

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT RUKUNGIRI
CASE NO: HCT-05-CR-SC-0141 OF 2003

UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

ARINAITWE DENIS :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: THE HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

Arinaitwe Denis hereinafter called the accused was indicted for defilement contrary to section 129 (1) of the Penal Code Act. The particulars of the offence alleged that the accused on the 22nd October 2002 at Ishasha village in Kanungu District had unlawful sexual intercourse with Kiiza Lydia, a girl under the age of 18 years.

The background facts of this case were that the accused and the victim were friends. The victim was by then 13 years old and a pupil in a primary school. During the night of 22nd October 2002

at 10.00p.m. the accused visited the victim's bedroom and had sexual intercourse with her as usual. A fairly jealous neighbour noticed it and informed the victim's mother who rushed to the scene. The accused escaped from the scene leaving his clothes and other items behind. The victim also escaped and slept at their neighbour's home. The matter was reported to the authorities and the accused was arrested and charged accordingly.

When the charge was read and explained to the accused, he pleaded not guilty. By that plea the accused put in issue all the elements of the offence charged for the prosecution to prove beyond all reasonable doubt. The essential elements requiring proof beyond reasonable doubt in the offence of defilement are:-

- (1) that the girl victim was below 18 years old at the time of the alleged offence;
- (2) That the girl victim experienced unlawful sexual intercourse;
- (3) That the accused participated in the unlawful sexual intercourse: See: **Bassita Hussain Vs Uganda.**

To prove this case to the required standard, the prosecution led evidence of four witnesses.

There was the evidence of **Tereza Nyanarushaho (PW1)** who was the victim's mother. She told court that the victim was now 16 years old and that on 22/10/2002 she was involved in sexual intercourse with the accused from her own house. She was alerted about the act by her neighbour. As she was trying to arrest the accused he fled through the window leaving behind his clothes, a pair of slippers and a condom. The victim also fled from the house.

Kiiza Lydia (PW2) who was the victim testified that she was 16 years old and that on the fateful night she had sexual intercourse with the accused from their home. In the process their neighbour called Kiiza alerted her mother who stormed the house but found that the accused had escaped from the window. Because of fear she also fled and slept at their neighbour's home. The following day she left for Ishasha P.7 school where she was studying. Her

mother followed her there and took her to Ishasha Police Post where she made her statement. She concluded that she had sexual intercourse with the accused many times.

Gloria Kafokuheka (PW3) told court that she was in the same room during the time the accused and the victim were having sexual intercourse. There was also evidence of Kakwateki (PW5) who led evidence on the medical examination report by the late Dr Sebudde. In that report the age of the victim had been placed at 12 years during the time of the alleged incident.

The accused made a sworn defence in which he admitted having sexual intercourse with the victim claiming that she was his wife. The defence disputed the age of the victim as being below 18 years.

As far as the ingredients of the offence are concerned, it was conceded that the act of sexual intercourse and participation of the accused was proved beyond reasonable doubt. I do agree. Apart from the fact that the accused did concede to the above

ingredients, there was overwhelming evidence from the prosecution witnesses. PW1 who was the victim's mother testified that on the fateful day she was alerted by Kiiza who was their neighbour that the accused and the victim were busy having sexual intercourse in one of the rooms from her house. She rushed to the scene but found that the two had narrowly escaped. In such a hurry the accused could not pick his clothes, condom and a pair of slippers. The victim's aunt (PW3) told court that she was in the same room where the accused and the victim were having sexual intercourse. The victim herself (PW2) confirmed that on the fateful day she met the accused who proposed an appointment with her for sexual intercourse. She agreed and at about midnight the accused joined her in her own bedroom where they had sexual intercourse until they were interrupted by her mother. Both of them fled the scene in disarray.

The above pieces of evidence were ably corroborated by medical examination which did establish the act of sexual intercourse and the concession by the accused that he did participate in the act of sexual intercourse.

The only contested ingredient was the age of the victim. The defence was that the victim was his wife and that she was above 18 years at the time of the sexual intercourse. The victim and her mother testified that the girl victim was 16 years old. The medical doctor who examined the victim 3/12/2002 estimated her age at 12 years.

