

IN THE CIRCUIT COURT OF GHANA HELD AT CAPE COAST, CENTRAL  
REGION ON FRIDAY 18<sup>TH</sup> DAY OF NOVEMBER, 2022 BEFORE H/H DORINDA  
SMITH ARTHUR (MRS.), CIRCUIT COURT JUDGE.

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SUIT NO. 103/2022

THE REPUBLIC

VRS

JOHN OTOO

**JUDGMENT**

The Accused person was arraigned before this Court on December 2, 2021 for the offence of Defilement Contrary to **Section 101(2) of The Criminal and Other Offences Act, 1960 Act 29.**

The accused person pleaded not guilty to the charge preferred against him for which reason the prosecution assumed the burden of proof and must prove the charge against the accused person beyond reasonable doubt in accordance with;

**Section 11(2) of the Evidence Act 1975 NRCD 323 states;**

*“In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind will find the existence of the facts beyond reasonable doubt.”*

Further, **Section 13(1) of NRCD 323** provides that the standard of proof is nothing less than proof beyond reasonable doubt no matter the offence charged.

See the case of **Ampabeng Vrs Republic [1977] 2 GLR 171 CA**

Under the **Evidence Act, 1975 (NRCD 323)** the burden of proof has two elements – namely, the burden of persuasion and the burden of producing evidence. The two are not the same. The burden of persuasion as provided in Section 10 of the Act involves the establishment of a requisite degree of belief concerning a fact in the mind of the court; or the party raises a reasonable doubt concerning the existence or non-existence of a fact, or that the party establishes the existence or non-existence of a fact. This burden is on both the prosecution and the defence.

In determining what is proof beyond reasonable doubt, our courts generally rely on the definition of Lord Denning in **MILLER VRS MINISTER OF PENSIONS [1947] ALL E.R. 372 AT 374**. In short the evidence that the prosecution adduced in proof of the charges must preclude every reasonable hypothesis except those which tend to support the charges. Conversely, the accused persons only need to adduce evidence which raises reasonable doubt as to their guilt.

The prosecution in order to discharge the burden placed upon them called two witnesses and tendered in evidence five exhibits.

## THE PROSECUTION CASE

The summary of prosecution case is that PW1 is the complainant and the survivor in this case. According to her she went to stay with accused and her mother when her biological father was convicted and sentenced to twelve years imprisonment to enable her continue her education. She said one afternoon, when she closed from school, her mother and siblings were at home and she was instructed to lay the parents beds. She took her bath before going to lay the beds. Then her mother left the house to plait her hair. After laying accused person's bed, she was laying her mother's when accused came into the room to pick some amount of money at that time. Accused gave some money to her half siblings for them to go and buy yogurt outside so she was the only one left in the house. Accused returned to the room, pushed her on the bed and had sexual intercourse with her. She tried to tell her mother when she came but accused prevented her from having any discussing with her mother. They left Brafoyaw and settled at Anomabo and over there accused had sex with her twice when she was having her bath. She lost her menses for two months and she informed accused. Accused bought Lydia contraceptives for her but she refused to take it. She was about to write BECE when that happened but she did not know she was pregnant so she took a boyfriend who had sexual intercourse with her once. A woman detected that PW1 was pregnant and informed her mother. Her mother tested her for pregnancy and informed accused on phone so accused informed her mother to pick an empty taxi for her so that he can send her to a hospital to abort the pregnancy but she refused. Her mother sent her out of the house around 11 pm since she refused to abort the baby. She came to Cape Coast and stayed with her Aunty who took her of her till she delivered. She lodged a complaint to DOVVSU because accused refused to take care of the pregnancy and refused to take care of the child when she delivered.

PW2 is the police investigator and he tendered in evidence the caution and charge statements of accused person. He tendered in evidence also the certified copy of the entry in register of births indicating her date of birth as August 22, 2004 and the maternal and child health record of the baby. A result of DNA analysis of the child and accused which gave the probability of paternity as 99.99% stating accused is the biological father of the child was also tendered in evidence.

