THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 69/94

UGANDA ..... PROSECUTION

VERSUS

PATTON LWANGA ..... ACCUSED

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

J U D G M E N T

The accused person Patton Lwanga is indicted for defilement contrary to the provisions of section 123(1) of the Penal Code Act, in the alternative he is indicted for aiding and abbeting another person to commit defilement contrary to section 21(1)(a) of the Penal Code Act. He was originally indicted together with one man called James Kaganda alias Ali Mike but later the indictment was amended and the other co-accused was dropped out of the indictment. This judgment is therefore in respect of him (Patton Lwanga) alone. The accused pleaded not guilty to the indictment and alternative count.

The case for prosecution has been basically that on the night of 25th December, 1991 at Nile Garden in the Municipality of Jinja the accused defiled one Sarah Mwase who was at that time aged 17 years. In the alternative the prosecution alleges that on that same day the accused aided James Kaganda alias Ali Mike to defile the same Mwase.

In answer to the indictment the accused maintains that he did not defile anybody on that night and he put up the defence of alibi to the effect that on the night in question he was nowhere near Jinja but he was at Kabalagala with his mother and his (DW1's) other members of the family.

It is trite law that the burden is upon the prosecution to prove the guilt of an accused person beyond reasonable doubt, the accused does not bear any burden of proving his innocence: Woolington v. DPP (1935)AC 462. It is also the principle of our law that an accused person should not be convicted on weakness of his defence but on the strength of prosecution case: R. v. Israil Epuku s/o Achietu (1934)1 EACA 166 at page 168. In a case of

In a case of defilement like the one now under consideration, prosecution is required to prove beyond reasonable doubt, inter alia, that there was unlawful sexual intercourse that the girl with whom such intercourse was had was under the age of 18 years and that the accused directly or indirectly took part in that defilement.

It is not in dispute that Sarah Mwase was 17 years old by the time the alleged offence was committed. This is borne out by her own evidence, the evidence of her father (PW4) and that of the doctor (PW2) who testified that the girl was actually 17 years in 1991. I accept the evidence of these witnesses to be truthful as far as it refers to the age of Sarah Mwase. I therefore hold that prosecution has proved beyond reasonable doubt that the victim in this case was under the age of 18 years at the time the alleged offence of defilement was committed.

The next issue to be handled is that of whether or not the offence of defilement was ever committed. The evidence of Sarah Mwase was to the effect that she was defiled by the accused and another boy who had sexual intercourse with her one after the other. This evidence however was shaken by contradictions which came up in her own evidence and that of the doctor. According to her the defilement took place on the night of 25th December, 1991 and that she reported the incident to the doctor on the morning of 26th December 1991 and she was there and then examined but later on she changed her mind and said that she did not know as to when she was acutally examined. The doctor in his report and evidence was specific that he examined this lady on the 30th December 1991 and according to him the defilement was on the 28th December 1991; although this contradiction does not rule out the possibility of the complainant having been defiled between 26th and 28th December 1991 it does to a certain degree create a doubt as to why there are these differences between the 2 witnesses who testified for the same side and on the same issue. Be that as it may, I do believe Sarah Mwase when she says that on the night of 25th December 1991 she actually had sexual intercourse with a man and since I have already said that by that time she was under the age of 18 years it follows as the night follows the day, that the offence of defilement was committed.

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That leads me to the vital point in this case which is whether or not the present accused person Patton Lwanga took part in the defilement of Sarah Mwase or aided anybody to defile her.

Related to this matter are 3 other issues which require consideration; those matters concern the question of identification, the defence of alibi and the issue of corroboration.

