THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

HCT – 05 – CR – CSC – No.0092 - 2008

UGANDA …… PROSECUTOR

Versus

TURYAHIKAYO GENIYO…… ACCUSED

BEFORE: HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The accused person TURYAHIKAYO GENIYO stands indicted for defilement contrary to Section 129 (1) of the Penal Code Act. It is alleged in the indictment that on the 3rd day of December, 2006 at Kirembe village in Rukungiri District he had unlawful sexual intercourse with MUGABIRWE AGATHA alias KYOGABIRWE a girl under the age of 18 years.

He pleaded not guilty to the indictment.

In a case of defilement, the prosecution must prove that the complainant was a girl below the age of 18 years; that she was involved in an act of sexual intercourse; and that it is the accused who had sexual intercourse with her.

First the age of the complainant.

She said she was aged 17 years at the hearing, implying that she was born in 1992 and therefore 14 years old in 2006. The admitted evidence of Dr.Baguma, PW1, put her age at 13 years in 2006. Her brother PW4 Tukamukunda Edward said that she was born in 1994, implying that she was 16 years old at the hearing.

I saw her as she testified. She did not give me the impression of having reached the age of majority, i.e. 18 years, at the time she testified. Court is satisfied that se was under 18 years of age in 2006 and even in 2009 when she testified in court.

The first ingredient of the offence has been proved.

I now turn to the alleged act of sexual intercourse.

As I directed the assessors, and I direct myself now, the prosecution must prove that there was sexual intercourse.

In order to constitute sexual intercourse, there must have been penetration of the penis into the vagina of the complainant, however slight.

The evidence of PW2 Mugabirwe is that a man, the accused, had sexual intercourse with her.

To take her own evidence as to age, she was 14 years old in 2006. At that age, she was not a toddler, she must be credited with knowledge of what constitutes an act of sexual intercourse.

I would have no problem at all believing that what she described to court was a typical act of sexual intercourse. However, in sexual offences, some additional evidence rendering it probable that the complainant's story is true and therefore reasonably safe to be acted upon is necessary. Such additional evidence, known as corroboration, can be direct or circumstantial.

I find corroboration to the complainant's evidence about sexual intercourse in the evidence of PW3 Owoyesiga Hilllary. He went to where accused was known to be stationed guarding a rice field from birds, got maize and met the victim going to accused's side.

The accused had earlier on sent him to call the girl for him. Upon taking off to roast maize and returning to where he himself had been guarding a similar rice field from birds, he did not see the victim. He walked to accused's garden and found the two, i.e. accused and the victim, in an act of sexual intercourse.

PW2 Owoyesiga said he was aged 16 years at the time he testified, implying that he was below 14 years of age in 2006. This places him in the age bracket of children of tender years.

I warned the assessors, as I warn my self now, that the evidence of a child of tender years is by that very fact likely to be unreliable because its mind has not yet learnt to fully understand the boundary between fact and fiction and is also open to outside suggestions or promptings of adults. I advised them further that after addressing their minds to such danger, they were entitled to go ahead and consider his evidence to be corroborative of the victim's evidence, if they are satisfied that it was truthful. They advised that PW3 Owoyesiga's evidence was truthful.

I find more corroboration of her evidence in the admitted evidence of Dr. Baguma who examined the victim on 4/12/2006 and saw signs of recent penetration. He found her hymen ruptured and concluded that the rupture was in a period of about 24 hours prior to the examination. The victim stated that she made an attempt to resist but her assailant over powered her. The Doctor saw signs of force having been used sexually.
I noted the demeanour of the victim as she testified. She impressed me as a truthful and credible witness, notwithstanding that the initial impression to court was that the man had

put the penis in her anus. She clarified that issue when she stated that he put it in the part where she urinates from.

From the above evidence, I have no hesitation in find that there was carnal knowledge.

This ingredient of the offence has also been proved.

As regards accused's alleged responsibility for the offence, once again the evidence implicating the accused is that of the complainant and PW3 Owoyesiga.

From their evidence, they knew the accused very well. They were staying in the same village where they had rice gardens.

The complainant and the accused were therefore not strangers to each other.

When put to his defence, the accused raised an alibi. He said that on the indicated date he was not in the area, that he had gone elsewhere in Bikurungu and had left behind a certain Banetti to guard the rice for him from birds.

He bears no burden of proving his alibi. It is the duty of the prosecution to destroy it by adducing evidence that places him at the scene of crime when the crime was being committed.

