THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CR-SC-0088 – 2010

UGANDA.....PROSECUTOR

VERSUS

KAGORO DEO.....ACCUSED

JUDGMENT

The accused person stand indicted for Aggravated Defilement Contrary to Section 129 (3) and (4) (a) of the Penal Code Act. It is alleged that he on the 18/12/2009 at Kanyamukale village in Kabarole District performed a sexual act with Mukikuru Asia, (victim) when she was 2 ½ years (two and half years only).

The accused on his part gave evidence on oath and denied the offence. He set up a defence of alibi and raised alibi a possibility of a grudge with victim's mother who wanted to cheat him of his UGX 240,000/= which he had kept with her.

The burden of proof is upon the prosecution to prove the case against the accused person, who has no duty to prove himself innocent. The standard of proof is very high. It is beyond reasonable doubt.

The ingredients of Aggravated Defilement are as follows:-

a) The victim must have been below the age of 14 years at the time.
b) She must have experienced an act of sexual intercourse, penetrative in nature.
c) The accused person must have been the defiler of the victim.

At the close of the case for both sides and during submissions, the defence, and rightly so in my view conceded that, the prosecution had proved the first two ingredients beyond reasonable doubt. The mother of the victim came with the victim to court. She was clearly still a toddler, who was always being held by the mother. She said she was 2 ½ years at the time for that, he delivered her on 17/07/2007. Even the accused himself in Cross-examination told court that the victim was about 1 ½ years at the time of the alleged defilement. In my considered view the ingredient has been proved beyond reasonable doubt the evidence on the record. As to the sexual act, usually medical evidence is the best evidence if available. But we were told by PWI, that the doctor who had examined the victim Dr. Mainuka, passed away last year. No one knew his signature or handwriting including PWI. Hence no medical evidence could be adduced in that respect. However both age and sexual intercourse can be proved by other congent evidence, (**See the case of OYEKI CHARLES VS. UGANDA, UCA CR. APPL. NO. 26/99).**

In this case, we have the evidence of the victim's mother (PW2), then PW4, who first answered the alarm raised by PW3 and PW5, the L.C.I Chairman of the area. All these said they examined the victim's private parts and saw blood flowing from there. This was after PW3 had found the accused defiling the victim and she saw him putting his penis in the victim's vagina. The child was a toddler of 2 ½ years. She could not testify though she was about 5 years at the time the case was being heard. No reasonable person could expect her to recall what had happened to her when she was only 2 ½ years old.

The failure of the victim to testify has been held not to be necessarily fatal to the prosecution case, if there is other congent evidence implicating the accused. (**See the case of PATRICK AKOL VS. UGANDA S.C.U. CR. APPL. 23/92).**

In the instant case there is evidence from PW3, who found the accused defiling the victim, and the blood found by PW2, PW4 and PW5 in her private parts, must have been from injuries she had sustained during the defilement.

I found all the prosecution witnesses truthful and reliable. They impressed me as people speaking the truth. I therefore accept their evidence as correct, that they found blood in the victim's private parts caused by accused's penis when he put it in the toddler's private parts. I accordingly agree with both learned counsel that the prosecution has proved the sexual ingredient beyond reasonable doubt.

I now turn to the third and last ingredient of the offence. The alleged participation of the accused in the crime. The prosecution called a total of 5 witnesses. Out of these, PW3 told court that she had witnessed the accused defile the victim. She told court that on the material day, she was at PW2's home. That at 12.30 p.m., she was in the kitchen. She was with the victim and one Kemirembe Aisha. That at that time, the victim fell asleep and she was taken inside the house to sleep. She was put in a chair in the sitting room. Then she went back to the kitchen. After a while, she heard the child crying. She went to find out what was the matter. There she found the accused person lying on top of the victim having sex with her. That she saw the penis through his untied/opened trouser and he had put in the victim's vagina. That the victim had no knickers on her by then.

That when the accused saw her, he came off the victim and moved to another chair. Then she moved out and called PW4 and told her what she had witnessed and PW4 who also informed PW5, the L.C.I Chairman of the area who arrested the accused after he had gathered his property and run away from their home. She also informed PW2 when she returned from the Mosque.

According to PW4 while she had gone to harvest banana, she saw PW3 come running and told her that the accused had defiled the victim. She rushed there and found the victim frosting from the mouth and saw blood coming from her private parts. That she found the accused still in the house and when she asked him what he had done, he denied, but that he started gathering his possession and putting them in a " Kavera". For her she got the victim and went to report to PW5, the area L.C.I Chairman.

According to PW5, he received information from PW4, at around 2.30 p.m. she found her at home. She had come with the victim. That she told him that, it was the accused who had defiled the victim. That she told him that the accused was gathering his property and might flee. PW5 went to victim's home, but was told by the children he found there that the accused had fled the area. He pursued him and arrested him along the way. That people gathered and wanted to beat him, but he saved him and took him to police. PW2, is the mother of the victim who more or less told court what the rest of the prosecution witnesses had told court.

