

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
CRIMINAL SESSION NO. 0070 OF 2017
(Arising from Criminal Case No. AA. 034/2016; CRB 650/2016 Budaka)

UGANDA :: PROSECUTION

VERSUS

KAKIRI RONALD alias KAKIDI :::::::::::::::::::::::::::::::::::::: ACCUSED

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] The accused **Kakiri Ronald** alias **Kakidi** stand charged of the offence of **Aggravated defilement** contrary to *Sections 129 (3) &(4)(a) of the Penal Code Act*. It is alleged that on the 27th day of October, 2016 at Bulumba “A” village, Pallisa in Budaka District, the accused performed a sexual act with Agnes Naikomba, a girl aged 7 years. The accused pleaded not guilty to the offence.
- [2] The Prosecution case as can be gathered from the Prosecution witnesses is as follows:-
- (i) On the fateful day of 27th October, 2016, **Zainabu Sabano** (PW₂) grandmother of the complainant/victim **Agnes Naikomba** was at her shop stall doing her small business as she does on any other day. At around 08:00 – 09:00am, the accused came to her and asked for a piece of soap. However, he had not come with money and as a result, he went back without the soap, to his home for the money. He never returned. This prompted **Zainabu Sabano** (PW₂) to send the complainant/victim who had been under her care to take soap to the accused.
 - (ii) It was later that the accused’s daughter came and told **Zainabu Sabano** (PW₂) that her father, the accused was sexually abusing the complainant/victim. She rushed to the accused’s place but found the complainant/victim coming out of the accused’s house. She checked the private parts of the victim and indeed

found that she had been sexually abused. She alerted her husband who was away and the community members. The accused also in the meantime fled the village and went to Kadama where the LCs picked him from and handed him over to police.

- [3] In his defence, the accused denied committing the offence and stated that on the day before the alleged incident, ie 26th October, 2016, he and his first wife had taken his second wife who was pregnant and in labour to Kadama Health Centre for delivery. He later returned home and left his 2 wives at the hospital. On the following day, he went to the complainant/victim's grandmother for a piece of soap because he wanted to wash some clothes. He purchased a piece of soap for 500/- but because she did not have "change" for 1,000/-, the accused decided to leave for his house to pick the 500/-. He returned upon which he was handed over the piece of soap.
- [4] That thereafter, after helping his father **Diphas Mulepo** to load jerrycans of water on a bicycle, he left for the borehole to fetch his own water. Upon return, he found children including the complainant/victim playing with dirty water he had left in another basin for cleaning his boots. He got bitter and got a stick to beat up these children but as they fled, the complainant/victim hit a bench that was around and fell down. She however, got up and went to her home. That it is then that **Zainabu** (PW₂) came and quarreled with the accused accusing him of beating up her grandchild. That the chairman intervened and warned him never to beat that child again. It was later that he got information that his 2nd pregnant wife had delivered upon which he advised her to come home.
- [5] On the following day of 27th October, 2016 at around 07:00am, he left for the gardens to harvest peas. It was at around 11:00am that he saw crime preventers together with the defence secretary LCI come and arrest him on the grounds of **raping** Zainabu's grandchild. That it is when he refused to part with money to Zainabu that he was taken to police where he was eventually charged with this offence.
- [6] It is trite law that it is the duty of the Prosecution to prove the guilt of the accused person beyond reasonable doubt and the burden of proof does not shift to the accused person, it remains with the Prosecution throughout except in some exceptional cases where the statute provides otherwise; **WOOLMINGTON VS. D.P.P (1935) AC 462** and **OKETH OKALE**

VS. R (1965) EA 555. It is also the law that a conviction should not be based on the weakness of the case as put up by defence but it must be based on the strength of the Prosecution case; **UGANDA VS. OLOYA S/O YOVAN AWEKA [1977] HCB 6.**

