

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO. 08 OF 2002

UGANDA.....PROSECUTOR

VERSUS

ABBAS Kimuli.....ACCUSED

BEFORE The Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

The accused was indicted for defilement contrary to section 123(1) of the Penal Code Act. the particulars of the indictment read as follows.

“ABBAS KIMULI, on the 27th day of March, 2001 at Bwerenga – Bugiri village in the Wakiso District unlawfully had sexual intercourse with Nakimuli Susan a girl under the age of 18 years.”

The accused denied the indictment. As a result Court tried him. The prosecution led the evidence of four witnesses in a bid to prove its case against the accused. Those witnesses were Sarah Nabachwa (PW1), Susan Nakimuli (PW2), No.19937 Detective Nicolas Amayo (PW3) and Anatoli Kizito (PW4).

In his defence the accused called one witness; and that was himself (DW1).

In very brief terms the prosecution case was as follows. On 27th March 2001 in the afternoon the accused lured Susan Nakimuli into going with him to Sewanyana’s house. On arrival, the two entered the house and engaged in sexual intercourse. Later on, Susan related to her mother what transpired between her and the accused that afternoon. The accused was arrested and charged with defilement.

The accused person’s defence was a denial of the offence. He explained that he was framed as a result of a grudge Sarah Nabachwa (Susan’s mother) had against him.

In order for the prosecution to succeed in a case of defilement it has to prove, beyond reasonable doubt, the following ingredients of that offence.

- (a) That the victim was a girl under the age of 18 years on the day in question;
- (b) That the victim had sexual intercourse with a male person on the day in question;
- (c) That the accused is the person who committed that offence; **(See section 132(1) of the Penal Code Act; Woolmington v DPP (1935) AC 462 and Bigirwa Edward v Uganda Criminal Appeal No. 27 of 1992.)**

Court will discuss the above ingredients of the offence in the light of the evidence on record and the law.

With regard to the first ingredient, that is to say, that the victim was a girl under the age of 18 years on the day in question, Court has this to say. The law is that the best evidence of age is a birth certificate. However, in its absence the evidence of a person, such as a close relative, who is well acquainted with the age of the victim is admissible. **(See Uganda v Enock Babumpabura Criminal Session Case No. 135 of 1992.)** Observation and application of common sense is also an acceptable method of telling some one's age. **(See R v Recorder of Grimsby. Ex Parte Purser (1951) 2 All E.R. 889.)**

In the instant case the prosecution did not rely on a birth certificate to prove Susan's age. Instead, it relied on the testimony of her mother (Sarah Nabachwa) in that respect. Nabachwa's testimony was to the effect that Susan was born in October 1985. That means that at the time of the offence Susan was 16 years old.

The accused did not challenge or contradict the above evidence. In the circumstances, Court is satisfied that the prosecution succeeded in proving, beyond reasonable doubt, that Susan Nakimuli was a girl under the age of 18 years on 27th March 2001.

With regard to the second ingredient, that is to say, that Susan had sexual intercourse with a male person on the day in question, Court must first of all define what, in law, amounts to sexual intercourse. According to **Archibold on Criminal pleading 30th Edition page 1124 at paragraph 2873,** sexual intercourse is complete where a male person's sexual organ penetrates a female person's complete where a male slightest penetration is enough. Our Courts have time

and again applied that principle with approval. **(See Habyarimana Ronald v Uganda (CA) Criminal Appeal No. 1 of 1998; and Didas v Uganda (CA) Criminal Appeal No. 35 of 1997.)**

In the instant case, the prosecution relied mainly on Susan's testimony in a bid to prove this ingredient of the offence. Susan testified that in the afternoon of the day in question some male person lured her into going to Sewanyan's home. On arrival, the couple entered the house and locked the door. They undressed. The male person, then, inserted his sexual organ into Susan's sexual organ and the two had sexual intercourse. That evidence aside, Susan's mother (Nabachwa) testified, too, that in the afternoon of the day in question she saw her daughter Susan and the accused emerging from Sewanyana's house.

Susan and her mother's evidence above was not shaken or contradicted in cross-examination. Court, therefore, thinks the said evidence represents the truth. In fact, Susan's evidence, by itself, is sufficient to prove that a male person's sexual organ penetrated her sexual organ thereby completing the act of sexual intercourse. **(See Uganda v Peter Matovu High Court Criminal Session Case No. 146 of 2001.)**

However, Nabachwa's testimony to the effect that she saw Susan and the accused emerging from Sewanyan's house in the afternoon of the day in question is simply added confirmation of the reliability of Susan's evidence.

All in all, Court satisfied that the prosecution succeeded in proving beyond reasonable doubt, that Susan Nakimuli had sexual intercourse with a male person on the day in question.

With regard to the third ingredient, that is to say, that the accused is the person who committed the offence in question, again the prosecution mainly relied on Susan's testimony was to the effect that it was the accused person who lured her into going to Sewanyana's home the two engaged in sexual intercourse on the day in question. Susan's mother (Nabachwa) testified, too, that she saw Susan and the accused emerging from Sewanyana's house in the afternoon of the day in question.

The accused denied the offence and alleged that he was framed because of a grudge Nabachwa had against him. He explained that for some time Nabachwa was quite unhappy with him

because he had befriended one of her daughters (i.e. Susan's sister); and that friendship had disrupted the girl's studies.

Susan's evidence implicating the accused with the offence in question was not shaken in cross-examination. Likewise, her mother's evidence above that tends to confirm the reliability of Susan evidence was also not shaken. Therefore, Court is satisfied that both pieces of evidence represent the truth. That aside, Susan could not have been mistaken about the identity of the person who had sexual intercourse with her on the day in question. She knew the accused before as a friend of her sister and brothers. The offence took place in broad day light; and there was abundant opportunity for Susan to identify the accused, for the accused picked up Susan on the day in question and the two went together to Sewanyana's house where they engage in sexual intercourse for twenty minutes.

Bearing all the above in mind, Court is of the opinion that the prosecution succeeded in proving, beyond reasonable doubt, that the accused was the person who committed the offence in question. The accused person's defence is simply a pack of lies, which Court hereby rejects. In full agreement with the lady assessor, therefore, Court has no choice, but to find the accused guilty of the offence of defilement and it hereby convicts him accordingly. It is so ordered.

E.S. Lugayizi , J

13/11/2002

Read before At 3:35 p.m.

Accused.

Mr. Ndamurani for the State.

Mr. Ntende for accused

The lady assessor

Mr. Sewanyana c/clerk.

E.S Lugayizi, J

13/11/2002