

IN THE CIRCUIT COURT HELD AT KPANDO ON MONDAY THE 13TH DAY OF JUNE 2023, BEFORE HIS HONOUR FRANCIS ASONG OBUAJO ESQ., THE CIRCUIT COURT JUDGE.

NO. CC. 113/2022

THE REPUBLIC

VRS:

KORKU BUKA

ACCUSED, PERSON PRESENT.

THE PROSECUTOR D/INSPECTOR HENRY ODOI DOKU PRESENT.

J U D G M E N T

Accused was brought to Court charged with the offence of defilement contrary to section 101 of criminal offences Act 29 of 1960. Accused pleaded not guilty to the charge in open court. The summary of the facts as presented by the prosecution are that on the 12/5/2022 at about 9:30 am at Wusuta Agavoe the victim age 4 had escorted one Kekeli who was 2-year-old who came to play with the victim to his mother in the neighbourhood as he was crying at the time. On her return to the house on a path, accused met the victim and took her to a lonely place in a nearby bush. Accused instructed the victim to remove her pant and she obliged and accused knelt before the victim and inserted the penis into the vagina through the back and ejaculated on her thighs. The victim after that ran to the house and disclosed her ordeal to the complainant who is the father of the victim. Accused was apprehended by the complainant and the family and handed him over to Vakpo police and later arraigned before this Court.

Accused pleaded not guilty to the charge. The prosecution by the plea, have taken upon themselves to lead credible evidence to prove the essential elements of the offence charged beyond reasonable doubt to secure the conviction of the accused or required under sections 11(2) and 13 (1) of the Evidence Act, 1975 (NRCD 323). In the case of YEBOAH AND ORS VRS. THE REPUBLIC (CONSOLIDATED) [1972]2 GLR 281-298 Per ATA BADU J as he then was held that: the guilt of the accused must be proven with the degree of certainty required by law. The accused has no burden on him to prove his innocence. It is the prosecution which must prove the guilt of the accused.

The prosecution called three witnesses who gave evidence at the trial. John Akotor of Vakpo Wusuta-Agavoe the father of the victim gave evidence under oath as PW1. He said the victim Peace Akotor age four (4) is a kindergarten pupil at Vakpo Adome. He added that on the 12/5/2022 at about 9:00 am a little boy called Kekeli of two years from the neighbourhood came to play with the victim at home at Agavoe. The victim sent Kekeli to his parents who live about fifty meters away when he started crying. Later the victim returned home crying and there was a whitish discharge on her thighs suspected to be sperm and she pointed at the accused who was about 40 meters away walking towards his house. PW1 added further that victim said to him that the accused inserted his penis into her vagina and then discharged the said substance on her thighs. He then called out to accused who came to him after hesitation and was questioned why he did that to the victim. Accused admitted doing so to the victim and said he did not know what came over him before he had sexual intercourse with the victim in a nearby bush about 40 metres away from the house. Accused again admitted the act before his brother that was invited to PW1's house and accused begged for forgiveness. He later sent both the victim and the suspect on his motorcycle to Vakpo police station and reported same. During cross examination, PW1

maintained that accused inserted his penis into the vagina and he admitted it when he was confronted at home.

Peace Akotor the victim age 4 years gave evidence as PW2 in camera with PW1 with her. PW2 was allowed to give oral evidence in court after I had interacted with her in camera due to her age to ascertain whether she is capable of giving evidence as a witness in satisfaction of section 59(1) of Evidence Act 1975 (NRCD 323) thus:

59 (1) "A person is not qualified to be a witness if that person is

- (a) Incapable of coherent expression so as to be understood, directly or through interpretation by another person...*
- (b) Incapable of understanding the duty of a witness to tell the truth"*

The victim (PW2) could speak the Ewe language eloquently and appreciated telling the truth always with the consequences of going to heaven or hell. She unmistakably identified the accused in camera that he was the one who once came to sharpen his cutlass in their house on one Friday. PW2 recounted how accused took her to a nearby bush between their house and that of Kekeli's house, removed her under pant and inserted his penis into her vagina and warned her not to tell anybody about it but she told her father PW1 and the mother. PW2 said then PW1 and her mother took diverse route in search of the accused. She added that after accused was apprehended, her mother subjected accused to severe beatings and wanted to hit accused with a big stick to kill him but for quick intervention of one Efo Kudjoe. PW2 further stated that PW1 took her and the accused to the Police station and she was also taken to Anfoega Hospital for treatment where her urine sample was taken.

Under cross examination PW2 maintained that it was the accused who remove her pants, inserted his penis into her vagina after he asked her to remove her pants and she refused. And that she cried and called her sister Bless but she did not respond when accused was inserting the penis into her vagina.

