

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CRIMINAL SESSION CASE NO. 08 OF 2003

UGANDA.....PROSECUTOR

Versus

KIZITO MUTYABA.....ACCUSED

BEFORE: HON. MR. V. A. R. RWAMISAZI-KAGABA

J U D G E M E N T

Kizito Mutyaba, who I shall refer to as “the accused” in the rest of my judgment is indicted for the offence of defilement contrary to section 129(1) of the Penal Code Act. It is alleged in particulars of the offence that Kizito Mutyaba, on the 9th day of December 2001 at Lusaana village, in Mubende District, had unlawful sexual intercourse with Nakizula Irene, a girl under the age of 18 years.

The accused denied the charge and was represented at his trial by Senyonga Karnya, while the prosecution was conducted by Niyonzima Vincent, a State Attorney based at Mubende. The case of the prosecution rested on the evidence of five witnesses. The gist of that evidence is that three girls namely Irene Nakizula, (PW2) Twinomugisha Harriet (PW3) and Nabisubi. Pros (PW4) left school at about 1.00 p.m. to go and eat or catch grasshoppers at the home of Nabisubi.

. Nabisubi who was the niece to the accused suggested that they branch at the house of the accused. Accused was at home. They entered his house and he received them. As they were leaving the accused’s house, he grabbed Nakizula, dragged her to his bedroom and had forceful sexual intercourse with her on his bed. She felt pain and went out crying. She was bleeding from her vagina. She told her companions Twinomugisha and Nabisubi, who were

waiting for her outside the accused's house that the accused had defiled her. The victim went home, reported to her mother that Kizito had defiled her. Her mother reported the sexual assault on their daughter to her father, Ronald Mutebi (PW5).

Mutebi reported the offence to Kasana Police Post next day. The police directed Mutebi to arrest the accused, but when Mutebi went to the accused's house, at about midday, the accused was not at home. The accused was eventually arrested from the house of Gerald, while hiding and covered with a blanket.

The victim was taken to Dr. Wagaba who examined her on P.F. 3 on the 10/12/2001 and put his findings on exhibit P1.

In his defence, the accused denied the charge but he admitted he was at his house and that the three girls visited him.

In all criminal cases the burden of proving the guilt of the accused and the ingredients of the offence with which the accused is charged rests with the prosecution. The accused has no burden to prove his innocence or to disprove the prosecution testimony. The prosecution shall succeed on the strength of its evidence. The weakness of the defence case or lies told by the accused shall not be a basis for convicting the accused, where a reasonable doubt is created by the prosecution evidence or the evidence adduced by both sides, that doubt must be resolved in favour of the accused.

I directed the assessors as I also warn myself on what the burden of proof means, the standard of proof required and the meaning of a reasonable

trial

See: (1) Woolmington vs. D.P.P. (1935) A. C. 462.

(2) Sekitoleko vs. Uganda (1967) E.A. 531.

(3) Ojapan Ignatius vs. Uganda - Criminal Appeal No. 25/1995 (S.C.)

(4) Leonard Aniseth vs. Republic (1963) E.A. 206.

This is sexual offence where the courts have insisted on the victim's evidence being corroborated before a conviction of the accused is founded on it. This evidence may be direct or circumstantial. It may be in the form of expert opinion, such as a doctor. But the court can still convict, if after warning itself of the danger of convicting basing on uncorroborated evidence, it finds the testimony of the prosecutrix truthful and reliable.

See: (1) Charles Katende vs. Uganda (1971) 2 ULR 10

(2) Safari Innocent vs. Uganda - Criminal Appeal No. 20/1995 (S. C.)

Both Nakizula (PW2) and Nabisubi (PW4) were witnesses of tender age who gave evidence on oath. It is not, therefore, necessary as a matter of law to have their testimony corroborated under section 40(3) of the Trial on Indictments Act. But because of their tender age, and as a matter of caution,

I will look for some other evidence to corroborate theirs. I must bear in mind that evidence which requires to be corroborated cannot corroborate other evidence which also requires to be corroborated as a matter of law.

