

THE RE PUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL SESSION CASE NO. 479 OF 1996

UGANDA

PROSECUTION

VERSUS

KABANDOLE FELIX..... ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE.

JUDGEMENT

1. The accused Kabandole Felix is indicted of the offence of defilement contrary to section 123(1) of the penal code Act. The particulars of the offence are that the accused on or about the 3rd April 1994 at Namakindu village in Masaka district had unlawful carnal knowledge of Ndagiire Betty, a girl below 18 years of age. The accused denied the offence.
2. The prosecution called five witnesses to prove its case, three of whom, their evidence was admitted under section 64(2) of The Trial on Indictments Decree. PW1, No. 12833 PC Kakoza, at the material time attached to Mpugwe Police Post in Masaka District, stated that on 9/8/94 at about 1.00 p.m. he was at the counter at his station. He received a report alleging that the accused had defiled PW4, Ndagiire Betty. He re arrested the suspect and placed him in custody. He then made a report and forwarded it to Masaka Police station.
3. PW2, Dr. Kazibwe, a medical officer attached to Masaka Hospital, stated that on 9/8/94 he examined one Betty Ndagiire. He found her to be thirteen years old. He found the hymen to be ruptured. The rupture was old. There were no injuries or inflammation around the private

parts of the girl. She had no bruises or injuries on her thighs or arms. The hymen had an old tear. There were no marks of violence on the body. She had a whitish discharge but no bloodstains. He made a medical report that was admitted as exhibit P1.

4. PW3, Charles Rwebuga, of Namakindu village was the father of the victim Betty Ndagiire. He stated that on 9/8/94 at about 10.30 a.m. he was at home when he received information that his thirteen-year-old daughter, Betty Ndagiire, had been defiled. He rushed to the scene of the defilement and found one Kabandole Felix who was armed with a Panga at the time. He found Ndagiire Betty crying. He mobilised the villagers to arrest Kabandole Felix, which they did. They took him to the Chairman RC 1 Mpugwe and later on to Mpugwe Police Post and made a report.
5. PW4, Ndagiire Betty, stated that she was at the time of testifying seventeen years old. On 9.8.94 she was sent together with her younger sister, Mega, to collect food from the garden at about 10.00 am. They set off and passed the accused's home, which was by the path leading to the garden where they were going. Soon after passing this house, the accused started chasing them. Mega managed to escape. PW4 was not so lucky. She was grabbed by the accused who took her to his house. He closed the door. He threatened me that if I made an alarm he would cut me. There was nobody else in the house. He got a condom and put it on his penis after removing his trousers. He tore off the PW4's knickers and forced her to lie down on some grass bedding on the floor. He set her legs apart and plunged his penis into her vagina and proceeded to have sexual intercourse with her. This may have lasted for about twenty minutes.
6. PW4's sister, PW5 called out PW4's name outside the house and the accused then left the witness and dressed up. He got hold of a panga and walked out of the house threatening to

cut them. PW4 then came out of the house and remained standing outside. She found her father Mr. Rwebuga and an Uncle Lozio. They asked the witness what had happened and she narrated the story to them. The accused at this time was in the courtyard of his house. The witness's father arrested the accused and took him to Mpugwe police post where a report was made. They were forwarded to Masaka police station to which they proceeded. They made a report and the accused was arrested.

7. PW4 was taken to the Hospital for examination where she was examined including her private parts. During cross-examination she denied that she had ever had sexual intercourse before this incident. She stated that she bled as a result of the accused ravishing her. There was blood in her private parts, and on the bedding where she was violated. She asserted that she was still bleeding when she got to the hospital for examination. She recalled experiencing a lot of pain during the sexual intercourse.
8. PW5, Zabeti Nakawuka, was an elder sister to PW4. On the day in question she recalls seeing PW4 strolling to the garden to go and collect food. The path passed by her home. A short while later Mega came back crying. She told her that the accused had chased them and managed to grab Ndagiire and had taken her inside his house. The witness ran to the accused's house, found it locked. She raised an alarm and rushed to call the Ndagiire's father, one Rwebuga. She found him at home just coming from his garden. She informed him what had happened and they rushed back to the scene. The accused was already outside the house. So was Ndagiire. The accused was arrested and taken to the police. Presently Mega was in school in Kampala. And that was the close of the case for the prosecution.
9. The accused testified not on oath and called no witnesses. He stated that he was a porter living on Namakindu village where he was, at the time, a porter for Mr. Wasswa. On the day

