

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MBALE**

CRIMINAL SESSION CASE NO. 009 OF 2010

UGANDA.....PROSECUTOR

VERSUS

GIMOGOYI MOSES.....ACCUSED

BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

The accused person Gimogoyi Moses was indicted for Aggravated Defilement c/s 129 (4) (a) of the Penal Code Act.

The particulars of the offence relied upon by the prosecution are that the Accused on the 6th day of November, 2009, at Kisanya Village in Sironko District, had unlawful sexual intercourse with Nandutu Sulaina a girl aged 12 years.

When the indictment was read and explained to the accused person, he pleaded not guilty. The prosecution called 4 witnesses to prove its case.

The evidence PW1 the medical Doctor who examined the victim and of PW2 the Doctor who examined the accused were admitted under provisions of Section 66 of the Trial of Indictments Decree, at the preliminary hearing. See Exhibits P₁ and P₂.

The prosecution showed the complainant Nandutu Sulaina was examined by PW1 the Police Surgeon upon the request of Salalira Police, Sironko District vide SD 08/06/11 of 2009.

The surgeon found the victim to be aged 12 years at the time of examination. She had a wide opening of the vagina and that the victim had had sexual intercourse more than twice.

Her hymen was ruptured although it could not be ascertained when that had happened. There were old vaginal tears around her private parts and a pus discharge that was evidence of a sexually transmitted infection. The tears were as a result of forceful sexual penetration.

The Medical Officer found that the victim is stunted and was not strong enough to put up any form of resistance. The report is dated 11/10/09.

The accused was examined by Dr. Nabende Peter, the District Health Officer of Sironko.

PW2 established the accused's apparent age to be 18 years and that he was of normal mental status. No physical external injuries were seen. The form is dated 9/11/09.

Counsel for the accused did not object to the reports being tendered into evidence.

PW3 Grace Nambozo is the mother of the victim PW3. At the time of hearing she told court that the victim was approaching 14 years of age. She identified the accused before court, saying that he was her husband and they had lived together as husband and wife in the same house for 2 years.

She testified that during the night of 06/11/09 at about 2am, she woke up and realised that the accused was not on their marital bed with her but was in bed with PW4 the victim. The victim was staying in the same house and room as the couple, sleeping on the floor.

The accused was having sexual intercourse with the victim. PW3 lit a small paraffin lamp, and went and informed her brothers and the LC.1 chairperson. They came and arrested the accused. When asked by PW3 why he had had sex with the victim the accused just laughed. He was taken to the home of the Defence Secretary.

Some elderly women then checked the victim and confirmed that she had had sexual intercourse.

The LC3 gave PW3 a letter and she took the victim to Police.

In cross-examination PW3 stated that she has eight children the oldest being 20 years. The victim is her fourth child. She had no children with the accused although they had lived together for 2 years. She could not recall any meeting where the clan warned her against marrying the accused. He had told her that he was 30 years of age; despite that Doctor's report put his age at 18 years.

The witness said that she did not know when the victim began having sex and that that night was the first time she caught accused with her. Later she acknowledged that was not the first time.

The witness's statement to Police was tendered into court as exhibit D, for purposes of showing contradictions within her testimony.

When the victim appeared to testify a voire dire was conducted to determine whether she understood the nature of an oath and the duty of telling the truth.

Answering the issue in the affirmative the court decided that she could give sworn testimony.

It was her evidence that at the time of hearing she was 13 years of age and she is in P.4 at Sipi Primary School; and resides with her sister in Sebei.

In 2009 she was staying with PW3 and the accused at Bukise in a one roomed house. She was sleeping on the floor and PW3 and the accused were sleeping on the bed. She confirmed that the accused had stayed with PW3 for 2 years, and identified him as the person in the dock.

She asserted that on the night in question, the accused left his bed and had sex with her. She felt a lot of pain and cried and that is when PW3 woke up and lit the lamp. The accused sat on his bed and laughed; even when threatened by PW3 with a panga.

The matter was reported by PW3 the next day and the accused was arrested. Elderly women checked her and confirmed that she had had sex.

On being referred to Police, by the LCs, the accused was detained while she was taken to Mbale for examination.

It was not the first time the accused had had sex with PW4, she had not disclosed it as he had threatened to kill her.

In cross-examination PW4 assured court that no other men apart from the accused had slept with her, several times and she had remained silent out of fear.