## **THE DEFENCE**

Accused testified that the survivor is his wife's daughter and she came to live with him and his children. He said his wife detected that PW1 was pregnant and when she was confronted, she mentioned one Kojo Little as being responsible. He continued that the survivor went to live with her aunt at Kakumdo. He continued that when the survivor attended hospital for the first time on 9/11/2020, it was detected by the Doctor that her first day of her last menstrual period occurred on 19<sup>th</sup> August 2020, 3 days to her 16<sup>th</sup> birthday. He continued that the survivor's birthday is 22<sup>nd</sup> August 2004 and the pre-natal records of the survivor show that as at 9<sup>th</sup> November 2020 she was 11 weeks 2 days pregnant. The survivor delivered the baby on 16<sup>th</sup> May, 2021. He further stated that he never had sexual intercourse with the survivor before she was 16 years.

DW1 is the wife of accused person and the mother of PW1 testified that it was accused person's car they used to go to the police station to lodge a complaint against PW1's father which later the father was convicted and sentenced. She stated further that she believe PW1's paternal relatives want to take revenge on her husband since it was his car that they used to go to the police station. She further stated that she noticed PW1 was pregnant two weeks after she completed JHS and that time PW1 was sixteen years

two months. According to DW1 when she asked her about the man responsible for the pregnancy, she mentioned two names who could be responsible for the pregnancy. She stated that even though DNA was conducted, she does not believe it.

### **EVALUATION OF EVIDENCE AND APPLICATION OF LAW**

The offence of defilement under **Section 101(2) of 1960, Act 29** states that;

*“Whoever naturally or unnaturally carnally knows any child under sixteen years of age, whether with or without his or her consent commits an offence and shall be liable on summary conviction to imprisonment for a term of not less than seven years and not more than twenty-five years.”*

Consequently, the essential ingredients of the offense of defilement are;

1. That someone has had natural or unnatural carnal knowledge of the survivor
2. That someone is the accused person.
3. That the survivor is under sixteen years of age

See: **ERIC ASANTE V THE REPUBLIC 2017 109 GMJ 1 SC**

To satisfy the court with a conviction the prosecution must prove the aforementioned three ingredients beyond reasonable doubt. The prosecution is required to prove that a crime has been committed but also must link the accused person to the commission of the crime especially where accused pleaded not guilty.

I will deal with all the issues together as they are intertwined but in sequence which is whether or not someone has had natural or unnatural carnal knowledge of the survivor and accused is the one who had carnal knowledge of the survivor and the survivor is under sixteen years of age.

The first issue is whether or not someone has had natural carnal knowledge of the survivor and same will be determined together with the second issue as to whether accused is the person who had carnal knowledge of the survivor.

PW1 testified and stated that one afternoon, when she closed from school, her mother and siblings were at home and she was instructed to lay the parents beds. She took her bath before going to lay the beds. Then her mother left the house to plait her hair. After laying accused person's bed, she was laying her mother's when accused came into the room to pick some amount of money at that time. Accused gave some money to her half siblings for them to go and buy yogurt outside so she was the only one left in the house. Accused returned to the room, pushed her on the bed and had sexual intercourse with her. She tried to tell her mother when she came but accused prevented her from having any discussing with her mother. They left Brafoyaw and settled at Anomabo and over there accused had sex with her twice when she was having her bath. She lost her menses for two months and she informed accused. Accused bought Lydia contraceptives for her but she refused to take it. She was about to write BECE when that happened but she did not know she was pregnant so she took a boyfriend who had sexual intercourse with her once. A woman detected that PW1 was pregnant and informed her mother. Her mother tested her for pregnancy and informed accused on phone so accused informed her mother to pick an empty taxi for her so that he can send her to a hospital to abort the pregnancy but she refused. Her mother sent her out of the house around 11 pm since she refused to abort the baby.

The survivor narrated how accused person had sexual intercourse with her and the many times he did. She mentioned that accused person had sexual intercourse with her before the family moved from Brafoyaw and settled at Anomabo. According to PW1, accused person had sexual intercourse with her on three different occasions, one at Brafoyaw and two at Anomabo and these sexual encounters resulted in pregnancy. She

was very coherent and exact in her delivery of her evidence and she did not contradict herself.

