

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

HCT-04-CR-SC-169 OF 2015

UGANDA **PROSECUTOR**
VERSUS
CHELIMO ANTONY **ACCUSED**

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused was indicted of aggravated defilement contrary to section 129 (3) (4) (a) of the Penal Code Act.

Accused denied the charge.

The prosecution has the burden to prove beyond all reasonable doubt that:

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

The prosecution relied on evidence of two witnesses PW.1 (the victim), PW.2 (the father of the victim).

Prosecution also relied on a total of 6 exhibits. (PE.1-PE.6).

In defence accused gave unsworn testimony and gave defence of alibi.

In submissions, the defence contested all the ingredients and urged court to find that the charge was a fabrication. The State, insisted that evidence sufficiently established the charge and called upon the court to convict. The assessors jointly agreed with the prosecution, and advised that court finds accused liable.

From the evidence on record, I find as herebelow.

Age:

The offence of aggravated defilement contrary to section 129 (3) (4) (a), requires the victim to be below the age of fourteen years. If the age is above fourteen years but below 18 years, then the offender commits an offence termed simple defilement c/s 129 (1) of the Penal Code Act.

Evidence of age in this case was challenged by the defence on grounds that medical form (PE.1) put the age between 15-16 years. The medical evidence be believed because according to defence counsel the birth certificate (PE.5) was made after the offence was committed. The school identity card (PE.3) was also without a signature and is hence unreliable.

The prosecution however insisted that the school ID card was obtained before the offence and should be believed.

I have examined the whole evidence of age both on this court file and the police file.

I notice that the first information given to police by the father of the victim indicated her age to be 15 years. The first charge against the accused was that of simple defilement basing on the age which in that charge sheet (PE.6), reads “a girl aged 15-16 years.” This piece of evidence when put together with PE.1, seems to suggest that the victim’s age was adjusted later on to facilitate the amendment of the charge to aggravated defilement. This is borne out by the fact that the birth certificate was produced on 9th January 2015 after the commission of the crime on 2014. I do agree with counsel for the defence that this evidence does not prove beyond doubt that this girl was 13 years of age at that time. The evidence shows she was aged above 14 years. The doctor puts the age as between 15-16 years, which is above the 14 years for a defilement.

I accordingly find that the evidence does not prove age as below 14 years.

Sexual intercourse

Defence counsel argued that both the victim and her father were talking of different dates and hence no sexual intercourse occurred. He further reminded court that the victim told court that she had already had sex with **Kevin**, so accused is not responsible.

The prosecution insisted that the difference in dates was due to the mess up by the Investigating Officer who drew the amended charge sheet, but that the offence occurred in October 2014 as

stated by PW.2 not December 2014 as stated by the victim. The Resident State Attorney, relied on PW.1 and PW.2's testimonies, and PF.3 to prove that sexual intercourse took place.

Having examined all the evidence on both court and police files, I note that the first information was given to police on the 30.10.2010, and complainant was reporting that offence happened on 26.10.2014. All police statements were taken thereafter and the suspect examined on 31.10.2014, while victim was examined on 1st.Nov.2014. The first charge sheet bears date of 26.10.2014 as date of commission of offence.

I therefore find that there is sufficient explanation to convince court that the reference to 26th December 2014 as date of the offence by PW.1 was in error as a result of the apparent error on PE.6- (Charge sheet) which was amended and a wrong date of 26.12.2014 inserted therein.

I will take this discrepancy as sufficiently explained and not being fatal to the prosecution's case. In any case accused addressed his mind to the said offence of 26.10.2014 to which he explained his innocence.

The evidence of PW.1 shows that on 26.10.2014 she was in the company of two other girls. They all went with accused to Kenya whereby the accused took them to his mother's home. He introduced her to the mother as his wife. At night he collected her from where she was sleeping with other girls and had sexual intercourse with her. The medical form shows a hymen which was lost, warm and moist due to sexual intercourse. The above evidence satisfies the requirement of proof of sexual intercourse. It has been proved that there was sexual intercourse on the victim.

Participation of accused:

The defence pointed out that since the victim said that she had ever had sex with Kevin then accused is not responsible. The Resident State Attorney however points out the fact that PW.1 testified that accused defiled her; and that there was no mistaken identity as conditions for identification were conducive.

I do agree with the prosecution.

The accused was properly identified by the victim as her assailant. The evidence of PW.2 corroborates PW.1. The victim was collected from Kenya at the parent's home of the accused. Accused was arrested alongside the victim and her friends, and taken to Bukwo Police Station. This evidence destroys his alleged alibi. Accused was properly placed at the scene of crime. The evidence by the prosecution proves the participation of the accused.

Having found as above, the evidence on record sufficiently proves that accused had sexual intercourse with **Cherop Moreen** on 26th October 2014, a girl aged between 15-16 years. The accused had been charged of aggravated defilement but on account of failure by prosecution to prove the age of the victim beyond doubt this charge of aggravated defilement is not proved. The evidence proves the offence of simple defilement contrary to section 129 (1) of the Penal Code Act.

Under section 87 of the TIA, *“a person charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it.”*

The accused will accordingly be found liable of simple defilement contrary to section 129 (1) of the Penal Code Act. He is accordingly convicted thereof. I so order.

Henry I. Kawesa

JUDGE

21.09.2016