

**IN THE CIRCUIT COURT HELD AT SOGAKOPE ON THURSDAY, 8<sup>TH</sup> DECEMBER, 2022 BEFORE HIS HONOUR ISAAC ADDO, THE CIRCUIT COURT JUDGE**

**CASE NO.: CC 203/2021**

**THE REPUBLIC**

**VRS**

**THOMAS KOFI AGBANU**

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**ACCUSED PERSON PRESENT**

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**INSPECTOR ELIKPLIM AVORGBEDOR FOR THE REPUBLIC PRESENT**

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**JUDGEMENT**

The Accused person herein stands charged before this Honourable Court with the offence of Defilement contrary to section 101 of the Criminal Offences Act, 1960 (Act 29).

**THE FACTS OF THE CASE**

On the 17<sup>th</sup> June, 2021 at about 11:30pm, whilst the victim was fast asleep with her blind grandmother, Tordzi Olivia, the Accused person entered the room. The victim, who was fast sleeping heard a sharp pain in her vagina and she shouted. Her grandmother woke up and asked the victim as to what happened and she narrated the ordeal that the Accused person was having sexual intercourse with her. The grandmother asked the victim to hold him but she could not because the Accused person run to the verandah of the room where there was light and the victim started shouting by calling the Accused person but he run away. The complainant who is the father of the victim reported the matter to the police and the Accused person was arrested.

In support of its case, the prosecution called three (3) witnesses to testify. The testimony of PW1 (Kekeli Shine Klayi) confirmed the facts as presented by the prosecution. PW1 added that she knew the Accused person very well and that sometimes she and her sister fetched water for him and even washed his clothes for him as well.

PW2 (Olivia Tordzi) told the court that on the 17<sup>th</sup> June, 2021, she was in the room sleeping with the victim when she heard her shouting. So she woke up and asked her why she was shouting. According to PW2, the victim then told her that the Accused person was having sexual intercourse with her and she felt a sharp pain in her vagina. It is the case of PW2 that she told the victim to hold the Accused person but he overpowered her and run away.

PW3 (Victor Sabah) per his Witness Statement narrated what the victim told him. PW3 added that he reported the matter to DOVVSU, Sogakope leading to the arrest of the Accused person. According to PW3 he was issued with a Medical Report Form to send the victim to the hospital.

PW4 (Detective Lance Corporal Habiba Arhin) investigated the case. PW4 relied on her Witness Statement together with the exhibits attached.

After the close of the case of the prosecution, the court ruled that a prima facie case had been made out against the Accused person, and so he was accordingly ordered to enter into his defence.

## **THE CASE OF THE DEFENCE**

The Accused person in opening his defence testified himself and called two witnesses as DW1 and DW2. The Accused person denied defiling the victim. It is the case of the Accused person that he was in the house one Friday morning when one teacher called Mr. Adeku of St. Kizito School called him to find out where I was. That he told him he was in the house and asked him to come over to the school to meet him. Just as he was about to go to the school, he saw one woman called Akorfa and Tordzi together with her granddaughter. So he received them and they told him that the victim said somebody came to have sex with her in the night and she felt pains and shouted. So she asked her to catch the person. According to the Accused person, when they finished narrating the story, he told them that it was not true. They invited him to meet their elders at 2:00pm on the same day. The Accused person further told the court that he denied the allegations of defilement against him at the meeting. Thereafter, he travelled until he was called on the telephone that the Police Commander wanted to see him.

DW1 (Xorla Agbanu) testified as the sister of the Accused person. DW1 told the court that they were at the palace of Togbe Mankralo when a gentleman by name Aforkpah reported the issue to the Mankralo. The victim's father was not around and so the Accused person was summoned to come. That when the Accused person came, he denied knowledge of the issue. After some time, they heard that the Accused person had been arrested. After his arrest, they got information that someone had gone to have sex with the victim again. So three of them went to see the person staying with the victim to find out if it was the Accused person who defiled the victim but she told them he was not the one.

