

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL SESSION CASE NO. 0080/2008**

<b>UGANDA</b>	<b>.....</b>	<b>PROSECUTOR</b>
	<b>=VERSUS=</b>	
<b>JACAN CHARLES</b>	<b>: .....</b>	<b>ACCUSED</b>

**JUDGMENT**

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

JACAN CHARLES hereinafter called the Accused person stands indicted for Aggravated defilement contrary to section 129 (3) of the penal code. It is alleged that on 12<sup>th</sup> November 2007 at Nnyamlia village, Nebbi District he had unlawful sexual intercourse with Wiango Oliver a girl under the age of 14 years.

The accused person pleaded not guilty and the prosecution proceeded to prove all the contentious issues in this case namely:-

1. Whether the alleged victim was aged below 14 years?
2. Whether there was sexual intercourse with the said Wiango Oliver?
3. Whether the accused had the alleged sexual intercourse?

See **BASITA HUSSEIN VS UGANDA CR. APPEAL 35 OF 1995 (SCU).**

The moment an accused person pleads not guilty to a criminal charge, the burden of proof entirely falls upon the prosecution. The prosecution must adduce evidence that proves beyond reasonable doubt that the offence was committed and it was committed by the accused person.

See **R Vs SIMS (1946) I K.B. 5.**

The complainant PW1 Wiango Oliver testified that she knew the accused person and that on 11<sup>th</sup> April 2004 he had sexual intercourse with her. She went to attend a film show with AROMA up to 10.00 pm. The film was followed by a disco dance which AROMA attended until late. She

decided to go to her aunt's home, her aunt called AROMBO, PW.2. When she was about to reach Arombo's place the accused came riding a bicycle and gave her a lift and when she reached the point of getting off the bicycle he stopped, got off the bicycle held her arm forced her down and started having sexual intercourse with her. She made alarm and AROMBO responded. Arombo made alarm and neighbours came to the scene. The matter was referred to Warr police post. Although the incident happened at 5.00 am she was able to see the accused because there was moonlight.

Under cross – examination she described what happened at the scene. He put his sexual organ into hers while he was pressing his knees on the ground. She heard people call him JACAN when they responded to the alarm. She did not know him before.

PW.2 AROMBO AGNES materially corroborated the victim's evidence that at 5.00 am on the day of the offence she heard PW.1 crying while calling her name for help. She went to the scene and found JACAN having sexual intercourse with the victim while he was half naked. She made alarm and people responded. The LC I chairman later referred the matter to Warr police post.

Under cross – examination she confirmed she saw what was happening, he had fixed his male sexual organ into the girl's sexual organ. He was on top of the girl, she was shouting, it was 5.00 am and there was moon light.

PW.3 OLAMA SEZERENA gave evidence of the victim's age as having been born to her in 2005. However this witness appeared not educated in matters of dates and this error was understandable.

The medical evidence of Odongo Joel was not adduced because the defence objected to its being presented by Dr. Onzubo Paul because Odongo Joel was capable of being traced. This medical officer who examined the victim was not traced or called before the closure of the prosecution case. A prime facie case was found based on the evidence of PW.1 and PW.2, the accused proceeded to defend himself not on oath.

In his unsworn testimony, the accused confirmed that on 12<sup>th</sup> November 2007 at about 5.00 am he gave a lift on his bicycle to PW.1 the victim. He carried her up to the home of PW.2

AROMBO. That out of the blue PW.2 appeared and accused him of having sexual intercourse with the victim. They struggled over the bicycle, he pushed her and threatened to beat her so she made an alarm and people responded. He was later, that day, arrested and subsequently charged with defilement of the victim, PW.1 in this case.

At the close of the evidence as a whole the prosecution contended they had proved the case beyond reasonable doubt. The defence contended that all the ingredients of the offence were not proved beyond reasonable doubt.

I will now examine the available evidence to determine whether or not the case stands proved. The victim testified that she was 14 years old at the time of giving her evidence which would imply she was 12 years in 2007 when the offence is alleged to have been committed. She testified that she does not go to school and she did not give evidence of how she came to know her age since she did not give evidence of her date of birth. In another aspect of her evidence regarding dates, she testified that the offence occurred on 11<sup>th</sup> November 2004 whereas the charge sheet and the summary of evidence state 12<sup>th</sup> November 2007, this vis-avis the rest of the evidence is a minor error.

