

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

HCSC NO HCT – 06 – CR – SC – 0085/2001

Orign 392/2000

CRB 791/2000

UGANDA :::::::::::::::::::::::::::::::::::::::

PROSECUTION

VERSUS

SEKITOLEKO JOSEPH :::::::::::::::::::::::::::::::

ACCUSED

BEFORE: THE HON. MR. JUSTICE ELIDAD MWANGUSYA:

JUDGMENT

The accused, SEKITOLEKO JOSEPH was indicted for the offence of Defilement contrary to Section 123 (1) of the Penal Code Act. The particulars in the indictment were that SEKITOLEKO JOSEPH on the 30th day of August 2000 at Kisayi village in the Rakai District had unlawful sexual intercourse with NAMATA JULIET a girl under the age of 18 years.

The accused pleaded not guilty to the indictment and as required in all criminal trials the prosecution assumed the burden of proving the guilt of the accused beyond any reasonable doubt and the burden does not shift to the accused to prove his innocence. A conviction is based on the strength of the prosecution case and not a suspicion or the weakness of the defence. This court is also enjoined to examine the case for the prosecution together with that for the defence.

As far as the case for the prosecution is concerned it is briefly as follows:-

On the 30th day of August 2000 the prosecutrix, the aged seven years was sent by her mother, SARAH NAMALE (P.W.5) to purchase paraffin from a nearby trading centre. On reaching the trading centre the accused first sent her to buy cigarettes for him from a small shop. She bought the cigarettes which she took to him. After receiving the cigarettes he offered her some Sweet Pepsi and then 'slept on' her after holding her mouth. She was wearing a pair of knickers which the accused removed and tore. He threw it away. After the accused had slept on her he told her not to say anything to her mother.

After he had left her she went back home and reported to her mother that the accused had done bad things to her. Her mother examined her and noticed blood coming out of her private parts. She went and reported to the Chairman Local Council I who traced the accused and arrested him. In the meantime she took the girl to a clinic in Rakai where she received treatment. She was later examined by DR. SESANGA who found her aged about 5 years and found signs of penetration. He found that the hymen had been ruptured and there were inflammation around her private parts. He also found an abnormal vaginal discharge. It was on the basis of the above evidence that the accused was indicted with this offence.

On the other hand the accused gave his defence on oath and denied having defiled the complainant. He testified that he was called from his home by the Chairman L.C.I who did not tell him why he wanted him. He only told him that the mother of the victim had made a complaint against him. On reaching the Chairman's home he was taken to Buyamba Police Post where he was informed of the allegations against him. He denied having defiled the girl. He also denied that the girl had been to his home where he sent her for cigarettes. He stated that the mother of the girl fabricated the case against him because she had borrowed some things and cash Shs.50,000/= from him and did not want to pay. He had threatened to take court action against her and she had him arrested before he did.

As in all cases of defilement contrary to Section 123 (1) of the Penal Code Act, the prosecution is required to prove that the victim of the alleged defilement was below 18 years of age, that she

was involved in an act of unlawful sexual intercourse and that the accused person was responsible for the act of unlawful sexual intercourse.

In the instant case Counsel for the accused submitted that the defence did not contest the age of the complainant because quite clearly she was below the age of eighteen years at the time of commission of the offence. Even at the time she testified in court which was more than two years after the incident her testimony and that of her mother was that she was aged below 18 years and her physical appearance indicated so. I hold that this element of the offence has been proved beyond reasonable doubt.

On the issue of unlawful sexual intercourse the prosecution mainly relied on the complainant whose narration of what befell her was not very clear. Her description of the act of unlawful sexual intercourse was that the accused slept on her and she felt bad. She stated that she was laying on her stomach when the accused slept on her. She could not explain what the accused did that made her feel bad and neither could she explain what she meant by 'feeling bad'. She kept quiet and looked down when asked what the accused did to her. My observation of this girl was that she was too shy to describe in detail what the accused did to her. Secondly, considering that she was aged only five years at the time of the incident and took about two years before she testified in court she might have forgotten the details of what happened to her. It would be dangerous to act on the uncorroborated evidence of her testimony and I warned the assessors so. But corroboration is to be found in the testimony of her mother who examined her immediately after the alleged sexual intercourse and blood coming out of the girl's private parts. The medical examination revealed that the girls hymen had been ruptured and there were inflammations around her private parts as which were consistent with force having been used sexually. This satisfies the requirements of S.38 (3) of the Trial on Indictments Decree that accused person shall not be liable to be convicted. On the unsworn testimony of a child of tender years unless such evidence is corroborated by some other material evidence in support thereof implicating the accused the evidence of the complainant was such testimony and it is corroborated. I find that this element of the offence has been proved by the prosecution. The inability of the girl to give details not withstanding.

On whether or not the accused is the one who had sexual intercourse with the girl the accused denied having defiled her and alleged that the mother of the girl fabricated the case against him because she owed him money which she had refused to pay and had threatened to take court action against her. The mother of the girl was a witness in this trial and none of the allegations by the accused was put to her in cross-examination. The defence sought to establish that she was selling alcohol in her home and one of her customers could have defiled the girl. But the girl was defiled during broad daylight by some one whom she knew. He first sent her for cigarettes and she identified the accuse as that person. She knew him very well and I don't think that this girl mentioned him to protect another defiler as the defence would like this court to believe. There was absolutely no reason for doing so.

