

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT THE SESSION HOLDEN AT MUBENDE
CRIMINAL SESSION CASE NO. 25 OF 2000**

**UGANDA :..... PROSECUTOR
VERSUS**

SEMIYINGO PAUL :..... ACCUSED

BEFORE: THE HON. MR. AG. JUSTICE PAUL K. MUGAMBA

JUDGMENT

Semiyingo Paul the accused herein was indicted for the offence of defilement contrary to section 123 (1) of the Penal Code Act.

A total of five witnesses were called by the support of the case for the state. The witnesses were Kyaterekera Namuyiga Fatuma (the complainant – PW1), Haruna Bukenya (father to complainant - PW2), Zoromina Nakate (grandmother to complainant - PW3), Nalongo Betty (sister to accused - PW4) and Detective Constable Ndundu (arresting officer- PW5). Medical evidence was admitted under Indictments Decree.

The accused had no witness and for his defence decided to keep quiet.

The prosecution case is briefly as follows:

At about 4.00 p.m. on 6th December, 1998, the complainant was at the home of her grandmother, PW3, with two other women, one Nabyesero who has since died and a female visitor who had come with a child. It was then that the accused who lived in the neighbourhood and is related to the father of the complainant appeared and asked the complainant to accompany him in order that he might give the complainant some Irish potatoes to carry back to the complainant's grandmother, PW3. Without hesitation, the complainant did as she was told and later arrived together with accused at the garden of the accused where accused proceeded to harvest some Irish potatoes and deposit them in a polythene bag. No sooner had he deposited the potatoes in the polythene bag than he suggested he and the complainant proceed to accused's banana plantation nearby where he could harvest a bunch of banana, also to be taken to complainant's grandmother. Meanwhile

the polythene bag together with its contents were left in the garden. On arrival in the banana plantation accused got hold of the complainant and lay her upon her back on the grass and proceeded to tear complainant's knickers. Accused pulled his trousers down to his feet, lay upon the complainant and inserted his penis in her vagina. The complainant cried out in pain and her cries were later heard by her father, PW2. When PW2, together with a Matovu Sunday, who had been searching for complainant heard her cries they went to the source of the noise and found accused lying on top of the complainant with his penis inside the complainant's vagina. They pulled the accused from the complainant and took both accused and complainant to the village authorities and later to Police. Accused begged for forgiveness from PW2 saying the act was not intended but that it resulted from his drinking of alcohol. PW2 did not oblige him but instead took the case to the Chairman L.C.1. The Chairman L.C.1 forwarded them to Kyenda Police Post. As it was late in the evening Police advised that they could not get medical assistance at the hour but that the complainant should not wash those parts of her body relevant to the case, her private parts. The accused was re-arrested and detained at Kyenda Police Post. Next morning the complainant was examined and treated at Mubende Hospital. PW1, PW2 and PW3 all state that after the act of sexual intercourse there was blood in the private parts of the complainant.

The accused offered no evidence in his defence, one of the options the law allows him.

In order for the prosecution to succeed in a case of defilement it has to prove the following ingredients of the offence:

- (i) that the complainant was under the age of 18 years at the time of the alleged offence;
- (ii) that the complainant had sexual intercourse on the day in question, to wit 6th December 1998; and

- (iii) that it was the accused who committed that offence. (Refer to section 123(1) of the Penal Code Act and Uganda vs. Donozio Yiga, Criminal Session Case No. 38 of 1995).

It is vital that the evidence adduced by the prosecution bears out the above ingredients.

With regard to the first ingredient, PW1, the complainant testified before this court. She was clearly of tender age. Court administered a voire dire and found her equipped with sufficient intelligence to testify and knew the duty of telling the truth. She did not testify under oath because of her age which she said was 8 years. Her father PW2 also stated the age of PW1 to be 8 years. This evidence of age is unchallenged and I find that the prosecution proved the first ingredient of the offence in this case to the effect that the complainant was below the age of 18 years on 6th December 1998.

Concerning the second ingredient, in law sexual intercourse is complete when a female's sexual organ is penetrated by a male sexual organ (see Archibold, Criminal Pleading Evidence and Practice, 38th edition at page 2873 para 2872)

The prosecution in this case introduced the evidence of PW1 who stated that she had had sexual intercourse. As a witness PW1 impressed me as one telling the truth and appeared confident. But she is of tender age. Court has to warn itself of the danger of relying on her evidence alone. It can nevertheless proceed and convict given certain conditions (see Chila and Anor vs. Rep. [1967] EA 772). However her evidence is corroborated by the evidence of PW2 who arrived at the scene and pulled the accused from the complainant. There is also the evidence of PW3 who stated that she examined the complainant soon after she was found with the accused. PW3 found blood in PW1's private parts. I am persuaded that the above testimony lends credibility to the complainant's story that on 6th December, 1998 she had sexual intercourse with the accused. The second ingredient of the offence of defilement has therefore been proved in this case and was never challenged.

The third ingredient relates to whether it was the accused who had sexual intercourse with the complainant on 6th December, 1998. As I have expressed earlier I was impressed by PW1 as a witness of truth and her fortitude during cross examination. She knew the accused. Again as stated earlier PW2 found the accused in flagrante delicto. PW2 was an equally impressive witness, a relative of the accused and he proceeded to produce the accused before other people as the person he had found having sexual intercourse with his daughter. There was no recess between the finding of the accused having sexual intercourse with the complainant and accused's eventual apprehension. The evidence was never challenged. I find for a fact that the accused committed the offence.

Accordingly, in agreement with the joint opinion of the gentleman assessors I find the accused guilty of the offence of defilement c/s 123 (1) of the Penal Code Act. I therefore hereby convict him accordingly.

I have deliberately ignored the medical report which was omitted in evidence because it is not authentic. It has no date to it and as such I have disregarded it in my arrival to this decision.

Paul K. Mugamba

AG. JUDGE

20/3/2000

20/03/2000

Accused present.

Ms. Nandaula - SSA for state.

Mrs. Bagambe for accused on state brief.

Both assessors present.

Mr. Ssubi - Court Clerk/Interpreter present.

Court:

Judgment read in court.

Ms. Nandaula:

The convict is a first offender. We have no record of his being convicted earlier. It is a serious offence carrying death sentence. The accused is an old man who took advantage of a small girl aged only 8 years thereby abusing the trust society has in old men who are supposed to safeguard young children from danger. He harmed her instead. Accused is a trustful man and a very reckless one. At his age he is a dangerous man to society. He needs to be put away from society for his conduct.

I pray for a deterrent sentence.

Mrs. Bagambe:

As stated by state council accused is a first offender. Accused is an elderly man who deserves some leniency so that he can get out of prison and enjoy the last years of life as a free man. He has been on remand since December 1998 and I pray that the passing sentence this be taken into consideration. I pray for a lenient sentence.

Accused:

I pray for a lenient sentence. I have four grand children who my son left behind. I have bad eyesight. I have backache. I am a first offender. I have never even committed an offence before LCs. My period on remand should be taken into account.

SENTENCE:

I agree with both accused is a first offender. I also agree with council for the accused and the accused himself that accused is an elderly man. However the offence he committed is not one a person of his age would have been expected to commit. I have to take into account the expectations of society and to stigma he so callously visited on the complainant. I sentence him to a custodial sentence of 12 (twelve years). His period on remand shall be taken into account.

Paul K. Mugamba

AG.

JUDGE

20/3/2 000

R/A explained.

Paul K. Mugamba

AG. JUDGE

20/3/2000