

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO**

**CRIMINAL SESSION CASE NO.0086 OF 2010**

**UGANDA :: PROSECUTOR**

**VERSUS**

**JUMA OLARO :: ACCUSED**

**BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGMENT**

The accused **Juma OLARO** was indicted for defilement contrary to **Section 129 (4) (a) of the Penal Code Act**. The particulars of the indictment alleged that the accused on the 9<sup>th</sup> September, 2007 at Butigirinya village in Kayunga District had unlawful sexual intercourse with Nankumba Proscovia, a girl aged 8 years.

The background facts to the indictment were as follows:

On 9<sup>th</sup> September, 2007 the victim's mother went for a funeral right leaving the victim at home in Bugigirinya village. The accused came and got the victim at home where he forcefully had sexual intercourse with her. The victim's brother alerted some neighbours who responded and apprehended accused. The victim's nephew was informed and took up the matter whereupon he took the victim for medical examination which revealed that the victim was 8 years old

and had been penetrated with a ruptured hymen. The accused was rearrested by the Police and charged accordingly.

When the indictment was read and explained to the accused he denied the offence. By that plea the prosecution was obliged as a matter of law to prove all the ingredients of the offence beyond all reasonable doubt. Under **Article 23 of the Constitution** a person accused of any offence is presumed innocent until proved guilty or unless he has pleaded guilty. The accused does not bear the burden to prove his or her innocence. An accused person need not do more than raise, if he opts to fight the allegation against him, some reasonable doubt about his guilt. It is in fact not obligatory for him to give any evidence in defence. For even doubts solely arising from prosecution evidence itself are sufficient to free him from the yoke of the charges even without him uttering a word. The fundamental principle is always that conviction should only be based on the strength of the prosecution evidence than the weakness of the defence: See **Okethi Okale v Uganda [1965] EA 555**. The following ingredients of aggravated defilement ought to be proved beyond reasonable doubt:-

- (a) The victim should be below 14 years old.
- (b) That Sexual Act was performed on the victim.
- (c) That it was the accused who performed Sexual Act on the victim: See **Section 129 (4) a of the Penal Code (Amendment) Act 2007**.

In an attempt to prove the above ingredients beyond reasonable doubt; the prosecution adduced the evidence from the witnesses: No. 4010 SPC Semwanga Godfrey Pw<sub>1</sub> who was the complainant. He testified that he got information from his young brother Senkungu Robert that the victim, who was his niece, has been defiled. He proceeded home where he found the accused had already been arrested from the home of the victim's grandmother. He took

the accused to Kayunga Police Station together with the victim. Thereafter he took the victim for medical examination.

Nankumba Proscovia Pw<sub>2</sub> testified that on 9<sup>th</sup> September, 2007 she met the accused as she was going to the shops to buy sugar. The accused person called her but she ignored him. The accused forcefully held her by the hand and pulled her inside his house where he had sex with her while holding her mouth. She further told court that the accused had sex with her two times when she was from the shops and the third time was when he found her at home cooking and he pulled her inside the house where he had sexual intercourse with her.

The accused on his part relied on the defence of total denial and grudge. He stated that he was arrested from his home for nothing. He testified that he was framed because a lady called Nagadya was in love with him but he was not interested because she was HIV positive. He further stated that he was framed because those people wanted to grab his land.

As far as the age of the victim is concerned, it is trite law that age is proved by medical evidence, birth certificate, evidence from the victim parents or guardians and by a mere observation and common sense.

No. 4010 SPC SEMWANGA Godfrey Pw<sub>1</sub> testified inter alia that the victim was 11 years old, primary pupil at Keguma.

Nankumba Proscovia Pw<sub>2</sub> testified that she was currently 11 years old pupil at Kitatya R. C. School in primary four. She testified after voir dire, because she was found to be of apparent age of below 14 years old. The medical examination report which should have corroborated the evidence of the above two witnesses was not admitted in evidence. It was merely tendered for

identification. The doctor who authored it did testify and therefore his professionalism was untested as required by law. Notwithstanding the absence of medical evidence which is paramount in proving age of the victim, the prosecution relied on the essence of the victim and her nephew who testified that the victim was 11 years old. The victim testified after voir dire. She visibly looked young but very intelligent. I do not have any doubt that she was 11 years old at the time of her testimony. The Defence also conceded that she was a girl below 14 years old. For the above reasons I do agree with the prosecution and defence and the unanimous decision of the assessors that the victim was a girl below 14 years of age.

### **Proof of Sexual Act.**

Under **section 129 (7) (a) and (b) of the Penal Code (Amendment) Act** sexual act means:

**“Penetration of the vagina however slight of any person by a sexual organ or unlawful use of any object or organ on another person’s sexual organ.”**

Proof of penetration is normally established by the victim’s evidence, medical evidence and any other agent evidence: See **Remigious Kiwanuka v Uganda; Supreme Court Criminal Appeal No. 41 of 1995 (Unreported)**.

