

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

HCT-05-CR- SC-0103-2001

UGANDAPROSECUTION

-VS-

NGABIRANO JOSEPHATACCUSED

BEFORE: THE HON JUSTICE P. K. MUGAMBA

JUDGMENT

Ngabirano Josephat is a juvenile who is indicted for defilement contrary to section 123(1) of the Penal Code Act. The prosecution called the evidence of five witnesses in support of its case. The complainant, Rosemary Kyomukama was PW1, Maria Goretti Twinamatsiko was PW2, Mbabazi Jenifer was PW3, Baryamwijuka Innocent was PW4 and Dr. Busingye Warugaba Amos was PW5. In his defence accused made a statement on oath and called no witnesses.

The prosecution case in summary is that on 14th April 2001 accused had sexual intercourse with Rosemary Kyomukama (PW1), a girl whose age was below 18 years. PW1 and PW3 had been walking together when accused came along and asked for money owing to him from PW3. Later accused went ahead leaving PW2 and PW3 to continue with their walk. Before long PW1 and PW3 parted company as PW3 proceeded to a funeral while PW1 went to a water source nearby. At the water tap accused forced PW1 to have sexual intercourse with him. After a few days PW2 observed that PW1 was not walking properly and inquired of her why this was so. PW1 related to PW2 that she had had sexual intercourse with someone she did not know before but one who had on the day of the intercourse demanded for his money from PW3. Upon further inquiry PW3 gave the name of this person as Joseph Ngabirano, the accused. PW1 later identified accused to be that person. Accused was later arrested and charged.

In his defence accused set up an alibi. He told court that he did not know PW1 before and did not meet her on the day in question. He further testified that he knew PW3 and agreed PW3 owed him money. He testified that he had demanded for his money from PW3 on another day and that at the time PW3 was with her husband digging in their garden. On the day in question he had left home at 7.00 am. to go to a trading centre to buy meat. He did not return to the village until 4.00 p.m., long after 1.00 p.m. the time the offence is alleged to have taken place.

The prosecution bears the burden to prove all the three ingredients of the offence beyond reasonable doubt. 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, that is to say 14th April 2001.
- (c) that it was the accused who committed the offence.

I have got to relate the above ingredients to the available evidence.

The first ingredient was not contested. Admittedly the prosecution did not produce a birth certificate. However the law allows for evidence of age to be obtained from someone who is acquainted with the person whose age is being inquired into and who might know facts relating to that age. PW2, mother of the complainant, testified that her daughter was born in 1993. Medical evidence contained in exhibit P1 shows that in the year 2001 the complainant was 8 years old. She testified in court as PW1 and clearly her age was below 18 years. I am satisfied that the prosecution has proved this ingredient beyond reasonable doubt.

The second ingredient is whether the complainant had sexual intercourse as alleged. As PW 1, the complainant, a child of tender years, testified that she was forced into sexual intercourse. For fear of punishment she did not tell anybody, not even her mother about the incident until inquiry was made by her mother concerning why she did not walk properly. She immediately told her mother what had happened when she was asked. When PW2 examined her she found her private parts swollen and bruised. Later PW1 was examined by a doctor who found injuries and inflammation in her private parts which had been occasioned less than a week before. 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.*

Court has the direct evidence of PW1 which is corroborated by the evidence of PW2 regarding her observations and that of the doctor contained in exhibit PT. It was the testimony of PW5 that a blunt instrument such as a penis could cause the injuries found on PW1. I am satisfied that the prosecution has proved the second ingredient, too, beyond reasonable doubt.

Accused's responsibility in the crime is the last ingredient. In this case PW1 was the only witness to the act of sexual intercourse to testify on behalf of the prosecution. She did not know accused before she told in commendable detail what happened on the occasion she had sexual intercourse. The testimony of PW1 is corroborated by that of PW3 that they were walking together when accused met them and demanded for his money from PW3. When PW 1 disclosed the identity of the person who had had sexual intercourse at the outset she had mentioned the person who had demanded for his money from PW3. According to PW3 the person who had demanded for his money was no other than Ngabirano Josephat, accused. It is also the testimony of PW4 that when PW1 was taken to accused's school she was able to point him out from the rest of his class as the person who had had sexual intercourse with her. Accused was also identified here in court as the person responsible, by PW1. I have indicated earlier that accused set up the alibi he did. When an accused person sets up an alibi it is not his responsibility to prove it. It is the responsibility of the prosecution instead to disprove and destroy the alibi by adducing evidence that puts the accused person at the scene of crime.

See *Uganda - vs- Phostin Kyobwengye [1988-1990] HCB 49.*

I find the alibi disproved by the evidence of the prosecution. It is an afterthought which is badly thought out especially when one realized that accused could not have spent the whole day purchasing meat, let alone recalls the day for the purchase of meat so readily when to his knowledge nothing untoward had happened. All in all I find the prosecution has proved this ingredient beyond reasonable doubt.

In their joint opinion the assessors advise me to convict the accused person. For the reasons I have given in the course of this judgment I agree with their opinion. I find accused guilty of defilement and convict him accordingly.

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/interpreter

Court: Judgment delivered in open court.

P. K. Mugamba
Judge

Court:

This file is referred to the Family and Children Court for sentencing as the convict is one who should be sentenced by the Family and Children Court under the law.

P. K. Mugamba
Judge