Dealing with the first of these issues first, it is the law that the court should approach with caution the evidence of one identifying witness especially where the identification is carried out at night when conditions for correct identification are very difficult: Abdala Bin Wendo V. R. (1953)20 EACA 166 and Uganda v. Frimigio Kakooza (1984)HCB 3. It was emphatically stated in the case of: Richard Kaweke Musoke v. Uganda (1983)HCB 1 at page 2 that evidence of one idenitifying witness should be water tight to avoid mistaken identity. In the case of: Abudala Nabulere v. Uganda (1979)HCB 77 some guide lines were given as to how the court should approach this issue of identification. It was pointed out that matters like the source of light, the time taken when the witness was observing the accused person, whether or not the accused was a stranger to the witness, the distance between the witness and the person he claims to have identified should be considered. In the present case there is only the evidence of Sarah Mwase (PW3) as evidence of identifying witness and these things happened at night. According to her own evidence she was dragged out of the dancing hall by some people who carried her out and who put her in a car, they were strangers and there was no light in the vehicle and the place where she was defiled was also not lit. In my opinion these were not conditions which were condusive to proper identification. Sarah Mwase's evidence confirmed this view because in court when testifying she got mixed up as to when she actually came to know the true identity of these people, whom she claims defiled her. At first she said that she did not know their identity at all until she met them at the police station but later on she changed her mind to the contrary. I agree with the view expressed by Mrs. Nsubuga, one of the 2 assessors who assisted me in this case, when she said that the identity of the persons whom Sarah Mwase claims to have known came to her mind after she had talked to her brothers about the issue then her brothers starting suspecting the accused as being one of the possible attackers that susp ion however strong can not be a ground for conviction: R. v. Israil Epuku s/o Achietu (1934)1 EACA 166 at page 167.

In my considered opinion this is a case where identification parade ought to have been conducted in accordance with rules laid down in the case of: Mwene s/o Mana v. R. (1936)3 EACA 29 to find out if Sarah Mwase was in fact sure of the person she believes defiled her.

Regarding the defence of alibi the authorities are clear as to what is expected of the accused. The law is that when an accused person puts up an alibi as his defence he does not assume the responsibilty of proving it: Uganda v. Kakooza (1984)HCB 1 and R. v. Anthony Hugh Johnson (1952)46 CR. APP. R. 25. It is the responsibility of prosecution to put up evidence that destroys that defence. In the instant case the accused testified on oath that on that particular night he was with the members of his family some 50 miles away from Jinja at Kabalagala in Kampala. He called his mother (DW2) who testified that on that night [illegible] with the accused at their home through out the night, there was however a difference in their names of the villages where they stay and prosecution was serious on that point. According to the mother the village is called Kasanga not Kabalagala. She however explained that their home is at the border of Kasanga village and Kabalagala village and some people refer to Kabalagala to mean Kansanga and vise versa. I am satisfied with her explanation in that the accused could have used Kabalagala to describe the same village as his mother. A part from that contradiction the evidence of the accused and that of his mother was quite consistent and impressive. I accept their evidence as truthful. I have come to this view also due to the shaky evidence of Sarah Mwase regarding the events of that night.

That being the position I find that prosecution has not satisfactorily discharged its burden of destroying the defence of alibi, in other words the evidence as given by prosecution does not put the accused at the scene of crime at the time the crime was being committed. The defence of alibi succeeds.

Another point which requires consideration is the issue of corroboration. As a matter of practice in sexual offences the court looks for corroboration although without such corroboration a conviction may be obtained after the court has cautioned itself of the dangers of basing such a conviction on uncorroborated

evidence of the complainant: R. v. Kostanti Kirimunyo (1943)10 EACA 64. In the present case there has been no sufficient corroboration in support of the complainant's story as to what happened on that night. The doctor's evidence cannot be regarded as evidence of corroboration as the dates given by the doctor are not the same as those given by the complainant when the defilement took place. The mere fact that the complainant complained to her parents is not corroboration but evidence of consistency: R. v. Opet s/o Erui (1936)3 EACA 122.

In all these circumstances and in full agreement with the unanimous opinion of the gentleman assessor and lady assessor I find that prosecution has not proved its case to the standard required to secure a satisfactory conviction as there is a doubt as to the guilt of the accused person. The benefit of that doubt must be resolved in favour of the accused person.

That being the position I find the accused not guilty of the offence of defilement and the alternative count for the offence of Aiding and abbeting defilement. I accordingly do acquit the accused person for both offences. The accused is to be released from prison forthwith unless he is being held there for some other lawful purposes.

C.M. KATO
JUDGE
2/12/1994