

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL SESSION CASE NO. 0026/2009**

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

**=VERSUS=**

**OGAM IDDI** ..... **ACCUSED**

**JUDGMENT**

**BEFORE HON. JUSTICE J.W. KWESIGA**

The accused person OGAM IDDI is indicted with aggravated defilement contrary to section 129 (3) of the penal code Act.

It is alleged in the particulars of the offence that on 17<sup>th</sup> April 2008, the accused person had unlawful sexual intercourse with WIAJIK JENETY a girl of 13 years of age. That this offence was committed at Nenkuwengi village in Nebbi District.

The brief facts of the case are that WIAJIK JENETY went to Nenkwenji where she watched a video show up to about 10.00 pm when she started returning home. After moving for about 500 meters from the video hall she was forcefully engaged into a sexual intercourse in addition to being assaulted by the assailant. This attack was about 100 meters from her home. She reported the matter to her parents the next morning, alleging OGAM IDDI, the neighbour in the village, was the culprit who assaulted her and defiled her.

For the prosecution to secure a conviction, the following essential ingredients of the offence must be proved:-

1. That the victim was a girl below 14 years of age.
2. That there was sexual intercourse with the victim.
3. That the accused person participated in commission of the offence.

These elements of the offence were settled in the decision of **Uganda Vs Mwesiga Bosco. High court criminal session No. 022 of 2009 (unreported)**, Which relied on **BASITA HUSSEIN VS UGANDA (S.C.) Cr. Appeal No. 35 of 1995.**

The prosecution must prove each of the three elements of the offence beyond reasonable doubt. This position was settled in **R Vs SIMS (1946) 1 K.B. 5.** The moment an accused person pleads not guilty to a criminal charge, the burden of proof entirely falls on the prosecution. The prosecution must adduce evidence that proves beyond reasonable doubt that the offence was committed and that it was committed by the accused person.

The examination of the evidence on record will be made in the order of the above stated elements of the offence. PW1 OKWONG BEN whose evidence was admitted in prosecution exhibit P1 is that the victim was 13 years at the time of defilement. She had injuries in her private parts which were consistent with force having been used against her sexually. The victim's hymen was ruptured and there were other external injuries on the chest and forearm that suggested bruises in course of her resistance to the forceful sexual Act.

PW 2, the victim stated her age as 14 years at the time of testimony therefore on 17<sup>th</sup> April, 2008 when she was defiled, she was below 14 years. PW 3 OKUM SELESTINA the mother of the victim and PW 4 OKELLO JENESIO the father of the victim both confirmed that the victim was born on 5<sup>th</sup> March 1994 and therefore on 17<sup>th</sup> April 2008 she was just 13 years old. In view of the above evidence the fact that the victim was a girl aged below 14 years of has been proved beyond reasonable doubt.

PW 2 WIAJIK JENET testified that the accused person had sexual intercourse with her forcefully on the 17<sup>th</sup> March 2008. However PW 3 the victim's mother testified that the victim reported the matter to her in the morning of 18<sup>th</sup> March 2008 at 7.00 am. The victim had bruises on her head. Under cross – examination she testified that she checked the victim's sexual organs the following morning and she observed semen on the victim's private parts, coming from inside the victims' private parts.

This evidence is corroborated by the evidence of the clinical officer PW 1 Okwong Ben who medically examined the victim on 24<sup>th</sup> April 2008 and found signs of penetration and these injuries were about one (1) week old. The evidence of PW1 and PW3 materially corroborated the victim's evidence on the fact that sexual intercourse took place. The decisions in the cases of **Uganda Vs George Wilson Simbwa (SC)** Criminal Appeal 37 of 1999 and **R Vs Basker Ville (1916) 2 KB 6SS.**

It was settled that corroborative evidence must confirm in some material particulars not only the fact that the crime was committed but also was committed by the accused person.

In view of the foregoing, it is important that there is proof that the accused, person committed the offence.

