

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CT-CO-0106-2001

UGANDAPROSECUTION

-VS-

NDYAGARUKA FRANKACCUSED

BEFORE: THE HON. JUSTICE P. K. MUGAMBA

JUDGMENT

Accused is indicted for defilement contrary to section 123 (1) of the Penal Code Act. The prosecution has called in all five witnesses in support of its case. The witnesses are Esteri Kanyebaze (PWI), Scovia Kashaija (PW2), Namanya Justus (PW3), Jacqueline Natamba (PW4) and Dr. Fred Bagenda (PW5). In his defence accused gave a statement on oath and called no witnesses.

Briefly the prosecution case is that accused was the sole teacher at a church school at Rwoburondo. On the day in question he called PW1 out of the classroom and told other pupils to remain in the classroom. Thereafter accused took PW1 to a bush behind the school and had sexual intercourse with her. PW1 was examined by her mother (PW2) and by a medical doctor and found to have a ruptured hymen and injuries in her vagina. Accused was later arrested and charged accordingly.

In his defence accused made a total denial of the state case. He testified that on the alleged occasion he did not go to school because he was sick.

The prosecution has a duty to prove all the ingredients of the offence beyond reasonable doubt if it is to secure a conviction.

See Woolmington vs DPP [1935] AC 462.

Okethi Okale and Others - vs- Uganda [1965] EA 555.

Those ingredients are:

- (a) that the complainant was less than 18 years of age at the time the offence is alleged to have been committed;
- (b) that the complainant experienced sexual intercourse on the occasion alleged;
- (c) that it was accused who committed the offence.

I must examine each of these ingredients in light of available evidence.

Regarding the age of the complainant at the time the offence was allegedly committed, the prosecution has not produced a birth certificate. However courts have allowed evidence of birth from testimonies of people who are acquainted with the person whose age is sought to be established and from other credible sources. PW2 is mother to PW1, She told court that PW1 was born in October 1995. There is also exhibit P1 which is the medical examination report where the age of PW1 was stated to be 5 years in the year 2000. The girl testified in court and was found to be of tender years. I am satisfied that prosecution has proved beyond reasonable doubt that at the alleged time of the offence PW1 was less than 18 years old.

Concerning the second ingredient, only PW1 testified that she did have sexual intercourse on the occasion. I have warned myself just like I did the assessors of the need for corroboration of evidence given by a child of tender years. PW2 examined PW1 and according to her testimony that was after she noticed the girl was sickly and was incontinent with her urine. PW1 had admitted to her that she had had sexual intercourse. On examination PW2 found injuries in PW1's vagina and a pungent smell. Later PW1 was medically examined and the medical officer found that PW1'S hymen was ruptured, that there were injuries and inflammations around the right labia minora, the vagina and that there was a smelling discharge. The rupture of the hymen and the injuries had occurred 2 — 5 days prior to examination on 27th April 2000. According to PW5 rupture of the hymen can possibly be caused by other means such as strenuous physical exercise. PW5 stated further that the injuries and inflammations were consistent with force having been sexually used and that the smelling discharge was a sign of venereal disease. In law sexual intercourse is complete when a female sexual organ is penetrated by a male sexual organ.

See Archbold Criminal Pleading- Evidence and Practice, 38th edition, paragraph 2872 at page 2873.

It does not matter how slight that penetration is. I am satisfied that the prosecution has proved beyond reasonable doubt that the complainant did have sexual intercourse on the occasion alleged, the 24th April 2000.

The third ingredient relates to whether accused committed the offence alleged against him. It is the testimony of PW 1 that accused was the person who had sexual intercourse with her. That evidence however needs corroboration before a conviction can be based on it. There is the evidence of PW4 who testified that she was present when accused called PW1 out of the classroom and took her to some place while insisting that other pupils should not come out of the classroom. PW4 also stated that when PW1 returned she was crying and did not play during recess time. Immediately PW2 inquired why PW1 was sick PW1 stated that the only teacher at their school had had carnal knowledge of her. This prosecution evidence is denied by accused who in his defence testified that on 24th April 2000 he could not have been at the school because he was sick. This is an alibi which accused has no duty to prove. Rather the prosecution must disprove and destroy the alibi by adducing evidence that places accused squarely at the scene of crime. I have noted that accused was the sole teacher at the school. I note also that the pupils would not have gone to school had it not been that the teacher was there. The two pupils have related to the conduct of accused of calling PW1 out of the classroom and how she returned crying and dejected. PW1 told her mother about the identity of the accused at the earliest opportunity. I find this evidence places accused at the scene of crime. His alibi is a tissue of lies seeking to have him avoid his criminal responsibility. I am satisfied that the prosecution has succeeded in proving this ingredient also.

Both gentlemen assessors in their joint opinion advised me to find accused guilty and convict him. For the reasons I have already given I agree with their opinion. I convict the accused person of the offence of defilement contrary to section 123 (1) of the Penal Code Act.

P.K. Mugamba

Judge

20th August 2002

20th August 2002

Mr. Murumba for the State

Mr. Bezire for accused person

Accused in court

Ms Tushemereirwe court clerk

Court: Judgment delivered in court.

P.K. Mugamba

Judge

Allocutus

State Attorney:

The convict has no previous record. The offence is a serious one carrying a maximum sentence of death. There is a big outcry in the society about teachers defiling pupils. I call upon court to punish persons found guilty of this offence seriously especially where victims are very young children. I pray for a deterrent sentence.

Accused has been on remand since May 2000.

Mr. Bezire:

Accused is a first offender. He has appeared repentant during trial. He is young and can be useful in future. I pray for a lenient sentence.

Convict:

I pray for a lenient sentence. I am an orphan and there are other siblings. I look after them. I do not know how they are.

Sentence:

There is a rising tide of defilement of pupils by their teachers in this country. Teachers are supposed to be trusted guardians of their unsuspecting charges. Unfortunately some of them have turned from gamekeepers to poachers instead. This has to be discouraged. I have taken into account everything said concerning sentence. I note that you have been on remand for over 2 years and I take that into account in passing sentence. I sentence you to 14 years' imprisonment.

P.K. Mugamba
Judge
20th August 2002

Court:

Right of Appeal explained.

P.K. Mugamba
Judge
20th August 2002