

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HCT-11 -CSC-005/2011

CRIMINAL CASE KAB-00-CR-CSC-235 OF 2009 CRB 3234 OF 2008

UGANDA :::PROSECUTOR

VERSUS

KATUTSI E ALIAS KAHIMA :::ACCUSED

BEFORE HON. JUSTICE J.W. KWESIGA

JUDGMENT

The Accused person, KATUTSI ELISAM also known as KAHIMA, is indicted for Aggravated Defilement contrary to Section 129 (3) and (4) (a) of the Penal Code Act.

It is alleged in the particulars of the offence that on 5th November, 2008, at Kinyungu Cell, in Kamwezi Kabale District, the Accused unlawfully performed a sexual act with Niwamanya Maria alias Agatha a girl aged 10 years. The Accused person pleaded not guilty and the prosecution set out to prove the case by calling five witnesses. The Accused person put up a defence of total denial.

The prosecution has the burden to prove the case as a whole against the Accused person.

The Accused person has no duty to prove anything. The prosecution evidence must prove

beyond reasonable doubt each of the following elements of the offence:-

- (a) That the victim is a girl aged below 14 years.
- (b) That a sexual was performed on the girl.
- (c) That the Accused person is the culprit.

The girl presented as PW 5, clearly appeared a child of tender age, she is stated to be 14 years old in 2011 which would make her 10 years in 2008. She was allowed to give unsworn evidence because by virtue of her age and understanding, she was unable to understand the nature of an oath or the duty to testify under oath. I have taken note that PW 4 AROZIO KAHANGWA, the child's grandfather (73 years old) stated she is 12 years old. The medical report, Prosecution Exhibit P.1 (PF 3), states the child was 10 years by 5th November 2008, when she was examined. The above evidence looked at together leaves no doubt that the victim was a girl aged 10 years or below 14 years in 2008 when defilement is alleged to have occurred and it is irrelevant that the exact age may not have been proved. P.W 5 Niwamanya told court that the Accused person found her picking firewood while singing, he told her that he wanted to "fuck" her and he held her and performed a sexual act with her. That he held her while they were standing facing each other. Under cross-examination she stated, he removed her knickers, and that he put down his trousers and did the sexual act as he prevented her from shouting.

PW 3 ALICE AHIMBISIBWE testified saw the Accused on 5th November 2008 at about

4:30 pm, holding the victim and having sexual intercourse. He was standing, balancing the child on his laps. She shouted at him, he put the girl down but she saw his penis still standing outside the trousers' zip. She called one KERENI, who joined her at the scene, other people gathered and the Accused was arrested at the scene. This evidence corroborates the victim's evidence both on the fact of occurrence of sexual intercourse and identification of the culprit. The victim also confirmed the intervention of PW 3 and Kereni.

P.W 1 KINTU GEOFREY who carried out medical examination at Kamwezi Health Centre, found signs of penetration. The hymen was ruptured about 2 hours before he examined the girl. She had multiple bruises on the left valva. She had bruises on the knee joint and elbow joints. The injuries were found to be consistent with force having been used sexually. This medical evidence materially corroborates the evidence of P.W 5 and P.W 3 that the child was a victim of defilement. The Accused, in Defence denied participation. He concedes he knows the victim and P.W 3 ALICE AHIMBISIBWE who said was an eye witness. He said at the material time he was at his place of work at Kamwezi Parent's School between 3:00 pm and 6:00 pm when defilement is alleged to have occurred. That he left work at 5:00 p.m and was arrested at 6:00 pm. He alleged that there was a grudge between the victim's grandfather (PW 4) Kahangwa and his family over cattle destroying crops. That Kahangwa had paid fine to the family of the Accused. However he agreed he had no grudge with PW 3, ALICE the eye witness. I have

examined this evidence on the alleged grudge, if the grudge actually existed, it does not offer explanation against the evidence of the victim and ALICE

AHIMBISIBWE who gave direct evidence of identification. The evidence of Kintu, the medical officer further corroborates that these witnesses did not tell lies on the fact of sexual intercourse. Therefore I find the grudge irrelevant.

The Defence of ALIBI is not watertight for the following reasons:- He said from 3:00 p.m to 6:00 p.m he was at the school where he works yet he stated that he left the school at about 5:00 p.m and he was arrested at 6:00 p.m. The circumstances show that when he was arrested he was surrounded, at the scene, by the school children who were returning from the school between 4:00 pm and 5:00 pm. In my view this accommodates 4:00 pm being the approximate time when Alice Ahimbisibwe said she saw and confronted the Accused who was in the defiling Act. The Accused in defence further made it clear that when coming from his place of work to his home, he passes by the victim's home. The Defence of Alibi does not stand in view of the above strong evidence that puts the Accused person at the scene of the crime. He confirmed that on his way from work to his home he passes in the compound of the home where the victim lives. The victim knew the Accused very well and she could not have made erroneous identification of her attacker. The time of identification was broad day light and ALICE AHIMBISIBWE was able to see the Accused at a distance. He was caught in the Act of defilement, he was arrested at the scene of crime and therefore his alibi is false and it is rejected.

The Assessors view is that all the essential elements of the offence have been proved beyond reasonable doubt and that the Accused person be convicted. I agree I find the Accused person guilty of Aggravated Defilement as charged and he is hereby convicted.

J.W.KWESIGA
JUDGE
8-9-2011