

THE RE PUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL SESSION CASE NO.473 OF 1996

UGANDA

PROSECUTION

VERSUS

PAUL KIWANUKA alias KIWALYANGA

ACCUSED

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

JUDGEMENT

1. The accused, Paul Kiwanuka is indicted of the offence of defilement contrary to section 123(1) of the Penal Code Act. It is alleged that Paul Kiwanuka on or about the 2nd June of 1995 at Matale village in Rakai District had unlawful sexual intercourse with Maimuna Nakintu a girl under the age of 18 years. The accused denied the offence.
2. The case for the prosecution, as can be gathered from its witnesses, is that on or about the 2nd June 1995 on Matale village, the victim, PW6, Maimuna Nakintu was sent to the well by her aunt, Aida Nassali, PW5, with whom she was living. This was mid morning at about 10.00 a.m. As she approached the well, she met a man who followed her to the well. That man had a bag. She reached the well and drew water. She then turned back. The man continued to follow her and along the way he asked for some water to drink. Maimuna obliged. She set her container down. And she offered him water to drink. He drank some water. He then grabbed the young girl and dragged her to the bush. He ravished her and left.

3. The young girl ran back to her aunt, Aida Nassali, in a distressed state, crying. Aida asked her what had happened. She narrated her unfortunate ordeal. Aida got hold of her and ran to the well in an attempt to trace the assailant. He was not at the well. She continued on toward some shops in the area. She found a group of young men. She told them of what befallen her young niece. She said the man responsible was carrying a bag. She inquired if he had passed that way. Following the information she obtained, she continued on to Kalisizo. At Ninze, she met another group and she narrated her story. As a result again of the information she received she continued on to Kalisizo. In Kalisizo town she met another group of people who told her that there was a man arrested at Ninze for stealing a chicken. She was advised to go and check if this was the person responsible for the ravishment of her niece.
4. At this point Aida and Maimuna must have turned back to repair to Ninze whence they had just passed a little while back. They found a man arrested. He had a bag with a chicken in it. Maimuna was asked if this was the person who had ravished her. She said yes. The man was arrested and taken to Kalisizo Police station. The man arrested was the accused standing in the dock according to the testimony of both Maimuna and Aida. Maimuna added that this was the man who had ravished her. According to Aida, Maimuna was now about 12 years old. At Kalisizo police station, Aida was given medical forms for the examination of Maimuna. She took her to Kalisizo Hospital for examination and a doctor examined her.
5. Dr. Nakwanagi of Kalisizo Hospital examined Maimuna and made a report, which was tendered in evidence. She found that there was hyperaemia or inflammation around the vaginal orifice. This was, in her view, consistent with application of force sexually. There were no other injuries. The hymen was not ruptured. That was the case for the prosecution.

6. The case for the defence as can be gathered from the accused's testimony on oath is that this must be a case of mistaken identity. The accused states that on the day in question he got up early and visited his friend on Matala village called Nsubuga. This was at about seven thirty in the morning. Nsubuga sold him a chicken and he returned to Kalisizo town at about nine thirty in the morning. While in Kalisizo at Katwe stage, two men came along and asked if he was selling the chicken. He said he was not. The men then said he was under arrest for stealing, among other things, this chicken. People gathered around and said he should be taken to the local council officials of the area. He was taken to Mile 18. He was made to sit in a courtyard. And some people went to fetch the owner of the chicken to ascertain if this was his chicken.
7. In the mean time some people started beating him up. And it was at this point that Aida emerged. She had a hoe. She struck him on the leg with her hoe injuring his tendon. She went away. At this point the local defence arrived and rescued him from further assaults. At about this time, the alleged owner of the chicken came and said the chicken, which the accused had, was not his chicken. Aida then came back and alleged that, not only had the accused stolen a chicken, but he had also defiled her child. He was then taken to the Police station. It is at the police station that he saw PW6 and not at the scene of his arrest or at Mile 18. He denied he had a bag the day he was arrested. And that was the close of the case for the defence.
8. The offence of defilement has three ingredients. Firstly, there must be sexual intercourse between a male and a female. Secondly, the female must be under the age of 18 years. And thirdly, the male must be the accused before the court. It is the duty of the prosecution to prove these three elements beyond reasonable doubt. The accused has no duty to prove his

innocence. The burden of proof remains on the prosecution throughout the trial. 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. The defence conceded that there was sufficient proof for the first two ingredients. That the victim in this case is under the age of 18 years and that on the day in question a man yet to be established ravished her has been proved.

