

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO. 137 OF 2001

UGANDA.....PROSECUTOR

VERSUS

ABDU SABWE.....ACCUSED

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

JUDGMENT

The accused was indicted for defilement on two counts. The first count alleged as follows.

“ABDU SAABWE on the 14th/09/2000 at Namalinda village in Nakasongola district unlawfully had sexual intercourse with Nanyonga Faith a girl under the age of 18 years.”

The second count both counts. Therefore, Court tried him. However, some time during the hearing of the case the prosecution abandoned the second count. For that reason, this judgment will, only, concern itself with the first count.

In all the prosecution called four witnesses namely, Samuel Kasozi (PW1); Faith Nanyonga (PW2); Teopista Nanyonyi (PW3) and Moses Mbangire (PW4).

In his defence the accused made an unsworn statement and did not call any witness.

In very brief terms the prosecution case was as follows. On 14th September 2000 at around 1:00 p.m. Faith Nanyonga, a girl who was about 13 years old went to the well to fetch some water. She was with her sister Teopister Nanyonyi and some other two persons. As they returned home Faith and Teopista were abducted by some one who had disguised himself with bark cloth. He looked like a ghost. That man took the girls far away into the wilderness and he had sexual intercourse with faith. Eventually, the two girls re-appeared. They revealed to their family that the accused abducted them and had sexual intercourse with Faith. The matter was referred to the

police. In turn, the police arrested the accused and charged him with defilement. Hence the proceedings which are the subject of the judgment.

In his unsworn statement the accused denied having committed the offence in question. He admitted that he was a witch doctor. He, then, pointed out that when Faith and Teopista disappeared Mbangire (their father who was his regular customer) consulted him. He advised Mbangire that the problem would be solved if Mbangire brought two goats and two chickens for ritual sacrifice. Mbangire complied; and soon afterwards the accused was able to find the lost children. The accused maintained that he, simply, did his job as a witch doctor and had no hand in committing any offence against Faith.

In order for the prosecution to succeed in a case of defilement it has to prove, 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 on the day in question;
- (b) That the victim had sexual intercourse with a male person on the day in question; 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 Faith was a girl under the age of 18 years on the day in question, the law is that the best evidence to prove someone'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 Babumpabura High Court Criminal Session Case No. 135 of 1992.)** Observation and application of common sense is also an acceptable method of telling someone'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 Faith's age. Instead, it relied on the testimony of Kasozi and Mbangire in that respect. Kasozi testified that he is a clinical officer and works at Nakasongola hospital. On 20th September 2000 he examined Faith and, among other

things, found that she was of the apparent age of 13 years. Mbangire (the father of Faith) testified that Faith was 11 years old at the time of hearing the case.

The above evidence, on the whole, shows that Faith was under the age of 18 years at the time of the offence. That evidence was not shaken or contradicted during cross-examination. That evidence was not shaken or contradicted during cross-examination. Court is, therefore, satisfied that the prosecution proved, beyond reasonable doubt, that Faith Nanyonga was a girl under the age of 18 years at the time of the offence. In any case, it was more than obvious at the time of hearing the case that Faith was still under the age of 18 years.

With regard to the second ingredient, that is to say, that Faith had sexual intercourse with a male person on the day in question, 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) Cri. 1 of 1998; and Didas v Uganda (CA) Criminal Appeal No. 35 of 1997.)** In the instant case, the prosecution relied on the evidence of Faith, Teopista and Ks effort to prove that aspect of its case. Faith testified that on 12th September 2000 at around 1:00 p.m. as they were returning home from the well (Teopista, two others and herself) a person covered in bark cloth appeared before them and ordered them to return to the well. They complied. He ordered two of them to return home. He, then, blindfolded Faith and Teopista by using their dresses and led them far away into the wilderness. He removed Faith's knickers and inserted his sexual organ into her sexual organ and had sexual intercourse with her. In her testimony Teopista related the same story. Kasozi, a clinical officer working for Nakasongola hospital, testified that on 20th September 2000 she examined Faith. He found that the inner layer of her private parts was red and her hymen was broken. In his opinion Faith sustained those injuries four days before he examined her. Kasozi was of that view because the healing process that is, ordinarily, complete within seven days was still going on.

The accused denied the above evidence.

