THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

SESSION CASE NO. 0074 OF 2010

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

=VERSUS=

ANYOLITHO ROBERT :::::::::::::::::::: ACCUSED

JUDGMENT

BEFORE HON. LAMECK .N. MUKASA

Representation

Ms Adubango Harriet (RSA) for State

Mr. Madira Jimmy for Accused

Assessors

1. Mr. Awudele Robert

2. Mr. Abiriga James

Court Clerk

Ms. Andezu Joyce

The accused, Anyolitho Robert is indicted for aggravated defilement contrary to section 129 (3) and (4) (a) of Penal Code Act. The particulars are that the offence are that the accused in the month of November 2008 at Ambali village, Kaya parish, Paidha sub county, Nebbi district had unlawful canvial knowledge or performed a sexual act with Anyonga Daisy a girl of 12 years of age.

In all criminal cases an accused person is presumed innocent until proved or pleads guilt. See article 28(3) (a) of the constitution of the Republic of Uganda. The burden of proof rests upon the prosecution throughout the trial, to prove both the charge and the ingredients thereof beyond reasonable doubt. This burden does not swift to the accused. See Woolington =Vs= DPP [1935] AC 462, Okeletho Richard =Vs= Uganda SC Crim. Appeal No. 26 of 1995.

In an offence aggravated defilement contrary to section 129 (3) and (4) (c) of the penal Code Act the following ingredients must be proved to the required standard:-

a) Sexual intercourse with the victim.
b) The victim was below 18 years of age at the time of the sexual intercourse.
c) Participation of the accused in the sexual intercourse.
d) That the accused was a person in authority over the victim.

The prosecution adduced the evidence of Okello Nicoles (PW1), Senior medical clinical officer Nebbi Hospital, Anyonga Daisy (PW2), mother of the victim, the accused relied on his unsworn statement in defence.

The defence did not contest the age of the victim. In her testimony Anyonga Daisy (PW2) stated that she had subjected to sexual intercourse twice in the year 2008 and once in 2009. Anyonga stated in her evidence that in 2008 she was 14 years old. Her mother Mone Irene stated that Anyonga was born in 1995. I had the opportunity to look at the girl at the time of her testimony and she visibly appeared below 18 years of age. See **Rev. Rwodu of Grimisloy Exparte =Vs= Pulses [1951] 2 ALLER 884** I therefore find the ingredient of age proved beyond reasonable doubt.

The second ingredient is whether at such tender age the victim was engaged in sexual intercourse. The law with regard to prove of sexual intercourse was stated by the Supreme Court in **Basita Hussen =Vs= Uganda SC Crim. Appeal** this:

> *"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victim's own evidence and corroborated by medical or other evidence. Though desirable it is not a most and first rate that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration.....whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".*

Anyonga testified that the accused started using her in 2008, first time and continued upto 2009.

That he had sexual intercourse with her two times in 2008 and once in 2009. Explaining how it all happened she stated:

> *".....I was sleeping in the house of my other paternal uncle called Selsi. I was sleeping alone in that house..... The accused was staying in his own house.....with his wife and his two children.....One day he brought his biscycle in the house, then I realized that he was sitting on me. I asked who it was. He answered that 'it is me keep quiet'. I made an alarm. He told me not to shout and he went out of the house..... The next day he came again at night. He find when I was sleeping. I woke up when he was lying on me. He wetted my bed sheets. He had sexual intercourse with me. He inserted his penis in my vagina. I made an alarm and he left using me, that if I ever reported the matter lightening will strike me.....*
>
> *I left that house and moved to the kitchen. He again followed me there. He continued to have sexual intercourse with me. He had sexual intercourse with me three times. I did not tell anybody because he had already cursed me".*

In **Chila & Ano. =Vs= R [1967] EA 722** it was held:

The law in East Africa on corroboration on sexual cases as follows:

> *"The Judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complaint, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, the conviction will normally be set aside unless the court is satisfied that there has been no failure of justice".*

I so warned the assessors as I do also caution myself.

The prosecution relied on the medical finding by PW1 Okello Nicholas for corroboration of sexual intercourse. His examination, done 16th February 2010, revealed that the hymen had been raptured and according to history as given in November 2008. The witness recorded his as PF3 (Exhibit P1A) and its appendix (Exhibit P1B). In his cross- examination the medical clinical officer stated that the rapture was long age. Mr. Madira, for the accused argued that the medical report findings should not be relied in corroborated of sex the victim's evidence as to sexual intercourse committed in 2008 or 2009 since the examination was conducted two years after .i.e. in 2010. He argued that the rapture discovered by the medical officer could have been caused by factors other than sexual intercourse. He further argued that had there been sexual intercourse in 2008 and 2009 the victim should have told her mother on the several times she visited her while at the accused's residence. Counsel authored that the hymen could not have remained the same from 2008 up to 2010. If I understood counsel well, his argument is that the hymen could have raptured outside the time of sexual intercourse in issue.

