THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0037 OF 2004

UGANDA :: PROSECUTOR

VERSUS

NATUKUNDA SILVER :::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused, Silver Natukunda, was tried on an indictment, which charged him with the offence of defilement contrary to section 129 (1) of the Penal Code Act. The particulars alleged that on 25th day of December 2002 at Runyinya village in the Rukungiri District he had unlawful sexual intercourse with Aijuka Fortunate, a girl below the age of 18 years.

The facts of the case were that on the 25th day of December 2002 at Runyinya village the victim Aijuka Fortunate was returning from church when she met the accused at 4.00p.m. The

accused blocked her way, grabbed her and threw her down and had sexual intercourse with her after removing her knickers. The victim tried to cry but the accused covered her mouth. Thereafter he left the victim to go home while crying. On reaching home the victim reported the incident to her parents who also reported to the relevant authorities. The accused was arrested and charged accordingly.

On arraignment the accused denied the charge thereby putting in issue all the essential ingredients of the offence of defilement. It is trite law that the prosecution must prove beyond reasonable doubt each and every essential ingredients of the offence charged before a meaningful conviction can be secured. An accused person bears no duty of proving his innocence since he is presumed innocent until proved guilty or until he pleaded guilty; See **Oketcho Richard Vs Uganda, Supreme Court Criminal Appeal No. 26 of 1995.**

Under section 129 (1) of the Penal Code Act, the essential elements of defilement which have to be proved beyond reasonable doubt are:-

(1) That the girl victim was below 18 years of age;

(2) That there was unlawful sexual intercourse involving the girl victim; and

(3) That the accused participated in the unlawful sexual intercourse: See **Bassita Hussain Vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995.**

To discharge the burden of proof cast on it by the law, the prosecution called the evidence of three witnesses: Orimubona Mary (PW1) who was the victim's grandmother to whom the victim reported the incident, Aijuka Fortunate (PW2) who was the victim and Yowana Kebitwire (PW3) who was the local council chairman to whom the incident was reported to. He arrested the accused and handed him to the police.

The prosecution further relied on the medical examination report of the victim Aijuka Fortunate which was admitted during the preliminary hearing under section 66 of the Trial on indictments Act. The statement of the arresting officer No. 29862 PC Jaffer Bambale was also admitted under the same section.

The accused on his part made a sworn defence and raised the defence of total denial and alibi.

In regard to the first ingredient whether the girl victim was below 18 years old, the prosecution relied on the medical examination report of Dr Sekitto Jonathan which was admitted during the preliminary hearing under section 66 of the Trial on indictments Act. In that report the said doctor had estimated the age of the victim at 8 years.

Orimubona Mary (PW1) who was the victim's grandmother testified that the victim was 12 years old. The victim herself testified that she was 12 years old. That means that she was about 8 years when the alleged offence was committed. The above pieces of evidence were not challenged by the defence. As

the victim was giving evidence, the court used ordinary observation and common sense and came to the conclusion that the victim was visibly young and indeed below 18 years old. Therefore in agreement with both assessors I conclude that the first ingredient has been proved beyond reasonable doubt.

As to whether there was sexual intercourse involving the girl victim, all that is needed is proof of penetration however slight. Even proof of rapture of the hymen is not necessary. Proof of penetration is normally by the victim's evidence and or medical evidence and other cogent evidence: **Bassita Hussain Vs Uganda** (supra).

The evidence of the victim Aijuka Fortunate was that on Christmas day in the year 2002 as she was returning from prayers from Rwabokoba Church she encountered the accused who suddenly grabbed her and forcefully had sexual intercourse with her after removing her knickers. She felt a lot of pain. Later on she went back home crying and revealed the incident to her grandmother.

Orimubona Mary who was the victim's grandmother testified that on Christmas day the victim returned from prayers while crying at around 4.00p.m. Her dress was soiled. The victim revealed to her that she had been sexually assaulted. She examined her private parts and confirmed that she had been defiled as her private parts had injuries. The victim had difficulties in walking. The medical evidence also corroborated the evidence of the victim and her grandmother that the victim had had sexual intercourse. This medical examination report by Dr Sekitto of Nyakibale Hospital was admitted during the preliminary hearing during the preliminary hearing under section 66 of the Trial on indictments Act. The examination was carried on 27/12/2002 whereby it was established that the victim had signs of penetration. Her hymen was raptured 1-2 days ago. She had inflammations around her private parts, which were consistent with force sexually used. The injuries were about two days old.

