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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT RUKUNGIRI

HCT-05-CR-SC-0024-2000

UGANDA ::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

10 NKURIYONGOMA YUSUF::::::::::::::::::::: ACCUSED

BEFORE: HON. JUSTICE P.K. MUGAMBA

PROCEEDINGS:

15

3/5/2000 Mr. Rwaheru for Accused

Mr. Byansi for the State.

Accused in court.

20 Assessors: Rwanika

Bazirakye

Court: The case is fixed for hearing on the 26/5/2000.

V.A.R.Kagaba

25 **Judge**

3/5/2000

26/5/2000 Mr. Rwaheru for the accused

Mr. Byansi for the State

Accused in Court

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Turyamubona – Court Interpreter

The indictment read to the accused.

Accused replies : - I deny the charge.

Plea of Not Guilty entered.

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Mr. Byansi:

We have agreed to admit the evidence of four witnesses.

Preliminary Hearing under Section 64 of the Trial on Indictments Decree.

5 (1) Dr. Birungi: Medical Superintendent of Kambuga Hospital, the examined the
victim Monica Nshemereire on P.F3 on the 30/5/99.

He found : The victim was aged about five years. He found signs of penetration. The hymen
was ruptured along time ago. He did not find any injuries or inflammation on the child's private
parts. There were no bruises on the thighs, hands, legs and elbows. There were no signs of any
10 venereal disease.

Court: The doctor's report is admitted as exhibit P1.

15 (2) Dr. Musinguzi – Medical Officer of Nyakibale Hospital – he examined the accused,
Nkuriyongoma Yusufu on P.F 24 on the 22/11/99.

He found that the accused was 20 years old, had no injuries on his body and his mental state
was normal. He found the accused erects normally and had no problem with erection.

Court: The report is admitted as Exhibit P.2.

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(3) D/IP Gumisiriza K. – Stated on 23/2/99, the accused was brought before him for
recording a charge and caution statement. He explained to him the charge and
cautioned him. The accused said he understood the charge and caution. The
accused gave him his statement which he recorded in English. He read the
25 statement back to the accused. The accused signed and the witness counter signed
it.

Court: The statement is admitted as Exhibit P.3.

(4) **Turyagumisiriza Lilian:** 25years old, Mukiga, House wife of
Bernard Birinkana. Ishasha village Nyanga Parish Kihihi Sub County,
Kinkizi County Rukungiri District States;

On the 17/2/99 at around 8.00p.m, while at her home, she heard one of her neighbours,
5 Tusimiraho Vida making an alarm and saying her daughter Monica Nshemereirwe had been
defiled by Nkuriyongoma. She went and saw the defiled girl aged nine years. She called the girl
aside and checked her private parts. She saw some sperms mixed with blood in the vagina of the
little girl.

10 Other people came – included the father of the girl – Bashaija Baguma, Turyamureba and
Jennifer, the grandmother of the girl. They all decided that they take Nshemereirwe, the victim
and Nkuriyongoma to the Chairperson of their village for assistance. When we reached the place
of the chairman called Likarido, he advised to keep both the victim and the suspect until the
following day. The following day – 18/2/99, he forwarded us to the chairman LCII, who in turn
15 forwarded them to Kihihi Police Station.

The recorded evidence is read over to the accused.

Signature of the Accused Nkuriyongoma

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Signature of the Defence Counsel

.....

25 Signature of the State – Attorney

.....

Selection and swearing in of the assessors.

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Assessors shown to the accused.

Accused: I have no objection.

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State Attorney: I have no objection.

Defence Counsel: I have no objection.

10 **Assessor (1)** Francis Rwanika 58 years teacher of Bushuru

Primary School Kabale District Catholic

Sworn.

Assessor (2) Mushabe Andrew – 52 years Meteorologist

Kabale

Municipality Catholic Sworn.

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The admitted evidence is read over to the assessors.

Court: Although there are witnesses in court, I am unable to take their evidence

because I have to travel to Kampala. The case is adjourned for further

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hearing on the 31/5/2000.

V.A.R. Kagaba

Judge

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26/5/2000

31/5/2000 Mr. Rwaheru for the Accused

Mr. Byansi for the State

Accused in court.

