

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0122 OF 2006

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

VERSUS

MAWEJJE RONALD ::::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

JUDGMENT:-

The accused MAWEJJE RONALD alias MULOKOLE was indicted for defilement contrary to section 129 (1) of the Penal Code Act. Upon the commencement of the Penal Code (Amendment) Act 2007 which repeated Section 129 of the Penal Code Act and the substitution thereof with a new Section, the accused was arraigned under section 129 as if the new section 129 had not been passed, that was by virtue of Section 13 (2) (e) of the interpretation Act Cap. 3) which provides as follows:-

“where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.”

Ordinarily, the state should have amended the indictment to reflect the new provisions of the law. However, since the new amendment simply recategorized the old offence of defilement into simple and aggravated according to the circumstances, I find no prejudice in that oversight.

The particulars of the indictment were that the accused on the 16th day April 2005, at Namaliga South Zone Bombo Town in the Luweero District, unlawfully had sexual intercourse with Najja Zuluta, a girl below the age of 18 years. When the accused was arraigned, he denied the charge. Consequently the prosecution was bound to lead evidence to prove all the essential ingredients of this offence. The essential ingredients of the offence of aggravated defilement are:-

- (1) That the girl victim was below 14 years old.
- (2) That sexual intercourse acts were performed against the victim.
- (3) That it was the accused who performed sexual acts against the victim: See Section 129 (4) of the Penal Code Amendment Act, 2007.

The duty to prove the above ingredients lies on the prosecution and the standard of proof is beyond all reasonable doubt. The accused does not bear the burden of proving his innocence even when he relies on the defence of alibi: Under the Constitution, he is presumed innocent until proved guilty or until he has pleaded

guilty. However weak his defence may be, the prosecution is only entitled to a conviction on the strength of the prosecution evidence. It is also trite law that the accused is not obliged to enter on his or her defence as he or she may reserve silence: See Section 73 (2) of the Trial on Indictment Act and ***Oketcho Richard Vs Uganda, Supreme Court Criminal Appeal No. 26/95*** (unreported).

In the instant case the prosecution relied on the evidence of Najja Zulita 14 years old (PW1) who was the victim of the alleged sexual assault. She testifies that she was 14 years old and on 16/4/2005 at 7.00p.m. she was sent by her elder sister to go to the home of the accused to collect mire mesh for roasting meat. On reaching the home of the accused the accused led her instead to his bed where she removed her knickers and the accused had sexual intercourse with her. Nafuna Zerida (PW2) testified inter alia that on 16/4/2005 she sent the victim to the home of the accused to collect wire mesh for roasting meat. The victim however over delayed and she sent one of her siblings called Namboze Kiiza to follow her up. Namboze reported to her that

she got the accused and the victim sleeping. Upon that report she went and found and confirmed that the accused was having sexual intercourse with the victim in his house and reported the incident to their mother Namusisi Josephine (PW3).

Josephine Namusisi (PW3) on her part testified that she was the mother of the victim and that on 16/4/2005 she went on a safari leaving behind her daughter Nafuna Zerida (PW2) in charge of her home and children. As she was there she received a call late in the night from her children that there was a problem at home. Since it was late she could not travel back home. She went back home the following morning and arrived at 4.00p.m. Upon arrival her children related to her how the accused who was commonly known as Mulokole had defiled her daughter Najja Zulita. She saw the victim and immediately reported the matter to police. The accused wanted to escape but was arrested. She later took the victim for medical examination. She testified that the victim was 14 years old.

Lastly the prosecution relied on the medical examination report of the victim which was admitted during the preliminary hearing under section 66 of the Trial on Indictment Act. The report established that the victim was 12 years old. Her hymen had ruptured 48 hours ago. There was penetration. She had injuries and inflammations around her private parts which were consistent with for sexually used.

The accused on his part after section 72 of the Trial on Indictment was explained to him decided not to say anything in his defence and left it on the court to decide.

