

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CRIMINAL CASE KAB-00-CR-CSC-237 OF 2009

CRB 3483 OF 2008

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

TURANZOMWE NORMAN::::::::::::::::::::::::::::: ACCUSED BEFORE HON.

MR. JUSTICE J.W KWESIGA

JUDGMENT

The Accused person Turanzomwe Norman is indicted for Aggravated defilement contrary to section 129 (3) and (4) (a) of the Penal Code Act. It is alleged that on 1st December, 2008 at Nyabwoko Primary School, in Kabale District, the Accused person unlawfully had sexual intercourse with KYARIMPA SCOVIA. The Accused person was represented by Mr. Bakanyebonera Felix, on state brief and Mr. Kalinaki Brian Resident State Attorney for the State.

The Accused person pleaded not guilty and left the prosecution to prove the case as a whole against the Accused person. Under Article 28 (3) (a) of The constitution of The Republic of Uganda every Accused person is presumed innocent until he is proved guilty or he pleads guilty. Throughout the trial, the burden of proof is upon the prosecution. The prosecution must prove all the elements of the offence beyond reasonable doubt. These principles of Law were settled in OKETCHO RICHARD VS UGANDA Cr. Appeal No. 28 of 1995 (SCU) and in WOULIMINGTON VS D.P.P (1935) AC 462.

The essential elements of the offence of aggravated defilement are the following;

- a) That the alleged victim is a girl who was below 14 years at the time of the offence.
- b) That somebody had sexual intercourse with her.
- c) That the Accused person participated in the sexual intercourse.

PW 3 Kyarimpa Scovia testified that she was 16 years old and in Primary Six (P.6) at the time of testifying. This would put her to 13 years in 2008 when the offence was committed. PW 1 Dr. Wanyama who examined her in 2008 stated she was 13 years old. P.W. 2 Mirimo, the father of the girl testified that

she is 16 years old. On the basis of the above evidence I find that the prosecution has proved beyond reasonable doubt that Kyarimpa Scovia was below 14 years of age when the offence was allegedly committed. With regard to sexual intercourse the complainant's evidence is very vital. On 1st December, 2008 at about 8:00 pm she met the Accused and Muhumuza, they forcefully had sexual intercourse with her. She was able to see them because there was a moon light. They kept with her until 10:00 pm, she ran home as she made alarm, they were chasing her and they stopped about 20 to 30 metres away from her. She immediately reported the culprits to her father as Turanzomwe and Muhumuza. Medical evidence corroborates the fact of sexual intercourse. Although the hymen appeared to have been ruptured long ago, she had bruises at the entry of her vagina suggestive of defilement. The Doctor observed that the complainant had dirty clothes, and tenderness of the abdomen. This evidence of dirty clothes corroborates the complainant's evidence that she was dragged on the ground from where she was defiled. The fresh bruises at the entry or opening of her vagina is proof of recent penetration. The Prosecution has proved beyond reasonable doubt that sexual intercourse with the complainant occurred. What remains at this stage is proof of participation of the Accused persons. The best identifying witness is the complainant. The question to be determined is whether she was able to recognise the culprits? The attack and defilement took place at night, this is visual identification which took place at night. It is true that where the guilt of the Accused person is dependent on the visual identification of a single identifying witness made in difficult conditions, such evidence should be taken with caution and

court should look for corroboration before acting on it. However, this is not a mandatory requirement of Law, it is a rule of practice. This court can act on evidence of a single identifying to convict without any corroborative evidence provided the court first warns itself and the Assessors of likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made and free of error or mistaken identification. The principles were settled in ABDALLA BIN WENDO VS R (1953) 20 EACA 106, RORIA VS R (1967) EA 583 and ABDALLA NABULERE & 2 OTHERS VS UGANDA (1975) HCB 77.

The tests laid down to be considered to LESSEN the danger of mistaken identification are the following:-

- a) Whether the witness was familiar with the Accused.
- b) Whether there was light to aid visual identification.
- c) The length of time taken by the witness to observe and identify the Accused.
- d) The proximity of the witness to the Accused in observing the Accused.

I have been advised by the Assessors that sexual intercourse and therefore defilement is done in a body to body contact and there is zero distance between the complainant and the Accused so this offers opportunity to observe the culprit. In the instant case the complainant said she knew the attackers before by appearance and by names of Muhumuza and Turanzomwe. That there was moonlight which helped her to identify them. She spent over one hour with the assailants and had enough time to recognize the

Accused person and the other person not before court. In the above circumstances the witness had cumulative aid of the conditions set out above to identify the Accused person. The aggregate conditions were favourable for correct and error free identification.

I have considered the Accused person's defence of denial ALIBI. He admitted he knew the girl but did not have sexual intercourse with her. DW1 Behangana Keneth, the Accused's brother, told court that the Accused person was at home at the time the offence was committed. He confirmed that the complainant and her father knew the Accused person and their homes are separated by a valley, therefore they knew each other very well.

I have found that this Defence witness did not give cogent evidence in support of the ALIBI. An Accused person who sets up an ALIBI as a defence has no duty to prove it but once he chooses to give evidence to prove the ALIBI it must be critically examined. The evidence of identification is so cogent that it places the Accused person right at the scene. The Defence witnesses confirm that the Prosecution witnesses who say they saw the Accused they knew him very well. The circumstances under which identification was made have been examined

above. PW 2 MIRIMO told court that he saw the culprits who had come up to his compound chasing the victim. He corroborated the victim's evidence that there was moonlight. She came home crying and reported she had been "raped" by the Accused

person and another. He saw them as they retreated from his compound. He reported the matter to PW 4 Gad Bagamuhunda the same night. In view of the above evidence of identification of the Accused person, I have no doubt in my mind that he participated in defiling the complainant. I agree with the Assessors opinion that the State proved all the elements of the offence against the Accused person. The Accused person is hereby found guilty and he is convicted for Aggravated Defilement under Section 129 (3) and (4) (a) of the Penal Code Act.

J.W. KWESIGA JUDGE

STATE: He has been on remand for 1 year and 4 months. The offence is punishable by death. The offence is a serious one. It was done with impurity. The girl was exposed to dangers of various diseases. The convict needs to be kept away from society.

DEFENCE:

Accused: I am an orphan. I was in responsible position. I pray for lenience.

SENTENCE AND REASONS

Court: The offence of defilement is rampant and a threat to the future mothers of this country. The offence was committed with impunity, the Accused defiled the girl with another criminal not tried, it would have been light if it was the Accused person alone that would suggest human weakness and temptation but a group defilement is a clear action of criminals who did not care about the damage caused to the victim. In view of

this I will only be lenient in that I will not sentence him to death or life imprisonment with a hope that he will reform in the period for which I sentence him.

The Accused is sentenced to 8 years imprisonment.

J.W. KWESIGA JUDGE 29/4/2011

In presence of :-

Mr. Kalinaki Brain Resident State Attorney for the State. Mr. Bakanyebonera Felix for Accused on state brief.

Mr. Turyamubona - Court Clerk.