30

Both Assessors in Court.

Mr. Byansi: I have three witnesses in court.

PW1: Agnes Monica Nshemereire 10 years Ishasha village Nyango Parish.

5 **Court:** having seen the witness, this court had decided to go through the Voire
dire proceedings in order to establish whether the witness is possessed
of sufficient intelligence to given evidence and
whether she appreciates the value of speaking the truth.

10 **Voire Dire Proceedings:**

My name is Agnes Monica Nshemereire. I am at Kazinga Primary School. I am in class II my
class teacher is Zimairi. Our headmaster is Mugisha. I know that man – (Points at the accused)
is Nkuriyengoma Majoro. He comes from Ishasha. He lives near our home. I have come for the
case. I was raped by Nkuriyengoma. I know the difference between telling the truth and telling
15 lies.

I have to tell court the truth. I have not been couched by parents to say what I am going to say. I
do not know what an oath means.

20 **Ruling of the Court:**

After asking the witness some questions I found the witness was steady in answering the
questions put to her. I asked her about her home background and why she had come to court and
for what. She said she knew the accused and had come for the case that concerned her and the
accused who raped her. The witness did not however appreciated the meaning of the oath.

25 I found she was possessed of sufficient intelligence to give evidence and understood the meaning
of telling the truth. I therefore, allowed to give an unsworn statement.

See: (1) **Sakila Vs. Republic (1967) EA 403**

30 (2) **Kibongeny Arap Kabil Vs. Republic (1959) EA 92**

(3) **Uganda Vs. Kisumiro Kidega**

H.C. Criminal Revision 29/90

Vol I H.C. Criminal Judgments P.142.

PW1: Agnes Monica Nshemereirwe 10 years old Kazinga Primary School, Nyanga

5 Parish.

Unsworn Statement of Agnes Monica Nshemereirwe:

I am in class II in Kazinga Primary School. I know that man in the dock (shown the accused). He is called Nkuriyengoma Majoro. He stays at Ishasha. He lives on the same village as myself.

10 He stays at the home of Birikano. He is a porter for Bireekano. Bireekano's home is about 100 metres from our home. My father is Basheija Frank. My mother is Tusimiraho Vida. I have come for a case. I was raped by Nkuriyengoma. The accused found me at home. It was in the evening. The sun had set down. There was darkness.

15 Accused asked me to accompany him. I was at home with my father, mother and Zairians (Congolese) who had come to our home as refugees. I accompanied him. When we reached the gate of the accused's home, accused caught me. I raised an alarm. But one answered my alarm. After he grabbed me, he pulled to the bush which was near their home. He raped me. He put me down. He lay on top of me. He raped me with his thing. I had never seen that thing. I have
20 brothers. I have never seen them urinating. The accused put his thing inside my private parts. He put his thing in my part which I use for urinating.

When he put his thing inside my private parts, I felt pain. He then released me. I went home crying because of the pain I was feeling.

25

When I went home, I reported to my mother that Nkuriyengoma has raped me. My mother went to inform my uncles, namely Baguma, Tumuramyé. These uncles and other people went to arrest the accused. I was with them when they arrested the accused. The accused was taken to the Chairman Licalido. I was also taken to the chairman. The accused was taken to Bireekano's (his
30 master) house and then to Nyanga Parish. Accused was forwarded to Kihihî. I was also taken to Kihihî police post. I was then taken to Dr. Birungis' who examined at my private parts. When

the accused raped me I had been wearing knickers which he removed from me. The knickers are at home.

PW2: Tusimiraho Vida: 28 years Ishasha village Nyanga Parish Kihihi Sub County Kinkizi
5 Sub-county Rukungiri District Church of Uganda – States.

I am the wife of Basheija Frank. I know Agnes Monica Nshemereirwe, she is my daughter. She was born 5/12/1989. I know the accused. He is Nkuriyongoma. He stays at the home of Turyamureba Provia, the wife of late Birekano. Birekano had already died when the accused
10 was arrested. Accused was a porter/herdsman of Provia Turyamureba. Our home were about 200 metres apart. Accused first come to work for Birekano’s family in 1998. He had been going and coming back.

