

THE REPUBLIC OF UGANDA
IN THE HIGH COURT UGANDA HOLDEN AT LUWEERO
HIGH COURT CRIMINAL SESSION CASE NO. 367 OF 2013
(ARISING FROM LUWERO COURTY CASE NO. 116 OF 2012)

UGANDA ::: PROSECUTOR

VERSUS

SERUBOGO DAVID ::: ACUSED

BEFORE: HON. MR. JUSTICE JOSEPH MURANGIRA.

JUDGEMENT

1. INTRODUCTION

1.1 The prosecution is represented by Ms Kasana Hanifa, State Attorney working with the Directorate of Public Prosecution`s office at Luweero. And whereas, the accused, Serubogo David, is represented by Mr. Wameli Anthony from M/S Wameli & Co. Advocates, Kampala

1.2 The two assessors in this case are

Mr. Herbert Masaba

Mr. Ddamulira Christopher

2. Facts of the case

It is stated by the prosecution that on 10th December, 2012 the accused, Serubogo David, found the victim, Mutesi Kalekwa a girl aged 8 years at a bore hole in Bunyaka village in Luweero District. He took her to his house and had sexual intercourse with her after which he gave her sh.100/= and told her to go back home.

The victim reported the matter to her grand-parents. The accused was arrested and taken to Kasana police post. He was charged with Aggravated Defilement and taken to court. Hence this trial.

3. Witnesses for the parties

3.1. Prosecution witnesses

- i) Mr. Mukama Tom, the grandfather of the victim, PW1
- ii) Ms Asanansi Namuleni, the grandmother of the victim, PW2
- iii) Mr. Stephen Kakoti, PW3
- iv) Mutesi Asanansi Kalekwa, the victim, PW4

3.2. Defence witnesses

- a) Mr. Serubogo David, the accused, DW1
- b) Mrs. Ruth Nabisalu, the wife of the accused, DW2

4. Prosecution exhibits

The prosecution relied on the following exhibits:-

- i) PF 3A on which the victim was examined, EXH P1
- ii) PF 24A on which the accused was examined, EXH P2
- iii) The accused`s plain statement he made at Kasana Police post on 12/12/2012, EXH P3

The accused Serubogo David is indicted with Aggravated Defilement Contrary to Section 129(3), (4) (a) of the Penal Code Act Cap, 120 Laws of Uganda

5. Ingredients of the charged offence:-

To prove the offence charged against the accused, the prosecution must prove the following ingredients

- (a) The victim was aged below the age of 14 years
- (b) A sexual act was performed on the victim
- (c) The accused is the one who performed that sexual act on the victim

6. The burden of proof

In our criminal law system, the prosecution bears the burden to prove all the above stated ingredients of the charged offence. The standard of proof is beyond reasonable doubt.

This burden of proof does not shift to the accused throughout the trial. This burden of proof always rests on the prosecution. The accused does not need to prove himself or herself innocent. If there is any doubt in the prosecution case, that doubt is resolved in favour of the accused. See the case of **Woolmington Vs DPP [1935], AC 462**.

7. Resolution of the case by court

In their respective submissions, both counsel for the parties agreed that the prosecution proved the 1st and 2nd ingredients of the charged offence of Aggravated Defilement. In the assessor's joint opinion, they too agreed that the 1st two ingredients of the charged offence were proved by the prosecution.

I have evaluated the prosecution and defence evidence on the court record, considered PF 3A on which the victim PW4 was examined, EXH P1 and the accused's plain statement he made at the police, EXH P3, I am thus in agreement with the counsel for the parties and the gentlemen assessors that the 1st and 2nd ingredients of the charged offence were proved by the prosecution beyond reasonable doubt.

The defence only contested the third ingredient of the charged offence; the participation of the accused in the commission of the charged offence. In his submissions, Mr. Wameli Anthony, counsel for the accused submitted that the prosecution failed to prove the charged offence against the accused beyond reasonable doubt. He evaluated the prosecution evidence of the four prosecution witnesses and raised the following in his view, doubts in the prosecution case.

1. PW4 the victim was the only identifying witness, who was a minor aged 8 years at the time of the commission of the charged offence. That therefore, her evidence needed to have been corroborated. That the fact of the accused's participation was not corroborated.
2. The accused in his defence raised a defence of alibi. That the accused gave evidence that at the alleged material time the accused had gone to Kasana Township to buy his shop merchandise; that he went at 3:00pm and returned back home at 6:00pm. That therefore the accused could not have been the one who defiled the victim PW4.
3. That there was a grudge or call it a bad relationship that existed between the accused and the victim's grandparents that as was stated by the accused in his defence arising from their failure to pay sh. 3000/= (three thousand shillings only) for the water from

the bore hole for the last three months before this incident. That on the alleged date, the accused beat up the victim when the latter forcefully fetched water from the bore hole. That this also escalated the bad relationship between the parents.

