

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO. 08 OF 2002

UGANDA.....PROSECUTOR

VERSUS

KASUMBA JOSEPH.....ACCUSED

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

JUDGMENT

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

“KASUMBA JOSEPH on the 24th of Feb 2001 at Kyebando Erisa zone in the district of Kampala did unlawfully and carnally know NABUKEERA OLIVER, a girl under the age of 18 years.”

The accused denied the indictment. As a result Court tried him. During the trial the prosecution called four witnesses, namely, Nabukeera Oliver (PW1); No.070 SPC Kyakuwa Moses (PW2); Sebyala Billy Christopher (PW3); and Dr. Kalyemenya (PW4). The accused called one witness and that was himself (DW1).

In brief, the prosecution case was as follows: On 24th February 2001 at around 10.00 a.m. Nabukeera Oliver, who was a student at Alliance High School at Kyebando, went to the accused person’s home to return a chemistry book. On arrival, the accused opened the door for her and ushered her into the house where the two had sexual intercourse. Later on, the accused was arrested and charged with defilement.

The accused made his defence under oath and denied having committed the offence in question. He explained that he was framed because of a grudge one Ben Kizito Nkugwa (a relative of Nabukeera and head master of Alliance High School) had against him.

Before discussing the merits of this case Court wishes to point out that it will not apply the rule of practice that requires it to warn itself against acting on the uncorroborated evidence of a victim in a case where the victim has made a sexual allegation against an accused. **(See Chila v Republic (1967) E.A. 665 and Boona Peter v Uganda (CA) Criminal Appeal No. 16 of 1992.)** This is because in **Uganda v Peter Matovu Criminal Session Case No. 146 of 2001** Court came to the conclusion that the said rule discriminates against women and is therefore unconstitutional and inconsistent with Uganda's international obligations under various conventions.

In order for the prosecution to succeed in a case of defilement it has to prove, beyond reasonable doubt, the following ingredients of that offence,

- (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 on the day in question;
- (c) That the accused is the person who committed the offence in question. **(See section 123(1) of the Penal Code Act; Woolmington v DPP (1935) AC 462; and Bigirwa Edward v Uganda Criminal Appeal No. 27 of 1992.)**

Court will proceed to discuss the above ingredients in light of the law and the evidence on record with a view to establishing whether or not the prosecution proved each of them beyond reasonable doubt.

With regard to the first ingredient, that is to say, that the victim was a girl under the age of 18 years on the day in question the law is clear. It is that the best evidence of someone's age is a birth certificate.

However in its absence the evidence of a person, such as a relative, who is well acquainted with the age of the victim is admissible. **(See Uganda v Enoch Babumpabura Criminal Session Case No. 135 of 92.)** Observation and application of common sense is also an acceptable method of determining 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 produce a birth certificate to prove Oliver's age at the time the offence was committed. Instead, it called Sebyala (who pointed out that Oliver was born in October 1985. Dr. Kalyemenya who examined Oliver on 26th February 2001 explained that he formed the opinion that Oliver was of the apparent age 15 years then. He based his opinion on her physical appearance that included her dentition. According to Dr. Kalyemenya, Oliver had a set of 28 teeth. That was consistent with the fact that, ordinarily, persons below the age of 18 years have that number of teeth. However, persons of 18 years of age and above have 32 teeth.

Sebyala's evidence and Dr. Kalyemenya's finding as to Oliver's age at the time of the offence were neither challenged nor contradicted. For that reason, Court is of the opinion that they represent the truth. In the circumstances, Court is satisfied that the prosecution succeeded in proving beyond reasonable doubt, that Nabukeera Oliver was a girl under the age of 18 years on 24th February 2001.

With regard o the second ingredient, that is to say, that the victim had sexual intercourse on the day in question Court has this to say. According to Archibald on Criminal Pleading 30th Edition page 1124 at paragraph 2843 sexual intercourse is complete when a male sexual organ penetrates a female sexual organ; and the slightest penetration is enough. Courts in this country have time and again applied that principle with approval. (See Habyarimana Ronald v Uganda (CA) Criminal Appeal No. 35 of 1997.) In the instant case, the prosecution mainly relied on Oliver's testimony to prove this ingredient. She testified as follows. On 24th February 2001 at 10.00 a.m. she visited a male person's home at Kyebando. While at that home that person took her to his bed. They undressed and the man inserted his sexual organ into her sexual organ; and the two had sexual intercourse. That evidence aside, Kyakuwa explained to Court that y 2001 after being tipped, he visited a certain house at Kyebando. Inside that house Kyakuwa found a male person who was dressed only in trousers. He did not wear a shirt. Shortly afterwards, he saw Oliver. She had covered herself with a blanket and was lying naked in a bed. Her clothes were in a nearby chair.

In his defence the accused denied having had sexual intercourse with Oliver on 24th February 2001. He pointed out that the allegation was a frame up arising out of a grudge, which Ben

Kizito Nkugwa (the headmaster of Alliance High School who was also Oliver's relative) had against him.

Oliver's and Kyakuwa's evidence above was not shaken or contradicted in cross-examination. Therefore, Court is of the opinion that it represents the truth. Oliver's evidence, by itself, is enough to satisfy Court as to the identity of the person who committed the offence in question.

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(See Uganda v Peter Matovu-supra.) Indeed, Oliver could not have been mistaken about that fact for she knew the accused before as her English teacher. In addition, the offence was committed in the accused person's home in broad daylight between 10.00 a.m. and 4.00 p.m.

In view of the above, therefore, Court is of the opinion that the prosecution succeeded in proving, beyond reasonable doubt, that it is the accused who committed the offence in question. The defence case is just a pack of lies, which were crafted in an attempt to save the accused person's skin; and Court hereby rejects it.

All in all, and in agreement with the assessors, Court has no choice but to find the accused guilty of the offence of defilement; and Court hereby convicts him accordingly.

E.S. Lugayizi

JUDGE

4/11/2002

Before: At 3.20 p.m.

Accused

Mr. Ndamurani for the State

Mr. Bwengye for accused

The assessors

Mr. Senabulya c/clerk

E.S Lugayizi

JUDGE

4/11/2002