See: (1) Lwanga Yusuf vs. Uganda (1977) HCB 280

(2) Uganda vs. Benedicto Kibwami (1972) 2 ULR 29.

(3) Kibangeny Arap Kolil vs. R (1959) E.A. 92

The accused is indicted for defilement which consists of three ingredients:

- a) That the victim (Nakizula) was a girl below eighteen years of age on the 9/12/2001.
- b) She (Nakizula) was subjected to penetrative sexual intercourse.
- c) It was the accused, Kizito who had sexual intercourse with her.

See: (1) Uganda vs. Ahimbisibwe Leonard alias Kanyampaka H. C. Criminal Session Case No. 161/99 (2) Bassita Hussein vs. Uganda - Cr. Appeal 35/1995 (S.C.)

On the issue of age Nakizula stated she was now 13 years old attending P.7. She was brilliant and spoke good English. Her father, Ronald Mutebi told court that Nakizula was born on the 29/7/1990. Dr. Wagaba Francis examined the victim on P.F. 3 on the 10/12/2001 and found her to be ten (10) years old then.

Both the prosecution and the defence agreed that the victim was below 18 years and treated the age of the victim as an admitted fact. The court also finds after observing the victim in court that she was and still is a person below the age of eighteen years. The issue of age is therefore proved.

Sexual intercourse means the slightest penetration of a male penis into the female's vagina. A female is any person who is born a female from the minute she emerges from the vagina of her mother. Sexual intercourse may be proved by direct or circumstantial evidence. It may be proved by expert evidence such as that of the doctor. That is why it always desirable that the victim in cases of defilement should be examined by a doctor whose opinion is relevant to prove the fact of sexual intercourse having taken place.

Whereas such accompanying features as ejaculation, presence of semen in the vagina, rapture of the hymen, hollow cavity of the vagina, injuries in or around the vaginal area may be

useful indicators of sexual intercourse having taken place, their absence do not exclude sexual intercourse having taken place.

As already stated, the prosecutrix was a young intelligent girl who narrated how the accused dragged her to his bedroom thereby separating her from her colleagues - PW3 and PW4. He pushed his penis into her vagina on his bed and the sex act lasted for a long time.

I find useful corroboration of her story in her bleeding from her vagina, feeling pain and reporting to both Twinomugisha and Nabisubi that Kizito had defiled her. Both PW3 - Twinomugisha and Nabisubi (PW4) saw her being dragged into the room by the accused and emerging therefrom while crying.

I also find the victim's story corroborated by the findings of Dr. Wagaba - on Exhibit P.1. He found Nakizula with injuries on her private parts, her hymen had been ruptured three days back and there were signs of her vagina having been penetrated about the same time. Finally the conduct of the accused lends substantial corroboration to the victim's story. The accused gave money to the girls, Nakizula being offered the highest amount to seduce his victim to surrender her sex to him, and if, the money was given after the act, to stop the victim and the other girls publishing the story of Nakizula's defilement.

The accused did not stop at giving money, he raised the sound of his radio so that the cries of Nakizula could not be heard by people outside his house. Lastly, after the sex act on Nakizula, he escapes from his house to the house of Gerald which is a mile from his house. While there, he covers himself with a blanket at a strange hour of midday.

The conduct of the accused as described above can only indicate a sense of guilt on his part after defiling Nakizula and corroboration to her testimony.

. See:(1) Muhamed Mukasa & anor vs. Uganda-Criminal Appeal 27/95 (S.C.)

(2) Telesfora Alex & anor vs. Republic (1963) EA 140.

Whereas lies told by an accused person may not form the basis of his conviction, such lies can provide useful corroboration of the prosecution case. The obvious lies told by the accused in this case are three. He told a lie when he said Twinomugisha had come to seduce him to be her husband. This story never surfaced when all three girls (PW2, 3 and 4) were testifying. The second lie was denying knowledge of Nakizula but later admitting he knew her and her father who he refused to give a commission after Mutebi (PW5) secured him a motor-cycle for purchase.

The third lie was about the motor-cycle deal with Mutebi which he did not raise when Mutebi was testifying in court.