It is noted that the survivor has delivered a baby hence the issue for determination is whether it was accused who defiled her, impregnated her, and as such is the father of the baby.

From the evidence of PW1, it was accused person who defiled her and impregnated her. She also mentioned that she did not know she was pregnant so she took a boyfriend and had sexual intercourse with him. She provided credible evidence to the fact that she took a boyfriend but she was pregnant before she took that boyfriend.

In defilement cases, carnal knowledge of the survivor has to be proven and same can be ascertained if accused person used his penis to penetrate the vagina of the survivor. Thus the act of sexual intercourse is deemed complete upon proof of any, the slightest or least degree of penetration. This is the express provision of **Section 99 of Act 29, 1960** which states that:

“Whenever, upon the trial of any person for an offence punishable under this code, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge shall be deemed complete upon proof of the least degree of penetration”

For the purposes of proving penetration decided cases finds it sufficient if there is evidence that any part of the virile organ of the accused was within the labia of the pendulum of the female, however slight this may be.

However, penetration is purely a question of fact and as most sexual offences are done in privacy or out of sight and hearing of third parties, eye-witnesses account to corroborate the act is very rare. The court therefore is making inference from circumstantial evidence and the DNA report relied on by prosecution.

According to the survivor, accused had sexual intercourse with her when she was laying her mother's bed. He pushed her onto the bed and had sexual intercourse with her. She mentioned accused had sexual intercourse with her twice after she had taken her bath in as well. According to her, it is one of such sexual intercourse which resulted in the pregnancy.

In R V. CAMPBELL [1956] 2 ALL ER 272, CCA which was cited in the case of REPUBLIC V YEBOAH [1968] GLR 248, the court gave a rule that the evidence of a young person must as a rule of prudence be well corroborated before being acted upon by the court. The court per Baidoo J in Yeboah's case qualified the rule of prudence and decided inter alia that the evidence of a sexual victim need no corroboration but it is prudent to look for corroboration from some extraneous evidence which can confirm the evidence of the victim in some material particular implicating the accused

Here, the court is to get extraneous evidence that must link accused person to the sexual act as narrated by the survivor. The survivor delivered a baby and a DNA analysis was conducted. The result provided that the accused cannot be excluded as the biological father of the child because they do share genetic markers. That of the genetic identities tested, 15 of 15 matched and the probability of paternity is 99.9996%.

Here, the DNA report concludes that accused is the biological father of the baby delivered by the survivor on May 16, 2021 when the survivor was sixteen years and nine months. From her date of birth it was left with six days for her to be exactly sixteen years and nine months when she delivered the baby.



These entire circumstantial evidence link the accused to the offence as he is the biological father of the baby meaning that he had carnal knowledge of the survivor which resulted in the pregnancy of the baby and each event followed each other contemporaneously.

In **GLIGAH AND ATISO V. THE REPUBLIC [2010] SCGLR 870**, the Supreme Court held in holding (3) that where:

*There were pieces of evidence which if put together made a very strong case against the accused person[s]. The same with circumstantial evidence. It was generally accepted that when direct evidence was unavailable, but there were bits and pieces of circumstantial evidence available, and when those were put together, they would make stronger, corroborative but more convincing evidence than direct evidence.*

From **Gligah**, the court can accept pieces of evidence or circumstantial evidence where direct evidence is not available. Here, circumstantial evidence is used to make the case stronger or to corroborate or give more convincing evidence. See **THE STATE VRS BROBBEY AND NIPAH [1962] 2 GLR 101** where the court held that circumstantial evidence must lead to one and only one irresistible inference that the appellant is guilty of the offence charged. See also **LOGAN V THE REPUBLIC [2007-2008] 1 SCGLR 76** where it was held that:

*“For circumstantial evidence to support a conviction it must be inconsistent with innocence of the accused. It must lead to irresistible conclusion not only that the crime had been committed, but it was in fact committed by the persons charged in order to arrive at a definite conclusion. Conviction based on circumstantial evidence which is not supported by facts is wrongful.”*

Here, the court can safely conclude that prosecution was able to lead sufficient evidence that the accused person had sexual intercourse with the survivor, and one of such sexual intercourse resulted in the pregnancy and the birth of the baby who is the biological child of accused person. Here, there is no dispute as to who the accused person is because the paternity DNA results links accused person to the crime without any doubt.

