THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT KAMPALA

CRIMINAL SESSION CASE NO. 146 OF 2001

UGANDA……..PROSECUTOR

VERSUS

ABDU SABWE……..ACCUSED

Before: The Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

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

> ***"Matovu Peter on the 18th day of July 2001, at Kyebando-Kisenyi zone in the Kampala District, unlawfully had carnal knowledge of NAMPA SARAH a girl under the age of 18 years."***

The accused denied the indictment. The prosecution called four witnesses in support of its case against the accused. Those witnesses were Dr. Kalyemenya (PW1), Dr. Nsereko Mukasa (PW2), Sarah Nampa (PW3) and Yerina Nakyejwe(PW4)

The accused gave evidence on oath and did not call witnesses.

In simple terms the prosecution case was as follows. On 18th July 2001 Sarah Nampa, escorted her aunt who boarded a taxi at Kalerwe. This happened at around 7:00 p.m. At this point, the accused appeared on the scene and persuaded Sarah to visit his home at Kyebando. The two set off. On arrival at the accused person's home they entered the house and had sexual intercourse. Later on, Sarah returned home and revealed to her mother what had transpired between her and the accused. Sarah's mother reported the matter to the police, which soon after arrested the

accused and charged him with the offence of defilement. Hence, the trial that is the subject of this judgment.

The accused gave evidence on oath and denied that he committed the alleged offence. He pointed out that the indictment was a frame up that arose from a grudge Nakyejwe and against him two weeks before the alleged offence. At that time, one of Nakyejwe's customers abandoned her. Instead, he bought sweet potatoes worth shs. 15,000/= from the accused. Nakyejwe got angry. She, therefore, warned the accused that would shortly destroy his business. Two weeks later, the police used on a charge of defilement, which he had no knowledge of.

Before Court endeavours to find out whether or not the prosecution proved its case against the accused it will outline a few principles, which are relevant in disposing of this case. The first principle is that the prosecution bears the burden of proving its case against the accused and that burden does not shift upon the accused except in very few circumstances where statutory law specifically provides so. **(See Woolmington v DPP (1935) AC 462; and Bagirwa v Uganda Cr. Appeal No. 27 of 1992.)**

The second principle is that the standard of proof required in criminal cases is ***"proof beyond reasonable doubt".*** Although that is a very high standard of proof it does not mean that the prosecution has to prove its case beyond any shadow of doubt. Instead, it means that the prosecution case must be strong; and it must reflect a high degree of probability that the accused committed the offence in question. In **Miller v Minister of Pension (1947) 2 All ER 372** at pages 373-374, the judge pointed out that where the evidence against a man is so strong as to leave only a remote possibility in his favour, which can be dismissed with such a remark, ***"Of course it is possible but not in the least probable"*** then the prosecution has proved its case.

Thirdly, in cases of this nature, that is to say, where the victim alleges that the accused committed a sexual offence against her, before a court acts upon the victim's evidence it must warn itself that it is dangerous to act on the uncorroborated evidence of the victim. However, where a Court does not find the required corroboration it must satisfy itself that the victim was a truthful witness if it is to base a conviction on her evidence.

The above rule is one of practice. It is part of Uganda's colonial legacy from Britain and our courts have been applying it religiously. **(See Chila v Republic (1967) E. A. 722; and Boona**

Peter v Uganda (CA) Criminal Appeal No. 16 of 1997.) The rationale behind the above rule is that women are liars especially in matters involving sexually allegations. The case of Neville and 5 others Cr. APP. R. 150 fully illustrates that point. In that case the judge, inter alia, commentes as follows,

> ***"On a charge of a sexual offence against a woman or girl, the judge should direct the jury in clear and simple language that it is dangerous to convict on the uncorroborated evidence of the complainant, because human experience in the courts had shown that women and girls, for all sorts of reasons and sometimes for no reason at all, tell a false story which is very easy to fabricate but extremely difficult to refute…"***

Therefore, to safeguard men against unwarranted prosecutions or false accusations in respect of sexual offences courts have always insisted upon the above rule of practice before convictions can be had. Be that as it may, Court has not come across any empirical data or basis for the belief that women are greater liars than men or, for that matter that they are much more likely to lie than say the truth in matters concerning sexual allegations. For that reason it seems that both the belief and the resultant rule have no logical basis. Therefore, the question Court wishes to raise here, is whether the said rule is legally justifiable? Court proposes to answer that question in the negative. It will base its stand on the premises below.

