

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO. 143 OF 2001

UGANDA.....PROSECUTOR

VERSUS

ASIIMWE JULIUS.....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,

“ASIIMWE JULIUS, between 4th and 7th August, 2001 at Katabi Busambaga village Wakiso district, had unlawful sexual intercourse with Acheng Florence a girl under the age of 18 years.”

The accused denied the indictment. He was, therefore, tried. During his trial the prosecution led the evidence of the following witnesses, Grace Angera (PW1); Francis Nsambu (PW2); No. 30321 David Dawachi Kaahwa (PW3); Florence Acheng (PW4); Det./Sup. Of Police Joseph Obwona (PW5) and Dr. Kalyesubula (PW6).

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

In brief terms the prosecution case was as follows. In the early part of August 2001 Florence Acheng, a girl under the age of 18 years, disappeared from her home. Various people made efforts to look for her.

Those efforts did not yield any results until 7th August 2001 when some people found her at the home of the accused at Katabi Entebbe. She pointed out that the accused had had sexual intercourse with her during her disappearance. The accused was arrested and charged with the offence of defilement, which is, now, the subject of this judgment.

In his defence, made on oath, the accused denied having committed any offence. He pointed out that Grace Angera framed her because, earlier on he had refused to pay her a sum of shs. 1,500,000/- she demanded as a bride price for Florence. The accused further explained that after the said event he gave up the idea of marrying Florence and that he knew nothing about the alleged offence.

In order for the prosecution to succeed in a case of defileee, beyond reasonable doubt three basic ingredients of that offence. **(See section 123(1) of the Penal Code Act; Woolmington v DPP (1935) A.C 462 and Miller v Minister of Pension (1947) 2 All E.R. (372)** Those ingredients are as follows,

- (a) That the victim was a girl under the age of 18 years at the material time;
- (b) That the victim had sexual intercourse with a male person at the material time; and
- (c) That the accused is the person who committed that offence.

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

With regard to the first ingredient, that is to say, that Florence was a girl under the age of 18 years at the material time, the law is that the best evidence to prove some one's age is a birth certificate. However, in the absence of a birth certificate 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 Bampabura High Court 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 Florence's age. Instead, it relied on the testimony of Grace who was Florence's close relative. Grace testified that Florence was born in 1987. That means that at the time of the alleged offence of age.

In his defence the accused person pointed out that he knew Florence's family well. They were his neighbours and Florence revealed to him that she was born in 1983.

Grace's evidence above was not shaken in cross-examination. Therefore Court is satisfied that it represents the truth. Obviously, the accused person's testimony in respect of Florence's age was

simply hearsay incapable of raising a reasonable doubt as to Florence's true age. In the circumstances, Court thinks that the prosecution succeeded in proving, beyond reasonable doubt, that Florence Acheng was a girl under the age of 18 years at the material time (i.e. between 4th and 7th August 2001)

With regard to the second ingredient, that is to say, that Florence had sexual intercourse with a male person at the material time, Court will 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 sexual organ. The 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.)** The prosecution relied on the evidence of Florence, Dr. Kalyesubula and Obwona to prove this aspect of its case. Florence testified that in the early part of August 2001 a male person lured her into his home. That person promised to marry her. She spent with him 5 days and 5 nights. During the night the two slept together. The man removed her knickers and inserted his sexual organ into her sexual organ and they had sexual intercourse. Dr. Kalyesubula examined Florence on 8th August 2001 at Entebbe hospital. Among other things, he found injuries in her private parts and her hymen had been ruptured not more than a week before. In the doctor's opinion those injuries were consistent with sexual intercourse. On his part, Obwona testified that on 10th August 2001 he recorded a charge and caution statement from the accused (i.e. "Exhibit P1") in which the accused admitted having committed the offence in question.

The accused denied the above evidence.

Florence's Dr. Kalyesubula's and Obwona's evidence was not shaken during cross-examination. Therefore, Court is satisfied that it represents the truth. In fact, Florence's evidence, by itself, is sufficient to prove this aspect of the prosecution case; and it not necessary for Court to warn itself in respect of that evidence before acting on it. **(See Uganda v Peter Matovu High Court Criminal Session Case No. 146 of 2001.)** that aside, Dr. Kalyesubula's evidence confirms the reliability of Florence's testimony. The confession Obwona recorded from the accused, though retracted, also points in a similar direction. It is added confirmation of the reliability of Florence's testimony. All in all, Court is satisfied that the prosecution succeeded in proving,

beyond reasonable doubt, that Florence Acheng had sexual intercourse with a male person between 4th and 7th August 2001.

With regard to the third ingredient, that is to say, that the accused is the person who committed the offence in question, the prosecution mainly relied on Florence's Nsambu's , Grace's and Obwona's evidence to prove this aspect of its case. Florence testified that the person who had sexual intercourse with her during the time of her disappearance was the accused. Nsambu's evidence was that when Florence disappeared from her home in the early part of August 2001 he saw her standing in the doorway of the house of the accused. The accused was also around. Nsambu reported what he saw to Florence's family. Grace testified that soon after receiving Nsambu's report she went with others to the house of the accused and found both the accused and Florence inside. Florence admitted to her that she had sexual intercourse with the accused. Obwana testified that on 10th August 2001 he recorded a charge and caution statement from the accused in which the accused admitted having committed the offence in question.

The accused denied the above evidence and testified that Grace framed him because he refused to pay her a sum of 1,500,000/- as bride price.

Florence's, Nsambu's Grace's, and Obwona's evidence above was not shaken in cross-examination. Therefore, Court is satisfied that it represents the truth. Indeed, there is no way Florence could have been mistaken about the person she had sexual intercourse with during the period of her disappearance. She knew the accused very well. The accused was living only a stone throw's distance away from Florence's house. Indeed, Florence's evidence is enough on its own to prove this aspect of the prosecution case. (**See Uganda v Matovu – Supra.**) the rest of the above evidence (i.e. Nsambu's, Grace's and Obwana's evidence) simply confirms the reliability that the prosecution succeeded in proving, beyond reasonable doubt, that it was the accused who committed the offence in question.

There were contradictions here and there in the prosecution case as to Florence's exact age and relationship with Grace. According to Nsambu, Florence could have been born in 1985, but he was not very sure. However, Grace's testimony was that Florence was born in 1987. Of course, Nsambu was not Florence's close relative. Therefore, he was not legally qualified to testify about her age. In any case, his evidence and Grace's evidence was agreed that Florence was under the

age of 18 years at the time of the offence. That contradiction is in Court's opinion, of no consequence. That aside, Grace testified that Florence was her daughter. Florence contradicted that piece of evidence and testified that Grace was her paternal cousin who had custody of her since infancy when both her parents died. Court does not, also, consider that contradiction a vital one for Court is very much aware that here in Uganda it is almost bad manners to refer to very close relatives in terms that might appear to place them at a distance. Hence, cousins are often loosely referred to as to as one's fathers or mothers. It is therefore not surprising that Grace described (Florence) her orphaned relative whom she brought up, as her daughter. That may sound very misleading, but that is the generosity and accommodative nature of the Ugandan culture.

All in all, Court is satisfied that the prosecution proved its case against the accused beyond reasonable doubt. The defence case is simply a pack of lies, which Court rejects. In full agreement with the assessors, for the reasons advanced above, Court finds the accused guilty of the offence of defilement and convicts him accordingly. It is so ordered.

E.S. Lugayizi (J)

2/12/2002

Read before: At 3:35 p.m.

Accused

Mr. Ndamurani for the State

Mr. Going for the accused

Mr. Sewanyana c/clerk

E.S. Lugayizi (J)

2/12/2002