But he had been at that home for two months before the commission of this offence.

15

On 17/2/99 at about 8.00p.m there was confusion or uprising in the small town of Ishasha in Congo, which is near our place. Many Congolese had run to our village to seek asylum. We cooked and ate supper with these refugees. Accused found us eating and we ate with him.

20 After supper I went inside to arrange the beds where the Congolese would sleep. The Congolese were about 10 adults excluding the children. We had super outside. The accused and Nshemereirwe were outside where we had been eating. I left them together where we had been eating. While I was inside the house I heard noise being made by the children of the Congolese. I went out to see what was happening.

25

Just I was coming out of the house Nshemereire came crying and saying Nkuriyengoma had raped her. Her (victim’s) father was in bed. I reprimanded Nshemereirwe for leaving home and told her I was going to tell her father so that he comes and beats her.

30 I went and reported to her father that Nshemereirwe had run to her grandmother.

I, the child, her father and grandmother went to the home of Birekano to ask the accused why he had raped our child.

We reported to her master what her porter had done. He master called the accused from his
5 (small house for porters) house. Accused came out.

Provia asked the accused if he had raped the child. Nkuriyengoma denied raping the child. The victim was there. The victim insisted in the presence of the accused and ourselves that it was the accused who had raped her.

10

Whele at the home of Turyamureba Provia, I and Lilian Turyagumanawe examined the private parts of Nshemereirwe (away form the public). We saw blood mixed with some whitish liquid in the vagina of Nshemereirwe.

15 There was some injury on the mouth of the vagina. The injury was a small tear appearing like a cut near the mouth of the vagina. We decided to take the victim and the accused to the Chairman LCI – Licado.

I reported to the Chairman that the accused had raped my child Nshemereirwe.

20

The chairman LCI said he had no where to keep the accused for the night. The chairman spoke to the accused about the case. The accused denied any knowledge about the case.

Provia, her master, offered to keep the accused for a night. He was put in the store. The store
25 locked by Provia. Next day, Provia took the accused out of the store – returned to the Chairman LCI with the accused. The Chairman LCI directed us to go to the Chairman LCII as he had no jurisdiction to her the case. The chairman LCII is called Nabo. Nabo directed us to go to the police. We went to Kihihi Police Post. We reported that accused had raped our daughter.

30 The accused and the victim were with us. Statements were recorded.

The police forwarded us to the Medical Officer – Kambuga. The doctor was not there. The Medical Assistant there asked for Shs 10000/= in order to examine the child. I did not have the money. He sent me away. I went back to the police as Kihikihi and then went home.

5 In May 1999, I was sent for. I and the child went to Kihikihi Police Station. Dr. Birungi has a private Clinic in Kihikihi. He comes there on Saturdays. The Policeman took us to Dr. Birungi's private Clinic. I and the child (victim) reported there. The first day, the doctor did not attend to us. On the next day, we went back, the victim was examined and certain forms completed by Dr. Birungi.

10

Cross Examination:

Rwaheru - No questions.

Re Examination – Nil

15

Assessors (1)

Nkuriyengoma was a regular visitor to our place.

Assessor (2) No questions.

20 **Mr. Byansi:**

That is the close of the prosecution's case.

Mr. Rwaheru:

I leave it so the court to decide.

25

Court:

It is the finding of the court that there is a case to answer.

The rights of the accused under Sections 71 (2) and 72 of the T.I.D are explained to the accused.

30

Accused States:

I will adopt my statement which I gave at the police. I have no witnesses to call.

I have nothing to say. I rely on my statement which is on record.

5 **Mr. Rwaheru:**

That is the close of the defence.

Addresses/Submissions of Counsel

10 It is conceded that the victim was below the age of 18 years when she was sexually abused. It is also conceded that the victim was sexually abused. The contention is whether it was the accused who had sexual intercourse with the victim.

15 PW1 has given an unsworn evidence. Both the law and procedure required that the evidence of such witness must be corroborated before a conviction can be based upon it. There is no evidence on record to render that corroboration. In the absence of that corroborative evidence, I pray the accused be acquitted.

