

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KABALE**

**HCT-11-CSC-122 OF 2011**

**CRIMINAL SESSION CASE NO. AA-204 OF 2009 CRB  
608/2009**

UGANDA :: ::PROSECUTOR

**VERSUS**

AYEBARE BANGYE MOSES:::::::::::::::::::::::::::::::::::::ACCUSED

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

**JUDGMENT**

The above named Accused person is indicted for Aggravated Defilement contrary to Section 129 (3) and (4) (d) of The Penal Code Act. It is alleged that Ayebare Bangye Moses, on 14<sup>th</sup> May, 2009, at Rubuguri Kashija Village, Rubuguri Parish, Kisoro District un lawfully performed a sexual act with Kyasiimire Fortunate a girl aged 16 years knowing that she was mentally retarded.

The Accused person pleaded not guilty and the State proceeded to prove the case against the Accused person. For the state to prove the case against the Accused person has to adduce evidence that proves beyond reasonable doubt the following elements of the offence:-

- (a) That the victim is a girl aged below 18 years.
- (b) That the girl was mentally retarded.
- (c) That a sexual act was performed on the victim.
- (d) That the Accused person is the culprit that performed the sexual act.

I will consider each element of offence and evidence available to determine whether the same has been proved. PW 1 Mugisha Sison, a Clinical Officer at Rubuguri Health Centre 4 examined the victim and established she was 16 years old. He found semen-like discharge in her private parts. He did not find any other injuries. He could not remember the time of that day when he examined the victim, he stated he wrote the report the day he made the report on 17<sup>th</sup> May, 2009. He further stated under cross-examination that he received the request for examination on 15<sup>th</sup> May, 2009. He stated that the fact that he found semens points to the fact that he examined the victim within (one) 1 hour after the sexual intercourse. He emphasized that if he had examined her after two days, the findings would have been different. He explained his contradictory medical record that if he had examined her on 17<sup>th</sup> May, 2009, he would never have found the semen like discharge.

PW 4 links the examination to the time of the crime. P/C Amos Bagwaneza stated that the Accused was arrested on 14<sup>th</sup> May, 2009 at 10:00 p.m. He prepared the Police form the next day 15<sup>th</sup> May, 2009 although he took the victim for examination and followed with the request the next day. The victim **PW 5 KYASIIMIRE FORTUNATE** gave evidence not on oath owing to her mental retardation. She was able to clearly describe the events of the night she went to the Accused person's house. She found the Accused in his house alone and he closed her in the house and put her on the bed and went on top of her. He told her he would give her money and he gave her 500/= after sexual intercourse. He opened the door and escorted her. She saw her mother and the Accused ran back to his house. That night she was examined in her private parts which she described as having been spoiled by the Accused. The defence cross-examined her and she gave further details; that the Accused called her from her home when she was preparing to go to sleep. She felt pain although she did not bleed. She said although the mother met her with the Accused she would have reported if she had not met them.

My impression is that this witness, despite being a person living

with mental disability, after being led by the prosecution patiently and in as simple manner as possible, she gave a consistent account of the events of the night. It is immaterial that she does not remember the exact date when the events occurred. This witness gave her evidence not on oath and section 10 of the oaths Act required that her evidence must be corroborated before any conviction can be based on her testimony.

The corroboration required is on the identity and participation of the Accused person in doing a sexual act with her.

Apart from the requirement in section 10 of Oaths Act, in sexual offences courts, always, will look for additional independent evidence, whether direct or circumstantial that corroborates the victim's testimony to render it safe to base a conviction on it.

See **Chila & Another Vs R (1967) EA 722**. The mother of the victim in this case, PW 3 GAHWEZA VASTA testified that on 14<sup>th</sup> May, 2009 at night realized that the victim was not in her room and with her husband started searching for her. She saw the Accused person escorting her from his house which was in almost the same compound as hers. The Accused ran back to his house and closed the door. She testified that the compound

was lit with electricity light and the although it was 9:30 p.m she was able to clearly see the Accused. The girl disclosed to her that the Accused had sexual intercourse with her and gave her 500/=. She told court that the girl was taken for medical examination that night.

