THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 70/94

UGANDA :: PROSECUTION

VERSUS

MUSERE SAMUEL :: ACCUSED

BEFORE: THE HONOURABLE JUSTICE C. M. KATO

J U D G E M E N T

The accused person Musere Samuel is indicted for defilement contrary to the provisions of section 123(1) of the Penal Code Act. The Indictment alleges that on the 5th June or September (both months appear in the Indictment) 1993 at the village of Kawaga, Gombolola Balawoli in the district of Kamuli the accused had sexual intercourse unlawfully with one Harriet Kikobye a girl under the age of 18 years. The accused pleaded not guilty to the Indictment.

The prosecution case has been based on the evidence of 4 prosecution witnesses namely:- Harriet Kikobye (PW1), Stephen Prost (PW2), Anasitanzia Tibekalirisa (PW3) and Shaban Wandera Kawongolo (DW4). The substance of the evidence as given by these 4 witnesses is that on 5/9/1993 the complainant was sleeping with 2 of her brothers in one room together with the accused, during the night the accused had sexual intercourse with her. The matter was reported to her parents who took her for medical examination and Dr. Wolfram Deisslir whose report was tendered in court by PW2 under section 30(b) of the Evidence Act examined her. In his report the doctor found the complainant's hymen ruptured and she was 10 weeks pregnant he also found that the girl was aged 15 years.

On the other hand the case for defence has been a complete denial of the commission of the offence. The accused said although he was at the home of the complainant's father and shared a room with the complainant he (accused) did not have any sexual intercourse with her. The matter was being planted upon him simply because the complainant's father for whom the accused worked did not want to pay him his money amounting to 30,000/=

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The law is clear as to the burden and standard of proof in criminal cases. The burden of proof in all criminal cases with the exception of a few statutory cases lies on the prosecution and that burden does not shift to the accused: Woolington Vs. DPP (1935)AC 462 and Okali Okethi Vs. Republic (1965)EA 555 at page 559. In a defilement case like the present one the duty is upon prosecution to prove that there was penetration and that the girl was under the age of 18 years (see section 123(1) of the Penal Code Act).

It is not in dispute that the complainant Harriet Kikobye was born in February 1978 which means in 1993 when the alleged defilement took place she was 15 years old. The requirement of age has therefore been proved beyond reasonable doubt. As regards to the penetration the evidence of the doctor coupled with the evidence of the complainant, shows that the complainant ahd actually had sexual intercourse sometime back. The only issue for determination therefore is whether or not the present accused had any sexual intercourse with the complainant as it is being alleged.

It is better that I deal with the contradictions which have appeared in the prosecution case before I can finally determine the issue of the accused's connection or non connection with the present case. The 1st contradiction appears in the evidence as regards to the date on which this alleged offence was committed. The typed indictment had as its original date 5th September 1993 being the date on which this offence was committed but for unknown reasons the month September was crossed out and replaced with June in ink. In court Kikobye (PWI) gave an impression that the offence was committed later than 5th September 1993 although her father says that the date on which the offence was committed is 4th September 1993. In her evidence Kikobye said that the accused visited their home on the 5th September 1993 and on that date he had sexual intercourse with her but she did not complain for fear of her father. The accused returned to complainant's home after about a week he again had another round of sexual intercourse with her and this was the time when she reported the matter to her parents. Mathematically it would seem this was about 12th September 1993, the medical report is unhelpful in solving this

problem of the dates because the medical report speaks of the complainant having been examined on the 8th September 1993 and by that time the complainant was already pregnant 10 weeks. The evidence of pregnancy cannot be related to the present crime. If the story that the 1st time the complainant met the accused was on the 5th September 1993 is true it would mean the complainant had already had sexual intercourse with either the accused or some other men 10 weeks previously. The earliest the complainant would have met the accused was in August when the prosecution witnesses seem to agree the accused first visited their home. The other contradiction which came to light is as to why the accused was at the home of the complainant's father. According to PWI he was there making bricks for the complainant's father but both the complainant's mother and father said that the accused was doing nothing at their home because by the time he came the complainant's father had completed the house. One other serious contradiction is with regard to the reporting of the incident. According to PWI she reported the matter to her mother the following morning but her mother and father insist that the complainant reported the matter to them the very night and it as on that night that even the RC were contacted and tried to settle the matter. Another contradiction is in respect of blood, the complainant says on that occasion no blood came out of her private parts but the mother says when she examined her she saw some blood in her private parts.

Although I agree with the view expressed by one of the assessors that villagers do not keep records of what happens around them surely if a matter happens during the day you can not say that it happened at night.

These contradictions in my view are serious ones and do go to the root of the case, they may also be as a result of the accused's story that there has been a conspiracy by the family of the complainant to deny him of his 30,000/= which the complainant's father owes to the accused for the work he did.

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Another point for consoderation is the manner in which this offence is alleged to have been committed, on that particular night the complainant and the accused agree that they were sleeping in one room which was shared by 2 other boys. It is unbelieveable that the accused would have endeavoured to have sexual intercourse with this girl in that room when other people were around. Even if he tried to do it there was no reason why this girl did not alert the other boys with whom she was sharing the mat and with whom she was using one gomas to cover themselves.

As I have just stated earlier the contradictions appearing above are of serious nature and in view of the fact that the complainant never complained to her other brothers on that night about what she alleges took place I find that prosecution has not discharged its burden of proving beyond reasonable doubt the guilt of the accused person. It is trite law that an accused person should not be convicted on the weakness of his defence but on the strength of the case as proved by prosecution: Uganda vs. Oloya (1977)HCB 4 and R. V. Israili Epuku s/o Achietu (1934)1 EACA 166 at page 167.

In these circumstances I find the accused not guilty and I do acquit him. I have not accepted the advice given to me by both assessors to find the accused guilty because both of them did not seem to have seriously considered the issue of contradictions in the prosecution case.

The accused person is to be released from prison forthwith unless he is being kept there for some other lawful purposes.

C. M. KATO
JUDGE
17/11/1994