

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE

HCT-04-CR-SC-0045-2013

UGANDA.....PROSECUTOR  
VERSUS  
BAINOMUGISHA ISSA.....ACCUSED

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

Juvenile offender **Issa Bainomugisha** is indicated for aggravated defilement contrary to sections 129 (3) and (4) of the Penal Code Act. It is alleged by the prosecution that this juvenile on the 16<sup>th</sup> day of December 2012 at Bilal Mosque in Mbale District had unlawful carnal knowledge of **Nabuzale Sofiya** a girl aged 8 years.

The juvenile offender denied the accusation against him thus casting the burden of proving his guilt onto the prosecution as required by the law.

During the trial of the offender he was represented by **Mr. Walyemera** while prosecution was represented by **Ms Checkwech** the Resident State Attorney Mbale.

In all criminal trials, it is incumbent upon the prosecution to adduce sufficient evidence to prove the offence against a suspect beyond any reasonable doubt. Should any doubt arise, the same has to be resolved in favour of the suspect which may lead to his/her acquittal.

In an indictment for aggravated defilement, prosecution has to prove the following ingredients.

1. That the victim was a child aged below 14 years at the time of offence.
2. That a sexual act was performed on the victim and;
3. That the sexual act was performed by the accused.

I will deal with the first and second ingredients together and then deal with the third one.

### **Ingredients 1 and 2:**

During the preliminary hearing under S.66 of the Trial on Indictments Act (TIA) both prosecution and defence counsel agreed on the admission of the medical examination report on Police Form 3A uncontested.

**Dr. Rubanza**, the police surgeon examined the victim on 18<sup>th</sup> December 2012 and found her to be aged 8 years. He found evidence of repeated defilement because she had tears on the left labia and left side of the hymen was ruptured by a probable erect penis. The victim was found to be HIV negative but had clinical malaria.

All indications were that there was slight penetration. The medical evidence was received by court and marked Exhibit P.1. This evidence was corroborated by what PW.2 the victim told court in respect of her age and what the grandmother to the victim (PW.3) told court.

Consequently, I will find that prosecution has proved both ingredients 1 and 2 that the victim **Nabuzale Sofiya** was a girl aged below 14 years. She was in fact aged 8 years. And that a sexual act was performed on her.

### **Ingredient 3: Whether the juvenile offender is the culprit?**

In her submissions **Ms. Chekwech** the learned State Attorney submitted that she had adduced sufficient evidence to place this juvenile at the scene of crime beyond any reasonable doubt. Mr. Walyemera for the juvenile submitted to the contrary.

When I carefully evaluated the evidence for both the prosecution and defence I was more inclined to believe the defence than the prosecution evidence.

Both **PW.2 Nabuzale Sofiya** and her grandmother **PW.3 Safina Nabuzale** gave contradicting evidence in an attempt to implicate this juvenile in the commission of this offence. PW.2 testified that they clean the mosque with PW.3. However, PW.3 said this was not true.

PW.2 said that the juvenile offender slept in the middle of her legs and it was the first time she was defiled. However medical evidence shows that PW.2 had been

defiled several times by the time of examination. PW.2 said she was defiled when her grandmother PW.3 was outside, but the latter said she had gone to Bududa to purchase trade goods when this offence happened since it happened on a Thursday 16<sup>th</sup> December 2012. PW.2 told court that she did not know how PW.3 knew about the offence. Whereas PW.2 the victim says the juvenile defiled her, she later in her testimony told court that she did not know what the offender did to her when he caught her. PW.2 emphasized this during cross-examination when she testified that **Issa** (the juvenile) did nothing when he slept between her legs. She further contradicted herself when she said she told her grandmother what happened to her but had forgotten what she told her.

When examined by court, PW.2 acknowledged that on other occasions she was defiled when the grandmother was away. She did not reveal who did this to her.

According to PW.3 it was her sister **Hadija Nabukwasi** who was with the victim suffering from malaria. She emphasized that contrary to what PW.2 told court, that she cleans the mosque alone, PW.3 said that she never did so unless she was together with her.

Whatever PW.3 testified in court was told to her by her sister which comprises hearsay evidence.

From the above contradictory evidence, it became apparent that the vehement and consistent denial by the juvenile offender that he committed the offence could be true and was not disproved by the prosecution. The offender put up a strong

defence of alibi which was not disproved by the prosecution evidence as required by the law.

I was convinced that at the time of the alleged offence, the juvenile offender was not at the mosque. He left at 6:00a.m. after prayers to Musoto to teach Arabic. He came back at 12:30p.m. The offender was told about the offence on 18<sup>th</sup> of December 2012.

From the evidence adduced by the prosecution, the defence story that the offender saw the victim at 1:00p.m vomiting from the effects of malaria could be true.

The imputation of a grudge between the juvenile and PW.3 could be founded because there was apparent rivalry for favour from the mosque administration between PW.3 and the juvenile offender. The assertion by the juvenile that PW.3 was upbeat priding that she had got this young boy could be true.

The allegations that this juvenile stole PW.3's phone and flat iron which were found with the owners including herself could have been part of the grand plan to victimize this boy.

From the evidence on record, I was convinced by the assertion by the juvenile offender and his witness (DW.2) that PW.3 always moved with the victim and if it meant cleaning, they cleaned together and that during day, the mosque has people all the time since it is located in the middle of town. Defilement could not happen

in the mosque at 10:00a.m in the presence of people. The allegation by the defence that PW.3 could have tortured her grandchild in the night of 17<sup>th</sup>/18<sup>th</sup> December was not disproved. This was witnessed by the child offender and thereafter the victim walked with difficulty.

According to **DW.2 Sheikh Gibendya** although both the juvenile offender and PW.3 are under him, PW.3 did not report to him what the juvenile allegedly did to PW.3's granddaughter. PW.3 reported the matter to police straight away and has since relocated from the mosque without informing DW.2.

The animosity between the juvenile offender and PW.3 was further revealed by DW.2 the Deputy Imam of Bilal mosque when he revealed that PW.3 locks out the juvenile offender in an attempt to prevent him from entering the premises to sleep. The conduct of PW.3 towards this young boy has created a lot of doubt in mind if the accusation against him is genuine or is motivated by malice.

On the other hand, the demeanour of the juvenile offender, coupled with the fact that he did not run away until he was arrested by police indicates a conduct of an innocent person.

From the evidence adduced on both sides in this trial I was not satisfied beyond any reasonable doubt that it was **Bainomugisha** who defiled the victim. As it was found out by the doctor, the victim was defiled on several occasions but it is not established who committed the multiple defilements. There is also a possibility

that the vicious assaults on the victim by PW.3 could have caused injuries to the victim.

The prosecution case was based on contradictory and inconsistent evidence to be believed. The defence story was consistent and coordinated that it would be unsafe to found a case against this juvenile.

I will find that participation of this juvenile offender in this offence has not been established. I am in total agreement with the unanimous opinion of the lady and gentleman assessor that in view of the lies and contradictions in the testimony of PW.3 plus the grudge PW.3 held against this juvenile his participation in this offence has not been established beyond any reasonable doubt.

I will accordingly set **Issa Bainomugisha** free.

The indictment is dismissed.

**Stephen Musota**

**JUDGE**

**26.03.2013**