THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0035 OF 2004

UGANDA :: PROSECUTOR

VERSUS

KITAMBALE DAN :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused in this case is called Kitambale Dan. He was indicted on a charge of defilement contrary to section 129 (1) of the Penal Code Act. The particulars alleged that the accused on 12th day of January 2003 at Kisharara village in Rukungiri District, had unlawful sexual intercourse with Boonabana Oliver, 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 set in issue all the essential elements in the offence charged. That meant that each and every ingredient in the offence charged had to be proved beyond reasonable doubt for a meaningful conviction to be secured against the accused. The essential elements requiring proof beyond reasonable doubt in the offence of defilement are:-

(1) That the victim was below 18 years by the time of the alleged offence;
(2) That the victim experienced unlawful sexual intercourse;
(3) That the accused participated in the unlawful sexual intercourse: See **Bassita Hussain Vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995.**

The law places the burden of proving the above ingredients on the prosecution. An accused does not bear the duty of proving his innocence. He is innocent until proved guilty or until he has pleaded guilty. A case in point is **Oketcho Richard Vs Uganda, Supreme Court Criminal Appeal No. 26 of 1995** (unreported).

In a bid to discharge that burden of proof placed on it by law, the prosecution called the evidence of three witnesses: Boonabana Oliver (PW1) who was the girl victim; Atukunda Viola (PW2) who was the victim's aunt and to whom the victim made the first complaint and Rugaba Ezra (PW3) who was the Defence Secretary who arrested the accused and handed him to the police officers. The prosecution further relied on police form 3 and its appendix where the victim was examined by Dr Busubwa of Nyakibale Hospital.

The accused made a sworn defence where he relied on defence of total denial and stated that he was framed.

In regard to the first ingredient whether the girl victim was below 18 years during the time of the alleged offence, the prosecution relied on the evidence of Dr Busubwa of Nyakibale Hospital. The evidence was admitted during the preliminary hearing under section 66 of the Trial on indictments Act. The Doctor established that the victim was 11 years old at the time of the alleged

offence. It is trite law that once a fact or document is admitted or agreed upon in a memorandum filed under section 66 of the Trial on indictments Act, it is deemed to be proved: **Abasi Kanyike Vs Uganda; Supreme Court Criminal Appeal No. 34/1989** (unreported) is a case in point.

The victim was herself before court and told court that she was 13 years old. She testified after a voire dire. She appeared to be visibly young. The defence did concede that she was below 18 years old. There was therefore overwhelming evidence that the victim was a girl below 18 years old.

In regard to the second ingredient whether the girl victim did experience sexual Intercourse, the prosecution relied on the evidence of Dr Busubwa who had examined the victim and found that there was penetration. Her hymen had raptured a few days ago. She also had inflammations around her private parts. The victim on her part testified that she was forced into sexual intercourse whereupon she felt a lot of pain and she cried. She reported the incident immediately to her aunt (PW2). The medical evidence and the evidence of the victim clearly proved

beyond all reasonable doubt that the victim did have penetrative sexual intercourse. The victim was emphatic that on the fateful day she was at their home when her assailant grabbed her and removed her trousers and placed her on the bed and had sexual intercourse with her. Her evidence was corroborated by the medical evidence and the testimony of Atukunda Viola (PW2), which highlighted the victims distressed conditions that she felt paid and cried. It is therefore my conclusion that this ingredient has also been proved to the required standard.

As for the participation of the accused the prosecution relied on the victim's evidence PW1 and that of her aunt (PW2). The victim testified inter alia that on the fateful day she was alone in the sitting room because her aunt Atukunda Viola (PW2) had gone to escort someone. The accused entered the house and started checking things from the bedroom where he was not allowed to enter as he was a mere porter. The accused could not tell her what he was looking for. She went to find out for herself. In the process the accused closed the door, grabbed her and removed her trousers and knickers and had sexual intercourse with her on

the bed. She felt a lot of pain and cried until her aunt (PW2) came and found her still crying in the sitting room whereupon she reported to her what the accused had done to her.

Atukunda Viola (PW2) testified that on the fateful day she left the victim at their grandmother's place and went somewhere. She came back at 5.00p.m. and found the victim in the sitting room crying. The victim told her that the accused had had sexual intercourse with her forcefully. She went to the bedroom and found the accused under the bed. She later informed their uncle one Aine who together with Rugaba Ezra (PW3) arrested the accused and took him to Buyanja Police Post.

Against that evidence the accused made a sworn defence in which he denied the offence and stated that he was framed by Atukunda Viola because she had refused to pay his salary which was given to her by her grandmother.

In the instant case the prosecution relied on the direct evidence from the victim to implicate the accused. The offence took place

during broad daylight. Moreover the accused was well known to the victim. He was their porter. According to Atukunda Viola (PW2) the victim reported to her immediately that the accused had had sexual intercourse with her, she testified that she found the victim crying from the sitting room. She proceeded to the bedroom where he found the accused hiding under the bed in the bedroom. PW2 also knew the accused very well.

Both witnesses could not have been mistaken on the identity of the accused. The defence of total denial could not arise. The offence took place during broad daylight and it was face to face. The accused could have taken advantage of the absence of the victim's grandmother who had gone to Kampala for treatment and the temporary absence of Atukunda Viola who had gone to her father's home. The accused was the only person who was with the victim. That fact he did not deny. It was that opportunity which he utilized to have this unlawful sexual intercourse with the victim. There was therefore satisfactory evidence of identification to prove that the accused was the one who had committed the offence. So in agreement with both assessors I find that the

prosecution have proved its case against the accused beyond reasonable doubt. The accused is therefore found guilty and convicted accordingly.

RUBBY AWERI OPIO

JUDGE

31/8/2005.

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. He is first offender. This offence is serious. The convict subjected the victim in sexual intercourse at an early age. He has been in custody since 2003. We pray for deterrent sentence.

Ndimbirwe:-

The convict is first offender. He is capable of reforming. He regrets the same. He prays for leniency. He is still young. Let

him not be sentenced for life. We pray for an appropriate sentence considering the time he has spent in custody.

SENTENCE:-

This is a very serious offence which carries maximum of death sentence. The offence is on the increase and has attracted public outcry. The convict introduced a very young girl of 11 years into sexual intercourse. The convict breached the trust the family had on him of giving him a job. For the above reasons this court will take a very serious view of the offence.

However this court will take consideration that the convict is first offender. He is young and can still reform. He has spent about two years in custody. Considering all those factors the convict is sentenced to 8 (eight) years imprisonment. The sentence takes consideration of the fact that he has been in custody since 2003. Otherwise he would have deserved 12 years in custody.

Right of Appeal explained.

RUBBY AWERI OPIO

JUDGE

14/9/2005.