

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

AT MBARARA

HCT- 05- CR –SC- 0191- OF 2003

UGANDA :: PROSECUTOR

VERSUS

RWAVIIRA STEPHEN :: ACCUSED

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA:

JUDGMENT:

The accused, **RWAVIIRA STEVEN** is indicted for the offence of defilement c/s 129 (1) of the Penal Code Act. The particulars of the offence were that on the 14th day of August 2002 at Mukuru cell in the Mbarara District he unlawfully had sexual intercourse with **NANKUNDA ANNET**, a girl under the age of 18 years.

The accused denied having committed the offence and for this court to determine his guilt or innocence the evidence as presented by the prosecution and the defence has to be examined together.

The case as presented by the prosecution was briefly that the accused was a neighbour and friend of the victim's family. His son was a playmate of the victim and he used to leave him with the mother of the victim as he went about his chores. He was a herdsman of General Elly Tumwine. On the day in question the two children were playing together at about 6.30 p.m. The mother of

the victim was cooking and bathing her other children. Later she went to look for the children who had been playing but her daughter and her friend had disappeared. She started looking for them while she was calling out for her daughter. The accused responded from the home of General Tumwine that he was with the children and would send over the victim. He did not. The mother of the victim continued the search and later retired to her home at about 10.000 p.m. She informed other neighbour. The accused took back the child at about midnight. The mother of the child asked her what she had been doing with the accused for all the time she had been with him. The child asked for a lamp to show her mother what they had been doing. Her mother observed semen in her private parts.

The accused tried to sneak away when the girl asked for a hurricane lamp to show her mother what she had been doing with the accused. But he was arrested by **MOSES MUBIRU** (PW5) one of the people that had gathered when the mother of the girl was searching for her. The accused was taken to the chairman LCI of the area where he spent a night because it was too late to take him to the police. While at the chairman's home he offered to pay compensation to the victim's family instead of being imprisoned but the following day he was taken to Rwemikoma Police Post and subsequently to Ibanda Police Station from where he was charged with this offence.

The prosecutrix did not testify at this trial. She was a child of tender years and when this court conducted a voir dire under s.40(3) of the Trial on Indictments Act it was found that she was not possessed of sufficient intelligence to justify reception of her evidence and did not understand the duty of speaking the truth. The inability of the prosecutrix to testify would not on its own

preclude this court from making a finding of fact as to whether or not sexual intercourse took place. This is following the case of **Hussein Bassita V. Uganda** where the Supreme Court of Uganda stated as under:-

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence. Through desirable it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

The evidence adduced by the prosecution consisted of that of the victim’s mother who testified that the child disappeared with the accused and when she returned she revealed that the accused had defiled her. She showed her mother what the accused had done and her mother observed semen in her private parts. The girl was later examined by **DR. RUHINDA GRACE** (P.W3) who found her with inflammations suggestive of force having been sexual used although her hymen was intact. The accused denied having defiled the girl. In his defence stated on oath he stated that he knew her as any other child in the village but denied that their homes were close or that his son was her playmate. He stated that he had a grudge with the mother of the victim whose cows had on three occasions trespassed on his gardens and she had paid him compensation on two of the occasions. On another occasion his own cows had trespassed on the gardens of the victim’s mother and his bull had been killed in the process.

The offence of defilement is constituted by the following ingredients:-

- (1) That the prosecutrix was aged below 18 years.
- (2) That there was an act of sexual which means penetration however slight of the penis into the vagina.
- (3) That the accused person participated or was responsible for the act of sexual intercourse.

The prosecution is required to prove all the ingredients beyond reasonable doubt and this burden on the prosecution never shifts to the accused to prove his innocence. He can only be convicted on the strength of the case as presented on the prosecution and not on the weakness of the defence case and in case of doubt the accused is entitled to an acquittal.

The first ingredient to be proved by the prosecution is that the prosecutrix was below the age of 18. The prosecution adduced the evidence of **DR. RUHINDA GRACE** (PW4) who examined her on 16/8/2002 and ascertained that she was below the age of 18. The girl herself did not testify but from her physical appearance the court including the assessors observed that she is still a child below 18 years. This was confirmed by her mother, who testified that her daughter is now aged 10 years. From this testimony Mrs. Ahimbisibwe the defence counsel conceded that the girl was below 18 years. I therefore find that the prosecutrix was definitely below the age of 18 years at the time of the alleged commission of the offence.

The next question is whether the girl had sexual intercourse. As I have already stated the girl herself was unable to testify to this fact. The requirement here is that whatever evidence the

prosecution relies upon that excludes that of the prosecutrix must be cogent enough to establish beyond reasonable doubt that sexual intercourse took place. This evidence consisted of that of the mother of the victim who observed semen in the girl's private parts when asked for a lamp to show her what she had been doing with the accused. On examination by **DR. RUHINDA** she was found with inflammations that were suggestive of forceful sexual intercourse. It is immaterial that the hymen was not ruptured because it is not necessary to prove rupture of the hymen in order to prove penetration as any slight penetration will suffice. In view of the testimony of **DR. RUHINDA** as to the inflammations and the existence of semen in the girl's private parts I find that the fact that sexual intercourse took place has been established by the prosecution beyond reasonable doubt.

The last issue is whether the accused is the one who had sexual intercourse with the prosecutrix. The testimony of the prosecutrix's mother is that the girl disappeared with her playmate (a son of the accused) from 6.30 p.m. until midnight when the accused took her back home. The girl was asked what she had been doing with the accused and she showed her mother what they had been doing. Her mother saw semen. Instead of protesting or explaining what he had been doing with the victim the accused tried to run away but was apprehended by **MUBIRU** (PW5). He was taken to the chairman from where he offered to compensate the victim's family instead of being imprisoned. To me his attempt to run away from the scene and his offer to pay compensation instead of being taken to prison were not actions of an innocent person. There is no reason as to why the accused tried to run away from the home of the victim when he could have protested his innocence there and then.

In his defence the accused stated that the case against him was fabricated by the mother of the victim because of the cases of cattle trespass that they had against each other. In the first place the mother of the victim was asked as whether or not she owned cows and she categorically stated that she did not. She was never asked as to whether or not she had had cases with the accused arising out of cattle trespass and the killing of his bull in her gardens. In view of the evidence that the girl was in the hands of the accused from 6.30 p.m. to the time he returned her to her home from where he was arrested I am satisfied that the identity of the accused as the one who defiled her has been established by the prosecution beyond reasonable doubt.

Both assessors were of the opinion that the prosecution had proved the offence of defilement c/s 129 (1) against the accused beyond reasonable doubt and I agree with their opinion. Therefore I find the accused guilty as charged and convict him accordingly.

Eldad Mwangusya

JUDGE

3/2/2006