The medical officer both on the report and in his oral testimony before court he shows that the rapture was older than 2010. I observed the victim in the course of her testimony. She appeared withdrawn. However withstood the vigorous cross-examination by the defence counsel and was consistent in her testimony. She impressed me as truthful. She explained that she had not any sexual intercourse with any body else.

That it was the accused who introduced her to sexual intercourse. That she could not tell anybody about what she was going through because of what she ..... That if she told any body she would be struck by lightening. She testified, further cross-examination, that she would feel pain after sexual intercourse. She bled on the first encounter and had a lot of pain. That on the subsequent accessions the pain decreased. That she would not tell any body, not even her teachers. But that when in 2010 she refused to go back to school and revealed the ordeal and was not struck by lightening she gained courage to talk about the incidents. In Aban Kibago =Vs= Uganda [1965] EA 507 the Court of Appeal upheld the trial judge's finding that in sexual offences the distressed condition of the complaint is capable of amounting to corroboration of the complainant's evidence depending upon the circumstances and the evidence.

I careful observed the young girl as she gave her testimony and I find her evidence truthful. I am prepared to rely on it even without corroboration. I however find corroboration in the medical evidence and in her distressed state as testified about by her and exhibited in the course of her and exhibited in the course of her testimony. In the circumstances I find that the prosecution has proved beyond reasonable doubt the ingredient of sexual intercourse.

The next ingredient is whether it was the accused who had the unlawful sexual intercourse with Anyango Daisy. The prosecution evidence on this ingredient is that of the victim, PW2. in her evidence, as already outlined above, she states that it was her paternal uncle the accused who had sexual intercourse with her.

In his unsworn statement the accused, interalia stated;

> *"I do not know why I was arrested. I was not told the offence I had committed"*

He in effected denied having committed the offence.

With regard to identification by a single witness it was held in **Adbulla bin wendo & Ano. =Vs= R [1953] 20 EACA 186** that:

> *"The testimony of a single witness regarding identification must be tested with the greatest care. The need for caution is even greater where it is .....that the conditions favouring correct identification were difficult. What is needed before convicting is other evidence pointing to the state of the accused".*

The test here is whether the evidence of the single identifying witness can be accessed as free from the possibility of error and whether it is truthful. The guideline to follow were extensively discussed by the Supreme Court in **Bogere Moos & Anor =Vs= Uganda SC Crim. Appeal No. 1 of 1997.** It was held:

> *"The starting point is that court ought to satisfy itself from the evidence whether the auditors under which the identification is claimed to have been made were or were not difficult and warn itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or upheld a conviction, unless it is satisfied that mistaken identity is ruled out. In do doing the court must consider the evidence as a while, namely the evidence, if any, or the factors favouring correct identification together with those rendering it difficult. It is trite law*

that no piece of evidence should be weighed except in relation to all the rest of the evidence".

Such factors to consider are set out in **Nabubere & Ano. =Vs= Uganda [1979] HCB 77.**

The first factor is visibility – whether there was light. It is Anyango's testimony that she used to sleep alone in the louse and later in the kitchen. That she would sleep in darkness as they were not providing her with a lamp, not even a local lamp. That would not even dare go out in the darkness but remain in her bed throughout the light. It is also had testimony that all three incidents were at night and the assaulter would find her a sleep. That while going to sleep she would lock or bolt the door with a nail and the accused had his way of moving the nail and open the door. Mr. Madira submitted, and I agree, that such conditions were not favourable for correct identification of the assailant.

However, I have to consider other factors. The second is where the witness knew the accused before or he was a complete stranger. It is the victim, her mother and the accused's evidence that the accused was the victim's paternal uncle. That the victim was staying and under the same homestead with the accused throughout 2008 and 2009. Therefore the accused was not a stranger to the victim.

The third factor is whether the witness had sufficient time to look at the accused or whether she only had a sleeping glance. Anyango testifies the accused would come when she would realize that there is somebody on her she would wakeup. She would wake up due to the weight on her. That the accused would speak to her warning her not to shout, not to tell anybody and

threatening her that if she told anybody she would be stuck by lightening. She testified that on the course of him talking to her she would recognize his voice. That is evidence that the accused would spend time with her and talk to her. For a period of two years it is evident that she was familiar with the accused's voice.

