

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

**HCT-04-CR-SC-56-2010**

**UGANDA.....PROSECUTOR**

**VERSUS**

**BWIRE MOSES.....ACCUSED**

**BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN**

**JUDGMENT**

**Bwire Moses** hereinafter called the accused is indicted for aggravated defilement contrary to sections 129 (3) and 4(a) of the Penal Code Act. Particulars allege that the accused on 6<sup>th</sup> June 2009 at Busulubi village, Masaba Sub-county, Busia District unlawfully performed a sexual act on **Nasabu Watali** a girl aged 13 years.

The accused denied the indictment.

Prosecution adduced in evidence the testimonies of four witnesses.

According to the victim **PW.1 Nasabu Watali**, her mother left her at home with her siblings. She had gone to Tororo to sale second hand clothes. While at home, one **Namulundu** and **Omukaga** came to her on a bicycle. **Namulundu** told her that she wanted her to go and pick certain things on Jinja road in Busia. PW.1 was

carried on a bicycle to Jinja road. At Jinja road, PW.1 was put on a motorcycle and taken to an unknown place. She later came to know the place as Busulubi village. That they arrived at Busulubi at around 4:00p.m and she was make to enter one of the houses in the compound. The compound had four houses and there were people around. PW.1 further testified that while in the house, the accused that she knew before came and found her there. He removed her clothes and his clothes and “did bad things to her in the down part,” (He had sex with her), after removing her pants as well. When she tried to refuse, the accused slapped her. That he repeated the sexual act in the night at around 9:00p.m. She felt a lot of pain.

PW.1 further testified that when the accused fell asleep she escaped in the night and ran away. She reached the road and pleaded with a bicycle man who rode her to her mother’s place the following day. The mother was found at home and she paid the fare of 4000/=. She explained to the mother what happened to her. The mother took her to police and thereafter to Red Cross clinic where she was examined. The accused was later arrested.

PW.2 was **Mukaaga** a barber in Busia who confirmed picking PW.1 from her home on the instructions of the accused who was at Jinja road in Busia. That the accused told him to go to one **Namulundu** to pick what **Namulundu** would give him. Together with **Namulundu**, he was given PW.I whom he rode on a bicycle upto Jinja road. At Jinja road, PW.2 secured a motorcycle which was hired by the accused, on which he rode two girls including PW.1 to the accused’s home. On reaching there, the mother to the accused paid him a fare of 5000/= since the

accused did not have money. PW.2 later learned that the accused was arrested for defilement.

The mother to PW.1 called **Biryeri Aisha** testified as PW.3. She confirmed that when she came from her business trip in Tororo on 6.6.09 at 8:00p.m she found when her daughter PW.1 was not at home. When she asked her younger child **Shamila Nakato** where PW.1 was; **Nakato** told her that **Namulundu** came with somebody and took PW.1 away on a bicycle at around midday. That **Namulundu** wanted PW.1 to get some things. She reported the matter to police when PW.1 came back the following day and narrated what happened to her.

**PW.4 Doctor Oundo** examined PW.1 and found her to be aged 13 years. He found evidence of penetration because the hymen had been ruptured 5 days prior to examination and had healed. He found no injuries on PW.3. The medical PF.3 was exhibited as P.I.

The same doctor examined the accused. He found him mentally normal and with no injuries. PF.24 was exhibited as Exhibit p.2.

In his defence, the accused maintained his denial of the indictment. He denied knowing PW.1 and said he saw her for the first time when she testified against him. That he was surprised to be arrested on allegations of defilement and taken to police. That on the day he was arrested, he worked in his garden and was arrested when he had come home and had just washed his feet.

In all criminal trials like the one under consideration, before court can convict an accused person, it must have adduced sufficient evidence to prove all the ingredients of the offence charged beyond any reasonable doubt. This burden remains on the prosecution throughout the trial except in a few instances which do not apply to a trial for aggravated defilement.

In a trial for aggravated defilement prosecution has to prove *inter alia* that:-

- (1) The victim was aged below 14 years.
- (2) A sexual act was performed on the victim.
- (3) The accused is the culprit.

I will deal with each of the ingredients separately.

**(1) Whether the victim Nasabu Watali was below 14 years at the time of offence.**

To prove this ingredients prosecution relied on the evidence of PW.1 (the victim), her mother, PW.3, and the Doctor's evidence PW.4. Just as I advised the assessors I was satisfied that prosecution availed sufficient evidence to prove that PW.1 was aged 13 years at the time of offence. The mother told court that PW.1 was 13 years. She confirmed that PW.1 was born in August 1996.

PW.4's examination report corroborated the evidence of both PW.1 and PW.3 when it revealed that PW.1 was 13 years at the time of offence.

I am satisfied that this ingredient was proved beyond any reasonable doubt.

**(2) Whether a sexual Act was performed on PW.1.**

To prove this ingredient prosecution relied on the evidence of PW.1 and PW.4. PW.1 gave a consistent chronology of events which led her to Busulubi village, Masaba sub-county. When PW.2 rode her there, she was put in a house. At around 4:00p.m, the accused found her there. She was undressed and the accused “did bad manners to her in the down parts.” In other words she was forced into sex. When she tried to resist she was slapped and cowed. That the act was repeated in the night at 9:00p.m before she escaped. She felt pain during the act.