All these lies tend to corroborate the prosecution story that the accused was the defiler of Nakizula. His lies and strange behaviour point to one conclusion of Kizito having defiled Nakizula.

On the third ingredient, the accused was well - known to the three girls - his visitors at 4.00 p.m. The offence was committed in broad daylight. The accused in his testimony admitted being at his home when the victim and her friends came to his house. All the three witnesses stated how they went to his house, how he dished money to them and how he took his victim to his room for sexual intercourse while Tiwnomugisha and Nabisubi cursed and protested that they were going to accuse him. The accused has therefore placed himself at the scene of crime when Nakizula was defiled. His subsequent conduct of running away from home and hiding at Gerald's house under cover of a blanket together with the lies he told at different stages of the case, are evidence of his guilty knowledge and participation in the crime. All the factors for proper identification were available to prosecution witnesses and I have no reason to doubt the prosecution story that it was Kizito who defiled Nakizula.

In his defence, the accused said he was at his house when the three girls came there. He denied ever having sexual intercourse with Nakizula. He told court that the case was manufactured by the three girls because he refused to accept the marriage proposal of Twinomugisha (PW4) and by Mutebi (PW5) who he refused to give a commission after Mutebi secured him a motor-cycle for purchase.

Where an accused alleges that a prosecution witness has told lies against him for a certain motive or grudge, that allegation must be investigated, and if found to have any merit, the evidence of the witness must be considered and applied with caution. Short of rejecting the evidence of a prosecution witness which is tainted with a motive, and applying the necessary caution, the court may look for some other evidence to corroborate that evidence.

See: (1) R. vs. Beck 74 Criminal Appeal Reports 74

(2) Archbold - 1997 Edition par 16-17 page 1498.

(3) Stephen Oporocha vs. Uganda (1991) HCB 8.

(4) Odwong Denis vs. Uganda (1992-93) HCB 70

Applying the principles stated above to the present case, I find the allegations labeled against the prosecution witnesses lacking any merit. All the witnesses accused of engineering the case against him gave evidence as PW2 to PW5. The accused did not raise any allegation

against any of them. The story sounds incredibly false against the three school children, who at their tender age, would not go out of their way to solicit the accused's love or marriage to one of them. I saw Mutebi in the witness box. He appeared a composed and serious man, who I think, would be the last person to engage in such dubious dealings as the accused was imputing against him.

I reject the accusations of the accused as mere lies coined by him to tarnish the image and evidence of the prosecution witnesses. I found the witnesses the accused imputed a grudge or motive straight and un wavering in the way they presented their testimony in court.

I observed one contradiction in the prosecution testimony and that was whether the accused gave money to the visiting girls before or after he defiled Nakizula. Does this contradiction render the evidence of the three girls unreliable? The general principle regarding the inconsistency in the evidence of witness or witnesses is that not every inconsistency will result in the witness's testimony being rejected. It is only grave inconsistency unless satisfactorily explained, which will usually, but not necessarily result in the evidence of a witness being rejected. Minor inconsistency will not, usually have that effect unless the court thinks they point to deliberate untruthfulness.

See (1) Serapio Tinkamalirwe vs. Uganda - Criminal Appeal 27/1989(S.C.)

(2) Constantino Okwel alias Magendo vs. Uganda - Criminal Appeal No. 12/1990 (S.C.)

I find the timing and squency when money was given a minor contradiction which can be explained in terms of the period that had elapsed since the event took place and their testifying about it. The inconsistency can also be explained in the context of the age of Nakizula and the trauma to which she was being subjected by the accused. In light of the evidence given by the prosecution witnesses, who I found truthful and reliable, I find the defence given by the accused as nothing but lies.

After considering all the prosecution and defence evidence together, I find the prosecution has proved all the ingredients of the offence of defilement against the

accused beyond reasonable doubt. In agreement with the opinion of both assessors, I find the accused guilty and convict him for the offence of defilement under section 129(1) of the Penal Code Act.

V.A.R.Rwamisazi- Kagaba

JUDGE

22/7/2004