**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURTOF UGANDA AT MBALE**

**HCCSC NO. 81 OF 2000**

**UGANDA…….PROSECUTOR**

**VERSUS**

**WAMBUZU MICHEAL……ACCUSED**

**BEFORE: THE HON. MR. JUSTICE RUADYA ATWOOKI**

**JUDGEMENT**

The accused in theis case Wambuzu Micheal was indicted for defilement contrary to section 123(1) of the Penal Code Act. The particulars of the indictment were that the accused, during or about the month of June 1999, at Busulani in Mbale District, he had unlawful sexual intercourse with Hadija Nabuduwa, a girl below the age of 18 years.

Upon arraignment the accused pleaded not guilty to the offence. Lord Goddard in R. V. Sims [1946] 1K.B. 135 held that whenever there is a plea of not guilty, every ingredient of the offence is put in issue. The prosecution must therefore prove all the ingredients, which constitute essential elements of the offence charged, plus the identity of the accused and any necessary knowledge and intent.

It is cardinal principle of the criminal law that the burden proving the charge beyond reasonable doubt is on the prosecution. The prosecution must prove each and every ingredient, which constitutes an element of the offence. **Ojepan Ignatius vs. Uganda** (SC) Cr. App. No. 25 of 1995 (unreported)

The accused ought not to be convicted on the weakness of his defence but rather, on the strength of the prosecution case. **Uganda vs. Oloya** [1977] HCB 4.

It is the law that in order to secure a conviction on a charge of defilement, three ingredients must be proved beyond reasonable doubt. First that an act of sexual intercourse, which means

penetration of the female was below sex organ by the male sex organ, occurred. Second that the female was below the age of 18 years, and lastly that the person charged with the off d the sexual intercourse. **Kibale Ishma vs. Uganda** Cr. App. No. 21 of 1998, (SC), (unreported). See also **Basiita Hussein V. Uganda** Cr. App. No. 35 of 1995, (SC), (unreported)

Briefly the prosecution case was that the accused had a consentual sexual relationship with Hadija Nabuduwa. They were found in the house of one Zaidi, the brother of the accused on the morning of 5/10/1999. The police officer PW1 PC Mwanyi effected the arrest. H in the house, and when ordered to open they refused. He forced open the door, and he arrested the accused. Inside that house was Hadija Nabuduwa. The accused recorded a confession under charge and caution.

The accused gave sworn testimony in which he denied the offence. He testified that he was forced to sign the so called confession statement, which he found already written, having been previously tortured while he was at the police post, before being to Mbale police station.

After the trial within a trial, I admitted the statement of the accused recorded under charge and caution. I promise to give my reasons and I hereby do.

The defence contention was first that the accused was tortured into signing the statement, that the procedure in recording the statement was defective.

From the evidence, it was clear that there was no torture of the accused while he was at Mbake police station. That was his evidence. The police also stated so the torture was some five or so days earlier while he was still at Busulai police post. About the promise of release from the Eteso speaking policewoman, again that was an obvious lie. The accused told court that he did not speak or understand that language. That was the only language that policewoman spoke, according to the accused. There was no way therefore she could have communicated the promise to him of release if he signed the confession statement. That defence had to be rejected.

That left only the issue of the procedure in recording the statement. The procedure in recording of a confession statement by the police was considered and set out in the case of **Festo Asenua and Another V. Uganda,** SC. Cr. App. No. 1 of 1998. That case directed the Police to follow

the instructions set down by the Chief Justice on recording of extra judicial statements in circular dated 2/3/1973, until the relevant police authority hands the appropriate rules.

The instructions demand that a statement of an accused person be recorded in the language which he understands, and an English translation thereof be made by the interpreter. The accused sign the vernacular copy. In a case like the one before me, there was no interpreter. There was prepared only one copy, the English version. The Police Officer and the accused spoke and understood the Lugisu language. That was the language used to communicate throughout. At the end of the session, the contents were read back to the accused in Lugisu and he confirmed it to be true and correct. He then signed the statement. This was the English version, and indeed the only version.

I realized that the procedure was not entirely in compliance with the rules set out by the Chief Justice, but not every departure from the strict compliance with those rules will make the confession statement inadmissible. The recording of the confession statements ought to follow those instructions, but each case will be judged according to the circumstances under which the statement was recorded.

I was satisfied that there was no prejudice to the accused by the omission by the police to record the confession statement in his vernacular language, once I was satisfied that the Police Officer fully and properly interpreted what was in the English version to him, and there was no disputed or complaint about that aspect. I according admitted the confession statement in evidence.

