

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

HCT-04-CR-SC-0025-2010

**UGANDA.....PROSECUTOR
VERSUS
WASOLO CHARLES.....ACCUSED**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The accused is indicted for aggravated defilement c/s 129 (3) and (4) (c) of the Penal Code Act.

This charge has the following ingredients which must be proved beyond doubt before a conviction is secured by the prosecution.

1. That there was sexual intercourse.
2. That the victim was below 18 years.
3. That the offender is infected with HIV and or the offender;
4. Is a parent, guardian or person in authority over the person against whom the offence is committed?
5. That the accused is the one who committed the sexual assault upon the victim.

The accused denied the offence.

The prosecution then led evidence to prove the case calling 4 witnesses, and also relied on exhibits PF.3 (Exhibit 1), PF.24 (PEx.2).

The defence called accused to testify for himself (unsworn). The defence tendered in for evidence a copy of the result slip for **Namono Rehema** (DE.1) and **Masango Umar** (DE.1). The witness statement for **Nakusi Assa** made to police on 21.09.2009 was admitted as a defence Exhibit 2, alongside a Sironko District Local Government Birth Certificate for **Namono Rehema** No. 3869 for identification. Defence also submitted for identification by court, Masaba Secondary School cumulative guidance Record for **Namono Rehema**; dated 25/Sept/2009.

The sum total of evidence on record is as follows:

PW.1 Namono Rehema stated to be 19 years. She stated that in 2009 she was a student in S.6 and the accused was the Assistant Director of Studies at the said school. He was a teacher of S.4. She told court that on 09.09.2009 the said teacher called her in his office and gave her a permission chit to go to his home and pick books. While going there, another teacher called **Mugonyi Isaac** confronted her and asked her where she was going. She informed him that she was going to **Mr. Wasolo**'s home to pick books. The teacher let her go. She went. On reaching the house, **Mr. Wasolo** also suddenly appeared, locked the door and grabbed her and pulled her into the bedroom next to the sitting room. He told her not to make noise lest he kills her, put her on a nearby mattress, pulled off her knickers and forced her into sex. She said she was still a virgin and had never had sex before. After the act, he told her not to go to school, but gave her 1500/= shillings so that she goes home. This money was given to **Mugidde** another girl who had come around, in the house. She then went home and armed late in the night, and found her mum but she did not tell her what had happened to her that day; she said she told her after a few days had passed for fear of being caned.

Next day when she went to school, she was summoned by **Mr. Mugonyi** who interrogated her together with **Madam Christine Ngumya**. Later she opened up and told the mum and the teachers that accused has forced her into sex. Later she was taken to police and was examined by the Doctor.

PW.2 Nakusi Assa, stated that **Namwanda Rehema** is her daughter born on 6th September 2009. She told court that in September 2009, while schooling at Masaba SS, a teacher called **Wasolo Charles** called her to his house and had sexual intercourse with her. She retold the information as stated by PW.1 regarding her confession to her as to how she had been forced into the sex act.

PW.3 Mugonyi David told court that the victim is a former student of Masaba S.S while the accused is a former teacher of Masaba S.S. He told court that on 19th September 2009, he was the master on duty. He saw **Rehema Namono** going out of school without proper procedure. He asked her and she informed him she was going to pick her books from the staff quarters, at **MR WASOLO CHARLES (DOS)**. **Mr. Wasolo** also appeared, so he left the girl to go. Later that evening the mother came to school looking for her daughter. Next day 20th September 2009, **Rehema** came back from the direction not of **Mr. Wasolo's** place. He called and quizzed her and she confessed that she was coming from **Wasolo's** home. Later he interrogated her alongside the matron and she confessed that she had been to **Wasolo's** place.

PW.4 Dr. Rubanza Banarbas of Mbale Municipality, told court that he carried out the examination of the victim **Namono**. His findings were that she was of the apparent age of 17 years, had a ruptured hymen about 5 days ago, and injuries in the labia and vagina which were also about 5 days old. She also had purse

discharge from the vagina and tenderness on her lower abdomen. Her cervix was excutable (very painful). She also had an infection involving the uterus and fallopian tubes resulting from a trauma on her vagina and labia, or a sexually transmitted infection in case the culprit had a sexual encounter. He concluded that the possible rapture of the hymen was an erect penis inserted in the vagina with some force on un-lubricated vagina.