9. What remains in contention is whether the accused was the person who ravished Maimuna or not. The only direct evidence on this point is that of Maimuna. Her testimony was made on oath after a *voire doire* established she knew the meaning of an oath and the duty of telling the truth. This evidence needs to be examined with the greatest care to eliminate the possibility of error. Secondly, under Section 38(3) of the Trial on Indictments Decree, if such testimony is to found a conviction, it must be corroborated in some material particular implicating the accused person. In addition, it is now an old established rule of practice that evidence of complainants in offences of this nature, identifying the accused as the person who committed the crime in question must be corroborated in that respect if it is to found a conviction.
10. The prosecution has not established how the accused in this case was arrested initially. The evidence of PW2 and PW3, who were suggested by the learned state attorney as having participated in the arrest of the accused, on close examination does not support that contention. Both witnesses state in general terms that the villagers got concerned and traced the suspect and arrested him. Both witnesses do not claim to have been in the group of villagers that effected the arrest of the accused. The other bit of evidence is the information PW5, Aida, was given by a group of people to the effect that someone had been arrested for

stealing a chicken. They advised Aida to go and check if it was the same person responsible for ravishing her child. She proceeded to where she had been directed, and found the accused already arrested.

11. The accused testified on oath as to how he was arrested. It was on allegations of stealing a chicken He was then taken to Mile 18 to the LC's of the area and the owner of the chicken allegedly stolen was fetched. He came and denied that the chicken, which the accused had, was his. The immediate cause for his arrest seems to be the question of stealing a chicken. There is no evidence contradicting this version of events. To the contrary the prosecution has no evidence on how the accused was arrested. I am unable in the circumstances to conclude that the accused was arrested because of the description given by Maimuna to her aunt, Aida, and in turn Aida gave it to the people who arrested the accused, as the prosecution would have us believe.
12. Maimuna and Aida came upon the accused in what must have been a very excited and tense state involving the arrest of an alleged thief in public. The accused in his testimony stated that he was assaulted while under arrest at Mile 18 and was only saved by the local defence personnel. This story is not improbable. The identification or recognition of the accused, whatever the case may be, in such circumstances that he was the person who ravished Maimuna, by Maimuna, leaves me with some unease. Maimuna may be telling the truth. It is also possible that in the circumstances of finding someone already arrested; it may have been difficult for the child to say to a crowd of adults milling around that that is not the person who ravished me. Maimuna in the description she gave her mother of the person who ravished her she stated that person had a bag. She states and she is supported by a number of prosecution witnesses, notably Aida and John Kalyabe, that the accused, when they found

him arrested, had a bag which contained a chicken. The accused denies having a bag at all. In his testimony he states that he had only a chicken and gives an explanation as to how he came by this chicken. It would have been helpful for the prosecution to have produced this bag, which was the article by which he was described and allegedly identified. This bag has not been produced in evidence and no explanation provided for its none production. This lends some credence to the accused's story that he had no bag at the time of his arrest. Absent the bag, Maimuna's identification of the accused in the circumstances of this case may not be free from error.

13. Learned Counsel for the state, Mr. Simon Khaukha submitted that the evidence that corroborates Maimuna's story implicating the accused is to be found in the testimony of the accused. The accused admitted being in Matale village at about the morning the crime in question was committed. This, he submitted, implicates him in the commission of this crime. I am unable to agree. The accused set up an alibi. He stated that he went to visit a friend of his called Nsubuga at about 7.00 a.m. and left to return to Kalisizo at about 9.30 a.m. He went with a chicken he had bought from Nsubuga. And he had no bag. He returned to Kalisizo where he was arrested. The state is under a duty to demolish the accused's alibi. In the particular circumstances of this case this could have involved taking a statement from Nsubuga if the accused made a statement at the police that set out this story. In case he provided a different story at the time, this could have been challenged in cross-examination of the accused, and shown to be either an afterthought or to be a fabricated alibi.
14. It may be possible for the accused to have visited Nsubuga, and then commit the crime on his way back to Kalisizo town. In that case, assuming that his story of how he came by the chicken he had is true, as it is not contradicted, Maimuna would have been able to observe

that the accused had a chicken at the time. She did not though. This may suggest that it is another person who committed the offence. If it was the accused that committed the offence, then he had not acquired the chicken as yet. The accused has succeeded, in my view, in his defence, to create doubt in the prosecution's case. The possibility that the offence in question was committed by another person can not be dismissed.

15. I agree with Assessor No. 1, Mr. Tom Wasswa that it is possible that the person arrested for stealing a chicken, the accused before this court may not be the person who ravished Maimuna. I find that the prosecution has not proved beyond reasonable doubt that it is the accused that committed this offence. I acquit him of the offence of defilement contrary to section 123(1) of the Penal Code Act. I order his immediate liberation unless held on any other lawful charge.

Dated, signed and delivered at Masaka this 27th day of October, 1998.

FMS Egonda-Ntende

JUDGE