

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CRIMINAL SESSION CASE NO.19 OF 2014

UGANDA

PROSECUTOR

VERSUS

TUGUME BOSCO

ACCUSES

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

Tugume Bosco was indicted for Rape Contrary to Section 129(3) and (4)(a) of the Penal Code Act. It is alleged that on the 29th May 2013 at Kigezi Village in Kisoro District, he performed a sexual act with Irasubiza Gift, a girl below eighteen years.

The accused and the victims are related and share the same compound. On the 29th May 2013, the victim remained home with other children of her age when her mother, Dusabe Sylvia(PW3) went to the garden. At 12.30 pm the mother returned to find the victim crying and when she inquired from her she was told “*Tugume got his animal and inserted it in my vagina.*” Court heard from the mother that the victim pointed at her private parts when explaining what the accused had done.

The mother examined the victim and found a bruise in her vagina whereupon she called Robert Sengiyunva(PW4) and narrated to him what she had been told and observed. PW4 looked for the accused who ran away and could not be immediately arrested. PW3, PW4 and Eric Mpakaniye(PW5) the victim’s father went to Nyakabande Police Post from where they were referred to Kisoro Police station. Mr. Sengoma Benjamin(PW6) a Senior Clinical Officer at Kisoro Hospital examined the victim on the 30th May 2013. His findings were that she was three years of age and “*had a crack involving the faucet*”. He attributed the injury to a blunt object.

The victim testified as PW5. She was a very intelligent witness with ability to appreciate and answer questions put to her and the value of telling the truth. She could not however understand what an oath is and gave evidence not on oaths. PW5 told Court that on the 29th May 2013 she was playing with other children at the home of the accused when the accused called her for peas. She then told Court;

‘He took me to his room. He slept with me .He put his thing in my vagina.... Mother came back and I told her. Also told Robert.....When he put his thing in me I was crying .Mother first checked me before calling Robert. When Tugume saw Robert he ran away and disappeared....’

Court heard from PW3, PW4 and PW5 that in the evening of the same day, they were called by the mother of the accused to arrest him since he had returned home.

The accused denied defiling the victim and told Court that he went to school on the 25th May 2013 and returned home for lunch at 1.00pm but his mother was still in the garden so he went back. At 5.00pm he returned home and took goats for grazing from 5.40 pm to 6.00pm and thereafter went to play football. PW3 and PW4 came and arrested him from their home at 7.00pm.

Court heard from the accused in his defence, that on the 9th May 2013 PW3's pig strayed into their garden and destroyed crops for the whole night. PW3 abused the accused on the 10th May 2013 because she could not see the pig which later surfaced but died on the 13th May 2013. PW3 attributed the death of the pig to the accused whom he forced to bury the carcass and vowed to have him imprisoned.

In an indictment for Aggravated Defilement, the Prosecution bears the onus to prove that the victim was below the age of eighteen and that a sexual act occurred between her and the Accused. The ingredients must be proved beyond reasonable doubt. The accused does not have the obligation to prove his innocence and this does not shift all through the trial except in a few statutory offences.

Where an alibi is raised as a defence like in the instant case, the Prosecution is required to adduce sufficient evidence to show that the accused was not where he claims to have been on the date and time the offence was committed. The evidence must place the accused at the scene of crime as the perpetrator so as to discredit the alibi.

On the 24th July 2017 when the victim gave her testimony, she told Court that she was seven years and in Primary two at Kigangyo Primary School. PW3 the mother told Court that the victim was born on the 17th February 2010 but did not produce her birth certificate. In the exhibited medical report, the victim was found to be three years on the 30th May 2013 when she was examined by the Senior Clinical Officer. This evidence was not challenged and from ocular observation of the victim, I have no doubt that she was three years at the time the offence was committed.

Section 129(7) of the Penal Code Act defines a sexual act to mean;

“penetration of the vagina, mouth or anus, however slight of any person by a sexual organ.” A sexual organ is defined as *‘a vagina or penis.’*

The victim described to her mother, PW3 what took place before she examined her and found she had been injured in the vagina. The report of the Senior Clinical Officer was to the effect that there was a crack involving the faucet. He explained the “faucet” on the body anatomy as *“the part where the two labias, the lips of the vagina; meet towards the anus.”* The probable cause of the injury was stated to be *“sexual assault”* in the medical report. I find all the above evidence sufficient to prove that a sexual act was performed on the victim. Penetration however slight amounts to performance of a sexual act.

The only direct evidence court heard was that of the victim herself who identified the accused thus;

“He is Tugume Bosco. He is a neighbor below our home. He is not a good man.”

There is no doubt that the accused and the victim know each other since Court heard that their homes are about ten meters apart and the accused said he has known the victim since she was born. The accused told Court he had no grudge with either PW4 who allegedly chased him after being told of the alleged defilement or with PW5, the victim’s father. The grudge attributed to PW2, the victim’s mother was not at all raised against her in cross examination. The accused introduced that vital piece of evidence in his defense which limited Court’s assessment of its veracity.

The accused was under the care and custody of his mother he told Court. He further told Court about how PW2 abused her and even forced him to bury the carcass of the dead pig but he did not tell all this to his mother! I do not find this very truthful evidence. The victim told Court that when at the home of accused, she and other children were eating peas. In the opinion of this Court this perfectly blends with the allegation that the accused called the victim to his room for peas. The same story about the peas also goes to discredit the alibi of the accused who claims to have returned from school and found no food.

I find the evidence of the victim, PW3, PW4 and PW5 relating to what happened on the 29th May 2013 sufficiently strong to discredit the alibi fronted by the accused. The accused performed a sexual act on the victim.

Section 40(3) of the Trial on Indictments Act provides for material corroborating evidence to be adduced if the evidence of a child of tender years not given on oaths is to form the basis for a conviction. The victim’s evidence is sufficiently corroborated by that of PW3, the mother who examined her and PW6 the Medical Officer who examined her on the 30th May 2013 and confirmed the occurrence of a sexual act.

I find the accused guilty of Rape contrary to Section 129(3) and (4)(a) of the Penal Code Act. I accordingly convict him.

Moses Kazibwe Kawumi

Judge

21st August 2017.