

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
CASE NO: HCT-03-CR-SC-137 OF 2006

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

VERSUS

KYEYUNE PAUL ::::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE E.K. MUHANGUZI, AG. JUDGE

JUDGMENT:-

Issues:-

1. Whether the accused, Kyeyune Paul, is guilty of the offence of defilement contrary to section 129 of the Penal Code Act.

FACTS:-

In the afternoon of 15/12/2002, Lydia Nanyombi was drawing water at a well at Matale village in Mukono District, when the accused allegedly found her there.

After drawing water both left the well but on the way the accused allegedly pulled Nanyombi to a banana plantation and forcefully subjected her to sexual intercourse and promised her shs.1,000/= twice. He also allegedly warned her not to report the incident to her parents or anyone else. Thereafter she went home where only fellow children were present, both her parents being absent. The following morning when she woke up she reported her ordeal of the previous day to her father who had returned home during the night while she was asleep. Her father in turn went with her to the local authorities and reported the incident. The local authorities summoned the accused who denied the offence and both parties were referred to police at Ngogwe. The accused was eventually charged with defilement which he pleaded not guilty to. At the trial the prosecution relied on evidence of three witnesses to

prove the offence while the accused testified on oath and called no witnesses.

ANALYSIS:-

A. The Law:-

Every accused person is presumed innocent until proved guilty or he/she pleads guilty (Article 28 (3) of the Uganda Constitution, 1995). The accused in this case pleaded not guilty. Burden of proving him guilty is upon the prosecution and never shifts to the accused through out the trial. Prosecution has to discharge that burden by proving every essential ingredient of the offence beyond reasonable doubt. (Woolmington Vs D.P.P. [1935] AC 462, Okethi Okale & Others Vs R. [1965] EA 555.

The offence of defilement has three essential ingredients, namely:-

- 1) Unlawful sexual intercourse with the victim.
- 2) The victim being aged below 18 year at the time.
- 3) The accused being the male who had the unlawful sexual intercourse with the victim.

B. The evidence:

To prove the above three essential ingredients the prosecution relied on evidence of three witnesses, namely:-

1. Dr Kasibante of Kawolo Hospital (PW1);
2. Nanyombi Lydia, the victim (PW2); and
3. Kazimili William, the victim's father (PW3).

The evidence of Dr Kasibante (PW1), which was admitted under section 66 of the Trial on Indictments Act, is as follows:-

On 17/12/2002 he received a request from Ngogwe Police Station to examine one Nanyombi Lydia, an alleged victim in a defilement case. He examined her and found that she was aged 8 years old there were signs of penetration and a ruptured hymen. The rapture was estimated to have occurred at least two days prior to the examination. There were inflammations around her private parts consistent with force having been used sexually. His findings were recorded on appendix to Police Form 3, which was admitted in evidence by consent of the parties as exhibit P1.

Dr Kasibante also examined the accused and recorded his findings on Police Form 24, which is used to examine persons accused of serious crimes. He found, upon examining the accused, that the accused was aged 20 years old then, had no signs of injury and was of normal

mental condition. That Police Form 24 was also admitted in evidence by consent of both parties as exhibit P2.

The evidence of Nanyombi Lydia (PW2), the victim which was taken under oath, after conducting the necessary voire dire is as follows:-

She knew the accused by name as a fellow resident of her village Bukasa in Matala. The accused's home was near her home. That on 15/12/2002 in the afternoon, around 4.00p.m. while she was drawing water at the well the accused met her there. That he asked her to draw some water for him which she did. That as she was lifting her water to go home the accused asked her of sexual intercourse with an offer to give her shs.1,000/= which she declined. That the accused caught her hand, pulled her, threw her down and took her to the banana

plantation where he removed her clothes and his and lay on her. That she cried and told him she would report him to her father. That the accused told her not to report him and he promised her money again but never actually gave her any money. That she picked her can of water and went to her home where she found only her sisters. Early the following morning she woke up and found her father (PW3) to whom she narrated her ordeal of the previous afternoon. That thereafter she accompanied her father to the local council authorities and reported the incident.

The evidence of Kazimili William (PW3) in essence confirmed that the witness was away from his home on 15/12/2002. That he had gone to do boda boda transport business at Matala and returned home at night when the children were already asleep and in absence of their

mother. That early the following morning Nanyombi Lydia reported to the witness that the accused defiled her at the water well. That the witness and PW2 went to the local council authorities and reported the incident that morning. That the local council authorities summoned the accused and when the accused denied any wrong doing the authorities referred the parties to Police at Ngogwe.

Prosecution thereafter closed its case and court find sufficient evidence had been adduced that the accused had committed an offence and accordingly put the accused to his defence.

As sole witness in his defence he testified on oath as follows:-

That he was a resident of Bukasa village in Mukono District prior to his arrest and subsequent remand in prison. That he know both Lydia Nanyombi (PW2) and her father Kazimili William (PW3) whose brother, Kalori the accused worked for as a porter. That on the day in issue he met the victim at the well around 2.00p.m and not 4.00pm. That he did not in any way have sexual intercourse with the victim. That around 4.00p.m. when he is alleged to have defiled the victim he was actually in forest with his employer's wife and children cutting and collecting firewood. That further the allegations against him were a fabrication by the victim's parents due to some grudges between him and them. That partly the victim's father (PW3) blamed the accused for causing the victim's mother separate from PW3. That on the other hand PW3's brother and the accused had a disagreement

over payment of wages to the accused for his work rendered to PW3's brother.