The next ingredient is the determination of the age of the survivor.

The prosecution tendered in evidence the birth certificate of the survivor which indicates that the survivor was born on August 22, 2004. The Birth certificate was not discredited and thus, it is accepted that the survivor was below the age of sixteen years at the time of the alleged crime.

This is because the gestational age for normal pregnancies is between 38 and 41 weeks. From the Maternal and Child Health record that was tendered in evidence, the pregnancy was a normal one.

According to Dr. Charlise Celestine, an obstetrician and gynaecologist in her post “ Due Date Calculator” Flo.health,

“The due date is 40 weeks from the first day of your last menstrual period. But some women can go beyond that to 42 weeks. The nine months of a pregnancy are actually 40 weeks. And your baby’s estimated due date falls on the 40th week, when you’ll actually be around 10 months pregnant. That’s to account for the fact that pregnancy is measured according to gestational age, not fetal age. So that means you count pregnancy from your LMP, not the date you conceived, adding an extra two weeks even though you weren’t technically pregnant then. Also, this method recognizes that not all months have the same number of days, so

you'll likely still be pregnant at nine months." See <https://flo.health › tools › due-date-calculator> [last accessed November 17, 2022].

Flowing from above, if the child was born on May 16, 2021 then the survivor was pregnant before 22<sup>nd</sup> August 2020 if 39 or 41 weeks are used. This means that the survivor was less than sixteen years when she became pregnant assuming the first sexual intercourse is the one that resulted in the pregnancy.

Therefore, the prosecution was able to sufficiently prove all the three ingredients of the offence of defilement beyond reasonable doubt. The court thus finds as a fact that the accused had sexual intercourse with the survivor who was under sixteen years of age and thus defiled her resulting in the birth of a baby girl. See **THE REPUBLIC V GYAMFI (2007) 13 MLRG 192.**

Did accused person create doubts in prosecution's case?

I have already determined that the prosecution was able to prove all the three ingredients of defilement against the accused person and thus it was left with accused to lead evidence to either create doubts in prosecution's case or discredit the evidence.

The AP testified that his wife detected that PW1 was pregnant and when she was confronted, she mentioned one Kojo Little as being responsible. He continued that the survivor went to live with her aunt at Kakumdo. He continued that when the survivor attended hospital for the first time on 9/11/2020, it was detected by the Doctor that her first day of her last menstrual period occurred on 19<sup>th</sup> August 2020, 3 days to her 16<sup>th</sup> birthday. He continued that the survivor's birthday is 22<sup>nd</sup> August 2004 and the pre-natal records of the survivor show that as at 9<sup>th</sup> November 2020 she was 11 weeks 2

days pregnant. The survivor delivered the baby on 16<sup>th</sup> May, 2021. He further stated that he never had sexual intercourse with the survivor before she was 16 years.

Under cross examination the accused answered among others the following questions:

Q. As at 9<sup>th</sup> November 2020 the survivor was 11 weeks 2 days pregnant as a result of a sexual encounter you had with her. Is that not so?

A. For what you are saying, I cannot tell whether she was 11 weeks 2 days pregnant.

Q. From paragraph 9 of your witness statement you said the survivor was 11 weeks 2 days pregnant. How come you are saying you are not aware?

