

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA**

**H.C.S.NO.0021 OF 2005**

**UGANDA:.....PROSECUTOR**

**VERSUS**

**KURU JEREMIA:.....ACCUSED**

**BEFORE:-**

**HON. JUSTICE AUGUSTUS KANIA:.....ESQ**

**JUDGE**

**JUDGEMENT**

Kuru Jeremiah herein after in this judgment referred to simply as the accused is indicted for defilement c/s 129 (1) of the Penal Code Act. It is alleged in the particulars of the offence that the accused on the 1<sup>st</sup> January 2002 at Omoo village, Arivu sub- County in the Arua District had unlawful sexual intercourse with Waliko Moska a girl under the age of 18 years. The accused denied the offence and pleaded not guilty.

The prosecution alleged that on the 1<sup>st</sup> January 2002 at 8.00 p.m the victim entered the house of the accused to get drinking water and gave it to her friend to drink; she then took the empty cup back into the house. The accused followed the victim into the house, grabbed her removed her pants, threw her down and had sexual intercourse with her. The victim informed her friends and her father who in turn informed the L.CS. The accused was then arrested and charged with defilement.

The accused made a sworn statement in his defence in which he denied the offence. He stated on oath that he was being framed up because of a grudge between the father of the victim and himself.

Once an accused person pleads not guilty to the offence he/she is charged with such person thereby puts in issue each and every essential ingredient of that offence. The burden of proof in Criminal case as a general rule is on prosecution to prove the guilt of the accused. This burden rests with the prosecution throughout and at no time does it shift onto the accused to establish his innocence.

To secure a conviction of the accused the prosecution must prove the guilt of the accused beyond reasonable doubt. And doubt arising as to the guilt or otherwise of the accused must be resolved in his favour resulting in his acquittal. **See Woolmington vs. DPP[1935] AC 462, Okethi Okale vs R[1965] EA 555.**

It is also a cardinal principle of our Criminal justice system that an accused person should be convicted on the strength of the case for the prosecution but not the weakness of the case for the defence since the accused has no burden to prove his innocence **See Israel Epuku s/o Achietu vs. R [1934] EACA 66.**

To secure a conviction of the accused in proving the guilt of the accused beyond reasonable doubt the prosecution must prove beyond reasonable doubt each and every essential ingredient of the offence charged. The essential ingredients of the offence of defilement which the prosecution is bound to prove beyond reasonable doubt are the following:-

1. That the complainant was under the age of 18 years at the time of the offence.
2. That there was unlawful sexual intercourse with the complainant.
3. That the accused participated in the unlawful sexual intercourse with the victim complainant.

With regard to the age of the complainant being under 18 years at the time of the offence PW1 Kazimiro Lamberto her father testified that she was 9 years old at the time of the offence though he could not recall when she was born. The complainant PW2 Waliko

Moska testified on 16/03/2005 stated that she was aged 13 years meaning she was about ten years old at the time of the offence in 2002. PW3 Dr. Olaro Charles testified that he examined the complainant Waliko Moska on the 2<sup>nd</sup> January 2001 at the request of the police following allegations that she had been defiled. He made a report which a finding that the complainant was aged 9 years at the time of the offence.

Apart from the above uncontroverted evidence of the prosecution witnesses, the complainant appeared in court and gave evidence as PW2. Because of her appearance the court considered her to be a child of tender years meaning she was under the age of 14 years. Because of this finding the complainant was subjected to a *voire-dire* a procedure reserved for children under 14 years old to determine if as witness they know the difference between truth and falsehood, they understand the duty to tell the truth and if they understand the nature of an oath.

From the uncontroverted evidence of PW1 Kazimiro Lamberto, PW2 Waliko Moska, PW3 Dr. Olaro Charles and my own observation of the complainant I find that the prosecution has proved beyond reasonable doubt that the complainant Waliko Moska was under the age of 18 years at the time of the commission of the offence.

As regards the fact of unlawful sexual intercourse with the complainant, PW2 Waliko Moska herself testified that on the fateful day the 11/12/2002 at about 8.00 p.m she was in a group of her friends who asked for water. She brought them water from the house of the accused and when she took the cup back into the house the accused grabbed her and had sexual intercourse with her. It was her testimony that she made an alarm which was answered by her father PW1 Kazimiro Lamberto who arrested the accused and took him to the LCs.

