REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA
CASE NO HCT- 03-CR-SC-0316/10

UGANDA……PROSECUTOR

VERSUS

NSIYALETA MUSA…….ACCUSED

BEFORE HON. LADY JUSTICE FAITH MWONDHA

JUDGMENT

The accused was indicted on a charge of aggravated defilement C/S 129 (3) 4 (a) of the Penal Code Act. The particulars as alleged by the prosecution were that the accused Nsiyaleta Musa alias Moses on the 21/08/2008 at Namwendwa Trading Centre in Kamuli District had unlawful sexual intercourse with Kantono Esther a girl under 14 years of age.

The prosecution like in all criminal cases has always the burden to prove its case beyond reasonable doubt in order to bring the guilt of the accused person home. ***See Sekitoleko v. Uganda [1967] EA 531***. The conviction is only based on the strength of the prosecution case but not on the weakness of the defense; see ***Ntura v. Uganda 1977 HCB 103***. The accused has no obligation to prove his innocence.

In this offence the prosecution has to prove the following ingredients beyond reasonable doubt;

1. That the victim was below 14 years of age
2. That she experienced unlawful sexual intercourse
3. That the accuse participated in the unlawful sexual intercourse

The prosecution led evidence of three witnesses to prove its case. The first was the victim herself. She gave her evidence on oath after a voire dire had been conducted. I was satisfied that the victim possessed sufficient intelligence to understand the nature of oath so she gave a sworn statement. She stated as far as ingredient one was concerned, that she was 12 years. PW2, the doctor who examined her also said that he examined her when she was taken to him. That at that time in 2008, the victim was at the apparent age of nine years. PW3 was the mother of PW1; she

testified that she gave birth to her on 16th April, 1998. I was satisfied that this ingredient was proved.

On the second ingredient, PW1 testified that on the 31st August, 2008, she was at her home at around 9:00am. That the accused called her to go and get change for him. That she went and the accused gave her the money i.e. 1000/=. That when she brought the money he held her by her hand and took her to his room. That he told her to lie on his bed and she did. That he removed her knickers and had sexual intercourse. That he had removed his trouser. That he inserted his penis in her vagina. That she cried because she feared that many people would her. Hat she had stomach pains. She stated that he did that when her parents had gone to dig.

PW2 the medical doctor testified that he received PF3 and its appendix in which the police forwarded one Kantono Esther the victim of defilement. He said that he found bruises and inflammations on the hymen which was not ruptured and around her private parts. That these injuries were consistent with force having been used sexually and they were at the entrance of the vagina. There was no injury on the elbow and the victim was not strong enough to resist the defilement because of the age (9 years). He said the injuries were recent. He said there were no signs of vaginal discharge but it was too early to establish that. The PF3 and its appendix were tendered and marked as EXP1 accordingly. He said that the bruises found led to slight penetration and because the victim was young he could not enter. The injuries were less than three weeks and that was recent. That even if the examination was carried out two weeks still the inflammation would be found out.

PW3 also testified that when her neighbor told her that Esther Kantono went in the accused's house, and she suspected that the accused had sexual intercourse with her, She reported to her husband and they called the victim. That when she was asked she admitted telling them that the accused called her in his room. That he took her there on his bed and he had sex with her. That the husband called the accused and on asking him, he admitted having done so. She stated that they reported the matter to police and thereafter the victim was examined in Kamuli hospital. I was satisfied that this ingredient was proved too.

On the third ingredient of participation there was evidence of PW1 herself. She stated that the accused who was a tenant in one of the rooms in their home at 9:00am called her in his room

purporting to send her to get change (money). That her parents had gone to dig in the garden. That when she brought the change the accused held her hand and took her on his bed, removed her knickers, he had removed his trouser and had sex with her. The accused was well known to the victim having been a tenant at her parent's house and the offence was committed in broad day light. The accused in his defense much as he tried to deny in an unsworn statement, he said he knew the victim. He tried to raise the defense of alibi when he stated that he went to dig at 6:30am and came back at 4pm. He contradicted himself and stated again that at 8:00am the children were at home where he also resided and they were writing. That the victim asked him for money to buy a pen and even other tenants were there. That the parents of the victim had gone to dig. That the victim brought money (balance) in the house. That when one of the tenants saw the victim came out of his room she asked him what the victim had gone to do in his house. That he answered her that the victim had bought a pencil. That after one week he was arrested. He said he was a tenant at the houses of the father of the victim.

In the case of ***Hussein Bassita v. Uganda Cr. Appeal No 35/95,*** the Supreme Court held that the act of sexual intercourse or penetration maybe proved without the victim's evidence or medical evidence so long as whatever the prosecution may wish to adduce to prove its case is cogent. In the instant case there was overwhelming evidence adduced by PW1 about the act i.e. how the accused had sex with her. It was in broad day light and she knew him earlier, there was ample corroboration including the medical evidence which was very consistent with what the victim testified. There was no doubt whatsoever in my mind that it must have been the accused that had unlawful sexual intercourse with the victim. The alibi had long been perforated by the prosecution evidence of PW1 and PW3 as already stated above. The defense of the accused crashed the defense of alibi finally too and he was squarely put at the scene of crime and there was no other inference other than that of the accused being guilty. His denials were empty and could not shake or cast doubt on the prosecution case. It was also held in the case of ***Mujuni Apollo v. Uganda Cr App No 26/99*** **as follows,**

"its well established that in a sexual offence the slightest penetration will be sufficient to constitute the offence. The hymen need not be touched let alone injured." The court of Appeal citing the case of ***Rivell [1950] Cr App R.87*** Matheson 42 re asserted its stand by holding that the

court can even convict without medical evidence as long as there is strong direct evidence or when the circumstances of the offence are so compelling as to leave no ground for reasonable doubt."

In the instant case the prosecution led very strong evidence that there was no doubt the accused committed the unlawful sexual intercourse. His defense could not shake and or challenge as to cast doubt on the prosecution case.

The assessors in their joint opinion advised me to convict the accused person and find him guilty as charged. They were satisfied that the prosecution had proved its case beyond reasonable doubt. I agreed with the assessors for the reasons as already given in this judgment.

Accordingly I find that the prosecution proved its case beyond reasonable doubt and the accused is found guilty and convicted forthwith as charged.

Faith Mwondha

Judge

7/09/10

Previous record- Nil

But he has been on remand for one year and 10 months. However this offence the convict has been convicted carries a maximum of death sentence. He defiled a very small girl. The age difference is very big. The victim could not even understand the impact. Some day in future she will know. Also because of the act of the convict, the parents suffered psychological torture. Cases of defilement are currently on the rise so there is need to have deterrent sentences. It's clear that the convict know that he committed the offence he led court through a whole trial. For the above I pray that the court imposes a harsh deterring sentence. So I pray.

Allocutus

The convict has been on remand for two years and one month. He's a first offender. He's 50 years and going to his advanced age. If a deterring sentence is imposed he can't be able to go home and participate in the development of this country. We pray for a lenient sentence.

Court

The convict is a first offender, but the offence he committed carries a maximum sentence of death. He has been in prison for two years and one moth. The circumstances in which he committed the offence are so grave because he was a tenant in the houses owned by the victim's parents. There was no respect for such a small child to introduce her to such stigma. The offence of defilement is so rampant in this country and also in Kamuli where the victim and the accused hail from. I shall pass a deterring sentence. The convict is sentenced to 25 years imprisonment.
RA explained.

Faith Mwondha

Judge

7.09.2010