- [7] In a case of Aggravated defilement contrary to **Section 129(3) and (4)(a) of the Penal Code Act**, before the Prosecution case can secure a conviction, it has to Inter alia prove the following ingredients of the offence;
- a. That a sexual act was performed on the victim.
 - b. That the victim was below 14 years of age.
 - c. That it is the accused who performed the sexual act on the victim.
- [8] As regards the 1st ingredient of the offence, **Section 129(7)(a) and (b) Penal Code Act** defines a sexual act to refer to **penetration of the vagina, however slight by the sexual organ of another or unlawful use of any object or organ on another person's sexual organ**. Proof of penetration is normally established by the victim's evidence and any other cogent evidence, (see **REMIGIOUS KIWANUKA VS. UGANDA S. C. CRIM. APPEAL NO. 41 OF 1995**).
- [9] In this case, the complainant/victim **Agnes Naikomba** (PW₁) testified on oath that on the fateful day, she took a piece of soap to the accused. He found the accused in his house who told her to go with him to his bedroom where he was going to show her a brush for which she would use to wash the accused's boots. The young and loyal victim accepted and when they entered the bedroom, the accused lifted her, placed her on the bed and then had sexual intercourse with her. According to her innocent understanding, the accused **poured "urine" in her vagina**. Thereafter, the accused got a piece of cloth and cleaned her.
- [10] Thereafter, the victim informed her grandmother Zainabu (PW₂) about what had happened to her. PW₂ checked and examined the victim. She confirmed that the victim had been sexually abused.
- [11] The sexual act was confirmed by the medical examination of the victim (P. Exh. I) wherein, though the hymen was intact, the victim had a pus discharge vaginally as a result of bacterial infection and the suspicion was that it could have been result of the sexual abuse. It should be recalled that during cross examination, the victim revealed that it was not the first time the accused was abusing her sexually, the accused had

been using her. It follows therefore, though the medical officer in **P. F3A** (P. Exh. I) stated that it takes 3 -21 days for incubation of a sexually transmitted disease (STD) implying that the sexual encounter in question may not have been the cause of the vaginal pus discharge of the victim, it is possible that the previous sexual abuse could have been the cause. I also note that the medical officer's advice to immediately subject the suspect for examination of STDs was not heeded to but it is clear from the victim's evidence that she was sexually abused as she clearly reported it to her grandmother (PW₂). Besides, the defence did not contest the above.

- [12] As regards the victim's age, it is usually proved by the production of her birth certificate followed by the testimony of her parents. It has however been held that other ways of proving age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child; **UGANDA VS. KAGORO GODFREY H. C. CRIM. SESSION CASE NO. 141 OF 2002.**
- [13] In this case, the victim (PW₃) put her age to 10 years and her grandmother also did the same. Court's own observation found the victim to be of tender years and before she testified, she was subjected to a **voire dire**. The totality of the above is supported and corroborated by the medical examination of the victim which put her age at 7 years. The totality of the foregoing satisfy me that the victim is below the age of 14 years. Again, the defence did not contest the age of the victim being below 14 years.
- [14] In view of the above, I do find that the 1st and 2nd ingredients of the offence have been proved beyond reasonable doubt.
- [15] The next and most important ingredient of the offence is whether it is the accused who committed the offence. It is the most important because the defence hotly contested it.
- [16] As regards this ingredient of the offence, the Prosecution relied on the evidence of the victim herself who testified as PW₃, her grandmother who testified as PW₂ and then the conduct of the accused immediately after the discovery that the victim had been sexually abused.
- [17] The victim **Agnes Naikomba** (PW₃) narrated in detail how the accused lured her into his bedroom and lifted her and placed her on his bed and then had sexual intercourse with her. In her naiveness, she stated that

the accused **“poured urine”** in her vagina. The grandmother **Zainabu**(PW₂) upon being tipped by **Mwayi Ali**, son of the accused, went to the accused’s house who was a neighbour and found the girl emerging out of the house of accused where she had taken a piece of soap at her instruction. She saw the victim’s dress wet at the back. In cross examination, she explained that upon examining/checking her, she found her having been sexually abused, the dress had a wet patch at the back caused by semen. Though the wet dress was not exhibited, I have no reasons to doubt this old woman, grandmother.

