

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT IGANGA
CRIMINAL SESSION CASE NO. 20 OF 2011

5 UGANDA.....PROSECUTOR

VERSUS

10 KIZURI SALIM.....ACCUSED

BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

15 KIZURI SALIM the accused person in this case was charged with aggravated defilement c/s 129 (3) (4) (a) of the Penal Code Act.

20 The prosecution contends that during the month of October, 2010 at Lugolole Trading Centre, Mayuge District, the accused performed a sexual act with one Nakagoro Asina, a girl then aged 10 years.

25 The accused denied the offence and raised an alibi. He claimed that the night the offence is alleged to have occurred, he was at the place of work where he worked as a night watchman. That he was on night duty from 03/10/10 to 08/10/10.

30 Further that he was implicated in the charge because he had broken off the love relationship he had with the mother of the victim, after learning that she was married. That the woman had threatened to deal with him.

35 The accused and complainant's homes were about were about 50 metres away from each other. There was a corridor behind the accused's house where he claims other people stayed.

To prove a charge of aggravated defilement, the prosecution has to prove the following ingredients of the offence beyond all reasonable doubt.

- (i) An unlawful sexual act occurred.

- (ii) The victim of the offence was below 14 years of age.
- (iii) The accused person is the perpetrator of the unlawful sexual act.

5 While dealing with the merits of the case, I bear in mind the principle of law that an accused person is presumed innocent until he is proven guilty or otherwise pleads guilty.

The onus is on the prosecution to prove all the ingredients of the offence beyond reasonable doubt if a conviction is to be sustained.

10

The burden of proof never shifts to the defence except in a few exceptional cases provided for by law. Even when the accused raises a probable defence, he does not thereby assume the burden of proving it. It is still up to the prosecution to adduce evidence to show that despite the defence, the offence was committed by the accused person - See Woolmington Vs. D.P.P (1935) A.C 322, Miller Vs. Minister of Pensions [1947]2 ALL E.R. 372-373; Sekitoleko Vs. Uganda [1967] E.A. 532 and R. Vs. Johnson [1961]3 ALL E.R. 969.

15

20

As required by law, I now proceed to evaluate the evidence of both the prosecution and the defence to determine whether the prosecution discharged the burden and standard of proof placed upon it by the law.

25

In respect of the first ingredient i.e. act of sexual intercourse, the prosecution relied upon the evidence of PW1 the doctor Nabangi Charles, PW3 Nankabirwa Fatina mother of the victim and PW6 Nakagolo Asina the victim.

30

PW5 told court that on the night of 05/10/10 while on her way from the shop where she had gone to buy sugar, she met the accused standing outside his house. He called her and she went to him, whereupon he grabbed her by the hand, took her behind his house into a corridor and forcefully had sex with her. When she got home she lied to her mother that she had a stomach ache. She only told her about the incident many days later when the pain became unbearable. This was because the accused threatened to kill her if she said anything.

35

The act was corroborated by medical evidence of PW1 and Exhibit P.1 to the effect that, the victim was examined on 11/10/10 and her vagina was

found with signs of recent penetration and the hymen was ruptured but had healed. However, the victim had frequency and pain in passing urine.

5 PW3 the mother of the victim took her to the clinic after the victim complained of pus coming from her vagina. The person, one Prossy who examined the victim called her and showed her the victim's wide vaginal opening. There was pus coming from the vagina.

10 The defence did not dispute the act of sexual intercourse having occurred. Court therefore finds that the first ingredient was proved beyond reasonable doubt.

15 As to whether the victim was below 14 years at the time of the offence was also proved by the evidence of PW1. Exhibit P.1 the medical certificate indicates that the victim was 10 years of age at the time of examination.

20 PW3 the mother also told court that the victim was born on 24/06/2001. Infact that means she was 9 years and 4 months.

The defence did also not contest this ingredient. Without any evidence to the contrary, I find that the age of the victim was below 14 years at the time of the offence was conclusively proved to the required standard.

25 The last ingredient to determine is whether it was the accused who committed the sexual act complained of.

30 On this issue the prosecution mainly relied upon the evidence of PW5 the victim. She was the only eye witness to the act. In her sworn statement, PW5 insisted that it was the accused who had sexual intercourse with her that night. She knew him as a neighbour and when he called her to come to him, there was a light in his house. Thereafter, he grabbed her and took her to the corridor behind his house and sexually assaulted her. He threatened to kill her if she told her mother.

35 In his defence, the accused raised an alibi. He claimed that during the night in question he was on night duty at the factory where he was employed. He was on night shifts between 03/10/10 - 08/10/10 and the shifts began from 7pm-7am.

As stated by PW3 and agreed by accused the distance between her home and accused's home was about 50 metres. The accused also agrees that there is a corridor behind his house, although he says there were people staying there.

The accused also insisted that the case against him was fabricated because the love relationship between him and PW3 the mother of the victim had gone sour. PW3 denied ever having had a relationship with the accused.

Counsel for the State submitted that in the circumstances, the accused who spoke to the victim before and after the offence was positively identified more so as he was well known to the victim as a neighbour. There was a light in his house. And that since accused was placed at the scene of crime his alibi had been disproved. The case of Alfred Bumbo & 3 Others Vs. Uganda SC Criminal Appeal 28/94 was relied upon.

Counsel for the accused stated that the alibi of the accused was never challenged in cross-examination.