The evidence of PW/CPL Naomi Antoe PW3 the investigator is that she had extract of occurrence on the 12/5/22 from Vakpo police over the incident and Amenvenku Dodzi accompanied PW1, PW2 and accused to the station. She said her initial interrogation of the accused in the presence of PW Evelyn Frimpong, accused admitted he lured the victim into a bush and inserted his penis between her thighs through the back and after wiggling, he ejaculated on her thighs. Accused was detained for investigation and endorsed police medical form from Dr. Fiagbenu of Anfoega Catholic Hospital indicates the victim's hymen is not intact. Accused caution and charge statements were subsequently taken PW3 tendered accused's caution statement into evidence as Exhibit A and A1 after they have been shown to accused and the content read and explained to accused in Ewe without objection. Police extract from Vakpo police and endorsed Police medical form of the victim admitted into evidence after they have been shown, read and explained to accused in Ewe without objections as Exhibit B and C respectively. The weighing card of PW2 admitted into evidence as Exhibit D to proof the age of the victim.

Exhibit A, accused's caution statement taken on the 13/5/2022. He said he met PW2, when going to charge his mobile phone at a man's house in their area at Wusuta Agavoe as a farmer. On his return he again saw PW2 and called her to a nearby bush and told her to remove her pant and she did so up to her knee level. He then knelt behind her and inserted his penis between her thighs but the penis did not touch her vagina and after wiggling, he ejaculated on her thighs. He did that because he knows the victim was not matured and may get hurt should he penetrate her vagina. The victim then ran away from the scene of crime. In Exhibit A1 taken on same day, accused relied on Exhibit A. Exhibit D Child Health Records also called weighing card of the victim per the child's Personal information on page of the record shows that PW2 was given birth to on the 18/8/2017 at Anfoega Catholic Hospital.

Exhibit C. endorsed Police medical form on the victim shows that the victim was seen by the Dr. on the 3/6/2022 at the clinic three (3) weeks after the alleged date of defilement. Upon examination of the victim though after 3 weeks, it was noticed that the hymen was torn and bruises noticed without blood.

After the close of the prosecution's case accused was ordered to open his defence for him to be heard as a prima facie case over the offence charged has been established by the prosecution.

DEFENCE OF THE ACCUSED PERSON

Accused elected to open his defence under oath after he was educated on his rights of silence, making a statement from the accused stand where he will not be cross examined and giving evidence under oath in the witness box and implications of each. Accused told the court that he did not know anything about the case brought against him and nothing more.

THE LAW AND ANALYSIS

Section 101 of Criminal Offence Act, 1960 (Act 29) provides that:

“(1) For the purpose of this Act, defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age.

(2) A person who naturally or unnaturally carnally knows a child under sixteen years of age, whether with or without the consent of the child, commits a Criminal Offence and is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years”

In the REPUBLIC VRS YEBOAH [1968] GLR 248 at 251 to 252 the essential elements of defilement which must be established by the prosecution beyond reasonable doubt have been stated thus:

- (1) *That the second prosecution witness is a girl under ten years of age*
- (2) *That someone has had sexual intercourse with the second prosecution witness.*
- (3) *That person is the accused.*

From the provisions of the law referred to and the decided case, the elements of this offence which the prosecution must establish beyond reasonable doubt to secure the conviction of the accused, in this case are:

- (i) *That the victim (PW2) is a girl under sixteen years of age.*
- (ii) *That someone had had sexual intercourse with the victim (PW2).*
- (iii) *That person who had sexual intercourse with the victim (PW2) is the accused person.*

At the hearing the father of the victim (PW1) a 45-year-old man of Wusuta-Agavoe gave the age of the victim as four (4) years and tendered the child Health Record of the victim which is commonly called Weighing Card from Anfoega Catholic Hospital into evidence as exhibit D without objections. Exhibit D shows that the victim was given birth to on the 18/8/2017. That makes the victim to be less than five (5) at the time of the incident. With this evidence, the age of the victim has been established as required by law beyond reasonable doubt.

On the second element of the charge, the victim who was with her father (PW1) at hearing recounted how the accused, she identified as the one who once came to sharpen his cutlass in their house, took her to a nearby bush between their house and her friend Kekeli's house, removed her pant and inserted his penis into her vagina. The victim (PW2) added that accused then warned her not to disclose what he did to her to anybody but told PW1 and her mother about it upon reaching home. PW2 further stated how PW1 and her mother went to search for the accused through diverse routes before accused was apprehended and how her mother wanted to hit accused with a stick. The evidence of PW2 has been corroborated by

the findings on the exhibit 'C' by Dr. Fiagbenu of Anfoega Catholic Hospital on the endorsed police medical form dated 3/6/2022 without objections. Upon examination of PW2 who was examined about three (3) weeks after the alleged defilement found that the hymen was torn with bruises noticed without blood. According to the report of the doctor, the circumstantial and anecdotal evidence from his findings suggest the victim was defiled due to late presentation of the victim at the hospital.

Further corroborative evidence given by PW1 the victim's father was that, the victim returned home from sending the friend Kekeli to the neighbouring house with a whitish discharge believed to be sperm on her thighs, and she pointed to the accused who was spotted at a distance of about forty metres, walking to his house, that he inserted his penis into her vagina and discharged on her thighs.

When these pieces of evidence are put together; thus the victim's own oral evidence at the hearing, the evidence of her father (PW1) and the findings made by the Doctor as endorsed on the exhibit 'C', that the hymen of PW2 has been torn, all point to one irresistible conclusion that the victim has been carnally known as provided under section 99 of Act 29/60.

