

The legal position in Uganda was settled under Article 28(3)(a) of the Constitution of the Republic of Uganda. That every person charged with a criminal offence is presumed innocent unless he pleads guilty or he has been proved guilty. I will examine evidence on each element of the offence to determine whether the state has discharged the duty of proving the case beyond reasonable doubt.

- Nalumansi, alleged victim was aged below 14 years.
- That she was subjected to a sexual act and that this was by the Accused person. All the three elements must be proved before the Accused can be convicted.

The state has the burden of proof in this case to prove the essential elements of the offence namely that:-

The Accused person Haji Numan Kidde aged 65 years is indicted with Aggravated Defilement Contrary to Section 129 (3)(4)(a) of the Penal Code Act. It is alleged that on 22<sup>nd</sup> February 2015 at Mende village, Wakiso district he performed a sexual act with Madina Nalumansi, a girl aged 9 years. The accused person pleaded not guilty to the charge and maintained in his defence that this case was fabricated.

**JUDGMENT**

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

**HAJI NUMAN KIDDE :::::::::::::::::::: ACCUSED**

**VERSUS**

**UGANDA :::::::::::::::::::: PROSECUTOR**

**HCT-00-CR-SC-0555-2016**

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

**THE REPUBLIC OF UGANDA**

PW7, Joshua Magade, a senior Clinical Officer told court that he examined Nalumansi (Victim) and found her to be 9 years old. Nalumansi (PW6) said she was 13 years old and she appeared to be below 14 years at the time of testimony, therefore, in 2015 she must have been 9 years old. I am satisfied that the state has proved beyond reasonable doubt that the fact of the age of the alleged victim being below 14 years was proved beyond reasonable doubt.

The defence contested the remaining two elements of the offence that there is no proof of sexual intercourse or participation by accused person. Section 129(7) of the Penal Code Act defines a sexual act as penetration of the girl's vagina. A sexual act or sexual intercourse can be proved by the victim's evidence or testimony by those who saw it happen, medical evidence or circumstantial evidence.

The Supreme Court settled this in the case of Basita Hussein Versus Uganda – Criminal Appeal No. 35 of 1995 that "***The act of sexual intercourse, a penetration may be proved by direct or circumstantial evidence. Sexual evidence is proved e.g by the victim's own evidence and corroborated by medical or other evidence***".

In my view, medical evidence is desirable evidence but not a must in sexual offences to prove penetration provided prosecution evidence is sufficient to prove the fact beyond reasonable doubt.

In the instant case, the testimony alleging the sexual intercourse was by Nalumansi Madina (PW6) a child of tender age who was unable to testify on oath. Though a muslim who did not appreciate the duty and implication of giving evidence on oath/affirmation, she told court that the Accused person had sexual intercourse with her in the field. That she went home crying. That her dress was wet and blood stained. That her clothes were taken for examination.



The above evidence must be corroborated before a conviction can be found on it. Section 10 of oaths' Act (Cap.19) states:- "No person shall be convicted or judgment given upon the uncorroborated evidence of a person who shall have given his or her evidence without oath or affirmation";

Lord Goddard (as he then was) in R. Versus Campbell (1956)2ALL ER 272 stated "To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children, the Judge must stop the case. It makes no difference whether the child's evidence relates to an assault to him or herself or to any other charge.----The evidence of an unsworn child can amount to corroboration of sworn evidence though a particular careful warning should in that case be given";

Section 40(3) T.1.A requires that where a child of tender age does not understand the nature of an oath and evidence is receive "----but where evidence admitted by virtue of this sub-section is given on behalf of the prosecution, the accused shall not be liable to conviction unless the evidence is corroborated by some other material evidence in support implicating him or her";

In the instant case, the unsworn evidence states that she was defiled and she started bleeding. This was corroborated by PW7, Joshua Maganda that he saw bleeding on 23<sup>rd</sup> February 2015, this supports the story that defilement was on 22<sup>nd</sup> February 2015.

There was no other evidence in the whole case to corroborate participation of the Accused Person.

PW4, D/C Okwanga Ceaser did not help the state case he relied on the story of the child. He stated that the Accused denied participation but he said "I established that he defiled the girl because in tomato garden the victim was consistent with her story and led us where

- Mr. Ssekajja for defence
- Mr. Tuhairwe Julius – SSA for state
- Miss Gorret Boogere – Court Clerk.

In the presence of:-

30/05/2018

**Judge**

J. W. Kwesiga

Dated at Entebbe this **30<sup>th</sup>** day of **May 2018**.

I agree with the defence contention that the vital element of the offence, participation was not proved. The accused person is not guilty and he shall be acquitted.

***it occurred***; This was a mis-direction and un-reliable evidence to prove participation.