Firstly, Court of the opinion that the said rule is in conflict with section 132 of the Evidence Act (Capt.43) which provides as follows,

> "Subjects to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact."

In essence, the above provision lays down a general rule and an exception. In simple terms, the general rule is the evidence of one witness is enough to prove any fact in any case. The exception to the rule is that where "***any other law in force***" provides so, the evidence of more than one witness may be required, in any case, to prove any fact. In Court's opinion the exception to the general rule in section 132 of the Evidence Act only covers ***"any other law in force***" which is the creature of the legislature. It does not cover ***"any other law in force"*** that has come into existence by way of other means outside the realm of the legislature; and certainly it does not cover a mere rule of practice that courts may wish to observe. To interpret the exception

differently would bring into the picture all kinds of possibilities. For example, that even unwritten customary law, etc., may, legally, furnish an exception to the general rule in section 132 of the Evidence Act. Court greatly doubt whether that was the intention of the legislature. From that standpoint alone, Court is of the opinion that the said rule is not legally justifiable, for it cannot stand as a valid exception to the general rule in section 123 of Evidence Act.

Secondly, and much more importantly, Court thinks that the above rule discriminates against women who are by far, the most frequent victims of sexual offences and is, therefore, inconsistent with Uganda's international obligations under various conventions and the Constitution.

The Collins English Dictionary and Thesaurus defines the word ***"discrimination"*** as follows,

> ***"The singling out of a particular person, group, etc. for special favour or disfvour…"***

The Convention on the Elimination of all forms of Discrimination Against Women (1979) (also known as CEDAW) provides a more elaborate definition of the word ***"discrimination"*** when applied in relation to women. Article 1 CEDAW provides as follows,

> ***"…"discrimination against women" shall mean any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, cultural, civil or any other field."***

The rule easily falls within the four walls of the above definitions. For, clearly, its effect is to single out women for disfavor in cases involving sexual allegations in the sense that it nullifies the recognition, enjoyment or exercise of their rights to equality before the law and equal protection of the law. Indeed, in such cases, the testimony of a victim is not, of itself, valuable. It is suspect; and this is, essentially, because she is a woman or a girl! **(See Neville and 3 others – supra.)** Uganda ratified **CEDAW** and the various conventions, which constitute the **International Bill of Rights**. In addition, under Article 21 of the Constitution that proclaims equality of all persons under the law, equal protection of the law and prohibition against discrimination on the ground of sex, Uganda enacted the herat of the above International

instruments in one stroke. Therefore, Uganda has the obligation to give effect to the contents of those international instruments. For that reason, the above rule that discriminates against women and is inconsistent with Uganda's international obligations and the Constitution is not legally justifiable. Under Article 2 of the Constitution the fate of any law that is inconsistent with the Constitution is very clear. Such law is null and void. It follows, therefore, that the above rule is null and void.

In concluding this area of the judgment, Court simply wishes to pay that it will not apply the above rule because it discriminates against women and is, therefore, in conflict with Uganda's international obligations and the constitution.

Court will, now, proceed to point out what the prosecution has to prove if it is to succeed in a case of defilement. A perusal of section 123(1) of the Penal Code Act reveals that the prosecution had to prove the following,

(a) That the victim was a girl under the age of 18 years on 18th July 2001;
(b) That the victim had sexual intercourse on 18th July 2001; and
(c) That the accused is the person who committed the offence in question.

