

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT IGANGA**

CRIMINAL SESSION CASE NO. 459 OF 2010

5

**UGANDA.....PROSECUTO
R**

VERSUS

10

OREM

NICHOLAS.....ACCUSED

**BEFORE: THE HONOURABLE LADY JUSTICE FLAVIA SENOGA
ANGLIN**

15

JUDGMENT

20

The accused person OREM NICHOLAS alias JUNIOR was indicted for Aggravated Defilement c/s 129 (3) & (4) (a) of the Penal Code Act.

25

The prosecution case is that on 06.05.10 at Bwole Zone, in Bugiri Town Council, Bugiri District, the accused person performed a sexual act with Nangiya Janat, a girl aged 11 years.

30

The prosecution case was based on the evidence of 5 witnesses. The evidence of the Doctor who examined the victim and that of the Doctor who examined the accused person was admitted at the preliminary hearing under Section 66 T.I.A.

35

In dealing with the merits of the case, I wish to bear in mind that the burden of proof is upon the prosecution to prove the case against the accused person beyond all reasonable doubt. The prosecution must

prove every ingredient of the offence. The burden does not shift except in a few exceptional cases provided for by law. The accused has no burden to prove his innocence. Where he raises a defence, it is still for the prosecution to prove that nonetheless the offence was committed
5 and it was committed by the accused person – See **Woolmington Vs. DPP (1935) A.C 322; Sekitoleko Vs. Uganda [1967]E.A 531** and **R. Vrs. Johnson [1961]3 ALL E.R. 969.**

To prove the charge of Aggravated Defilement, the prosecution had to
10 prove beyond reasonable doubt the following ingredients of the offence:

- (i) There was an unlawful sexual act committed.
- (ii) The victim of the offence was below 14 years of age at the time of the offence.
- (iii) The accused person is the perpetrator of the unlawful sexual
15 act – See **Basuuta Hussein Vs. Uganda Criminal Appeal 35/95.**

It is the duty of the court to evaluate the evidence of the prosecution and of the defence and determine whether the prosecution has
20 discharged the burden and standard of proof as required by law.

To prove that there was an unlawful sexual act committed the prosecution relied upon the evidence of PW1 the Doctor who examined the victim. The evidence was admitted under Section 66 T.I.A.
25

It is to the effect that the victim Nangiya Janat was medically examined on 07.05.10 and found to be 11 years of age. Her hymen was found to have been recently ruptured. She was in severe pain and she had an abnormal vaginal discharge syndrome an indication of a sexually
30 transmitted infection. Her vestibule was all inflamed.

The defence admits that the act of sexual intercourse was proved beyond reasonable doubt on the basis of the doctor's report - Exhibit P₁. I therefore find as a fact that an unlawful sexual act was committed on
5 the victim Nangiya Janat.

The next issue for determination is whether the victim of the offence was below 14 years of age at the time of the unlawful sexual act.

10 The undisputed evidence of PW1 the Doctor shows that the victim was 11 years of age at the time of the offence. This ingredient too was not disputed by the defence. In the circumstances, I find that the victim was below 14 years at the time of the offence. This 2nd ingredient was also proved beyond reasonable doubt.

15

What is left for court to determine is whether it was the accused who committed the unlawful sexual act on the victim. To prove this ingredient the prosecution relied upon the evidence of PW3 Lukowe Madina Namukwana the grandmother of the victim, PW4 D/W IP
20 Namuyomba Judith the Investigating Officer and PW5 IP Magara Dominic a Police Officer who recorded a charge and caution statement from the accused person.

PW3 testified that on 06.05.10 she could not find the victim who was
25 staying with her, to help her with work. PW3 then went looking for the victim and found her at Kamyufu's bar in a room, in bed with the accused person. The time was 8pm, but PW3 says she clearly identified the accused whom she had known for 3 months as a T.V repairer. The accused was working for Kamyu. PW3 raised an alarm and arrested
30 both the victim and the accused but the accused escaped.

There was an electric light in the room where she found the two having sex.

5 The victim was taken to police and she spent a night there.

PW4 admitted receiving the victim at police from PW3; on 07.05.10 although the matter had been reported at the counter on 06.05.10.

10 She interviewed the victim and obtained a statement from her. The victim told her that it was the accused person who had sexual intercourse with her in a room that is part of the Local Bar known as Kamyufu's bar. The statement was admitted in evidence as Exhibit P₃ without any objection from the defence.