DW2 (Agbanu Emelia) testified as the daughter of the Accused person. DW2 told the court that when her father was arrested on Friday, she went to the parents of the victim on Monday. That the grandmother of the victim described to her and those present how the incident happened. That the victim's grandmother said the person came with water in a pale and soap but could not tell what the person used it for and that was the first time the victim was defiled. The victim's grandmother told her somebody else came to the victim and used a pale and soap for the second time but could not defile the victim because she wore a pair of khaki trousers and an overall dress.

At the end of the trial, this Court was enjoined to determine the issue of whether or not the Accused person herein had natural or unnatural carnal knowledge of the victim (PW1).

### **BURDEN OF PROOF**

The common law rule that a person was presumed innocent until the contrary was proved or he pleaded guilty is reinforced by Article 19(2)(c) of the 1992 Constitution which reads:

*"A person charged with a criminal offence shall ----- (c) be presumed to be innocent until he is proved or has pleaded guilty."*

The mandatory requirement that the guilt of the person charged ought to be established beyond reasonable doubt and the burden of persuasion on the party claiming that a person was guilty, has been provided for in sections 13 and 15 of the Evidence Act, 1975 (NRCD 323). Significantly, whereas the prosecution carries that burden to prove the guilt of the Accused beyond reasonable doubt, there is no such burden on her to prove her innocence. At best she can only raise

a doubt in the case of the Prosecution. But the doubt must be real and not fanciful.

In Republic v. Adu-Boahen & Another [1993-94] 2 GLR 324-342, per Kpegah JSC, the Supreme Court held that:

*“A plea of not guilty is a general denial of the charge by an accused which makes it imperative that the prosecution proves its case against an accused person ..... When a plea of not guilty is voluntarily entered by an accused or is entered for him by the trial court, the prosecution assumes the burden to prove, by admissible and credible evidence, every ingredient of the offence beyond reasonable doubt”.*

### **THE LAW AND EVALUATION OF EVIDENCE**

Section 101 of Act 29 defines defilement as the natural or unnatural carnal knowledge of a child under sixteen years of age with or without the child’s consent. It needs be said that a person under sixteen (16) years of age lacks capacity to give consent with respect to carnal or unnatural carnal knowledge and any such consent given by the child is void. In the case of The Republic vrs Yeboah [1968] GLR 248-256, the Court laid out the three essential elements of the offence of defilement as follows:

- i. The alleged victim is less than sixteen years of age.
- ii. That a person has had natural or unnatural carnal knowledge of the victim.
- iii. That, that person is the accused person.

At this point, the question to ask, having stated the above ingredients of defilement is whether the prosecution has successfully proved the ages of PW1 as being below the age of sixteen (16) years old. In answering this question, it must be stated that the victim's Hospital Weighing Card which was tendered in evidence as Exhibit 'C' has the Date of Birth of the victim as 16<sup>th</sup> May, 2007. At the trial, the Accused person forcefully challenged the age of the victim and confronted the victim with the question whether she was 13 years or 14 years old. The following is part of what transpired on the issue of the age of the victim:

*Q. In your Witness Statement you stated that you were 13 years. But now you say 14 years, which one should I accept?*

*A. On my NHIS card, it is written 2008 but my Weighing Card states 2007.*

*Q. I put it to you that statement is not true.*

*A. I am 14 years now.*

Whether the victim was born in 2007 or 2008, she was still under the age of 16 years at the time the incident happened. The Accused person has not disputed the age of the accused person being less than 16 years old. More so, the Accused person and the victim are neighbours and so if she was more than 16 years old, the Accused person would have raised it. It needs be further said that a person under sixteen years of age lacks capacity to give consent with respect to carnal or unnatural carnal knowledge and any such consent given by a child is void. In the circumstances, I hold that the prosecution has been able to establish the age of PW1 to be under sixteen (16) years old.

