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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT TORORO

SESSION CASE NO.84/2010

UGANDA

PROSECUTION

Versus

BALISIMA JULIUS

ACCUSED

BEFORE HON. MR. JUSTICE MIKE J. CHIBITA

JUDGMENT

The offence with which Balisima is charged with is aggravated defilement c/s 129 (3) (4) (b) and (c) of the Penal Code Act. The section deals with defilement of a girl below 18 years where the offender is infected with HIV and is a parent or guardian. The offence under this section leads on conviction to death penalty being imposed.

The assessors returned a split decision.

The victim, Akongo Juliet, stated that she is 14 years old, she has a child from the alleged defilement, whom she appeared with in the witness box, and contracted HIV in the process of being defiled. There are medical records to confirm penetration, pregnancy and HIV positive status.

The ingredients for the offence of aggravated defilement are:-

- The victim was below 18 years at the time of the offence.
- There was sexual intercourse.
- The accused is or was HIV positive at the time of the offence or was a parent or guardian of the victim.

The accused participated in the offence

The parties agreed on all the three ingredients except participation of the accused upon which they agreed to submit.

Akongo Juliet, the victim, testified that the accused, who is the husband to her mother, forced her into sex in the parents' marital bed. For clarity purposes, the victim is the daughter of the wife but not of the accused. She is therefore a step daughter whom the accused found already born when she married the mother. This however does not diminish the guardianship role enjoyed by the accused over the victim.

She stated that he had sex with her several times and gave her money in exchange. That the child she has was fathered by the accused and that she had never slept with another man before the accused defiled her. That she later reported the matter to her mother.

The mother reported the matter to the Local Council authorities but they did not take action. That the matter was later reported to higher authorities with the help of an NGO called MIFUMI. Whereupon the accused was arrested, she was taken for medical examination and hence their presence in court. She mentioned the existence of a land wrangle between the two parents.

The victim, who is now a young mother, said to be infected with the HIV virus, seemed calm and composed in the witness box.

The next witness to pin the case of defilement on the accused was Adikin Beatrice the mother of the victim and wife of the accused. She first stated that she was 35 years but under cross examination admitted to not knowing her proper age. She stated that her daughter was born in 1992, which would make her older than 14 years but still below 18 years. The difference in age therefore would not make a material difference as far as the offence of aggravated

defilement is concerned. There are enough other aggravating factors.

She first stated that she did not know the father of her daughter's child but later stated that it was the accused. She denied having a land wrangle with the accused. She stated that she was a bit confused during cross examination. What was confusing her? Is it the situation she finds herself in that is confusing her, or, is she not telling the truth?

She persistently failed to call a spade a spade when asked what the accused had done to the victim. Either she was an evasive liar or the incident had traumatized her so much she felt embarrassed to even put in words what had happened.

Alternatively, or additionally, being a rural African woman, the sensitivities of her culture would not allow her to state certain things in public. This is the view espoused by the prosecution to explain the witness's apparent discomfort in the dock.

The accused chose to make an unsworn statement, meaning that he chose not to be subjected to cross examination. He stated that he is a retired UPDF soldier but working as a Security guard prior to his arrest. He married the victim's mother and they bought the plot on which they were living prior to his arrest.

He denied that the victim's child is his. He blamed his current predicament on his wife's sons, whom he accused of never having accepted him as their father, the husband of their mother.

He also pointed to the plot of land they bought with his wife, which they were attempting to sell and deprive him of its ownership. The accused blamed all this partly on the fact that he is not a local boy of the area.

I found the victim to be a credible witness. The fact that she has a child, is infected with HIV, reported the matter to her mother

against all odds and attendant repercussions all point to a consistency that the accused actually defiled her, impregnated her and infected her with HIV.

By telling her mother that the husband had defiled her, she was ~~risking estrangement from both her mother and the accused~~. There must be a reason why she would take such a bold and risky move. In absence of any other motive and with the strength of her testimony, I believe it is the truth that motivated her to come forward.

The matter is said to have first been reported to the Local Council authorities who took no action. The accused himself admits that much. The victim was later linked up with Mifumi which eventually helped get the matter to Police. This persistence to pursue justice, in my view, was motivated by the desire to get justice.

