

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL SESSION CASE NO. 0075 OF 2019

(ARISING FROM NAKAWA COURT CR. CASE 0011 OF 2018)

UGANDA ----- PROSECUTOR

VERSUS

P.C. OGWANG JULIUS ----- ACCUSED

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

The Accused person No. 63819 PC Ogwang Julius was indicted for aggravated defilement contrary to Section 129 (3) (4) (a) of the Penal Code Act.

The Prosecution case based on the evidence of five witnesses was that on the 29.11.17, at the Ministry of Works, Transport and Licensing Board at Portbell Road, Nakawa Division in Kampala District, the Accused performed a sexual act with Nabakka Angel, a girl aged 16 years, whereas he was HIV positive.

The Accused vehemently denied the offence and pleaded not guilty to the charge.

The medical examination report of the victim, the medical examination report of the Accused person and the sketch plan of the scene of crime were all admitted in evidence as Prosecution exhibits under S.66 of the Trial on Indictment Act.

In dealing with the merits of the case, I bear in mind the established principles of law that the burden of proof is on the Prosecution to prove the guilt of the Accused person beyond all reasonable doubt.

The burden of proof does not shift except in a few exceptional cases provided for by law; and that the Accused has no burden to prove his innocence.

Where the Accused raises a Defence, it is still for the Prosecution to prove beyond all reasonable doubt that nonetheless, the offence was committed and it was committed by the Accused person.

5 In a case of aggravated defilement, like the current one, the Prosecution had to prove the following ingredients of the offence to the required standard: -

- 1) There was an unlawful sexual act committed
- 2) The victim of the offence was below 18 years of age
- 10 3) It is the Accused person who performed the unlawful sexual act
- 4) The offender is infected with HIV.

Unlawful Sexual act:

15 To prove this ingredient of the offence, the Prosecution relied upon the evidence in Exhibit P1 the medical examination report of the victim.

The Doctor found the victim to be 16 years of age.

20 There were multiple bruises around the entrance to the vagina and a whitish discharge. Although the hymen had old ragged tears no other new tears.

The evidence of PW1 Aidah Nakirizza, the former employer of the victim was that, she is a cook at a hotel in Lufula, which is near Jinja Road in Industrial area. That the victim Nabakka Agnes used to work for her as a food vendor.
25 One of the places where the victim used to take food was the Ministry of Works.

That on the date in question that is 29.11.17 at about 6 – 7pm, in the evening, the victim took food and tea to the Police Officers at Ministry of
30 Works.

However, she took long to return. When she eventually got back at about 8pm, she was crying. She told PW1 that she had been sexually assaulted by a Police Officer.
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The matter was reported to Jinja Road Police Station. The day, the witness and the victim went back to the Police Station, and the victim was taken for medical examination. She was given medicine to prevent HIV.

40 At another hospital, at Naguru where the victim was examined, she was found with injuries on her private parts.

The victim never returned to work and thereafter she went back to her home in Masaka and never came back to Kampala.

5 PW2, Bumali Nswadi used to be a Crime Preventer Coordinator in the Industrial area. He confirmed that Nabakka, the victim used to work for PW1.

That on 29.11.17 at about 8.30pm, he had gone to take tea and food at the Restaurant, when he saw the victim crying.

10 When he asked what had happened to her, PW1 told him that the victim had been sexually assaulted by a Police Officer Ogwang at the Ministry of Transport next to the Ministry of Internal Affairs.

15 Knowing that the assailant was armed, he decided not to confront him and instead took the victim to Jinja Road Police Station and reported the case.

The Police Officer who was at the Counter examined the victim and confirmed that she had been defiled. The case was recorded in the book and a reference number given.

20 The victim was also taken for medical examination at Naguru and given tablets to prevent HIV. The witness did not get to know the results of the medical examination.

25 PW3, No. 33491 DC PL Mwitoro Annette investigated the case after it was reported to Police.

30 She found out that the victim who was working for PW1 was sent to look for customers. When she went to the Ministry of Works, she was grabbed by the and kissed her by force. When she tried to resist, the assailant pulled her towards the toilet, held her mouth when she tried to make an alarm, over powered her and forcefully had sexual intercourse with her.

35 When he was done, he left her in the corridor. The colleague who came and found the victim crying instead insulted her and called her a prostitute (Malaya) who was pretending not to know what had happened.

40 PW4 DAIP Iyaa William Moses confirmed that the case of the victim's defilement was reported to Police and that he was with other Police Officers and the Guardian of the victim when they took her to Naguru China Hospital for checkup and she was given tablets to prevent HIV.

There is no doubt from all the evidence available that an unlawful sexual act was committed. This was confirmed by Exhibit P₁.

5 The term sexual act has been defined under S. 1329 (7) (a) of the Penal Code Act to mean (a) penetration of the vagina, mouth or anus however slight, by a sexual organ.