The best way of proving age of a child is by producing a duly certified birth certificate compiled with evidence of identification. But in the absence of birth certificate, age can be proved by any admissible evidence: In **R Vs Cox [1898] 1 QB 179**, the court relied on the evidence of persons who had seen the child and the headmistress of the school at which her eldest sister attended, to determine her age.

Age may also be proved by medical evidence. In **Emuroni Francis Vs Uganda; Court of Appeal Criminal Appeal No. 2 of 2000** it was held inter alia that in defilement cases, medical evidence is paramount in determining the age of the victim and

that the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence like birth certificate etc. In **R Vs Recorder of Grimsby Exparte Purser [1951] 2 ALL ER 889** it was further held that age can be determined by observation and common sense. In fact when it is more than obvious to everybody that the victim is under 18 years at the time of the offence there is always no difficulty arising. It is only where the victim's appearance is not sufficient to satisfy the court and the assessors that some kind of evidence must be given: See **R Vs Turner [1910] 1 K.B 346.**

In this case the victim testified that she was currently 16 years old. The victim's mother also confirmed that the victim was 16 years old although she stated that she did not know the year the victim was born. She testified that the victim was her 13th child and that her 10th child was born in 1980. If one is to be conservative and find that the witness was producing after one year that would put the victim's year of birth at 1986. That would mean that she was 16 years at the time of the sexual intercourse.

Considering the above evidence together with the medical evidence and the fact that the victim was still in primary it is more probable that she was still below the age of 18 years. My observation and common sense did convince me that the victim was still below age according to the way she was answering questions posed to her in court.

For the above reasons I do not agree with both assessors that the prosecution did not prove the age of the victim as being below 18 years. There was sufficient evidence, which proved that the victim was below 18 years. That meant that the sexual intercourse which the accused had with the victim under the pretext of marriage was unlawful. The victim was not capable of consenting to the sexual intercourse nor the alleged marriage in view of her under age. The second ingredient was accordingly proved beyond all reasonable doubt.

As to the participation of the accused, the prosecution contended that it was the accused who had unlawful sexual intercourse with the victim. The accused in his sworn defence relied on total

defence. He stated that the victim was his wife with whom he had stayed for two years.

It is clear from the victim's evidence that she was not yet married to the accused by any definition. The victim was still a school pupil. She was sleeping in the same house with her mother and other children. It was the accused who convinced her and she surprisingly agree to host him in her mother's house, where they had sexual intercourse.

For the above reasons I find that the prosecution has proved all the ingredients of this offence beyond all reasonable doubt.

Both assessors were of the opinion that the age of the victim had not been proved in that they were of the same age brackets. Much as it is true that they were in the same age brackets, the victim's age was still below 18 years old. And since she had sexual intercourse with the accused, the offence of defilement was complete.

In the end I find that the prosecution has proved this case beyond all reasonable doubt and convict the accused as charged.

RUBBY AWERI OPIO

JUDGE

12/9/2005.

15/9/2005:-

Accused present.

Twinomuhwezi for the state.

Ndimbirwe present for the accused on state brief.

Judgment read in open court.

Twinomuhwezi:-

There is no previous record of the accused. Convict is charged with a very serious offence with maximum of death sentence. The convict has been on remand since December 2002. We pray for an appropriate sentence.

Ndimbirwe:-

The convict is a young man who naively attempted to contract marriage, which was against the law. I pray court to take into consideration the childish association. He has no previous record. Let court consider the remand period. We pray for leniency.

SENTENCE:-

This is a very serious offence which entails maximum of death sentence. This is a simple case where the accused should have been remorseful. The accused desecrated the house of the victim's mother by having unlawful sexual intercourse in her house. That was very abominable.

The girl victim was also to blame for inviting the convict to her mother's house. Apparently she was a borderline case.

For the above reasons the convict is sentenced to three years imprisonment for wasting the time of court. That sentence takes consideration of the period he spent on remand.

Right of appeal explained.

RUBBY AWERI OPIO

JUDGE

15/9/2005.