

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CASE NO: HCT-00-CR-SC-0116 OF 2002

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

MUWONGE JOHN ::::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The Accused Muwonge John was indicted for defilement contrary to section 123 (1) of the Penal Code Act. The particulars of indictment alleged that Accused on 25th November 2001 at Wabishasha village in Nakasongola District, unlawfully had carnal knowledge of Asaba Winifred a girl under the age of 18 years.

The brief background of the case is that the victim was residing with her grandmother in Wabishasha village, Katuugo Parish, Kagooge sub-

county in Nakasongola District. On 25th November 2001 the victim was seen playing at home at around 11.00a.m. later on the victim was heard crying in the bush.

The victim told people that the Accused told her to go to the bush to collect passion fruits from where he spread a polythene bag on the ground where he had sexual intercourse with her. The victims private parts was examined by local people. It was found with injuries and blood and the victim could not walk. The matter was reported to police. Medical examination was later carried out where it was found that the victim's hymen had recently ruptured. Her introitus bore some inflammations. The victim was also found to be of an apparent age of 4 years.

The Accused denied the offence. It was then upon the prosecution to prove the case beyond any reasonable doubt: See Leonard Aniseth Vs Republic [1963] EA 206 and Serugo Vs Uganda [1978] HCB 1.

The following are the essential elements of the offence of defilement which are to be proved beyond reasonable doubt; namely:-

- 1) That the victim was below 18 years old at the time of the alleged offence;
- 2) That the victim experienced unlawful sexual intercourse;
- 3) That the Accused participated in the unlawful sexual intercourse.

In regard to the first ingredient of the offence the prosecution relied on the evidence of PW1 Janet Mugoya Kasanda who testified that the victim who was her grandchild was 6 years old. PW2 Asaba Winnie who was the victim in this case also stated her age at 6 years. She testified after a voire dire and no one was in doubt that she was a child below 18 years old. I therefore agree with both Assessors that the prosecution proved beyond reasonable doubt that the victim was below 18 years at the time of the alleged offence.

The second ingredient is whether the victim experienced sexual intercourse. In a bid to prove the above ingredient the prosecution relied

on the evidence of PW4 Gladys Mirembe; PW1 Janet Mugoya Kasanda and PW2, Winnie Asaba. The clinical officer who allegedly examined the victim could not be traced to testify in Court. That could have formed the best evidence. However sexual intercourse can be proved by any cogent evidence. Hence it was not fatal that the clinical officer could not be traced to testify. In any case it is trite law that sexual intercourse can also be proved by the testimony of the victim. See *Badru Mindu Vs Uganda* 1994-94\5 HCB 11.

Gladys Mirembe PW4, testified that on 25th November 2001 at 11.00a.m. which was a Sunday, she was at her home when she overheard a child crying. She went to where that child was crying and found her to be Asaba Winnie, a granddaughter to Kasanda. She got to where that child was crying to find out what her problem was. On reaching the spot she found that the victim was standing in one place and could not move. She asked her what had happened to her and she replied that Muwonge had had sexual intercourse with her. She then asked how it happened and the victim replied that her assailant took her to that place after

promising to give her passion fruits. After that she took the victim to her grandmother who later confirmed that the victim had been defiled.

Janet Mugoya Kasanda PW1 testified that she left the victim playing outside as she was cooking in the kitchen. That she was surprised to see the victim being brought home while crying by Gladys Mirembe (PW4) while requesting her (Kasanda) to check her private parts. On checking the same she found injuries in it and it had blood. On top of that the victim could not walk properly. She decided to warm water and pressed the victim with ghee by way of first aid. She went ahead and inquired from the victim what had happened and she confirmed that she had experienced sexual intercourse.

Asaba Winnie PW2 confirmed in her unsworn testimony that she had experienced sexual intercourse. As a child of tender years her evidence needs corroboration as a rule of law. See Section 38 (3) of the TID. See Patrick Akol Vs Uganda [1994 – 95} HCB 1. However there was the necessary corroboration in the evidence of PW1 and PW4. Also circumstances under which the victim was found i.e. her distressed

condition also corroborated her evidence. She was found crying and she continued crying. Furthermore she could not walk properly. All those could go to support the evidence that the victim experienced sexual intercourse. Therefore in agreement with both Assessors, I find that the prosecution has also proved the second ingredient beyond reasonable doubt.

In regard to the third ingredient of the offence which relates to the participation of the Accused the prosecution relied on the evidence of PW1, PW2 and PW4. The evidence of Kashada was that the victim was brought to her by PW4 Gladys Mirembe while crying.