PW.3 SEZERENA OLAMA testified that she is the mother of the victim and that she was born in 2005 which would have made her 2 years old in 2007, certainly the girl was not born in 2005 because she was much older than 4 years at the time of testimony. The unanswered issue is when was the victim born and how old was she at the time of alleged offence?

The answer could not be found in the evidence of prosecution witness number three, the victim's mother.

The medical evidence which would have helped in the circumstances was not adduced leaving the age to be assessed by Court's observation.

PW.1 and PW.2 testified that there was sexual intercourse committed by the accused which the accused person denied. In sexual offences the victim is always the best witness in the issue of penetration and identification but once that evidence is not cogent it can not sustain a conviction

unless it is corroborated by independent evidence. Where there is cogent evidence of the victim, the trial court is entitled to act on the evidence even without corroboration.

PW.1 the victim, gave sworn testimony because she testified when she was 14 years or above and she ably described how sexual intercourse occurred. That the accused person opened his trousers' zip, removed his penis and put it in her sexual organ after removing her pants. She made Alarm and her aunt found him on top of the victim having sexual intercourse.

PW.2 Arombo corroborated the victim's evidence. Following the victim's alarm, she found JACAN having sexual intercourse with the victim. She stated

“... I saw what he was doing, he was lying on Oliver Wiango and he was having sexual intercourse”.

Under cross – examination she stated,

“I saw what happened with my eyes. I got him when he had fixed his penis into the girl's vagina”.

He was on top of the girl and the girl was crying. There was moonlight and she was near them. She grabbed the accused person's bicycle for which he struggled with her and he took it away.

There was some corroboration from the accused's unsworn defence evidence. That he was at the scene at 5.00 am. That he was with the victim when PW.2 came to the scene. That PW.2 grabbed his bicycle and made an alarm alleging that he had sexual intercourse with the victim.

The supreme court of Uganda in **Uganda Vs George Wilson Simbwa Crim. Appeal 37 of 1995** held that corroborative evidence must confirm some material particulars not only that the crime was committed but also that it was committed by the accused. Also see **R Vs Baskerville (1916) 2 KB 658**.

I find that PW.2 and the accused person corroborated the fact that the accused person was properly identified at the scene of crime at the time the offence was committed. PW.2 corroborated the victim on the fact of sexual intercourse by the accused. Whereas medical evidence would have further corroboration on the point of penetration, I find that its absence is

not fatal to the prosecution case. This would have been desirable evidence but not mandatory evidence.

Finally as regards the victim's age, she testified that she was 14 years in 2009 and therefore 12 years in 2007. I observed this girl testify, I was in no doubt that she was not older than 14 years and certainly she was much younger in 2007 when she was defiled. I appreciate that both the victim and her mother are illiterate and from a rural set-up and were not conversant with calendar dates, this alone can not defeat their pursuit for Justice.

It's the duty of the trial Judge to judge the age among other issues. I find that she was under 14 years of age at the time of defilement in 2007.

The two assessors have advised that the accused person be acquitted basically due to lack of medical evidence. However, I find that while medical evidence was desirable, it is not always mandatory. In the circumstances I differ with the assessors and I find the accused person guilty. He is convicted as charged under section 129 (3) of the Penal code Act.

**JUSTICE J.W. KWESIGA**

**21 – 9 – 2009**

**Presence of:-**

Ms Asiku Nelly state Attorney

Mr. Madira Jimmy for Accused.

**SENTENCE**

State: The convict was remanded 27/11/2007. It is about 2 years. No previous record. However I pray for deterrent sentence. He tempered with the girl's purity.

**A Defence**

The convict is a first offender he has stayed long on remand. He is 24 years old. Youth offender with a future. He can reform. I have a wife and two children. I pray for lenience.

**Court:**

I have put in consideration the fact that the accused person has spent almost 2 years on remand and the age of the girl victim. I have considered the seriousness of the offence and all the above put together I find a sentence of (5) five years appropriate to enable the accused person reform and return to society as a useful citizen. Sentenced to 5 years Imprisonment.

**JUSTICE J.W. KWESIGA**

**21 – 9 – 2009**