

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA
(SITTING AT JINJA HIGH COURT)**

CRIMINAL SESSION CASE NO. 253 OF 2014

**UGANDA.....
PROSECUTOR**

VERSUS

**WAISWA TWAHA.....
ACCUSED**

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

Background and brief facts

The accused **WAISWA TWAHA** was on an unspecified date indicted with the offence of aggravated defilement contrary to sections 129 (3) and (4) (b) of the Penal Code Act. Cap. 120 LOU.

It was stated in the indictment that on 18/1/2014, in Nakabaale village, Luuka District, being a person infected with the human Immune Deficiency Virus (HIV), he performed a sexual act with **WANYANA SHAKIRA** a girl aged 12 years.

The accused denied the offence and a plea of not guilty was entered on 9/1/19. He was represented by Mudhumbusi Daniel while Aliwali Kizito represented the State.

The prosecution case is that Wanyana Shakira the victim then aged 12 years, was visiting her grandmother in Nakabaale, Luuka District to attend a family function. The accused was also present. During the night of 18/1/2014, Wanyana was sleeping in her room with several other

people including the accused. Towards 3:00 am, she woke up suddenly to the feeling that someone was forcing her into the act of sex and she was feeling pain. She called out to her mother, Mastula Mutesi, the latter who flashed a torch and saw the accused just getting up from her and in the process of dressing up. Mutesi locked up the accused inside the room and called the police. The accused was arrested and taken to Irongo Police post. The victim was subjected to medical examination and also assisted to record a statement.

The prosecution presented two witnesses and closed their case. Neither counsel made submissions of a no case to answer, leaving it to Court to make a decision. This therefore is my ruling on the same, and my decision under section 73(1) of the TIA on whether the accused ought to be put on his defence to this charge.

The law

It is now a well-established law that on a charge of aggravated defilement, at whatever point the prosecution choose to close their case, the burden lays upon them to adduce evidence to prove the following elements beyond reasonable doubt:-

- i. The victim is below 14 years.
- ii. That the victim experienced unlawful carnal knowledge (sexual intercourse).
- iii. It is the accused person who had sexual intercourse with the victim or that the accused person participated in the commission of the offence.

By law it is expected of the prosecution that, at the close of their case, they have made out a *prima facie* case, one on the face of it, is convincing enough to require that the accused person be put on his defence. See for example **Rananlal T. Bhati Vrs R (1957) EA** followed in **Uganda Vrs Kivumbi & Ors Crim. Case No. 20/2011**.

Therefore in order for the court to dismiss the charge at the close of the prosecution case, I must be satisfied that: -

- a) There has been no evidence to prove an essential element of the alleged offence, or

- b) The evidence adduced by the prosecution has been so discredited as a result of cross examination or, is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

See “A Guide to Criminal Procedure in Uganda” (supra) at page 120.

The evidence

It was an agreed fact that Wanyana the victim, was 12 years at the material time of the offence. The accused was introduced to her as an uncle at a function held at the home of one Nsibirano. She claims to have shared a room with the accused and several others on the night of 18/1/14. She narrated that she woke up in the dead of night to the feeling of someone trying to have sex with her by inserting a male penis into her, a result of which she felt pain and made an alarm. Her mother Mutesi Mastula answered her alarm by flashing a torch towards her. She was able to identify the person on top of her as the accused. That upon seeing the light, the accused jumped up and begun dressing up.

Mutesi claims to have seen the accused totally naked on top of Wanyana, with the aid of a torch light. That she examined Wanyana and found her vagina to be smeared with sperms and with blood oozing out of it. She exclaimed that the accused had destroyed her young daughter.

Police Form 3A in respect of Wanyana indicated that she had suffered a ruptured hymen, had bruises in her genitals and a watery discharge. The examining officer concluded that those injuries were a result of sexual intercourse.

The evidence indicates that the accused was present in the same room with the victim during the night she stated to have been defiled. It is alleged that he was identified just after the act of sex by both the victim and her mother with the use of a torch light. His arrest was caused in the same room and in the same homestead at which both he and the victim were attending family festivities. The prima facie evidence is that he was at the alleged crime scene and had opportunity to commit the offence. That conclusion will of course require his rebuttal.

I would conclude therefore that the accused has a case to answer to the charge of aggravated defilement. I do order that he presents his defence using any one of the three options open to him at law.

I so order.

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EVA K. LUSWATA

JUDGE

26/03/2019