

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0037 OF 2002

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

VERSUS

OWAKUBARIHO PAUL ALIAS KAGURI :::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE D.N. MANIRAGUHA

J U D G M E N T:-

The accused is facing the charge of defilement contrary to section 123 (1) of the Penal Code Act and the particulars allege that “OWAKUBALIHO PAUL alias KAGURI on the 2nd day of September 2000 at Katembe Cell Kiringa Parish in Rukungiri District had unlawful sexual intercourse with AKAMPURIRA ELIZABETH a girl under the age of 18 years”.

In brief it is the prosecution case that on that day Elizabeth Akampurira was at their home when the accused went there and asked her to go and help him look for a hen. That on the way he turned against her and had forceful sexual intercourse with her in a banana plantation. After that the girl went back home and when her mother Tumuhairwe Robina returned from the garden she was made aware of the incident whereof she set the process in motion that finally led to the arrest and prosecution of the accused person.

On the other hand it is the defence story that on that day the accused took his radio for repair and left his home at around 10.00a.m. He was at the repairer's place up to around 2.00p.m. when the repair work was complete and he left the place reaching their nearby Trading Centre at around 3.30p.m. where he stayed till 5.00p.m. It is at that time that he says that the LC1 Chairman called Mwebesa Stephene arrested him alleging that he had had sexual intercourse with Tumuhairwe's child – Akampurira Elizabeth.

The issues raised by the above averments on both sides are:-

- a) Whether the girl was below 18 years at the time.
- b) Whether there was any sexual intercourse with the unlawfully.
- c) Whether it was the accused person responsible.

Uganda Vs Stephen Mulengera [1994-1995] HCB 28.

The prosecution did call the girl and her mother Tumuhairwe Robina. Court had a chance to see the girl in court and made its own observations as to the girl's age.

Mr Ndimbirwe, learned counsel for the accused conceded that issue of age. From all the above it is found proved that the girl was below 15 years.

On the issue of unlawful sexual intercourse with the girl, it was Mr Ndimbirwe's submission that it had not been satisfactorily proved in as much as the prosecution relied on the girl's testimony, and she being a minor, corroboration is needed as by law and practice, which corroboration he contends is lacking since no medical evidence was adduced in support.

Looking at the law from decided cases the position is as put by Mr Waninda, learned State Attorney, that whereas it is desirable to have medical evidence in a case as this, it is not mandatory and

failure to adduce it is not fatal so long as there is other cogent evidence that can sufficiently prove the fact.

See: **Badru Mwidu Vs Uganda Crim. Appeal No. 1/97 [1994-1995] HCB 11** and **Bassita Hussein Vs Uganda Crim. Appeal No. 35/95 S.C.**

In the present case the girl victim testified before court how she was lured into the act of sexual intercourse. She graphically described what took place leaving no doubt as to the nature of the act being sexual intercourse.

I am aware of the legal need and practice to look for corroboration in a case as this, but after due warning court can still convict if it is satisfied that the girl could not but have told the truth. **Chila Vs R [1967] EA 722** and **Kaija Moses Vs Uganda Criminal Appeal No. ,.... At pages 6-7.**

Secondly corroboration is provided by the testimony of her mother Robina Tumuhairwe (PW1) who told court how she found her daughter bleeding from her private parts and on being asked what the cause was she revealed her ordeal with a man who sexually assaulted her. This woman described the ghastly effect on the girl's private parts a fact confirmed by PW4 Mwebesa Stephen to whom the girl was immediately taken since he was the LC1 Chairman of the area.

This girl struck me as a very truthful witness, stood firm and was uncontroverted in her testimony. At her tender age of 8 years when testifying she still stood her ground despite the cross-examination. I saw no need to doubt her and do believe her. The act of sexual intercourse is satisfactorily proved by her evidence and there is adequate corroboration from independent testimony of those other two witnesses. So the issue is answered in the positive.

