THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CO-170-2002

UGANDA……... PROSECUTOR

VS

SSEMAKULA ASANASIO…….. ACCUSED

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

The charge against the accused, Ssemakula Asanasio alias Twine is of defilement, contrary to section 129 (1) of the Penal Code Act. Three witnesses were called by the prosecution to prove its case. The victim herself was PW1, Mutungi Francis was PW2 while Byarugaba Sam, father of the victim, was PW3. Accused gave a statement on oath in his defence. He denied involvement in the offence.

The prosecution case in brief is that at about 8 am. on the 17th December 2001 the victim was left at home to lock the house while her parents went ahead to the garden. Accused was a well known porter working in the neighbourhood. While the victim was at home accused forced the victim onto beddings which were on the floor of the house and had sexual intercourse with her. When accused was still lying on top of the victim PW2 entered the house and, using a spear, he was able to arrest the accused. PW2 raised an alarm which was answered by several people including PW3 - Accused was taken to Kazo Police Post and later to Mbarara Police Station. This charge was preferred against him in consequence.

The onus is on the prosecution to prove the case against the accused person beyond reasonable doubt. See *Sekitoleko vs Uganda* [1967] EA 531. It is not the responsibility of the accused to prove his innocence. Where the charge is that of defilement the prosecution must prove the following three ingredients:

1. That the prosecutrix was below 18 years of age.

2. That the girl had sexual intercourse on the occasion alleged.

3. That accused committed the offence.

With regard to the age of the prosecutrix, the best evidence of age is a birth certificate. Where there is none courts have accepted some other evidence such as age determined after a medical examination, evidence of a person or persons acquainted with the age of the individual in issue or assessment resulting from observation of the individual in issue. There was no birth certificate produced in the instant case. There was no evidence of a medical examination either. However according to PW3, father of the girl, at the time of his testimony the girl was 13 years old. The girl testified in court. In my assessment she was a girl of tender years from observation and that is why her evidence was received unsworn after a voire dire. Given that she was of an age less than 18 years I am satisfied the prosecution has proved this ingredient beyond reasonable doubt.

The second ingredient the prosecution ought to prove is that there was sexual intercourse on the occasion alleged between the prosecutrix and the person who molested her. Sexual intercourse is said to have taken place whenever there is penetration, however slight, of the female sexual organ by a male sexual organ. According to the prosecutrix the man who molested her put his penis in her vagina causing her much pain. However the evidence of the victim is that of a child of tender years which requires corroboration in every material particular. The evidence of PW2 is that he saw the man who molested the victim lying on top of her on beddings that were on the floor. PW2 said the man had put his penis in the victim's vagina. There is no evidence available of anyone, let alone medical personnel, examining the victim. I find evidence of sexual intercourse not corroborated as ought to be the case. Consequently I do not find the prosecution to have proved this ingredient beyond reasonable doubt. Nevertheless what the evidence of the victim and PW2 bring out is supportive of an offence other than the one charged here.

Regarding accused's participation, the victim pointed out the accused, who was well known to her, as the person who molested her. PW2 testified that he found accused, also well known to him, lying on top of the victim with his penis in her vagina. PW2 had proceeded to arrest accused

and raised an alarm which was answered by PW3 amongst others. All prosecution witnesses testified that accused was then arrested at the home of PW3 which was the scene of crime.

In his defence, however, accused stated that he did not commit the offence alleged and that he was not arrested at the home of PW3 but somewhere else. When an accused person sets up a defence of alibi it is not his duty to prove it. It is the responsibility of the prosecution to disprove the alibi by adducing evidence which places accused squarely at the scene of crime. I find the prosecution evidence places accused at the scene of crime since accused was arrested there. The prosecution has disproved the alibi which I find a fabrication as to the evidence of PW2 and PW3, not to mention that of the victim herself, overwhelmingly disproves that of the accused whose story relating to his arrest is dubious. This ingredient has been proved beyond reasonable doubt.

The two assessors in their joint opinion advise me to convict accused as charged. For the reasons I have given in the course of this judgment I do not agree with that advice. I find accused not guilty of the charge of defilement and acquit him of it. However I find accused guilty of the lesser charge of indecent assault, contrary to S. 128 (1) of the Penal Code. He is accordingly convicted of that charge.

P. K. Mugamba
Judge
12th April 2005

ALLOCUTUS.

State Attorney:
The convict is a first offender. He has been on remand for 3 years and about 3 months. The act for which the convict is convicted demeaned the dignity of a young girl. He should be given a deterrent sentence.

Mr. Tibamanya:

Take into consideration the period accused has been on remand. Three and a half years are sufficient punishment for anyone who demeans a juvenile. He is a first offender. Let him be warned seriously.

Convict:

I have been on remand for a long time. I left four children at home. One is in S.3 while another is in S. 1. There is also my child in P.6. I have two other children in nursery. I pray court to set me free so that I can go and take care of those children.

SENTENCE:

The convict committed a serious act against a juvenile he should have protected. He is lucky the evidence available could not amount to defilement owing to the manner investigations were handled. This, needless to say, was unfortunate. Be that as it may, I have taken into account the fact that the offence for which accused is convicted carries a maximum sentence of 14 years imprisonment. I have taken into account also the fact that the convict is a first offender with filial responsibility. I have also noted that he has been on remand for 3 years and 3 months which I have taken into account before passing sentence and have deducted from the sentence I could otherwise have handed down. He is sentenced to 5 years' imprisonment.

P. K. Mugamba

Judge

12th April 2005