

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CRIMINAL SESSIONS CASE NO.183 OF 1993

UGANDA:..... PROSECUTOR

VERSUS

ATHOCON NEREO

ACCUSED

BEFORE; HONOURABLE MR. JUSTICE J.W.N.TSKOOKO

JUDGEMENT

The accused Athocon Nereo is indicted for defilement c/s 123 (1) of the Penal Code Act. The particulars of the offence allege that the accused on or about 31st day of August, 1992 at Kigumba Trading Centre in Masindi District unlawfully had sexual intercourse with one Justin Mono, a girl under the age of 18 years.

The prosecution called six (6) witnesses. These are Justin Mono (PW1) angelin Acen (PW2) Man Nganuta (Pw3) No.19272 O/c Opuyi 1. (PW4) No. 1641 P/c (PW5) and Luuka Okaro (PW6) accused gave an unsworn statement. No other defence witness testified.

Briefly the prosecution case is that in the afternoon of 31/8/1992, P3, the mother of the complainant (PU1) Sent Pw1 to a Grinding Mill in Kigumba Trading Centre to grind wheat for chapatti. PW1 found 5 or 7 other persons at the mill which delayed here after about an hour she went to the home of PW2 to drink water. She was a friend of Grace Daughter of PW2 with who she had been at school. PW2 returned home from some journey and found Pw1 and her children at home. This was about 3.00 p.m. Soon the accused and another person whom Pw2 described as

being drunk appeared. The two addressed Pw1 in presence of pw2 thus 'we should carry this girl'. The two grabbed Pw1 and each held her by the hand and pulled her away as pw1 was crying saying "leave me, leave me alone". Pw2 told the two men to leave the girl. They ignored as they pulled pw1 away towards Ssalongo's houses (acholi Inn area,) where the accused rented accommodation. PW2 instructed her daughter to follow up. That daughter returned and reported as that pw1 had been locked up in a houses pW3 searched for pw1 in the home of P2 and was told about what had happened. She was led to the accused's residence where he was closeted with Pw1. PW3 called. Accused said he did not know her and would not open for her. That was about 10.00 p.m. From inside PW1 informed PW3 that she had been prevented from opening the door. Neighbors of the accused chased PW3 away. She returned to the home of PW2 where she spent the night till next morning when she pursued the matter of her daughter. This culminated in the arrest of the accused at his home in the morning by Pw5. this was on 1/9/1992, on which date pw1 was taken to Kiryandongo hospital for examination. According to Pw1 and PW3, the age of FW1 was 14 years in 1992. PW6 confirmed this. Both pw3 and Pw4 testified that when each saw PW1 on 1/9/1992 she was in distressing state. Apart from the contradiction created by PW4 who claimed to have taken PW1 to hospital on 2/9/1992 the evidence of prosecution witnesses appears to be consistent from beginning to end. Accused on his part stated that he had been a friend of pw1 since April 1992. On 31//1992 he was provoked into taking Pw1 to his residence after Pw1 claimed that there was another man who was her fiancé and was paying dowry. He neither denied nor admitted pulling PW1 from the house of PW2.

He admitted that PW3, mother of pw1 went to his residence on that day at 9.00 p.m. and told him as Pw1 was married to another man. "Accused agreed to pay dowry to facilitate refund of the other fiancé's dowry. Next morning matters did not go well. He was arrested and hence this case. I directed the assessors as I direct myself now that they had to examine evidence of Pw1 against that of the accused. I directed them and I am directing myself now that if evidence of Pw1 is believed, then like in all sexual offences, it is the practice in our law to seek for corroboration of her evidence. I explained to the assessors that the corroboration required is independent evidence which establishes the guilt of the accused person see - Chila vs. Republic (1967) R.v Jones (1939) 27 Cr.Ap.Rep.33.

I have carefully examined the evidence of the complainant (Pw1), of PW2 of PW3 and the accused. I have considered submissions of Mr. Kabali Learned RSA and Mr. Fred Isingoma Learned defence counsel. I am satisfied that the evidence of Pw1, P113 and P116 proves that the complainant was aged 14 years by 31/8/1992. She was thus a girl aged below 18 years. I don't accept learned counsel for accused that proof of age is unsatisfactory medical evidence and even that of Pw1 is unchallenged on age.

I believe the complainant that she was forcefully dragged away by the accused and his companion to the residence of the accused when the accused ravished her. His declaration in presence of PW2 on evening of 31/8/1992 showed his determination to have sexual intercourse with PW1. He does not expressly admit having had sexual intercourse with her but that is obvious. His conduct towards Pw3 still confirms he had sex with her medical evidence confirm this. I believe these witnesses. I also believe constable Habomujuni when he stated that he found accused at his residence and arrested accused there and then. Although there are differences in the time (as between Pw1, Pw3 and Pw5) as to the exact time of the arrest of the accused, I consider that difference to be very minor and inconsequential in this cases.

Pw5 appears to suggest that he arrested accused inside his residence whereas Pw1 suggests that the arrest was outside. In my view this is minor and immaterial, the contradiction is minor. It is not deliberate lie. The essence is that both Pw1 and accused were found at residence of accused on the morning of 2/9/1992 and I find that as a fact. Pw4 claimed that he took Pw1 to hospital on 2/9/1992. This contradiction does not affect prosecution.

Having carefully considered the prosecution evidence and that of the accused. I am satisfied that the prosecution has proved the case against the accused. Pw1, PW2, Pw5 and Pw6 all impressed me as honest witnesses.. Pw 2, PW3,5 and Pw6 each independently corroborates the evidence of Pw1. I find as a fact that the accused had unlawful sexual intercourse with Justin Mono on 31/8/1992 in his residence.

According to medical evidence Justine was still a virgin because her hymen was not ruptured. Pw2 in part testified that some members of Alur Community practice forced marriage as was attempted

marriage in this case. She also testified that other members of the Alur Community don't practice forced marriage and that her own marriage was not forced. In my view such ancient and out modeled customs about forced marriages are repugnant and contrary to our laws and are no longer permissible. Further I do not accept the accused's claim that PW1 was his girl friend and he was due to marry her. I reject his claim that PW 3 wanted any dowry from accused.

It is plain from his evidence that alur women can't be paid dowry. PW1 was pregnant when she testified. She said she has since got married to another man. Learned Defence Counsel submitted that this shows that she was mature and she was probably not below it when accused had sex with her. He submitted that this raises doubt in favour of the accused. Neither the assessors nor I are in doubt at all that PW1 was below 18 by 31/8/1992. there is paradox in our law that whereas some girls get married, when they are under 18 years, men who defile girls whose age is below 18 commit the offence of defilement. But that is matter that can be considered in another forum or perhaps in mitigation of sentence. It certainly is not defence to an offence of defilement contrary to s.123 (1) of the Penal Code act as amended. The two assessors advised me that the prosecution has proved the case against the accused they advised me to convict the accused. Having considered all the evidence on the record, the submissions of both counsel and the law, I am satisfied beyond any reasonable doubt that the prosecution has discharged its burden of proof of the guilt of the accused. I agree with the opinions of the 2 assessors. There is ample corroboration of the evidence of PW1. I accordingly find the accused guilty of the offence.

I convict him.

JW.N TSEKOOKO

25/11/93