From the above evidence I have no slightest hesitation in finding that there was sexual intercourse involving the girl victim.

This brings me to the last ingredient which relates to the identity of the person who committed this offence. On this, the prosecution relied on the evidence of the girl victim and her grandmother. The victim Aijuka Fortunate (PW2) testified that on the fateful day she met the accused as she was returning from Christmas prayers. The accused whom she knew as their neighbour in the village grabbed her and had unlawful sexual intercourse with her. The incident took place during broad day light. Mary Orimubona (PW1) who was the victim's grandmother testified that on the fateful day the victim returned from prayers while crying and informed her that the accused had had forceful sexual intercourse with her.

The defence of the accused was that of total denial and grudge. The grudge was because the victim's grandmother (PW1) had refused to pay his debt after he renovated her house.

In the instant case the complainant was a child of tender years whose evidence would call for corroboration as a matter of law. There is corroboration in the testimony of My Orimubona (PW2)

who testified that immediately after the act the victim went home crying and immediately informed her as to what the accused had done to her. In **Omuroni Francis Vs Uganda; Court of Appeal Criminal Appeal No. 2 of 2000** it was held that after being sexually assaulted the complainant's information to a third party as to the identity of the assailant is relevant and admissible in evidence. That is how the evidence of PW1 constitutes corroboration of the victim's story.

The defence of grudge and total denial were merely afterthought. The accused was properly identified at the scene. The accused was very well known to the victim since they were neighbours. They were living only 400 metres apart. The offence took place during broad day light at 4.00p.m. on a peculiar Christmas day. These were therefore favorable conditions for proper identification. See **Isaya Bikumu Vs Uganda, Supreme Court Criminal Appeal No. 24 of 1989.**

Immediately after the assault she reported the incident to her grandmother (PW1) naming the accused as her assailant. It is

trite law that evidence of the victim is the best evidence of identification. **Badru Mwindu Vs Uganda, Court of Appeal Criminal Appeal No. 1 of 1997** is a case in point.

From the above evidence I can not resist the conclusion that the participation of the accused had been established beyond reasonable doubt.

In conformity with the unanimous opinions of lady and gentleman assessor I do find that the prosecution has proved the case against the accused beyond reasonable doubt. The accused is accordingly found guilty and convicted.

RUBBY AWERI OPIO

JUDGE

1/9/2005.

14/9/2005:-

Accused present.

Twinomuhwezi present for the state.

Ndimbirwe present for the accused on state brief.

Judgment read in open Court.

RUBBY AWERI OPIO

JUDGE

14/9/2005.

Twinomuhwezi:-

I have no previous record of the accused. The offence carries maximum death sentence. This office is on the increase. There is

AIDS disease. He has been in custody since July 2003. We pray for deterrent sentence because the convict was a very young girl.

Ndimbirwe:-

The convict is very remorseful. This is his first time. We pray court for leniency. Take the period on remand into consideration. He was 26 years old at that time. He should be given a chance to live a useful life.

SENTENCE:-

This is a very serious offence as it entails maximum of death sentence. The offence is on the rise and has attracted public outcry especially due to AIDS. The offence is aggravated by the tender age of the victim. She was merely 8 years old while the convict was 26 years old. The convict introduced the victim to sexual intercourse at a very tender age. She will live to hate sexual intercourse for life. For the above reasons this court will take a very serious view of the offence.

I have looked at the mitigating factors. The convict is first offender. He has spent along time in custody. He is fairly young. He should be given chance to live as a useful citizen. I am not going to impose the maximum death sentence. However considering all the circumstances of this case especially the tender age of the victim at 8; the convict is sentence to twelve years imprisonment. The sentence takes care of the period spent on remand otherwise he deserved fifteen years.

Right of Appeal explained.

RUBBY AWERI OPIO

JUDGE

14/9/2005.