

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**AT SOROTI**  
**CR. SESSION NO. 0011/2011**

**UGANDA .....PROSECUTOR**

**VERSUS**

**MUSANA LUKA.....ACCUSED**

**JUDGMENT**

**BEFORE: HON. JUSTICE WILSON MASALU WILSON.**

The accused, Musana Luka was indicted for Aggravated Defilement contrary to section 129 (3) and 4 (a) of the Penal Code Act. The particulars were that Musana Luka, between the 19<sup>th</sup> and 23<sup>rd</sup> day of June, 2010 at Kichinjaji in Soroti district, performed a sexual act with Idiangu Catherine, a girl aged 13 years. The accused pleaded not guilty to the indictment.

The prosecution called three witnesses to prove its case. The accused gave unsworn testimony in his defence and called no witnesses. The prosecution case was that the accused tricked the victim and lured her to his home, a camp at Moruapesur within Soroti district where he had sexual intercourse with her several times till she became pregnant. The father of the victim (Idiangu Catherine) eventually traced the accused and the victim who was found sleeping together at night and had the accused arrested and forwarded to police and charged accordingly. The

accused on the other hand denied the offence, alleging that he was a victim of circumstances and that the real boy friend of the victim was Achuku Roomy, who is his friend. Accused 's case was that they were arrested at Aduku's house where Idiangu Catherine was, when he had gone there to collect his motor-cycle, borrowed by Achuku Roomy.

It is trite law that accused does not bear the burden to prove his innocence. The burden is upon the prosecution to prove the guilt of an accused person beyond reasonable doubt. It is also the law that an accused person should not be convicted on the weakness of his defence but should only be convicted on the strength of the case as proved by the prosecution. (*See Uganda vs Dic Ojok 1992 – 1993*) HCB 54.

In a case of aggravated defilement such as this one where the accused denies the charge, the burden is upon the prosecution to prove all the ingredients of the indictments of the indictment. The ingredients are:-

- i. That the victim was below 14 years of age.
- ii. That the victim was subjected to sexual intercourse.
- iii. That it was the accused who was responsible for the sexual intercourse.

As far as the first ingredient of the offence was concerned, the prosecution relied on the doctor's evidence who testified as PW.1, and the testimonies of the victim herself, PW.2 and the father of the victim PW.3.

PW.1 Dr. Valentine Aruo of Soroti referral Regional Hospital testified that the victim, Idiangu Catherine was taken to him on account of Aggravated defilement. He testified that the victim was aged 13 years

and that he arrived at that conclusion by examining the breast of the victim and the pubic hair. The Appendix to police form 3 was tendered in court as prosecution exhibit No. 2 without any objection from Counsel for the accused.

PW.2. Idiangu Catherine testified that she was born now 15 years, putting her age below 14 years by the time the offence was committed in June, 2010. Lastly, on the issue of age was the testimony of PW.3 Odere Kokas, the biological father of then victim, Idiangu Catherine. He confirmed that the victim was born on Tuesday, 28.10.1996. That meant that by the time of the commission of the offence between 19<sup>th</sup> – 23<sup>rd</sup> June, 2010, the victim was 13 years and 8 months old, below the age of 14 years provided by the law. In his submissions, learned Counsel for the accused, Mr. Ewatu conceded to the age of the victim as being below 14 years.

It is in the circumstances, the finding and holding of this court that the prosecution has proved the first ingredient of the offence beyond reasonable doubt. The victim Idiangu Catherine was below 14 years of age.

I now turn to the ingredient as to whether the victim, Idiangu Catherine was subjected to unlawful sexual intercourse.

The prosecution relied on the evidence of the complainant or victim of defilement, Idiangu Catherine who testified as PW.2 She testified that she did not know the accused before 19.6.2010 when he took her to his home and second time in Gweri where bicycles are repaired. That the accused, Musana took her to Moruapesur. That he locked her in the house and played sexual intercourse on her or with her. She told court how accused removed his trousers, pulled out his penis and inserted it into her vagina. That accused threatened to call police to have her

arrested if she refused she went on to tell this court that accused seduced her into submission and continued playing sexual intercourse with her from day to day, while in a locked house where he brought her food.

She confirmed to court that accused eventually made her pregnant and that her father arrested them with accused in the act of sexual intercourse at mid night.

During cross examination by Counsel for accused, she reiterated that it was the accused and not Roomy who all along played sexual intercourse with her and that it was accused who made her pregnant.

I find corroborative evidence to the complaint's claim that she experienced unlawful sexual intercourse in the evidence of Dr. Valentino Aruo of Soroti Regional Hospital. He examined her on 29.6.2010 and found that she had signs of penetration PW.1 went on to testify that the victim had recent lacerations of the hymen and vulva, and that the hymen was ruptured due to early sexual relationship. The doctor also testified that Idiangu Catherine had inflammations around the private parts, consistent with force and that the injuries were 1 week less old. He concluded that Idiangu Catherine was 10-12 weeks pregnant. And the medical form, Appendix to police form 3 was tendered in court as prosecution exhibit amidst no objection from defence Counsel.