4. That the prosecution tended to connect the accused with the offence charged using the HIV+ status of the accused with that of the victim, PW4, (**whereupon examination by the doctor on PF 3A was found to be HIV+**). Counsel for the accused contended that the defence adduced evidence that PW4's (victim) mother was HIV+ and that as such, the victim could have contracted the HIV virus from her mother.

In her submissions, Ms Kasana Hanifa counsel for the prosecution in reply does not agree with the submissions by counsel for the defence. She too evaluated both the prosecution and the defence evidence and submitted that the prosecution evidence proved this 3rd ingredient of the charged offence against the accused beyond reasonable doubt. She further submitted that in his defence, the accused put himself at the scene of crime. She prayed that the accused be found guilty and convicted as charged.

In their final joint opinion, the two gentlemen assessors considered both evidence by the parties, analyzed the same and found that the accused committed the charged offence and advised me to convict the accused as charged. I evaluated the evidence of the parties on the court record as a whole. I further analyzed the submissions by both counsel for the parties.

In his submissions, counsel for the accused Mr. Wameli Anthony raised four (4) pertinent issues which should be resolved by court. On the issue of the like hood of the victim, PW4 not to have been able to identify the accused, PW4 the victim gave direct evidence against the accused. She told court in her evidence that on that fateful day when she was going to the bore hole to fetch water, the accused took her to his house and had sexual inter course with her. In her evidence she said that, that was the accused's 5th (fifth) time to have sex with her. That on the first time she had been at his shop to buy goods. That the second time she was going to school. And that the rest of the times, the accused had sexual intercourse with her as she was going to the borehole to fetch water. From her evidence, PW4 the victim very well knew the accused. They had sexual intercourse on five different occasions during the day. The accused had a shop in the area and also operated a business of a bore hole in the village. Thus, PW4 the victim was familiar with the accused. The sexual acts were performed during the day time; hence there was enough light that enabled PW4 to see and observe the accused as the very person who performed the sexual acts on her. Therefore the question of mistaken

identity of the accused by the victim does not arise in this case. There were favourable factors that enabled PW4 to properly identify the accused. See the case of **Abdallah Nabulere & Another Vs Uganda Criminal Appeal No. 9 of 1978** in support of my findings on the issue of identification of the accused by the victim, PW4.

Further, PW4's evidence was corroborated by the evidence of PW2, her grandmother who told court that when she noted that the victim had delayed at the borehole and she was not walking properly and had sh.100/=, she asked her. That the victim, PW4 revealed to her the name of the accused as her defiler. PW3 also informed court that when the victim was taken to him, she mentioned Serubogo David as her defiler.

Furthermore counsel for the accused Mr. Wameli Anthony, in his submissions raised an issue of alibi. It is trite law that the defence of alibi must be raised at the earliest point. In the instant case, the alibi should have been raised at the time he was arrested; that is at the police station. The second earliest point would be during cross examination of the prosecution witnesses. This alibi only came up in defence that the accused at the alleged time of the commission of the charged offence had gone to Kasana Township to do shopping for his shop. I hasten to add that in cross examination, the accused's defence was destroyed. In his answers in cross examination, the accused also put himself at the scene of crime.

EXH P3, the accused's plain statement he made at the police was put in evidence for the prosecution in proof that the accused's defence was a mere denial of the charged offence. Again, the accused in his defence put himself at the scene of crime when he gave evidence that on that fateful day, he only caned the victim for forcefully fetching water from his bore hole.

On the issue of the grudge between the accused and the victim's grandparents on ground that the latter failed to pay to him shs. 3000/= for a bill of water they had fetched from the bore hole. My finding is that the allegation of a grudge by the defence is farfetched. The victim's grandparents came to court gave evidence and this issue was never explored during cross examination. PW1, Mukama Tom, the grandfather of the victim, gave evidence that he is an office attendant in Luwero Town Council. It is my considered opinion that PW1 is a Public Civil Servant who earns a salary and there is no way how he could fail to pay the water bill of sh.1000 (one thousand shillings) per month. Thus the accused's allegation on that point in his defence do no hold any water at all.

On the issue raised by the defence that PW4, the victim might have got the HIV virus from her mother, in my considered view is un-believable. The defence did not bring to court any documentary evidence to prove that the victim`s mother is HIV+. The accused in his defence stated that he had sexual intercourse with the victim`s mother and may be infected her with HIV/AIDS. That therefore, he is not the one who infected the victim with the virus HIV/AIDS. In his plain statement he made at police on 12/12/2012, EXH P3, which was allowed in evidence without any objection from defence counsel among other things, in that statement he stated; **“.....the said girl I have not had any sexual intercourse with her. I only had sexual intercourse with her real mother, Kulusi when she was still at their place last year.”**

According to the prosecution evidence on record, at the time the accused had sexual intercourse with the victim on 10th December, 2012 she was aged 8 years. This meant that by the time the accused had sexual intercourse allegedly with her mother in 201, she was already born. And that, therefore, it is the accused who infected the victim with HIV/AIDS. It is unfortunate that throughout the victim`s short life, she will permanently live in pain and suffering.