With regard to the first ingredient as to the age of the victim the prosecution relied on the victim's evidence, that of her mother and the medical examination report. The medical examination report established that the victim was about 12 years old. In ***Francis Omuroni Vs Uganda, Court Appeal Criminal Appeal No. 2 of 2000*** (unreported) 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 could

professionally determine the aged in the absence of any other evidence, like birth certificate etc.

In the instant case the medical examination report was admitted under memorandum of agreed facts filed during the preliminary hearing under section 66 of the Trial on Indictment Act. It is trite law that once a fact or document is admitted or agreed upon under such a memorandum it is deemed to have been proved: See ***Abasi Kanyike Vs Uganda, Supreme Court Criminal Appeal No. 34 of*** (unreported).

The victim, her sister and mother testified that the victim was currently 14 years old. Although the victim's mother told court that she did not know when the victim was born, she was emphatic that the victim was 14 years old. Court also had the opportunity of looking at the victim as she was giving her testimony. She fitted the age she was claiming. I therefore find that the prosecution has proved beyond reasonable doubt that the victim was a girl below 14 years old.

With regard to whether the acts of sexual intercourse had been performed on the victim, the state relied on the victim's evidence, that of her sister and medical examination report. In ***Bassita Hussain Vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995***, the court held inter alia that in sexual offences, the victim testified on the material date she was sent by Nafuna Zerida (PW3) to the home of the accused to collect wire mesh for roasting meat. The accused instead took her in his house where she willingly had sexual intercourse with him Nafuna Zerida (PW2) confirmed that she sent the victim to pick wire mesh from the home of the accused but instead of picking the item the victim ended up having sexual intercourse with the accused and that she peeped and saw the two having sexual intercourse.

The above pieces of evidence were corroborated by the medical examination report in which the victim was found to have had penetrative sexual intercourse. Her hymen had ruptured 48 hours ago. She had injuries and inflammations around her private parts which were consistent with force sexually used. From the above evidence I do agree with the concession of the defence that the

prosecution had proved this ingredient beyond all reasonable doubt.

In regard to the identity of the person who performed sexual acts against the victim, the prosecution relied on the victim's evidence (PW1) and that of her sister Nafuna Zerida (PW2). On the date in question the victim had been sent by Nafuna (PW2) to the home of the accused to pick wire mesh. Earlier on, the accused had gone to pass time at the home of the victim. The victim testified that the accused took her into his house where she willingly had sex with him on his bed. In the process her sister Nafuna Zerida found them still having sexual intercourse. Nafuna Zerida did confirm that when she waited in vain for the victim to return from the home of the accused where he had sent her, she decided to send their younger sister Namboze Kiiza to find out why she had over delayed. Namboze Kiiza returned and informed her that she found the victim sleeping with the accused. Upon that report, she went to the home of the accused where she found the accused lying on top of the victim naked having sexual intercourse. The above pieces of evidence were not challenged at all. The accused

on his part opted to keep silent which was his constitutional and statutory right.

Considering the overwhelming evidence produced by the prosecution I have no scintilla of doubt that the accused did participate in the sexual intercourse with the victim. The accused was a family friend as he used to frequent the home of the victim. He was caught red-handed having sexual intercourse with the victim from his own house.

The assessors were not unanimous, while one advised me to convict the accused the other one advised me to acquit on the ground that the prosecution had not proved the age of the victim. That could have been because he took into consideration the fact that the victim had produced with a soldier who was in Somalia. However, the victim's mother told court that the second assailant escaped narrowly from the long arms of the law. Otherwise, considering the prosecution evidence, especially the medical evidence which was not discredited having been admitted under section 66 of Trial on Indictment Act: See **Omuroni** (supra).

I am well satisfied beyond reasonable doubt that the victim was a girl below 14 years old at the time of the incident. accordingly, I find that all the ingredients of this offence have been proved beyond reasonable doubt. I therefore find the accused guilty as charged and convict him accordingly.

RUBBY AWERI OPIO

JUDGE

5/12/2007.

7/12/2007:-

Accused present.

Kote for the state.

Wamukota for the accused on state brief.