

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT ARUA

CRIMINAL SESSION CASE NO. 0056/2008

UGANDA **PROSECUTOR**
=VERSUS=
OKARBOTH JENESIO **ACCUSED**

JUDGMENT

Before Hon. Justice J.W.Kwesiga

The accused person, Okarboth Jenesio, is indicted for Aggravated defilement contrary to sections 129 (3) of the penal code Act. It is alleged in the particulars of the offence that on the 25th day of July 2007, at Afero village, in Nebbi District, the accused had unlawful sexual intercourse with BIRWINYU MANUELA a girl under the age of 14 years.

The accused person pleaded not guilty to the offence. Once an accused person pleads not guilty, the burden of proof remains entirely upon the prosecution to prove each and every ingredient of the offence. The prosecution has the duty to adduce evidence that sufficiently proves all issues in contention including the identity of the accused person. The prosecution evidence is summarized as follows;-

PW.1 Florence Biryema, testified that she is a mother of the alleged victim Birwingu Manuela. This child has mental instability. She reported to PW.1 that the accused had defiled her. PW.1 reported to the matter to LC I official who referred her to Paidha police post. That she was normal when she reported. She estimated the alleged victim's age as 13 years.

PW.2 OWEKONYING ROZA that she got a report from the victim that the accused had defiled her. That the victim was her cousin and they were staying together. The accused was her brother and was also staying in the same home with her.

The alleged incident took place when she was away for a neighbour's funeral. The accused denied the allegations.

PW.3 Birwinyu Manuela testified after court had conducted a Voire dire. Her testimony was uncontrollable talk but intelligible speech. On the identity of the accused person she was positive and she called him Ochoki. She stated:-

“I met Ochoki when I had gone to pick mangoes. He started removing my dress, he removed my panties and he did bad things to me. After he wanted to give back the panties, I refused it... I told him I was going to report to his sister because she is the one who had sent me for mangoes.”

“I bled in my private parts. I told ROZA that he used his KOKOA to sleep with me and I felt pain in my private parts. I was taken to Paidha for medical examination.”

In cross-examination, this witness being a child of tender years and having a history of mental defect was tested by suggesting to her that she was defiled by one of the assessors, she answered this

“I don't know the Assessor, I know the accused, he is Achoki. It is him, Achoki did it to me. It is Achoki who did bad things to me.”

The victim was very firm and positive in identifying the accused person who she said she has always known as Achoki. She resisted any diversionary questions that suggested she was mistaken.

This child who is mentally sick and is of tender years gave evidence which was corroborated on the fact of sexual intercourse. When she was brought to her mother PW.1 by ROZA she had already reported to ROZA that she had been defiled. On looking at her, the mother realized she was not looking normal. She was taken to PW.4 ONENCHAN GADAFI a clinical officer who examined her and made the following findings. These are contained in prosecution exhibit P.I:-

- a) She had reduced mental ability due to disease.
- b) She had severe tenderness on the lower abdomen.
- c) She had bruises and abrasions on the external LABIA MAJORA.
- d) She had ruptured hymen.

e) She was about 11 years old.

He concluded that the injuries were consistent with forceful penetration.

Therefore there was no doubt left in the minds of this court that the child was aged about 11 years which is below 14 years of age and that she had been sexually exploited and abused.

The medical evidence corroborated the victim's evidence that she was subjected to unlawful sexual intercourse. The prosecution has proved these two elements of the offence beyond reasonable doubt.

The accused person, Okanboth Jenesio, aged 40 years, gave evidence not on Oath and he denied the allegations in the charge sheet. That he left the home, the alleged scene of crime very early in the morning of 25th July 2007 to dig in the garden of ORYEMA SILIMANI (D.W.2) and that after work he spent the rest of the day at Siliman's home. He first heard of the alleged defilement on 1st August 2007 when he was summoned to the LC I chairman's place. That all allegations were lies.

DW.2 SILIMAN ORYEMA:- He denied knowledge of anything material to this case. He said the accused came to his place on 26th July 2007 at about 2.00 to 3.00 pm for a casual visit with his uncle.

The above defence amounts to an alibi. The accused denied presence at the home. The legal position is that he has no duty to prove the alibi. Once an accused sets up a defence of Alibi he assumes no duty to prove the alibi. It is the duty of the prosecution to disapprove it by adducing evidence the squarely places the accused person at the scene of crime.