in question he was coming from the plantation to his home when he saw PW4 with her friend going somewhere. They passed him. When he was in his house he heard some voices outside the house. He came out and found several people including PW5. PW4 was also outside. They told him he had defiled PW4. They arrested him, beat him up and took him to the local council officials. He was thereafter taken to Mpugwe police post and later on to Masaka police station. He spent three days at Masaka police station after which he was charged in court with the present charges.

10. Mr. Simon Khaukha, the learned Senior Resident State Attorney, appearing for the prosecution submitted that the prosecution had proved its case beyond reasonable doubt. He submitted that the offence of defilement had three elements which are: (a) the victim must be below 18 years of age; (b) An act of sexual intercourse taking place; (c) And that it was the accused who defiled the victim. He submitted that there was sufficient evidence to prove that Pw4 was below 18 years and learned counsel for the accused, Mr. Kamugunda, conceded this. He submitted that there was sufficient evidence to show that Pw4 had had sexual intercourse with the accused in the testimony of PW2 and PW4. He relied on the testimony of PW2 and PW5 who claim to have found the PW4 outside the accused's house to provide collaborating evidence that it was the accused that had sexual intercourse with PW4. He further submitted that any contradictions and inconsistencies in the evidence of the prosecution were minor and could therefore be ignored or disregarded. He invited me to disbelieve the evidence of the accused.
11. Mr. Kamugunda, learned counsel for the accused, submitted that the prosecution had failed to prove its case beyond reasonable doubt, as it was obliged to do under our law. He submitted that the only direct evidence on whether PW4 had had sexual intercourse with the accused

was the testimony of PW4. He attacked her as an untruthful witness. PW4 had testified that she bled during the alleged sexual intercourse and up to the time they went for examination before PW2. PW2's testimony contradicted this piece of evidence. He stated in his report that there were no bloodstains or injuries or inflammation in the vagina of PW4. He submitted that this was a major contradiction, showing that PW4 was liar whose evidence was therefore unreliable to found a conviction. He attacked the prosecution for failing to call Mega as a witness. He further argued that the prosecution failed to exhibit the pair of knickers PW4 had asserted were torn by the accused.

12. The offence of defilement contrary to section 123 (1) of the Penal Code Act has three elements. (a) Sexual intercourse between two people; (b) One of who is a female under the age of 18 years; (c) and the other is a male and the accused in the case before the court. It is the duty of the prosecution to prove these three elements beyond reasonable doubt. See *Woolmington v. D. P. P.* [1935] A.C. 462; *Bhatt v R* [1957] EA 332; *Gabriel s/o Maholi v R* [1960] 159; *Wibiro alias Musa v R* [1960] EA 184; and *Uganda v Sebyala & others* [1969] EA 204.
13. It was conceded by counsel for the accused that there was sufficient evidence to prove that the victim, PW4, was below the age of 18 years. I agree. The testimony of PW2, PW3 and PW4 established beyond reasonable doubt that PW4 was thirteen years old at the time the offence complained of was alleged to have been committed.
14. What remains in issue are the other two elements. The question to be answered is whether PW4 had sexual intercourse and if she did so, whether it was with the accused. The only direct evidence on this matter is of PW4. It is contradicted by the testimony of PW2, the medical officer, who examined PW4 soon after the alleged defilement took place. PW4

testified during cross-examination that she bled as a result of the accused ravishing her. Up to the time of the examination she stated she was bleeding. I will quote in full the agreed testimony of the doctor.

