

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO.1176 OF 2016

UGANDA

PROSECUTOR

VERSUS

NAMUSOKE ZAINA

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was indicted for Aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act. The Prosecution case is that on the 22nd day of July 2016 at Kiwalimu Zone, Kasangati, the accused who is HIV Positive performed a sexual act with Tumwesigye Joseph Kato, a boy aged 11 years at the time.

Counsel agreed to admit in evidence Police forms 24A and 3A relating to the medical examination of the accused and the victim respectively. They were both examined by a Clinical Medical Officer at Kiira Health Center on the 25th July 2016. The accused was found to be 23 years, with no body injuries and mentally sound. She was found to be HIV positive. The victim was in good health with no body injuries, mentally sound and 12 years at the time of the examination.

The complainant (PW2) in his testimony told Court that he was 14 years old and ably identified the accused as one of their neighbors before their family shifted from Kiwalimu Zone at Kasangati. His testimony was that on the 22nd July 2016, his parents were away and the accused took care of them. At about 9.00pm, the accused who stayed in the rooms adjacent to those of the victim's family banged the wall separating their residences which scared the complainant and his twin sister (PW3). They left their house and sat on the veranda in the darkness outside .

The accused invited them into her house which had a solar lamp. She immediately laid a mat for PW3 on the bedroom floor and told the victim to sleep on her bed behind a curtain. The accused is alleged to have then fondled the victim and slept on top of him while extinguishing the solar lamp. She held the victim's mouth and warned him to keep quiet or else she was to kill him and the twin sister before disappearing from the village. The accused is then alleged to have pulled out the complainant's penis, and inserted it in and out of her vagina for about eight minutes while still lying on top of the victim.

The complainant's mother returned and they were then escorted out by the accused with a warning to him to keep quiet about what had taken place. The complainant however revealed what had taken place to PW3 the following day. PW3 told a neighbour who escorted them to Kasangati Police station and informed the victim's parents which led to the arrest of the

accused. Detective Constable Parmu Gorrette(PW4),investigated the case. She told Court that the accused confessed to the occurrence of a sexual act but claimed it was initiated by the complainant while they slept. In her house.

Atuhaire Jennifer Babirye(PW3) confirmed the invitation to stay with the accused on the 22nd July 2016 and that she slept on a mat in the bedroom but did not see what took place behind the curtain.PW3 and the complainant told Court that they were only three people in the accused's house on the 22nd July 2016.PW3 justified her reporting of what she had been told by the complainant to the fear that her brother could have been infected with a disease by the accused.

The accused in her defence agreed to having hosted the complainant and PW3 into her house on the 22nd July 2016 saying she came back and found them seated outside on the verandah. The accused opened for them and the complainant slept on her bed with a one Nakamya Grace who had come for a visit though the accused had wanted him to sleep in one of the chairs.PW3 slept on the carpet and the accused slept on the floor in the bedroom.

In cross examination however, the accused stated that she slept in the bedroom while the complainant,PW3 and the guest slept in the sitting room.The accused further denied admitting to any sexual act and claimed that the Police statement was recorded in English which she does not understand. She further told Court that it was not read back to her for confirmation of the contents before she was told to append her signature to it.

To secure a conviction on a charge of Aggravated defilement, the Prosecution is required to prove that;-

1. The victim was below fourteen years at the time the offence was committed.
2. A sexual act was performed with the victim.
3. That the accused is the person who performed a sexual act with the victim.

The Prosecution is required to prove all the ingredients of the offence and the degree of proof is that of beyond reasonable doubt. The burden to prove them does not shift to the accused who is under no duty to prove his innocence since any conviction must be based on the strength of the Prosecution evidence. Proof beyond reasonable doubt does not mean proof beyond any shadow of doubt or with utmost certainty , the standard is met when the evidence is so strong against the accused as to leave only a remote possibility in his favour.

The age of the complainant was stated to be 12 years at the time he was examined on the 25th July 2016.At the time he gave testimony in Court he was 14 years. The medical examination report was admitted in evidence under section 66 of the Trial on Indictments Act. Court had the opportunity to observe the complainant during the trial and it is not in doubt that he was below the age of fourteen at the time the offence was allegedly committed. This ingredient of the offence was hence sufficiently proved by the Prosecution.

Evidence of the occurrence of a sexual act is normally from the victim and it may be corroborated with other circumstantial evidence which may include medical evidence. It was argued by the Prosecution that medical proof of penetration is harder to come by where victims of defilement are boys as opposed to girls. I find merit in this argument on the basis of the anatomical differences in the sexual organs of boys and girls.

The direct evidence to prove the occurrence of a sexual act was that of the complainant since PW3 told Court that she was asleep on the other side of the curtain separating her from where the accused and the complainant slept. She relied on what she was told by the complainant. PW4 told Court that there was an admission by the accused but the statement was not tendered as a Prosecution exhibit which renders her evidence in that respect inadmissible.

The complainant told Court that the accused threatened her and he feared for his life before she began pulling his penis and subsequently moved it in and out of her genitals. The complainant further told Court that the accused had earlier tried to lure her into love when they were going to pick maize from the garden but he resisted her moves which testimony was not contested by the accused.

The accused on the other hand gave contradictory evidence of the sleeping arrangement in her house on the 22nd July 2016. While she told Court in her evidence in chief that the complainant slept with a visitor on her bed, she changed to say that he slept with the visitor in the sitting room while she slept in the bedroom. The question to ask is why could she have left the complainant to sleep with a stranger and not in the chair she wanted him to sleep on?

The accused could also not explain how the alleged visitor accessed the house yet it was her who opened for the complainant and PW3 which implies the house had been locked? The complainant and PW3 were consistent and firm in cross examination and clearly narrated the build up to the events of the day. I believed their testimony as to where each of them slept and their evidence to the effect that there was no visitor in the house.

I do not find validity in the argument by Counsel that the complainant could not have properly identified the person who sexually abused him. The Complainant and the accused had been neighbors for close to one year, they were not strangers to her house, they were near each other from the time the accused invited them into her house and the encounter lasted for over ten minutes. I hold that the circumstances were conducive for positive identification of the accused as the person who slept with the complainant.

Section 129(7) of the Penal Code Act defines a sexual act as the slightest penetration of one sexual organ into another. The accused held the mouth of the complainant, extinguished the lamp, smooched his penis and used it for her sexual gratification by pushing it in and out of her genitals which amounts to the performance of a sexual act.

The accused admitted to being with the complainant and PW3 in her house on the 22nd July 2016. Her alibi as to the sleeping arrangement was however discredited by the contradictions in her own evidence. The presence of a visitor in the house could not be explained away since

the accused told Court that she opened for the complainant and PW3 when she came back at about 8.30 pm. The sleeping arrangement coherently described by PW2 and PW3 clearly points to the intention to commit the sexual act since the accused should have logically slept with PW3 and not the male complainant. For those reasons I find the version of evidence by the Complainant and PW3 more acceptable.

The complainant was the single identifying witness produced by the Prosecution. I have duly warned myself that there was no mistaken identity as to the accused being the perpetrator of the crime. The conditions surrounding the commission of the offense were conducive for the proper identification of the accused.

Christopher Byagonza V Uganda.Crim.Appeal No.25/1997.

I find the accused guilty of Aggravated defilement contrary to section 129(3) and (4) of the Penal Code Act and accordingly convict her.

Moses Kazibwe Kawumi

Judge

22nd February 2018.