She asked the victim what her problem was and she replied that the Accused had lured her into the bush with a promise to give her passion fruits. Instead of fruits the accused proceeded to have sexual intercourse with her.

PW2 Asaba Winnie who was the victim told Court that it was indeed the Accused who had done bad things on her. She confirmed that the Accused lured her into the bush on the promise that he was going to give her passion fruits. The Accused instead laid her down and defiled her. She told the same story to Gladys Mirembe (PW4). Mirembe Gladys testified that she saw the Accused at the scene as she was going to find out why the victim was crying in the bush.

The Accused in his defence denied the offence and pleaded that he was being framed by PW1 because she did not want to pay his debt.

After considering both the prosecution and defence evidence I find the prosecution witnesses forming a complete circle of the events which took place. I find that the victim was lured to the bush by the Accused person; she was found crying and she revealed that it was the Accused who had had sexual intercourse with her. She testified that she had known the Accused before. The offence took place in the mid-morning at around 11.00a.m. the Accused was seen at the scene walking away.

In addition to that I find that the victim's evidence was corroborated by that of PW1 and PW4 who narrated exactly the same story, how the incident took place. There could not be any mistaken identity in view of the above evidence: see Abdalla Nabulere Vs Uganda [1979] HCB.

The defence attacked the evidence of the victim that it was inconsistent when she said that she was coached by PW1 what to tell Court. I think she must have said that out of confusion due to the rigorous cross examination she went through, considering her age such was a normal slip of tongue. In any case, she recollected herself and stated that as a born again Christian she was not telling lies and she maintained that it was the Accused who had done bad things to her and that she was not forced by her grandmother to frame the Accused. In fact the victim impressed me as a truthful born again who was willing to tell the truth. Considering the totality of evidence on record I do not believe the defence of a frame-up by PW1 Janet Kasanda. This matter came to book not because of the efforts of Janet Kasanda. It came about because PW4

discovered the victim crying in the bush where the Accused was cited. From there the victim mentioned the Accused as her assailant. In those circumstances I find the defence raised by the Accused a mere afterthought. The Accused even stated that he was framed up for being the only Muganda in that area. That would not be true in light of the evidence of Janet Mugoya Kasanda that the Accused used to assist her so much. In the end I agree with both Assessors that the prosecution has proved all the ingredients of this offence beyond any reasonable doubt.

I therefore find the Accused guilty as charged and convict him accordingly.

RUBBY AWERI OPIO

J U D G E

20/6/2003.

20/6/2003:-

Accused present.

Atenyi for the state.

Seguya present.

Judgment read in open Court.

Atenyi:-

The offence of defilement for which the Accused is convicted is a very serious one as reflected in maximum penalty of death. He has been on remand for 1 ½ years. He has no previous record. However sexual intercourse sexual offences especially defilement in our society and are causing great danger especially due to aids and other STD's.

Circumstances of this offence made it more aggravating considering the fact that the convict owed this toddler a duty of care. He was 38 years at the time and the victim only 4 years. Parents of the victim had offered him employment and therefore regarded him a member of the family. Instead of protecting the victim the Accused demanded to have sexual

intercourse with the victim. Courts owe our society duty of protecting it thru exemplary and deterrent sentences.

Considering the trauma distress and agony the victim suffered and her parents. I pray that Court imposed maximum sentence. I so pray.

Seguya:-

The Accused is first offender so he gets benefit of 1st offender. He has also been on remand since 2001. He is married with kids who are missing his fatherly care. He should be given a genuine sentence which will enable him go back to meet his family. I so pray.

SENTENCE:-

This is a very serious offence which entails maximum of death sentence. The offence is also on the increase and there is a public outcry against it especially due to aids and other STDs. The circumstances under which it was committed had aggravating factors being the victim was only a child of less than 5 years old. The Accused on the other hand was 38

years old. If it is true that the Accused is married and has children then one wonders why he went with a child of that age. That proves that the accused is a very dangerous person to family. It is true that Court has a duty to protect society from the likes of the Accused. This Court should therefore take a very serious view of this offence to reform the Accused and to deter others so that society is protected.

I have considered the fact that the Accused is 1st offender who has no previous remand known to the Court. I have also considered that he has a family behind who should be given a chance to enjoy his paternity. For that reason I am not will to pass the maximum sentence of death. However considering all the circumstances of this case the Accused is sentenced to nineteen (19) years imprisonment. This sentence takes the fact that the Accused has been on remand for 1 ½ years otherwise he would have been sentenced to 21 years imprisonment.

Right to Appeal explained.

RUBBY AWERI OPIO

J U D G E

20/6/2003.