In sum total, I hold that the prosecution proved this 3rd ingredient of the charged offence beyond reasonable doubt.

8. Conclusion:

In closing, in agreement with the counsel for the prosecution and the two gentlemen assessors, I find that prosecution proved its case against the accused person beyond reasonable doubt. The accused is found guilty and convicted of Aggravated Defilement contrary to section 129(3) (4) (a) and (c) of the Penal Code Act.

Dated at Luweero this 25th day of April, 2016.

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JOSEPH MURANGIRA

JUDGE

25/04/2016.

25/4/2016

Ms Nabasitu Daisy for the state holding brief for Ms Kasana Hanifa: The state will be here in the afternoon.

Mr. Walyamera Daniel holding brief for Mr .Wameli Anthony for the accused.

The accused is in court.

The 2 assessors are in court.

Mr. Kavuma Michael the clerk is in court

Court : Judgment is delivered in open court to the parties.

The case is stood over till 2:00 pm for mitigation of sentence.

Later at 2:00pm

Court as before;

Court: Adjourned to 27/4/2016 for mitigation of sentence.

JOSEPH MURANGIRA

JUDGE

25/04/2016

27/4/2016

Ms Kasana Hanifa State Attorney for the state.

Mr. Wameli Anthony for the accused

The accused is in court.

The matter is coming up for mitigation.

The two assessors are in court.

Mr. Micheal Kavuma the clerk is in court.

Prosecution:

- a) The convict is a first offender.
- b) The victim was infected with HIV AIDS.
- c) The offences of aggravated defilement are rampant

So I pray for a deterrent sentence. I also observe the health condition of the convict. So I don't have specific years to pray for.

Counsel for the accused in mitigation.

- a) We pray for a lenient sentence.
- b) Convict is a first offender and this means that it is not his habit to commit offences and he can reform.
- c) He has spent close to 3 years on remand.
- d) He is also living positively with the HIV/ AIDS virus and his health in prison is not guaranteed.
- e) He is aged 50 years, thus he is in his advanced age.
- f) He was also a bread winner of his family.
- g) We also alive that the victim in the process was infected with HIV/ AIDS.
- h) For this particular convict, given his health conditions and appearance, we submit that there is little life in this convict, so a long custodial sentence amounts to a death warrant.

I therefore, pray that the court considers all the above and he be sentenced to 5 years imprisonment.

We so pray.

Court: Sentence shall be delivered on 28/4/2016 at 9:00am. Accused further remanded.

JOSEPH MURANGIRA

JUDGE

27/4/2016

28/4/2016

Sentence and reasons for the sentence.

1. All the mitigating factors that were advanced by counsel for the prosecution and that for the defence.
2. The convict is a first offender.

3. Offences of aggravated defilement are rampant in this jurisdiction and Uganda at large. There is dire need to pass sentences to curb down this offence.
4. The convict is HIV Positive and had un protected sexual intercourse with the victim knowing he was sick with a deadly disease.
5. The convict is a married man with two wives yet he went for a girl who was aged 8 years at the time. This is a total shame to the convict.
6. The convict infected the victim with the HIV/ AIDS Virus. The court was informed that the child was on ARV's and that she does not know what she is suffering from and many times she is down with fever/malaria and does not go to school.
7. The convict by infecting the victim with HIV/ AIDS an incurable disease passed a death sentence against the victim.
8. The victim will live in pain and agony until she dies; her death is soon than later.
9. The convict's actions against the victim must be traumatizing the parents and relatives of the victim.
10. The consequences and circumstances pertaining on how the offence was committed puts the offence in the category of the rare of the rarest cases.
11. The maximum sentence for such an offence is death.
12. The convict has been on remand for a period of 3 years and 4 months.

Therefore, considering the above stated mitigating factors, I would have sentenced the convict to 23 years and 4 months. However, I do subtract from such a sentence the period the convict has spent on remand. Therefore, the convict is sentenced to 20 (twenty) years imprisonment.

Dated at Luweero this 28th day of April, 2016.

JOSEPH MURANGIRA

JUDGE

28/4/2016

Ms. Kasana Hanifa State Attorney for the state.

Mr. Wameli Anthony for the convict is absent.

Ms. Birungi Monica holding brief for Wameli Anthony.

The convict is in court.

The two assessors are in court.

Court: sentence is delivered to the parties in open court.

Right of Appeal is explained to the parties.

JOSEPH MURANGIRA

JUDGE

28/4/2016