On the other hand, the accused swore and denied the offence. He first told court that on the material day he was in Munkura village, Ruteete, in Burahya county, away from the scene of the area. He denied the offence and that he was arrested when he had come to visit his daughter in Kanyamukale (where the offence is said to have taken place) at Rwimi. That PW5 is the one who arrested him. He also denied any knowledge of the prosecution witnesses. However, in cross-examination, he acknowledged not only knowing them but that, some of them were his relatives and that he had been with the victim's family for about one year before this incident. That the victim was a daughter to his son called Rajab Kamangara who was PW2's husband with whom he had been staying with. He blamed his problems

on PW2 whom she alleges to have been keeping his UGX 240,000/=. He thinks she wants to cheat.

I have carefully considered all the evidence on record and I have carefully and critically analysed the demeanors of the prosecution witnesses and that of the accused person. I find that, the prosecution witnesses were truthful and reliable. On the other hand I found the accused unreliable and unbelievable. All the prosecution witnesses, especially PW3 gave their evidence in a straight forward manner. The accused on his part was jumpy and shifting in the witness box. PW3, who was the eye witness, told court, calmly and candidly that on the material day while at home, the victim fell asleep and she took her to the sitting room to sleep and she went back to the kitchen. Then she heard the victim crying. She went to find out the cause and found the accused on top of the victim defiling her. She saw him put his penis in her vagina.

It was at 12.30 p.m. during day time. She knew the accused well as he used to reside in the same village and in PW2's home. She was also in PW2's home. Accused also acknowledged that he was arrested from PW2's home. In such circumstances, there was no possibility of mistaken identity on part of PW3.

Secondly PW2 said that, the accused used to stay with them and according to PW4, being informed by PW3, about the accused defiling the victim, she went and found the accused still in the house where the victim was. The accused raised a possibility of a grudge between himself and PW2 over his UGX 240,000/= which he alleges to have given to her for safe custody. But in my considered view, how can this affect the direct evidence given by PW3, who has nothing to do with the money allegedly given to PW2 by the accused? PW3, is still a young girl of 14 years, and I do not see any ground for her to frame the accused with such heinous crime. (**See the case**

of FRANCIS NYOMBI VS. UGANDA UCA CR. APPL. NO. 19/98). I dismiss this alleged grudge as a mere lie but even if it existed it did not affect PW3 direct and convening evidence implicating him in the crime. The accused had also raised an alibi that he was in Ruteete – Burahya and not at the scene, but it was destroyed by himself during cross-examination when he found that he was actually in the home of the victim at the time and he was arrested from there by PW5.

Also his reported flight from the scene soon after the incident as stated by PW3, PW4 and PW5, corroborate his participation in the crime, as such behavior is inconsistence with innocent behaviour (**See the case of REMIGIOUS IWAMUKA VS UGANDA, S.C.U. CR. APPL. 4/95).**

The assessors have advised me to find the accused guilty as the prosecution succeeded in putting the accused at the scene of the crime. After putting everything into consideration, I agree with them I find that on the evidence before me, I am satisfied beyond reasonable doubt that the accused is the one who defiled the victim on the material day and I find that the prosecution has proved all the ingredients of the offence of Defilement with Aggravation beyond reasonable doubt. I find him guilty Under Section 129 (3) 4 (a) of the Penal Code Act and I convict him accordingly.

AKIIKI – KIIZA
JUDGE
17/03/2011

17/03/2011 AT 9 P.M.
Baine for state.

Orone for accused.

Judgment read in open court.

AKIIKI – KIIZA

JUDGE

17/03/2011

Resident State Attorney: No previous record regarding the accused. I pray that he be treated as a first offender. However, conduct of the convict, in defiling innocent young grand daughter, aged 2 ½ years only, requires to be condemned in the strongest terms possible. This is a case befitting the maximum sentence. I pray that he be sentenced to death.

AKIIKI – KIIZA

JUDGE

17/03/2011

Allocutus:

Orone: The accused person has instructed me to state as follows:-

Accused is a first offender. He is 63 years old. He has been on remand since 2009. This should be put into consideration while passing the sentence.

AKIIKI – KIIZA

JUDGE

17/03/2011

Court: Sentence and reasons thereof:-

Accused is allegedly a first offender. He has been on remand for about 2 years. I take this into account while considering the sentence to impose on the accused. He has prayed for leniency. He is 63 years old. However, the accused committed a very serious offence. The maximum possible sentence upon conviction is a death penalty. This shows the gravity of the offence of Aggravated defilement. The accused in this case, defiled his own grand daughter, who was aged only 2 ½ years. This to say the least is despeakable and abominable in our African culture. Actually it was even incest on his part. He is expected to take care of the victim as he said that, the victim is the daughter of his own son Rajab. However accused decided to be anti-social and anti culture and decided to have sex with the little grand daughter. In my view the accused deserves no mercy. Putting everything into consideration I sentence the accused to life imprisonment.

Right of Appeal explained.

AKIIKI – KIIZA
JUDGE
17/03/2011