The other factor is closeness of the witness to the accused at the time of commission of the offence. It is a fact that there must be body to body contact of the participants in sexual intercourse. So the fact of closeness is undisputable. First occasion she realized when the accused was on her. On the other occasion when the accused was lying on her.

All the above factor's put together leave no doubt as to the victim's ability to positively identify the accused. Her testimony is corroborated by her conduct as testified to by her mother that Anyonga, despite all her efforts, refused to go back to stay at the accused's home for the first term in 2010 and that it was then that she revealed what she was going through.

In his defence the accused stated that the charges were fabricated against him by the victim's mother (PW3) because he had failed to reconcile her with her husband who the accused's brother following their broken marriage. Counsel for the accused argued that this is manifested in the fact that the victim's father was not called by the prosecution as a witness. I agree with Ms. Adubango's contention that the prosecution's obligation is only to call witnesses whose evidence would be sufficient to prove its case beyond reasonable doubt. The prosecution was not required to call each and every relative of the victim or accused or both. Further PW3 was not cross-

examined about the existence of any grudge between her and the accused. In his submission Mr. Madira did concede that it raise issues of grudge in the course of the accused's defence, not cross-examined about in the close of the prosecution's case would be an afterthought. As such the accused's defence is suspect and carries little weight if any. In fact it is both PW3 and the accused's evidence that PW3 used on several accessions to visit the victim while at the accused's home. According to the accused she would stay for several days each visit. That shows the attitude PQ3 had towards the accused which the accused betrayed by his conduct towards their child, the victim.

I believe the prosecution's witness and I find that the prosecution has proved beyond reasonable doubt that the accused had unlawful sexual intercourse with Anyonga Daisy.

The last ingredient is whether the accused was a parent or guardian of or a person in authority over Anyonga Daisy, her mother Mone Irene and the accused himself that the accused is a brother to the victim's father. The accused is the victim's paternal uncle and by an African culture a parent to her. It is the evidence of the three that Anyonga was staying in the accused's homestead throughout 2008 and 2009. Therefore under his apparent care and he had authority over her. This ingredient is not contested by the defence and I find it proved beyond reasonable doubt.

In the final result I am in agreement with the opinion of the gentlemen assessors and find the accused guilty. He is accordingly convicted of aggravated defilement as indicated.

LAMECK .N. MUKASA

24/10/2011

24/10/2011

Mr. Bamulutira for state

Mr. Madira for accused

Accused present

Both assessors present

Mr. Canrach Emmanuel court clerk

Court:Judgment delivered

Mr. Bamulutira

The previous records of conviction against the victim not known. The convict has been on remand since February 2010. However the conduct of the convict was merciless and unknown to engage the victim in sexual intercourse on 3 occasions at such a tender age. He was not been remorseful since this trial started. The offence is rampant in the area and being done by people meant to protect the victims. They intended .....against the victims and abuse them. I therefore pray for a deterrent sentence to be given to the convict section 123 (c) PCA provides that a conviction the convict is liable to suffer death. I pray that he is sentenced to death.

Mr. Madira:

The convict is a young man of apparent age of 31 years. He has a family of 2 children and wife. The sole bread winner for his family. This court has discretion in passing sentence. Death sentence which is the maximum may not seem to meet the ends of justice in this case. The convict given the opportunity can be useful not only to himself but to society which he has been serving as a teacher at a low salary. I pray court exercise leniency and the accused has spent one year and eight months. There is no evidence that while on remand he has been violent. This shows he is capable of reforming. I pray for a minimum sentence that would allow him to come out immediately or slightly after so I propose 2 years.

Convict:

I left my children and wife alone and have orphans which I look after. I also have children of my brothers whom I look after.

SENTENCE

I have carefully considered the factors raised by counsel for the state as regards the protection of young children and the society against abusers of young children's right against sexual abuse.

I have also considered the mitigating factor raised by both the accused and his counsel in his favour. I also mindful of the period the convict has remained on remand.

The convict was a parent to the victim. He abused the protection the victim expected from him and turned against her. He introduced her to sexual immorality and for his selfish interest chose this young girl to stay alone in a house so as to gain free access to her. This was also had effect on her was further brutality towards her.
The accused's conduct and acts have visibly affected the girl throughout her life. I actually remand that she should availed counseling services.

The convict further abused to trust in him to care for the victim by his own brother.

Further the convict is a teacher and as such had double responsibility as a clan parent and also as a custodian of young children in his profession as a teacher.

Society and mainly children should be protected from people such as the convict. In the premises the convict is sentenced to eighteen (18) years of imprisonment from this date of conviction.

The convict has a right of appeal against conviction on sentence or both.

LAMECK .N. MUKASA

JUDGE

24/10/2011