Besides, there was evidence of Odere Kokas, PW.3 the father of the victim. He narrated to this court how he found his daughter, Idiangu Catherine missing from home and how he mounted a search in vain. Eventually, PW.3 traced the daughter at accused's house at mid night with the assistance of police and caught the two infragrato Delicto.

PW.3 confirmed during cross examination by defence Counsel that when the torch was flashed, he saw both accused and his daughter lying on the mat naked.

In the circumstances above, I do not hesitate to find that an act of sexual intercourse took place. There was indeed penetration of the male sexual organ into the victim's sexual organ, the vagina.

The level of penetration required for the purpose of the offence is the slightest penetration. The said level of penetrations was not only achieved in this case, but was deep making the victim pregnant and as learned Resident State Attorney Mr. Jatiko submitted, the result was a child whom the victim was holding as she testified in court. Even Counsel for the accused conceded to the 2<sup>nd</sup> ingredient of the offence.

The law on proof of sexual offences in this country has long been settled. In **Badru Mwidu vs Uganda (1994 – 1995 HCB 11** the court of Appeal of Uganda ruled that normally in sexual offence, the evidence of the victim is the best evidence on the issue of penetration, let alone identification. I shall shortly come to the last ingredient of identification. But before that, and for emphasis, I quote another leading case in Uganda's criminal jurisprudence on the act of sexual intercourse.

In **Bassitta Hussein v Uganda Supreme Court Criminal Appeal No. 35 of 1999**, it was held as follows:-

**“The act of sexual intercourse of penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not a last and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to**

**adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.”**

In the present case, the result of pregnancy and child even go beyond reasonable doubt.

I conclude therefore that the prosecution has proved the 2<sup>nd</sup> ingredient of the offence beyond reasonable doubt. The last ingredient is whether it was the accused who was responsible for the unlawful sexual intercourse. In view of the authorities of **Badru Mwidu vs Uganda (Court of Appeal of Uganda (Court of Appeal of Uganda and Bassitta Hussein vs Uganda (Supreme Court)**. Quoted herein above, I can authoritatively state that it is now trite law that the victim’s evidence is very vital in proving the act of sexual intercourse and the identification of the Assailant.

In this case, it is the direct evidence of the victim, PW2, Idiangu Catherine, she knew the accused very well since he lured her into a love affair and during cross examination by court reiterated that she had played sexual intercourse with the accused six times before he took her to his house, a camp at Moruapesur.

The victim, Idiangu Catherine remained consistent ever since that it was the accused who had sexual intercourse with her throughout the week long stay at his house. He would bring her food and lock the house and pounce on her like a hungry lion for sex whenever he returned. I have found no reason to disbelieve her testimony. And as submitted by Mr.

Jatiko for state, the accused was in the circumstances well known to the victim. Infact the victim all along sounded resolute and truthful.

However as this is a sexual offence, the victims's sworn evidence requires corroboration as a matter of practice. This was indeed the holding in the case of **Lwanga Yusuf vs Uganda (1977) HCB 280**, quoted by learned Counsel for the accused, Mr. Ewatu. And this is more so when considering that this was evidence of a child of tender years, being of the age or apparent age, of less than 14 years. That, position was equally emphasized in **Kibangeny Arap Kolil v Republic (1959) E.A. 92.**

In the present case, the evidence of Idiangu Catherine was a child of tender years but it was sworn testimony. That is different from a position where it is unsworn evidence of a child of tender years. **In Kabura v R. (1974) E.A.188**, it was held that where the evidence of a child of tender years is sworn, then there is non necessity for corroboration as a matter of law, although a court should not convict upon it if it is uncorroborated, without warning itself of the dangers of doing so.

In the present case, even without warning myself of such danger, I found corroboration in the evidence of PW.3 Odere Kokas, the father of the victim. He with the assistance of police arrested the accused red-handed. He testified that as the torch light was flashed, he saw his daughter and accused naked on a mat in the house, and that accused was

arrested and taken to police. During the rigorous cross examination by defence Counsel, PW. Stated:-

**“To tell the truth, even if God was to be a witness, it is the accused whom we found with my daughter at mid night. It is not true that accused was standing outside .....**”

PW.3 concluded the strenuous and rigorous cross examination that there was no way he could be grateful to accused, who defiled his daughter who was in Primary five, and who had even told police that PW.3 ‘s daughter was his wife.

As I watched the demeanor of PW.3 a very humble peasant of Amusia village, Gweri Sub County, who could even recall the exact date and day of the week his daughter (The victim was born), as Tuesday, 28.10.1996, and who stood the tricky and rigorous cross examination by defence Counsel, the impression I got was of a very sincere and truthful witness. His testimony therefore corroborated that of the victim, Idiangu Catherine as far as the identification of the accused as the person who continuous and without mercy played sexual intercourse with the young, innocent and unsuspecting victim till she became pregnant and now has a six months baby. In his defence, the accused did not deny that the victim did not know him. And the accused did not even deny being found with the victim. He only purported to state that he was found with the victim at his friend’s house when he had gone to collect his motor cycle, a story which not even an LC. 1 court can believe. As was held in



the old case of **Republic vs Manila Ishwedal Purohit (1992) 2 EACA 58** where the conduct of an accused implicate him when confronted soon after the alleged incident, such conduct cannot be explained by any other reasonable hypothesis than that of his guilt. So contrary to the submissions by learned Counsel, Mr. Ewatu that PW.2's evidence had not been corroborated; this court finds that besides PW.3 the father of the victim, even the accused himself in his purported defence corroborated the victim's testimony.

