

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

CRIMINAL SESSION CASE NO. 009 OF 2011

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UGANDA.....PROSECUTOR

VERSUS

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OJENGO ABDU.....ACCUSED

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

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JUDGMENT

The Accused is charged with Attempted Defilement c/s 129 (5) of the Penal Code Act.

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It is alleged that Ojengo Abdu on 13/10/2010 at Wanyama East Zone, in Bugembe Town Council, attempted to perform a sexual act with Nakamya Shamin, a girl aged 12 years.

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In the alternative, the Accused was charged with Indecent Assault contrary to Section 128 (1) of the Penal Code Act. It is alleged that the Accused on 13/10/2010 unlawfully and indecently assaulted Nakamya Shamin.

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Attempt is defined under Section 386 (1) of the Penal Code Act as follows:

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“when a person, intending to commit an offence, begins to put his or her intention into execution by means adapted for its fulfillment, and manifests his or her intention by some overt act, but does not fulfill his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.”

The Accused denied the charges and hence put each and every ingredient of the offence in issue.

- 5 The prosecution has the burden of proving all the ingredients of the offence beyond reasonable doubt. **See: Woolmington Vrs. DPP (1935) AC 462.**

The ingredients of Attempted Defilement are:

- 10 (a) Attempt to perform a sexual act.
(b) The age of the victim.
(c) The participation of the Accused.

15 Regarding the ingredient of age, both the prosecution and defence agree that the victim was aged 12.

This is supported by the evidence of PW1 Nabakooza Fatima, the mother of the victim who stated that the victim was born in 1998 and was therefore aged 12 at the time of the offence.

20 On attempt and participation of the Accused, the State has relied mainly on the evidence of PW1, the mother of the victim. She stated that the victim disappeared and later came back without her shorts and slippers.

25 The victim who unfortunately is an imbecile, led PW1 to the door of the Accused.

30 PW2 and PW5 and other people narrated to her that the Accused had defiled the victim.

35 PW2-Karim Muwanika testified that on the material day he was called to the scene by a neighbour that Isiko (Ojengo) was defiling a child. He went to the Accused's residence, peeped through the window and saw the Accused lying on top of the victim with his trousers down.

PW5 also testified that she and others saw the accused lying on top of the girl supposedly performing a sexual act.

5 The girl ran out of the Accused's room, wild eyed, and without her slippers and skirt.

PW2 Dr. Katende examined the victim and reported that he found no signs of penetration, although the girl had a discharge from her private parts.

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There was no evidence of a sexual act having been performed on the girl.

15 The victim herself could not talk although she led her mother to the Accused's house. She also did the same with PW6 the Investigating Officer and the Chairperson and another Police Officer. She pointed out the Accused's residence and the bed.

20 The Accused's defence was a total denial of each and everything, not even the fact that the witnesses - PW1, PW2 and PW5 all placed him at the scene.

25 He instead said he was framed because his son had a grudge with the victim's family.

30 It has been submitted for the State that the Accused's actions amounted to completion preparations for the act of defilement - by removing his clothes, and those of the victim and lying on top of her. That he had started putting his intentions into execution within the definition of **attempts**.

35 The case of **Uganda Vrs. Rwabulikwire Moses HCT Criminal Session Case 66/2001** was cited. In that case, the facts were similar as the hymen of the victim was intact, no injuries as per the medical evidence.

However, the victim testified that the Accused had had sexual intercourse with her and discharged semen on to her private parts.

5 The Judge held that although this act fell short of sexual intercourse, the assailant had made all the necessary preparations but had failed to consummate his plans.

10 The defence has submitted that the evidence by the prosecution does not prove that there was any attempt to defile.

15 They cited the contradictions and inconsistencies in evidence of PW1, PW2 and PW5 whose evidence of the events at the scene is contradictory.

I have considered both the prosecution's evidence and that of the Accused.

20 I have also considered the submissions by both counsel.

The fact is that the Accused was placed at the scene by PW1, PW2 and PW5 and this is not explained by the defence.

25 PW2 and PW5 clearly saw the Accused lying on the bed half naked with the victim who was also naked.

30 PW1 confirms that the victim returned home without her shorts and slippers, and this is corroborated by PW2 and PW5 who saw the victim come out of the Accused's house with only her blouse.

I am satisfied that the Accused was indeed at the scene as per the evidence adduced.

35 I have considered the evidence of P1, PW2 and PW5 regarding the alleged Attempted Defilement.

PW2 and PW5 saw the Accused lying on the same bed with the victim, half naked. However, unlike the authority cited by the prosecution, there was no other evidence that there was an attempted sexual act manifested by trying to insert the sexual organ of the male into the victim or actual ejaculation but just short of sexual intercourse as in the case cited.

The Assessors gave an opinion that the evidence does not prove a charge of Attempted Defilement or even the alternative charge of Indecent Assault.

I agree with them in part. The evidence available does not show that the Accused had gone to the extent of putting his intentions to defile into execution.

The charges of Attempted Defilement have not been proved beyond reasonable doubt.

I accordingly find the Accused not guilty of Attempted Defilement.

The evidence however reveals that the Accused had undressed the victim and even he himself had undressed and was purportedly lying on top of the victim. PW1, PW2 and PW5 all agree that the victim came out of the Accused's premises half naked.

The Accused according to PW1, PW2 and PW5 was very hostile when he was confronted after coming out of his house.

These events point more to an act of Indecent Assault rather than attempted Defilement.

I accordingly find the Accused guilty on the alternative Count of Indecent Assault contrary to Section 128 (1) of the Penal Code Act and I convict him accordingly.

Godfrey Namundi
JUDGE
13/11/2013

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13/11/2013:

Accused in court

10 Prosecutor: Kitimbo

Defence: Kabonesa

Court: Judgment read in open Court.

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Godfrey Namundi
JUDGE
13/11/2013

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Right of Appeal explained.

25 **Godfrey Namundi**
JUDGE
13/11/2013

30 Prosecutor: There is no evidence of a criminal past record.
Consider the ages between the victim and the
offender. The offender was 68 years while
the victim was 12 years and mentally
35 challenged which was known to the Accused.
He should be sentenced to 12 years
imprisonment.

5 Kabonesa: The convict has been on remand for 3 years. He has learnt a lesson. He is remorseful and a first offender who left 7 grandchildren and 3 elderly wives at home. He is 68 an age that is very advanced with several illnesses associated with age.

10 Pray that he be given a lenient sentence of 1 years imprisonment.

15 Sentence: The offence committed by the convict is shameful given his age and that of the victim.

20 He even took advantage of the imbecile and tried to defile her. Am sure the intervention of the residents prevented him from putting his intentions into force.

25 His offence is really technical but his mind was geared towards defilement. He has been on remand for 3 years and is now 68 as for the charge sheet. Court will only exercise leniency due to his advanced age and give a sentence of 3 years imprisonment.

30 **Godfrey Namundi**
JUDGE
13/11/2013