THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CASE NO: HCT-01-CR-SC-0066 OF 2001

UGANDA :: PROSECUTOR

VERSUS

RWABULIKWIRE MOSES :::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE AUGUSTUS KANIA

JUDGMENT:-

Rwabulikwire Moses is indicted for defilement contrary to section 123 (1) of the Penal Code Act. It is alleged in the particulars of the offence that on the 10th day of July 2000 at Kisagazi village in the Kasese District the accused had un unlawful sexual intercourse with Nyabongo Racheal, a girl below the age of 18 years. The accused denied the offence.

The prosecution case in brief is that on the fateful day when the complainant was sleeping in her grandmother's house, the

accused who was an employee of the complainant's grandmother entered the house and had sexual intercourse with the complainant. After he had had sexual intercourse with the complainant, the accused threatened her with a beating should she reveal what had taken place to anyone. A few days later when the mother of the complainant came back from Kampala, the complainant revealed what had befallen her leading to the arrest of the accused. On being examined by a doctor the hymen of the complainant was found to be intact but she was found to be suffering from a venereal disease. The accused was equally found with a venereal disease infection.

The accused made a complete denial.

Once an accused person pleads not guilty to the offence with which he is charged, he thereby puts in issue each and every ingredient of that offence. Having put the essential ingredients of the offence in issue, the prosecution has the burden of proving

the guilt of the accused person. The accused person has no duty to prove his innocence. The prosecution can only secure a conviction if it proves the guilt of the accused person beyond reasonable doubt. A doubt as to whether the accused committed the offence or not must be resolved in favour of the accused leading to his acquittal: See **Woolmington Vs DPP [1935] AC 462, Lubogo & Others Vs Uganda [1967] EA 440** and **Serugo Vs Uganda [1978] HCB 1.**

In the offence of defilement the essential ingredients which the prosecution must prove in order to get an accused person convicted are the following:-

1. that the complaint was under the age of 18 years at the time of the offence.
2. that there was unlawful sexual intercourse with the complainant.

3. that it was the accused who had unlawful sexual intercourse with the complainant.

To prove the first ingredient the prosecution relied on the evidence of PW1 Dr Mugambwa and PW5 Nyabongo Rachael. The evidence of PW1 Dr Mugambwa was that he received a Police Form 3 together with its annexture dated the 15th day of July 2000 with a request that he examine Nyabongo Rachael who was a complainant in a defilement case. He examined the complainant on the 16th day of July 2000 and found her to be aged 5½ years. PW5 Nyabongo Rachael who testified on oath stated her age to be 7 years at the time of her testimony. Because the complainant was by my observation a girl of tender years, she had to be subjected to a voire dire because her evidence could not be take on oath. The defence even conceded that the complainant was a girl under the age of 18 years. From this undistributed evidence of the age of the complainant and the observation of the complainant in the court by me, I find the prosecution has proved

beyond reasonable doubt that the complainant was at the time of the offence below the age of 18 years.

In order to prove the fact of sexual intercourse with the complainant, the prosecution relied on the evidence of PW1 Dr Mugambwa and PW5 Nyabongo Rachael. I propose to start with the evidence of PW5 Nyabongo Racheal the complainant herself. Her evidence was that on the 10th day of July 2000 she was sleeping in her grandmother's house where her assailant found her and had sexual intercourse with her. In describing how the assailant had sexual intercourse with her she stated that her assailant took off his trousers and inserted his penis into her vagina and the poured urine into her vagina.

The evidence of PW1 Dr Mugambwa which is comprised in Police Form 3 and which was tendered in evidence as an exhibit P1 on the court record is that he examined the complainant but found her hymen intact. There were no injuries or inflammations around

the private parts of the complainant. There were also no injuries on her thighs, legs, elbows and arms. It was also his testimony that he found no injuries on the complainant which were consistent with force having been sexually used. In cross-examination PW1 Dr Mugambwa admitted that he found no evidence of penetration.