The mother's evidence was neither here nor there. I have tried to get into her mind and establish what was going on. This is what is possibly going on in her mind. Here is her daughter carrying her husband's child. Her daughter is now her co-wife. Her grandchild is her step child. Her ~~husband~~ is also her son in law.

The same man who had carnal knowledge of her also had carnal knowledge of her daughter. She and her daughter had seen the nakedness of the same man! Both her husband and her daughter are HIV positive. What about herself? What about the child? Are they not HIV positive as well?

I think the witness was right to state during cross examination that she was confused. She was dealing with some major issues in her life and she has cause to be extremely confused. To expect her to come to court, face her husband, son in law and betrayer in the presence of her daughter whom he had carnal knowledge of and expect her to maintain a straight face and remain composed would be expecting too much.

Yet she came and testified to what was material. She stated that her daughter, the victim, informed her about the defilement and she then reported to the authorities.

The accused dwelt on the dysfunctionality of the family and implied that the motive of this case is the plot of land that he co -- owns with the victim's mother. I stated that I believe the victim's evidence and therefore believe that there was a wrangle over the plot of land as she and the accused stated.

The existence of a land wrangle however does not negate the commission of the offence that the accused is charged with. The land wrangle co existed with the defilement. In fact the dysfunctionality of the family and the land wrangle were a fertile recipe for the commission of the crime against the victim.

I find that the prosecution has proved its case as required by law and I accordingly convict the accused as charged.

DATED at Tororo this 26th day of August, 2011



JUSTICE MIKE J. CHIBITA

ALLOCUTUS

STATE: There is no record of previous conviction. The penalty is death. I cannot describe in better terms the dilemma the family finds itself in. Convict abused his authority and visited upon his victim agony and misery. The future of the family is bleak. We therefore ask for a punitive sentence.

DEFENCE: We pray that in sentencing the convict court should take into account holding in the Kigula and that you exercise mercy and leniency. We also pray that consideration be had for the time spent on remand. Convict is 35 years at which age he is capable of being a meaningful citizen.

Besides, the convict is sick of a serious disease. We invite court to take into account the state of medical facilities and the custodial sentence should take this into account.

SENTENCE AND REASONS FOR IT:

There are many aggravating factors in this case. The convict infected the victim with the HIV virus. The convict was a guardian to the victim. A child has been born into this incestuous liaison. The victim was below 14 when she was defiled.

The convict therefore deserves the maximum penalty.

I am aware of the Kigula case and I have been attentive to the pleas for leniency. I appreciate that the convict is HIV positive and prisons are not necessarily equipped to care for his sickness. I will therefore not give him what he deserves.

In view of all the above, I sentence the convict to 14 years in prison inclusive the time already served.

Right of appeal explained.

SENTENCE READ AND DELIVERED IN THE PRESENCE OF:

1. STATE ATTORNEY: NAMATOVU

2. DEFENCE COUNSEL: OKWALANGA

3. ACCUSED: BALISIMA JULIUS

4. COURT CLERK: PASCAL OSILO

BY JUSTICE MIKE J. CHIBITA.....

Mike Chibita 26/08/11

He is in a hopeless situation but I am deeply aware that this court has a large and deep heart full of mercy, fairness and kindness and we wish to move this court to apply those virtues on the facts of this case to the benefit of this helpless citizen. I believe every human being is inherently good and I am tempted to concede that satanic forces are in the force. The convict was taken by satanic forces. Without being vested with leniency, court would have no job to execute. The submission of the State be ignored and damped into River Nile. It is a principle of humanity that when things seem too bad is when miracles are performed. This is one such case that I crave court to show the world that a condition cannot be hopeless. The convict can live a good life later.

Sentence and Reasons

I will consider the convict a first offender. I will take into account the respective submissions by the respective counsel. I will note the innovative submission by Mr. Okwalanga where he tried to use biblical overtures to persuade this court to be lenient. The convict committed a serious offence. Court has a duty to protect the girl child from savagery men like the convict. The aggravating factors are deadly and could be a threat to the victim's life. Although I will not hand down the ultimate sentence, I will sentence the convict to 18 years imprisonment.

Right of appeal explained.



Musota Stephen

JUDGE

6.12.2010