Mr. Byansi:

20 Since the ingredients 1 and 2 have been conceded by the defence Counsel, I do not have much to add.

On ground 3, the identification of the accused, the prosecution has led the following evidence.

25 PW1 testified was known to her. She knew him by name, what he did and he stayed. Although the offence was committed at night, there were favourable circumstances for proper identification. They were seated outside the house before the accused requested her to accompany him, where he ended up defiling her.

Corroborative evidence is to be found in the evidence of PW2; the victim's mother who told court that they had supper with the accused among others. PW2 left accused seated with the victim when she went inside to prepare beds for the "refugees".

- 5 When PW2 came of the house, the victim and accused were not where she had left them. She saw victim come crying and mentioning the names of the accused as having defiled her. The victim reported to her that the accused had raped her. From all this, it can be concluded that it was Nkuriyongoma who defiled the little gir.
- 10 The accused story that he is impotent is a lie since he has been proved otherwise by Dr. Musinguzi. This lie is corroboration of his having defiled Monica, the victim Prosecution has proved the three ingredients beyond reasonable doubt. I pray he be convicted as charged.

Mr. Rwaheru: I have nothing in reply.

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Opinions of the Assessors Mr. Mushabe Andrew we are giving a joint opinion

There are three ingredients for the offence of defilement – namely;

- 1) the age of the victim being under the age of 18 years
- 20 2) the victim was sexually intercoursed
- 3) it is the accused who had sexual intercourse with the victim.

Age:

The age of the victim was found to be below the age of 18 years. The victim said she is 10 years
25 her mother said she was born on 5/12/89. The doctor said she was five years.

Sexual Intercourse:

30 Pw1 who testified that the accused put his "thing" in her vagina. She felt pain. PW2, the mother of the victim examined her at Provia's place.

She saw a cut/tear on her part of the victim's vagina, and there was blood and sperm like substance in the vagina of the victim.

- 5 Dr. Birungi who examined the victim later found the hymen was ruptured as a result of vaginal penetration.

Identification of the defiler

PW1 who clearly and consistently testified that she knew the accused very well. She said she
10 was with accused where Congolese had gathered. She said accused as a close neighbour used to come to the victim's home frequently. This evidence was corroborated by the evidence of PW2 who said, she knew the accused as a close neighbour. That very evening, accused had super with them. She left the accused with the victim outside when she went into the house to prepare "beds" for the Congolese. The victim consistently testified that it was the accused who defiled
15 her.

The evidence of PW1 is truthful. In his defence, the accused stated that he was impotent and could not have performed an act of sexual intercourse. But Dr. Musinguzi found him very capable of erecting. This casts a doubt in his defence. We do not accept his alibi. We have the defence full of lies and unreliable. We have found the prosecution has proved beyond reasonable
20 doubt that it is the accused who committed the offence.

We advise your Lordship to convict the accused as charged.

Court: Judgment will be given on the 1/6/2000.

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V.R. Kagaba

Judge

31/5/2000

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1/6/2000 Mr. Rwaheru for the Accused

Mr. Byansi for the State.

Accused in Court.

Both Assessors in Court

Court: The judgment of the court is read to the accused in the presence of both Counsel.

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V.R. Kagaba

Judge

1/6/2000

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ALLOCUTUS:

Mr. Byansi:

The convict does not appear to be repentant. Considering the offence of defilement is on the rise,
15 it is my prayer the convict be given a very severe sentence to teach him a lesson and to act as a
warning to others.

Mr. Rwaheru:

The convict is a first offender. He has been in custody for fifteen and half months. He is 21
20 years old. I pray court to take these factors into consideration when deciding on the sentence and
to pass a fair sentence to him and the society.

Sentence and Reasons for the same

25 The accused person was a close neighbour to the victim. They were so close that they even
shared meals in the night. The accused abused the hospitality extended to him by the mother of
the victim who was so kind and hospitable to him that she even served him with super. The
accused exploited the youth, innocence and neighbourliness of young Agnes Monica. He passed
off as a good neighbour and invited her to accompany him not knowing what lay in store for her.