The accusation that she stayed in her grandfather's home or that the accused was framed was totally denied by PW4 or that any meeting had ever been called to chase PW3 away for sleeping with a young boy.

She insisted that she is 13 years of age and not 18 years and she has not began her menstrual period. Her biological father lives in Bufumbo, although he was informed of the defilement he did not take any action.

At the close of the prosecution case, the court ruled that the accused had a case to answer and he was called upon to give his defence. See the case of **Bhatt vs. R. [1957] E.A. 332.**

When Section 74 of the T.I.A was explained to the accused he opted to give an unsworn statement and to call one witness.

The accused told court that he is 20 years of age. He admitted staying with PW3 for 1 year but that he left her after his parents caned him. He does not have any children with PW3.

Totally denying the offence, he stated that he was not at PW3's home on the date in question, but at his grandmother's home where he spent the night.

On the morning of 16/11/09 he went to PW3's home to get a hoe and panga to use in the garden. PW3 chased him away and threatened to have him arrested.

The accused says he went away and returned with 2 friends Paul and John and got the garden implements. PW3 then asked him for money and upon giving her 500/= she threw it away and demanded that he removes his property and leaves her house.

That his grandmother also advised him to go and pick his property however, he instead went to the garden to work.

It was while he was working that the LC.1 Chairperson came and told him of the alleged defilement and they went together to PW3's home. They found PW3 caning the victim and the victim and the accused claims that that's why PW4 was forced to say that he had defiled her and it was because he had not slept at PW3's house.

That PW4 had lived in the house for about 1 month only while he slept at his grandmother's home. He totally denied ever having sex with PW4 at any one time.

DW2 Daniel Omasula is the LC.1 Chairperson of the village. He recalled people going to his home and telling him that accused had defiled PW4. Upon finding the accused, he requested 2 old women to examine the victim and find out if she had been defiled. The old women upon checking her confirmed it.

He wrote a letter referring the parties to police and that is all he did.

The accused requested for an opportunity to call 2 other witnesses and Witness Summons were issued for that purpose. But when the witnesses did not appear by 2.30pm, on the date they were expected the defence closed its case.

While dealing with the merits of the case, court has to bear in mind that the onus is always on the prosecution to prove all the ingredients of the offence beyond all reasonable doubt if they are to secure a conviction. And as expressed in a number of decided cases, the standard of proof is beyond reasonable doubt. The burden of proof never shifts to the defence, even where the accused raises a defence, except in a few exceptional instances provided for by law. The accused has no legal burden of proving his innocence. Refer to **Woolington vs. D.P.P [1953] A.C. 462.**

In case of aggravated Defilement as the one now before court, the prosecution must prove the following ingredients of the offence:

- (i) There was performance of a sexual act;**
- (ii) The Victim of the act was below 14 years of age;**
- (iii) The accused before court performed the sexual act.**

The issues for the court to determine are implicit in the ingredients of the offence. The evidence of both sides has to be evaluated in order to determine whether or not the prosecution has discharged its burden on each of the ingredients.

To prove that a sexual act was performed on a victim, the prosecution relied upon the evidence of PW3, the eye witness and mother of the victim, the evidence of the victim herself and that of PW1 the doctor who examined her. The evidence of those witnesses is to the effect that a sexual act was performed on the victim.

PW3 and PW4 testified that the victim lived with PW3 and the accused person her step father in the same house. She slept on the floor next to the bed of her parents. On the night in question, her step father the accused moved to her bed and had sex with her. When she cried due to pain,

PW3 woke up and realised accused that accused was not in their marital bed. She lit a lamp and saw the accused have sex with the PW4.

PW4 was examined by elderly women who confirmed that a sexual act had taken place.

PW1 the doctor on examination of PW4 found signs of penetration and a wide vaginal opening. They hymen was ruptured although he could not tell when. However, there were old vaginal tears as a result of forceful sexual intercourse.

PW4 told court it was not the first time which supports the findings of PW1.

DW2 the LC.1 chairman who requested the elderly women to examined PW4 also confirms that a sexual act took place.

In face of the above evidence, I find that there was a sexual act performed on the victim. The first ingredient was proved by the prosecution beyond all reasonable doubt. The evidence of the doctor which indicates that the victim had had sex more than twice is not disputed. All that was required to prove the offence is penetration, however slight. This was established in the case of **Uganda vs. Apollo Mwesigwa; Criminal case No. 99/92** among others.

