

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO: HCT-00-CR-SC-0051-2004
UGANDA ::PROSECUTOR
VERSUS
MPAGI WILLIAM::ACCUSED
BEFORE: THE HONOURABLE MR. JUSTICE MOSES MUKIIBI

JUDGEMENT

The accused, Mpagi William, was indicted for the offence of defilement Contrary to Section 129 (1) of the Penal Code Act. The particulars of the offence alleged that in the night of the 11th March 2003 at Nakikoota village in the Luwero District Mpagi William did unlawfully and carnally know Nabunya Edith, a girl under the age of eighteen years. On arraignment the accused denied the indictment where upon the Prosecution called five witnesses to prove its case. The accused gave evidence on oath but called no witness in his defence.

The Prosecution case is as follows:-

The accused was a resident of Nakikoota village and a neighbour to the home of Samuel Kibirige (PW4). In the night of 11/3/2003, Nabunya Edith, a daughter of Samuel Kibirige (PW4), the victim, was asleep at home when the accused gained access to the inside of the house. Nabunya Edith (PW1) had brothers like Kibirige John (PW3) and others who were sleeping in the same house. The accused fell over them. He told them that he wanted Nabunya Edith (PW1). He eventually got hold of her, lifted her and threw her on her father's bed. She was wearing a dress but no knicker. The accused inserted his penis into her female sexual organ. In the meantime the other children had ran outside and some of them were raising an alarm.

After defiling the victim in the house the accused carried her on his shoulder outside the house. There was bright moonlight and Nabunya Edith (PW1) the victim, and Kibirige John (PW3) recognized and identified the accused. The accused carried the victim behind the house to a Kayinja (banana) plantation. He then held the victim's neck firmly with his fingernails while the two were standing. He released her and ran away.

The next morning Samuel Kibirige (PW4) came back and received information of what had transpired from his children. Acting on that information he reported the matter to the LC1 Chairman. Later on the accused was arrested by the LC1 authorities and escorted to Luwero Police Station. The accused was charged, taken to court and there remanded in custody.

Nabunya Edith (PW1) was medically examined on 13/3/2003 by Doctor Ssekabira Umar (PW2) a Medical officer at Luwero Health Centre Four. The Doctor's medical examination report on Police Form 3 and an Appendix thereto dated 13/3/2003, were admitted and marked jointly as Exhibit P.1.

In his sworn evidence the accused denied the indictment. He put up a defence of an alibi. He told court that on 11/3/2003 he went to bed at 9.00pm at his home. People, who included one Tino Kibuuka, came to his home at around 12.30 am. They found him sleeping in his house. He also told court about the existence of an old grudge between him and Sam Kibirige (PW4). He testified that Sam Kibirige (PW4) severely assaulted him in 1994, and from that time until the 12th March, 2003, when he was arrested, the accused was not greeting Sam Kibirige (PW4).

The elements which the Prosecution is required to prove in this case are:-

- (i) That the victim, Nabunya Edith, was, at the time of the alleged offence, a girl under the age of 18 years.
- (ii) That there was sexual intercourse with the victim.
- (iii) That the accused was responsible.

The Prosecution has the burden to prove the guilt of the accused person beyond reasonable doubt. The Prosecution has to prove each one of the ingredients of the offence beyond reasonable doubt.

See: WOOLMINGTON V. DPP (1935) AC 462.

SERUGO V. Uganda (1978) HCB 1.

OKETH OKALE AND ANOR v. R (1965) EA 553.

In the instant case Learned Counsel Mr. Wankandya, representing the accused person on state brief, submitted that he was not contesting the first and second ingredients of the offence.

To prove the age of the victim the Prosecution adduced the evidence of the victim herself, who gave sworn evidence saying that she was aged 12 years.

Doctor Ssekabira Umar (PW2) who examined her on 13/3/2003 told court that he found her to be 11 years old. Samuel Kibirige (PW4), the victim's father, told court that she was aged 12 years.

I am satisfied, as were the assessors, that the Prosecution has proved beyond reasonable doubt that Nabunya Edith (PW1) was, at the time of the alleged offence, a girl under the age of 18 years.