- [18] The evidence of both PW₂ and PW₃ is supported and corroborated by the accused’s conduct immediately after the commission of the offence. According to PW₂, the accused fled the village and went to Kadama where the LCs looked for him and upon getting him, they handed him to police.
- [19] On his part, the accused admitted in his defence that indeed, the victim went to his place during the absence of his 2 wives who had gone to hospital because his 2nd wife was in birth labour pains. The accused also admitted that he left the scene but explained that he had gone to his gardens to harvest peas. Indeed, it is the crime preventers and the defence secretary LCI who came and picked him from there whereupon they later handed him to police. It is inconceivable, as the defence claim that the allegations of the sexual abuse upon the victim are trumped up charges because the grandmother merely wanted money from him.
- [20] As PW₂ explained, upon arrest, the accused sought to be forgiven but she refused because she was not the father of the victim. It would be the father of the victim to forgive the accused. The issue of money as the accused himself explained in his defence, was proposed by the defence secretary LCI as a way to have the matter settled and not that the accused did not commit the offence in question. Indeed, he contradicted himself when in cross examination he stated that he was arrested when his 2 wives were still in the hospital. This contradicted his earlier statement that it was after his 2 wives had returned from the hospital, that he went to the garden to harvest his peas. This contradiction placed him at the scene of the crime and at the same time corroborated both PW₂ and PW₃ that it is who committed the offence and the disappearance purportedly to harvest peas was actually fleeing the scene.
- [21] It should be noted that the accused’s house and the home of the victim are close – they are close neighbours. People especially neighbours

gathered around. The accused's claim of an existing grudge is surely an afterthought because if it was so, any of the neighbours and especially the LCI Chairman would have intervened to rectify the situation and assert that the issue was the beating up of the victim and not defilement. Their silence by leaving the accused to sort it alone is evidence that PW₃'s evidence is credible.

- [22] The gentleman and lady assessors also disagreed with the defence and found that the Prosecution had proved its case beyond reasonable doubt and advised that the accused be found guilty as charged and he be convicted accordingly. I am satisfied that the Prosecution has proved its case against the accused beyond reasonable doubt. I find the accused guilty as charged and I convict him accordingly.

ByaruhangaJesse Rugyema

JUDGE

10/12/2020

10/12/2020:

Accused present.

Wamimbi for state brief.

Muliro for State.

Masola: Clerk.

Court:

Judgment delivered in the presence of the above.

Byaruhanga Jesse Rugyema

JUDGE

10/12/2020

State:

This is a grave offence which carries a maximum sentence of death. The accused was an immediate neighbor of the victim who has not been remorseful at all and as a result, I propose a sentence of 25 years.

Mr. Wamimbi:

- The accused/convict is a 1st offender with no past record.
- He is aged 45 years, a productive age and therefore deserve an opportunity to be useful to the society.
- While in prison, the convict became a good Christian and actually, he was entrusted with the position of being a treasurer.
- He had been on remand for a period of 4 years and 1 month.
- Before arrest, he was a bread winner with 8 children, some of whom are school going.
- In the premises, I pray for a lenient sentence.

SENTENCE:

The accused is a 1st offender aged 45 years but who defiled a child of tender years aged between 7 - 10 years. The sexual abuse of this child by a neighbor had been frequent and as a result, the victim had developed vaginal discharges. He does not deserve to go back home to face this victim. This was cruel on the part of the accused and as a result, I find the aggravating factors outweighing the mitigating factors. In the circumstances, I do sentence the accused to 14 years term of imprisonment but taking into account of the fact that he has been on remand for a period of 4 years and 1 month, he will serve 9 years and 11 months. Right of appeal explained.

Byaruhanga Jesse Rugyema

JUDGE

10/12/2020