The next issue to determine is whether the victim was below 14 years of age.

The Doctor's report exhibit P1 that was admitted under Section 66 T.I.A indicates that the victim was 12 years at the time she was examined and that was sometime in November, 2009. At the time of hearing in July, 2011, PW3 the mother of the victim told court that the victim was approaching 14 years. This was corroborated by the victim herself based upon what her mother had told her.

PW4 appeared in court and appears small for her age, but this was explained by the Doctor's report which indicates that she is malnourished and stunted.

Counsel for the accused in her address to court did not submit on this issue.

Without any evidence to the contrary, this court finds that the second ingredient of the offence was proved. The victim of the sexual act was below 14 years at the time of the offence.

Court now proceeds to determine whether it was the accused person who performed the sexual act on the victim.

To prove this issue the prosecution relied upon the evidence of PW3 and PW4 who were the eye witnesses to the act; and testified that they lived and slept in the same house with the accused. Further that it was the accused who had sexual intercourse with the victim.

The accused denied the offence and told court he was being framed by PW3 as he had found another wife and was planning to leave her. That PW4 had been beaten into saying that it was him who had had sex with her.

Accused raised an alibi saying that on the night in question, he was at his grandmother's home, and only went to PW3's home the next morning to pick garden implements.

Counsel for the accused also submitted that the accused was never identified at the scene of crime and that court should not accept the prosecution evidence as PW3 and PW4 contradicted themselves on the type of light that was lit that night.

Further that although the victim had a wide vaginal opening, the Doctor's report does not indicate who had sex with her. She prayed court to acquit the accused.

The position of the law on the defence of alibi is well settled. It is not the duty of the accused person to prove his alibi but for the prosecution to destroy it by putting the accused person squarely at the scene of the crime. The case of **Ssekitoleko vs. Uganda [1968] E.A. 531** supports this view.

The prosecution witnesses PW3 and PW4 both identified the accused person as the person who had sex with PW4 on the night in question. PW3 and the accused lived as husband and wife in the same house with PW4. The accused was therefore very well known to both prosecution witnesses for about 2 years. The possibility of mistaken identity was therefore ruled out.

It is on record that PW3 on getting up lit a lamp and saw the accused having sex with the victim. Although in her police statement the witness talked of lighting a torch, what is important is that there was some form of light.

PW3's statement was put in evidence by the defence as Exhibit D₁ to show contradictions, which according to counsel for the accused made the prosecution evidence unreliable. However, after going through the statement I am unable to agree. I find that the contradictions relied upon by counsel for the accused do not go to the root of the prosecution case. They do not point to deliberate untruthfulness.

It was also established that the morning after the sexual act PW3 immediately reported to her brothers and to the LC.1 chairperson DW2 naming the accused as the perpetrator. This is confirmed by DW2.

For all those reasons, I find that the accused was placed at the scene of the crime on the night in issue and was correctly identified by both PW3 and PW4. His claim that he spent the night at his grandmother's home is disproved and his alibi fails.

The accused's claim that he was framed because he was trying to break of the relations with PW3 cannot also be sustained for the same reasons. There is nothing to indicate that PW3 and PW4 connived to implicate the accused person. Exhibit D₁ tendered in court by the defence has nothing to that effect.

While I agree with counsel for the accused that the circumstances surrounding the case point to immorality, i.e. a mother of 8 children, 38 years of age, having a sexual relationship with an 18

years old. It cannot reduce on the blame worthiness of the accused person or reduce the offence to one of simple defilement.

All ingredients as proved by the prosecution point to aggravated defilement. And if the accused was aggrieved by the circumstances of his relationship, with PW3 then he should file a complaint against PW3 with the Police.

Considering his age at the time of hearing, he must have been 16 when he was married by PW3 since they had lived together for 2 years. To decide that the circumstances of his relationship reduce his blameworthiness would tantamount to saying that two wrongs make a right.

On the evidence as a whole I am satisfied and I agree with both Assessors that the prosecution discharged its burden and proved the guilt of the accused person beyond all reasonable doubt.

This court accordingly finds the accused person guilty of Aggravated Defilement c/s 129 (4) (a) of the Penal Code Act and he is convicted of the same.

Dated the 27th day of February 2012

Flavia Senoga Anglin
JUDGE