Further that the evidence of PW5 was most incredible because she went to school for 4 days before telling her mother about her ordeal. Also that, she never raised an alarm although there were people near where she was defiled from and it was also near the pathway.

Counsel argued that there is no evidence corroborating the prosecution claim that it is the accused who committed the offence.

It can be discerned from the evidence that the offence took place at night. Court therefore has a duty to closely examine the surrounding circumstances to ensure that the witnesses were honest and accurate and that there was no possibility of an honest but mistaken identification. It has to be borne in mind that a witness may be honest but mistaken and warn itself of the danger of conviction on the uncorroborated evidence of a single identifying witness. Refer to the case of Uganda Vs. R.O 973 Samuel Kasujja & 2 others Criminal case 08/92, Tomasi Omukono Vs. Uganda Criminal Appeal 04/97 and Roria Vs. Republic [1967] E.A. 583.

Case Law has further established that *“in sexual offences, before an accused can be convicted, the evidence of the complainant has to be corroborated by either direct or circumstantial evidence uncontradicted and accepted by the court”*. – Charles Katende Vs. Uganda [1971]2 ULR.

5

In the present case, upon examination of the evidence as a whole, I find that that accused was well known to the victim. They were neighbours whose homes were just about 50 metres apart. The accused called the victim to come to him and apparently there was a light in his house. The accused spoke to the victim before and after the offence. PW5 the victim was very consistent in her evidence and unshaken in cross examination that it was the accused person who sexually assaulted her that night.

Courts have decided that *“recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant”* – Wamalwa & Another Vs. Republic [1999]2 E.A. 358 (CAK) where the case of Anjononi & Others Vs. Republic was applied.

While the complainant never disclosed her ordeal immediately to her mother, that alone is not sufficient reason to discredit her evidence, more so as it is on record that her assailant threatened to kill her if she told her mother. And when the matter was discovered, it is the accused person she immediately named him as her assailant.

25

Having carefully scrutinized the evidence relating to identification and being satisfied with that the prosecution witnesses were honest, I find that the identification of the accused as the assailant was positive and free from the possibility of error – Njira & Others Vs. Republic [2002]1 E.A 218 (CAK).

30

For those reasons I find that the accused’s defence of alibi was disproved. He was positively identified and placed at the scene of crime.

The accused claims that he was implicated by the victim’s mother as they had a love relationship was not believed. PW2 the mother of the victim was asked about the alleged relationship and she said she was married and had not had a relationship with accused who had been in the area for only 2 months.

35

Court accordingly finds that the prosecution proved beyond all reasonable doubt that it was the accused person who performed the unlawful sexual act with the victim.

5

In agreement with the assessors' opinion court hereby finds the accused person guilty of aggravated defilement as indicted under the provisions of section 129 (3) (4)(a) of the Penal Code Act and he is convicted of the same.

10

Flavia Senoga Anglin
Judge
02.10.13

15

02.10.13:

Accused before court

20 Katami Lydia for the state present

Ngobi Balidawa holding brief for Mukaaga Johnson for accused present

Both assessors present

Counsel for accused: Case is for Judgment.

25

Court:

Judgment delivered in open court. Accused found guilty of the offence of aggravated defilement and is convicted of the same as indicted.

30 Flavia Senoga Anglin

Judge

02.10.13

Counsel for the State:

The offence with which accused has been convicted carries a maximum sentence of death. The age gap between the victim and the accused was 20 years. The accused therefore ought to have acted more reasonably in the circumstances.

5

There is also a high incidence of this offence within this jurisdiction which calls for deterrence.

It is for those reasons I pray for a deterrent sentence and 15 years would serve the ends of justice.

10

Counsel for accused:

We have 4 factors in mitigation. The convict is a first offender with no past criminal record. He deserves a sentence that will rehabilitate him and help to reintegrate him in society. Court should take that into account.

15

The period spent on remand is 3 years having been imprisoned in October 2010. For that period he has been a prisoner with curtailed freedom.

The convict is a family man, with a wife and 5 children to care for. Before the offence was committed he was the sole bread winner. His continued stay in prison will adversely affect the family.

20

The convict appears repentant and appears to have reformed. We therefore pray court exercises its discretion and pass a reasonable sentence in the circumstances. We so pray.

25

Accused:

Since I have been in prison I have learnt a lot. I will never do such a thing again. I pray for leniency to enable me go home and take care of my people.

30

Court: Sentence at 11.30am.

5 Flavia Senoga Anglin
Judge
02.10.13

10 Later 11.35am:
Court constituted as before.

Counsel for state: Case is for sentencing.

15 Court: Sentence

Accused is sentenced to imprisonment for 12 years for the following reasons:

The victim of the offence was a child of tender years – 10 years of age. The convict was a neighbour who ought to have been aware of the tender age.

20 He abused the trust of the victim who knew him when he called her to come to him and he instead dragged her to a corridor and ravished her.

In addition the convict threatened to kill the victim if she revealed what had happened to her.

25

While convict appears repentant at his age then when he was *20 years* older than the victim he ought to have known better than taking advantage of a minor. He should have protected her instead of harming her as he did.

30 However, taking into consideration the period of 3 years spent on remand, court finds that 12 years will suffice to meet the ends of justice.

Right of appeal against conviction and sentence explained to the accused person.

5 Flavia Senoga Anglin
Judge
02.10.13

10