

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
(CRIMINAL DIVISION)

HCT-00-CR-SC-0007-2017

(ARISING FROM LDC. COURT, CRIMINAL CASE NO. 008/2016)

UGANDA PROSECUTOR

VERSUS

MUGISHA UMARU ACCUSED

BEFORE: HON. MR. JUSTICE J. W. KWESIGA

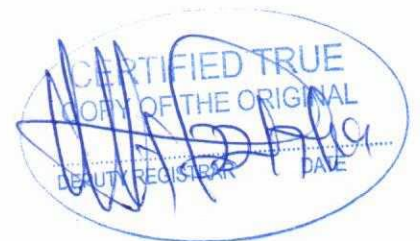
JUDGMENT:

The Accused person is indicted under Section 129(3) and (4)(a) of the Penal Code of Aggravated Defilement. It is alleged that Mugisha Umaru on the 6th and 7th day of April 2016 performed a sexual act on Nakibule Joan, a girl aged 7 years old.

The Accused pleaded not guilty and the State proceeded to prove:-

- (a) That Nakibule Joan was a girl aged below 14 years.
- (b) That there was a sexual act performed on her
- (c) That the Accused person committed the offence.

Before discussion and application of the Law to this case I will first summarise the available evidence which is as follows:-



PW1, Namuddu Annet, is the mother of the victim. That this girl, Nakibule Joan was on 4/1/2010 and therefore, nine years old today.

She knows the Accused person as a man she was cohabiting with for (7) seven months before the date of alleged offence.

On 10/4/2016 she left the Accused with her two daughters including the victim. She returned at 5:00 p.m and found the Accused and Patricia (Not the victim) in bed. She became suspicious, called her neighbour Baraza who came and took Patricia for medical examination.

Baraza returned with Patricia after medical examination with police and the accused person was arrested.

On 11/4/2016 both Nakibule and Patricia were examined. The girls were 7 and 10 years old at the time. PW2, Baraza Melicent, 34 years old told court that she was PW1 Namuddu's friend. Both were residents of Makerere Kivulu.

On 10/4/2016 at about 8:00 p.m or 9:00 p.m Namuddu called her and she said Patricia be the one to tell her what she called Baraza for. That Patricia told her that the **"Accused was about to enter her with his thing"**. She took Patricia to police. After police had interviewed the girl Patricia, they decided to arrest the accused. She checked Patricia and saw fluids in her private parts.

PW3, Oligo Michael, a Clinical Officer of Mayfair Clinic examined Joan Nakibule and made a report admitted as P.E.2 dated 11th April 2016. He found no other injuries except a recently ruptured hymen consistent with sexual penetration done 3 to 5 days before 11th April 2018.



PW4, Bwambale (D/c) arrested the Accused on 10/4/2016 on complaint by Baraza over defilement.

PW5, Nakibule Joan, the victim. She knew the Accused because they lived together with her mother and Patricia. She said he used her. He slept on her in bed. He told her not to say it. She described what happened as follows:- **"He got his thing and put it in mine. I felt pain in my private parts"**. He did it three times and Patricia was always present.

In his defence the Accused denied the offence and stated the Complainant, PW1 fabricated this case because he had got another woman.

Ms. Jean Nareeba, State Attorney submitted that the state proved all the essential elements of the offence beyond reasonable. She asked this court to find the Accused person guilty and convict him.

Mr. Steven S. Ssenkezi for defence contested participation by the Accused person. He contended the prosecution omitted examination of fluids allegedly seen by PW2 Baraza. Patricia who gave first information was not called. That PW1 had another purpose to serve, she was aggrieved by the Accused person getting another woman. This was a motive to incriminate the accused person.

In my view, in cases of sexual offences such as defilement and rape, the victim is the best witness when she is able to testify because they are normally possessed with direct evidence that proves what happened. They experience the unlawful sexual intercourse or sexual act under trial.

Penetration, where it is an element of the offence, ordinarily takes place when the culprit and the victim are so close that visual identification or

recognition of the culprit is favourable to the victim. Therefore, I am well guided by the holdings in the case of **Basita Hussein Versus Uganda - Criminal Appeal Case No. 35 of 1995** that "The act of sexual intercourse, a penetration may be proved by direct or circumstantial evidence".

In the instant case, there is the evidence of the victim PW5 Joan Nakibule. She stated that the Accused person put his "thing" in her "thing" and she felt pain. He did it three times. This evidence is corroborated by PW3 Olingo Michael, a Medical Clinical Officer who examined the girl on 11th April 2016. He found that the hymen had been ruptured and the girl's vagina had inflammations or injuries of 3 to 5 days before that were consistent with sexual penetration. In my assessment the State/Prosecution evidence proves beyond reasonable doubt that a sexual act was performed with the victim.

Mr. S. Ssenkezi criticised the State for not calling Patricia who is another child who was said to have been the source of the first complaint to the police. In my view this did not create any reasonable doubt on the fact that there was a sexual act. A good Prosecutor, for many good reasons may not call all witnesses lined up in police investigation where adequate and cogent evidence has been received through one or two witnesses. I do not fault the Prosecution on this point.

Secondly, I have considered the contention that medical report does not include a finding of fluids in the girl's private parts. It is settled that slightest penetration once proved is adequate to prove rape or defilement and it is



not true that every penetration results into fluids associated with sexual intercourse. Each case will depend on it's own unique facts.

On the issue of the age of the victim, her mother (PW1) evidence is that she was born on 4/1/2010.

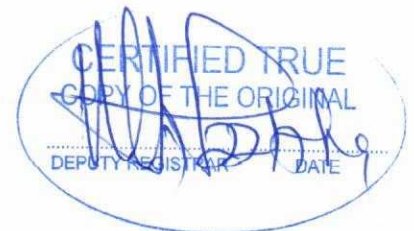
The Medical Report (PE.2) was states that on 11/4/2016 the girl was 7 years old. This evidence was not challenged. I had opportunity of seeing the girl when she testified in this case. She clearly appears to be below 14 years of age. I have no doubt that she was about 7 years when she was defiled.

Participation in this case depends on the credibility of PW (Principal Witness), the girl who is the victim. She knew the Accused person very well. They lived together in a single roomed residence. The Accused used to be left with Joan (victim) aged 7 years and Patricia aged 10 years.

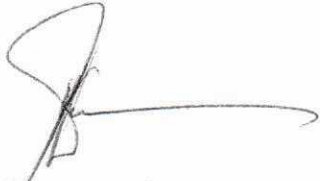
Joan told court that he sexually used her three times before he was arrested. This is overwhelming opportunity for the victim to identify the Accused person. He told her not to tell anybody.

The facts above gave assurance to correct identification. I have found no merits in the Accused person's denial and alleged motive of fabrication by PW1 being that she was an aggrieved person because the Accused had affairs with another woman. This, does not discredit the evidence of the victim, Baraza and the Medical Report. Therefore, I agree with the joint opinion of the Assessors that the prosecution has proved against the Accused person the case of Aggravated Defilement C/s. 129(3) and 4(a) of the Penal Code Act.

I do hereby convict the Accused person accordingly.



Dated at Kampala this 5th day of July 2019.



J. W. Kwesiga

Judge

5th / 07/2019

In the presence of:-

1. Accused
2. Miss Ainebyona for state holding brief for Ms. Joan Nareeba (SA).
3. Mr. S. Ssenkezi for Defence.
4. Mr. Irumba Atwooki – Court Clerk