10 The medical report exhibit P₁ was never challenged by the Defence. And the established principle of case law is that ***"such evidence admitted under S.66 Trial on Indictment Act is deemed proved"***. – Refer to the case of **Abasi Kanyike vs. Uganda SCCA 34/89**.

15 Although the Prosecution failed to bring the victim to appear and testify, I agree with Counsel for the State that this does not take away the fact that she was sexually abused. - This finding is fortified by the holding in the case of **Basita Hassa vs. Uganda Cr. App. No. 35/1995** where it was held that ***"the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of defilement to prove sexual intercourse"***.

20 In this case, the people the victim informed immediately after the act appeared and testified and as already indicated, the medical evidence shows that she had bruises on her private parts. While the hymen had old tears, or had long been broken, the bruises she was found with supported the evidence that a sexual act had been performed on her.

25 The submissions of Counsel for the Accused in respect of this ingredient are accordingly rejected.

30 This court finds that the ingredient that there was a sexual act performed, was proved to the required standard.

35 The next ingredient of the offence to determine is **whether the victim was below 18 years at the time of the offence**.

Exhibit P₁ on which the victim was medically examined indicates that she was 16 years at the time of the alleged offence.

40 The evidence was admitted under S.66 of the Trial on Indictment Act and as pointed out by Counsel for the State, was never challenged by the Defence.

However, Counsel for the Accused argued that PW1 testified that the victim told her that she was 18 years of age, therefore that leaves two conflicting ages of the victim. And that without evidence for example, of a birth certificate or observing the victim in Court, the issue of the age of the victim was not satisfactorily proved beyond reasonable doubt.

Nonetheless, I am more persuaded by the submissions of Counsel for the State which are fortified by the holding in the case of **Abasi Kanyike vs. Uganda SCCA 34/89** cited in the case of **Uganda vs. Bahkamanya Patrick Cr. Case No. 025/2012 SN Case 319/2012**, where it was held that ***"such evidence admitted or agreed upon under S.66 Trail on Indictment Act is deemed proved"***.

That the victim was below 18 years of age was further confirmed by the undisputed evidence of PW3 who was the Investigating Officer in the matter.

She testified that she met the victim and interviewed her and the victim told her she was between 15-16 years of age.

The witness summoned the biological mother of the victim who told her that she had produced the victim in 2002 at Lwengo, but had lost the documents of the victim's birth.

Further that, the witness took the victim for medical examination and the Doctor confirmed that she was below 18 years of age.

This court therefore finds as a fact that victim was below 18 years at the time of the offence.

This ingredient was proved to the required standard.

The next ingredient for court to determine is **whether it is the Accused person who committed the unlawful sexual act.**

As already indicated in this judgment, the victim, the eye witness to the offence did not testify. But case law has established that, that is of no consequence.

In this case therefore, the Prosecution relied upon evidence of other witnesses who talked to the victim after the act was committed.

PW1 then employer of the victim told court that when the victim eventually returned to the Restaurant on the fateful night and she was crying, she informed her that she had been sexually assaulted by a Police Officer.

5 PW2, the Crime Preventer Coordinator in the Industrial area, confirmed that when he asked the victim what had happened to her, he was told that he had been sexually assaulted by a Police Officer one Ogwang, at the Ministry for Transport.

10 Knowing that, the assailant was armed, he decided not to confront him but instead reported to Jinja Road Police Station.

PW3, the Investigating Officer when she interviewed the victim, the victim told her that when she went to the Ministry for Works looking for customers for the eats she was selling, the Accused person grabbed her, kissed her by force, and when she tried to resist, he pulled her towards the toilet, held her mouth when she tried to make an alarm, over powered her and forcefully had sexual intercourse with her, despite that she was crying.

20 When he finished, the Accused dressed, picked his gun and left the victim in the corridor.

The colleague of the Accused who came in thereafter and found the victim crying, instead of assisting her, just abused her and called her a prostitute.

25 Other people also came and the victim told them what had happened.

The colleagues of the Accused advised him to plead to the victim for forgiveness. The Accused asked for forgiveness and offered to give the victim Shs. 100,000/- which she refused and she left and went back to PW1 crying.

30 The victim knew the Accused as a customer of PW1 but that he was not her boyfriend.

The matter was reported to Police but the Accused disappeared from his place of work.

35 Formal summons were issued but the Accused did not appear to answer the summons. He was arrested on 27.03.18 with assistance of Police Headquarters Staff Unit, where he was attached.

40 The Accused was handed over to the witness by the Staff Officer of Tourism Police Department and taken to Jinja Road Police Station.

When the witness talked to the Accused, he admitted having been with the victim but that she appeared to be 21 years of age. And that they were talking about love affairs and he was surprised when she began crying.

5 According to this witness, while the Accused did not directly admit having sexual intercourse with the victim, he implied it when he said he was surprised when the victim cried and made an alarm.