Faith's, Teopista's and Kasozi's evidence was not shaken or contradicted in cross-examination. Court is; therefore, satisfied that it represents the truth. In fact, Faith's evidence, by itself, is sufficient to prove this aspect of the prosecution case; and it is 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.)** Teopista witnessed what befell Faith. Her evidence and Kasozi's evidence further confirm the reliability of Faith's evidence. In the circumstances, Court is satisfied that the prosecution succeeded in proving, beyond reasonable doubt, that Faith Nanyonga had sexual intercourse with a male person on 14th September 2000.

With regard to the third ingredient, that is to say, that the accused is the person who committed that offence, Court has this to say. Faith and Teopista testified that it was the accused who committed the said offence. They admitted that although initially the man who abducted them blindfolded them, they were able to identify him as the accused because they knew his voice. They further pointed out that were able to identify him as the accused because they knew his voice. They further pointed out that the following day the accused returned to the wilderness where they spent a night in the open. This time he had not disguised himself with bark back cloth; and they were not blindfolded. They actually saw him with their own eyes. Mbangire (the father of Faith and Teopista) also testified that after the above named children disappeared, the accused approached him. He claimed that as a witch doctor he was in position to bring the children back safely. He pointed out that he only needed two goats and two goats and two chickens to do a good job. The following day Mbangire gave the accused two goats and two chickens. The accused went to the swampy places near the well where the children were abducted from and brought them back.

In his defence, the accused denied having committed the offence in question. However, he admitted that in the course of his work as a witch doctor he helped Mbangire to recover his children who had been abducted by a ghost.

Faith's and Teopista's evidence implicating the accused was not shaken in cross-examination. Court is, therefore, satisfied that it represents the truth. Indeed, the two girls knew the accused before; and had heard him speak to other people by his home when going to school. So they knew his voice. That aside, the fact that the accused confidently advised Mbangire that he, as a witch doctor, would recover the lost children; and later he did so when he received two goats and

two chickens, leads to an irresistible inference. The inference is that the accused actually knew where those children were before he went to see Mbangire about them. That confirms the reliability of Faith's and Teopista's testimony that it was the accused who committed the offence in question. In the circumstances, Court is of the opinion that the prosecution proved, beyond reasonable doubt, that it was the accused who committed the offence in question.

Be that as it may, there were inconsistencies here and there in the prosecution case in respect of dates and time, but such inconsistencies were minor and Court easily ignored them. (See **Dusmani Sabuni v Uganda (1981) HCB 1.**) However, there was one other apparent inconsistency that was not as easy to deal with as the ones above. It was projected as follows. On the one hand, Faith testified that the accused person's sexual organ was too big to enter her sexual organ. That area of her testimony seemed to suggest that her sexual organ was, therefore seemed to suggest that her sexual organ was not penetrated. However, Kasozi (the clinical officer who examined Faith soon after the offence in question) found that Faith had injuries in the inner layer of her private parts and her hymen was broken. Those injuries clearly showed that there was penetration.

Court pointed out earlier on in this judgment that in law sexual intercourse is deemed to have taken place where a male person's sexual organ penetrates a female person's sexual organ; and the slightest penetration is enough. Applying that principle one finds that when Faith's and Kasozi's testimony is read together it is supplementary and not contradictory. Each piece helps to complete the other. Consequently, court had to ignore that apparent inconsistency too.

All in all, Court is satisfied that the prosecution succeeded in proving its case against the accused, beyond reasonable doubt. The accused person's defence is simply a pack of lies, which Court hereby rejects.

In full agreement with the assessors, Court hereby finds the accused guilty of the offence of defilement and convicts him accordingly. It is so ordered.

Before Court takes leave of this matter it wishes to point out that there is evidence in this case suggesting that it was possible to include in indictment some other serious offences which the accused committed against the liberty of two little girls. Court wonders why that was not done. The DPP would, always, do well to include in an indictment all the offences disclosed by the

facts in a police file, for one cannot tell before hand which offence will stand the rigours of a trial and which one will not be able to stand such rigours.

E.S. Lugayizi (J)

2/12/2002

Read before: At 3:08 p.m.

The accused

Mr. Twinomuhwezi for the State

Mr. Wadidi for the accused.

E.S. Lugayizi (J)

2/12/2002