Section 99 of Act 29/60 states that:

Where, on the trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge is complete on proof of the least degree of penetration.

From the requirement laid down in this law as to how to determine what constitute carnal knowledge and unnatural carnal knowledge to be proven, the available evidence at the trial clearly shows that that threshold of the least penetration of PW2 on that day has been satisfied in my candid view.

It was held in THE REPUBLIC VRS YEBOAH (supra) holding I that:

“1. The evidence of victim on oath in law needed no corroboration but it was prudent rule of practice to look for corroboration from some extraneous evidence which confirmed her evidence in some particular, implicating the accused. Apart from the fact that the evidence of a victim in a sexual offence must be corroborated, there was the added factor that the victim was a young person of only nine years and the evidence of a young person must as a rule of prudence be well corroborated before being acted upon by the court. There was ample circumstantial evidence corroborating the testimony of the victim that the accused ravished her ...”

The summary of the facts of this case was that the victim age nine years testified that the accused had sexual intercourse with her in his workshop. Even though she felt pains, she did not report the incident till about a week after when she confessed to her mother. A doctor who examined her and the accused testified that the victim had a tear in her hymen, inflammation in her vagina. Even though the accused denied the offence the court found as a fact that the victim was defiled.

The instant case before this court appears to be much stronger than the REP. VRS. YEBOAH (supra). In this case, the victim PW2 who is 4 years old reported the incident to the father PW1 immediately after the incident and pointed at accused who was walking away and was apprehended by PW1 and the wife. Even though accused admitted in his caution statement Exhibit ‘A’ taken a day after the incident, he denied carnally knowing the victim. At the hearing, the victim clearly identified the accused and recounted how he inserted his penis into her vagina and she reported to the father. And that her mother had wanted to hit the accused with a big stick and other related facts. This in my view, lends strong credence to the fact that the victim was truthful about the incident. The demeanour of PW2 at the hearing left me with no doubt that she was telling the truth.

Even though the evidence of the doctor shows that he examined PW2 after some three weeks of the alleged incident, he found the hymen torn with bruises noticed without blood. The accused denied having carnal knowledge of PW2 stating that if he had done so to PW2 at her age, she could not walk back home on that same day. Not knowing that carnal knowledge is complete after proof of the least penetration of a penis. I am therefore satisfied that the victim was carnally known by someone.

On the requirement of who had carnal knowledge of PW2. Accused was identified as the one who did so. The testimony of PW1 was that PW2 ran to them crying and they saw a whitish discharge on her thighs and she pointed out to the accused in a distance as he was walking away and accused was apprehended there and then. When asked whether she knows the accused person at the hearing, the victim (PW2) identified the accused first as the one who on one occasion came to sharpen his cutlass in their house. And it was the same accused who took her to a nearby bush in between their house and Kekeli's house removed her pant and inserted his penis into her vagina. That was about six months after the incident of which PW2 had not seen the accused, but was able to recall that it was he who had carnal knowledge with her in a nearby bush. The evidence of PW1 and PW2 appear to be credible as to who the perpetrator was. Per exhibit A, the caution statement of accused he admitted that he did so to PW2 and begged PW1 for forgiveness.

On the basis of the available evidence considered at the hearing as to the identity of the one who ravished PW2 on that day, accused and no other but him who did so to PW2 on the day.

It is my finding of fact at this stage, after considering available evidence at the trial and the applicable laws pertaining to the offence charged that accused on the 12/5/2022 at about 10:00 am while going to charge his mobile phone in a nearby house met PW2 and the friend Kekeli on the way. As he was returning from the said house, accused

met only PW2 returning home and he called her to a nearby bush with an intention to have sexual intercourse with her. Accused then removed her pant and went behind her and bent her over and inserted his penis into her vagina. After penetrating her vagina and when PW2 started crying due to the pains, he quickly withdrew the penis from the vagina but ended up ejaculating on her thighs, before letting her go. PW2 quickly reported her ordeal to the father and pointed out accused to them while he was walking away.

It is my candid view from the entirety of the evidence led by the prosecution in this case that, all the elements of the offence have been established in fact and in law against the accused beyond reasonable doubt to secure his conviction. In so doing I have not forgotten of the evidence of the accused in denying this offence. The denial of the accused as compared to the evidence of the prosecution at the hearing, did not throw any form of doubt in the prosecution's case at all. I therefore reject his denial, as I accept the evidence of the prosecution. I hereby find accused person guilty of the offence of defiling a girl of four (4) years of age and convict him.

BY COURT:- Has the accused anything to say before sentence is passed.

Accused prays for the mercy and forgiveness of the court.

BY COURT:- In sentencing the accused I have taken his plea on mitigation into consideration the fact that accused has spent 13 months in custody as he had nobody to stand surety for him. Not losing sight of the increasing rate of defilement cases in this jurisdiction that this court is handling, a deterrent sentence will have to be given. I therefore sentence accused to ten years' imprisonment with hard labour.

FRANCIS ASONG OBUAJO

CIRCUIT COURT JUDGE.

13/6/2023