While summing to the assessors court particularly drew to their attention two very critical matters. First is the matter of corroboration both generally regarding evidence of complainants/victims in sexual offences as well as specifically with regard to evidence of children of tender age under section 40 (3) of the Trial on Indictments Act. That whereas it is generally, as a matter of practice but not law, unsafe to base a conviction on uncorroborated evidence of a victim of a sexual offence, court may, if convinced that the victim's evidence is truthful, base a conviction on such evidence. That however, evidence of a child of tender age given under section 40 (3) of the Trial on Indictments Act requires

corroboration by some other material evidence before court can base a conviction upon it.

The other critical matter is the one of alibi. Court warned the assessors that the duty of the prosecution to prove every ingredient of the offence beyond reasonable doubt which never shifts to the accused through out the trial requires that even when the accused sets up an alibi still the accused is under no obligation to prove such alibi. Since such alibi may raise reasonable doubt in the prosecution case then it is the duty of the prosecution to disprove such an alibi.

C. FINDINGS:-

Upon carefully considering evidence of Dr Kasibante (PW1), Nanyombi Lydia (PW2) and Kamili William (PW3) above stated and in total agreement with both assessors

and counsel for both parties court finds that prosecution has proved beyond reasonable doubt that Lydia Nanyombi was aged below 18 years of age by 15/12/2002, had no capacity to marry and or to engage in sexual intercourse and was actually not married to the accused or to any other man and was subjected to unlawful sexual intercourse on or about 15/12/2002.

Therefore essential ingredients No. 1 and No. 2 have been proved to the required standard.

Ingredient No. 3 - Participation of the accused:-

Regarding whether the accused is the male that had sexual intercourse with the victim the prosecution relied entirely on the evidence of both the victim, Lydia Nanyombi (PW2) and Kazimili William (PW3) which evidence was substantially contested by the accused.

Court finds that evidence of PW2, the victim, is the only material evidence while that of PW3 is merely derived from information given by PW2 and PW3 about the incident.

While a report by a victim of sexual intercourse assault of her ordeal promptly to authorities or to her parents may amount to corroboration (**Lwanga Yusuf Vs Uganda, [1971] HCB 280**) and while circumstantial evidence can corroborate evidence of a complainant in a sexual offence (**R Vs Achan Abel [1972] 1 ULR 13**) the type of corroboration required under Section 40 (3) of the Trial on Indictments Act is:-

“Other material evidence”

In this court's considered opinion that type of evidence would be independent evidence from that given by the child of tender age but not such evidence as is based on information given by that same child whose evidence requires corroboration under section 40 (3) of the Act. The evidence of PW3 is not independent evidence or material evidence regarding participation of the accused in the commission of the offence because it is solely derived from what PW2 the child of tender age (the victim) informed her father (PW3). What, in Court's opinion, would amount to material or independent evidence that would suffice to corroborate the evidence under Section 40 (3) of the Act would, for instance, be either direct or circumstantial evidence from a witness testifying to either seeing or hearing the accused in action or speaking with the victim at the time or place in issue. Another example of such evidence could be some

scientific examination and findings of the blood or other cells of the accused on the victim's body at the time in issue. Court believes other examples of material or independent evidence are there.

In the instant case court is unable to find any material or independent evidence implicating the accused in the commission of the offence to corroborate the evidence of PW2, the victim as is required by Section 40 (3) of the Trial on indictments Act.

Lastly is the matter of the alibi which the accused set up. While the victim (PW2) stated that she met the accused at the water well at about 4.00p.m. on the day in issue the accused put their time of their meeting at the well at 2.00p.m. The accused stated that at 4.00p.m. and

thereafter in the forest with the wife and children of the victim's uncle fetching firewood.

Legally an accused person, who sets up an alibi as a defence, does not assume the burden of proving that alibi. That burden remains on the prosecution to prove that the accused was at the scene not at a different place where he claims to have been at the material time, the crime was committed. See ***Mushikoma Watete alias Peter Wakhokha & Others Vs Uganda SCCA No. 10 of 2000, 1 SCD (CRIM) 1996 - 2000 at page 22.***

Upon carefully considering both prosecution evidence (mainly PW2) and evidence of the accused, court finds that the two hours difference between 2.00p.m and 4.00p.m., the different times at which the accused and the victim stated to have met at the water well, to be

sufficiently wide apart to cast reasonable doubt on the prosecution case as to whether the accused assaulted the victim as alleged. With this doubt in mind court must resolve the doubt in favour of the accused.

See: 1. R Vs Chamlon Were Olango [1937] 4 EACA 46.

2. Abdu Ngobi Vs Uganda, S.C.C. Crim. Appeal No. 42/95 (unreported).

3. Wandera Alex Vs Uganda, S.C.C. Crim. Appeal No. /95 (unreported).

4. Siraji Sajabi & 2 Others Vs Uganda, CA Crim. Appela No. 31/98 (unreported).

In the result, contrary to the opinion of both assessors court finds that the type of corroboration required under section 40 (3) of the Trial on Indictments Act has not been satisfied by the prosecution in this case. Prosecution has failed to disprove the accused beyond reasonable doubt

the essential ingredient of participation of the accused in the commission of the offence.

DISPOSITION:

Upon court finding that prosecution failed to prove the essential ingredient of participation of the accused in the commission of the offence to the required standard court hereby finds the accused not guilty of the offence of defilement contrary to section 129 of the Trial on Indictments Act, hereby acquits the accused and sets him free forthwith unless he is held on other charges.

E.K. MUHANGUZI

AG. JUDGE

22/10/2007.

22/10/2207:-

Mr Sewankambo Hamza, State Attorney for state.

Defence Counsel absent.

Accused in court.

Nabirye Rebecca – Court Clerk.

Court:-

Judgment delivered and signed.

E.K. MUHANGUZI

AG. JUDGE

22/10/2007.