For the second element of the offence the Prosecution is required to prove that there was penetration, however slight, of the victim's vagina in an act of sexual intercourse.

Nabunya Edith (PW1), the victim, testified as follows:

The intruder came to her and lifted her up. He threw her on her father's bed. She was wearing a dress but without a knicker. He (the intruder) removed his short and slept on her. She was lying on her back. He slept on her stomach. She felt him inserting his animal into her female organ. She felt pain down. (The witness demonstrated by touching the area of her private parts). She shouted. She went to Luwero Police Station. She was interviewed. From the police station she was taken to Kasana Health Centre. She was examined in her private parts.

Dr. Ssekabira Umar (PW2) testified as follows:-

He is a Medical Officer and the In-charge of Luwero Health Centre (Four). On 13th March, 2003 he was at the same place when he received and examined Nabunya Edith (PW1). He found that :-

She was 11 years old. There was penetration of her female sexual organ. Her hymen had been ruptured. The said rupture was recent, less than seven days old. She had inflammation around

the private parts. These injuries were consistent with force having been used sexually. She had no injuries on the thighs, elbows or back. The injuries were less than seven days old. He put this information on an Appendix to Police Form 3.

On Police Form 3 he stated that Nabunya Edith had bruises on the neck which was tender; that the hymen had been ruptured. He concluded that forceful sexual intercourse had taken place.

Police Form 3 and an Appendix thereto dated 13/3/2003 were admitted and jointly marked Exhibit P.1.

Samuel Kibirige (PW4) testified as follows:-

At Luwero police station the police gave him forms to take Nabunya (PW1) to Kasana Health Centre. He took the forms and the child to that Health Centre. Nabunya was examined by a Doctor.

Sexual intercourse is proved by the victim's own evidence and corroborated by medical or other evidence.

See: *Bassita Hussain v. Uganda*, Supreme Court Criminal Appeal No. 35 of 1995 (un reported).

In *Badiru Mwidu v. Uganda*, Court of Appeal Criminal Appeal No. 1 of 1997 (unreported) the court observed that normally in sexual offences the evidence of the victim is the best evidence on the issue of penetration and even of identification.

In the instant case I find corroboration of the evidence of Nabunya Edith (PW1) in the evidence of the Doctor (PW2). This evidence in my view, is consistent and credible, and I do believe it. It confirms the fact that the victim, Nabunya Edith (PW1) had sexual intercourse in the night of 11th March, 2003. I am satisfied, as were the Assessors, that the Prosecution has proved beyond reasonable doubt that there was unlawful sexual intercourse with Nabunya Edith (PW1) by her assailant in the night of 11th Marc, 2003.

For the third ingredient of the offence the Prosecution is required to prove beyond reasonable doubt that it was the accused who ravished the victim.

Nabunya Edith (PW1) testified as follows:

In the night of 11/3/2003 at about 1.00 am she and her brothers and sisters were asleep. Both parents were not at home. The witness felt some one touching her hand. She tried to light a match but the intruder grabbed and destroyed the matchbox. The intruder, a man, ordered them to sleep. He asked them if they knew him. He told them that he was the son of Kyakumuyita. He asked them where their father was. He told them he wanted Nabunya. They raised an alarm. He ordered them to keep quiet. He told them that he had a gun and would shoot them. They kept quiet. He told Nabisere Pross, a younger sister of the witness, to look for her (Nabunya). Pross found her and said: "She is here". The intruder came to the witness and lifted her up. He threw her on her father's bed. He was not wearing a shirt. He was wearing a pair of shorts. He removed his short and inserted his animal into her female sexual organ. She shouted. Mpanga William and Kibirige John (PW3) also shouted. The assailant lifted her and took her outside. He kicked Kibirige (PW3) who was outside at the front of the house. He (the assailant) took her behind the house in the Kayinja (Banana) plantation. He then held her neck firmly with his fingernails. The two were standing. He then released her and ran away.