Throughout his unsworn testimony, accused stated that he received the victim who was allegedly looking for one Achuku Roomy, then he bought her tea and food to eat and that at night it was the victim who was welcomed him to Achuku's home but Achuku was not around and he was arrested. In the first instance, such testimony is consistence with the victim's evidence of no mistaken identity of the accused as the one who ravished her.

So not withstanding the fact that an accused cannot be convicted upon the weakness of his defence, the fabricated defence of the accused rendered support to the evidence of identification.

Whether accused was found with victim at mid night or 9.00 p.m. as accused stated, whether he was found in the house with the victim or standing at the door way after alleged being welcomes by the victim as accused stated, the truth the matter is that accused was found and arrested that night while he was with the victim.

Accused's evidence therefore makes the inference of guilt stronger and amounts to corroboration. This court therefore finds that the prosecution has squarely placed the accused at the scene of crime and rejects accused's evasive denial as a pack of lies aimed at distorting the truth. And much as learned Counsel for the accused submitted that there was need for further corroboration, it was not necessary because even from the unsworn testimony of accused, who stated that all along he knew the victim and received her and fed her as she waited for his purported friend Acuku Roomy, in the concluding paragraph of his testimony stated to the contrary. Accused stated as follows:-

“Even the girl was beaten to say it was me. I had never had sex with the girl. The child in court is not mine. I don't know the father of the child. To tell the truth, I don't know that girl”.

That is how the accused concluded his purported defence in a totally contradictory and confused manner unacceptable to this court in the circumstances of this case and by all standards. And as already stated above, accused's own evidence puts him at the scene of crime. He had the opportunity to convict the offence. His denial had been destroyed by direct evidence of PW.2 and PW.3 I therefore entirely agree with the opinion of both Assessors, and learned Counsel for the state Mr. Jatiko Thomas that the man in the dock, Musana Luka, defiled Idiangu Catherine.

The prosecution has therefore proved the 3<sup>rd</sup> ingredient of the offence beyond reasonable doubt.

Having found and held that the prosecution has proved all the ingredients of aggravated defilement beyond reasonable doubt, and as advised by the gentleman assessors, I do hereby find the accused guilty as charged.

Accused is accordingly convicted of Aggravated defilement on Idiangu Catherine contrary to sections 129 (3) (4) (a) of the Penal Code Act.

Hon. Justice Wilson Masalu Musene,

JUDGE

26/7/2011.

Mr. Jatiko: The prosecution has no past criminal record. He has been on remand for 1 year now. However, this is a very serious offence. The convict is not remorseful by continuous denial of his own fresh and blood. I pray for a harsh penalty in the circumstances.

Mr. Ewatu: The state has conceded that the convict has no known records. The convict is 29 years old and still a youth contrary to the assertion by the state, the convict is remorseful. The convict has a wife and two children, four and 2 years respectively. They are yearning for his protection. The court should also take into consideration of one year on remand I therefore pray for exercise of leniency on the convict who is still youth. I so pray.

### **Sentence and reasons:**

The convict is said to be a first offender. And I know the court is to take into account the period convict has been on remand. That has been considered. Also considered are the mitigation factors raised by learned Counsel for the convict, Mr. Ewatu. They call for leniency. However and as submitted by the learned Senior Resident State Attorney Mr. Jatiko, the offence in question is very serious. The convict introduced sexual intercourse to an under age girl of Primary five, making her pregnant. This was not only a breach of the law, but it under mines the government policy of promoting gender equity and empowerment of the girl child through equal opportunities to education. Ugandan society is sick and tired of adult men who seek sexual gratification from children as if the world is coming to an end. The courts in this country will not sit by and watch such heinous crimes go unpunished.

And ordinarily, a convict in the dock now would deserve no mercy.

However and as already noted in view of the mitigating factors raised by learned Counsel Mr. Ewatu, I shall not sentence you to the maximum penalty of death. The other consideration is of being of youthful bracket as submitted. In the circumstances, taking into account the factors stated above, an appropriate sentence would have been 15 years imprisonment. But since you have been on remand for 1 year, you will now serve 14 years imprisonment.

Court: Right to appeal against the conviction and sentence explained.

Hon Justice Wilson Masalu Musene

**JUDGE.**

Court: Judgment read out in open court.

27.7.2011: Accused present.

Mr. Ewatu for accused on state brief.

Assessors present.

Ecutu Court Clerk present.

Mr. Jatiko for state.

Hon. Justice Wilson Masalu Musene,

JUDGE

27/7/2011.