars alleged that the accused on 28th day of July 2002 at Nyakabunga village in Rukungiri District had unlawful sexual intercourse with Orikiriza Beatrice a girl under the age of 18 years.

When the charge was read and explained to him, the accused pleaded not guilty. By that plea the accused set in dispute all the essential elements of the offence so charged. That meant all the essential elements of the offence had to be proved by the prosecution beyond all reasonable doubt to enable a meaningful conviction to be secured against the accused.

In defilement, the prosecution must prove three ingredients, namely:-

- (1) That the victim was below 18 years at the time of the alleged offence.
- (2) That there was unlawful sexual intercourse with the victim.
- (3) That it was the accused who had the unlawful sexual intercourse with the victim: See **Bassita Hussain Vs Uganda; Supreme Court Criminal Appeal No. 35 of 1995.**

The law places the burden of proving the above ingredients on the prosecution. An accused does not bear the burden to prove his innocence. He is innocent until proved guilty. As a rule of law he

should only be convicted on the strength of the prosecution evidence and not on the weakness of his defence:

See **Oketh Okale Vs R [1965] EA 555.**

In order to discharge the above the burden, the prosecution called the evidence of four witnesses and further relied on the medical examination report where the victim was examined.

The accused on his part made a sworn defence where he raised the defence of grudge and total denial.

As far as the age of the victim is concerned, it is trite law that the best way of proving age of a child is by producing a duly certified birth certificate coupled with evidence of identification. In the absence of a birth certificate, age can be proved by any admissible evidence. age can also be determined by observation and common sense: See **Uganda Vs James Byakatonda; Masaka Criminal Session Case No. 205/1994** per Berko J (as he then was). In **Omuroni Francis Vs Uganda; Court of**

Appeal Criminal Appeal No.2 of 2000 it was held inter alia that in defilement cases, medical evidence is paramount in determining the age of the victim and that the doctor is the only person who could professionally determine the age in the absence of any other evidence like a birth certificate.

In the instant case the age of the victim did not present much difficulty since evidence on that issue was not challenged and was overwhelming.

In the first place there was medical evidence by Dr Rutahigwa of Nyakibale Hospital who examined the victim and established her age at 9 years. This piece of evidence was admitted during the preliminary hearing under section 66 of the Trial on indictment Act. The law is that where a fact or a document is admitted or agreed upon in a memorandum filed under section 66 of the Trial on indictments Act it is deemed to be proved: See **Abasi Kanyike Vs Uganda; Supreme Court Criminal Appeal No. 34/1989**. The victim's mother (PW1) testified that the victim was 12 years old and that she was born in 1996. The victim herself

stated that she was 12 years old. She gave unsworn evidence after a voire dire. It was perfectly obvious to everybody that the victim was under 18 years at the time of alleged offence. For the above reasons I do conclude that Orikiriza Beatrice was under the age of 18 years at the time of the alleged offence.

In regard to whether the girl victim experienced sexual intercourse all that the law requires is to prove that she was penetrated however slight. Even proof of rapture of hymen is not necessary nor that there was emission of semen. Usually evidence of the victim in sexual offences is the best evidence on the issue of penetration and even identification. However in the absence of the victim's evidence, recourse will be taken to other cogent evidence: See **Omuroni Francis Vs Uganda** (supra).

In the instant case the victim Orikiriza Beatrice (PW4) testified that on the fateful day which was a Sunday, she was grabbed by a man who removed her knickers and forcefully had sexual intercourse with her whereupon she felt pain. She told court that her mother came back and found her still being intercoursed.

Tumusiime Loy (PW1) testified that she was the victim's mother. She told court that on the fateful day 28/7/2002 she returned from her garden and found the accused having sexual intercourse with the victim in her house. Among other things, she examined the victim's private parts and found therein white staff around her thighs. The victim was also crying during and after the sexual assault. She testified that she took the victim to Dr Rutahigwa for medical examination. The medical examination report which was admitted under a memorandum filed under section 66 of the Trial on indictments Act did prove that there were signs of penetration. The victim's hymen had ruptured long ago but she had injuries and inflammations around her private parts, which were consistent with force sexually used. All the above injuries were still fresh during the examination. The examination was carried one day after the alleged incident.

From the above evidence I have no hesitation in concluding that the prosecution has proved this ingredient beyond all reasonable doubt. There was a string of corroborative evidence that sexual intercourse had occurred to the prejudice of Orikiriza Beatrice.

In regard to the participation of the accused, the prosecution relied on the evidence of the victim Orikiriza Beatrice (PW4), Tumusiime Loy her mother (PW1) and their neighbour Baryamujura (PW3).

