THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0130 OF 2003

UGANDA :: PROSECUTOR

VERSUS

ZIKANGA TIBIHWEIRE:::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: THE HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused in this case is called Zikanga Tibihweire Peter. He was indicted for defilement contrary to sections 129 (1) of the Penal Code Act. The particulars of the offence alleged that the accused on the 25th day of May 2002 at Kinyamatojo village, in Rukungiri District, had unlawful sexual intercourse with Kyarisiima Lakeri, a girl under the age of 18 years.

Upon arraignment, the accused denied the offence. With that plea, the accused had put in issue all the essential elements of the offence charged.

For that reason the prosecution was required as a matter of law to prove beyond all reasonable doubt all the essential elements of this offence in order to secure a meaningful conviction. The essential elements requiring proof beyond reasonable doubt in offence of defilement are:-

(1) That Kyarisiima Lakeri was, on 25th May 2002, aged below 18 years.

(2) That she had unlawful sexual intercourse; and

(3) That it was Zikanga Tibihweire Peter who participated in the said unlawful sexual intercourse. See **Sebuliba Haruna Vs Uganda; Court of Appeal Criminal Appeal No. 54 of 2002** (unreported)**.**

The law places the burden of proving the above ingredients on the prosecution. The standard of proof required is very high. It is beyond all reasonable doubt. An accused does not bear the duty to prove his innocent. He is innocent until proved guilty. Court should always avoid being suspected of shifting this burden of proof from the prosecution to the accused: See **Oketcho Richard Vs Uganda; Supreme Court Criminal Appeal No. 26 of 1995** (unreported).

To prove its case prosecution called four witnesses: Asiimwe Mugisha Penlop (PW1) who was the victim's mother. Her testimony related to the victim's age. She testified that the victim was assaulted when she was returning from her aunt's place where she had gone to collect clothes. Bitate Sylvester (PW2) testified that on the fateful day he met the accused together with the victim. The victim was crying. When he tried to inquire from the accused why the victim was crying the accused instead ran away. He became suspicious and reported the matter to the victim's mother whereupon it was discovered that the accused had sexually assaulted the victim. Thereafter a group of villagers arrested the accused and handed him over to No. 28102 D/C Turyamureeba (PW3) who was attached to Bigambara Police Post.

Kyarisiima Lakeri (PW4, 9 years old made unsworn evidence and told court that it was the accused who had sexual intercourse with her. She stated that on the fateful day her mother (PW1) had sent her to her aunt to collect clothes. On her way she met the accused who convinced her that he was going to pick for her some mangoes from the bush. The accused led her to the bush where he instead forced her into sexual intercourse during which she felt a lot of pain. The accused told her not to tell anybody. As she was returning she met one Bitate (PW3) but she did not tell him anything. On

reaching home she went to sleep. She concluded that she was later examined by her mother and later on by a medical doctor.

Lastly, the prosecution relied on the medical examination report of Dr Baguma who examined the victim from Rujumbura Health sub-District on 27/5/2002 and established her age and that she had experienced sexual intercourse.

The accused on his part made a sworn defence where he relied on total denial and alibi.

As to whether the girl victim was below 18 years old, the prosecution contended that she was. The defence did not challenge the prosecution on this ingredient. They conceded. The evidence which established this ingredient was the medical evidence which was admitted under section 66 of the Trial on Indictment Act where the age of the victim was established at 3 years. The mother of the victim (PW1) testified that the victim was born in 1997 and that she was now 6 years old. The victim herself was in court. She gave unsworn evidence after a voire dire. She appeared visibly young that her evidence was taken from chambers to avoid mental stress from

open court proceedings. It is trite law that when it is more than obvious to everybody that the victim is under 18 years at the time of the offence, there is no need to adduce any further evidence to satisfy the court and the assessors. It is only circumstances when then victim's appearance is not sufficient to satisfy court and the assessors that some kind of evidence would be required: See **R Vs Turner [1910] 1 KB 346.**

In the instant case it was obviously clear that the victim was below 10 years old. It was overwhelmingly clear from the victim's mother and the professional evidence from the doctor that the victim was a girl below 18 years old. The first ingredient has therefore been proved beyond all reasonable doubt.

On the second ingredient whether the victim experienced sexual intercourse, the defence was of the view that there was sexual intercourse involving the victim. The evidence which the prosecution relied upon were the medical evidence where the victim was examined by Dr Baguma. That medical examination established inter alia, that the victim had experienced penetrative sexual intercourse. Her hymen was ruptured within 48 hours from the examination. The victim also had inflammations around her

private parts and the vaginal introitus. Those injuries were consistent with sex forcefully used.

