

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

HCT-04-CR-SC-96-2008

UGANDA.....PROSECUTOR

VERSUS

MWANGA NAKOJA alias MUSEVENI.....ACCUSED

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

Nakoja alias Museveni hereafter referred to as the accused is indicted for aggravated defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act.

Prosecution alleges that the accused person on the 15th day of March 2007 at Ngezi village in Kapchorwa District had unlawful sexual intercourse with Cherotich Farantin a girl aged 4 years. The accused denied the indictment against him.

In all criminal trials, it is incumbent upon the prosecution to adduce sufficient evidence to prove the offence against the accused person beyond any reasonable doubt.

In an indictment for aggravated defilement, prosecution has to prove the following ingredients:-

- (i) The victim was a child aged below 14 years.
- (ii) A sexual act was performed on the victim.
- (iii) The sexual act was performed by the accused.

I will make findings on the ingredients as outlined above starting with ingredient (i) and (ii) together.

I am in total agreement with the concession by Mr. Mutembuli Yusuf learned counsel for the accused that both ingredients (i) and (ii) have been proved by the prosecution beyond any reasonable doubt.

PW.I Dr. Kuule Julius of Kapchorwa Hospital examined the victim Cherotich Farantin on 16th March 2007 and found her to be 4 years old. Her hymen was ruptured and there were signs of penetration done 24 hours before examination. The victim's dressings were soiled with blood and blood was oozing out of her vagina. The evidence of PW.I was corroborated by that of PW.2 Yakobo Sophie, the mother of the victim who testified that the victim was aged 6 years implying that at the time she was defiled she was aged 4 years.

Whether the accused is the culprit

After a careful evaluation of the evidence adduced by PW.2 and PW.3 No.32625 D/C Cheptosis Hanningbode and the defence testimony denying the offence and putting up a

defence of *alibi*, I am in agreement with the submission by learned counsel for the defence that participation of the accused has not come out in evidence beyond doubt. The evidence of PW.2 Yakobo Sophie comprised of hearsay which is inadmissible in law. Whatever she told court was told to her by her daughter the victim. The victim however told her she was defiled by a man she did not know. That the said man was with on Joel. When PW.2 set off with her husband to look for Joel, they found him at a video Hall. Joel told the dual that he was bathing with Nakoja, the accused, at the river. That Joel suspected it was the accused who defiled the victim. Joel and the accused were arrested and taken to police.

In all, police arrested five people but only the accused was retained apparently because the victim identified him. However there is no evidence that identification parade as conducted to pinpoint the accused.

Prosecution did not adduce the evidence of the victim who had reached the age of 6 at the time of PW.2's testimony. No reason was given why she was not produced in court for court to conduct a *voire dire* to establish whether she was capable of giving evidence.

To compound the problem the man who implicated the accused did not testify in court to try and confirm the unreliable evidence of PW.2. Joel was at the core of implicating and linking the accused person to this offence. The absence of Joel's evidence left a big gap in the prosecution case.

In his defence, the accused person put up a defence of *alibi*. He said that between 7:00A.M and 5:00P.M, he was at school. From school he went to a video Hall. He said he did not know who Joel was and denied being with him on 15.3.2007 at the river. It was the duty of the prosecution to disprove the accused person's defence of *alibi*. This would have been done probably if Joel gave evidence against him.

I am of the view that prosecution did not adduce evidence to disprove the accused person's defence of *alibi*. It failed to place the accused at the scene of crime.

Prosecution has failed to prove participation of the accused person in this crime beyond any reasonable doubt.

The lady and gentleman assessors have advised that prosecution has not proved the case against the accused to their satisfaction. I agree with the unanimous opinion of the assessors.

Consequently, I will find the accused person not guilty of aggravated defilement. I will acquit him and dismiss the indictment against him. He is set free unless lawfully held.

Musota Stephen

JUDGE

21.4.2011

21.4.2011

Accused in court.

Alpha Ogwang Resident State Attorney.

Chebet Interpreter.

Assessors in court.

Mutembuli for accused.

Court: Judgment delivered.

Musota Stephen

JUDGE

21.4.2011