

Hon. Mr. Justice
J.K.N. Tsekono.

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

CRIMINAL SESSION CASE NO. 13/93.

UGANDA PROSECUTOR

VERSUS

OKURUT S/O ODWAR ACCUSED.

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU

J U D G M E N T:

The accused is charged with defilement contrary to section 123(1) of the Penal Code Act. It is alleged that on 8.11.90 at Kelim village in the Kumi District, the accused, Okurut s/o Odwar had unlawful sexual intercourse with Madudu Perepetwa a girl under eighteen years of age.

An eye witness, PW1, testified that on 8.11.90 at around 5 p.m. she was on her way to collect some firewood. She followed the village path towards the well. In the bush near the path, she heard some murmure and peeped at a distance of about ten paces only to see the accused between the thighs of the victim playing sex with her. The accused was naked and his pair of shorts was in the vicinity. She raised an alarm which scared the couple and the accused quickly got up, picked his pair of shorts, put on and started running away from the scene of crime, leaving the victim still lying down. Immediately the witness reported the matter to the mother of the complainant, PW2.

On receiving the report, PW2 met the victim on the way back home while crying. She saw some grass on the back of the complainant's head. When she examined the victim, she saw blood oozing from the vagina and some sperms could also be seen. She was walking with difficulty with her legs astride. She then reported the matter to the clan leader one Mikaya Akabwai.

The following morning, PW2 in the company of the said clan leader, the victim herself, PW1 and others visited the scene. At the scene, the witness saw grass pressed down and it was PW1 who confirmed that it was the exact place where she found the accused having sexual intercourse with the complainant.

Evidence of PW3 is that on the material day at about 5 p.m. as she was going home from the village well, she met the victim being followed by the accused. She became suspicious and warned the accused who instead abused her as stupid. On her way back to the well a second time, she learnt from PW1 that the accused had already sexually abused the complainant. She too reported the matter to PW2, the mother of the victim.

When trial within a trial was conducted it was ruled that the extra judicial statement made by the accused to the Magistrate Grade 11, was admissible in evidence on the ground that it was made freely and voluntarily without any torture, promise, intimidation, inducement or harassment whatsoever.

In his confession, the accused informed the Magistrate, PW4 on 28.11.90 that the victim Madudu Perepetwa was before the incident his girlfriend. He had befriended her for about six months before the alleged offence. On 8.11.90, after his day's work, he went to have a bath at the well where he met the complainant on the way. She informed him that there was some "ajono" (malwa) at their home for sale. He gave her a deposit of shs 50/- to go and book the "ajono." In the process, he suggested to her that he wanted to play sex with her which suggestion he says the victim readily accepted.

They entered the bush off the path to the well and started having sexual intercourse until PW1 found them and raised an alarm. The parents of the complainant knew of their friendship but were alarmed on this occasion because he played sex with ^{her} in the bush instead in a house.

When the matter was reported to the clan leader and the R.C. officials of the village, the accused readily admitted having committed the offence. He also maintained the same admission before the Police at Kumi Police station and still maintained the same before the Magistrate.

In his defence, the accused denied having sexual intercourse with the complainant on 8.11.90 but admits that the victim has been his girlfriend for the last six months before the incident. He says he admitted the offence because of torture both at the Police station and also before the clan leader and the R.C. officials. He also says he admitted the same before the Magistrate, PW4, because the Police threatened him with imprisonment for seven years and also threatened to kill him if he did not accept the alleged offence.

In the offence of defilement, the prosecution must prove the following ingredients inter alia beyond reasonable doubt, namely:- Whether there was penetration and whether the victim was a girl under the age of eighteen years.

Evidence of an eye witness, PW1, is that on the material day of the alleged offence, she found the accused physically having sexual intercourse with the victim in the bush off the path to the village well.

He was naked and was between the thighs of the complainant doing the act. She raised an alarm and the accused picked his pair of shorts, put it on quickly and ran away from the scene of crime.

The mother of the victim on receiving a report, checked on the complainant and found that blood was pouring out of the vagina and there were also some sperms around. Medical evidence of PW5 revealed that on 13.11.90 when the complainant was examined, her hymen had ruptured recently about nine days ago. Her labia was bruised and those injuries were consistent with force used sexually. She also had signs of V.D. infection with pus discharge from the vagina. She was not capable of putting up strong resistance as she was only about ten years old.

When the accused was also examined on the same date, it was found that his prepuce was swollen and torn. In the opinion of the doctor, he concluded that the injury was caused by forced entry into a narrow canal. All that evidence corroborates the retracted confession which the accused made to the Magistrate, PW4 as stated above. By and large, the court finds that the prosecution has proved beyond reasonable doubt that there was penetration. It is immaterial that it is not proved that the alleged sexual intercourse was complete with a ejaculation therein.

As regards the age of the victim, the mother of the girl put her age at ten years. Medical evidence of PW5 also confirms the same age. In the light of that court finds that Madudu Perepetwa, the victim in the instant case was a girl under the age of eighteen years old.

Whether it was the accused who actually committed the alleged offence, evidence is that PW1 on 8.11.90 at around 5 p.m. found the accused in the act. She knew the accused very well as a villagemate before the incident. The incident took place in broad day light. Before that, PW3 also met the accused following the victim and warned him. In the premises, mistaken identity does not arise.

The accused is guilty of defilement contrary to section 123(1) of the Penal Code and is therefore convicted accordingly as charged. (4)

J U D G E

S e n t e n c e: The accused is treated as first offender and he is 50 years old at his trial. The offence is very serious and carries maximum sentence of death. The circumstances in which the accused committed the offence are brutal in that he took advantage over a girl of ten years and an imbecile who could not understand the intention so that she could resist:

Before committing the offence, the accused was warned but instead abused the person who advised him. He does not therefore heed advice. He is said to be having a wife who should have satisfied his sexual lust but chose to victimise a young girl.

Children must be protected against sex maniacs in the like of the accused, especially now that AIDS is rampant in the country.

Although the accused has been in remand custody for 3 years and 3 months, the society must be protected against very immoral people in the like of the accused to deter him and also those who may venture to commit the same offence.

In the premises, the accused is accordingly sentenced to 8 years imprisonment.


STEVEN GEORGE ENGWAU

J U D G E

Court - R/A against conviction and sentence explained to the accused in open court.


STEVEN GEORGE ENGWAU

J U D G E

22.3.94