Mr. Sendegeya, defence Counsel submitted on the discrepancy between the dates the girl is alleged to have been defiled and the date she was examined when the testimony of the complainant and her mother was that she was examined on the same day. The mother of the complainant testified that she went to the Hospital twice. She did not have the forms when she first went. She collected the forms from the Police later. Although she stated that everything was done in the month of August the medical report which was admitted at the commencement of trial indicates that the examination was done in September and the injuries observed were not fresh. This is an indication that if the complainant was examined after the defilement the findings were not recorded immediately and this necessitated recording of the findings later. So to me the discrepancy in the dates does not go to the roof of the case and is to be ignored. It does not raise any doubt about the fact of defilement which her own testimony and the medical report established.

The assessors were unanimous in their opinion that the prosecution had proved all the ingredients of the offence of Defilement C/S 123 (1) beyond reasonable doubt. They advised court to find the accused guilty as indicated. I agree with the opinion of the assessors. The accused is found guilty as indicted and is convicted accordingly

ELIDAD MWANGUSYA

JUDGE

20.01.2003

Order:

The accused testified that he is now aged 20 years which puts his age at the commission of the offence below 18 years. This court will carry out an inquiry to establish age of accused because my observation is that he is well above the age of 20 years. This inquiry to establish the age of accused will be carried out on 03.02.2003.

Accused to be remanded till then.

ELIDAD MWANGUSYA

JUDGE

20.01.2003

03.02.03

Accused/convict in court.

Mr. Sendegeya for accused S/brief

Mr. Byansi RSA for state

Both assessors absent

Mr. Mbazira Court Clerk.

Court:

Case for ascertainment of age of convict.

ELIDAD MWANGUSYA

JUDGE

03.02.2003

DR. DANIEL KIBUKA MUSOKE D/ASP, Police Surgeon, Southern based at the Regional Police Headquarters, Masaka.

I hold a Bachelor of Medicine/Surgery obtained from Makerere University in 1999. I also hold a Post Graduate Diploma in Forensic Medicine obtained from the Royal College of Police Surgeons in Cleveland USA. I also hold a certificate in HIV/AIDS care from the Academic Alliance between Makerere Univ. and North America Infections Disease Society. I also hold a certificate in C/ASP Police Course.

I know the accused person. I was requested by the Regional CID Officer to examine him and ascertain his age. I examined the accused today at 9.30 a.m. I made my report in that respect.

Court:

Witness shown a document and states:-

This a Police Form24 compiled by me.

The apparent age of accused is established to be 23 years. The accused was found to have a fully developed dentition consistent with the age of 23 years. He was found to have no injuries and his mental state is normal.

The report is signed, stamped by me.

Mr. Byansi:

I apply to tender the medical report on PF.24.

Mr. Sendegeya:

I have no objection.

Court:

P.F. 24 tendered and marked court exhibit 1.

ELIDAD MWANGUSYA

JUDGE
03.02.2003

Mr. Sendegeya cross-examination:

I am sure accused is above 23. Dental formula is the method I used. This is a method recommended by the International Working Committee on age. They are methods including x rays of the bones of a victim. In a like person dental formula is the one recommended.

Mr. Byansi:

No re-examination.

Court:

On the original charge sheet the age of the accused is given as 22 years. He has been on remand as an adult and now as a child. Dr. Kibuka Musoke's testimony is to the effect that accused is over 23 years which confirms the original age given the accused's testimony that he is now aged twenty must have been for the purpose of escaping punishment and it is to be ignored. He will be sentenced as an adult. He is not a child for the purpose of the children's Statute.

ELIDAD MWANGUSYA
JUDGE
03.02.2003

Mr. Byansi:

The convict is presumed a first offender. The convict has been convicted of a serious offence carrying a maximum death sentence. It should be considered that offence has become so prevalent. It is a duty of the court to protect the public from persons like accused. The victim of this case was a very young innocent child aged only 5 years. In this error of Aids this child was exposed to the danger of catching the killer disease. The convict deserves a severe custodial sentence to keep him away from society.

Mr. Sendegeya:

As stated by my learned friend the accused is a first offender. He has been on remand for almost 2 ½ years. He is a young man. A very long custodial sentence will not assist him in reformation which is one of the purposes of punishment. He is sorry for what happened. He is not a hardened criminal. I pray that this court gives him a reasonably short sentence.

Accused/Convict:

I pray for mercy from this court. I am looking after children of my late father. They have left school since I was arrested. I would want to back and cater for their education.

Court:

The victim of this defilement was aged only five years. The circumstances of this defilement must be condemned by this court because the young girl was sent by her mother on an errand and she ended up in the hands of the convict who lured her into sexual intercourse at such an innocent age. Many young girls are sent on such errands and this court is to send out a message that such girls are to be protected and their defiles will be mercilessly dealt with. In the circumstances of this case and taking into account the period accused has spent on remand he will be sentenced to a term of imprisonment of ten years.

ELIDAD MWANGUSYA

JUDGE

03.02.2003

Court:

R/A explained.

ELIDAD MWANGUSYA

JUDGE

03.02.2003