

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

HCT-04-CR- SC -244 OF 2016

UGANDA

.....

PROSECUTOR

VERSUS

WETOKHO PATRICK

.....

ACCUSED

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

JUDGMENT

Accused person was charged of aggravated defilement contrary to section 129(4) (3) (a) of the penal code Act.

The particulars are that **Wetokho Patrick** on the 2nd Day of August 2015 at Bulowo village in the Manafwa District performed a sexual act with Kiisa Gift a girl aged 12 years.

Accused denied the charge.

In all criminal cases the prosecution has the burden to prove the case beyond all reasonable doubt.

The ingredients for this offence are;

1. That the girl was below 14 years.
2. There was sexual intercourse.
3. The accused participated.

The case for the prosecution consisted of evidence of **PW1 Dr. Rubanza** who examined the victim **Kiisa Lillian** and found her vagina bleeding with a minimal ruptured hymen.

There were observed minor injuries around the labia, caused by an erect penis. The victim had experienced a first sexual encounter 24 hours ago. He had a signed medical examination report tendered in as PE1.

PW2 Wamukwa Titus examined the accused and found him with normal mental status. He signed a medical examination report tendered in as PE2.

PW3 Gift Khisa, stated, stated that she was a girl of 13 years schooling at Buwayo primary school in p.5.

On 25/ August 2015 in the night while sleeping, she slept under a net under a table but did not know what happened to her. She was just woken up by her father, and she on waking up realized that there were many people in the house, whom she did not know very well.

She had no pain. She found accused had been tied with ropes for a reason she did not know. She said she was told that accused has “done bad manners to her” (played sexual intercourse). She said from police, she never went anywhere else.

PW4 Semu Omuka, said that on 2nd August 2015 at about 11:00am, he was with his wife, accused had visited them. He heard a noise at 11:00am like of a rat. He woke with a torch to check in the children’s room. He then saw accused coming out of the children’s net. He asked accused what he was doing and he told him he was folding a chair but on checking the children’s bed, he saw that accused had pulled **Gift**’s nicker down to around her thighs.

He told the wife to check her and she did so. The mother (wife) found that accused had played sex with the girl and blood was flowing from **Gift**’s vagina. He then mobilized the other relatives and his wife. Another lady checked the girl; but she was still fast asleep.

They called LC officials and then woke up the girl.

Accused was then forwarded to police.

PW5: Beatrice Mulimbwa said PW3 is a daughter and PW4 her husband.

On 2nd August 2015, while sleeping her husband woke her up to go and witness what the accused had done. When she went she saw **Gift** sleeping, her nickers removed and halfway her legs and her skirt removed. She checked her and saw blood flowing and confirmed that accused

had played sexual intercourse with her. She talked to accused and he accepted. He also accepted before the LCs that he had played sex with **Gift**. He was then forwarded to the police.

PW6 Neumbe – a crime preventer checked the victim and saw blood from her vagina. She was instructed to take the girl for checking and **Dr. Rubanza** conducted the medical examination.

At close of the prosecution's case the accused opted to keep quiet and leave it to court.

I will therefore now resolve the issues (ingredients) as below;

1. Whether the girl was below 14 years of age.

There is evidence on record through PE1 (medical examination), PW1, PW3, PW4, PW5, that the victim was aged 12 years, and was 13 years at the time of testifying in court.

This evidence proved ingredient of age.

2. Whether there was sexual intercourse.

According to PE1 (police form 3A) examination of the victim, and PW1, PW3, PW4 and PW5, the victim was bleeding, had a ruptured hymen and showed signs of having been sexually assaulted.

In **Uganda V. Byekwaso Criminal session case 117 of 1993**, Court held that the doctor's evidence showed that the victim was sexually assaulted and the nature of the injuries rules out assault by a finger.

Also in **Bassita Hussein V Uganda Criminal Appeal 35 of 1995**, the Supreme Court held:

“The act of sexual intercourse or participation may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victim's own evidence and corroborated by medical or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or participation. Whatever evidence the

prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.”

