

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO

CRIMINAL SESSION CASE NO. 0097 OF 2010

UGANDA ::: PROSECUTOR

VERSUS

MAGIDU OTHIENO ::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The accused person was indicted for defilement contrary to **Section 129 (1) of the Penal Code Act**. The particulars of the offence alleged that on 27th January 2007 at Kikwanya village in Mukono District he had unlawful sexual intercourse with Busikwa Deborah, a girl under 18 years of age.

When the accused was arraigned he pleaded not guilty to the indictment. Consequently the burden of proving his guilt beyond reasonable doubt would rest upon the prosecution and it does not shift to the accused except in some rare cases while the Statute provides otherwise: See **Woolmington v DP {1935} AC 402**. The above obligation is from the fundamental principle that every accused person is presumed innocent until proved guilty or until he has pleaded guilty to the charge. The above principle was entrenched in Article 28 (3) (a) of the 1995 Constitution of the Republic of Uganda. It is also the law of this country that a conviction should not be based on the weakness of the case as put

up by defence but it must be based on the strength of the prosecution case: See **Uganda v Oloya S. O. Yovan Oneka {1977} HCB4.**

In order for the prosecution to secure a conviction for defilement under **Section 129 (8) of the Penal Code Act** it must prove beyond reasonable doubt, the following ingredients:-

- (1) That the victim was a girl below 18 years old.
- (2) That the victim experienced sexual intercourse.
- (3) That the accused participated in the sexual intercourse: See **No.0875 PTE. WEPUKHULU NYUGULI vs Uganda, Supreme Court Criminal Appeal No. 21 of 2010 (Unreported).**

With regard to the age of the victim, it is trite law that age of the victim can be determined by medical evidence and other cogent evidence. In **Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** it was held inter alia, that in defilement case, 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. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. Observation and common sense are relevant in cases where it is too obvious to everybody that the victim is a person below age by mere observation and common sense. It is only in circumstances where the victim's appearance may not be sufficient to satisfy court and assessors by her under age posing difficulty requiring that some kind of evidence should be adduced. See **R v TURNER {1910} 1 KB 346.**

In that instant case the prosecution relied on the medical examination report which was admitted during the preliminary hearing under **Section 66 of the Trials on Indictment Act**. The victim was examined on 6/3/2007 by Dr. Katende of Jinja Hospital where her age was established to be 8 years during the time of the alleged incident.

The prosecution also relied on the evidence of Wekola Peter (Pw₁) who was the biological father of the victim who testified that the victim was now 11 years old meaning that in 2007 she was 8 years old. The victim Busikwa Deborah testified that she was 11 years old. She gave her evidence after voir dire. The above evidence clearly shows that the victim was a girl below 18 years old. For the above reasons I do agree with the unanimous decision of the assessor that the age of the victim has been proved beyond reasonable doubt as required by law.

As to whether the victim experienced sexual intercourse, the law provides that sexual intercourse must be formed by penetration however slight it may be: See **Basita Hussein v Uganda, Criminal Appeal No. 35 of 1995**.

Proof of penetration is normally established by medical evidence, the victim's evidence and any other cogent evidence: See **REMIGIOUS KIWANUKA v UGANDA, Supreme Court, Criminal Appeal No. 41 of 1995 (Unreported)**.

Any other cogent evidence may include testimonies from other reliable witnesses and circumstances surrounding the offence like conduct of the accused and distressed condition of the victim.

The prosecution led evidence through two witnesses: Busikwa Deborah Pw₂, the victim of defilement told court that on the material date at 1.00 p.m. she was

cooking at Fina's place with a one Ololomo. The accused decided to send Ololomo away to buy for him cigarettes. It was at that time when the accused pulled her and took her to Bisona's cassava garden, laid her down, removed her knickers put his penis in her vagina and had sex with her. That when she bled the accused left her. The above evidence was corroborated by that of Peter Wekhola the victim's father. He testified that he got information from Mrs. Akamanda that his daughter had been defiled by the accused. He reported the matter to the Local Council Chairman who gave him a letter of introduction to the Police. The Police gave him PF3 to refer the victim to Jinja Hospital for medical examination. The medical examination was done by Dr. Katende and it was admitted during preliminary hearing under **Section 66 of the Trial on Indictment Act**. The report confirms that the victim had been defiled since her hymen had ruptured two days ago. The defence also conceded that there was proof of penetration and that sexual intercourse had been established.

From the above pieces of evidence I do agree with the prosecution and the concession of the defence that there was overwhelming evidence to establish that the victim had experienced sexual intercourse.

It was the participation of the accused which was contested. It is trite law that evidence of the victim is the best evidence of identification: See **BADRU MWINDI v UGANDA, Court of Appeal, Criminal Appeal No. 1 of 1997 (Unreported)**.

In her evidence Pw₂ Busikwa Deborah who was the victim testified that she knew the accused very well as he was staying at Fina's place which was neighbouring their home. She stated that on 22/2/2007 at around 10.00 a.m. while she was cooking food at Fina's place with Ololowo, the accused sent Ololowo to buy for him cigarettes and it was at that time that the accused pulled

her and took her to Bisonia's cassava plantation lay her down, removed her knickers put his penis in her vagina had sex with her. She stated that when blood came the accused left her and she went back home. Later she related the story to Mama Fina because that time her father was away.

The accused made an affirmed defence of total denial and Alibi. He stated that on the material date he was in his garden digging. When he went back home he got arrested from the Trading Centre by LC I Chairman who told him that he had defiled Wamono's daughter. He claimed that Wamono could have framed him because of a grudge he had, after failing to buy a Kibanja from his younger brother.

After looking at the victim's evidence I do get difficulties in believing the defence of the accused. In the 1st place this offence took place during broad day light at 10.00 a.m. The victim knew the accused. The victim was emphatic that the accused took advantage by first sending away Ololomo to go and buy for him cigarettes before he pulled her quickly to the bush when he had sex with her from Bisonia's cassava plantation. The victim's evidence was corroborated by that of Wekola Peter Pw₁ who testified that he was informed by Mrs. Akamanda (Mama Fina) that the accused had defiled the victim. Peter Wekola also testified that before his arrest the accused attempted to run away but was pursued and arrested. That conduct was not of an innocent person and it did corroborate the victim's evidence that it was the accused who was responsible for the crime. For the above reasons, I find that the prosecution has proved all

the ingredients against the accused beyond reasonable doubt and find him guilty as charged and convict him accordingly.

**HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE**

29/10/2010

29/10/2010

Accused present.

Masinde for the State.

Senkumba holding brief for the defence.

Judgment read in Open Court.

**HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE**

29/10/2010

Masinde: No previous conviction. However I pray for a deterrent sentence for exposing the victim to sexual intercourse at such an early age. The offence is very common in Mukono. He should serve as an example.

Senkumba: In mitigation he has spent 4 years on remand. He is very remorseful. He has learnt his lesson. He has a family at home. I pray for a lenient sentence. I do pray.

Allocatus: I pray leniency so that I goback home. That is all.

SENTENCE

This is a very serious offence. The accused ravished a girl who was only 8 years old. By then he was 30 years old and therefore he was old enough to be the father of the victim. He exposed her to the risk of HIV. He is claiming to be a family man. However he should have known that the law does not allow him to go with a girl below 18 years more especially a girl of only 8 years. The victim stands traumatized for the rest of her life having been introduced to sexual intercourse at such an early age. I would consider the fact that he has been in remand for 4 years. He is also 1st offender. For those reasons the accused is sentenced to seventeen years imprisonment.

Rights of Appeal explained.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

29/10/2010