In defence accused, **Wasolo Charles** stated that he was the a DOS of Masaba S.S. On that day a student **Namono Rehema** went to him seeking permission to go home and collect personal effects. He referred her to the master on duty, and then she went and got permission from **Mr. Mugonyi**-one of the masters on duty. That he later saw her with a permission chit.

On 22/Sept/2013 he was in class, when headmaster summoned him and handed him over to two gentlemen who arrested him. He said a one **Wambi** district Chairman orchestrated his arrest on account of jealousy. He said he never had sex with **Rehema** but she testified to avoid a suspension.

The defence offered court with a highlight of points for court's consideration which I have taken into consideration while evaluating all the evidence to make conclusions thereon.

I will now determine the ingredients as here below; in order of the highlights by defence counsel.

1. **Whether the girl was below 18 years.**

While the prosecution put the girl's age at 17 years; and offered evidence to show that **Rehema Namono** was aged 17 years at the time of the sexual assault, the defence was of a different view. It was the defence's case that the result slip of **Rehema** (DEX.1), for S.4 showed that she was 17 years in 2007. This is corroborated by the Result slip of her twin brother **Umar Masonga** which shows that he was also 17 years when he sat S.4 in 2007.

Defence attacked PW.2's testimony of the age of **Namono Rehema** being 17 years yet she agreed that she had informed both **Namono Rehema** and **Umar Masonga** their true age.

Defence further attacked PW.4 (the Doctor **Rubanza**'s method of determining the age as not conclusive) since he told court that it is normally only 50% conclusive. Defence relied on DEX.3, the cumulative report showing that **Namono Rehema** was born in 1991 meaning that in 2009, she was already 18 years.

Whereas the defence's inferences of age from the school UNEB result slips tendered as DEX.1, and the cumulative report (DEX.3), could be persuasive means of determining age, they cannot be conclusive determinants to offset, the more scientific and orthodox methods that are used to infer age by courts; or government.

Age of a person is a biological function of birth. The parents of a child are the best record of that person's age. When a biological parent like (PW.2) the mother of **Namono** testifies about age- it is more truthful in evidential value than a UNEB pass slip which is subject to manipulation by different players. The second source of age of individual are Government Certificates of birth. On the prosecution side

a certificate of birth was exhibited. Certificates of birth and Immunization cards are legally recognized documents that are informative of individual's age. The Certificate of birth of **Namono** shows that she was born on 16th October 2007. The same date her mother testified in court. This cannot be challenged using a UNEB pass slip whose information is always obtained either from the parents or from a birth certificate.

The third method of telling age is by expert opinion of a doctor or medical opinion. The opinion of doctors in cases where age is in doubt has been sought and has been relied on. In a case of this nature where the parent, the child, the birth certificate, and the Doctor are all putting the age at 17 years, and the UNEB Slip is on the other hand offering a different age, my inclination is to find that the age of **Rehema Namono** for purposes of this case was proved to have been 17 years. The result slip exhibited by the defence cannot be relied upon in view of the above very conclusive evidence by the prosecution. This ingredient is therefore proved.

2. **Whether there was sexual intercourse.**

The State alleged that there was sexual intercourse of **Namono Rehema** on 9th September 2009.

The defence attacked the evidence and pointed out that its doubtful if there was sex by accused and the victim. The biggest point for defence is that PW.4 that the sexual act was about 5 days old. The other pieces of evidence were that the doctor found STD on the accused yet the victim had purse or an infection. Defence also doubted if penetration was by a sexual organ.

Contrary to the objections raised on this evidence by defence, it's on record from evidence of PW.1 (the victim) that when she went out of school she was forced into sex that day by the accused. She however revealed this act to her mother and to the teacher (PW.3) a few days later after the act. Medical examination conducted by PW.4(**Dr. Rubanza**) found that the victim had suffered a ruptured hymen, had bruises, and also had an infection all consistent with her having indulged in sex about 5 days ago. The use of the word "about 5 days ago" is a vague statement. It is not true to conclude as the defence did that this must mean that sex happened 5 days ago. "About" means any days within the timeframe of 5 thereabout. It can be 6, 7 etc.

This sexual intercourse could therefore have been within the range of the period of 13 days, which makes the 9th day of September 2009, inclusive in the set of days when this sexual act could have been performed upon the victim. Going by the evidence of PW.1, PW.2, PW.3 and PW.4, and PE.1, I find that there was sexual intercourse committed against **Namono**. This ingredient is also proved.

