THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0131 OF 2003

UGANDA :: PROSECUTOR

VERSUS

AKANKWASA ANDREW ::::::::::::::::::::::::::::::::::::

ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused, Andrew Akankwasa, was indicted for defilement contrary to section 129 (1) of the Penal Code Act. The particulars alleged that the accused on 1st day of July 2002 at Kinyabushisha village in Rukungiri District had unlawful sexual intercourse with Kobuzare Sarah, a girl under the age of 18 years.

When the charge was read and explained to the accused, he pleaded not guilty. By that plea, the accused had put in issue all the essential elements of the offence charged for the prosecution to prove beyond all reasonable doubt. The essential elements of the offence of defilement under section 129 (1) of the Penal Code Act are:-

(1) That the girl victim was a girl below 18 years old;

(2) That the she experienced sexual intercourse;

(3) That the accused participated in the unlawful sexual intercourse with the victim: **See Katende Ahamada Vs Uganda, Court of Appeal Criminal Appeal No. 2 of 2002** (unreported).

The burden of proving all the above ingredients lies squarely on the prosecution throughout the trial even where he relies on the defence of alibi. The standard of proof required is very high. It is beyond all reasonable doubt. See **Dhamuzungu Nathan Vs Uganda; Court of Appeal Criminal Appeal No. 70 of 2002** (unreported).

To prove this case the prosecution called evidence from six witnesses and relied on the medical report of the victim where the victim was examined by Dr Rutahigwa. The prosecution further relied on the medical examination report of the accused by the same doctor who found him mentally sound and aged 18 years.

The accused gave sworn evidence where he relied on the defence of alibi and grudge.

To prove the first ingredient of this offence, which is the age of the victim, the prosecution relied on the medical evidence of the doctor who examined the victim and established that she was 8 years old at the time of the alleged incident. Anna Mukibi (PW1) who was the victim's mother also testified that the victim was born on 28th May 1994 and that she was now 11 years old. Christine Atwebembere (PW2) and Ahabwe Sam (PW3) testified that they were employed by North Kigezi Diocese at Kinyasano Child Development Centre where the victim was a project child. Ahabwe Sam (PW3) in particular testified that the victim was 7 years old by the time he left the project after this incident.

The victim herself appeared in court and told court that she was born in 1994 thereby establishing her age at 11 years.

The defence did not contest the age of the victim. It was so notorious that the victim was a girl below 18 years old. This ingredient has therefore been proved beyond all reasonable doubt.

With regard as to whether the victim did experience sexual intercourse, the prosecution contended that there was. For that contention the prosecution relied on the medical evidence of the doctor who examined the victim on 23/7/2002 where it was established that the victim had signs of penetration. Her hymen had raptured for the period the doctor could not tell. She had minor bruises on the vulva which were consistent with force sexually used. In light of the above medical evidence the defence conceded that the act of sexual intercourse had been proved

beyond all reasonable doubt. I do agree with that concession. That piece of evidence was admitted during preliminary hearing under section 66 of the Trial on indictment Act. It is trite law that a fact or a document admitted or agreed upon in a memorandum filed under section 66 of the Trial on indictments Act is deemed to have been proved: See **Abasi Kanyike Vs Uganda Supreme Court Criminal Appeal No. 34/1989** (unreported).

Apart from the medical evidence, there was also the victim's testimony that sometime back she had sexual intercourse from her grandmother's house with a certain man. This evidence was corroborated by the testimony of Anna Mukibi (PW1) who was the victim's mother. She testified that upon getting information that the victim was a suspect of sexual abuse, she examined her private parts and found there injuries which confirmed that she had been having sexual intercourse. I must emphasize that physical examination of the victim's private parts by parents or relatives constitutes cogent evidence in proof of penetration. It is as good as professional examination if done by experienced

people: See **Sebuliba Haruna Vs Uganda; Court of Appeal Criminal Appeal No. 154 of 2002** (unreported).

In light of the above overwhelming evidence, I do agree that the prosecution has proved the second ingredient beyond all reasonable doubt.

This leads me to the last ingredient as to the identity of the person who participated in this offence.

The prosecution relied on the victim's evidence to implicate the accused. She testified that she knew the accused because they were staying in the same place. She testified that as she was coming back from school the accused lured her and took her to their grandmother's house and promised to give her photographs and avocadoes. Thereafter the accused removed her knickers and had sexual intercourse with her. This testimony was corroborated by the evidence of PW1, PW2 and PW3 who told

court that the victim told them that it was the accused who had introduced her to sexual intercourse.

The accused relied on the defence of alibi and grudge. The defence of alibi collapsed when the defence conceded that the claim by the accused that all along he had never left prison custody, was false. The position clearly corroborated the victim's evidence that it was the accused who had played sex with her. The above pieces of evidence should have been buttressed by the charge and caution statement of the accused. however the same was poorly recorded as the officer who administered the same did not know the language of the accused well. This court cannot be sure whether he recorded all that that accused had told him. I therefore ruled that the charge and caution statement had no evidentiary value .

All in all there was overwhelming evidence that it was the accused who had participated in the unlawful sexual intercourse

with the victim. The allegation of family grudge was unfounded. This matter came to light when the victim revealed to the school authorities that the accused was having sexual affairs with her. It was the school authorities who alerted the victim's mother that there was something going between the accused and the victim. In the circumstances the defence of grudge was a mere afterthought meant to divert the course of justice. Therefore in agreement with both assessors I do find that the prosecution has proved all the ingredients of this offence beyond all reasonable doubt. I therefore find the accused guilty as charged and convict him accordingly.

RUBBY AWERI OPIO

JUDGE

14/9/2005.

15/9/2005:-

Accused present.

Twinomuhwezi present for the state.

Ndimbirwe present for the accused on state brief.

Judgment read in open Court.

RUBBY AWERI OPIO

JUDGE

1/9/2005.

Twinomuhwezi:-

The accused on 15/8/2002 appeared in High Court on defilement charge. He was convicted and cautioned. He was cautioned because he was juvenile. When he was on bail he defiled this victim. Defilement cases are rampant. There is a public outcry. He has been on remand since 29/9/2002 up-to-date. He has high propensity for young girls. We therefore pray for a deterrent sentence to put him out of the community.

Ndimbirwe:-

This is a serious case. The accused at his age is running to jail. At his age court should be considerate by giving a sentence that will give him a chance to live a more lawful life. I pray that period on remand be considered. We pray for leniency.

SENTENCE:-

This is a very serious offence, which entails maximum of death sentence. The convict is a second offender. On 15/8/2002 he was convicted of defilement and cautioned because he was then a juvenile. It seems he has not learnt his lesson yet.

It is true at his age court should not pass a long custodial sentence against him because he can still change and live a more useful life.

But this is a very serious offence considering the age of victim. She was only 8 years old at that time while the convict was 18 years old. This court should take a very serious view of this

offence. For the above reasons the accused is sentenced to six (6) years imprisonment. The sentence takes into account that he has been in custody since 2002. Otherwise he should have been sentenced to 9 years imprisonment.

Right of Appeal explained.

RUBBY AWERI OPIO

JUDGE

15/9/2005.