

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

HCT-04-CR-SC-110-2008

UGANDA.....PROSECUTOR

VERSUS

KOCHI SIRAJI.....ACCUSED

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

The accused Kochi Siraj is indicted with two counts. In count I, he is indicted for defilement c/s 129 (4) (a) of the Penal Code Act. It is alleged that the accused on 15th February 2008 at Bumangoye village in Bududa District unlawfully had sexual intercourse with Nambafu Irene a girl aged 8 years.

In the second count, the accused is indicted for incest c/s 149 (1) of the Penal Code Act. It is alleged that he committed incest with the victim in count I, the victim being a daughter to his sister.

The accused denied both counts.

It was incumbent upon the prosecution to adduce evidence to found a *prima facie* case to warrant putting the accused person onto his defence.

In an attempt to prove that there was sexual intercourse with the victim aged 8 years and by the accused who is an uncle, prosecution adduced the evidence of two witnesses and closed its case.

PW.I was Nambafu Irene the victim. She testified that on 15.2.08, the accused who is a maternal uncle “did bad manners to her” at night. She did not tell anybody because the mother was feeling dizzy due to HIV drugs she had taken. The next morning, she did not tell her either. She however went and visited another uncle called Wandeka. She returned in the evening. That evening, her mother PW.2 asked her to escort her to the toilet. It was that following night at around 8:00p.m that the mother (PW.2) asked PW.I why she called her at night. This was when she revealed to PW.2 that the accused “did bad manners to her.”

When cross-examined, PW.1 said they all slept together in the sitting room. He shared the bed with the accused but shifted to the mother’s bed at night. That night 3 other uncles visited their home.

PW.2 was the mother of PW.1 called Nabushawo Scholar. She testified that she slept with the children in one room before she got visitors. The accused had lived at her home for over a week when she got visitors from Kenya. She left the bedroom to the visitors and shifted to the sitting room where the accused used to sleep. The beddings were on the floor and the victim shared a bed with the accused. That in the night the victim asked to share a bed with the mother. She did not comprehend the events since she was dragged. The following day at night PW.2 told PW.1 to wash her feet and short call before going to sleep. PW.1 could not do it because she felt pain. PW.1 explained that it was because the accused did bad manners to her the previous night.

When PW.2 asked the accused, he denied any wrong doing. PW.1 reported to one Silvia a woman Secretary who checked the child and confirmed that PW.1 had been defiled.

PW.1 was medically examined but no evidence was adduced by prosecution to this effect.

This was the evidence adduced by the prosecution. The question is, is this evidence sufficient to found a *prima facie* case to require the accused to be put on defence. I do not think so.

A *prima facie* case is where prosecution has adduced sufficient evidence upon which a reasonable court could convict if no explanation is given by the accused person.

In the instant case, the only evidence upon which the prosecution has based its case is that of juvenile PW.1. The mother PW.2 gave no direct evidence to link the accused to this offence. She was asleep and dazed by drugs. She was told what happened by her daughter the following day at night. The following day the daughter told her nothing about what happened to her at night. She had no basis for claiming that the accused defiled her. A whole day following this allegation was spent by PW.1 at her other uncle's home called Wandeka. It is not substantiated what could have happened to her while away from home.

PW.2 did not check her daughter to ascertain if there was anything wrong. It was one Silvia the woman LC.I who checked PW.1 and "confirmed she was defiled." However Silvia was not called as a witness to corroborate the allegation by PW.1.

To further weaken the prosecution case was failure to adduce medical evidence to prove that PW.1's hymen was ruptured and that she had tears on the labia with puss discharge.

Being a child of tender years, who gave evidence not on oath, there was need for evidence to corroborate her singular evidence for it to be safely believed.

Without such evidence I have found it very difficult to find at this stage that the victim PW.1 was defiled by the accused. There is no proven direct or circumstantial evidence to connect the accused to this offence given that many male visitors were at her home and spent several nights punctuated by drinking. Secondly PW.1 spent the day after the alleged defilement outside her home. She spent the day at Wandeka's home. Anything could have befallen her.

In view of the weak prosecution evidence none of the ingredients of the offence of aggravated defilement has been proved except the fact that PW.1 was aged 8 years at the time.

No reasonable court could convict the accused basing on the singular evidence of the victim if the accused decided not to give evidence.

Prosecution has failed to adduce evidence to found a *prima facie* case by the time it closed its case. I will find the accused with no case to answer in agreement with submission of Mr. Magirigi learned counsel for the accused person on count I.

Having found that prosecution has not made out a *prima facie* case on count I it follows that count 2 of incest must also fail. The accused will be acquitted on both counts and the indictment is dismissed. He is set free unless lawfully held.

Before taking leave of this case, I must say the prosecution of this case was perfunctorily done leading to such an unfortunate end.

Musota Stephen

JUDGE

5.4.2011

5.4.2011

Accused in court.

Alpha Ogwang Resident State Attorney.

Magirigi on State brief.

Kimono Interpreter.

Resident State Attorney: Matter for ruling.

Court: Ruling delivered.

Musota Stephen

JUDGE

5.4.2011