30

The country is crying and weeping about the frequency and abundance of his offences of defilement. No one knows what is happening to mankind. Added to this, (frequency) is the fear of the widespread AIDS epidemic. No one should gamble into unprotected sex because the results may be disastrous.

5

The accused subjected the victim to unprotected sex and no one knows she could have been infected with AIDS during that encounter. In that case, her death is assured.

10 The courts must come out sternly to punish the convicted defilers with stiff custodial sentences so that such people are kept away from society for a while. By imposing these stiff sentences, the public should receive a message how concerned the courts are about the offence and what measures the courts are putting in place to control or put to an end the ugly habit of playing with the lives of youthful females. The virginity of Agnes in this case is gone and she will live with the trauma, (mental, Physical and psychological) of what the convict/the accused did to her
15 on that sad night in her life history.

In mitigation, I take into account, that the convict is a first offender; he has been in custody for about 15 months and is a young man of 21 years. The victim was about seven years while the accused was 20 years. Be that as it may, this is a very serious offence whose maximum sentence
20 is death. I will not give the convict the maximum sentence because of the mitigating factors listed in his favour above.

25

Sentence:

The accused shall serve a sentence of thirteen (13) years imprisonment.

V.R. Kagaba

30 **Judge**

1/6/2000

Right of Appeal Explained to the accused/Convict has a right to appeal to the court of Appeal within 14 days from today.

5

V.R. Kagaba

Judge

1/6/2000

10

SUMMING UP NOTES TO ASSESSORS:

31/5/2000

A. **Indictment:** Difelement Contrary to Section 123 (1) of the Penal Code Act.

5

Ingredients: (1) Age – under 18 years

(2) Sexual Intercourse

(3) Participation of Accused.

B. (1) Burden of proof in Criminal case on the prosecution.

10

(2) Reasonable Doubt.

C. **Corroboration.**

(a) Sexual offences.

(b) Evidence of witness of tender age.

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D. **Single Witness:-**

Need for corroboration. Court could convict without corroboration if it believe the witness is truthful.

20

E. **Evidence (Evaluation)**

Truthfulness - Credibility – Demeanour Consistence as distinguished from corroboration.

25

F. **Contradictions:**

Test to be applied. Are they minor or substantial – do they affect me. Credibility of the witness or the value of their evidence?

G. Evidence in support of each ingredient:

30 **Age:** PW1 – PW2 and Dr. Birungi.

Sexual Intercourse:

PW1 – PW1 Dr. Birungi and Turyagumisiriza Lilian (admitted No.4)

Identity of Accused:

5 PW1 – neighbour – spoke – together at meal and request for accompaniment.

PW2: Accused at super – with victim outside the house.

Single witness:

10 Corroboration : PW2.

Lies of Accused that he was impotent (See Dr. Musinguzi (Admitted No.2)

Defence: Denial – in his Charge and Caution Statement

15 **Alibi:** Accused has to raise it

Prosecution: has burden to disprove it and place accused to the scene in terms of time and place.

20 **Verdict:** Convict on any of the following:

Defilement

Attempted defilement

Indecent Assault.

25 **Acquit:** for defilement or on all alternative verdicts.

Witnesses

Admitted:

30 1. Dr. Birungi – examined victim

30/5/99 – Penetration signs hymen ruptured – long time ago. Victim – 5 years.

2. Dr. Musinguzi – Accused 20 years – normal – not impotent.
3. I/IP Gumisiriza – Caution and Charge Statement – denial.
4. Lilian Turyagumisiriza – girl 9 years saw sperms + blood in vagina of Agnes Monica.
Alarm by PW2 – Tumiraho Vida – saying accused had defiled her daughter. (Never
5 Spoke to accused).

PW1: Agnes Monica Nshemereirwe age?

Defile at 8.00 p.m.

Refugees at her father's place.

- 10
- Accused asked her to accompany him.
 - 100 metres away – Reported to mother.

PW2: Received report from PW1 – examined her. Accused eating with other Congolese – had
super – Returned weeping and saying Accused Stiff had raped her – Exh. Her – blood + whitish.

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