

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
AT THE CRIMINAL SESSION HOLDEN AT MBARARA
HCT-05-CR-SC-0107 OF 2003

UGANDA :: PROSECUTOR

VERSUS

BAMWENDA LAUBEN :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA:

JUDGEMENT:

The accused, BAMWENDA LAUBEN is indicted for the offence of Defilement c/s 129(1) of the Penal Code Act. The particulars of the offence are that, he, on the 25th day of March 2002 at Akanyanya village in the Mbarara District had sexual intercourse with GLORIA alias NGUNGU a girl under the age of eighteen years.

The accused denied having defiled the girl.

Briefly the case for the prosecution was that the prosecutrix then aged about seven years was a pupil at Akanyanya Primary School. According to her teacher, KAKAYAYA NAONI (P.W.4) she was in Primary 1B. On the 25/03/2002 she was in the class when she started urinating uncontrollably. At first her teacher punished her but the teacher realised that there was a problem. The teacher informed the Senior Woman of the school who examined the girl and found out that there was a problem. The Headmaster of the school was informed and the prosecutrix was quizzed as to what had happened and she revealed that one of their workers at her home had been defiling her after giving her sweets. She further revealed that he had had sexual intercourse with her the previous day. The Headmaster of the school went and informed the Chairman of Local Council who doubled as the Chairman of the school. The Chairman, RWERA DAVID (PW5) organised for the arrest of four porters including the accused. On their arrest the prosecutrix picked out the accused as the porter who had been defiling her. The accused protested his innocence but was taken to the police from where he was charged with this offence.

The prosecutrix gave testimony about her alleged defilement. She stated that she had been left at home by her parents and the accused who was a

porter in their plantation followed her as she was proceeding to the well and told her that he wanted to sleep with her. She refused. The accused forcefully removed her pair of knickers and pushing something that he pulled from his trousers between her thighs. She felt pain. She tried to raise an alarm but the accused held her by her mouth to prevent her from raising an alarm. She bled from her private parts. The accused told her not to mention anything to any one and he would give her ripe bananas. She did not inform anyone until her teachers discovered that she had a problem.

The prosecutrix was examined by Dr. BYARUHANGA MOSES whose evidence was admitted under S.66 of the Trial on indictments Act. He examined her on 29.03.02 and found that she was aged less than ten years and her hymen was not ruptured. She had a bruise on the right labia minora which was consistent with force having been sexually used. The injury was less than two weeks old.

On the other hand the accused denied having defiled the girl whom he knew as a daughter of his employer, one, Lydia who testified in court as P.W.3. She had employed him to remove some unwanted grass from her

pasture and she had agreed to pay him Shs.100,000/= and a bull on completion of the job. She paid him a deposit of Shs.40,000/= but refused to pay him the balance of the cash and the bull. She later fabricated the case against him after quarrelling over the payment.

In all criminal trials the burden of proving all the ingredients of the offence is on the prosecution throughout. It never shifts to the accused who can only be convicted on the strength of the prosecution case and not the weakness of his defence. The standard of proof that the prosecution bears is beyond reasonable doubt and if there is any doubt in the case that doubt in the case that doubt should be resolved in favour of the accused who would be entitled to an acquittal. Before court arrives at any conclusion as to the guilt or innocence of the accused the case for the prosecution has to be evaluated together with the case for the defence as I proceed to do.

The ingredients of the offence that the prosecution has to prove in a case of defilement are as follows:-

- (1) That the prosecutrix was aged below the age of 18 years at the time she is alleged to have been defiled.

- (2) That there was unlawful sexual intercourse
- (3) That the accused was responsible or participated in the act of sexual intercourse.

On the age of the prosecutrix the prosecution adduced the evidence of the girl herself, that of her mother, her teacher and Dr. Moses Byaruhanga all of which point to the fact that at the time of the alleged offence the girl was below 10 years. This court including the assessors had the opportunity to observe her physical appearance which showed clearly that she is well below the age of 18 years. The defence did not contest this ingredient and my finding is that the prosecutrix was below the age of 18.

The next issue is whether sexual intercourse took place. Sexual intercourse is an act of penetration, however slight of a penis into a vagina. It is immaterial whether nor the hymen is ruptured. In the instant case the medical examination established that the hymen was not ruptured. According to the girl herself the accused pulled something from his trousers and pushed it between her thighs. She demonstrated the part of the body from which the accused pulled the thing which she did not know by pointing to her own private parts and stated that the accused pulled the thing from a

similar region of his body. From the description of what the accused did to her and from what she told her teachers and mother when she returned home there was sexual intercourse which is supported by the examination of the girl by her mother and medical report which revealed a bruise on her labia minora which was consistent with force having been sexually used. This medical report was admitted by the defence. In my view the above evidence is conclusive of the fact that there was sexual intercourse of the prosecutrix.