Lastly on whether it was the accused responsible. His defence is an alibi as outlined above. He does not bear the burden of proving it but the prosecution has to adduce evidence rebutting it and placing the accused at the scene, then sufficiently connecting him with it.

Sirasi Kisembo Vs Uganda Crim. Appeal No. 13/98, and Safari Innocent Vs Uganda Crim. Appeal No. 20 of 1995 (CRIM) 1996/2000 page 12.

What then is the weight of this alibi as against the prosecution evidence?

One guideline in such a case is that for an accused carries much weight it should have been at the earliest time (at police) so as to enable the prosecution to investigate the same. A late alibi raised on the trial becomes suspect as possibly an afterthought.

Festo Anderoa Asenua & Anor Vs Uganda Crim. Appeal No.
1/1998 S.C.

In this case the accused 's story does not ring true. That he was away the whole day only to be arrested at the trading centre after 5.00p.m.

The girl victim knew the accused so well as to know even his source of livelihood as hunting and his dogs. She used to pass near his home on the way to the well and he admits this knowledge. So she could not be mistaken in pin pointing him as the time of event was during the day after a conversation, going together for a distance, and her immediate report all bear no possibility of mistaken identity.

The accused person's version is too far fetched to be true and is inherently incredible that it is rejected to the preference of the

prosecution version. The alibi duly fails and is used as corroboration against him.

Moses Kasana Vs Uganda Crim. Appeal No. 12/1981 S.C. at page 7.

Moreover, even the conduct of the accused in escaping from arrest assisted by his brother, then running away from the village till he was traced in another village where he had gone to hide also adds strength to the prosecution case and to his responsibility.

See: **Bogere Charles Vs Uganda Crim. Appeal No. 10/98 S.C.**

As for the defence of a grudge set up by the accused the court considers and rejects the same because there is evidence of actual defilement and not mere simulation of it. No parent could

have torn her daughter so much and subjected her to such trauma just to get even with the accused.

Ntambi Vs Uganda Crim. Appeal No. 19/98, and **Augustine Rwamuhizi Vs Uganda Crim. Appeal No. 15/96 (C.A.)**

(unreported).

Having thus analyzed the evidence in light of principles of law, I am in no doubt that the prosecution has proved all the ingredients beyond reasonable doubt, and in agreement with the unanimous opinion of the gentlemen assessors I do convict him of defilement contrary to section 123 (1) of the Penal Code Act.

D.N. MANIRAGUHA

J U D G E

31/02/2004.

31/02/2004:-

Accused in court.

Ndimbirwe for the accused.

Mr Wandinda for the state.

Ms Namara Court clerk.

Judgment pronounced.

D.N. MANIRAGUHA

J U D G E

31/02/2004.

Mr Wandinda:-

The prosecution is not in possession of the convict's previous record. But the offence is serious with a maximum sentence of death. The circumstances of the offence were grave. He

deceived a very young child of five years to help him chase a hen, then turned into a beast against an innocent child and defiled her.

We have evidence that he joined the two systems (anal and vaginal) in the act. In these circumstances I pray for a deterrent sentence to deter him and other potential offenders.

Mr Ndimbirwe:-

The convict has been on remand since 2000 and we request that this be taken into account when passing sentence. The convict has reflected on his actions and regrets this. I pray for leniency coupled with the fact that he is a first offender. He is still a young man married with a family.

Court:-

The convict is treated as a first offender. He has shown remorse. But the offence is serious and horrific in the circumstances that

have led to permanent injury on the girl. The victim was a child of five years at the time and has to live with this trauma all her life.

Society deserves protection from the likes of the convict by imposition of protective and deterrent sentence.

Considering that the convict has been on remand since 2000, but aware of the gravity of the offender a commensurate sentence of twelve (12) years imprisonment is passed against the convict. He is duly sentenced.

Right of Appeal is explained. Accused is committed.

D.N. MANIRAGUHA

J U D G E

31/02/2004.