THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CR-SC-0053-2008

UGANDA……PROSECUTOR

VERSUS

IYAPETE DAVID…..…….ACCUSED

BEFORE: HON. MR. JUSTICE E.K. MUHANGUZI

RULING

This is a ruling under section 73 of the Trial on Indictments Act, Cap. 23, on whether or not at the close of the prosecution case, there is sufficient evidence that the accused committed the offence.

Briefly, the accused was, on 29/01/2009 indicted on the offence of defilement contrary to section 130 of the Penal Code Act. It was alleged that the accused on 18.9.2007 at Opadoi village in Pallisa district had unlawful sexual intercourse with **Isukali Sarah** who is an imbecile under the age of 18 years. He denied the charge. Hearing of evidence commenced on 12.02.2009 and prosecution called a total of five witnesses. At the close of the prosecution case counsel for both parties did not make any submissions but left court to make the requisite finding on whether there was sufficient evidence that the accused committed the offence.

According to Article 28 (3) (a) of the Ugandan Constitution every accused person is presumed innocent until proved or he/she pleads guilty. In the case before court the accused denied the offence. In this case the accused has to be proved guilty. The burden of proof is on the prosecution. See: - ***Woolmington v. D.P.P. (1935) A.C. 462***.

At this stage of the proceedings the standard of proof is that standard on which a reasonable tribunal, properly directing its mind on the law and evidence, would convict if the accused does not offer any explanation (***Rananlal T. Bhatt v. R[1957] E.A.332***). This standard of proof is also known as establishing or making out a *prima facie* case against the accused.

The offence of defilement has three essential ingredients each of which the prosecution must prove in order to prove the offence, namely:-

1. Performance of a sexual act;
2. The victim being, at the time, below 18 years of age, in case of simple defilement or below 14 years of age, or there are other aggravating condition, in case of aggravated defilement;
3. The accused being the male who performed a sexual act with the victim.

Failure to prove any of the above three ingredients amounts to failure to prove the offence.

According to the case of ***Rananlal T. Bhatt v. R,*** (ibid) no *prima facie* case can be made out or established by any amount of worthless or discredited prosecution evidence.

Having carefully considered the evidence of especially PW.1 (Dr. Okoth David of Pallisa hospital), court finds that the victim, **Isukali Sarah**, was aged 13 years at the time and had signs, on her sexual organs, of sexual intercourse having taken place. Further that she had a raptured hymen. PW.3 and PW.4 testified that the victim was a young girl who was also somehow disabled and abnormal. On the basis of this evidence court finds that ingredients No.1 and No.2 above were sufficiently proved, though imbecility of the victim was not proved.

On whether the third and last ingredient was proved, court observes firstly, that the victim was not called to testify, though she was able to communicate sufficiently to the mother (PW.4- **Grace Omolo)** and to PW.3 **(Okwatum Lawrence Musa),** her half brother who confirmed that the victim was able to communicate intelligibly to anybody who understands Ateso language.
Court further notes that none of the prosecution witnesses testified to finding the accused actually having sexual intercourse with the victim at the time and place in issue.

Secondly, court notes that the offence was allegedly committed on 18.9.2007 at about 8:00p.m and the victim was examined by PW.1 on 19.9.2007 at a time that was not specified but most probably during day time, which must have been within less than 24 hours after the time of 8:00p.m when the offence was allegedly committed.
Yet, PW.1 stated that the victim's hymen was raptured about two days before 19.9.2007 which puts the time to 17.9.2007. That timing would be a day earlier than 18.9.2007 when the offence was allegedly committed.

Thirdly, court notes several contradictions in the evidence of PW.2, PW.3 and PW.4 regarding whether PW.2 and other children went as far as the bush where the accused

was arrested. PW.2 denied going that far whereas PW.3 stated that the children did and even surrounded that bush in order to arrest the accused. PW.3 first stated that the children escorted her to the bush but in her re-examination stated that, because it was already at night, when she went to the bush to search for the victim, the children did not follow her. Court finds these contradictions so grave that they render such evidence worthless and discredited.

Fourthly, PW.3 (**Okwatum Lawrence Musa**) stated that the person who actually arrested the accused is **Omaiga J.P. Ali**. Neither **Omaiga** who allegedly arrested the accused nor **Okurut** the LC.I Chairman to whom the accused was first taken, testified for the prosecution. This left a major gap in the prosecution evidence.

For all the above reasons court finds that the 3rd and last ingredient of the offence and as such the whole offence was not proved by the prosecution. Therefore court finds prosecution evidence not sufficient that the accused committed the offence, in terms of S.73 of the TIA.
Consequently, court finds the accused not guilty, acquits him and sets him free forthwith unless he is held on other charges.

E.K. Muhanguzi

JUDGE

18.02.2009

24.02.2009

Accused present.

Ms. Ogwang State Attorney for State.

Mr. Madaba on brief for **Mr. Mutembuli** for accused.

Loyce Orone Court Clerk.

Court: Ruling delivered.

E.K. Muhanguzi

JUDGE

24.02.2009