In order to find out whether or not the prosecution proved its case against the accused beyond reasonable doubt Court will consider, below, each of the above ingredients in relation with the law and the evidence on record.

With regard to the first ingredient, that is to say, that the victim was a girl under the age of 18 years on 18th July 2001, 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 victim, is admissible. **(See Uganda v Enock Babumpabura Criminal Session Case No. 135 of 92.)** Observation and common sense are also acceptable methods of gauging a victim'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 produce a birth certificate to prove the victim's age. Instead, it relied on some other two pieces of evidence, that is to say, Dr. Kalyemenya's evidence and Yerina Nakyejwe's evidence. Dr. Kalyemenya examined the victim on 20th July 2001. He formed the opinion that the victim was 16 years old at that time. **(See Exh. P1.)** He based his opinion, among other things, on the fact that the victim had a set of 28 teeth. According

to him only persons below the age of 18 years have that number of teeth. Persons of 18 years and above have a dental formula of 32 teeth. On her part Nakyejwe, who is the victim's mother, testified that her daughter Sarah was born in 1985.

The accused did not shake or contradict the above evidence.

In essence, Nakyejwe's evidence and Dr. Kalyemenya's evidence was agreed that Sarah was 16 years of age at the time of the offence in question. The assessors, who had opportunity to observe the victim when she gave evidence in Court, also, shared that opinion.

In the circumstances, Court is of the opinion that the prosecution succeeded in proving, beyond reasonable doubt, that Sarah Nampa was a girl under the age of 18 years on 18th July 2001.

With regard to the second ingredient, that is to say, that the victim had sexual intercourse on 18th July 2001, first of all Court must define what, in law, amounts to sexual intercourse. According to **Archibald on Criminal Pleading 30th Edition page 1124 at paragraph 2873**, sexual intercourse is complete when a male sexual organ penetrates a female sexual organ; and 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 98; and Didas v Uganda (CA) Criminal Appeal No. 35 of 1997.)** in the instant case, the prosecution relied solely on the evidence of Sarah to prove that she had sexual intercourse on 18th July 2001. In her testimony Sarah insisted that she had sexual intercourse on the day in question. She explained that the act took place at Kyebando where some one took her into a house, removed her knickers and had sexual intercourse with her by way of inserting his male sexual organ into her female sexual organ. Despite vigorous cross-examination Sarah firmly stuck to that story.

The defence case was a denial that the accused committed the offence in question.

After carefully considering all the evidence in respect of this ingredient, Court believes that Sarah told the truth in this area of her testimony. That aside, Nakyejwe's evidence to the effect that she examined Sarah soon after the offence in question was committed and found a whitish liquid in her private parts tends to confirm Sarah's story to the effect that she had sexual intercourse that day.

In the circumstances, Court has no hesitation in finding that the prosecution succeeded in proving, beyond reasonable doubt, that Sarah Nampa had sexual intercourse on 18th July 2001.

With regard to the third ingredient, that is to say, that the accused is a person who committed the offence in question, the only evidence implicating the accused with the offence in question comes from the mouth of the victim (Sarah). In her testimony Sarah narrated that on 18th July 2001 at around 7.00 p.m. after she had escorted her aunt to catch a taxi at Kalerwe the accused appeared on the scene. He introduced himself by telling her his name and where he worked. He, then, confessed his love for her; and asked her to go with him to his home at Kyebando. Sarah hesitantly agreed. The two then proceeded to the said home where they engaged in sexual intercourse.

The accused in his defence denied that he committed the offence in question. He explained that Nakyejwe framed him as a result of a grudge that arose, two weeks before his arrest, in the market where he and Nakyejwe worked. He insisted that Sarah did not visit his home at Kyebando in the evening in question and that he did not have sexual intercourse with her.