There was moonlight. The assailant lifted the witness over his shoulder. Her head was in front of and the legs behind the assailant. As the assailant was carrying her, at the shade of the house, she saw his face. She had her back on the man's shoulder and was facing upwards. She turned over and saw his face for a short time. The assailant carried her for a distance of about 55 metres. She turned over and had a look at his face three times. She recognized the face to be that of Willy (the accused). She knew Willy. He was a village mate. She had seen him at his home three days before. Whenever she was sent to Kito to buy things she used to pass by the accused's home at the roadside. She used to greet the accused. However, she had never talked to the accused for any length of time. She had also seen the accused at the well. He had come to fetch water. She heard him talking to another man. She knew the voice of the accused.

When the accused left her in the Banana plantation she ran towards the road leading to her home. She went to the place where one Kituuka and her brothers were. They asked her whether she had recognized the man who had defiled her. She answered that it was the man who had just been released from prison called Willy. The witness and her brothers feared to go back home and spent the night at Ntale's home.

The next day the witness and her relatives went to the home of their maternal aunt called Nakato. The witness reported to Nakato that the accused had invaded their home and defiled her.

The witness together with her siblings went to the LC1 Chairman called Sebisubi. She told the Chairman that her attacker was called Willy. The Chairman told them to go home. The witness' father came and a report was made to him. He later went to the LC1 Chairman. The Chairman and the witness' father arrested the accused. He was taken to Luwero Police Station.

During cross examination the witness testified as follows:-

The attacker invaded them at 1.00am. She was asleep. When she felt someone touching her hand she got scared. There was no light in the house. The attacker was not a frequent visitor to the witness' home. In the Kayinja (Banana) plantation the plants were closely planted. There was moonlight. When the attacker released her in the banana plantation she did not look at him. She was in a state of fear. She just ran off.

Kibirige John (PW3) aged 8 years, gave sworn evidence as follows:-

He stays at the home of Kibirige Sam, his father. Nabunya Edith (PW1) stays at the same place. It was at night. The witness was asleep. Someone fell over them. He woke up. The assailant was kicking things. The witness moved out of the house. He stood under the shade at the front of the house. Nabunya (PW1) was inside the house. The assailant came out carrying Nabunya on his shoulder. The witness grabbed his leg. The assailant kicked him. The witness saw the assailant who was not wearing a shirt. He was wearing a trouser. The witness saw him at the shade. There was moonlight under the shade. The witness saw the man's face. The assailant came out staggering. The witness stood in front of him. The assailant carried away Nabunya and took her to the banana plantation. The witness saw and recognized the assailant to be Willy, the

accused. The witness had known the accused before as their neighbour. He used to see the accused everyday while on his way from school.

During cross examination the witness testified as follows:-

When the assailant kicked things in the house and fell over them he (the witness) was scared. When he saw a man coming out of the house he (the witness) was still scared. There was very bright moonlight. The witness observed the assailant for about 10 minutes. He also saw the assailant's shadow against the wall.

Samuel Kibirige (PW4) testified as follows:-

He resides at Nakikoota village, Luwero Sub County, in Luwero District.

Nabunya Edith is his daughter, aged 12 years. In the night of 11th /12th March, 2003 he had not slept at his home. On 12/3/2003 he was informed of a problem at home. He went to the LC1 Chairman called Serwanga. He did not find his children there. He went to the home of Nakato, his sister in law. He found his children there. There was: Nabunya Edith (PW1), Kibirige John (PW3), Mpanga, Kalule and Nabawanga. The witness asked the children if they had recognized their attacker. Acting upon information from them he went back to the LC1 Chairman. Thereafter, he moved with three LC1 officials, namely: Ssebuliba, Secretary for Defence, Serwanga, the Chairman, and Mrs. Kasule, Secretary for women. The witness went to his home. He found nothing left behind by the attacker. They went to the accused's home at about 9.00 am but he was not there. The witness remained at the accused person's home. Later on he saw Willy brought by the secretary for defence. The LC1 Chairman gave the witness a letter to go to police. The secretary for defence escorted the accused to Luwero Police Station. Nabunya (PW1) and the Chairman LC1 also went to police.

The accused had not been around in the village all the time. He had been away for two years. He had returned recently and put up a hut. The incident occurred less than a month since the accused's return.

