

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CRIMINAL SESSION CASE NO 10/2002

UGANDA:.....PROSECUTION

VERSUS

MUKOOZA AUGUSTINO:.....ACCUSED

BEFORE: THE HON JUSTICE V.F. MUSOKE-KIBUUKA

The accused person, Kakooza Augustino, was indicted for defilement contrary to 123 (1) of the Penal Code Act. The prosecution which bears the burden of proof to prove the case against an accused person beyond any reasonable doubt, **see vs Cheluman Wero Olango (1937) 4 EACA 46 AND Otim Gabriel vs. Uganda SCCA No. 16 of 1993, called five witnesses**

The case for the prosecution, as summarized from the evidence on record, is that the complainant PW1, Nalubega Robina, in 2001 lived with her mother, PW2 Nakate Josephine. They lived at Nyendo within Masaka Municipality. PW1 attended Hope Nursery and Primary School.

On 31st 2001, PW1 went to the market to buy some tomatoes. As she proceeded home she met a man standing by a shop. The man engaged her in some conversation during which he asked her to become his wife. The man gave her Shs. 13,000/= after which he grabbed her and had sexual intercourse with her while tying a handkerchief around her mouth to prevent her from making an alarm. That took place in a busy area behind Bright Grammar Primary School.

The following day, the complainant again met the same man and the two had sexual intercourse at about 1.00 p.m. in an unfinished building near Bright Grammar Primary School. The complainant, for some days, kept it to herself and never revealed to anyone that she had experience sexual intercourse.

Later the complainant revealed to her mother PW2, Nakate Josephine that the person who had given her the Shs. 13,000/= had had sexual intercourse with her. She led her mother, PW3,

Ngobya Dan and PC, Baruku Jerome, to a bar in Nyendo where she pointed out the accused as the man who

PW5, Doctor Rukundo Tom of Masaka Hospital examined PW1 on 4th September 2001, against Police Form 3 (Exh P1) He found her aged 13 years. Her hymen had ruptured about five days previously and had healing edges. Her vagina was inflamed. The doctor found signs of sexual penetration.

The accused was identified in Court by the complainant as the person who had sexual intercourse, on two separate occasions, with her and by PW2, PW3 and PW4, as the man who was pointed out to them by PW1 as the man who had engaged her into sexual intercourse and whom they arrested from a bar at Nyendo.

For this defence, the accused denied having any sexual relationship with the complainant. He stated that he first saw the complainant when she pointed him out in the bar if one Maama Ssali at Nyendo where he was drinking beer with some friends. The accused also claimed that the case against him was framed up by PW2, the mother of the complainant. The accused said that he and PW2 had been lovers for some time. But the accused had walked out of that relationship sometime in July 2001, because the accused he had befriended another woman by the name of Fenesta. Nakate had framed up the charge of defilement against the accused in order to secure her revenge against him in that respect.

The offence of defilement has three essential ingredients. Each essential ingredient must be proved by evidence, beyond reasonable doubt, in order for a conviction to be entered upon the indictment. The three essential ingredients are:-

- (a) age of the complainant;
- (b) act of unlawful sexual intercourse involving complainant; and
- (c) participation of the accused.

In the instant case, the defence has specifically conceded to two of the three essential ingredients of the offence of defilement as proved by the prosecution during this trial, beyond any reasonable doubt. The two are, the age of the complainant being below 18 years during the month of

August, 2001 and the complainant having been involved into an act or acts of unlawful sexual intercourse during the months of August 2001.

Since it is the duty of the Court to make a specific finding on each of the essential ingredients of the offence involved in this trial, I will briefly state this Court's conclusion, in respect of the first two essential ingredients of the offence of defilement without detailed evidential analysis.

On the age of the complainant this Court is satisfied that the evidence of PW1, PW2 and that of Doctor Rukundo, PW5, proved beyond any reasonable doubt that on 31st August, 2001 the complainant was aged below 18 years. This Court had the opportunity of seeing the complainant in the witness's box. She testified upon oath after a *voire dire* had been conducted to establish whether she could testify upon oath or not. Her general appearance was that of a child below 18 years.

