

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

CRIMINAL APPEAL NO. 059 OF 2011
(Arising from Kaliro Criminal Case No. 086/2011)

5

KASAJJA

PETER ::

APPELLANT

10

VERSUS

UGANDA ::

RESPONDENT

15

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

JUDGMENT

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The Appellant was tried and convicted of the offence of Attempting to commit an unnatural offence contrary to section 146 of the Penal Code Act.

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He was sentenced to a serve 4 years imprisonment. He has appealed against both conviction and sentence.

Five grounds of Appeal were raised namely:

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1. The learned trial magistrate erred in law and fact when she considered the prosecution evidence in isolation of that of the defence.

2. The trial magistrate erred in law and fact when she heard that the Appellant did attempt to have carnal knowledge of the complainant against the order of nature.
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3. The trial magistrate failed to judicially evaluate the evidence and came to a wrong decision.
- 10 4. The trial magistrate erred in law and fact when she found the evidence of the prosecution witnesses corroborative.
- 15 5. The sentence of 4 years was harsh and excessive in the circumstances.

Save for Ground No. 5, all the first 4 Grounds are in respect of evaluation of evidence as reflected from the submissions
20 by both Counsel for the Appellant and for the prosecution.

Ground No. 5 was not argued so I assume that it was abandoned.

25 For the Appellant, it is submitted that there were grave contradictions in the prosecution case which were ignored by the magistrate in evaluating the evidence.

It is submitted that the complainant and accused were friends who used to visit each other's home.

- 5 That there was no evidence of seduction by the Appellant.

The photographs at the scene did not demonstrate any sexual/unnatural act.

- 10 That the evidence of the complainant was not corroborated since they were only 2 in the room and that the other witnesses PW2 and PW3 could not have seen what was happening in the room through the hole in the wall/door.
- 15 Finally when PW2 and PW3 opened the door of the room, they found the Appellant fully dressed.

- 20 For the prosecution, it was submitted that the difference in the ages of the accused and the complainant cannot explain their alleged friendship. That the Appellant kept on seducing the complainant and promised him money. Then laid a trap for him. The Police found him in the complainant's room.

No authorities were cited.

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The magistrate in her Judgment dealt with the ingredients of the offence of Attempting to Commit an Unnatural Act contrary to Section 146 of the Penal Code Act. These are:

- The attempt must be by the accused.
- 5 - The attempt must be trying to engage in unnatural sex.

After reviewing the evidence, she was satisfied that the accused/Appellant was properly placed at the scene of crime.

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She then dealt with what attempt constitutes.

15 Rightly she found that to constitute attempt, the actions must go beyond mere preparation. The accused although fails to commit the overt act, must have the direct or specific intent to commit the full offence. It must be the purpose of the accused to engage in the conduct or cause the result which constitutes the targeted offence. He must reach a point of no return such that if he is not interrupted or
20 disrupted or if he does not abandon the act, it would inevitably result in the commission of the crime.

I do not fault the magistrate's understanding of Attempt.

The evidence on record however reveals so many loopholes that the conclusion that the accused attempted to commit the offence cannot stand.

5 Apart from the evidence that the Appellant was giving Airtime to the complainant which is not even corroborated, the only other evidence is what happened on the material day.

- 10 - The Appellant was indeed found in the complainant's house.
- He was found with his clothes on, so was the complainant.
- The photographs exhibited are those of the Appellant and the complainant dressed.

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Attempts are defined in **Section 386 (1) of the Penal Code Act;**

20 **“When a person intending to commit an offence, begins to put his or her intention into execution by means adopted to its fulfilment, and manifests his or her intention by some overt act, but does not fulfil his or her intention to such an extent as to commit the offence, he or she is**

25 **deemed to attempt to commit the offence.”**

In **Uganda Vrs. Ojengo - Jinja Criminal Session Case No. 9/2011**, the accused was acquitted of Attempted Defilement when he was found lying on the bed with the victim naked, but nothing else had happened.

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Similarly, in **Uganda Vrs. Rwabutikire Moses HCT Session Case No. 66/2001**, it was held that even when he assailant makes all the necessary preparations but fails to consummate the plans this falls short of the attempt.

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In the instant case there is no concrete evidence that the Appellant/accused had made all the necessary preparations to the extent that there was no point of return other than consummating his illegal acts.

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The complainant himself in his testimony never stated that the Appellant tried to use his sexual organ on him in anyway.

20 All in all, the Appellant's actions and conduct were very suspicious, but fall far short of being categorized as an attempt to commit an unnatural offence/act.

This appeal succeeds.

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The Judgment and conviction of the lower Court are set aside. The Appellant is found not guilty as he should have by the lower Court and is acquitted accordingly.

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Godfrey Namundi

JUDGE

07/04/2015

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07/04/2015:

Muziransa for Appellant

Birungi for Resident State Attorney

5 Court: Judgment read.

Godfrey Namundi

JUDGE

10 **07/04/2015**