15. “ On the 9th August 1994 I examined one Betty Ndagiire who I found to be a thirteen year old girl. Her hymen was ruptured. The rupture was old. There were no injuries or inflammations around her private parts. She had no bruises or injuries on her thighs or arms. The hymen had an old tear. There were no marks of violence on the body. She had a whitish discharge but no blood stains.”
16. PW2 never observed any bleeding in his examination of PW4. Since PW4 states that she was still bleeding when she went for examination, I am at loss as to how the PW2 could have missed to observe this. To the contrary, PW2 did not observe any bloodstains that would have been evident even if bleeding had stopped. In addition, some kind of lacerations or abrasions or bruises should have been revealed on examination in view of the bleeding. PW2 did not find any injuries of any sort in or around her private parts. This can not be consistent with PW4’s story of her condition after the alleged sexual intercourse
17. I am inclined to accept the evidence of PW2 on this point rather than the evidence of PW4. Firstly, the testimony of PW2 was agreed upon by both the Prosecution and the defence. Secondly, the doctor, a professional, has no or had no interest in the outcome of this prosecution. Of the two he is the one least likely to tailor his testimony to suit his own purposes. On the other hand, PW4, the complainant in this case, is definitely interested in the outcome of this case in a certain manner. Thirdly, in case of any doubt as who to believe between the two prosecution witnesses, the doubt should be resolved by accepting the

version most favourable to the accused. I find that on this portion of her testimony PW4 was lying.

18. This raises two matters for consideration. One is the effect of this contradiction and discrepancy on the prosecution case. The other, which is related to the first one, is how should the testimony of PW4 be treated since she has been found to be lying in part. Can we sever the false part of her testimony from the rest of her testimony?
19. Where there are contradictions and discrepancies between the prosecution witnesses, which are minor, and of a trivial nature these may be ignored unless they point to deliberate untruthfulness. Where the contradictions and discrepancies are grave this would ordinarily lead to the rejection of such testimony unless satisfactorily explained. See Alfred Tajar v. Uganda, Criminal Appeal case no. 167 of 1969 (unreported); Emmanuel Nsubuga v Uganda, Supreme Court Appeal No. 16 of 1988 (unreported); and Suleiman Katusabe v Uganda, Supreme Court Criminal Appeal No. 7 of 1991(unreported).
20. In the instant case the contradiction between PW2 and PW4 is not minor. It relates to the credibility of the complainant in this case. If she was injured and she bled, as she asserts, this is an important detail in the case for the prosecution. It is contradicted by PW2, another prosecution witness. I do not agree with the learned Senior Resident State Attorney that this is a minor discrepancy or contradiction. Even if it were to be regarded as minor it seems to me to point to deliberate untruthfulness on the part of either PW2 or PW4 which would result in the rejection of their evidence. It would appear to me that whether this contradiction is regarded as minor or major the result is the same in this case.
21. The other matter for consideration is whether it is possible to sever the false part of PW4's testimony from her other testimony. Pw4 is the sole witness as to the identity of the accused.

I think the words of the Supreme Court in the case of LT. Mike Ociti v Uganda, Supreme Court Criminal Appeal No. 7 of 1988(unreported) answer this point. “ The consideration which we would have thought of greater consequence, were that this sole witness to the identity of the appellant was not proved to be consistent, nor corroborated, on the issue of identity. However, if a sole witness to the identity of an accused is found to be deliberately lying on part of the case, great care must be taken considering whether the false part of his testimony can be excluded legitimately from the rest of his evidence, or whether, it affects his whole evidence. Generally speaking, where a sole witness as to identity is found to be deliberately lying on an important aspect of his evidence, it is not logically possible to believe the witness in part and reject his evidence in part.” Page 4 of the typed copy of the judgement.

22. I am inclined to find that it is not possible to sever the false part of PW4’s testimony from the rest of her testimony. The testimony of Pw4 is so flawed that it can not found a conviction. Absent PW4’s testimony, there is no other testimony in this case to connect the accused with the remaining elements so far not proved in this case. In agreement with the gentlemen assessors, I find that the prosecution has failed to prove this case beyond reasonable doubt. I find the accused not guilty of the offence of defilement as charged. I acquit him of the said charge and order his immediate liberation from custody unless he is held on some lawful charge.

Signed, dated and delivered at Masaka this fifteenth day of October 1998.

(Signed) FMS Egonda-Ntende

JUDGE

15/10/1998.