

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO
CRIMINAL SESSION CASE NO. 61 OF 2004

UGANDAPROSECUTOR

Versus

KYAKUWA MOSESACCUSED

BEFORE: HON. JUSTICE V. A. R. RWAMISAZI-KAGABA

JUDGEMENT

Kyakuwa Moses, who I shall refer to as “the accused” in the rest of my judgment is Indicted for the offence of defilement contrary to section 129(1) of the Penal Code Act. It was stated in the particulars to the charge that, Kyakuwa Moses, on the 23rd day of May 2001 at Kigoti village, in Kayunga District had unlawful sexual intercourse with Ajio Eve alias Tazita, a girl under the age of 18years. The accused denied the charge and was represented by Kafuko Ntuyo while the prosecution was led by M/s Farida Nakayiza a State Attorney.

The prosecution’s case rested on four witnesses. The accused and Ajico Lucy, the mother of the prosecutrix, Ajio Eve, lived very near each other at Kigoti village. At 5.00 p.m. on the 23/5/2001 Ajico Lucy wanted to send his daughter to the nearby shops to buy some groundnuts for her. The accused, who was at Ajio’s home offered to take Ajio Eve to his home so that she could collect some groundnuts and bring them to her mother. Ajio and the accused left together for his (accused’s) home. While at his home, the accused dragged Ajio into his house, removed her knickers, gagged her mouth, made her lie on her back on the floor and pushed his penis into her Vagina, and lasted long while having sexual intercourse with her. He was lying on her stomach while he defiled her.

She felt a lot of pain in her private parts. She raised an alarm which was responded to by her mother, Lucy Ajiko. Ajico (PW4) arrived at the accused’s house as he was trying to fit on his trousers. His penis was seen by Ajico before he pushed it inside his trousers. According to Ajico, her daughter jumped from the ground on seeing her. Her daughter was trying to shout and cry but she was prevented from doing so as the accused had placed his hand over her

mouth. Eva was both unhappy and crying. Eva told her mother (PW4) that the accused had sexual intercourse with her.

The accused was arrested by villagers and taken to Bbale Police Post. The mother of the victim and a woman called Mega examined the private parts of Eva and observed therein a slippery like substance similar to male sperms.

The father of the victim escorted the victim and the accused to Kayunga Police Station and handed the accused to P.C. Onvit (PW2). Dr. Ahmed Matovu of Kayunga Hospital examined her on P.F. 3 (Exh. P1). The same doctor Ahmed Matovu examined the accused on P.F. 24 on the 29/5/2001. (Exh. P.2) The accused had a wound on the skull and bruises on his back. D/Sgt Odo, (PW3) visited the scene of the crime and drew a sketch plan of the scene which was admitted at Exh P.3. After the accused was explained the provisions of section 73(2), 74 and 75 of the Trial on Indictments Act, he chose to say nothing.

In all criminal trials, the prosecution has the unshifting burden of proving all the ingredients of the offence with which the accused is charged and his guilt beyond reasonable doubt. This burden does not shift to the accused except in a few statutory cases, but this is none of those exceptions. The prosecution must succeed on the strength of its own evidence. The weakness of the defence or lies told by the accused shall not be a basis for convicting the accused. I explained to the assessors, and I also warn myself, about the burden proof, the test to be applied and what a reasonable doubt means in law.

See: (1) Woolimington vs. D.P.P. (1965) A.C. 462.

(2) Okethi Okale & others vs. Uganda (1965) EA 555

Secondly, I explained to the assessors as I warn myself that in all sexual offences the court must look for and obtain corroboration of the victim's testimony which implicates the accused in the commission of the offence. This is a rule of practice which has been so consistently followed that it has almost acquired the rule of law. However the court can convict on the uncorroborated evidence of the prosecutrix, if after warning itself of the danger of convicting on the uncorroborated evidence, it is satisfied that the prosecutrix is truthful and her evidence reliable.

See: (1) Chila and another vs. Republic (1967) EA 722

(2) Christopher Kizito vs. Uganda - Criminal Appeal No. 18/93 (S.C.)

Ajio Eva stated she was 12 years old. She was permitted to testify on oath after the court carried the intelligence test on her which is called *voire dire*. However, being a witness of tender age, the court should, as a matter of prudence obtain some corroboration of her testimony before basing a conviction upon it.

Although the law does not set down a legal definition of tender age the courts, over time, have laid down as a tender age to mean any person who is below fourteen years old.

See: (1) Kibangenyi Arab Kabil vs. Republic (1959) EA 92

(2) Sakila vs. Republic (1967) EA 403

(3) Solomon Oumo Mgele vs. Republic (1958) LRT 53

The accused is indicted for defilement which involves three ingredients that the prosecution must prove beyond reasonable doubt, namely:

- a) That the victim was under 18 years when it was sexually abused.
- b) There was sexual intercourse involving the prosecutrix and a male
- c) that, it is the accused who had sexual intercourse with the victim.

See: Bassita Hussain vs. Uganda — Criminal Appeal 3 5/1995 (S. C.)