The next ingredient of the offence of defilement to establish by the prosecution is whether or not the person had natural or unnatural carnal knowledge of the

PW1. The victim (PW1) in her evidence told the court that the Accused person had sexual intercourse with her at the time that she was sleeping. Sexual intercourse means that the man should have used his penis to penetrate the woman's vagina and not by any other means such as the fingers, tongue or an object. It needs to be noted that per section 99 of Act 29, the least degree of penetration of the penis into the vagina is enough to have proved beyond reasonable doubt that there was a sexual intercourse between the man and the woman.

The Medical Report on PW1 which was tendered in evidence and marked as Exhibit 'A' and signed by Dr. B.H. Atuguba of Catholic Hospital, Battor and dated 21<sup>st</sup> June, 2021 reads:

*".....On examination: Not pale, ....., hydration is satisfactory.*

*Stable cardiorespiratory system*

*Abdomen – Full soft, non-tender*

*No organomegaly*

*Stable speculum examination*

*Normal vulva, normal vagina mucosa, no Hymen seen. Normal cervix*

*Central Nervous System – Grossly intact."*

The diagnoses, by inference, establish that PW1 had been carnally known and it was a natural carnal knowledge. It must be said that even if the medical evidence proves that the hymen of the victim was not broken but there is evidence of least degree of penetration of the victim's vagina by the penis, then it can be said that there was sexual intercourse.

Exhibit 'A' confirmed the absence of hymen of PW1, and by inference, PW1 has had sexual intercourse, although the medical report did not confirm the identity of the culprit. The medical report did not also establish whether the hymen was recently broken or it was broken by the act that resulted in this instant case. At least at that level of the medical examination, unless DNA comes in to match any liquid found in the vagina to any man in whole wide world, the simple conclusion from the medical report showed that someone had carnal knowledge of PW1.

At this juncture, a vital question to be asked and answered is the question of who is this person who had sex with PW1. The Accused person in his Cautioned and Charge Statement given to the police on 12<sup>th</sup> July, 2022 denied having sexual intercourse with PW1.

It is indeed a fact that PW1 and the Accused person lived in the same community at Mepe and so very well-known to each other. Also not in dispute, is the fact that the victim fetched water for the Accused person and sometimes washed his clothes for him. The victim was very consistent in her answers provided under cross examination and her testimony remains firm and unshaken. The victim identified the Accused person as the one who had sexual intercourse with her and she gave vivid descriptions of the account. In the words of PW1 per her Witness Statement which was filed on the 22<sup>nd</sup> July, 2021, the following is part of what she told this Court:

*"On 17/06/2021 at about 11:30pm I was sleeping with my grandmother and sister Abigail Klayi in the same room when I suddenly felt a sharp pain. I woke up and saw accused person Thomas Agbanu whom we popularly call Fo Tommy having sexual*



*intercourse with me. I shouted and my grandmother woke up and asked me as to what happened and I narrated my ordeal that Thomas Agbanu was having sexual intercourse with me. She asked me to hold him but because of his strength, he overpowered and run to the verandah of the room and I started calling his name but he doubled up and went away."*

I do not think a thirteen (13) year old girl can make all these out on her own to put a man who can be his father or grandfather into trouble. The degree of certainty that it was the Accused person who defiled PW1 has been established by the prosecution.

Upon a careful evaluation of the entirety of the evidence adduced at the trial, I am fully satisfied of the guilt of the Accused person as I find that the prosecution has been able to prove its case against the Accused person beyond reasonable doubt. In the circumstances, I find the Accused person herein, *Thomas Kofi Agbanu* guilty of the offence of Defilement and he is accordingly convicted.

**SENTENCING:**

On the question of sentence, the Accused person is a first time offender. I have also considered the gravity of the offence and the revulsion felt by law abiding citizens, the age of the victim as well as the trauma the victim had gone through. The Court will however impose the minimum sentence on the Accused person.

I hereby sentence the Accused person herein to serve a prison term of Seven (7) years IHL.

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**ISAAC ADDO  
CIRCUIT JUDGE  
8<sup>TH</sup> DECEMBER, 2022**