

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CO-0175-2002

UGANDA.....PROSECUTOR

VS

ASHABA ALEX.....ACCUSED

BEFORE: THE HON. MR. JUSTICE P.K. MUGAMBA

JUDGMENT

The charge against Ashaba Alex is that of defilement, contrary to section 129 (1) of the Penal Code Act. The victim testified as PW1. The prosecution called three witnesses in support of its case. The victim testified as PW1, Atwine Byaruhanga Gordon testified as PW2, while Karuhanga Nelson gave his evidence as PW3. Medical evidence contained in Police Form 3 was agreed under Section 66 of the Trial on Indictments Act. it is exhibit P.1.

The prosecution case is that at about 4 p.m. on 25th August 2001 accused, who was an employee at the home of PW3, enticed the victim who is daughter to PW3 to his bedroom and proceeded to have carnal knowledge of her. In due course PW2 came along and saw what accused was doing with the victim. PW2 raised an alarm which was answered by several people who assisted him arrest accused. Accused was eventually handed over to police and charged. The victim was medically examined at Uganda Martyrs Hospital, Ibanda and her hymen was found recently ruptured. There was inflammation in her private parts which was consistent with force having been sexually used.

In his defence, which was given on oath, accused denied ever having been an employee of PW3. He stated that he saw the victim for the first time ever in court. It was his evidence he knew PW2 who he believed had framed him because he (accused) had declined to sell land to him.

The prosecution has a duty to move the case against an accused person beyond reasonable doubt. See Sekitoleko vs Uganda [1967] EA 531. It is not the responsibility of the accused person to

prove his innocence. Where the charge is that of defilement the prosecution must prove his innocence. Where the charge is that of defilement the prosecution must prove the following ingredients:

- 1) That the prosecutrix at the time in issue was below 18 years of age,
- 2) That the prosecutrix had sexual intercourse on the occasion alleged, and
- 3) That accused was a participant in the crime.

The best evidence of age is a birth certificate. In this case there was no birth certificate produced in evidence. Nevertheless courts will accept some other evidence to arrive at the age of an individual, such as findings after medical examination of an individual. PW2, the father of the prosecutrix testified that at the time his evidence was being received the prosecutrix was 12 years old. Agreed medical evidence shows that in the year 2001 the prosecutrix was 7 years old. The girl appeared in court to give her evidence and from my observation she was clearly of tender years. That is why she gave her evidence unsworn after a voire dire. I am satisfied that this ingredient had been proved by the prosecution beyond reasonable doubt.

Regarding sexual intercourse, it was the testimony of the prosecutrix that she had sexual intercourse on the occasion and that she felt pain. Her evidence is that of a child of tender years and needs to be supported by some other independent evidence. PW2 testified that he examined the private parts of the prosecutrix three days after the day she allegedly had sexual intercourse. It was the evidence of PW2 that there was pus in the girl's private parts. A report of medical examination was agreed and admitted in evidence. It shows the girl's hymen had been ruptured recently and that there were bruises and laceration around her private parts. The report mentioned pus discharge and was made five days after the girl was allegedly sexually molested. That report further stated that the prosecution has proved beyond reasonable doubt that the girl did have sexual intercourse on the alleged occasion.

Finally the prosecution must prove that accused participated in the crime. The prosecutrix was the only witness to the incident according to the evidence on record. She is the only one who testified that accused participated in the offence. But the prosecutrix is a child of tender age and her evidence requires corroboration in every material particular. Since here evidence of accused's participation is not corroborated it cannot be used as the basis for conviction of the

accused. There is need for some other independent evidence, which sadly, is missing. I do not find this ingredient proved beyond reasonable doubt by the prosecution.

The gentlemen assessors advised me in their joint opinion that while two ingredients had been proved beyond reasonable doubt by the prosecution they did not find the prosecution had proved that accused participated in the crime. I have shown in the course of the judgment that that is my finding also. Consequently I agree with their opinion that accused should be found not guilty and acquitted. He is accordingly acquitted of the charge.

P.K. Mugamba

Judge

14th April 2005