

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT ARUA
CRIMINAL SESSION CASE NO. 0013/2009

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

=VERSUS=

CANDIA AKIM ::::::::::::::::::::::::::::::: **ACCUSED**

JUDGMENT

(Before Hon Justice J.W.Kwesiga)

The accused person, CANDIA AKIM is indicted with Aggravated defilement contrary to section 129 (3) of particulars of the offence that on the 11th day of May, 2008 at Eteleva village, in Arua District the accused had unlawful sexual intercourse with Munguci Sharon a girl under the age of 14 years.

The accused person pleaded not guilty and therefore all matters against him became in issue including his identity. The prosecution has a duty to prove all issues in this case beyond reasonable doubt. The prosecution evidence must prove all essential elements of the offence of aggravated defilement beyond reasonable doubt. Failure to prove any of them would result into the acquittal of the Accused. The elements of the offence to be proved are the following:-

1. That the victim is a girl aged less than 14 years.
2. That the victim was subjected to sexual intercourse, which is unlawful.
3. That the accused person participated in the unlawful sexual intercourse.

PW.1 ASEA SAM, a senior clinical officer with 25 years experience in clinical medical services testified that he examined MUNGUCI SHARON, the victim and recorded his findings in police form PF3 and its appendix which was admitted as prosecution exhibit P.1 and he made the following findings: The victim was 8 years old, she had signs of penetration. Her hymen had been ruptured approximately 2 weeks before the examination. There were other injuries around the victim's sexual organ which were consistent with force having been exerted sexually.

PW.2 Munguci Sharon, the victim gave her evidence not on oath due to her tender age and inability to understand the duty of testifying on oath. She testified that she is 9 years old in primary one class. That when her mother had gone somewhere, that the accused person took her from the sitting room to the bed room and started doing to her what she called bad manners. That he pushed his penis into her vagina and the following morning she reported to her mother who had spent the night away.

PW.3 OCOKORU EUNICE, the victim's mother stated the victim was born in the year 2000. On the night of 11th May 2008 she had a quarrel with the accused who was her husband which forced her to sleep out of the family house, leaving the victim and other young children in the house where the accused slept. The following morning, when she returned home she was informed by the victim that the accused had defiled her. She reported the matter to the (LCs) Local Council Authorities who referred her to Ulepi police post and the accused was subsequently arrested and the victim was taken for medical examination.

The accused person, in his unsworn testimony denied the allegations. He confirmed that he had a domestic misunderstanding with PW.3 who left the house and spent the material night not in the house. That he left during the night to look for PW.3 and on advice of his brother DROTI he spent the night at his house. That he did not know anything about the allegations of defilement.

Considering the above evidence, this court is left with no doubt that Munguci Sharon is a girl of age below 14 years. She was eight (8) years at the time of the alleged offence. This is proved by the medical evidence of PW.1 SAM ASEA, PW.2 the victim and PW.3 the victim's mother that the child was born in the year 2000.

The findings of ASEA PW.1, corroborates the evidence of the victim PW.2 that she was a victim of unlawful sexual intercourse. The medical evidence specifically proves that there was sexual penetration and the child being a minor of tender age this was unlawful sexual intercourse. She falls with the prohibited age for purposes of sexual engagements.

In view of the above, I am satisfied beyond reasonable doubt that the prosecution has proved the first two elements of the offence, namely the age of the victim being below 14 years and the fact of unlawful sexual intercourse. The crucial issue now remaining for determining is whether the accused participated in the commission of the offence.

PW.2 Munguci Sharon is the only identifying witness. She is a single identifying witness and she is a witness who gave evidence not on oath because of her tender age. Her evidence needs corroboration of some other independent nature. This corroborative evidence may be direct or circumstantial. The corroboration in this type of the offence should be in support of this witness's evidence on the fact of sexual intercourse and the identity of the culprit. I have already held that her evidence on the fact of sexual intercourse has been adequately corroborated by the findings of ASEA SAM in medical examination report P.1.

