

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CO-0176-2002

UGANDA.....PROSECUTOR

VS

TUSIIME YONA.....ACCUSED

BEFORE: THE HON. MR. JUSTICE P.K. MUGAMBA

JUDGMENT

Tusiime Yona is charged with defilement, contrary to section 129 (1) of the Penal Code Act. The five witnesses called by the prosecution were the victim herself as PW1, Mbagirwa Alfred as PW2, Sabiiti Banard as PW3, D/ASP Baryabasha Billy as PW4 and Dr. Mugisha Trifon as PW5. A charge and caution statement was admitted in evidence. The original Runyankole/Rukiga statement is exhibit P.1. The English translation is exhibit P.2. In his defence made a statement on oath. It was an alibi.

The prosecution case is that accused had been husband to the sister of the victim. That sister had since died leaving two orphans. There was an arrangement for the orphans to get supplies of milk from their maternal grandfather. On the day material to this case the victim had gone to accused's home to deliver milk at about 5 p.m. While she was there accused had summoned her into his house after which he had locked the door. He had proceeded to have sexual intercourse with the victim forcefully. Later the victim had been rescued by her father, PW2 and the secretary for defence, PW3. Accused was thereafter arrested and charged with the offence. A medical examination of the victim was carried out. The report is exhibit P.3.

The onus is on the prosecution to prove the charge against an accused beyond reasonable doubt. See *Sekitoleko vs Uganda* [1967] 531. It is not the duty of the accused person to prove his innocence. Where the charge is of defilement the following ingredients ought to be proved:

- i. That the victim was below 18 years of age

- ii. That the victim had sexual intercourse on the occasion, and
- iii. That accused participated in the crime.

There was no birth certificate produced as evidence of the age of the victim. The father of the victim, PW2, testified that at the time material to this case the victim had been 12 years old. PW1 states her age at the time of her testimony to be 15 years. The age of the victim in 2001 when she was medically examined is given as 12 – 14- years in exhibit P.3. I am satisfied that at the time of the alleged offence in the year 2001 the victim was below 18 years of age. This ingredient has been successfully proved by the prosecution.

The victim testified as PW1 saying that she had sexual intercourse on the occasion alleged. The defence itself does not contest evidence that the girl had s consequently I find this ingredient proved by the prosecution beyond reasonable doubt.

The prosecution must prove also that accused participated in the alleged crime. This must be proved by the prosecution to the required standard I have already related to. It is not the responsibility of o prove his innocence. In this case accused set up a defence of alibi. He stated on oath that at the time in issue he had taken cattle for grazing four miles away from the scene. He added that he did not return home on that material night. When an accused person sets up a defence of alibi it is not his duty to prove it. It is the responsibility of the prosecution to disprove and destroy it by adducing evidence which places the accused person squarely at the scene of crime. See Watete alias Wakhoka & others Uganda [1998-2000] HCB 7. For the prosecution the victim stated that accused had been at home on the evening in issue and that he was the one who called her into the house and locked her inside before he had sexual intercourse with her. There is also the evidence of the father of the victim, PW2, who stated that when he was called to the scene he found the victim outside the house while accused was inside the house. In addition there is the extra judicial statement in which accused admits he had carnal knowledge of the victim for the first and only time ever on the occasion.

The prosecution evidence has to be evaluated alongside defence evidence. As I have pointed out prosecution evidence must have preponderance over defence evidence in order to disprove the alibi. For reasons best known to itself the prosecution elected not to cross examine the accused on his defence statement made on oath. I hold this was an unfortunate departure. In a similar case

the Supreme Court Appeal No. 7 of 1998 matter. In Abasi Sali & Kasendwa Muhamed vs Uganda Criminal Appeal No. 7 of 1998 reported in 1 SCD (Crim) 1996/2000 at page 125, 135 the following wisdom appears:

‘In our view failure by the learned judge to properly evaluate the evidence of the two appellants on their alibis is fatal. The learned Judge and two assessors did not give sound reasons as a basis for rejecting the alibis. The evidence on alibis has been given on oath. That evidence was not shaken in cross-examination. Remembering that, under our criminal justice, the prosecution, in a criminal trial, throughout the trial bears the burden of proving the guilt of an accused person, we are not satisfied that in this case, the prosecution had discharged that burden to the standard required in a criminal trial.

We think, with respect, that both the trial Judge and the Court of Appeal erred when they did not evaluate the defence evidence. In our view the evidence of alibis raised a reasonable doubt which must be resolved in favour of the appellant. -----‘

Need I add more? By failure to challenge accused’s alibi the prosecution conceded to the veracity of his testimony of an alibi. As it stands disproved, I find the prosecution has equality failed to prove the accused participated in the alleged crime.

In their joint opinion the gentlemen assessors advised me that while the prosecution had proved two ingredients, the age of the victim and that she had sexual intercourse, beyond reasonable doubt there was no such proof of accused’s participation in the crime alleged. They advised that I should find accused not guilty. For the reasons that I have given in the course of this judgment I agree with that opinion. I find accused not guilty and acquit him of the charge.

P.K. Mugamba

Judge

25th April 2005