15

The victim indicated in the statement that on the date in question she went to Kamyufu's bar at about 8pm to watch a film. The accused was the film attendant. As she was passing in the corridor to go home, the accused pulled her into a room and forcefully had sex with her. When
20 she heard her grandmother PW3 calling her she got out of the room. PW3 not convinced with her answer entered the room and found the accused. When she raised an alarm, the accused ran away.

The sketch map of the place where accused and the victim were found
25 is exhibit P₄.

PW5 admitted recording a statement from the accused on 10.05.10 when he received him at Bugiri Police station. The accused admitted having had sex with the victim although he claimed it was the victim

who requested for it. When they heard PW3's voice the accused asked the victim to leave.

5 The statement was recorded in English as according to PW5, the accused told him he understands English. It was admitted in evidence as Exhibit P₅ without any objection from the defence. Counsel for State submitted that all this evidence proved that it was the accused who committed the offence.

10 The accused person generally denied committing the offence and also raised an alibi. He stated that on the date in question between 6pm and 11pm he was at his home at Mugona re-coiling a radio transformer and never left home at all that day between the time stated above. That he only got to know PW3 a month before the alleged incident when he
15 repaired her Telephone and she failed to pay the Shs.15,000/- for the repairs.

Further that he said what he did in his statement because he feared being assaulted by police. Also that the statement was never translated
20 to him in Lusoga.

And while admitting having been at Kamyufu's bar on the date in question, the accused said he went there at 4pm to repair a Television and left at 6pm.
25

That when he was arrested the next day he was never told why and he saw PW3 with another man only at police and when he was being taken to prison. Further that PW3 told him that she had wanted him to sell his plot but since that had failed, the case would go on.

30

DW2 Abigail Amulen an Aunt of the accused did not know if accused had committed the offence. She insisted however that, she saw the victim after the accused had been imprisoned when PW3 rented a house near where she was living. Adding that PW3 chased away the victim from her home and the victim left and got married in 2011. She passed away after a caesarean operation at the age of 14 years.

Counsel for the state submitted that the accused persons had failed to substantiate his alibi. While counsel for the accused insisted that the accused could not have been in two places at the same time. That is, at the scene of crime and at his home.

Contrary to the submissions of counsel for the State, the principle of law is that an accused person does not bear the burden of proving his alibi. It is up to the prosecution to bring evidence to show that despite the alibi the accused was squarely placed at the scene of crime - **Sekitoleko vs. Uganda [1968] E.A 531.**

In the present case, the evidence of PW3 was to the effect that she caught the accused person and the victim red handed having sex. However counsel for the accused denounced this witness as a liar, contending that none of the people who were at the alleged scene of crime - Kamyufu's bar was ever called as a witness to corroborate the evidence of PW3.

However I find that there is ample corroboration of PW3's evidence in the evidence of PW4 the Investigating Officer, to the effect that it is the accused who performed the sexual act complained of.

PW4 took a statement from the victim which was admitted in evidence as Exhibit P₄. The victim told PW4 that it's the accused person who had sex with her during the night in question.

- 5 While the victim herself never testified, it is on record that the defence never objected to the tendering in of her statement.

Case Law has also established that ***“failure by the victim to testify is in itself not fatal to the prosecution case if there is cogent evidence pointing irresistibly to the accused as the defiler”***.
10 Further that ***“evidence of a complaint by the victim of a sexual offence is admissible when the complaint is made to a 3rd person. And any information as to the identity of the assailant to a third person is relevant and admissible in evidence”*** - See
15 **Mayombwe Patrick vs. Uganda Criminal Appeal 17/02 C.A.**

I agree with the state counsel that, though the victim never testified as she had passed away in July, 2012, the evidence is admissible on the basis of the above authority.

20

The evidence is further corroborated by the testimony of PW5 who took the accused's charge and caution statement. The accused clearly admitted in the statement that he had sex with the victim.

- 25 In his defence, the accused admitted to have made the statement although he claimed to have made it out of fear of assault and also that it was never read back to him.

Counsel for the accused accordingly submitted that court should treat
30 the statement as repudiated by the accused and it should not be relied

upon. And that since the accused could not understand the language of the officer who recorded the statement, it is not his statement, as he does not understand the English language.

5 I am mindful of the requirement of accepting a repudiated or retracted confession with caution. And the established principle that, before court can find a conviction on such a confession, it must be fully satisfied in all the circumstances of the case that the confession is true.

10 The court will only act on a confession if it is corroborated by independent evidence accepted by the court – Refer to **Festo Androa Asenwa & another vs. Uganda SC. Appeal 1/88** where the case of **Tuwamoi vs. Uganda [1967] E.A 84** was relied upon.

