

**IN THE HIGH COURT OF UGANDA AT MOROTO**

**CRIMINAL SESSION CASE NO. 104 OF 2014**

**UGANDA V LONGOLE NICHOLAS TETEE**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**JUDGMENT**

The accused person is indicted with aggravated defilement c/s 129(3) (4) (a) of the Penal Code Act. It is alleged that the accused person on 24<sup>th</sup> April 2014 at Acholi Inn village , Rupa sub county in Moroto district performed a sexual act with Lokeris Jennifer a girl aged below 14 years.

Prosecution as led by Mr. Zerald Amalo RSA while the accused person was represented by Mr. Ogire on state brief.

Assessors were Mr. Lomilo Joseph and Ms Margret Noma.

The state had a duty to prove beyond reasonable doubt the following elements of aggravated defilement:

- 1) That the girl was aged below 14 years
- 2) Performance of a sexual act
- 3) Participation

**Proof of age**

PF3 that was tendered by consent showed that the girl was aged between 13 and 14 years although in court she said she was aged 26 years, a fact attributed to illiteracy. She was examined on 25.4.2014 , a day after the alleged defilement and found to be between 13 and 15 years old.

## **Performance of a sexual act**

PF3 admitted by consent showed that there was penetration and semen was visible in her sexual organ.

It was Lokeris Jennifer's testimony that at Acholi Inn, at about 8 p.m, she was defiled by the accused person. As performance of a sexual act was not contested by defense counsel, I found that the state proved performance of sexual act to the required standard

## **Participation**

It is participation of the accused that was vigorously contested by the defence.

According to the victim Lokeris, on 24.4.14, she was in town in search of casual work and as it was late, she and other girls were housed by a woman and shown where to sleep. While she was asleep, the accused entered the house and defiled her. It was her testimony that the other girls ran away and she did not see them again. In the meantime, she reported the attack to her brother who then reported the matter to police in the morning and accused was arrested in the morning at 9 a.m although she earlier said the accused was arrested that night .

It was in cross examination that Lokeris revealed that she was told by Lolem that it is the accused who had defiled her.

It is apparent from her narrative that she did not know the accused prior to the incident where she was defiled at night in a room where the light had been put out. She claims she saw the accused in the compound that night yet in answer to court, she said after the incident , she saw the accused at police the next morning at 9 a.m.

It is now well settled that the court must be satisfied that conditions favoured correct identification by a single identifying witness at night .Such conditions include length of time the victim spent with the accused person, the lighting, whether the accused was known to the victim prior to the incident, distance between the accused and the victim, among other factors.

In this case , Lokeris admits she had never seen the accused prior to the incident which happened under cover of darkness. The next time she had contact with the accused was in the morning at the police. Clearly, she did not positively identify him at the scene but at the police station after his arrest.

This means , court must look for independent evidence of identification.

According to Lokeris, she was told by her friend Lolem soon after the attack that it was the accused who had defiled her. Lolem was never called to give evidence.

In law, her statement to Lokeris amounts to hearsay evidence that can only be admitted under specific circumstances. The rationale for inadmissibility of hearsay is that the person who attests to the existence of a fact is not available for cross examination to test her truthfulness. **3A Wigmore, Evidence para 884 ( Chadbourn rev. 1970)** explains as follows:

*'when the statement of a person not in court is offered as evidence of the fact stated, the real ground of objection is that it has not been subjected to the test of trustworthiness which the law regards as desirable before listening to any testimonial evidence, namely, the test of cross examination'*

The failure by the prosecution to avail Lolem for cross examination means there is no independent evidence to corroborate Lokeris on the identification of the accused whom she saw under difficult circumstances at night.

Therefore , I find that the accused person was not positively identified as the attacker and disagree with the assessors that the accused was positively identified for the reasons given above.

In the premises, the state has not proved beyond reasonable doubt the offence indicted and he is acquitted of the offence indicted, accused person is released from custody unless lawfully held in connection with some other offence.

**DATED AT MOROTO THIS 25<sup>TH</sup> DAY OF JULY 2016.**

**HON. LADY JUSTICE H. WOLAYO**