

THE REPUBLIC OF UGANDA

IN THE HIGH COURT AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO. 0129 OF 2001

UGANDA.....PROSECUTOR

VERSUS

MUBANGIZI SIMON.....ACCUSED

BEFORE: THE HON. MR. JUSTICE E. S. LUGAYIZI

JUDGMENT

The accused was indicted for defilement. The particulars of the indictment read as follows,

“MUBANGIZI SIMON on the 2nd day of January 2001 at Kawempe, Kiganda zone, Kampala District, did unlawfully have Carnal Knowledge of NAMUGAMBE CHRISTINE a girl under the age of eighteen (18) years.”

The accused denied the indictment and was, therefore, tried. During the hearing the prosecution called four witnesses in support of its case. They were Dr. Martin Kalyemenye (PW1); Detective Assistant Inspector of police Kauka George (PW2); Christine Namugambe (PW3); and Nakayiza Kate (PW4).

The accused person called one witness in his defence; and that was himself (DW1)

In very brief terms the prosecution case was on 2nd January 2001 the accused who was in the same drama group with Christine befriended her and had sexual intercourse with her at Nvujjo Hall at Kawempe.

In his sworn evidence the accused denied having committed the offence in question. He explained that Christine’s mother framed him as a result of political differences. On his part, he supported President Museveni during the last presidential election, but Christine’s mother supported during the last presidential election, but Christine’s mother supported Colonel Kiiza Besigye. Hence the enmity and the resultant grudge.

In order for the prosecution to succeed in a case of defilement it has to prove beyond reasonable doubt three ingredients of that offence. (See section 123(1) of the Penal Code Act; and DPP v Woolmington (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 time in question;
- (b) That the victim had sexual intercourse with a male person at the time in question;
- (c) That the accused is the person who committed that offence.

Court will consider the above ingredients in turn in the light of the law and the evidence on record with a view to ascertaining whether the prosecution discharged its burden.

With regard to the first ingredient, that is to say, that the victim (Christine) was a girl under the age of 18 years at the time in question 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 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 a good guide in proving some one's age. (See **Recorder of Grimsby. Ex parte Purser (1952) 2 ALL E.R 889.**) In the instant case, the prosecution did not rely on a birth certificate to prove Christine's age. Instead, it relied on the evidence of Nakayiza (PW4) and Dr. Kalyemenya (PW1) in its endeavor to prove that aspect of the case.

Nakayiza testified Christine was her daughter. She was born in May 1987; and was, therefore, 15 years of age at the time of hearing this case Dr. Kalyemenya who examined Christine on 1st March 2001 was of the opinion that she was 13 years old then.

The above evidence was not shaken in cross-examination. Court is therefore, satisfied that the prosecution proved, beyond reasonable doubt, that Christine Namugambe was a girl below the age of 18 years at the time in question (i.e. on 2nd January 2001). In any case, the accused person did not contest that aspect of the prosecution case.

With regard to the second ingredient, that is to say, that the victim had sexual intercourse with a male person on the day in question, Court has this to say. In law the act of sexual intercourse is complete once a male person's sexual organ penetrates a female person's sexual

organ. It does not matter how slight the penetration may be. (See **Archibold on Criminal Pleading 30th Edition page 1124 paragraph 2873.**) In the instant case the prosecution mainly relied on Christine's evidence and Kauka's evidence to prove this aspect of its case. Christine's testimony was that she was part of a group of drama actors at Kawempe. On 2nd January 2001 a certain male person who was also part of that group befriended her. The two of them then had sexual intercourse at Nvujjo Hall. That aside, Kauka testified that on 28th February 2001 he took a charge and caution statement (Exh. P3) from some one accused of the offence of defilement. That person admitted having had sexual intercourse with Christine sometime in January 2001.

The accused denied that the above evidence was true.

On the whole Christine's and Kauka's evidence was not shaken. Therefore, Court thinks that it represents the truth, in fact, Christine's evidence is sufficient, by itself, to prove this aspect of the prosecution; and it is not necessary for Court to warn itself about it before acting on it. (See **Uganda v Peter Matovu Court Criminal case No. 146 of 2001.**) The accused person's confession though retracted, it bears some details which no one else expect the accused knew. For example, it lays a background to the accused person's relationship with Christine. At least, the said confession confirms the reliability of Christine's evidence above. In the circumstances, Court is satisfied that the prosecution succeeded in providing, beyond reasonable doubt, that Christine Namugambe had sexual intercourse with a male person on 2nd January 2001.

With regard to the third ingredient, that is to say, that it was the accused who committed the offence in question, the prosecution led evidence from three witnesses to prove that aspect. They were Christine Kauka, and Nakayiza. Christine's testimony was that the person she had sexual intercourse with on 2nd January 2001 was the accused. Kauka testified that in his charge and caution statement recorded on 28th February 2001 the accused confessed to having had sexual intercourse with Christine in January 2001. Nakayiza's testimony was that sometime in February 2001 she went with some other persons to arrest the accused. On seeing them the accused endeavored to run away, but they arrested him.

The accused denied that the above evidence was true. He insisted that Nakayiza framed her as a result of a grudge that was brought about by political differences between them.

Christine's, Kauka's and Nakayiza's evidence was neither shaken nor contradicted during cross-examination. Therefore, Court is of the opinion that it represents the truth. Christine's evidence implicating the accused with the offence in question is, by itself, enough to prove this aspect of the case. **(See Peter Matovu – Supra.)** Indeed, Christine could not have been mistaken about the identity of the accused because Christine and the accused were lovers. The confession Kauka recorded from the accused is added evidence pointing to the fact that the accused participated in the offence in question. Nakayiza's testimony also tends to point more to the guilt of the accused than his innocence. **(See Terikabi v Uganda (1975) HCB 63)**

Notwithstanding the foregoing, there were contradictions here and there in the prosecution case about places and time. In Court's Opinion those were minor and did not affect the substance of the prosecution case. Therefore, Court ignored them. **(See Dusman Sabuni v Uganda (1981) HCB 1.)** However, some difficulty arose with Christine's two police statements. In her police statement of 27th February 2001 she implicated the accused, but she exonerated him in the second statement she made the following day. In cross examination when counsel for the accused asked her to account for the disparity in the two statements Christine pointed out that the first statement was the correct statement. She then explained that certain individuals who picked her up from home on 28th February 2001 and took her to the police station again, in the absence of her mother, coerced her into making the contradictory statement of 28th February 2001. In Court's opinion that was a plausible explanation. It is strange that after Christine had made a very clear statement implicating the accused with the offence in question on 27th February 2001 some persons required her to go back to the police station to make another statement! It is obvious that the said persons had the wrong motive, that is to say, to try to derail the ends of justice in this case. All in all, the above contradiction had no negative effect on Christine's evidence as a whole. Therefore, Court had no choice but to ignore it as well.

In conclusion, Court is satisfied that the prosecution succeeded in proving beyond reasonable doubt, that the accused is the person who committed the offence in question. The defence case was an afterthought, which the accused cooked up to save his skin; and Court therefore hereby rejects it.

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

E.S. LUGAYIZI, J

27/11/2001

Read before: At 9.40 a.m.

The accused.

Mr. Ndamurani for the state

Mr. Wadidi for accused

Mr. Sewanyana c/clerk

E.S. LUGAYIZI, J

27/11/2002