In answer to cross examination the witness told court that the accused was not in hiding when he was found.

No. 26014 D/C Onyeme Calestino (PW5) testified as follows:-

On 12/3/2003 he was on duty at Luwero police station. He was allocated a case file of defilement to investigate. The complainant was Kibirige Samuel. The victim was Nabunya Edith. The suspect was the present accused person.

He was led to the scene by the victim and her father. It was at Nakikoota- Kito village at the house of Kibirige Samuel. The victim showed the witness the place where she had been defiled. It was on her father's bed. The witness visited the scene on 14/3/2003. The scene had been tampered with. He did not remove anything to be treated as exhibit.

Ms. Komuhangi Alice, Senior State Attorney, submitted that the accused's alibi has been destroyed by the evidence of Nabunya Edith (PW1) and Kibirige John (PW3) who identified the accused at the scene. Counsel for the state submitted that the evidence of these two witnesses put the accused at the scene beyond reasonable doubt. Learned Counsel invited court to examine the accused's conduct upon being told that Sam had been attacked. Counsel submitted that the accused did not bother to find out the details or even to join the search team. She submitted that the accused's conduct was not consistent with his innocence; that it pointed to his guilt. Counsel submitted that there was no grudge between the accused and Sam Kibirige. She submitted that the allegations of the accused's torture after being arrested were not put to Sam Kibirige during cross-examination. Counsel submitted that allegations of torture were an after thought and lies on the part of the accused.

Learned Counsel Mr. Wankandya, on State brief for the accused, submitted that it was not the accused who defiled the victim. He submitted that following their invasion by an attacker the victim had been gripped with fear. He submitted that Kibirige John (PW3) was under a similar state of fear. He contended that the evidence of these witnesses was coloured by fright. Learned Counsel referred to the victim's evidence that the attacker had played sex with her and that she had felt pain; that it was her first sexual encounter. Counsel also referred to the victim's evidence that the attacker had carried her from the house on his shoulder. Counsel contended that the victim was frightened.

Counsel submitted that Kibirige John (PW3) moved out of the house because he was afraid. Counsel argued that if Kibirige John (PW3) saw the assailant carry his sister away he must have become more scared. Counsel submitted that Kibirige John (PW3) was torn between fear for his life and protection of his sister. Counsel submitted that the victim had not interacted enough with the accused to enable her recognize the voice of the accused.

On the question of the accused's alibi learned Counsel cited:

SEKITOLEKO v. UGANDA (1967) E.A .531.

He submitted that the onus of proof lies with the state Prosecution to destroy the accused's alibi, and to put the accused squarely at the scene of the crime.

Learned Counsel submitted that the Prosecution failed in its duty. Counsel submitted that the conduct of the accused the following day (on 12/3/2003) was not conduct of a guilty person. Samuel Kibirige (PW4) told court that the accused remained in the village and that he was not in hiding. Learned Counsel submitted that the conditions were not favourable for identification. He submitted that in such circumstances what is needed is other evidence, whether direct or circumstantial, pointing to guilt from which a Judge or assessors can reasonably conclude that the evidence of identification though based on the testimony of a single witness, may be accepted as free from the possibility of error.

Counsel cited:

RORIA v.R (1967) E.A.583.

NABULERE and 2 others v. Uganda (1979) HCB 77 (CA).

Counsel submitted that the accused's defence of alibi has not been destroyed. He submitted that the third ingredient of the offence of defilement has not been proved beyond reasonable doubt. He prayed court to acquit the accused.

Ms. Komuhangi, Senior State Attorney, in reply submitted that though the children Nabunya Edith (PW1) and Kibirige John (PW3) were afraid they could still identify their attacker.

The Lady Assessor Ms. Basiima Embabazi Erinah expressed the opinion that the victim could properly identify the accused and that her evidence of identification was corroborated by Kibirige John (PW3). She advised court to convict the accused as indicted.

On the other hand the Gentleman Assessor, Mr. Waryemera Dan, expressed the opinion that the Prosecution has failed to prove the accused's presence at the place of crime, that is Kibirige's home. He, therefore, advised court to acquit the accused person.