Regarding the alleged act of unlawful sexual intercourse, the complainant's evidence was most elaborate as to what transpired between her and the man who engaged her into sexual intercourse no more than one occasion. Her evidence is strongly corroborated by that of Doctor Rukundo, PW5, and the findings of the doctor set out in Exhibit P1. This Court is therefore, dully satisfied that the prosecution has proved, beyond reasonable doubt, that the complainant was involved into an act of unlawful sexual intercourse as alleged in the indictment.

Essential ingredient number three was the actual bone of contentions in this case.

To prove the identity of the accused person in this case, the prosecution has produced the evidence of PW1 is the complainant in a sexual offence. As a rule of the practice of this Court, her evidence would require corroboration ***Chila and others vs. Republic (1967) E.A. 722***. However, the Court may go ahead and act upon the uncorroborated evidence of the complainant, after warning itself that the assessors of the danger involved, if the Court believes that the complainant's evidence is truthful. I did warn the gentlemen assessors and myself in that respect.

Learned Counsel for the defence, Mr. Nyanzi, threw the question of the truthfulness of the complainant in this case in wide focus. He asked this court to examine her previous conduct in relation to this case whereby she had lied to both hee the source of the shs. 13,00/= and

determine whether she was not telling another deliberate lie with regard to the identity of the accused person in this case.

After observing PW1 testify in Court and observing her demeanor and assessing her credibility, I have not the slightest doubt in my mind that she was a highly truthful witness. She had seen the accused not on one single occasion but on more than three different occasions. The time was always day time and she had a lot of time with the accused on all those occasions. She knew where the accused worked and where he stayed. There is therefore no permissibility of any mistake identity when she pointed him out to the police on 4th September 2001. She did so without any hesitation.

The accused's defence of a total denial cannot stand in view of the evidence adduced against him by the prosecution during this trial. The second defence of a frame up of the case against the accused by PW2 does not seem equally to be without substance or merit. PW2 specifically stated that she had never seen the accused before his arrest. I have no doubt about her testimony. She appeared to me to be a credible witness in all aspects.

The two gentlemen assessors in this case, Mr. Muwwulya Haruna and Mr. Kiggundu Henry gave me an unanimous opinion. They both advised me that the prosecution had proved the case against the accused person beyond any reasonable doubt and the accused is convicted as charged. I am in full agreement with both gentlemen assessors in that regard.

I, therefore convict the accused of the offence of defilement contrary to section 123 (1) of the Penal Code Act.

V.F MUSOKE-KIBUUKA

JUDGE

19/12/2003

Ms. Nandawula: the convict's criminal record is unknown. He has been convicted of a very serious offence. He took advantage of a very young girl aged only 13 years and seduced her with money. He is a dangerous person to society. Small girls are in danger as men lure them using money especially in this era of the deadly disease Aids. I pray for a severe sentence.

Mr. Nyanzi: it is true the convict has been found guilty of a serious offence because it is punishable with the most maximum sentence known in law. I pray that Court passes a custodial sentence instead, which will serve a better purpose. The convict has been on remand for a period of 2 years and four months. I pray as above.

V.F. MUSOKE-KIBUUKA

JUDGE

19/12/2003

Accused: I did not commit the offence. I pray for lenience.

Court: Sentence and Reasons.

This convict has been convicted of defiling a young girl aged 13 years at the time. He is a first offender. He used money to lure the girl into illicit sex. He does not appear remorseful or repentant. He did not commit the offence once but more than once.

If he had not spent 2 years and 4 months on remand I would have sent him on custodial term of 9 years. In the circumstances, I reduce the period by 2 years and 4 months and sentence him to imprisonment for 6 years and 8 months.

V.F. MUSOKE-KIBUUKA

JUDGE

19/12/2003

Court: Right of Appeal explained.