

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CR-SC- 41-2012

**UGANDA.....PROSECUTOR
VERSUS
GIMEI STEPHEN.....ACCUSED**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused was indicted on two counts. On count 1 of aggravated defilement and on count 2 of doing grievous harm c/s 219 of the Penal Code Act.

Accused denied both counts.

It is however noted that during the hearing, prosecution opted to concentrate on count 1, and did not address itself on count 2. The court will also handle the case as it was argued by the prosecution. The second count having been abandoned court addressed its mind only on count 1- aggravated defilement.

The ingredients for proof on this charge are:

1. That there was sexual intercourse.
2. That the girl was below 14 years.
3. That accused was responsible.

The burden to prove this case is on the prosecution.

1. Whether the girl was below 14 years.

Evidence of PW.1 (uncle of the victim) and PW.2 (victim) PE.2, (Police form 3), all offer evidence to prove that the victim was aged below 14 years. The evidence was corroborated by the victim's appearance in court. The evidence therefore proves that the girl was below 14 years.

2. Whether sexual intercourse took place

The evidence of PW.1 was to the effect that he found the children crying and the accused ran out of the house, and began fighting him. PW.2 the victim confirmed to PW.1 that the accused had sexual intercourse with her. PW.3 Everlyne Newumbe stated that she saw accused playing sexual intercourse with the victim. PE.2 (medical form) shows that the victim Nafuna Doreen suffered a partial-posterior rapture, suffering minor injuries consistent with force being used sexually.

All the above evidence is enough to prove that sexual intercourse actually took place. The level of penetration is irrelevant as held in *Uganda v. Bogere 1994 HCB 36*.

3. Whether accused was the culprit.

In defence accused put across the defence of alibi. He stated that at the alleged time he was at his home sleeping. He was surprised when the following morning people came to arrest him alleging that he had committed a crime against children.

It was stated for prosecution through PW.1, PW.2, PW.3 and PW.4 that accused was at the home of PW.1 at the stated time. It was stated through PW.2 and PW.3

that accused used a torch to flash at them several times, which light they used to positively identify him. PW.3 stated that when she tried to open the door, accused threatened to slaughter them if they dared to open the door.

PW.2 (victim) stated that she woke up only to realise that accused was playing sex with her. PW.1 stated that he found accused in the house and they struggled and fought. Accused used a panga to hit him on the leg, injuring him in the process. PW.4 confirmed that when they went to arrest accused shortly thereafter they found him with blood stained clothes and a panga. PW.4 further told court that accused had a behaviour of sexually assaulting women.

The defence counsel argued that the above evidence was riddled with inconsistencies. That the evidence of PW.2 and PW.3 was of minors who were scared, and cannot be believed. He attacked the fact that PW.2 and PW.3 give contradicting testimonies of whether accused was found sleeping on top or by the side of the victim. The prosecution however argued that the said inconsistencies were minor and did not go to the root of the matter.

I agree with the prosecution that going by the holding of the case of **ABDALLA NABULERE v. UG. 79 HCB** the most important thing here is not what position of sex accused used, but whether accused actually played sex with the victim. In **Nabulere**, conditions for identification include;

1. Sufficiency of light.
2. Familiarity with accused.
3. Distance between the victim and the accused.

In this case identifying witnesses said accused flashed his torch so lighting the room. All the witnesses are very familiar with the accused. PW.1 actually even shared a drink with him. PW.2 and PW.3 knew him as a relative and PW.4 knew his habits very well. While playing sex with PW.2 the distance was very close with PW.2. All the children were sleeping in tow and PW.2 said she could see very well accused playing sex with the victim. Pw.2 herself woke up to find accused using her.

All the above conditions operate to rule out any possibilities of mistaken identity. The above factors operate to nullify the inconsistencies pointed out by the defence. The evidence by the prosecution clearly places accused at the scene of crime. I find that the evidence sufficiently shows that the accused participated in the crime. This ingredient is therefore proved.

The final analysis, the assessors jointly advised this court to convict the accused person. I agree. The evidence on record is sufficient to sustain the charge of aggravated defilement against the accused person.

I accordingly find the accused guilty as charged on count 1 and accordingly convict him. No evidence was led to prove count 2. I discharge the accused on count 2. I so order.

Henry I. Kawesa

JUDGE

22.01.2014

22.01.2014

Accused present.

Resident State Attorney **Justine Chekwech**.

Accused represented by **Angura Jude** for Accused.

Resident State Attorney: Matter for judgment.

Court: Judgment pronounced in presence of all parties.

Henry I. Kawesa
JUDGE
22.01.2014

Resident State Attorney:

The convict is a first offender. Offence attracts a maximum sentence of death. He has spent 2 years and 1 month on remand. The convict was 30 years at time of commission. Victim was 6 years. The age difference is big. He ought to treat the child as a daughter, instead of sexual abuse. Offence is very rampant. Young girls are molested. Girl was emotionally assaulted. In circumstances I pray for deterrent sentence as a lesson to others to help others reform. I so pray.

Henry I. Kawesa
JUDGE
22.01.2014

Jude:

We pray for leniency. As a first offender, the convict has spent more than 2 years. He was charged on 14, June, 2011, he has spent 2 years and 7 months. We pray for leniency. He is aged 32 years. Pray for discretion of appropriate sentence.

Accused: I pray for mercy, my parents died.

Court: Sentence

The penalty on conviction is death. However due to mitigations raised and fact that he has spent 2 years and 7 months on remand, court will pass a custodial penalty to realise deterrence and rehabilitation. Accused is sentenced to a custodial penalty of 10 years. I so order.

Henry I. Kawesa

JUDGE

22.01.2014