Another important evidence was that of the victim's mother (PW1) who examined the victim and told court that she saw white substance and blood stains in the victim's thighs whereupon she concluded that the victim had been sexually used. In **Sebuliba Haruna Vs Uganda; Court of Appeal Criminal Appeal No. 54 of 2002,** the Court of Appeal held inter alia that the examination of the victim's private parts by a mature woman was as good as medical evidence. There was also evidence from the victim herself who testified that on the fateful day as she was returning from her aunt's place, she met the accused who convinced her to go to the bush so that he could pick for her mangos. From there the accused had forceful sexual intercourse with her whereupon she felt pain.

From the above evidence I do agree with both the prosecution and the defence that there was overwhelming evidence that the victim had experienced sexual intercourse on the material date.

As for the participation of the accused, the prosecution relied on the victim's evidence who told court that she knew the accused very well. She

stated that on the fateful day as she was returning from her aunt's place she met the accused who convinced her that he was going to give her some mangoes. The accused took her to the bush from where he removed her knickers and inserted his penis in her vagina, whereupon she felt a lot of pain. As she continued with her journey home she met Bitate (PW2) on the was but she did not tell him anything. Being a child of tender years the victim's evidence requires corroboration: See **Dhamuzungu Vs Uganda; Court of Appeal Criminal Appeal No. 70 of 2000** (unreported), **Patrick Akol Vs Uganda Supreme Court Criminal Appeal No. 23/92.** The accused on his part made a sworn defence and raised the defence of alibi and total denial.

In her evidence the victim stated that the accused well known to her. They used to pray in the same church. Her evidence was corroborated by the evidence of Bitate (PW2) who testified that on the material date between 5-600p.m. he met the accused together with the victim. The victim was crying. As he was trying to inquire why the victim was crying, the accused took off to the bush. The following day he tried to trace for the victim and found that she was the child he had found the previous day with the accused. Whereupon the victim narrated to them that the accused had

ravished her the previous day from the bush. The incident took place between 3.00 – 6.00p.m. during broad day light. There could not have been any mistaken identity.

Another implicating factor in this case was the conduct of the accused of running away to the bush upon realizing that Bitate (PW2) was about to arrest him. This was followed by his disappearance from the village. That was not conduct of an innocent person and it corroborated the victim's evidence that it was none other than the accused who had participated in this offence. Therefore I find the defence of alibi and total denial raised by the accused as mere fabrications which were intended to confuse this court.

There was both direct and circumstantial evidence from PW1, PW2 and PW4 which clearly implicated the accused in this offence. I accordingly agree with the unanimous opinions of both assessors that the prosecution has proved all the ingredients of this offence beyond all reasonable doubt and find the accused guilty as charged. He is convicted accordingly.

RUBBY AWERI OPIO

JUDGE

6/9/2005.

14/9/2005:-

Accused present.

Twinomuhwezi for the state.

Ndimbirwe for the accused on state brief.

Judgment read in open court.

Twinomuhwezi:-

I have no previous record. He is first offender. He is charged with a serious offence. Maximum sentence is death. This offence is rampant. The girl was young. The accused was old even to be the victim's grandfather. The convict has been in custody since May 2002. I pray for a deterrent sentence to keep away from young girls and also to teach others.

Ndimbirwe:-

This is a very serious offence. The accused now is 37. The convict needs leniency at such age. Let the period he has taken on remand be considered. He has a family.

SENTENCES:-

This is a very serious offence which entails maximum of death sentence. The offence is on the increase and has attracted a public outcry especially due to aid scourge. This offence is more aggravated by the tender age of the victim. The victim was below 5 years during the incident. Therefore the convict introduced the victim to sexual intercourse at a very tender age. She will remain traumatized for life because of that. She may even live to hate sexual intercourse because of irresponsible inhuman act of the accused. The accused behaved in a very cruel manner by having sexual intercourse with the victim considering his age. He should have treated the victim as his own child. For the above reasons this court will take a very serious view of this case.

Court has looked at the fact that the accused is first offender. He has been on remand since 2002. He is below 40 years. Considering all the

aggravating and mitigating factors in this case the convict is sentenced to 15 (fifteen) years imprisonment. That sentence takes consideration of the fact that he has been in custody since 2002 otherwise he deserved 17 years imprisonment.

Right of appeal explained.

RUBBY AWERI OPIO

JUDGE

6/9/2005.