With identification there is always the possibility that a witness though honest may be mistaken. For this reason, the courts have over the years evolved rules of practice to minimize the danger that innocent people may be wrongly convicted. These are that:-

- (a) The testimony of a single witness regarding identification must be tested with the greatest care;
- (b) The need for caution is even greatest when it is known that the conditions favouring a correct identification were difficult;
- (c) Otherwise, subject to certain well-known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence.

These safeguards are adequate, if properly applied, to reduce the possibility of a mis- carriage of justice occurring. There is no requirement in law or practice for corroboration.

See: ABUDALA NABULERE and 2 others v. Uganda (Supra).

ABDALLA BIN WENDO and Another v.R (1953) 20 E.A.C.A. 166.

RORIA v.R (Supra).

The trial judge has to examine closely the circumstances in which the identification came to be made. If the quality of the identification evidence is good the danger of a mistaken identity is reduced, but the poorer the quality, the greater the danger. When the quality of identification is poor the court should look for other evidence which goes to support the correctness of identification before convicting on that evidence alone.

See: ABUDALA NABULERE and 2 others v. Uganda (Supra).

The trial Judge should examine the identification evidence with great caution where the conditions favouring a correct identification were difficult and negative the possibility of error.

WILSON NDEGE and Another v. Uganda (1979) HCB 162 (CA).

Where the evidence alleged to implicate an accused is entirely of identification that evidence must be absolutely water tight to justify a conviction.

See: R.v. ERIA SEBWATO (1960) EA 174.

The true test is whether the evidence can be accepted as free from the possibility of error. See: Uganda v. KAWEKE MUSOKE (1981) HCB 12 (Odoki, J. as he then was).

In H.C. Criminal Session case No. 331/95 Uganda v. AI. Ntwatwa Daniel and A2 Mukooli James, this court made a humble effort to list unfavourable factors for correct identification as follows:

- (i) An attack occurs at night;
- (ii) A witness is taken by surprise;
- (iii) The witness is frightened and fears for his life.
- (iv) There is a flurry of activities and the witness is not in a calm frame of mind;
- (v) A witness has only a fleeting glance of an attacker.

It is my view that all these factors were present in the instant case and affected both Nabunya Edith (PWI) and Kibirige John (PW3). In the case of Nabunya (PWI) her attempt at visual identification occurred after she had been defiled and injured. Her attacker was carrying her over the shoulder outside; she was facing upwards; she could not even see which direction she was being taken; nor did she know her destiny. This was when she purportedly turned over three times and saw the attacker's face.

However, when she was put down in the Kayinja (Banana) plantation she never looked at the face of her attacker.

Nabunya (PW1) told court that she had never talked to the accused for any length of time. I agree with the submission of learned counsel for the defence that the victim had not interacted enough with the accused to enable her recognize his voice. Whatever the attacker talked in the night, at the home of Kibirige, in the dark room, must have scared the victim. In my view the victim was never in any calm frame of mind to be able to figure out the voice of the attacker. It was at that moment that the victim knew that the attacker had come for her. The victim's siblings were trying to raise an alarm.

For a person who had had very limited interaction with the accused those conditions were not favourable to a correct identification by voice.

Kibirige John (PW3) saw the attacker at the shade. He told court that there was moonlight under the shade. This left court imagining at what angle, in relation to the house, the moon was shining. This witness told court that he observed the assailant for about 10 minutes. From his evidence Kibirige John (PW3) only looked at the assailant under the shade. This was the time the attacker was carrying Nabunya (PW1) over his shoulder. I cannot imagine where, or even why, the attacker stopped for 10 minutes to enable Kibirige John (PW3) to recognize him. I do not believe this evidence of Kibirige John. Kibirige John (PW3) told court that he used to see the accused everyday while on his way from school. Samuel Kibirige (PW4) told court that the accused had not been around in the village all the time. He testified that the accused had been away for two years; that he had recently returned to the village but less than one month had elapsed at the time the attack on his family was carried out. Samuel Kibirige (PW4) told court that the accused put up a hut when he returned. In light of this evidence this court was left wondering where Kibirige John (PW3) could have seen the accused everyday while on his way from school. This, in my view, casts doubt on this witness' claim that he previously knew the accused very well.

