

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO. 0148 OF 2001

UGANDA:.....PROSECUTOR

VERSUS

TAMALE STEPHEN:.....ACCUSED

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

RULING

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

“TAMALE STEPHEN, on the 17th of December 2000, at Kyanja Nazareth zone in Kampala District, had unlawful carnal knowledge of NALWEYISO KETTY, a girl under the age of 18 years.”

The accused denied the indictment. In a bid to prove its case against the accused the prosecution led the evidence of the two witnesses, namely, Nalweyiso Ketty (PW1) who is 9 years old and gave sworn evidence; and Seubunya Denis (PW2). In brief those witnesses testified as follows. On 17th December 2000 at Kyanja on Gayaza road at around 1.00 p.m Nalweyiso Ketty and some other girls were playing at the well. A man came and took Ketty into the bush on the pretext that he wanted her to pick a jack fruit for him. Somewhere in the bush the man had sexual intercourse with Ketty. She left the bush crying and bleeding. A search for the attacker was mounted in the area. Subsequently the accused was arrested as the suspect and charged with defilement.

At the end of the above testimony the prosecution offered no further evidence. In reality, that meant that the prosecution had closed its case and that it had no faith in it. At that point, counsel for the accused Mr. Arthur Katongole submitted that the prosecution had failed to make out a prima facie case which required on record connecting the accused with the offence in question. For that reason, he called upon Court to acquit the accused of the offence of defilement.

Court did not expect Mrs. Mutabingwa to say anything, but she did. She submitted that the prosecution had made out a prima facie case which require and the accused to enter his defence.

Be that as it may, in the famous case of **R.T. Bhatt v R (1957) E.A. at page 332**, a prima facie case was defined as follows.

“one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

However, where at the close of the prosecution case a major ingredient of the offence has not been proved, clearly a prima facie case has not been made out against the accused. In those circumstances the accused would be entitled to an acquittal. (See **Wabiro alias Musa v R (1960) E.A. 184; Uganda v Alfred Ateu (1974) HCB 179 and Kadiri Kyanju and Others v Uganda (1974) HCB 215**).

In the instant case the prosecution had to prove three major ingredients of the offence of defilement. They are, (a) the age of the victim as being under 18 years at the time of the offence; (b) sexual intercourse between the victim and a male person on the day in question; and (c) the participation of the accused in the offence in question. The vexed question to answer now is whether Mr. Katongole's submission that the prosecution failed to prove that the accused participated in the offence in question is meritorious? Court thinks that Mr. Katongole's submission is meritorious. Clearly, the record shows that the victim (Ketty) was unable to recognize her attacker. In fact, while in the Court she identified someone else as her attacker and not the accused. That left the State with only Sebunya's evidence. Sebunya's evidence was to the effect that he arrested the accused somewhere near the scene of crime on the day in question. When the accused saw Sebunya and his group closing in on him, instead of walking on he pretended that he was going to Kato's home. The accused was trembling and his trousers were wet with spermatozoa. If, Sebunya was a truthful witness, that evidence would have materially incriminated the accused. However, in Court's opinion, it was doubtful that Sebunya was a particularly truthful witness. It seems that apart from telling the police that he arrested the accused somewhere near the scene of crime, his police statement was devoid of any detail incriminating the accused with the offence in question. Needless to say, Sebunya's mind must have been very fresh about those details two years ago. The fact that he did not include them in

his police statement then, casts a lot of doubt on his testimony in Court which purported to incorporate them two years later. Consequently, after Sebunya's evidence has been discredited as doubtful, only suspicion remains against the accused. It is trite law that mere suspicion is not enough to enable Court to convict a person of criminal offence. **(See Israili Epuku s/o Achientu (1934) IEACA 161 at page 168).**

All in all, therefore Court agrees with Mr. Katongole that the participation of the accused in the offence in question was not proved at the close of the prosecution case. This means that the prosecution failed to make out a prima facie case against the accused. For that reason, Court cannot require the accused to put in his defence, instead, Court must acquit him of the offence of defilement and set him free; and it is so ordered.

E.S. Lugayizi

(JUDGE)

7/11/2002

Read before: AT 3:10 p.m.

Accused in Court

Mrs. Mutabingwa for the State

Mr. A. Katongole for Accused

Mr. Senabulya – Court Clerk

E.S. Lugayizi

(JUDGE)

7/11/2001