THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA HOLDEN AT IGANGA

CRIMINAL SESSION CASE NO. 311 OF 2015

UGANDA::PROSECUTOR
VERSUS

KWENYA MARTIN:: ACCUSED

RULING ON A NO CASE TO ANSWER

The accused **KWENYA MARTIN** was on an unspecified date indicted with the offence of aggravated defilement contrary to sections 129 (3) and (4) (d) of the Penal Code Act. Cap. 120 LOU.

It was stated in the indictment that during the month of May 2014, at Ngangali Village, Iganga District, the accused perfumed a sexual act with Babirye Bitansi, a girl aged 17 years and with a mental disability.

The accused denied the offence and a plea of not guilty was entered on 16/12/19. The accused was represented by Bwenene Victoria while Awali Kizito and subsequently Nabende David, represented the State.

It was the prosecution case that Bitansi Babirye, the victim was in born in 1997 and at the material time aged 17 years and mentally impaired. That during May 2014, the accused being the victim's village mate, he lured her into his house and performed a sexual act with her. That on 24/5/2014, the accused sent for the child to go to his home to fetch water. The victim's mother who was aware of the sexual relationship between them reported the matter to the LCI Chairperson who forwarded the matter to

Kasolo Police Post, the latter who caused the accused's arrest. Both the victim and the accused were referred to hospital for medical examination which was carried out on the victim on 26/5/2014. The accused was accordingly charged and arraigned.

The prosecution managed to present only one witness to prove their case, and then waived their right to submit on a no case to answer. Defence counsel likewise did not make any submission.

On 13/2/2020, after perusing the record I was of the view that the prosecution at the close of their case, had not presented evidence that would require the accused to be put on his defence. I discharged him on the same day with an undertaking to give my detailed ruling later. This therefore is my ruling.

It is an established principle that an accused person can only be expected to present his case if by the close of its case, the prosecution has made out a *prima facie* case, one on the face of it, is convincing enough to require that the accused person be put on his defence. See for example **Rananlal T. Bhati Vrs R (1957) EA** followed in **Uganda Vrs Kivumbi&Ors Crim. Case No. 20/2011**. This is not a case beyond reasonable doubt as would be the case at the close of the trial. Therefore, in order for the court to dismiss the charge at the close of the prosecution case, I must be satisfied that: -

a) There has been no evidence to prove an essential element of the alleged offence, or

b) The evidence adduced by the prosecution has been so discredited as a result of cross examination or, is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

See **"A Guide to Criminal Procedure in Uganda" B.J. Odoki 3rd Edition at page 120**.

The prosecution is expected to prove all the elements of the offence to the above stated degree. For the avoidance of doubt, these elements are:

i. The victim is below 14 years or below 18 years if there are aggravating circumstances e.g. if the victim suffers from any disability, the accused is in a position of authorirty over the child, and where the accused is confirmed to be HIV positive.
ii. That the victim experienced carnal knowledge (sexual intercourse).
iii. It is the accused person who had sexual intercourse with the victim or that the accused person participated in the commission of the offence.

PWI Mwanga George, the sole prosecution witness stated that he is a clinical officer attached to Iganga Hospital with 20 years' experience. One of his duties was to attend to police cases. He admitted that the victim was on 26/5/14 presented to him for examination. He examined her and confirmed from her dental formular that she was about 17 years. He stated further that she reported to him that she had been forced into sex about four times. That upon examination, he saw that her genitals were partially raptured and he concluded that she had been involved in sexual involvement.He explained in cross examination that it was possible for a woman to have sex four times and still have a partially raptured hymen. PW1 also noted that the victim was not in her normal state, and not being

a mental expert referred her to one. He conceded that because of her mental state, she could not confirm the truth of what he narrated to her.

As I have already clarified, at this point in time of the prosecution, it was incumbent upon the State to sufficiently prove not only that the victim was the subject of sexual intercourse, but also that there were aggravating circumstances.

Neither the victim nor her parents were called to testify and that source of the child's actual age was therefore absent. Also without the testimony of the victim or any other witness, it was not possible to tell that the victim had ever been a victim of sexual intercourse. At best, the prosecution only produced credible evidence that a girl aged 17 years was the victim of sexual intercourse.

I am prepared to believe that Babirye Bitamisi the victim in question was a child of 17 years at the time the offence was committed. However it cannot be confirmed that she had a mental impairment. Neither the victim nor any family member was presented to confirm that fact. PW1 conceded that he was not an expert in mental illness and thus referred her to an expert. He did not give her a referral letter and did not know whether she was ever presented for mental examination. As such, it cannot determined that the victim had a mental illness. For the purposes of this case, the offence of aggravated defilement can only be procured for a 17 year old girl if she suffers from any kind of mental or physical impairment or where the accused is confirmed to be HIV positive. It is thus doubtful in those circumstances that this was a correct charge that could be sustained.

In addition, there was virtually no evidence linking the accused to the offence. According to PW1, the victim did not mention the name of the one who had allegedly defiled her. No witness was presented to show how and when the accused defiled the child.

Therefore, with that evidence, I can only tell for certain that a female of 17 years was defiled. Even then, without the victim confirming that she was the person examined on PF3A on 20/5/14 in Iganga Hospital, it is not definite that it was the same victim in this case.

My conclusion is that there was only dismal evidence to support the indictment.The State did not produce sufficient evidence linking the victim to PEX1. Also, there was virtually no evidence to show that the accused participated in the offence. No just tribunal could ask an accused person to present their defence. It was correct which I did, to dismiss the charge under Section 73(1) TID and to discharge the accused.

My decision remains the same and I direct that this file be closed.

I so order

Signed

EVA K. LUSWATA

JUDGE

20/02/2020