

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CRIMINAL DIVISION)**  
**HCT-00-CR-SC-0041-2014**

**UGANDA.....PROSECUTOR**

**VERSUS**

**HAJJI KYEYUNE SOWEDI.....ACCUSED**

**BEFORE: HON. MR. JUSTICE J. W. KWESIGA**

**JUDGMENT:**

Hajji Kyeyune Sowedi, 61 years old is indicted with Aggravated Defilement Contrary to Section 129 (3) and (4)(a) of the Penal Code Act. It is alleged in the particulars of the offence that on 30<sup>th</sup> August, 2013 at Octopus Lodge, Ndeeba, Makindye Division in Kampala district, he performed a sexual act with Nakitende Jauhava aged 11 years old. He pleaded not guilty to the charges and in his defence he pleaded that this is a fabricated case.

The state has the burden to prove the whole case against the Accused person. For the state to get a conviction against, this Accused person must adduce evidence that proves beyond reasonable doubt the following ingredients of the offence of Aggravated Defilement:-

1. That a sexual act was performed with Nakitende Jauhara.
2. That it is the Accused person who committed the sexual act.

In all criminal proceedings, the standard of proof is proof beyond reasonable doubt. The evidence in proof of a fact must establish that the offence was committed and was committed by the Accused person.

The Accused person is presumed to be innocent until he pleads guilty or he has been proved guilty.

### **Proof of Aae.**

Was the alleged victim aged below 14 years? The age of the victim can be established or proved by her appearance, her testimony and medical evidence. At the time of testimony, she said she was 15 years in 2017 and it would follow that in 2013 she was below 14 years. Medical report states she was born on 20<sup>th</sup> June 2002 (11 years). I am satisfied that the prosecution evidence proved beyond reasonable doubt that the alleged victim was aged below 14 years in 2013.

In my view, it is not necessary that the exact age be proved, it is enough to prove that the victim in Aggravated Defilement was aged below 14 years.

### **Sexual Act.**

PW1, Nakitende told court that on 30<sup>th</sup> August 2013 the Accused person put her on a bed in Octopus Lodge and had sexual intercourse, that he removed his clothes, told her to remove hers and had forced sexual intercourse with her. She returned home, she did not tell her mother or anybody else.

On the 4<sup>th</sup> September 2013, he took her to Ndeeba, bought her lunch and told her to wait for him. When they had lunch and went to Octopus Lodge where he had left his bag that contained documents but the people at the Lodge arrested him and they picked her from the Restaurant. Under Cross-Examination she told court that he entered his penis but stopped on top; she did not bleed, she did not tell anybody. She was examined two days later i.e after 4/9/2013.

Dr. Ojara Santo (PW3) prepared Exhibit P.1 (Police form 3A), he noted the following:-

- No injuries observed.
- Hymen was intact.
- Bruises around the genitals.

In court he said the bruises could have been caused by other scratches such as use of a finger. He did not tell court how recently the scratches occurred to place them on 30/8/2013, about a

week before he examined the girl.

PW4, Namara Sharon, told court that on 4/9/2013 at about 4:00 p.m she was called from home, that an oldman had a child in the lodge. He found the oldman standing outside Octopus Lodge. That the child was in the lodge room sitting on a bed and she told her (PW4) that Hajji had brought her in the lodge.

This narration contradicted PW1 on where she was found. The girl said she was not at Octopus Lodge but in a restaurant where Hajji left her to eat lunch.

In his defence, the Accused person told court that the alleged victim was known to him, she was entrusted to him by her mother (PW2) to help her by connecting her to people offering bursaries. On the way she demanded for food, it was about 1:30 p.m, he took her to Luwombo Hotel, left her there to eat as he went for prayers.

At about 3:20 p.m he gave her documents to take to her parents, this was on 30/8/2013. This was the last time he saw PW1, Nakitende.

Under Cross-Examination he told court that on 4/9/2013 is when he took her for food but not at Octopus. He had never been to Octopus Lodge.

The alleged victim (PW1) police statement was admitted as Defence Exhibit DE.1. the contents of this exhibit contradict the narration of PW1 while she testified, in the statement she signed on 4<sup>th</sup> September 2013 she stated:- **When I reached home, since I was feeling pain I told mother but she could not believe it since she was trusting Hajji so much and only told me that when he comes she will ask him".**

**In court she said, " I did not tell anybody, the second time I told police after the arrest".**

**In evidence in chief she stated "I did not tell my mother what happened because he had threatened to kill me".**

PW2, Nasali Fatuma, the mother told court that she was close to her daughters but PW1 did not tell her about the incident and she did not notice that there was anything wrong until she was called to the police.

*In examining contradictions in this case, I am alive to the fact that it is not all contradictions that would defeat a position being presented by the party whose evidence is contradictory, however, where contradictions are major and go to the root of the matter or point to deliberate falsehood in the testimony of the witness and in a criminal trial where they create reasonable doubt in proof of a particular fact, it must always be resolved in favour of the Accused person.*

The contradictions between a statement made to the police, which has not been denied by the maker, with what he/she states in court on oath and paint a picture of two different stories becomes fatal because the court is put in a dilemma as to which of the two positions is true. What is pertinent here is proof of whether there was a sexual act performed with the alleged victim.

On 30<sup>th</sup> August 2013 the following have been considered:-

- (i) The victim (PW1) told lies to the police when she stated that she developed paid out of the sexual intercourse and that she reported this fact to her mother. The mother denied and told court that she did not notice anything wrong.
- (ii) She (PW1) contradicted her own statement when she stated that she never told anybody. This is incredible for a girl who was defiled on 30/8/2013 to accept to go back with the culprit on 4/9/2013. The normal reaction would have been to refuse or

appear reluctant to her mother.

- (iii) The medical report does not corroborate the story of a sexual act. The hymen was intact and the girl's genitals had scratches capable of being caused by fingers which could include her own fingers. Her evidence is that the Accused put his penis in her private, however, the Doctor's evidence does not state that a penis is capable of causing the scratches he observed. He stated in cross- Examination **"The bruises can be explained medically other than by sexual activity e.g use of fingers, normal scratching or playing around the part"**.

Proper investigations should have presented evidence obtainable from the alleged scene of crime as circumstantial or even direct evidence to the Accused person's alleged use of a lodge room or premises that would point a scene meant for such a crime.

- > For example did the Accused rent this room or how did he access the room with a minor?
- > Why was no employee/attendant of the lodge brought as a witness?
- > The crime preventer, Namara stated that she was called by people who alleged defilement, **who are they?**
- > The Accused person's defence is that he has never been in Octopus Lodge. The victim's evidence is that she was not found in the Lodge but where Accused had taken her for lunch.
- > Namara stated that the girl was sitting on a bed in the lodge.

All these examined together, they have overwhelming doubt as to whether the Accused or the victim was in the lodge, the alleged scene of crime as contained in the charge sheet.

In my view, the state evidence does not prove beyond reasonable doubt that a sexual act was performed with the victim whether by the Accused person or anybody else. It is unfortunate that this old man, appearing so weak has had to live in prison since 13<sup>th</sup> September 2013 (about four years) with this charge on his head.

The joint opinion of the Assessors is that the state has proved all the elements of the offence.

However, considering the examination I have made on the details of the evidence as a whole, I am unable to follow the advice of the Assessors.

In my view, the state has not proved the case beyond reasonable doubt. I acquit the Accused person, he shall be set free unless he is held for any other lawful reason.

Signed: J. W. Kwesiga Judge

3/8/2017