

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT TORORO**

HIGH COURT CRIMINAL SESSION CASE NO. 36 OF 2000

UGANDAPROSECUTOR

VERSUS

OKOCH MOSES..... ACCUSED

BEFORE THE HONOURABLE MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The accused Okoch Moses alias Amos was indicted for defilement contrary to section 123 (1) of the Penal Code Act. It was alleged in the particulars of the indictment that the accused, in January 1999, at Nahayaka village, in Busia district, had unlawful sexual intercourse with Nekesa Violet, a girl below the age of 18 years. On arraignment, the accused pleaded not guilty to the offence.

Five witnesses testified for the prosecution. Dr. Odong Odur examined the accused on 10/5/1999. He found him to be a man of the apparent age of 22 years. He was of apparent normal mental disposition. The medical report was tendered in evidence as PE1. Doctor Bwire examined the complainant, Nekesa Violet, on 28/4/1999. She was a girl who looked below 15 years of age. She had a hymen which had ruptured more than one week previously. The Doctor found that she was about 20 weeks pregnant.

The complainant, Nekesa Violet testified that at the beginning of January, on a date which she could not recall, she went to stay with her Aunt one Nabwire Eunice. Nabwire Eunice is the wife of the accused. The following morning, at about 6.00 a.m., her Aunt went to the well to fetch water. While she was away, the accused came and held her. He threatened her with death if she made any noise or told anyone. He had sexual intercourse with her. When her Aunt returned she did not tell her for fear of being killed. Nekesa Violet returned home 3 days later. Some 4 months

later, she became unwell. She was taken to the hospital where she was found to be 20 weeks pregnant.

Nerima Jane is the mother of Nekesa Violet. She testified that sometime in January, the sister of her husband, called Nabwire Eunice came to their home and took away their daughter, Nekesa Violet. Nekesa returned three days later. Later in April, she noticed changes in her daughter's body constitution. On taking her to the hospital, it was confirmed that Nekesa was about 20 weeks pregnant. She was with her husband Okot Vincent. The girl Nekesa was questioned about the person who was responsible for the pregnancy. Nekesa told her parents that the husband of her Aunt, the accused was the one responsible for the pregnancy. The husband reported the matter to the police and the accused was arrested. While he was at the police, she went and confronted him. The accused begged her for forgiveness for the defilement of her daughter Nekesa. She told him that she could not do so alone without her husband. She said that she discussed this with her husband and they decided not to forgive the accused, but left matters to continue in court.

Okot Vincent is the father of the complainant. He told court that his daughter, Nekesa Violet went to stay with his sister sometime in early January. His sister Nabwire Eunice is married to the accused. They got married on 26/12/1998. He was the one who gave her away to the accused in marriage, as the brother. When she returned it was realised that Nekesa was not well. She was taken to the hospital. The doctor told him that Nekesa was pregnant. He asked her who was responsible for the pregnancy. Nekesa informed him that Okoch Moses the accused herein was the one, and that he had threatened her with death if she told anyone. That was why she had not told them. He took the matters to the police, and Okoch Moses was arrested.

The accused gave a sworn statement. He called no witnesses. He denied the offence completely. He said that he does not know Nekesa Violet or Nabwire Eunice, his so called wife. He said that at the time of his arrest, he was not married. He said that there was no grudge between him and Nekesa. He knew her father Okot Vincent. He was a bicycle repairer to whom he used to take his bicycle for repair. There was no grudge between them.

In a criminal case the prosecution must prove the indictment beyond reasonable doubt. Each and every ingredient which constitutes the offence must be proved beyond reasonable doubt Woolmington vs. The DPP [1935] AC 462. Leonard Aniseth vs. Republic [1963] EA. 206.

It is the law that in order to secure a conviction in a charge of defilement, three ingredients must be proved beyond reasonable doubt. First that an act of sexual intercourse, which means penetration of the female sex organ by the male sex organ, occurred. Second that the female was below the age of 18 years, and lastly, that the person charged with the offence is the male person who committed the sexual intercourse. Kibale Ishma vs. Uganda Cr. App. No. 21 of 1998, (SC), (unreported).

The defence did not contest the ingredient of age, and that of sexual intercourse. With respect to age, there was the testimony of the complainant herself, Nekesa Violet. She said that she was 15 years when she testified in the year 2000. That means that she was 14 years in 1999. The doctor who examined her in April 1999 found her to be a girl of less than 15 years. Nekesa's father said that his daughter was born in 1985. That would mean that she was 15 years when she testified in the year 2000. I am therefore satisfied that Nekesa Violet was a girl below the age of 18 years in January 1999, when the offence was allegedly committed.

With regard to the ingredient of sexual intercourse, there was the evidence of Nekesa. She stated that in early January, she went to live with her Aunt, Nabwire Eunice, the wife of the accused. On the morning after her arrival, the accused came and had sexual intercourse with her. Doctor Bwire examined her in April, and found her to be some 20 or so weeks pregnant. She had a hymen which had ruptured more than a week previously. The doctor's testimony corroborated that of the complainant. As stated earlier, the defence did not contest this ingredient. It was admitted. I therefore find that the prosecution proved the ingredient of sexual intercourse beyond reasonable doubt.

The last ingredient in the charge of defilement which the prosecution had to prove beyond reasonable doubt is the participation of the accused in the act of sexual intercourse. This was strongly contested by the defence.