The victim (PW4) testified that on the fateful day her mother left her at home as she went to the garden. That as she was there the accused who was in their sitting room sent her to collect fire for lighting his cigarette. Upon bringing the same the accused grabbed her and removed her knickers and proceeded to have sexual intercourse with her whereupon she felt pain. The accused stopped her from making noise by holding her mouth. She told court that her mother came back and found the accused still having sexual intercourse with her. Her mother then called some people who arrested the accused.

Tumusiime Loy (PW1) who was the victim's mother testified that on the fateful day 28/7/2002 she returned from her garden at 12.00 midday and found the accused having sexual intercourse

with the victim from her bedroom. She stood there watching for sometime. She later raised an alarm which was answered by one Xavier Baryamujura (PW2). They arrested the accused and took him to the local council chairman called Fagin Kanyesigye.

Xavier Baryamujura (PW2) testified that on 28/7/2002 he was at his home at around midday when he heard an alarm being raised by Loy Tumusiime (PW1) that someone was defiling her daughter. He answered the alarm and found that the accused was the culprit. The accused begged for forgiveness. They arrested the accused and took him to the chairman's home.

Denis Kanyesigye (PW3) testified that he was the area Defence Secretary. He told court that on 28/7/2002 he was attending prayers when his local council chairman summoned him. Upon arrival, he found that the accused was at the chairman's house on allegation of defiling the victim. The chairman instructed him to take the accused to Bugangari Police Post, which he did. He concluded that the victim was in a bad condition.

The accused on his part made a sworn defence in which he denied the offence. He admitted that he was arrested from the victim's home where he was working and that he went there to demand for his wages. He stated that he was framed because the victim's mother could not pay him his due wages for 6½ months.

In the instant case the alleged incident took place during broad daylight. The accused was very well know to the victim. He was their porter of substantial trust. That was how he could enjoy the victim's sitting room facility. The victim testified that the accused first requested her to get for him fire to light his cigarette. After collecting the fire the accused grabbed her and forcefully had sexual intercourse with her. Loy Tumusiime (PW1) testified that she came and found the accused still having sexual intercourse with the victim and when she made an alarm her neighbour Baryamujura (PW2) answered and they arrested the accused immediately.

With the above pieces of evidence I have no doubt that the accused was properly identified as the person who committed the offence. There was no mistaken identity. The defence of grudge and total denial were merely to mislead court and were mere fabrications. It could be true that the accused went to the victim's home to pick his wages. But I think he took advantage of the absence of the victim's mother to ravish the innocent victim. Clearly in that regard the accused had turned his license into a tool for mischief and when he was netted he was too shocked to flee. For the above reasons I agree with the unanimous opinions of both assessors that the prosecution has proved all the ingredients of this offence beyond all reasonable doubt. I therefore find the accused guilty as charged and convict him accordingly.

RUBBY AWERI OPIO

JUDGE

2/9/2005.

14/9/2005:-

Accused present.

Twinomuhwezi present for the state.

Ndimbirwe present for the accused on state brief.

Judgment read in open Court.

RUBBY AWERI OPIO

JUDGE

1/9/2005.

Twinomuhwezi:-

I have no previous record. Treat him as first offender. The convict is charged with a serious offence which has maximum of death sentence. Cases of this nature are rampant. This is an era of AIDS. He has been on remand since 13/8/2002. We pray that the convict be given a deterrent sentence to teach others. young girls have to be protected.

Ndimbirwe:-

The convict has been on remand since 2002. We pray court to take that into consideration. He regrets his action. He will live a

useful person if given chance. At that time he was just 19 years old. He is a very young boy. He is still useful. I beg court to be considerate and give him chance as a young man.

SENTENCE:-

It is true this is a very serious offence as it entails maximum of death sentence. This offence has attracted public outcry especially because of AIDS and it is on increase in this area. The same is aggravated by the age of the victim. She was only 9 years old. The accused at 19 years was old enough to know which age is appropriate for sexual intercourse.

For the above reasons this court will take a very serious view of this offence.

However court will also consider that the convict was only 19 years at the time of the offence. He was therefore a young man. Committing him to a long custodial sentence would not be very useful. He still has a chance to change and be a useful citizen. He has been on remand for a long period. That will also be

considered. Above all sentence must be reciprocal to the offence committed.

For the above reasons the accused is sentenced to 9 (nine) years imprisonment. The sentence takes the fact that he has been in custody since 2002.

Right of Appeal explained.

RUBBY AWERI OPIO

JUDGE

14/9/2005.