PW3 Dr. Olaro Charles testified that he examined the complainant on the 2/1/2002 the day following the incident and made the following findings;-

1. There was hepermenia and tenderness of the introitus

2. The hymen had been ruptured.
3. There were inflammations and injuries around the private parts.
4. These injuries were less than 24 hours old.
5. There were signs penetration had taken place.

He concluded in his oral evidence that sexual intercourse with the complainant had been place. PW3 Dr. Olaro also compiled his report which was tendered as a prosecution exhibit and marked P .1. The evidence and the findings of Dr. Olaro Charles which were not in any way disputed tend to corroborate the evidence of the complainant that someone had unlawful sexual intercourse with her. On the basis of the evidence of PW2 Waliko Moska and PW3 Dr, Olaro Charles I find that the prosecution has proved the fact of unlawful sexual intercourse with the complainant beyond reasonable doubt.

This now takes me to the third ingredient of the offence of defilement which is to determine if the accused participated in this offence. The first piece of evidence that tends to implicate the accused in the commission of this offence is the testimony of the complainant PW2 Waliko Moska. She gave evidence that that fateful night she entered into the house of the accused to all drinking water for her friends. After having given water to her friends, she went back into the house to return the cup. On entering the house this second time, the accused grabbed her and had sexual intercourse with her. She raised an alarm and this alarm was answered by among others her father. PWI Kazimiro Lamberto who then arrested the accused and took him to the LCs.

PWI Kazimiro Lamberto's evidence in this regard is that that fateful night he heard his daughter Waliko Moska making an alarm to the effect that the accused was attempting to have sexual intercourse with her. He answered the alarm and at the scene in the house of the accused he found the complainant seated on the bed naked with her pants torn. He also observed that the accused was scared and even attempted to flee the scene but he arrested him.

The accused who denied the offence stated in his sworn statement that one of the girls with whom the complainant was informed him that the complainant had alleged that he had had sexual intercourse with her (the complainant). On hearing this he took the complainant to her father PWI Kazimiro Lamberto who instead started assaulting him. The version of the accused sound incredible. If what he stated was true he would no doubt have caused the two prosecution witnesses to be cross examined when they testified that PWI Kazimiro Lamberto came to the scene in answer to the alarm made by the complainant and found both the complainant and the accused at the scene which was the house of the accused. Not having challenged PWI Kazimiro Lamberto and PW2 Waliko Moska on their testimony, the only inference to draw here is that their version of the incident is the correct one. I accordingly find that it is the accused who had unlawful sexual intercourse with the complainant in his house, the complainant made an alarm and when PWI Kazimiro Lamberto answered the alarm he found the two in compromising circumstances.

The accused IS also implicated by circumstantial evidence. The circumstances relied on by the prosecution are that the complainant made an alarm to the effect that she was being sexually assaulted by the accused PWI Kazimiro Lamberto answered the alarm and on reaching the scene he found the complainant and the accused in the same house. The complainant was naked and her pants were torn. When she was taken for Medical examination, PW3 Dr. Olaro Charles found her to have been defiled less than 24 hours before the said examination. The irresistible inference to make from this set of facts is that it was the accused and no one else who defiled the complainant. It is now trite that if a girl or woman found in the same house with a man complains that the man had unlawful sexual intercourse with her and it is found that indeed some body had sexual intercourse with her the only influence to make is that it was that man with whom she was in the house responsible **See Ugandan vs Bikikya Zakaria Cr. Sess Case No. 294/94 (unreported) and Uganda vs Muhyanuuzi Fred Crim Session Case No. 119/94.**

Mr. Oyarmoi learned counsel for the accused attempted to discredit the testimony of PWI Kazimiro Lamberto on grounds that the pants of the complainant he stated were torn were not exhibited and because his oral evidence did not tally with his police statement. With regard to the failure of the prosecution to tender the torn pants, it is not absolutely necessary to produce exhibits before evidence is assigned evidential value. Evidence not supported by exhibits, though mentioned may be cogent enough of PWI Kazimiro Lamberto's evidence is in no way reduced by failure to exhibit the tom pants. With regard to the omissions of part of the evidence of PWI Kazimiro Lamberto in his police statement, it is trite what a witness says on oath over rides any statement made at the police which is not on oath Anyway it is not a requirement that every thing a witness testifies to in court must be in his police statement.

In the result the prosecution having proved beyond reasonable doubt each and every essential ingredient of the offence of defilement and having agreed with the unanimous opinion of the Assessors I find the accused guilty of the defilement of Waliko Moska c/s 129(1) of the Penal Code Act and convict him accordingly.

Signed

HON. AUGUSTUS KANIA

JUDGE

4/7/2005