Miss Daisy Bandaru counsel for the accused submitted that the offence was committed at night, the circumstances were not favourable to correct identification and the possibility of mistaken identification could not be ruled out. On the other hand Miss Harriet Adubango State Attorney, for prosecution contended that the victim ably identified the accused as the person that defiled her notwithstanding that it was at night.

I have examined the evidence on this element of identification with the above arguments of the two learned counsel in mind. I have considered the evidence of PW.2 the victim (Munguci Sharon). She was positive that the accused, CANDIA AKIM was married to her mother called OCOKORU EUNICE. That the incident happened on the night her mother slept outside the house. She had been sleeping in the sitting room where she ordinarily slept with her young brothers. The accused took the children to the bedroom where he used to sleep with the victim's mother. That the accused pushed his male sexual organ into hers. He lifted her leg and water splashed on her thighs.

PW.3 Ocoru Eunice received the complaint from the victim the next morning, she stated that she saw dried whitish substance on the victim's private parts which she called sperms. Similar to what she experiences when the accused had sex with her.

The accused person in his defence corroborated the victim's evidence that on the material night the victim's mother PW.3 slept out of the house leaving the accused in the house with the victim and other younger children that he shifted the victim and another small girl to sleep in the bedroom. He left the children in the house at night and never came back until the next morning when he found PW.3 already at home. That he was not told what happened until the 20th day of May 2008 when he was under arrest at Bondo.

The accused put up an ALIBI in his defence to the effect that on the material night he left the children in the house and returned after the complainant (PW.3) had come home. In effect he avers that the defilement could have occurred in his absence.

It is trite that once an accused person puts up an **alibi** in his defence he assumes no duty to prove his defence. The duty is on the prosecution to disprove the **alibi** by adducing evidence that places the accused at the scene of the crime. This, the prosecution can do, by calling additional evidence if the ALIBI is belatedly raised or by utilizing the evidence adduced before the defence was disclosed.

In the instant case the evidence of the victim PW.2 and the evidence of PW3 the complainant and corroborated by the defence evidence. The accused returned home on the material date at about 9:00 pm, PW3 left him in the house with the victim. There is no evidence as to how late he left the house to stay away until the next morning. It is not in dispute that he did shift the victim from the sitting room where she was sleeping with her younger sister or brother to the bedroom where the offence was committed. This evidence renders the defence of Alibi not available to the accused person and it is dismissed as untrue.

The victim had sufficient opportunity to identify the accused. He was her step father or married to her mother. He was in the house with the victim, he woke her up with the other child from the sitting room to the bedroom where he was sleeping with the youngest child who was crying because the mother had left the house and he definitely operated all the above closely in the observation and hearing of the victim. There was no evidence led that there was light during these events but the other circumstances of prior knowledge of the assailant by the victim, the closeness and the fact that there was no indication of any outsider's possibility to commit the

offence leaves no doubt that the accused committed the offence. I am alive to the fact that this evidence of identification is of a child of tender age who testified not on oath I have warned myself of dangers associated with this kind of evidence but considering the case as a whole I am satisfied that it is the accused who defiled the victim. Both the Assessors arrived at the same conclusion and advised this court to find the accused person guilty as charged. In the circumstances and in view of the above assessment of the evidence I find the accused person guilty of Aggravated defilement contrary to section 129 (3) of the penal code and he is accordingly convicted.

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J.W.KWESIGA

JUDGE

20/8/2009

Read in presence of:

Ms Adubango Harriet S/A for the state

Ms Daisy Bandaru for the accused on state brief.

Accused in Court.

SENTENCE

I have considered the submissions of both the state and defence Advocates. I have considered the fact that the accused has spent 1 year and 3 months on remand. However, there is nothing to show that he is remorseful for what he did. He was a person left in custody of children including the victim who was a step-daughter. He had a duty to protect the children. He abused the victim sexually, prematurely ending her purity. Not only does this violet the provisions of the Law it also offends the right of the child to being protected. I am unable to be more lenient than to sentence the accused person to 17 (seventeen) years Imprisonment. He is sentenced to 17 years in prison.

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J.W.KWESIGA

JUDGE

20/8/2009