

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CRIMINAL SESSION CASE NO. 303/94

UGANDAPROSECUTOR

VERSUS

MBOILA DAUDIACCUSED

BEFORE: THE HONOURABLE C.M. KATO

JUDGMENT

The accused person Daudi Mboila also called Erisamu Mboila whom hereinafter is to be referred to as the accused is indicted for defilement c/s 123(1) of the Penal Code Act. The indictment alleges that on 22-1-94 at the village of Kasita in the district of Jinja, the accused unlawfully had sexual intercourse with one Oliva Mutosi Naigaga who was by then below the age of 18 years. The accused pleaded not guilty to the indictment.

It is the law of this country that the burden of proving accused's guilt lies on the door steps of prosecution and that burden does not shift to the accused because the law presumes him innocent until the contrary is proved:

Woolmington v. DPP (1935) EA 462 and Okethi Okale v. Republic (1965) EA 555 at page 559. It is also part of our law that the accused is not to be convicted on the weakness of his defence but he must be convicted on the strength of the case as proved by prosecution: Israel Epuku s/o Achietu v R. (1934) 1 EACA 166.

In the present case the case for prosecution was basically that on 22-1-1994 the accused paid a visit to the home of one Matama and when he was there he allured the young girl to a nearby sugar cane plantation where he had sexual intercourse with her. When she came back blood was observed on her dress, on being asked by her grandmother Matama as to what had happened the girl kept quiet. The accused was arrested and taken to the police, where he made his statement accepting that he had defiled the girl but at the material time he did not know what was going on, he discovered what he was doing when his penis could not penetrate as far as he had expected. The girl who was the victim of this incident could not testify because after voire dire had been conducted she was found to be too young to be able to testify before the court as she did not know if she had any religion, she did not know the nature of an oath nor could she tell the difference between telling lies and truth.

In his sworn evidence before the court the accused denied having had any sexual intercourse with the girl and he said this matter was brought against him because of a grudge between him and P5, because this accused had stopped his brother from working with PW5. Regarding the statement which he made to the police officer (pw6) he said it was not read to him at any rate he made the statement after he had been beaten.

The essential ingredients of the offence of defilement are basically two. The first one being that there must have been unlawful sexual intercourse and the second one being that the girl who was the subject of such sexual intercourse must have been below the age of 18 years. It must also be shown that the accused took part in the unlawful sexual intercourse

To prove the first ingredient prosecution brought forward the evidence of Dr. Katende (PW1) who testified that on 11-3-94, he examined Olive Mutesi Naigaga and he found that her hymen had been ruptured for unknown duration and in his opinion the rupture was due to defilement. The prosecution also put forward the evidence of PW3 Irene Mbawali who attended to the girl's treatment while she was in the hospital at Jinja for a week. Another piece of evidence adduced by prosecution to prove the first ingredient of the offence was by PW5 Waiswa Peter who testified that he observed some blood on the dress of the child. In my view prosecution has proved beyond reasonable doubt that the victim in this case actually had unlawful sexual intercourse with a man.

Regarding the second ingredient of this offence it is not seriously in dispute that at the time of this incident the girl was below the age of 18 years. According to the doctor when he examined the girl she was about 6 years old at that material time and according to the evidence of Samanya who is the father the girl was about 6 years at the time this incident took place although at the time of trial he said her age was about 7 years. I find it as a fact that Olive Mutesi Naigaga was below the age of 18 years when the offence was committed.

It is my firm holding that prosecution has proved beyond reasonable doubt that the offence of defilement was committed.

The most pertinent issue to be decided is whether or not the accused was responsible for the defilement of the victim. The evidence upon which prosecution relied to connect the accused with this offence is purely circumstantial in a sense that the nobody physically saw the

accused defiling the little girl. The law as stated in the case of Simon Musoke v. R. (1958) EA 715 is that the court will only proceed to convict an accused person on circumstantial evidence if that evidence is of such a nature that it points to nothing but to the guilt of the accused and there must be no co-existing circumstances which would weaken the inference of the accused's guilt. In the instant case prosecution has relied on the evidence of Peter Waiswa (PW5) who was present when the girl was narrating the story of how she had been with the accused and when the girl mentioned the accused's name the accused attempted to run but he (Peter waiswa) over powered and arrested the accused. This piece of evidence was seriously attacked by the learned counsel for defence Mr. Sanya who requested the court to treat this piece of evidence as hearsay since the girl herself had not testified. In my opinion this is not hearsay evidence because this particular witness saw with his own eyes some blood on the girl's dress and he also participated in arresting the accused who was trying to run away. The other piece of evidence upon which the prosecution relied was the accused's own confession to D/Inspector Margret Balidawa (PW6). Although strictly speaking that statement may not be treated as a confession because the accused was admitting the crime but he was saying the whole thing happened like a dream on the authority of the case of: Mali Kizza s/o Lusota v. R. (1941) 8 EACA 25 this was an admission not a confession. In this admission the accused admitted having defiled the girl. In his defence he did not deny having made that statement but he says he did so after he had been seriously assaulted. The story of his being seriously assaulted is something of an afterthought since the statement was admitted by consent of both sides. Even if this statement was to be treated as a confession and it has been retracted by the accused still his conduct of trying to run away offers enough corroboration of that statement.

In my opinion the evidence of PW5 taken together with the accused's statement to PW6 clearly shows that the accused in fact defiled the young girl Oliva Mutesi Naigaga. The mere fact that the girl is too young to testify does not mean the prosecution cannot prove the case against the accused by use of some other available of evidence as it is not a rule of our practice that in all cases complainants must testify in order to secure a conviction; each case must be taken on its own merits.

In full agreement with the opinion of the gentlemen assessors I find that the prosecution had proved its case against the accused beyond reasonable doubt and I do find him guilty of defilement c/s 123(1) of the Penal Code Act and I accordingly convict him of that offence.

C.M. KATO

JUDGE

1-9-1995