When identification of a suspect as the person who committed the offence is in issue, courts consider factors like the time of the alleged incident, i.e. whether it was day time or at night; the time the victim stayed with her abuser; and whether the victim and the witness knew the accused before the incident.

From the evidence, the offence was committed in broad day light. The victim stayed with the accused for a long time, given that PW3 Owoyesiga went home, roasted maize and returned to the garden during the time the two were together. And as already observed

above, the victim, PW3 Owoyesiga and the accused were all village mates. All this evidence excludes the possibility of any mistaken identity. Accused's evidence that he was not in the area on 3/12/2006 lacks any credibility at all. It is a lie.

He also alluded to a possibility of a grudge between him and PW4 Tukamukunda Edward. According to him, he had wanted sell part of his rice garden, the said Tukamukunda failed to raise the required amount and he, the accused, offered it to another person. That the witness told him that he would suffer for it and shortly thereafter this case came up. I don't hesitate to say that this evidence of a grudge lacks any credibility. It is cheap and ridiculous. Even then, fail to see how a grudge between him and Tumukunde would have prompted Mugabirwe to implicate the accused. In any case he was caught re-handed in the act. This is in my view a fabricated grudge. It is baseless, incredible and I reject it.

Notwithstanding the fact that an accused cannot be convicted upon the weakness of his defence, fabricated lies like this render support to the complainant's evidence of identification. It makes the inference of guilt stronger and can amount to corroboration. His denial has been destroyed by the prosecution credible evidence and I reject it.

As regards inconsistencies, in criminal trials, they often arise. They may be minor or major. For instance, whereas the indictment mentions the offence date as 3/12/2006 and other witness said the offence was committed on that date, the victim said it was 3/10/2006.

I do not think that she mentioned that date as a deliberate falsehood to mislead court. I think she was mistaken about it.

I am therefore inclined to ignore it on account of being minor.

After serious consideration of the available evidence, the law involved and after warning myself about basing a conviction on the truthfulness of the complainant's evidence and

that of PW3 Owoyesiga, I accept her evidence that the male person who had sexual intercourse with her was the accused.

In full agreement with the unanimous opinion of both assessors, I find that the prosecution has proved its case against the accused beyond reasonable doubt. I therefore find him guilty of defilement contrary to Section 129 (1) of the Penal Code Act and I convict him as indicted.

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YOROKAMU BAMWINE

JUDGE

25 – 11 – 2009

25/11/2009 **Accused** present

Mr. Waligo for state

Mr. Matsko for accused

Both assessors present

Court: Judgment delivered.

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YOROKAMU BAMWINE

JUDGE

25 – 11 – 2009

Mr. Waligo: No previous criminal records. However, we invite court to find that there is high prevalence in adults finding sexual gratification in children. Children are introduced to early sex. Research shows that such girls end like that. In such circumstances, court remains the only advocate for morals. Such people should be punished to bring them to order. Punishment should send a signal to other intending criminals. We pray for a harsh sentence.

Mr. Matsiko: Convict is a first offender. He is a Youngman, 24 years old. He has been on remand for almost 3 years, since December, 2006. He appears remorseful and repentant. He tells me while in prison he fell sick. He does not feed on posho which is served in prison. The mother used to bring him food but she is dead.

In Uganda today, there are instances of spoilt young girls. They induce old men into sexual acts. The case at hand is defilement.

The convict and victim were almost in the same age bracket. In these premises, it is my humble prayer that he be given a lenient sentence.

Convict – allocutus: I invite court to be merciful. Period served on remand is enough.

Court: **Sentence - reasons for it.**

The accused is a first offender. He has wasted court's time in a situation where even a blind man would **'see'** that he was at the wrong side of the law.

He introduced sex to a young girl. I take cognizance of what learned counsel says about young girls smiling boys but hasten to add that according to medical evidence, the complainant's hymen ruptured during the impugned sexual act. It is men of accused's type that induce girls to go in for early sex and once introduced to it, they are hooked on it. The more reason why a message must be sent over to accused and those with intending plans to know that crime does not pay. Considering age of the victim, accused's own age and the period of close to 3 years spent on remand, a sentence of five (5) years imprisonment would meet the ends of justice.

He is so sentenced.

Right of appeal explained.

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YOROKAMU BAMWINE

JUDGE

25 – 11 – 2009