In this case the prosecution placed before court evidence of PW1, PW4, PW5 and PW6, all who participated in checking and observing the PW3(the victim)- shortly after, and found her with blood and injuries consistent with penetration due to sexual assault.

PE1, the Doctor noted that:

“forcefully penetrated deep into vagina about 24 hours ago- first sexual encounter. No semen observed ...”

Also in section (e) he comments thus;

“ vaginal bleeding. Minimal ruptured hymen . Multiple tears on labia and vaginal walls..”

Though the victim’s testimony is that she did not realize what had happened to her, the evidence through PE1, PW1, PW4, PW5 and PW6, suggests that a sexual assault was performed upon her.

This ingredient was therefore proved.

3. Whether the accused participated in the crime

The accused according to the evidence adduced, was on the night in question a visitor in the house. PW4 stated that he heard noise in the children’s room. He had a torch and went to check. He found accused coming from the net, where the victim (PW3) and other children were sleeping. When he asked him what he was doing he said he was from folding a chair. Upon checking on the victim, he realized that her skirt was removed and her nickers moved half way her legs.

She was however sleeping. He called PW5 (wife) who also confirms that she met the girl asleep as described. On checking her she was bleeding and she concluded she had been sexually used. The evidence of **PW6 Neumbe**, confirmed that the following morning she received PW1, and her DPC instructed her to go and check her. She checked her and blood was coming from her

private parts. She was further directed to forward her to Mbale to **Dr. Rubanza** for medical checkup.

The medical examination was done on PF3A and submitted.

The above facts are all consistent in narration by all witnesses. Evidence shows that;

- i) Accused was at the scene at the time the victim got assaulted.
- ii) Accused was found moving from the victim's bed by PW4, shortly after the act.
- iii) There was no break in chain of causation as PW4 acted swiftly and informed PW5 (and others) PW5 checked immediately. PW5 said accused accepted that he had committed the crime before her and the LCs.
- iv) PW1 and all witnesses (PW4, PW5) confirmed she was asleep throughout this ordeal and was only woken up.

The circumstantial evidence raises only one serious question which if conclusively answered proves that accused was the culprit. Could the accused have performed sexual intercourse upon the victim without her feeling pain or waking up in the process? I do not find any evidence on record to suggest that this was not possible.

The evidence conclusively from all the witnesses and the exhibits (PE1) shows that this is what exactly happened.

The victim PW1 according to the medical evidence as corroborated by PW3, PW4 and PW5 shows that the accused was able to have sex and achieve the described level of penetration into PW1's vagina without causing her to wake up, she indeed said she did not realize what happened but woke up when accused was arrested and tied up. She confirms that she went to police (hence was examined). When she woke up there were many people in the house.

PW5 explained that they did not wake up the girl so that they *“wait and other people come to see, and also not to tamper with evidence...”*

It is a fact that this girl was very young and with no prior sexual encounter. The medical report shows that the sexual assault resulted into “ *a minimal ruptured hymen , with multiple tears on labia and vaginal walls*”

The medical report also noted “*difficulty in walking*” by the victim.

The import of the above facts is that the accused carefully performed his act, and cunningly managed to have his go at the girl in her “ *sleeping frenzy*” she appears to be a heavy sleeper – who even when people came into the house still did not wake up from their noise . This is not uncommon happening as there are even people called “sleep walkers!”

I find no other reasonable explanation from the evidence on record save that accused is the one responsible.

The assessors thought that perhaps the blood was due to a first menstruation cycle. If that was so, what of the injuries found by the doctor on her vaginal walls, and the partial rapture of the hymen? What of the medical opinion that the blood was due to a first sexual encounter, due to an erect male penis inserted deep in the vagina?

There was no contrary evidence to prove the other possibility. Since this court found that sexual intercourse had been proved, I further find that the sexual intercourse was performed by the accused person.

I therefore find that all ingredients have been proved. The accused is found guilty of the charge. He is accordingly convicted as charged.

Henry I. Kawesa

JUDGE

21.02.2017