

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO. 0150 OF 2001

UGANDA.....PROSECUTOR

VERSUS

BEMBA IBRAHIM.....ACCUSED

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

JUDGMENT

The accused was initially indicted for the offence of defilement contrary to section 123(1) of the Penal Code Act, which he denied. His trial, therefore, began. Subsequently, the State amended the indictment and replaced it with one of indecent assault contrary to section 122 of the Penal Code Act. The accused denied the amended indictment as well. In all, the prosecution called two witnesses in its effort to prove its case against the accused. Those witnesses were Anifa Namubiru (PW1); and Mariam Nalubega (PW2).

In his defence the accused called one witness, namely, himself (DW1).

In very brief terms the prosecution witness put up this story. The family of the accused and the family of the victim (Anifa Namubiru) were friends. As a result, at the end of 1999 Anifa went and spent her school holiday with the family of the accused at Kasangati. Anifa's mother (Nalubega finally picked her up from Kasangati on 6th February 2000. Anifa related to her mother that during the holiday the accused had time and again, sneaked into the sitting room where she slept, removed her knickers and placed his sexual organ into her sexual organ. Nalubega examined Anifa's private parts and saw pus coming out of them. She took her to hospital where she received treatment. The accused was later arrested; and hence the proceedings which are a subject of this judgment.

The accused person denied having committed the alleged offence. He explained that Anifa's mother framed him after she had failed in her designs to befriend him.

In order for the prosecution to succeed in a case of indecent assault it must prove, beyond reasonable doubt, the following ingredients of that offence.

- (a) That there was an assault on a woman or a girl at the material time;
- (b) That the said assault was indecent; and
- (c) That the accused is the person who committed that offence. (See section 122 of the Penal Code Act: and DPP v Woolmington (1935) A.C. 462)

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

With regard to the ingredient, that is to say, that there was an assault on a woman or girl at the material time, Court will first of all define what amounts to an assault in criminal law. According to Words and Phrases legally defined Volume 1: A – C page 123 the word “assault” is defined as follows.

“assault” is generally synonymous with the term “battery”, and is a term used to mean the actual intended use of unlawful force to another person without his consent.”

Therefore, in this judgment, Court will use the word “assault” to mean ***“the intended use of unlawful force to another person without his or her consent.”*** In the instant case, however, it is not necessary to prove lack of consent, for there is uncontroverted evidence on record that the victim (Anifa) was a girl below the age of 18 years. (See section 122(2) of the Penal Code Act.) Anifa’s mother (Nalubega) testified that Anifa was born in October 1989. That means that at the time of the offence she was slightly over 10 years of age. Be that as it may, according to Anifa (who gave her evidence on oath) she spent the end of year school holiday in 1999 with the family of the accused at Kasangati. She slept in the sitting room of that family’s house alone. However, time and again, in the night a male person came, removed her knickers and placed his sexual organ into her sexual organ. That evidence aside, Nalubega also testified that when she went to Kasangati to pick up Anifa on 6th February 2000 she found her in a depressed state. Anifa related to her what had befallen her. Nalubega then, examined Anifa and found pus in her private parts. Subsequently, she took Anifa to Hospital for treatment.

Anifa's evidence showing the intended use of unlawful force upon her person in the nights in question and Nalubega's evidence tending to confirm Anifa's story was not actually contradicted. Court takes it that the said evidence represents what actually happened to Anifa at Kasangati in December 1999. In the circumstances, Court is satisfied that the prosecution proved, beyond reasonable doubt, that some one assaulted Anifa at Kasangati during the month of December 1999.

With regard to the second ingredient, that it to say, that such assault was indecent Court has this say. Collins English Dictionary & Thesaurus defines the word indecent as follows,

“1. Offensive to standards of decency especially sexually.

2. unseemly or improper...”

Again the prosecution relied on Anifa's and Nalubega's testimony in a bid to prove this ingredient. Anifa's testimony was that while she stayed with the family of the accused at Kasangati in December 1999 some one, time and again. Sneaked to the sitting room where she slept at night. That person removed her knickers and then placed his sexual organ into her sexual organ. Nalubega also testified that when she went to pick up Anifa from Kasangati on 6th February 2000 she found her in a depressed state. Anifa narrated to her mother her ordeal. In turn, her mother (Nalubega) examined her and found pus coming out of her private parts. Subsequently, Nalubega took Anifa to hospital where she received medical treatment.

As earlier on pointed out Anifa's and Nalubega's evidence was not shaken in cross-examination. Therefore, Court accepted both pieces of evidence as the truth. Indeed, among other things, the above evidence shows that whoever engaged in such acts against Anifa did something offensive to any standard decency, especially in sexual matters. Those acts were also unseemly and improper. In the circumstances, Court is of the opinion that the prosecution succeeded in proving beyond reasonable doubt, that the assault Anifa suffered during her stay with the family of the accused at Kasangati in December 1999 was decent.

With regard to the third ingredient, that is to say, that the accused was the person who committed the offence in question, the prosecution solely relied on Anifa's testimony in a bid to prove this aspect of its case. Anifa's testimony was that on various nights in December 1999

while she was on holiday with the family of the accused at Kasangati, the accused sneaked in the sitting room where she slept, removed her knickers and placed his sexual organ into her sexual organ. At first, Anifa shouted, but the accused threatened that he would throw her into a pit if she continued to do so.

In his defence the accused denied having committed the offence in question. He explained that he was framed because he did not respond to Nalubega's overtures to befriend her.

Anifa's evidence above was not shaken in cross-examination. Therefore, Court thinks that she was truthful, even, in that area of her evidence. However, it should be remembered that the attacks in question took place at night and in darkness. For that reason, Court must, also, be satisfied that Anifa was not mistaken in identifying the accused as her attacker. **(See Rorial v Republic (1967) E.A 583; and Nabulere v Uganda (1979) HCB 77.)** According to Anifa's testimony she was sure it was the accused who committed the offence in question because at the material time she heard his voice which she knew well. Secondly, the accused was the only male person living with them at the time of the offence. In court's opinion those two factors or circumstances lead to no other conclusion than that it was the accused who committed the offence in question. **(See Simon Musoke v R (1958) E.A. 715.)** In the circumstances, Court is satisfied, too, that Anifa could not have been mistaken in identifying the accused as her attacker.

ALL IN ALL, Court is of the opinion that the prosecution succeeded in proving beyond reasonable doubt, that it was the accused who committed the offence in question. The accused person's defence is simply a lie, which was crafted with view to saving his skin; and Court hereby rejects it. In agreement with the first assessor but in disagreement with the second assessor, for the reasons given above, Court has no choice but to find the accused guilty of the offence of indecent assault contrary to section 122 of the Penal Code Act; and therefore hereby convicts him accordingly. It is so ordered.

E.S. Lugayizi (J)

20/11/2002

Read before: At 3:07 p.m.

Accused

Mr. A. Muhuniza for the State

Mr. Ntende for accused

The assessors

Mr. Sewanyana c/clerk.

E.S. Lugayizi (J)

20/11/2002