There is ample corroboration in this witness's evidence. She confirmed that the victim has a mental disability which supports the victim's evidence that she dropped out of school in Primary three. The mother said she could not go to school because of mental disability. P.W 3 confirmed the story given by the victim that she was defiled by the Accused and while he escorted her, the Accused and the victim saw P.W 3 and the Accused ran back to his house and locked up. The victim and PW 3 lived very closely in the same compound with the Accused,

there was electric light in the compound therefore there were sufficient circumstances to enable identification of the Accused. The evidence of Sison Mugisha, the Clinical Officer, is to the effect that he examined the victim and found that she had sexual intercourse most probably an hour before he examined her because her private parts had semen like discharge. This medical evidence is independent and corroborating the fact of the sexual intercourse and the time it occurred which puts it between 9:00 p.m and 10:00 p.m or thereabout. The Accused puts up a defence that he was away until 10:00 p.m I find the evidence of the prosecution to have destroyed this ALIBI. P.W 3 GARAHWEZA positively identified him while escorting the victim at about 9:30 p.m. P.W 4 P/C Bagwaneza Amos, confirmed he got a complaint of defilement of this victim on the night of 14<sup>th</sup> May, 2009 by Garahweza, P.W 3.

It was at 10:00 p.m. The Accused was arrested immediately from his house with the help of LC III Chairperson, Tumuheirwe. He confirmed that the victim was examined that very night, and the Clinical Officer verbally explained that there had been a sexual act done to the victim because he wanted a prima facie ground for detaining the Accused. This witness confirmed that the following day 15<sup>th</sup> May, 2009 he made a formal request for the medical findings under Police form PF 3 which was exhibited. This evidence supports the explanation given by Sison Mugisha that the dating of the medical report 17<sup>th</sup> May, 2009 was due to the fact that the examination was at a time when he did not have Police form and must have filled it later from his examination notes. Considering the above evidence I am satisfied that the Prosecution evidence proves beyond reasonable doubt that a sexual act was performed with Fortunate Kyasiimire on the 14<sup>th</sup> day of May, 2009 and that it was by the Accused person.

The victim's mother, PW 3, told court that the girl was born on 12<sup>th</sup> February 1993, which made her 15 years old in 2009 when she was defiled. P.W 2 NIYONSABA CHARLES a Psychiatric Officer at Kisoro Hospital told court that the victim was a patient he used to treat for mental problems. He confirmed she was a mentally retarded person. P.W 3 Garahweza the victim's mother told court that the victim became completely mentally ill when she was in Primary three and since then she is mentally on and off and under medical treatment as a person living with mental disability. The Accused person and the family of the complainant lived closely almost in the same compound and he knew that this girl was mentally retarded or unstable.

Section 129 (4) (b) provided that where the victim of the offence

of defilement is a person with a disability and she is below 18 years the offence is aggravated defilement. Section 129 (7) of the Penal Code states that disability includes a substantial functional limitation of daily life activity caused among other conditions mental barriers. I am satisfied that the victim who was rendered incapable of going to school, living on chronic medical assistance is a true person living with disability and below the age of 18 years.

The joint opinion of Assessors is that all the elements of the offence were proved, and advised me to convict the Accused. I agree, The Accused person has been found guilty as charged and he is convicted.

**J.W. KWESIGA JUDGE**

## **S E N T E N C I N G**

**State:** We do not have criminal record, he may be treated as a first offender. The Accused person is convicted of an offence which has a maximum sentence of death. The court has a duty to protect the weak against the strong. Accused is a dangerous person to juveniles and weak children. The victim needs to be protected.

**Accused:** I am 29 years old. I was working with NGO dealing in mines. I have a Diploma in Leisure Tourism and Hotel Management.

**Defence Council:** He is a first offender. He is remorseful and sorry, he is a young man, still energetic and capable of being useful citizen. He was looking after 3 orphans. He was working in Southern Sudan working to look after the orphans. He promised to reform. He has been on remand since 2009.

**S E N T E N C E** The Accused/convicted person is a well educated man who should have been a guide to his society away from living a criminal lifestyle. He defiled a child who due to mental

retardation could not fully differentiate the genuiness of the

Accused who told her he was taking her to give her money, but later on turn against her and sexually exploited her. This man needs adequate time in the institution that rehabilitates people of his kind, the prison. Considering that the maximum sentence provided is death, I will be lenient and give him another chance. He will serve **14 years imprisonment** to give him time to reflect on his action and reform before he returns to society.

**J.W. KWESIGA JUDGE 8-9-2011**