WIAJIK JENET (PW 2) the victim gave evidence on oath and testified that she was attacked by the accused who pulled her off her way home and had sexual intercourse with her in a banana plantation. That accused hit her on the head and she started bleeding. That he had sexual intercourse with her at three points; under a tree, in a banana plantation and in a valley under avocado tree. He chased her after sexual intercourse and she went home half-naked because the accused threw her skirt away. She reported the matter in the morning to her mother. She stated she knew OGAM because he was a neighbour in the village.

Under cross-examination she firmly maintained her evidence in chief and added that she bled from her sexual organ and that she had never had sexual intercourse before this incident. She told court that she felt pain when he put his sexual organ into her private parts.

PW. 3 testified that the victim reported the next morning that the accused OGAM defiled her and on checking the victim and observed semen in her private parts. PW1 also corroborated the victim's evidence on the fact of sexual intercourse.

What remains is proof of the culprit's identity. Was there any evidence that corroborated the victim's evidence of identification and if not is this fatal to the prosecution case?

Corroboration as a matter of judicial caution and in practice it is desirable on all elements of the offence in sexual offences. The purpose of this caution is to rule out a possibility of mistaken identification or false evidence that could incriminate a suspect that may otherwise be innocent.

Sexual offences of rape and defilement more often than not are committed in isolated surroundings where direct evidence of independent witnesses may not be available to corroborate the victim's testimony. Circumstantial evidence is often relied on to corroborate the victim's evidence. Although there is corroboration in this case, requirement for corroboration is not mandatory. Where the complainant in particular the victim gives cogent and watertight evidence of identification of the defiler, a conviction based thereon shall be valid provided the trial court takes all the necessary caution before relying on the uncorroborated evidence of the victim if she is of tender age.

In **REMIGIOUS KIWANUKA VS UGANDA Crim. Appeal 41 of 1995 (SC)** where the complainant was 13 years at the time of the offence but was 15 years old at the time of her testimony. The Supreme Court held that she was not a child of tender years and thus her evidence did not require corroboration on that ground.

In the instant case, the victim testified that when she led the authorities and her father to the scene of defilement in the valley, the accused person who was with them escaped and ran away. This evidence was corroborated by PW 4 that on 18<sup>th</sup> April 2008 that while the victim was leading him and other people to the scene of defilement, the accused ran away. This conduct is not consistent with behaviour of an innocent person. This is circumstantial evidence of his guilty and participation in the offence on the scene he did not want to be confronted with.

I have considered the fact that the offence occurred at night which was presumed to be dark. However, there were other circumstances that favoured correct identification. The fact that the victim knew the accused before, the accused exposed himself to the victim when he took her to three different scenes of defilements and this was time long enough for the victim to know who was defiling her. The victim testified that there was moonlight and that before he chased her or

let her free he took her up to his home. This evidence was not challenged or discredited in course of cross – examination. The above evidence of identification squarely puts the accused person at the scene of the crime. I find that the prosecution has proved the three essential elements of the offence of Aggravated defilement.

Both the Assessors have equally found the accused guilty as charged and I hereby convict the accused of aggravated defilement under section 129 (3) of the Penal Code.

J.J KWESIGA

Judge

3 – 9 – 2009

### **SENTENCING**

**State:** The accused was first remanded 30/4/2008. No criminal record. We pray for deterrent sentence. The aggravated defilement is grave. He assaulted and defiled her in addition.

**Defence:** The accused is young 30 years old. No previous criminal record. He is capable of reforming. Long custodial sentence will not serve the purpose of reforming the accused. We pray for lenience.

### **SENTENCE**

I have considered the period of 1 year and 4 months the accused has spent on remand, the criminal rate of defilement in this country is so alarming and threatens destruction of decent upbringing of the girl child, the mother of tomorrow for this country who must be protected by the law. The best way to do it is to keep each proven defiler out of circulation and under institutional reforms long enough before return to society. There is also need to punish the defilers sufficiently for this grave crime and considering the above, I **find 15 (Fifteen) years** imprisonment adequate for this purpose and he is accordingly sentenced.

J.W. KWESIGA

Judge

3 – 9 – 2009.

**Read in the presence:-**

Ms Harriet Adubango for State

Mr. Jimmy Madira for the accused.

Mr. Canrach – court clerk/interpreter.