With regard to the age of the victims, there was only the evidence of PW3 Haji Zurbairi Tuti. He was the uncle and Guardian of the victim Hadija Nabuduwa. He testified that he knew the age of the girl to be 18 years, meaning that in 1999 when the offence was allegedly committed, she was 15 years old. He was asked how he came to know that age since he was not the girl's natural father, and his response was that he had her birth certificate. He produced a photocopy in court which was not tendered in evidence by the prosecution although defence Counsel had extensively cross-examined on it. There was no other evidence adduced in court to prove the age of the victim.

There was no explanation given why the victim in this case Hadija Nabuduwa was not called as a witness. Her Uncle PW3 told court that she was at home still continuing with her education. This

was where he was also staying. This failure by the prosecution to call a material witness, without any reasonable explanation for such a failure, especially one who could, with relative ease and little expense, have been produced, creates a doubt in the prosecution case. A birth certificate, which was solid to be available, was not produced. There was a photocopy of the same upon which Counsel for the defence extensively cross-examined PW3, but court was not given a chance to look at it, as it was not exhibited, even for purposes of identification.

That ingredient of the offence was not proved beyond reasonable doubt. The next ground was with regard to the act of sexual intercourse. The evidence in this regard was from the confession statement. The statement read that the accused was being charged with having unlawful sexual intercourse with Hadija Nabuduwa on the 5th October 1999. After the caution, the accused is recorded to have said the following. "it is true I committed the offence on 5th October 1999. I talked to the victim who accepted and I took her to my friend's place called Zaidi where I was got in the room before the action is when I was arrested and before that I had had sexual intercourse with the victim in May 1999 and it was once.

The indictment which was read to the accused, and to which he entered plea read that the accused had unlawful carnal knowledge with the victim "during or about June, 1999."

It is rather difficult to understand why there appears to have been so much confusion as to the date or period of the alleged offence. The charge against which the accused made the statement was for 5th October. The indictment in respect of which this trial is all about reads "during or about June", whatever that means. In the so-called confession statement, the accused talked of May. Now can it be said that the accused confessed to the crime with which he was indicted? That evidence left a lot to be desired. The discrepancies in these dates remained unexplained.

In the case of **Tuwamoi vs Uganda** [1967] EA 84 the Court of Appeal for Eastern Africa had this to say.

"if the confession is only evidence against an accused, then the court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with that degree of certainty required in a criminal case….The present rule then as applied in Eas Africa in regard to a retracted confession, it that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the

absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true."

There was the evidence of the arresting Police officer who found the victim in the house where the accused was arrested. It was submitted that that was circumstantial evidence which corroborated the confession statement. With respect, I do not agree. First, that evidence showed that there was opportunity to engage in the act of sexual intercourse. It did not show that sexual intercourse had taken place or that the accused played any part in it. If there had been for example, an examination of the victim soon there after and a positive result obtained showing recent sexual intercourse, then that evidence would have had that effect as claimed by the prosecution.

Secondly, that evidence could be circumstantial evidence, and indeed evidence of corroboration, if the evidence of confession contained in the statement was credible and acceptable. From what I have said about that confession evidence, it would be risky to rely on it as proving the ingredient of the act of sexual intercourse.

Lastly there had to be proved that the accused participated in the act of sexual intercourse. I have already found that there was doubt about the act of sexual intercourse having taken in view of the evidence that was adduced before court, or rather absence of it. It therefore becomes only academic to ascertain whether the accused participated in the same.

I will only say that the prosecution sought to put a lot of reliance on the lies, which the accused told, in court. It is true that the lies, which the accused tells in court, can corroborate prosecution evidence. See **Kutegana Stephen V. Uganda** Cr. App. No. 60 of 1999 (unreported). However there must, in the first place be in existence on the record, evidence which is credible, and to which the lies act as corroboration. Evidence of corroboration means independent evidence which affects the accused by connecting him or tending to connect him with the crime. Confirming in some material particulars not only the evidence that the crime has been committed, but also that the accused committed it. See Kibale Ishma vs. Uganda Cr. App. No. 21 of 1998, (SC), (unreported).

If I may, with respect, paraphrase their Lordships in **Hassan Kasule V. Uganda** SC Cr. App. No. 10 of 1987 (unreported), were the conviction of the appellant was solely upon his

confession. Given the unsatisfactory features regarding the evidence of confession in this case, and in the absence of other corroborative evidence, it would be unsafe to base a conviction upon such evidence.

The two ladies assessors both advised me to acquit the accused, as the ingredients of the offence of defilement were not proved beyond reasonable doubt. I have no reasons to differ from that opinion.

I accordingly find the accused person not guilty of the offence of defilement contrary to section 123(1) of the Penal Code Act, and I acquit him of those charges. He is to be set free and at liberty forthwith unless he is held on other lawful charges.

**RUGADYA ATWOKI**

**JUDGE**

**15/11/2002**