

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT THE SESSION
HOLDEN AT MUBENDE
CRIMINAL SESSION CASE NO. 54 OF 2000

UGANDA:..... PROSECUTOR

VERSUS

KASIGAZI JOHN:.....ACCUSED **BEFORE:**
THE HONOURABLE MR. AG. JUSTICE PAUL K. MUGAMBA

J U D G M E N T:

Kasigazi John, the accused in this case, stands indicted for the offence of defilement, contrary to section 123(1) of the Penal Code Act.

All in all five witnesses were called by the Prosecution in support of their case. These were Namukolaki Scovia (PW1 - the complainant), Aida Kibalama (P.W.2 - mother of the complainant), Nyirabazungu Makulata. (P.W.3), Dr. Ngobi James (P.W.4) and Byaruhanga Ferdinand (P.W.5).

In his defence the accused gave an unsworn statement and called no witnesses.

Briefly the prosecution case is that at about 4.00 pm on 25th June 1998 P.W.1, a girl aged 9 years then, was sent by her mother P.W.2 to a family plot 150 metres away to go and harvest a bunch of banana for the family meal. No sooner had PW1 arrived in the garden than the accused arrived holding a pineapple and took away the panga PW1 had gone with from her. He threatened her that if she did not follow him into his house some distance away, he would cut her with the panga. Meanwhile accused pulled PW1 towards his house and put his hand on her mouth so that she would make no noise to invite other people to her situation. Once inside the house, accused removed PW1's knickers, lay her on her back on the bed with her legs parted. Thereafter accused removed his trousers lay on top of PW1 and inserted his penis in PW1's vagina. Accused who kept threatening to cut PW1 if she made noise had shut the door when they entered the house. When the mother of the girl (PW2) noticed PW1 had taken

long on the errand she went out looking for her and ended at the house of the accused, where she heard accused telling PW1 who was crying out in pain that when she reached home she should not mention what had taken place between him and her to anybody. When accused learnt that PW2 and PW3 had arrived at his house, he ran out of the house and threatened to cut PW2. PW2 and PW3 examined PW1 and noticed blood flowing from her vagina. Medical examination indicated rupture of the hymen. The matter was later reported to police.

In his defence accused set up an alibi. He told court that he had found PW1 in his garden at about the time of the offence. PW1, according to accused, had stolen maize in his garden. He had taken P.W.1 with him in order to report the incident to the father of P.W1 but that on the way they had met P.W.2 who had removed the panga the girl had gone with from the girl and had threatened to use it in cutting accused. That PW2 had gone on to raise an alarm and to say that accused had defiled PW1. That soon after a neighbour also came and supported P.W.2. Later that day accused was arrested and later charged with the offence of defilement.

Three ingredients must be proved by the prosecution in order for it to successfully prove a case of defilement. The three ingredients are.

- (a) that the complainant was a girl under the age of 18 years at the time of the alleged offence;
- (b) that the complainant had sexual intercourse on the day in question, to wit 25th June 1998; and
- (c) that it was the accused who committed that offence.

With respect to the first ingredient, PW1 and PW2 told court that PW1 is 11 years old. In court she appeared to be of tender age and her evidence was taken after a voire dire under provisions of S. 38(3) of the TID. The defence did not contest the fact that PW1 was below

18 years of age at the time of the alleged offence. In the circumstances I find that the first ingredient has been proved beyond reasonable doubt.

Regarding the second ingredient, sexual intercourse is complete when a female's sexual organ is penetrated by a male organ (See Archbold, Criminal Pleading Evidence and Practice, 38th edition, paragraph 2872). It is the evidence of PW1 that on 25th June 1998 she had sexual intercourse. Although court may proceed to convict upon the uncorroborated evidence of a complainant where it is satisfied such a witness was truthful, I warned the assessors just as I do warn myself of the danger of acting upon the uncorroborated evidence of a complainant of tender age in a case involving a sexual offence. The case of Chila and Anor vs. Republic (1967) EA 722 applies. The complainant, PW1, testified in court. Despite being of tender age I am satisfied she was clear and firm. She was never shaken even in cross examination. I found her a truthful witness. Her evidence was corroborated by PW2 and PW3 who examined her immediately after she came out of accused's house. They observed blood flowing from her vagina. The same evidence is supported by medical evidence where the next day, 26th June 1998, PW6 found that her hymen had been ruptured. In the circumstances I find that the prosecution succeeded in proving the second ingredient of the offence of defilement.

As for the third ingredient, PW1 told court that it was accused who had sexual intercourse with her on 25th June 1998 in his house. PW2 and PW3 also testified telling court that they had found accused and PW1 in accused's house with the door shut. Later accused had emerged from the house and found both witnesses outside his house. It was in the afternoon, accused was known to both witnesses and the occasion was at accused's house. On the other hand accused set up an alibi. He was not at his house at the time as is alleged in the prosecution evidence but rather was arresting PW1 and taking her to her father to report the theft of his maize by PW1. It was on the way to make the report that they met PW2 who alleged accused had defiled PW1. Where an accused person sets up an alibi it is not his duty to prove it. See Sekitoleko vs. Uganda (1967) EA 531.

I am satisfied that the complainant was a truthful witness. She could not have been mistaken about her defiler since she knew him before, she saw him when he arrested her and took her to his house and proceeded to have sexual intercourse with her. It was during broad daylight

and there is in addition evidence of PW2 and PW3 who saw accused at the spot. Accused's evidence did not impress me but is a pack of lies designed to make him escape his ghastly responsibility. The prosecution has succeeded in placing accused at the scene of crime. I am in no doubt that the prosecution has once again proved a vital ingredient of the offence.

I have heard the joint opinion of the two assessors and I am in agreement with them. I find the accused guilty of the offence of defilement contrary to section 123(1) of Penal Code and convict him accordingly.

In course of shifting evidence I have come across some inconsistencies in the prosecution case such as whether accused was arrested at his house at all or not and how he was dressed when he came out of his house. PW2 and PW3 also do not seem to agree who arrived at accused's house first. I have attributed the discrepancies to the passage of time and find, where they exist, they are inconsequential.

Paul K. Mugamba

Ag. J u d g e

31.03.2000

3.40 p.m.

31.03.2000

Accused present

Ms. Nandaula SSA for state

Ms. Bugembe for accused

Assessors present

Mr. Subi court clerk/interpreter

Judgment read in open court.

Paul K.Mugamba

Ag. J u d g e

31.03.2000

ALLOCUTUS:

Ms. Nandaula:

The convict is a first offender. He has been convicted of a serious offence carrying a maximum sentence of death. The offence was committed in a very brutal manner where accused used a lot of force on a small girl and threatened to cut her with a panga. Accused is dangerous to society. He had a wife but he could still sexually assault small children. Court should protect likely victims. Defilement is now very rampant. I pray for a deterrent sentence.

Ms. Bugembe:

Accused is a first offender. Accused has a family. He has two children and a wife. He was the sole bread winner of the family. He has spent some time on remand. I pray the period on remand be taken into account. I pray for a lenient sentence.

SENTENCE:

I have heard submissions of both counsel concerning sentence. Accused acted in a brutal manner on a small unsuspecting child he should be expected to protect. He has a family and filial responsibility should not be strange to him. I sentence him to imprisonment of 12 years. His period on remand should be taken into account.