

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**AT MASAKA**

**HCT- 06-CR -SC - 81 OF 2013**

**UGANDA.....PROSECUTION**

**VERSUS**

**KIGOYE JOHN.....ACCUSED**

**BEFORE : HON. LADY JUSTICE MARGARET C.OGULI -OUMO (JUDGE)**

**JUDGEMENT**

Kigoye John was indicted of for aggravated **Defilement contrary to section 129(3) (4) (a) (d) of the Penal Code Act .**

The particulars of the offence are that Kigoye John on the 5<sup>th</sup> Day of January, 2013 at Buziga Landing Site in the Kalangala district performed a sexual Act with Nakama Jackie , a person below the age of fourteen years.

The accused pleaded not guilty and the matter went to full trial.

Kigoye gave an unsworn statement in which he denied the offence.

The brief facts of the case are that of January, 2013 at about 5:00pm the victim along with other children went to collect firewood.

On the way they met the accused who isolated the children . He took the victim further away from the other child she was with.

When they reached a secluded place in the forest he ordered the victim to undress and proceeded to have sexual intercourse with her .

The sexual act caused the victim to cry out in pain and the dog she was with started barking. When her colleague Kamoga Jovan Ntale responded to her alarm, he found the accused lying on top of the victim and her knickers hanged on a stick.

Tata Gidawho was known to both the victim's family and the accused, who was near by also came by. The accused tried to call him as a witness in his defense and he declined.

The accused on seeing the rescuers put on his trousers and fled from the scene.

The victim ran home and informed her mother. The mother examined her and found signs of a sexual act that is semen fluids and other scratches around her Vaginal area.

The matter was reported to Bugoma police post.

A medical examination found her Hymen partially torn and that she was only aged 12 years old.

The accused person was arrested and charged with aggravated defilement.

The prosecution presented four witnesses to prove its case.

The accused denied the offence and the matter went to full trial

In all criminal cases an accused person is presumed to be innocent until proved guilty or until he pleads guilty (**see Article 28(3)a of the constitution**).

The prosecution has the duty to prove each and every ingredient of the offence beyond reasonable doubt. (**see Woolmington Vs DPP 1935 A.C P.462**)

That principle of the Law has been reaffirmed by the courts in Uganda in the case of **Richard Oketcho Vs Uganda SCCA No. 26/1995**.

In the case of aggravated defilement such as the present, the prosecution has to prove the following ingredients beyond reasonable doubt;

1. That the victim at the time was below the age of 14 years
2. That a sexual Act was occasioned to the victim

3. That the accused was responsible.

### **Issue 1**

#### **Whether the victim at the time was below 14 years of age?**

Prosecution relied on the Evidence of Pw1, Pw2 & Pw3

Pw2 the mother of the victim testified that her daughter was 13 years of age at the time of the commission of the offence.

Pw1 the nurse who examined the victim put the age at 12-13 years of age

The medical officer who examined her put her age at 13 years as evidenced by PF3A which is exhibited as Exhibit 'PE1'

The Defense did concede to this ingredient.

Court therefore finds that the prosecution had proved this ingredient of the offence beyond reasonable doubt

As regards issue 2 on the sexual Act being occasioned to the victim prosecution relied on the evidence of PW1, PW2, PW3 & PW4.

Prosecution adduced evidence of PW4 the victim who described to court how the accused also known as Ragga 'D' removed her panties and inserted his penis into her Vagina.

PW4 testified that he found Ragaa 'D' lying on top of the victim with her panties hanging on the stick

When the victim reported to her mother what Ragaa 'D' did to her PW2 the mother physically examined her and found semen around her private parts. She took her to PW1 who also examined her and found semen in her private parts.

It is trite law that in sexual offences, the evidence of the victim must be corroborated. **(see section 129 of the Penal Code Act).**

I did address myself to the need for corroboration especially when PW3 and PW4, the victim and her nephew Jovan Ntale who saw Ragaa 'D' lying on top of her were both minor children of tender years and I did conduct a voir dire to establish whether they knew the importance of telling the truth and I did establish that they were not capable so they did not make sworn statements.

The evidence of the above witness was corroborated by the medical evidence contained in PF3A.

Besides this the distressed state of the victim when she came to tell her mother conforms to the body of the victim who was in a stressful situation.

This is confirmed by PF3A in which it is reported that at the time of the medical examination the victim was stressed (see **Sam Buteera Vs Uganda SCCA No.1 of 1971**).

I observed PW4 Jovan Ntale and although he was a child he proved to be straight forward and truthful.