15 However, it is worth noting that the Supreme Court emphasised in that same case that ***“Corroboration is not necessary in law and court may act on a confession alone if fully satisfied after considering all the material points and surrounding circumstances that a confession cannot but be true”.***

20

In the present case, the statement of the accused was not objected to when it was tendered in. It also has details that lend credence to the evidence of PW3 and of PW4 as to what occurred the night the offence took place – PW3 found the accused and the victim in the act when she
25 went to Kamyufu’s bar. The accused admitted in the statement that they heard PW3’s voice and he asked the victim to leave the room.

Secondly, the alleged fear of being assaulted by police was never brought out in cross examination of PW5.

30

Neither was PW5's statement that the accused told him that he understands English clearly and hence the recording of the statement in English, was ever challenged. The accused signed the statement and does not deny his signature. In the circumstances where both the recorder of the statement and the accused understand English, there was no need for an interpreter.

For all those reasons I find that the accused person was placed at the scene of crime and that he made the statement - Exhibit P₅ voluntarily and that he understands the language in which it was recorded. His alibi is accordingly disproved.

In disagreement with the assessors' opinion, I find that the prosecution proved beyond all reasonable doubt that it was the accused person who had sexual intercourse with the victim that night.

The accused is therefore found guilty of Aggravated Defilement c/s 129 (3) & (4) (a) of the Penal Code Act and he is convicted of the same as indicted.

20

Flavia Senoga Anglin

JUDGE

01.10.13

25

01.10.13:

Accused present

Katami Lydia for State parent

30 Balidawa Ngobi for accused present

Both assessors present

Counsel for State: Case is for Judgment.

5 Court: Judgment delivered in open court. Accused found guilty as indicated and is convicted of the same i.e. Aggravated defilement.

Flavia Senoga Anglin

10 **JUDGE**

Counsel for State:

The offence of which accused has been convicted carries a maximum sentence of death. The offence is rampant within this jurisdiction. I
15 therefore pray for a deterrent and reformatory sentence.

Counsel for accused:

There are about 5 mitigating factors.

The accused is a first offender with no previous criminal record. We
20 pray court takes this into account.

The age of the offender; he is a very young man 24 years of age. Young offenders need more rehabilitation than punishment. We pray court exercises leniency while sentencing.

The period spent on remand - convict has been on remand for 3 years
25 and 4 months. He was arrested in May 2010, court should consider this in awarding sentence as accused has been a prisoner and all his liberty and privileges curtailed for that period.

Loss of self control - according to B.J. Odoki Rtd. CJ in the Book Guide to Criminal Procedure in Uganda 2nd Edition page 152 ***“a person who
30 commits a crime when he has lost his self control deserves***

leniency because of the reduced moral blame worthiness. Self control may be lost through sudden temptation”

5 Considering the age of the convict we pray court takes that as a mitigating factor.

10 Ignorance of the law - by the convict. The general principle is that ignorance of the law is no defence. But the C.J in the book referred to above page 51 says ***“It is well known that not everyone knows all the laws of the country that govern him. Therefore this may afford him a ground for the court to be lenient to him because of the reduced moral blame worthiness.”***

15 Since the convict and victim were in the same age bracket we pray court takes this into account and gives a lesser sentence.

20 Throughout the trial accused exhibited conduct of a repentant and remorseful person which implies that he has learnt. This should be taken into account.

Court: Sentence at 2pm. Accused further remanded till then.

Flavia Senoga Anglin

25 **JUDGE**

01.10.13

Later at 2.25pm.

30 Accused present

Katami Lydia for State present

Balidawa Ngobi for accused present

Both assessors present

5 Counsel for State: Matter is for sentence.

Court: Sentence

The accused is sentenced to a caution.

10 Reasons for sentence:

Accused is a young man of 24 years of age with no previous criminal record.

He had been on remand for 3 years and 5 months.

15 The victim of the offence passed away **not** as a result of the action of the accused person but because she was thereafter married off to another person.

Compensation would have been appropriate in the circumstances of the case, but the victim for whom it should have been given is dead.

20 The guardian of the victim gave court the impression that she would have wanted to be compensated but she can bring a civil suit against the convict to recover what she deems is due to her - considering her action of later marrying off the victim.

25 While sexual violence is not condoned court considers that the period of 3 years and 5 months already spent on remand by the accused will suffice to meet the ends of justice considering the peculiar circumstances of this case.

The accused is accordingly cautioned.

The right of appeal against conviction and sentence explained to the convict.

Flavia Senoga Anglin

5 **JUDGE**

01.10.13

10