

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

**HCT-05-CR-SC-088-2004**

UGANDA.....PROSECUTOR

VS

NUWAGABA PEREGI.....ACCUSED

BEFORE: THE HON. MR. JUSTICE MUGAMBA

**JUDGMENT**

Nuwagaba Peregi, the accused, is charged with defilement, contrary to section 129 (1) of the Penal Code Act. to prove its case the prosecution called six witnesses. The prosecutrix testified as PW1, Kerani Muheirwe was PW2, Geoffrey Kazoora was PW3, Matsiko Shaban was PW4, D/C Onume Geoffrey was PW5 while Turyasingura Micheal D/ASP was PW6. Police Form 3 detailing results of medical examination on the prosecutrix was received as Exhibit P1. The evidence on it was agreed under S. 66 of the Trial on Indictments Act.

Briefly the case for the prosecution is that on 11<sup>th</sup> February 2003 the prosecutrix was walking back home to Ihoho village from Katooma. Along the way she came to a hill where cattle grazed with accused in their charge. The time then was about 11.00 a.m. As the prosecutrix went past accused, accused had arrested her by holding her arm before throwing her to the ground where he proceeded to have sexual intercourse with her. The then 15 year old girl tried to raise an alarm but accused had stopped her by putting his hand on her mouth and assaulting her. For one hour accused did not release the prosecutrix. When the prosecutrix was finally free she reported her experience to the local authorities who proceeded to arrest accused following details of her description of him. Upon his arrest accused was identified by the prosecutrix as the person who had molested her. Accused was taken to Police to where he was detained and later charged with this offence.

In his defence accused made an unsworn statement. He denied involvement in the offence.

The prosecution has a duty to prove the case against an accused person beyond reasonable doubt. Accused is under no duty to prove his innocence except in some limited cases. But this is not one of them. Where the charge is defilement the prosecution must prove the following ingredients:

- i. That the prosecutrix was below 18 years at the material time,
- ii. That the prosecutrix had sexual intercourse at the time alleged, and
- iii. That accused participated in the offence.

The best evidence of age of a person is a Birth Certificate. Where this is not available courts have reached conclusions regarding age from testimony by person who are acquainted with the age of the individual involved, results of medical examination or from general observation of the individual when that individual appears before court.

PW4 testified that he is brother to the prosecutrix. He stated that at the time material to this case the prosecutrix was 15 years old. There was also medical evidence contained in Exhibit P1 which showed that on examination the prosecutrix was 15 years old. The defence does not contest the age of the prosecutrix as presented by the prosecution. I am satisfied this ingredient has been proved by the prosecution beyond reasonable doubt.

Sexual intercourse is competence when there is penetration of the female organ by the male sexual organ, however slight this might be. PW2, PW3 and PW4 testified that PW1 had told them she had experienced sexual intercourse. Medical evidence which was admitted shows that she had sexual intercourse in the recent past. The alleged date of intercourse was 11<sup>th</sup> February 2003 and the examination was done on 13<sup>th</sup> February 2003. There is also the extra judicial statement which was admitted in evidence. The statement disclose that the girl had sexual intercourse on 11<sup>th</sup> February 2003. It is not contested by the defence the girl had sexual intercourse then. This ingredient also has been proved by the prosecution beyond reasonable doubt.

It was the testimony of PW1 that accused was the person who had sexual intercourse with her. When she freed herself from the person who molested her she told PW2, PW3 and others where she had met the person who molested her, that he had a hat on, that he wore a blue sweater with red marks on the front, that he was brown and tall and that he was looking after cattle. PW3 and others who went to look for a person answering the description given by PW1 came across

accused, it was the evidence of PW3 that accused tried to flee but that he was soon apprehended. Accused was well known to PW3. Upon arrest of accused, he was immediately identified by PW1 as the actual person who had molested her earlier on that day. Accused was thereupon taken to the Sub-County headquarters and later to Police.

There was an extra judicial statement which was admitted in evidence. It was made by the accused person before PW6, a Police officer permitted to record such statements. In the statement accused admitted the offence but later he repudiated it in court. It is unsafe to base a conviction on a repudiated confession which is not corroborated. See *Uganda vs Emmanuel Rwaheeru & Another* [1987] HCB 19. In the instant case accused admitted to having had sexual intercourse with the prosecutrix on the occasion alleged. The evidence in the extra judicial statement is corroborated by that of PW1, PW2 and PW3.

Accused in his defence denied involvement in the offence alleged against him. When an accused person puts forward an alibi as his defence he does not assume the responsibility to prove it. The prosecution has a duty to prove the alibi by adducing evidence which places the accused person squarely at the scene of crime.

I have looked at the evidence adduced by the prosecution as well as the defence of the accused person and I am satisfied the prosecution has disproved the alibi. Accused's description and location were given to PW2, PW3 and others. Following those details accused was arrested when trying to escape. After his arrest he was produced before PW1 who recognized him as the person who had molested her short while before. The extra judicial statement adds credence to the evidence. The alibi has been shattered and I reject it as false.

The prosecution has proved beyond reasonable doubt that accused participated in the crime.

The assessors in their joint opinion advice me to find accused guilty and convict him as charged. What I have stated earlier in the course of this judgement agrees with that opinion. Consequently I find accused guilty of the charge and convict him of defilement.

P.K. Mugamba

Judge

20<sup>th</sup> June 2006

20<sup>th</sup> June 2006

Accused

Mr. Dhabangi for accused person

Mr. Onencan State Attorney

Mr. Tuhaise court clerk

Court:

Judgement read in open court.

P.K. Mugamba

Judge

**ALLOCTUS**

State Attorney:

No past convict, the offence is serious and fetches death sentence as maximum. It is on the raise in society. Send clear message by stiff sentence.

Mr. Dhabangi:

Give accused lenient sentence.

Convict:

I have been on remand for long. I ask for a lenient sentence.

**SENTENCE**

I have heard what has been said by the prosecution, counsel for convict and the convict himself. The offence committed by the convict is a serious one. I note he has not past record of conviction and that he has been on remand for over three years. I take into consideration the period he has

been on remand and deduct it from the sentence I would otherwise have handed down to him. He is sentenced to five years' imprisonment.

P.K. Mugamba

Judge

Right of Appeal explained.

P.K. Mugamba

Judge