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

HCT-04-CR-SC-0146-2013

UGANDA.....PROSECUTOR
VERSUS
KUNYOMA AYUB.....ACCUSED

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused is indicted of aggravated defilement c/s 129 (3), (4) of the Penal Code Act.

It was alleged that **Kunyoma Ayub** on the 21st day of June 2012 at Nasemeyi village, Kapisa Parish in Butaleja District performed a sexual act with **Magosa Aisa** a person aged 13 years old.

Accused denied the charge.

Prosecution has the burden to prove that;

1. The girl was below 14 years.
2. There was sexual intercourse.
3. Accused participated in the crime.

Basing on the evidence on record and submissions as argued, I resolved the above issues as herebelow:

1. Whether the girl was below 14 years.

Defence argued that age was not proved as there were inconsistencies in the testimonies of PW.1 regarding her age; and her mother's statement putting her own age at 36 years. Meaning she gave birth at 11 years. Counsel argued that PW.2 was untruthful.

Resident State Attorney in rebuttal clarified that the witnesses consistently put her age at 13 years, with PW.2 saying she was born on 13.2.1999. This was confirmed by PW.3 who also said she was born on 13.2.1999. He argued that the testimony of PW.2 on her age only shows that she gave birth to PW.1 while young at 25 years.

I have examined the evidence, and observed PW.1 in court.
She put her age at 15 years; hence in 2012 she would be 13 years. Her mother confirmed she was born on 13/Feb/1999.

PW.3, her father confirmed that she was born on 13.2.1999.

The Police form (PE.1) on which she was examined her age is shown as 13 years.

From the above evidence I do not find anything to suggest that the victim was not of the said age. I find that her age was proved to have been below 14 years at the time of the crime. This ingredient is proved. See ***Uganda vs. Nicholas Okello (1984) HCB 22***- on proof of age by birth certificate or parents as best proof of age.

2. Whether there was sexual intercourse of a girl (below 14 years.

It has already been proved that the victim was below 14 years.

Was there sexual intercourse of this victim?

Evidence was led by prosecution through PE.I that the hymen was raptured, but was an old rapture. The girl was found with signs of penetration.

PW.1- the victim told court that she was forcefully penetrated and had sex; and her mother found them in the act.

PW.2 –the mother confirmed during cross-examination that she saw the victim playing sex with the accused, she described the act as, "he was in between the legs the girl and they were having sex".

PW.3- who got information the next day, was informed by PW.1- that true she had played sex but had been forced.

Accused stated that he had not been at that place.

The defence said details of the sexual encounter were not given on the medical form or by the witnesses. However the law is that the slightest penetration or touching of the victim is enough.

I find that the evidence on record proves that indeed sexual intercourse was performed on the victim. This ingredient was duly proved. See ***BOSSITA HUSSEIN V. UGANDA CR A. 35/1995 SUP. COURT***, holding that sexual

intercourse is best proved by the victim's own evidence and corroborated by medical or other evidence.

3. Whether accused is the culprit.

Prosecution led evidence through PW.1 (victim) and PW.2 (mother) that accused had sexual intercourse with PW.1. PW.1 was the victim of the assault, while PW.2 found them in the act and witnessed PW.2 in action between PW.1's legs having sexual intercourse with her. PW.3 was told the next day by PW.1 how she had been sexually assaulted by PW.1. When examined, the medical report showed that she had been sexually penetrated.

Accused put up a defence of alibi. Defence counsel argued that accused's participation was not proved since PW.2 had stated that she failed to convince neighbours and LCs to come to her rescue. He faulted her statement that she hear people "fighting" in the house as evidence that she never saw what was going on inside the house. He further faulted the medical evidence which did not clarify how long ago the girl's hymen had been raptured. He faulted the conditions for identification as not being conducive since it was 8:00a.m and dark.

The Prosecution in reply reminded court that accused was a well known neighbour, and he called the victim into his house and started to forcefully play sex with her. PW.2- the mother found them red handed in the act.

It is my finding that the evidence above satisfies me that accused was a well known neighbour to PW.1, and PW.2. On the fateful day he was properly

identified by PW.1, who knew him very well. He was further identified by PW.2- the mother of the victim who knew him very well and saw him in the act.

In ***Uganda vs. Byekwaso Cr. Session 117/93*** **Hon. J. Mpagi Bahigeine** stated in a case of similar facts, that;

> "*the fact that the victim and her brother picked on the accused as the person guilty of the defilement who had been their good neighbour and accused's smokescreen alibi would, taken together strongly corroborate the victim's testimony that it was the accused who had sexually assaulted her*."

In this case immediately after the crime accused is said to have disappeared from his home for four (4) days until 4 days later when he was arrested. This behaviour, taken together with his total denial of knowledge of the victim and her mother, who were his well known neighbours is very suspicious- and operates to corroborate the prosecution's case.

PW.4 gave evidence placing accused back to his home area and identified the statement he made at police, exhibited as PE.2. The statement further corroborates the evidence of PW.1 and PW.2 that accused was known to them as a neighbour. In the statement which he signed he admitted knowledge of PW.1 and PW.2. this destroys his denial in evidence in chief, and evidence of PW.1 and PW.2 effectively destroys his alibi.

From the evidence it is therefore dully proved by the prosecution that indeed this accused did sexually assault the victim. Participation of the accused was dully proved.

This ingredient is accordingly proved.

The assessors in their opinion found accused liable on this charge. I agree with their opinion. I find that the accused person is guilty of the charge. I do hereby convict him thereof as charge. So be it.

Henry I. Kawesa

JUDGE

07.08.2014

07.08.2014

Accused present.

Resident State Attorney **Malinga** for State.

Counsel Obonyo for accused.

Court for judgment.

Court: Judgment communicated to all parties in presence of accused.

Henry I. Kawesa

JUDGE

07.08.2014

Resident State Attorney:

I am not aware of his previous criminal record. He has been on remand since July 2012. The offence attracts death in the rarest of cases. The case is rampant dispute

the several tough punishments by courts. We pray that a strong message be sent to the public. We pray that he be given 30 years in custody.

Henry I. Kawesa

JUDGE

07.08.2014

Counsel:

Accused is a first offender. Has no previous criminal record. Has been on remand since July 2012. We pray that he be considered. He is a young man, if given a touch sentence may spend all his life in prison. We pray for a lenient sentence-shorter than 30 years. He should come out and do something for himself. He is remorseful and has reformed. At such age these are children looking after the old. Keeping him in prison will keep him in there serves no purpose we so pray.

Henry I. Kawesa

JUDGE

07.08.2014

Accused:

I pray that a lenient sentence be passed so that I go back home to school.

Court: The convict is a first offender he has been found liable of defilement which is capital offence. Court notices that he is of borderline age, which at commission of offence was put at 19 years. He appears still in the age bracket of

19-21 years which is fairly young. Court will take into consideration this fact, and fact that he is remorseful and needs rehabilitation.

He will be sentenced with a view to have him reform, and gain rehabilitation. The offence is rampant and must be deterred. Given the circumstances mitigations and observations above especially of age, accused is sentenced to 5 years imprisonment. Prison should consider transferring him to a reformatory school if they are convinced that he fits therein upon proof of age by a medical doctor of the prison. I so order.

Henry I. Kawesa

JUDGE

07.08.2014