Lastly this court has to determine as to whether or not the accused is the person who had sexual intercourse with the prosecutrix. The accused denies having defiled the girl and states that the case was a fabrication by her mother who is avoiding paying his money for which he had worked. In the circumstances of this case. I do not see how the case was fabricated by the mother of the victim when the discovery that the girl had been defiled was by her teachers in absence of the mother who had gone for treatment. The discovery was as a result of the girl's teacher who observed that the girl was urinating uncontrollably which was abnormal. The accused was arrested in absence of his alleged boss and on his arrest with three others the victim singled him out as the person who had defiled her.

This sequence of events which occurred in absence of the victims mother rules out any possibility that the case was fabricated because I do not see how she could have arranged with the girl's teachers and the chairman of the school that during her absence in hospital the accused should be framed for a defilement that never took place. The girl herself identified the accused as the person who defiled her and singled him out on his arrest. The act itself took place in broad daylight as the girl was going to the well to fetch water. In these circumstances I find that she was not mistaken about her defiler and that there was no fabrication because the act of sexual intercourse was proved. The requirement for corroboration as required under S.40 (3) of the Trial on indictments Act has been satisfied by the medical evidence which is corroborative of the fact of sexual intercourse and the testimony of RUHINDA who witnessed the identification of the accused from among other males. Although this was not a proper identification parade it shows that the girl knew the person who had defiled her who after all was not a stranger.

The assessors were of the unanimous opinion that the prosecution had proved all the ingredients of the offence beyond reasonable doubt. For the reasons given in this judgement I agree with them opinion and

consequently I find the accused guilty as charged and convict him accordingly for the offence of defilement c/s 129 (1) of the Penal Code Act.

Eldad Mwangusya

JUDGE

3/2/2006

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
AT THE CRIMINAL SESSION HOLDEN AT MBARARA
HCT-05-CR-SC-0107 OF 2003**

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

VERSUS

BAMWENDA LAUBEN :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA:

RECORD OF PROCEEDINGS:

21/11/2005

Accused in court.

Mr. Bazaare for accused in state brief.

Mr. Ngabirano Resident Senior State Attorney.

Mr. Rutazana court clerk/Interpreter.

Court:

Indictment read and explained.

Accused:

I did not do it. P.N.G.

Mr. Ngabirano:

Case may be fixed for 2/2/2005.

Mr. Bazaare:

No objection.

Court:

Case fixed for 2/2/2005.

Assessors:

1. Mr. Kashoma.
2. Mr. Twine Fred.

Eldad Mwangusya

JUDGE

21/11/2005

2/12/2005

Accused, Bamwenda Leuben present.

Mr. Bazara for accused in state brief.

Mr. Ngabirano Resident Senior State Attorney.

Both assessors present.

Mr. Rutazna court clerk/interpreter.

Mr. Ngabirano:

I have a witness in court and I am read to proceed. We have agreed on some facts as follows:-

DR. BYARUHANGA MOSES, Police Surgeon, Uganda Police Medical Services, Mbarara who states as follows:-

That on 29/3/2002 he examined one, Nanteza Gloria a victim of an alleged defilement. He found her aged less than ten years old.

Her hymen was not ruptured. She had a bruise on the right labia minora which was consistent with force having been sexually used. This injury was less than two weeks. She had no other injuries. She was not capable of putting up force on resistance. There were no signs of VD or STD.

He signed the report and stamped it.

Court

The medical report is tendered and marked exhibit P. 1.

Eldad Mwangusya

JUDGE

2/12/2005

Court

Memorandum of agreed facts prepared this 2nd day of December 2005 and signed as follows:-

1. Leuben Bamwenda
(Accused)

2. Mr. Bazare
(Counsel for accused)

3. Mr. Ngabirano
(Counsel for the state)

Reference:

Eldad Mwangusya

JUDGE

2/12/2005

Court:

Assessors sworn as follows:

1. Mr. Kashoma Arthur, 49 years old, farmer of Nkokonjeru, Mbarara (Protestant sworn).
2. Mr. Twine Fred, 57 years, farmer, Mbarara Municipality (Protestant sworn).

Eldad Mwangusya

JUDGE

2/12/2005

PW2 NYANGORO GLORIA.

Court:

This is evidently a girl of tender years and she look shy. Her testimony will be taken from the chambers.

Eldad Mwangusya

JUDGE

1/12/2005

Voir dire:

Nyangoro Gloria:

My mother us Twinobusingye Lydia. I go to school at Ahakayanja.
Rushororo. I am in primary 2. I know how to write my name.

Court:

She writes her name as