The law now is settled that in cases of defilement, the penetration need not be the sexual organ "penis". The slightest touch of a victim using any object suggestive of sexual advances to that victim can amount to defilement. This argument of non proof of the sexual object is therefore unnecessary and is not called for; as it is not a necessary ingredient for this offence, once there is evidence that penetration and rapture of the hymen happened the days described by the victim (PW.1).

I am therefore satisfied with the prosecution's evidence that sexual intercourse of the victim **Namono**, did infact take place. This ingredient has also been proved.

3. Whether the accused person was responsible for the sexual assault.

For the prosecution, it was alleged through PW.1 and PW.2 that accused was responsible for sexual assaulting the victim on 9th day of September 2009.

However the defence maintained their assertion that the evidence raises a doubt as to whether the accused was the culprit. The attack was based on the evidence offered by PW.4 (Doctor) that the act of sexual intercourse was about 5 days old. However I have already ruled that the Doctor's opinion on the time of the alleged sexual act provided a timeframe which could be enlarged above 5 or below 5, and 9th September 2009, cannot be excluded as a possible date within that timeframe which is inconclusively stated by like doctor.

Their next point that according to them (defence) raises a point of doubt regarding accused's participation is the fact that while the victim had an infection, no venereal disease was found on the accused. This to me is a valid observation because the comment of the PE.1 (which is PF.3) the doctor notes "suspect to be checked of venereal disease as soon as possible." Then during his testimony PW.4, told court that he found infection on the victim which he concluded were the result of the trauma (injuries in her vagina), but not due to the sexual intercourse since the suspect had no infection.

The Doctor's conclusion here raises a number of questions regarding the cause of the infection on the victim. The defence raised a question to him if such injuries could also result from using an artificial sexual object like an artificial penis. However he also said that if an erect penis penetrates an unprepared vagina it can also be injured.

The evidence above is contradictory as regarding scientific determination of whether the injuries on the victim were from the sexual assault, or from something else. The doctor attempted to separate the infection found on the victim from the sexual act, but in the process ended up blowing up the chain of causation. For the lack of an STD on **Wasolo**, can following the doctor's own explanation lead to a conclusion that his penis never penetrated **Namono's** vagina.

This evidence when considered along with the other pieces of evidence creating doubt cited by the defence like the fact that PW.2 testified that the victim informed her after a day or two, PW.3 that the victim told him the following day, PW.4 (doctor) inability to conclusively determine the date of sexual intercourse but stating it to have been about "5" days ago- and the failure by the prosecution to procure the victim for further cross-examination all according to defence amount to a serious doubt as to whether accused committed the crime.

In court I noted that PW.3 (**Mugonyi David**) was very evasive while giving evidence. It was obviously clear that either he intended to cover up for the accused or he was deliberately evading to say the truth. His evidence was key to collaborate both PW.1 and PW.2 as a person who saw the victim go to accused's house and who got first information from her. He however answered evasively all questions put to him both in evidence in chief and cross-examination. His evidence was very unreliable and hence, failed in its worth for collaboration purposes, to link accused to the scene of crime. There was therefore lack of collaboration. There were gaps in evidence not covered by close of the prosecution's case. The girl **Mugidde** was never called, yet she was vital to place accused at the scene; and to prove that the victim was also at the scene. The matron/Nurse, was not called to collaborate the fact that the victim actually spoke

to her and to PW.3- who was evasive. There were no leads in this evidence to conclusively show that the man whom **Namono** played sex with on 9th September 2009, was **Wasolo**. It is true she went to his house and perhaps was invited by him as she says, but her subsequent silence, her conduct of keeping quiet and even going back to school, without complaining- could mean that she had sex with other men or another man- within that timeframe. **Wasolo** denied being at the scene. Her conduct destroyed it further, and **PW.4 Dr. Rubanza** buried it. He (PW.4) left a lot of uncertainties on the participation of the accused.

After the above analysis of evidence as a whole, I find that this vital ingredient was not proved by the prosecution.

The fact that accused is a guardian of the victim as a teacher needs no further proof. However it's the finding of this court, following the unanimous opinion of the assessors, that the accused **Wasolo** was not the assailant in this matter. The accused is therefore not found liable on the charge. He is acquitted thereof. I so order.

Henry I. Kawesa

JUDGE

13.03.2014