A. Yes, I said that.

Q. From paragraph 11 you said you never had sex with the survivor before she was 16 years. What do you mean by that?

A. I do not know how to explain it.

Accused person gave evasive answers during cross examination and he could not explain or admit to evidence stated in his own evidence in chief. Also, he contradicted himself in his answers under cross examination even though he was only asked seven questions. These are some of the answers:

Q. And you are aware that she was pregnant before she left the house.

A. The mother informed me so I was aware she was pregnant before she left the house.

Then later

Q. I put it to you that you had sex with the survivor who was below 16 years and impregnated her.

A. The survivor turned 16 years on 22<sup>nd</sup> August 2022 and it was when she left in October 2020 that her father's sister informed us that she has gone to the hospital with the survivor and she is pregnant. We did not take her to the hospital.

He had earlier answered that he knew the survivor was pregnant before she left the house but from his later answer he said he got to know of the pregnancy after the survivor had left the house.

The evidence of accused does not raise any doubt as to his guilt but only assert that he did not have sex with the survivor before she was sixteen years. The safest inference the court can make from such statement is that he had sex with her and whatever sex he had with her is what resulted in pregnancy which proves that she was less than sixteen years when she conceived the child. The statement at paragraph 11 of his witness statement is different from his caution and charged statements as all along he had denied ever having sexual intercourse with the survivor.

The evidence of DW1 is that of a desperate wife who wants to help a husband at all cost even against her own daughter. She was not coherent and she contradicted the evidence of accused. Her witness statement is full of her believe and not what she saw or witnessed. From paragraph 16 of her witness statement, she stated that she questioned the survivor in the presence of accused contrary to what accused stated. Accused stated he was not present when the survivor was being questioned. Also, she stated that she has seen the DNA report but she does not believe it. Also, accused said, the survivor mentioned a boy called Little name as the one responsible for the pregnancy but DW1 said the survivor mentioned two. It is noted that her statement at paragraph 22 contradicts her statement at paragraph 10 and 11 which is to the effect that when she asked the survivor who was not responsible for the pregnancy, she was not able to tell her who was responsible and that it was her niece who mentioned the name Little to

her. the court does finds that the evidence of accused person and that of his witness lack credibility for all the inconsistencies and contradictions.

Hence, the accused person and his witness could not raise a doubt in his defence that he was not the one who defiled the survivor and that the survivor was not under sixteen years when he had sexual intercourse with her and impregnated her. Consequently, the accused person failed to raise a doubt in the evidence of the prosecution.

## **DISPOSITION**

I therefore find the accused person guilty of the offence of defilement of a female fewer than sixteen years of age under **Sections 101(1) of Act 29** and convict him.

Pre sentencing hearing:

I have considered all the mitigation factors rendered by counsel for accused person on behalf of accused person that he is a married man with children and the bread winner of the family including the child of the survivor. That the court should give him the barest minimum of the sentence.

I have noted that accused took advantage of the survivor who had gone through a traumatic life of being defiled by her biological father. She had to testify against her biological which led to the conviction of her father. Accused was to be her solace and step father to the survivor but yet he became her sexual abuser.

I have noted the extent of damage accused has caused to the survivor by not only defiling her but making her a mother. She now has a child who is a step sibling to her mother's children. The children of her mother are her half siblings so her daughter is also a half sibling to her half siblings.

I have again noted the psychological effect the survivor will go through if not helped.

I have further noted that accused was not kind to the survivor by allowing her to be sent away from the house, not maintaining her and the child, and by abandoning her as her Aunt who took charge of her during her pregnancy died. But for the court's order of maintenance, the accused would not have maintained the child.

However, I have noted the age of the survivor that she was getting to sixteen years and the fact that she was sexually active before the accused person defiled her.

I hereby sentence accused person to eight (8) years IHL for the offence of defilement.

The survivor is referred to UUC Counselling unit for counselling. Counsel for accused person should ensure that the child is maintained through the proceeds of the accused commercial vehicle which was brought to the attention of the court.

Accused is convicted and sentenced.

**H/H DORINDA SMITH ARTHUR (MRS.)**

**CIRCUIT COURT JUDGE**

**ACCUSED PERSON PRESENT.**

**PROSECUTOR: C/INSP JOHN ASARE BEDIAKO PRESENT.**

**EUGENE LARBI APPIAH ESQ. FOR AP PRESENT**