It is the practice of this court that the testimony of a complainant in a sexual offence requires corroboration before a conviction can be founded on such testimony. The supreme Court in the case of Kibale Ishma (supra) held that the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so, he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. The evidence of a prosecutrix in a sexual offence like the one before me requires corroboration. During the summing up, I warned the assessors, as I also warned myself of the danger of basing a conviction on the uncorroborated testimony of the complainant in a sexual offence. Having so warned myself, I could proceed to convict even in the absence of corroboration if I am satisfied that the testimony of the complainant is truthful.

Corroboration has been defined by the Supreme Court in the Kibale Ishma case (supra) to mean independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed, but also that the accused committed it.

Nekesa Violet gave her testimony on oath. In law therefore her testimony does not require corroboration. But being a sexual offence, her evidence in practice requires corroboration. She testified that she went to her aunt's place to live with her sometime in January, 1999. The morning after her arrival, while her aunt had gone to the well to fetch water, the husband, the accused came and had sexual intercourse with her. He warned her not to tell anyone lest she would be killed. The time was about 6:00 am in the morning. She knew the accused. He was the husband of her Aunt. The time was early morning. The act of sexual intercourse was carried out uninterrupted. In those circumstances there could not possibly be any mistaken identity, and the defence did not contest this.

Mr. Magirigi, leaned counsel for the defence did contest the evidence of the doctor. He said that it was unsatisfactory, and could not offer the necessary corroboration. The doctor in his report said that when he examined Nekesa in April 1999, he found that she was about 20 weeks pregnant.

Mr. Magirigi contended that if the complainant had sexual intercourse in January, then by end of April she would be not 20 weeks pregnant, but at the very most 17 weeks pregnant. That created a doubt about the evidence of the complainant, which doubt ought to go to the benefit of the accused.

The medical report which was under attack was admitted in evidence under section 64 of the Trial on Indictments Decree as PE2. The doctor noted in the report as follows, “she is pregnant about 20 weeks! “Nekesa went ahead to give birth 9 months after the act of sexual intercourse. Ms Okalany learned Counsel for the State submitted that this was a matter of fact confirmed the doctors evidence that Nekesa was pregnant about 20 weeks when he examined her in April. The doctor gave an estimate and he stated so by saying “about”. He was not categoric about the period. He was justified in his conclusion about the pregnancy when Nekesa gave birth in September. The fact that Nekesa gave birth in September, nine months after the alleged act of sexual intercourse was corroboration of her testimony. I could not help but agree with that submission. It was supported by the evidence. Nekesa said that she gave birth in September. This was not contested at all or challenged in cross examination. I therefore take it as the truth.

Nerima Jane the mother of the complainant stated that when her daughter told them that it was the accused that had sexual intercourse with her, matters were reported to the police. The accused was arrested. On his arrest, Nerima Jane went to the police and confronted him. The accused begged her for forgiveness for the sexual intercourse with her daughter Nekesa Violet. Nerima said that she did not forgive him as she wanted to talk it over with her husband. This begging for forgiveness from the mother by the accused is further corroboration of the complainant’s evidence.

In the case of Safari Innocent vs. Uganda, Cr. App. No. 20 of 1995, (unreported) the Supreme Court held that, “the evidence of the complainant that she had been defiled was clearly corroborated by the medical evidence, that her hymen was torn, and the appellant’s confession to, and request for mercy from the mother of the complainant. Further the prosecution evidence that the appellant disappeared from his home in the neighbourhood and could not be traced at the material time and his plea for mercy, also clearly supported the complainants evidence that it was the appellant who ravaged her.”

The accused denied the offence. He said that he did not know Nekesa, the complainant. The first time to see her was in court. He did not know Nabwire Eunice, his so called wife either. He said that he was not married at the time of arrest. He said that there was no grudge between him and either the complainant or her father, Okot whom he knew well as a bicycle repairer. He was not Okot's brother in law.

The denial by the accused that Nabwire Eunice was not his wife was not believable. Okot Vincent stated that he was the brother of Nabwire Eunice. He said that he gave her away in marriage to the accused. He even remembered the date of their marriage, as 26/12/1998. This is the person with whom his daughter went to live with, being the husband of her Aunt. The accused admitted knowing Okot. He also admitted that there was no grudge between him and Okot. I had the opportunity of observing the accused as he gave his testimony. He was not impressive at all. He was only making a defence to try and save himself from the offence. I also noted that much as an accused has no duty to put up a defence, there was no contention or challenge to the evidence of Nerima Jane in cross examination that the accused talked to her and begged her for forgiveness for defiling Nekesa.

I had the opportunity of observing Nekesa Violet as she gave her testimony. She was straightforward and consistent. She was not shaken in cross examination, nor did she contradict herself. I found her an honest and truthful witness, and I accept her evidence. Nerima and Okot were also credible witnesses. They impressed me as honest witnesses. They had no reason to tell lies against the accused. None of the prosecution witnesses had anything to gain by making such allegations against the accused unless these were true. I accepted their testimonies as truthful.

I accordingly rejected the accused's defence. I was satisfied that the prosecution proved the participation of the accused beyond reasonable doubt.

I looked for but did not see any inconsistencies in the prosecution case. The gentlemen assessors in their individual opinions advised me to convict the accused as charged. I have no reasons to differ from their advice. I therefore find the accused guilty of the offence of defilement contrary to section 123 (1) of the Penal Code Act, and I convict him accordingly.

RUGADYA-ATWOKI

JUDGE

20/03/01