10 PW3 was last in touch with the victim after Accused was arrested and taken for medical examination. The victim was summoned and appeared and confirmed that Accused was the suspect.

15 PW4 DAIP Iyaa William Moses testified that the Accused was working under him in 2017, at the Ministry of Works. They were deployed at the Transport and Assessment Body, to guard the facility during the day and at night.

20 On the 30.11.17, at about 6.30am, the victim was brought to him by relatives and it was reported she had been defiled the previous night by the Accused person Ogwang.

The victim was taken to Naguru for medical examination.

25 The matter was handed over to Investigating Officer at Jinja Road Police Station.

On checking at the duty station of the Accused, the witness found that the Accused had left the duty station the previous night. He disappeared from duty after the act.

30 The Directorate of Counter Terrorism was required to look for the suspect. And the Commandant Tourism Police where Accused was directly deployed was asked to find the Accused.

The Accused was eventually arrested and charged.

35 In his Defence, the Accused acknowledged knowing the victim as someone who was selling tea around the Ministry of Works. That on the date in question at about 8.30pm, the victim appeared and asked if she could serve them tea but that they declined as they were already taking Chapatti and Soda.
40

The victim remained talking with him and his colleague until 9pm when she left. That no complaint of the offence was made that night. When the month

ended, he was deployed to another place in December, and to several other places in January up to March, 2018.

It was on 26.03.18, when his Commander called him to report. When he got there, he was arrested by two ladies and a man. That he went with them to his house and picked the gun and ammunition and handed them over to the Armory and then went to Jinja Road Police Station.

He was informed of the charges, he requested to see the victim but was not allowed to do so.

Eventually, he was taken to Prison but was later released on bail.

Counsel for the State submitted that with all that evidence, the Prosecution had proved to the required standard, that it was the Accused person who committed the offence.

Also that, the acts of the Accused person of abandoning his duty station are not acts of an innocent person.

Counsel for the Accused submitted on the other hand that, no other person witnessed the alleged sexual act and the victim never testified.

Further that, the victim did not specifically identify her abuser and yet there were many Police Officers guarding the facility.

Counsel emphasized the evidence of the Accused that he never absconded from duty but had just been re-deployed to another place and that is why he still had the gun.

That the conduct of the Accused looked at as a whole is not conduct of a guilty person and therefore that the participation of the Accused was not proved to the required standard.

In determining this issue, I bear in mind the principles established by decided cases that ***"there is no legal burden upon an Accused to prove his innocence"***.

However, it is apparent from the Defence of the Accused that he was at his place of work that evening and indeed claims to have sat and conversed with the victim although they declined to take her food.

Although victim did not testify, she identified her assailant to PW2- as P.C. Ogwang, although PW2 feared to confront him that night as the Accused was armed. I accordingly find that the Accused person was placed at the scene of crime and positively identified.

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There was corroboration in the victim's contention as according to PW3, the Accused was advised by his colleagues to try and settle the matter and indeed offered the victim money as a way of settlement, which the victim declined. He also asked for forgiveness.

10

This evidence was not disputed. Why would the Accused have tried to settle the matter if he was not the culprit?

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It was also the undisputed evidence of PW3 that after the matter was reported to Police, formal summons were issued but Accused did not appear to answer the summons until he was arrested on 27.03.18, with the assistance of Police Head Quarters Staff Unit.

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If Accused had been formally re-deployed as he claims, why would it have been necessary to issue formal summons?

The Investigating Officer would have been referred to the place where the Accused had been re-deployed.

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It was the further undisputed evidence of PW3 that the Accused admitted having been with the victim although according to him, she appeared to be of mature age. And that the Accused indirectly admitted to have had sexual intercourse with the victim and was surprised by her reaction.

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The disappearance of the Accused person was also confirmed by PW4, who stated that when the matter was handed over to the Investigating Officer at Jinja Road Police Station, and he checked at the duty station of the Accused, it was found that he had left the duty station the previous night that is, disappeared from duty after the act.

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The Directorate of Counter Terrorism was required to look for the Accused, and the Commandant Tourism Police where Accused was directly deployed was asked to find the Accused.

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Contrary to the submissions of Counsel for the Accused, I find that the conduct of the Accused was not that of an innocent person and that he was placed at the scene of the crime.

In their joint opinion, the Assessors advised court to acquit the Accused on the ground his participation in the commission of the offence had not been proved to the required standard.

5 But from all the reasons set out in this judgment, I disagree with the Assessors' opinion and find that the Prosecution proved that the offence was committed and it was committed by the Accused person.

10 The Accused is accordingly found guilty of aggravated defilement contrary to Section 129 (3) (4) (a) of the Penal Code Act and he is hereby convicted of the same

15 **FLAVIA SENOGA ANGLIN**
JUDGE
01.02.2021