The assessors were warned that the victim was a child of tender age and she was the only identifying witness in this case and that they had to take great caution before relying on her evidence to advise the court to rely on it to convict the accused person. They were cautioned that her evidence desires corroboration both on the fact of the sexual intercourse and the identity of the accused person.

The Assessors in their opinion found all ingredients of the offence proved beyond reasonable doubt and advised court to find the accused guilty as charged. I have already held that the victim's evidence on the fact that she is a victim of defilement was corroborated by the medical evidence contained in prosecution exhibit PI and the testimony of PW.4 GADAFI ONENCHAN.

What remains to be resolved is evidence of identification. The victim, at the earliest opportunity reported that she had been defiled by the accused. The victim knew the accused person as Ochoki. PW.1, the victim mother state "I knew Okanboth as Ochoki. I told the police the name of Ochoki" The victim also referred to the accused person as Ochoki.

PW.2 Owekinying Roza testified "Manuela told me that Okanboth defiled her under a mango tree when she had gone to pick mangoeshis other name is JENESIO and also called Ochoki."

PW.3 Manuela Birwinya, the victim, when she was asked whether she Knew ROZA (PW2) she became emotional and started talking uncontrollably and stated "I don't want to go there again." She then narrated that when she was there and had gone to pick mangoes, the accused person, Ochoki, attached her and defiled her. She added to her evidence her verbal exchange with the accused;

"I asked him why he had done such a bad thing to me yet I had been staying in their home helping to fetch water and firewood. When my mother comes I would tell her what you did to me. I knew Ochoki, he is present, he is the accused person. He defiled me and I bled."

The above evidence clearly shows that the victim knew the accused person very well. The incident took place in broad day light. The victim's evidence was cogent and consistent right from the scene of crime up to end of her testimony. I find that her uncontrollable speech at the commencement of her evidence when she was asked whether she would go back to the home of the accused and ROZA was an emotional reaction due to the trauma she was caused by the attacker, the accused in that home. I find this reaction corroborating her evidence of

identification. Her resenting the accused and his surrounding amounts to corroboration of her evidence on who is the culprit.

I have sufficiently warned myself like I warned the Assessors that to base a conviction on identification evidence of a single witness, it should be either corroborated materially or cogent and consistent. The circumstances ought to have been favourable to correct identification.

The High Court in the case of Uganda Vs Mukasa Everisto Crim. Sess No. 22 of 1998 held inter alia, the court having warned it's self of the dangers pertaining to uncorroborated evidence may still convict if satisfied that the victim in a sexual offence is truthful. I have No doubt that in my mind that the victim properly and correctly identified the accused person under the above analyzed circumstances. I agree with both Assessors that the prosecution has proved all the ingredients of the offence in the indictment. The accused person is found guilty of aggravated defilement contrary to section 129 (3) of the penal code and he is accordingly convicted.

J.W. KWESIGA

Judge

8/9/2009

Judgment read in presence of:

Mr. Oyarmoi for Accused on state brief.

M/s Asiku Nelly for State.

Mr. Canrach – Interpreter.

Accused person in Court.

SENTENCING

State:

He is first offender. No previous record. He has been on remand for 2 years and 8 days. He is 40 years old. The nature of the offence is grave and the maximum sentence is death. The manner in which he committed the offence is cruel and inhuman. The child had a disability. The accused was expected to protect the child who had a disability. He deserves a heavy punishment. We pray for deterrent sentence.

DEFENCE

I am 41 years old, married with six children. First offender. Has been on remand for about 2 years and 8 days. This is a serious offence, the circumstances be taken into account. He appears repentant. He prays lenient.

SENTENCE

The convict is a first offender who has spent 2 years and 8 days on remand. He is a relative of the victim who was mentally sick and therefore deserved protection of adults including the accused person. Contrary to this expectation, the convict abused and exploited this child of tender age sexually. This Court appreciates that the purpose of the Law is to protect these weak, defenceless children against the brutal and heartless adults of this kind. This objective will be achieved by keeping such culprits out of circulation long enough to teach them a good lesson and to reform. The maximum sentence in this case is death, I have discounted it and I do hereby sentence the accused person to 17 (Seventeen) years imprisonment.

J.W. KWESIGA

JUDGE

8/9/2009