In his unsworn statement, the accused claimed that he found the victim and another child just after she had had an epileptic attack as she is an epileptic and he used her dress to help her clean herself when he was coming from the landing site.

The defense conceded that the 2<sup>nd</sup> ingredient was proved beyond reasonable doubt

In view of the above the court is of a considered opinion that the prosecution had proved this ingredient of the offence beyond reasonable doubt.

Finally the court must consider whether the accused participated in the commission of the offence.

Learned counsel representing the state submitted that the victim who was PW3 was not a stranger to the accused person. That she described that the accused had a bicycle with a pumpkin on it and the accused himself in his defense said that when he came from fishing he went and picked pumpkins and yams which he

had on his bicycle and that the accused person under the guise of helping them find firewood separated PW4 from the victim and upon reaching a secluded place, proceeded to defile her.

That the incident took place between 6- 6:30 pm when it was still day light such that both PW4 and the victim could clearly see him.

That both the victim and PW4 were close to the accused and even talked to him and thus there was no question of mistaken identity.

It is trite law that in case of identification of the accused by a single witness, an accused person can be convicted on such evidence if the conditions are conducive for correct identification and there is no question of mistaken identity.

The conditions are the following;

1. Whether there is enough light as to visibility
2. Whether the witness was known to the accused before
3. The distance between the witness and the accused
4. The duration in which the witness had to observe the accused.

In the instant case the incident occurred between 6-6:30pm when there was still light, so the victim could observe the accused.

The children were not strangers to the accused and he himself admitted to knowing them and meeting them on the fateful day.

They said he had a pumpkin on his bicycle and he too in his defense stated that he went to pick a pumpkin before he met the children.

Finally the accused was close to the children and talked to them. Infact in his own words he stated that he cleaned the victim which shows that there was a zero distance between him and the victim.

With all the above it is undoubtedly true that the accused was positively identified by the victim and her nephew JovanNtale and there is no question of mistaken identity.

Consequently it is court's view that the prosecution has proved this ingredient of the offence beyond reasonable doubt.

The assessors in their opinion advised the court to find the accused guilty and convict him as charged.

And court does find the accused guilty and convicts him as charged.

### **Present**

1. Mr. David Baxter Bakibinga counsel for the state
2. Mr .Zikusooka Herbert counsel for the accused on state brief.
3. Accused person
4. Assessors
5. Sentongo Joseph -court clerk
6. Amongin Eva -Research assistant.

### **ANTECEDENTS**

#### **State**

We have no known criminal record in respect of the accused before court.

However the convict committed a serious offence against a defenseless victim who is clearly a young girl with a disability.

Apart from epilepsy, she has mental retardation as observed by court.

Convict ought to have acted as a protector instead of a predator.

Such conduct ought to be severely punished so that children can grow in a secure society.

In the premises we pray for a deterrent sentence.

We so pray.

## **Defense counsel**

The convict is a first time offender

The convict has been on remand for one year,3 months and 3 days.

Convict has confided has confided in me that he regrets participation in the commission of the offence.

He is remorseful and prays for a lenient sentence

He is 38 years of age and prays that court exercises its discretion to award a lenient sentence.

## **Convict**

I pray that court gives me a lenient sentence

I am an orphan, I have 5 children whose mother died in Sudan.

The eldest of my daughters is disabled

I pray for a lenient sentence so that I can go back and look after my children.

## **SENTENCE AND REASONS FOR IT.**

Kigoye John was indicted for aggravated defilement contrary to **section 129(3)(4) a of the Penal Code Act.**

The particulars of the offence are that Kigoye John on the 5<sup>th</sup> day of January,2013 at Buziga landing site in Kalangala district performed a sexual Act on Nakama Jackie a person below 14 years of age .

The accused denied the offence and the matter went to full trial.

The prosecution called 4 witnesses to prove its case and the accused was found guilty and convicted

There is no criminal record regarding the accused.

He has been on remand for 1 year, 3 months and 2 days.

He is 38years old and claims that he is remorseful

He prayed for a lenient sentence

However the offence the offence with which he was convicted carries a maximum sentence of death on conviction.

The offence with which he was convicted has become rampant in the community and the convict violated the bodily integrity and decency of the victim who isn't only a child in need of protection from him but she is also a vulnerable child being mentally handicapped

In view of the above, court sentences him to 24 years in jail .

He has a right to Appeal against the conviction and sentence.

Hon. Lady Justice Margaret C.Oguli -Oumo

(judge).

13/5/2013.