I have also considered the time lag between the attack and the identification of the accused by Nabunya Edith (PW1) or Kibirige John (PW3) as the assailant. Nabunya (PW1) testified that when the attacker left her in the banana plantation she ran to the place where one Kituuka and her siblings were. She identified to them who her attacker had been: "the man who had just been released from prison called Willy".

The Prosecution did not adduce any evidence of what Kituuka did with that information. The victim and her siblings spent the rest of the night (on 11th/12th March, 2003) at Ntale's home. The victim must have narrated to Ntale what had happened to her. The Prosecution did not adduce any evidence of what Ntale did upon receiving information of the identity of the attacker. Nabunya (PW1) told court that she and her siblings went to the LCI Chairman called Sebisubi where they named Willy as their attacker. The Chairman told them to go home. The said LC1 Chairman did not feature anywhere else in the case.

Samuel Kibirige (PW4), after talking to the victim, apparently went to a different Chairman called Serwanga. This witness had called on Serwanga before he met his children at the home of Nakato, his sister in law. Apparently, Chairman Serwanga knew nothing about the identity of the assailant at that time. It would appear to me that before Samuel Kibirige (PW4) met with his children no other person had come out to take action against the identified attacker. In my view it is highly probable that the victim and/or Kibirige John (PW3) had not yet named their attacker. It is also possible that the suspicion of the accused as the attacker was the result of a fruitful discussion held by members of Samuel Kibirige's family at the home of Nakato.

I have developed serious doubts about the victim's evidence of identification. I do not think it is reliable. Also, in my view, there is a big risk of an honest mistake in identification. It is my firm opinion that the quality of the identification evidence was very poor, and there is great danger of a mistaken identity. I have not been able to find any other evidence which supports the correctness of the identification.

With regard to the accused's alibi the law is that there is no burden of proof on an accused person who puts forward an alibi as his defence. The burden of proof lies on the Prosecution to adduce evidence to destroy the alibi by placing the accused person at the scene of the crime.

See: SEKITOLEKO v. UGANDA (Supra);

BOGERE MOSES AND ANOR v. Uganda, Crim Appeal No. 1 of 1997 (SCU) (Un reported).

If on full consideration of the whole of the evidence available to the court it is found that the alibi put up is credible and that it has not been negated, then the Prosecution will not have proved their case beyond reasonable doubt and the accused must be entitled to be acquitted of the charge.

See: KIBALE ISHMA v. UGANDA Criminal Appeal No. 21 of 1998 (SCU) (Un reported).

It is my view that the Prosecution has failed to prove to the required standard that the accused was at the scene of crime at the material time. I must, therefore, reject the opinion of Lady Assessor Ms. Basiima Embabazi Erinah. With due respect to her, despite very careful direction from this court, she failed to grasp the legal principles applicable to identification evidence, and

she consequently failed to evaluate the accused's evidence of alibi alongside the rest of the evidence in the case. I, therefore, prefer and adopt the opinion of the gentleman Assessor, Mr. Waryamera Dan. I find that the Prosecution has failed to prove beyond reasonable doubt that it was the accused who had sexual intercourse with Nabunya Edith (PW1). In agreement with the gentleman Assessor I find that Mpagi William is not guilty of the offence of defilement contrary to section 129 (1) of the Penal Code Act, and I hereby acquit him of that offence.

I order that the accused be released from prison and set at liberty immediately unless he is otherwise lawfully remanded for another offence or unless he is serving a prison sentence for another offence. Order accordingly.

MOSES MUKIIBI

JUDGE

30/8/04

30/8/04 at 3.25 pm.

Ms. Komuhangi Alice Senior State Attorney for state.

Mr. Wankandya on SB for the Accused is absent.

Accused person is in court.

One Assessor – Mr. Waryamera Dan is in court.

Ngobi: Court Clerk/Interpreter.

Court:- Judgment is delivered in Open court.

MOSES MUKIIBI

JUDGE

30/8/2004.