The victim Nankumba Proscovia Pw<sub>2</sub> testified that on the 9/9/2007 the accused met her as she was going to buy sugar for her grandmother Nakato Emirina. The accused pulled her and dragged her into his house where he had sexual intercourse with her. She testified that the accused had sex with her three times, the last time was from her grandmother’s house. The accused got her cooking

and pulled her inside the house where he had sexual intercourse with her. The victim's evidence was corroborated by that of No. 4010 SPC Semwanga Godfrey who testified that on the material date he had gone for a funeral right with the victim's mother. As he was there he received information from his brother that the victim had been defiled. Upon that information he proceeded home where he found the accused had already been arrested by the area Local Chairman a one Tendo. Semyalo stated that he took the victim for medical examination because she was feeling pain. The victim also stated that she felt pain. From the victim's evidence which was corroborated by that of the complainant, I am convinced beyond reasonable doubt that Sexual Act had been performed on the victim. It is unfortunate that the medical evidence which should have been useful in corroboration of penetration was not conclusively tendered in evidence. However the victim's evidence and that of the complainant was enough to establish that penetration had occurred.

### **Participation of the accused:**

In proving participation, it is trite law that evidence of the victim is the best evidence on identification: See **Badru Mwindu v Uganda, Court of Appeal Criminal Appeal No. 1 of 1997 (Unreported)**.

In the instant case Nankumba proscovia Pw<sub>2</sub>, who was the victim in this case testified that it was the accused who performed sexual act on her while she was going to buy sugar from the shops. The accused pulled her to his house where he forcefully had sexual intercourse with her. The same day the accused followed her up to her grandmother's home where he pulled her inside the house where he had sexual intercourse with her. Semyalo Godfrey Pw<sub>1</sub> testified that he got information from his younger brother Senkungu Robert that the victim had been defiled. He proceeded home where he found the accused had

been arrested by LC I vice-chairman Mr. Tendo. At the scene he also found his sister Jackline Ndibaze.

In his defence the accused raised the defence of total denial and grudge. He stated that there was a grudge between him and one Nagadya because he had rejected a love affair with her. Later he stated that Nagadya had framed him because they wanted his free land.

Upon carefully perusing the victim's evidence I am well satisfied that the identity of the accused had been properly established. The victim testified that she knew the accused very well. Sexual intercourse took place three times over a space of time. The victim was emphatic that the accused had sexual intercourse with her twice when she had gone to the shops and the third time was when she was at her grandmother's house where the accused was arrested as he was trying to run away. She was a truthful witness when she said she was also planning to run away fearing that she would be beaten.

The offence took place face to face during broad day light. The victim's evidence was corroborated by that of Mr. Semyalo Godfrey Pw<sub>1</sub> who stated that he found the accused already arrested at the scene. With the above evidence I find that the participation of the accused was established beyond reasonable doubt and the defence of the accused of total denial and grudge a mere sham if not an afterthought to wriggle him from this total mess of his life when he was in the evening of his life at 70 years. The said grudge with Nagadya had no connection with the victim because the said Nagadya had no relationship with the victim. It also follows that even if Nagadya wanted to grab his land the victim had nothing to do because there was no relationship between them. For the above reasons I find that the evidence against the accused is compelling and without hesitation I conclude that the prosecution has proved all the ingredients

against the accused person beyond reasonable doubt and find him guilty as charged and he is convicted accordingly.

**HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGE**

**28/10/2010**

**29/10/2010**

Accused present.

Masinde for the State.

Senkumba present for the accused on State brief.

**Judgment read in Court.**

**HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGE**

**29/10/2010**

**Masinde:** I have no record of the accused. However I pray for a deterrent sentence because as an elderly person he should have set a good example but instead went and defiled the girl not once, not twice but three times. It caused her trauma.

**Senkumba:** He is an old man of advanced age. He has spent over 4 years in remand. He has learnt a lot. We pray for a lenient sentence to allow him go back home. We so pray.

**Allocotus:** I am an old man. I pray for lenient sentence. I am now weak. That is all.



## **SENTENCE:**

This is a very serious offence as it entails maximum death sentence. The accused went with a girl who was only 8 years old. At 70 years old he should have considered the victim his great grandchild whom he should have protected. Instead he had sexual intercourse with her not once, not twice but three times. He had the audacity of following up the victim and had sexual intercourse with her at her grandmother's house. That was beyond impunity. That act shall remain in the victim's mind for life. I will however consider that he is 1<sup>st</sup> offender who has spent over 4 years in custody. Tying all the above conditions together the accused is sentenced to 17 years imprisonment.

Rights of Appeal explained.

**HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGE**

**29/10/2010**