

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HCT- 03-CR-SC 0329/2010

UGANDA.....PROSECUTION

VERSUS

MUGANZA BUWAYAACCUSED

BEFORE HON. LADY JUSTICE FAITH MWONDHA

JUDGMENT

The accused was charged with aggravated defilement C/S 129 (3) (4) (a) of the Penal Code as amended. The particulars as alleged by the prosecution were that the accused Muganza Buwaya on the 9th day of October, 2009 at Matum village, Kisozi sub county in Kamuli District had unlawful sexual intercourse with Kamidha Alaisa a girl below 14 years of age.

The prosecution like in all criminal cases except in insanity cases has the burden to prove the case beyond reasonable doubt to bring the guilt of the accused person home. The burden is on the prosecution throughout the trial see *R v. Johnson [1961] 3 ALL ER 969 and Sekitoleko v. Uganda [1967 EA 531*. The accused has no duty to prove his or her innocence. Even where he or she opts to keep quiet throughout the trial or offers a weak incredible defense he or she can only be convicted on the strength of the prosecution case against him or her; see *Justin Nankya v.*

Uganda SC CR Appeal No 24/1995 Unreported cited with approval Okoth Okale v. R [1955] EA 555.

For the case of aggravated defilement there are three ingredients to be proved beyond reasonable doubt;

1. That the victim was under 14 years of age
2. That she experienced unlawful sexual intercourse
3. That it's the accused who participated in the unlawful sexual intercourse.

The prosecution led evidence of three witnesses in addition to the admitted evidence as per S.56 of the TIA to discharge its burden. The admitted evidence was that of the arresting officer No 45013 Cp Kyayola Timothy and the medical examination of the victim contained in PF3 and its appendix and also PF24 where the accused was examined and he was found to have no injuries at all and was of normal mental condition.

On the first ingredient, there was the evidence of PW1 who testified that she was an aunt and sister to the mother of the victim who's deceased. She told court that her sister gave birth to the victim in 1999 and she passed on two weeks after the delivery. That after that she took over the responsibility of caring for the victim. The medical evidence upon examination of the victim revealed that the victim was 10 years. The child came to testify in court as PW2 and the court held a *voire dire*. The child obviously was below fourteen years of age. She possessed sufficient intelligence to understand the nature of the oath and she gave an affirmed statement. I was satisfied that thus ingredient was proved.

On the second ingredient there was PW2's evidence, the victim herself. She narrated how the accused had sexual intercourse with her. She told PW1 who was waiting for her and had tried to look for her but in vain. PW1 said that the victim came home at around 10: oopm. And that the victim was crying and when she reached home she met PW1 and she told her that the accused had sex with her. That she checked her by looking at her private parts.

Its trite law that in sexual offences before conviction is made there has to be corroboration in the material particulars of the evidence of the complaint. But that court may convict on the evidence of the complainant (victim) alone after due warning has been taken both of the judge and the

assessors of the danger of doing so; see *Chilla v. Republic* [1967] EA 722. I had no doubt on this. In the instant case there was overwhelming evidence which corroborated the victim (complainant) in the material particular.

That the victim had blood therein and there was wet semen as well. That her private parts had gotten swollen. The PF3 and its appendix which had been admitted and marked as EXP3 revealed that there were signs of penetration and her hymen had ruptured. The rupture of the hymen was recent. There were inflammations around her private parts and the injuries were consistent with force having been used sexually. The victim was not strong enough to put up resistance. The injuries also had looked at the victim and saw that the victim had injuries and semen which was met around her private parts. The accused held her hand after unzipping and lowering his trouser and had sexual intercourse with her. He inserted his penis in her vagina. I was satisfied that this ingredient was proved.

On the third ingredient the evidence of PW2 was to the effect that one Namugwere a woman who was working at the home she was staying, sent her for cigarettes at around 7:00pm. That as she went Namugwere was following her in company of the accused. That Namugwere was holding her arm and the accused branched in a small path. That Namugwere handed her over to the accused who held her hand and put her down. That he removed his trouser and he had a small bottle of waragi. That after unzipping his trouser he had sex with her. That he held her mouth when she tried to make an alarm. That after that he told her to go otherwise he was going to beat her. The victim knew the accused as Muganza of Wankandulo and she stated that she knew him before the offence was committed. He used to come to their home and talk with Namugwere and drink waragi.

This case depended on proper and correct identification by a single identifying witness. Since the omission of the offence was at about 7:00pm. Though 7:00pm one can positively identify a person, there was need to test the credibility of the evidence which surrounded the proper and correct identification. The laws relating to this fact have long been settled by superior courts. In the case of *Abdalla bin Wendo and another v. R* [1953]20 EACA 166, *Abdulla Nabulere and others v. Uganda*[1978] HCB 79; *Bogere Moses and Another v. Uganda Cr App No I of 1997 Sc, Unreported*; *Uganda v. George Simbya Sc Cr App No 37/1995* it was held that while identification of an accused person can be proved by the testimony of a single witness, this does

not lessen the need for testing with the greatest caution the evidence of such witness regarding identification especially when the conditions favoring correct identification are difficult. Circumstances to be taken into account include the presence and nature of light, whether the accused person is known to the witness before the incident or not, the length of time and the opportunity the witness had to see the accused and the distance between them. Where the conditions are unfavorable for correct identification what is needed in other evidence pointing to the guilt from which it can be reasonable concluded that the evidence of identification can safely be accepted as free from possibility of error. The true test is not whether the evidence of such witness is reliable. A witness may be truthful and his evidence apparently reliable and yet there is still the risk of an honest mistake particularly in identification.

From the evidence as adduced by the prosecution by PW2 all the conditions favorable to proper identification were existent. The accused was very well known to the victim. He was a frequent customer of their home and he used to come and drink waragi with Namugwere. Even on the fateful; day the accused came together with Namugwere when they came following her. Namugwere then held her hand and she handed her over to the accused who had branched and she went away. That that is when the accused had sexual intercourse with the victim. By implication since Namugwere and the accused were together following the victim, the accused was at the victim's home before 7:00pm which facilitated her identification. When Namugwere sent the victim for cigarettes it was still early and the victim was very consistent in the sequence of events. I was satisfied that the ingredient of participation had been proved.

The accused in his defense tried to deny the offence saying that he went and bought matooke at Matume at around 8:30pm and then went to Nankandulo where his home was. It was about time when the victim was defiled in Matume by the accused since the prosecution evidence revealed that the victim went back at about 10:00pm after she had been defiled. He was trying to concoct lies which could not shake the prosecution case.

The Principal Attorney Mr. Mulindwa Badru submitted on all the three ingredients affirming that the prosecution had proved its case beyond reasonable doubt.

The defense conceded on the first and second ingredient but contested the third ingredient. Jacob counsel for the accused submitted that there was no proper identification and that therefore the

accused could not have been positively identified to make him to have participated in the unlawful sexual intercourse. He prayed that the court finds the accused not guilty and that it acquits him and sets him free.

The assessors in their joint opinion advised court to find the accused person guilty because the prosecution had proved its case beyond reasonable doubt.

I agreed with them because of the reasons already given in this judgment. The accused is found guilty and is convicted accordingly as charged.

Faith Mwendha

Judge

17/09/2010