Sarah was confident and firm in what she said in the above area of her testimony. Court, therefore, thinks that she told the truth even in that area. However, it should be remembered that the offence in question was committed at night. For that reason, merely being a truthful witness is not enough. Before Court acts upon Sarah's evidence it must be satisfied that she could not have been mistaken about the identity of the person who had sexual intercourse with her on the night in question. In other words, Court must be sure that Sarah's evidence implicating the accused was free from the possibility of error or mistake. (See Roria v Republic (1967) E.A. at page 583; and Nabulere v Uganda (1979) HCB 77.

First of all, Court admits that the condition of lighting obtaining at the time the accused met Sarah was not clarified. However, it is a fact that 7.00 p.m., which ordinarily marks the beginning of nightfall in Uganda, is not quite a dark part of the night. This is particularly so, since Uganda is geographically located at the Equator. Even in the absence of additional lighting at that hour, it is quite possible for one to recognize another person especially another person one has seen before. In the instant case, the accused was not a stranger to Sarah. She had seen him before at Kalerwe market where he sold sweet potatoes near her mother's stall. In addition, when

the two met that evening the accused made sure that Sarah did not mistake him for someone else. He introduced himself to Sarah by telling her his name and his place of work. At that point, Sarah must have been doubly sure of the identity of the person who had presented himself to her. Thereafter, the accused and Sarah remained together and only parted company after having had sexual intercourse at the home of the accused. With the above evidence in mind, Court is satisfied that Sarah could not have been mistaken about the identity of the person who had sexual intercourse with her on 18th July 2001; and that person is the accused.

In the circumstances, Court thinks that the prosecution succeeded in proving, beyond reasonable doubt, that the accused is the person who committed the offence in question.

Before concluding this matter it is important to point out that there are several contradictions in the prosecution case. The first one is in respect of time. Sarah testified that on the material day she left home to escort her aunt to catch a taxi at around 7.00 p.m. However, her mother (Nakyejwe) testified that Sarah left home that day at 6.00 p.m. and returned at 8.00 p.m. The second contradiction is in respect of distance. Sarah testified that the accused worked 2 meters away from her mother's stall at Kalerwe market, but her mother testified that her stall was 10 meters away from the accused person's stall. The third contradiction is in the respect of Sarah's virginity before the offence in question was committed. Dr. Kalyemenya's evidence suggested that Sarah was not a virgin before the offence in question was committed. However in her evidence Sarah insisted that she was a virgin before the offence in question was committed.

Court carefully considered all the above contradictions. In its opinion, the first two are very minor. Obviously, they do not affect the substance of the prosecution case and must, therefore, be ignored. **(See Sabuni v Uganda 1981 HCB page 1.)** However, the third contradiction is a bit complicated. Its effect may not be easy to determine if its context is not well understood. Sarah is 17 years old or so. Therefore, it is not out of place to conclude that she is still under the authority of her parents.

At the time she gave her testimony her mother was just outside the court room; and probably some of her other relatives (who were not witnesses) in this case were seated inside the court room. From all appearances Sarah was placed in a dilemma as to how to answer the question concerning her virginity when Mr. Katongole (counsel for the accused) asked it. Taking into

account all, Court thinks, too, that the last contradiction did not affect Sarah's general credibility as a witness; and it must, therefore, be ignored.

In disagreement with the lady and gentlemen assessors for the reasons given above Court is of the opinion that the prosecution succeeded in proving its case against the accused, beyond reasonable doubt. In the circumstances, Court must reject the accused person's defence, which was simply a pack of lies.

All in all, Court has no choice but to find that the accused is guilty of the offence of defilement contrary to section 123 (1) of the Penal Code Act; and it hereby proceeds to convict him accordingly. It is so ordered.

E.S. Lugayizi

19/10/2002

Read before: At 3.29 p.m.

Accused in Court.

Mr. Ndamurani for the State

Mr. A. Katongole for accused

The two assessors

Mr. Senabulya c/clerk

E.S. Lugayizi

19/10/2002