Her evidence was corroborated by that of PW.4 who examined her. The doctor found signs of penetration. PW.1’s hymen was ruptured 5 days before examination although it had healed. PW.1 narrated what happened to her to her mother PW.3. PW.1 reported to police immediately and the victim was taken for medical examination. I am satisfied beyond any reasonable doubt that a sexual act was performed on PW.1.

**(3) Whether the accused participated.**

The accused denied participation in this offence. He denied knowledge of the victim. He said he saw her for the first time in the dock. **Mr. Majanga** learned counsel for the accused supported him. That PW.1 was not sure if she knew the accused or not. That she again said she knew the accused after arrest. That there is no explanation why examining the victim took 12 days.

Further that the evidence of PW.2 should be treated as accomplice evidence because he participated in the offence. It was held in ***Watete alias Wakhoka & 3 Others v. Uganda [1998-2000]*** *inter alia* that:

*“.....a witness is said to be an accomplice if he participated as a principal or accessory, in the commission of offence which is subject of trial. The clearest case is where the witness has confessed to the participation in the offence or has been convicted either on his own plea of guilt or by the court finding him guilty at the trial. In absence of such conviction or confession, however, a court may find on the strength of evidence before it at the trial that a witness participated in the offence to one degree or another. Evidence that a witness conspired to commit or incited the commission of the offence under trial would be sufficient evidence of such participation and would justify the trial court in treating such a witness as an accomplice; and if the trial fails so to do, the appellate court would quash conviction based on that witness’ evidence if it is uncorroborated.”*

After a careful evaluation of the evidence and role played by PW.2, I am in agreement that the conduct of PW.2 makes him an accomplice with **Namulundu**. PW.2 testified that he was a barber not a cycle taxi operator. The fact that he took instructions from the accused to go to **Namulundu** and with **Namulundu** to PW.1’s home to pick her on a bicycle then depositing her on Jinja road after which he got a motorcycle hired by the accused to ride PW.1 and another girl to the

accused's home suggests that he knew the scheme by the accused. I will therefore treat PW.2's evidence as accomplice evidence which requires reception with care. I was however able to find corroboration of PW.1's story from the testimony by PW.2 and PW.3 regarding how PW.1 found herself in the accused's home. The accused hired the motorcycle and the mother to the accused paid the fare of 5000/= after PW.2 deposited the girl at the accused's home. Even if PW.2 did not directly know what was going on, he constructively knew that what he was doing was wrong by carrying the poor girl aged 13 years all the way from her home to the accused's home to the accused's home without instruction or permission from her mother or guardian.

I am satisfied that although PW.2 can be treated as an accomplice, his evidence is truthful and I will believe it. PW.2's evidence, coupled with the consistent evidence, PW.1 satisfies me that PW.1 was able to identify the accused person. She knew him before and she spent a long time with him during day and at night. There was no evidence of mistaken identity. I am satisfied beyond any reasonable doubt that it is the accused person who defiled PW.1.

The lady and gentleman assessors in their unanimous opinion advised me to acquit the accused of the offence because prosecution failed to prove participation of the accused. I do not agree with the opinion of the assessors in view of the strong and believable evidence of both PW.1 the victim and PW.2 the person who procured PW.1 from her mother's home with help of **Namulundu**. He used a bicycle to carry her and then used a motorcycle hired by the accused to take the victim to the accused's home. This evidence was corroborated by what PW.1 and PW.3 told

court. Although PW.2's evidence was received with caution I am satisfied he told the truth.

Consequently, I will find **Bwire Moses** guilty and convict him of defiling **Nasabu Watali** contrary to sections 129 (3) and 4(a) of the Penal Code Act.

**Musota Stephen**

**JUDGE**

**19.4.2011**

19.4.2011

Accused produced.

**Bwiso** Resident State Attorney.

**Majanga** on State brief.

**Ojambo** Interpreter.

**Resident State Attorney:** Case for judgment.

**Court:** Judgment delivered.

**Musota Stephen**

**JUDGE**

**19.4.2011**



**Resident State Attorney:**

I have no previous conviction. However I pray for a deterrent sentence because cases of defilement are prevalent. The convict knew what he was doing was wrong. He wasted court's time. His conduct was with impunity because he even slapped the victim. He deserves no leniency. It is the duty of court to protect society against abuse of the girl child. A deterrent sentence will refrain the convict and deter others. Upon conviction accused is liable to suffer death. The convict deserves a maximum sentence.

**Musota Stephen**

**JUDGE**

**19.4.2011**

**Majanga:**

The convict is remorseful. He has been on remand for almost 3 years now. He has not wasted court's time but he is entitled to trial. The convict is a young man about 22 years now. He is capable of reform. We pray that a lenient sentence be passed.

**Musota Stephen**

**JUDGE**

**19.4.2011**

## **Sentence and Reasons**

I will consider the respective submission by both learned counsel. The convict did not waste time. I will consider that the convict committed a grave offence where he abused a little girl of 13 years after circumstances akin to abduction. The victim was traumatized.

I will note that the convict is a young man capable of... and hanging does not result in reform. I will consider the objects of sentence and the trend now that death sentences are awarded in extreme cases. I will not award such sentence. I will consider the time spent on remand and add on a sentence of 7 years imprisonment. The convict is so sentenced and right of appeal explained.

**Musota Stephen**

**JUDGE**

**19.4.2011**