Age:

The victim gave her age as being 12 years. She was an intelligent young girl who was attending P.4 at Gayaza Primary School. Her mother, Lucy Ajico testified that the victim was born about 1992. Dr. Ahmed Matovu (PW1) found Eva to be eight years old when he examined her on the 24/5/2001, which is three and half years to this date. The defence counsel did not dispute her age. I find this ingredient has been proved by the prosecution.

Sexual Intercourse:

I explained to the assessors that the slightest penetration of a male penis into a female vagina is enough to constitute the act of sexual intercourse. The sexual act need not be accompanied by the tearing (rapture) of the hymen, ejaculation or visible injuries to the female's private parts. But the existence of those features I have described above may be strong evidence pointing to the act of sexual intercourse having taken place. These features may be more pronounced where there is more force used to overcome resistance or where the female is still very young and her private parts still very vulnerable or tender.

See: (1) *Oketcho Richard vs. Uganda — criminal Appeal 12/1995 (S. C.)*
(2) *Archbold— 1997 Edition —paragraphs 20-24 20-25 page 1696*

Ajio (PW5) narrated how the accused dragged her into his house, removed her knickers, gagged her mouth and pushed his penis inside her vagina during the sexual assault which lasted for a long time. She cried, felt pain and raised an alarm which attracted her mother Ajico (PW4) to the accused's house.

Ajico corroborates the victim when she says she found Kyakuwa having sex with her daughter. He jumped off her but his penis remained out as he tried to fit on his trousers. Ajico said Eva was trying to shout and cry but could not do so as accused had placed his hand on her mouth. Upon her release, Ajio (PW5) told her mother that the accused had committed sexual intercourse upon her.

PW4 together with Mega (deceased) examined the private parts of Ajio and observed therein (in the vagina) some slippery liquid which she described as semen which is excreted by a man during sexual intercourse.

The victim, after being rescued, was unhappy and depressed according to the observations by Ajico (PW4). Lastly, I find ample corroboration in the report of Dr. Matovu. The doctor found Ajio's vagina had been penetrated and the hymen ruptured, though he was non-committal as to when it was ruptured.

I do not agree with the defence counsel who submitted that there was no proof of penetrative sexual intercourse having taken place upon the body of Ajio. I find the prosecution has proved that sexual intercourse took place involving the victim.

Participation of Accused:

The accused was a close neighbour to the Ajico family (80 metres apart). He went to the Ajico family and collected the victim for the purpose of giving her groundnuts to deliver to her mother (PW4).

The accused was very well known to the victim and her family. The offence was committed in broad day light, in the house, there were no obstructing objects to conceal the face or body

of the accused. The victim was followed by her mother to the accused's house where, according to her she found the accused on top of Ajio although Ajio says her mother came as she was leaving the accused's house. I will comment on this contradiction later.

The defence counsel conceded that there could not be any mistake about the identity and participation of the accused given the factors I have listed above. Finally, the father of the victim reported the accused as the defiler of his child to the Police basing on the information given to him by her daughter. This led to the accused's arrest. I am therefore left in doubt that it was Kyakuwa who defiled Ajio.

I warned the assessors that it is the accused's right if he chooses to say nothing in his defence. No one, assessors or court should make any adverse remarks about his choice. I will also, say nothing about it. But his choice to say nothing does not lessen the burden placed on the prosecution to prove the guilt of the accused beyond reasonable doubt.

I have already referred to the contradiction between the evidence of PW4 and PW5 as to what accused was doing when the victim's mother arrived at the accused's house in response to the alarm of the victim. The victim said her mother arrived as she was leaving the house after being defiled. The accused was inside the house struggling to dress up. On the other hand, the mother said he found the accused on top of his daughter, got off her on seeing her (Ajico) and his penis was dangling outside.

The law relating to inconsistencies is that minor inconsistencies may be forgiven and ignored where they occur. But where the inconsistencies are substantial, they may occur. But where the inconsistencies are substantial, they may render the witnesses's evidence untruthful and the witness unreliable unless such contradictions are shown to be made innocently and can be explained in the context of the witness and the circumstances of the case.

See: (1) Abdu Ngobi vs. Uganda — criminal Appeal No. 10/1991 (S.C.)

(2) Uganda vs. Abdalla Nassur (1982,) HCB 1

Applying the law to the contradictions between the testimony of Ajio (PW5) and her mother (PW4), I find the contradiction does not seriously taint the prosecution case as to the accused's participation in the commission of the offence with which he is indicted or the truthfulness of the prosecution witnesses. PW5 Ajio could have forgotten what was

happening given her tender age and the traumatising circumstances in which she found herself.

After considering the evidence for the prosecution, and defence together, I find the prosecution has proved all the three ingredients of the offence of defilement beyond reasonable doubt. I find the accused guilty of the offence of defilement.

Consequently and in agreement with the opinions of both assessors, I convict the accused for defilement contrary to section 129(1) of the Penal Code Act.

V. A. R. Rwamisazi-Kagaba

Judge

7/1/2005