

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT ARUA
CRIMINAL SESSION CASE NO. 0077/2008**

UGANDA ::::::::::::::::::::::::::::::::::::::

PROSECUTOR

=VERSUS=

TOROKA MAJID ::::::::::::::::::::::::::::::::::::::

ACCUSED

JUDGMENT

BEFORE HON. JUSTICE J.W. KWESIGA

TOROKA MAJID, the accused person is charged with Aggravated defilement contrary to sections 129 (3) of the penal code Act. It is alleged in the particulars of the offence that on 2nd November, 2007 at Kukunga village in Yumbe District, he had unlawful sexual intercourse with CHEKA AULA NEBILA a girl under the age of 14 years.

The accused person pleaded not guilty and therefore the prosecution remained with the duty to prove all issues in the case, including the identity of the accused person.

Under our criminal justice, the Accused person has no duty to prove his innocence. It is the prosecution that has the burden to prove that he is guilty and this must be proved beyond reasonable doubt.

The prosecution must discharge its burden by adducing evidence that establishes each essential element of the offence of Aggravated defilement, namely;-

- a) That the victim is a girl aged below 14 years.
- b) That she was subjected to unlawful sexual intercourse.
- c) That the accused person participated in commission of the offence.

I will proceed to consider this case under the above stated order of the issues that need to be proved.

The prosecution and the defence agreed on the evidence of PW.1 ACILE GEOFREY the clinical officer from Yumbe hospital who examined CHEKA, the alleged victim. He found that she was about 10 years old in December 2007. He found that she had a ruptured hymen and inflammations around her private parts. The injuries were consistent with force having been used sexually. He concluded there was penetration of the victim's sexual organ.

PW.4 CHEK, though she said she did not know her age, but going by the findings of PW.1 she was about 12 years when she testified. After the court had conducted a voire dire examination she was let to testify on oath. She testified that she knew the accused as TOROKA MAJID. They stay together in ROMOGI. That the accused found her in a tree where she was guarding crops against Monkeys. Her evidence is summarized as follows;

“He stood below the tree and called me down. He started by removing my dress, he laid on me. He held my mouth tightly. He started by pushing his finger into my private parts...He did the thing and blood came from my private parts. He entered me. He pushed his Kokoa into mine.”

In answering the Court's question, she said she uses her 'Kokoa' for urinating which was understood to be her sexual organ.

In Cross-Examination she stated as follows: -

“... I am sure it was the accused person. It was during the day, in the afternoon. I am not happy because of what he did. He did it.”

PW.1 ADRORE MALIK received the first complaint from the victim on 2nd December 2007. She saw the victim being examined by one EJORO ASIINA and she saw blood and semen on her private parts.

PW.2 MALE ALI LC1 Secretary for Security in KURUNGA village, said that he received the report on 2nd December 2007 from PW1. The accused admitted before him and said he had been tempted by satan. That the accused admitted voluntarily.

PW.3 AMUTE JOSFRED (D/ASP) took a charge and caution statement from the accused person on 3rd December 2007. The statement was admitted as PROSECUTION EXHIBITS P2 and P3, the Lugbara version and English translation.

In the charge and caution statement he denied penetration. The relevant part is

“I grabbed her, threw her down, I climbed on her, pulled her skirt up ... I spermed in my trouser, I did not penetrate into her vagina”.

Sexual intercourse is complete when the female organ is penetrated by the male sex organ and it does not matter how slight that penetration may be.

See **ARCHIBOLD on Criminal pleadings, evidence and practice, 38th Edition page 1124 at page 2872** and **Uganda Vs Baturine Richard, H.C Crim. Sess case No. 589 of 1986** , Where it was held that slightest penetration was adequate to prove the case of defilement beyond reasonable doubt.

In view of the above authorities it is immaterial that the accused person spermed in his trousers and not inside the victim’s vagina. His charge and caution statement contains admissions which corroborate the victim’s evidence of identifying the accused person while he sexually assaulted her. The accused puts himself at the scene of the crime which renders his defence of denial a lie.

PW5 IJORU ASIINA who examined the girl shortly after the incident said she checked the girl on request by LC I chairman. She opened the girl’s legs, she found blood, the vagina was swollen and enlarged. The girl had difficulty in walking.

This witness is an old woman aged 50 years. There was no doubt that she was able to observe what she reported, she was straight forward. Her evidence and the medical evidence corroborates the victim’s evidence on the fact of that the victim was subjected to unlawful sexual intercourse.

The victim testified that she knew the accused very well. The incident took place during the day. She had time to observe him as he called her down from the tree before he grabbed her and defiled her. The accused person's charge and caution statement corroborates her evidence of proof of the accused person's participation.

The victim testified after a voire dire examination and she definitely was below 14 years. The medical evidence established that she was ten years old at the time of defilement. This Court is satisfied that the victim was below 14 years of age.

In view of the above the prosecution evidence has proved all the ingredients of the offence of aggravated defilement beyond reasonable doubt. Both Assessors' opinion is that the prosecution has proved all ingredients of the offence beyond reasonable doubt. I agree with the Assessors and I do hereby find the accused person guilty of aggravated defilement and he is accordingly convicted.

Dated this 17th day of September 2009.

J.W.KWESIGA
JUDGE
17.9.2009

17/9/2009

Ms Adubango for State

Mr. Manzi holding brief for Mr. Oyarmoi for Accused.

SENTENCING

STATE

Accused has been on remand 21.12.2007. no previous criminal record. I pray for a derrent sentence. The offence of defilement is rampant.

DEFENCE

I pray for lenience for the convict. Remand for 1 year 8 months 17 days. He is a first offender. Aged 22 years old. He is married. A long custodial sentence will not give him a chance to reform. This is a serious offence but we do not agree that the convict should be punished for purposes of sending a message to public, this would make him suffer for the public. We pray for lenience.

COURT

I have heard the submission made by both the State and Defence Lawyers. I have considered the fact that the accused has been on remand for 1 year 8 months and 17 days. Defilement is a rampant crime threatening destruction of young girls and the Law is intended to punish the culprit and protect the children from this sexual abuse and exploitation. This can be best done by keeping culprits out of society long enough for them to reform. This convict does not show any remorse for the offence committed and lenience to him would be misplaced. To serve the above purpose I do hereby sentence the convict to 7 (Seven) years Imprisonment.

JUDGE

17 – 9 – 2009