Sexual intercourse is said to have taken place when there is the penetration of the female sexual organ by the male sexual organ. The very slightest penetration will amount to sexual intercourse. It is not required that the hymen should be ruptured or that there should be the omission of the male seed for sexual intercourse to be considered to have taken place. See **Halsbury's Laws of England 4th Edition Vol. 11 page 653** though PW5 Nyabongo Rachael, the complainant herself, testified that her assailant had sexual intercourse with her by inserting his penis and urinating into her vagina, this negatived by categorical finding by DW1 Dr Mugambwa that the complainant's hymen was intact, no injuries

consistent with force having been sexually used were noticed and that he found no signs that penetration had taken place. Because penetration which is an essential ingredient of sexual intercourse was absent in this case I find the prosecution has not proved the fact of unlawful sexual intercourse with the complainant beyond reasonable doubt.

Mr Charles Ngabirano, the learned State Attorney submitted that since PW1 Dr Mugambwa found that the complainant was infected with a venereal disease it should be found there was unlawful sexual intercourse with the complainant. But as PW1 Dr Mugambwa himself stated a venereal disease at least of the type the complainant was found to be suffering from can be contracted be means other than sexual intercourse. No inference of sexual intercourse having taken place can be drawn from the mere fact that the complainant was found to be suffering from a venereal disease.

Though the evidence of the complainant falls for short of proving the fact of sexual intercourse, I find that it reveals that her assailant made all necessary preparation to have sexual intercourse with the complainant though he failed to consummate his plans. He went to where the complainant was sleeping, removed his penis and tried to enter the vagina of the complainant and ended by discharged onto the complainant what appeared to be urine. This I find constitutes attempted defilement contrary to section 123 (2) of the Penal Code Act.

Though no unlawful sexual intercourse was proved to have taken place it still remains to establish whether it was the accused who participated in the attempting to defile the complainant. The prosecution case which seeks to implicate the accused, as the complainant's assailant is that adduced through PW5 Nyabongo Rachael the complainant herself. Her evidence was that on the 10th day of July 2000 when she was sleeping in her grandmother's house the accused went to the house, removed his trousers and

inserted his penis into her vagina and then poured urine into her vagina. She felt pain and wanted to cry but the accused threatened to beat her if she did. The accused who was known to her as Moses was employed by her grandmother as a herdsman. She also testified that the accused was residing in her grandmother's home. The accused who made an unsworn statement denied the offence.

PW5 Nyabongo Rachael testified that her assailant was the accused. She narrated how he came to where she was sleeping, took off his trousers, put his penis in her vagina and poured urine into her vagina. The complainant also pointed out in court the accused her assailant who was the herdsman of her grandmother. The complainant was cross-examined on other aspects of her evidence but not on the aspect that it was him who sexually assaulted the complainant. It is now trite that failure to examine a witness on a point by the opposite party leads to the inference that fact testified to is admitted. See **Uganda Vs Cleophas Ntura**

[1977] HCB 103. In the instant case the failure by the defence to cross-examine the complainant on the aspect of the accused having participated in attempting to defile the complainant leads to the inference that that aspect of the evidence of the complainant is admitted. I accordingly find that the prosecution has proved beyond reasonable doubt that it was the accused Rwabulikwire Moses who attempted to defile the complainant contrary to section 123 (2) of the Penal Code Act.

In summing up the case to the Assessors I warned them as indeed I adverted my mind to the position that there is a danger in basing a conviction in sexual offences on the uncorroborated of such evidence of the complainant. I pointed out that there is a requirement that corroboration for such evidence should always be looked for. It is however not unlawful to base a conviction on the uncorroborated evidence of the complainant provided that after warning the assessors and the presiding Judge warning himself as indeed I did in the instant case, if the Judge finds the

evidence of the complainant to be truthful, he may convict in the absence of corroboration. Though in the instant case the evidence of the complainant with regard to the sexual assault and the participation of the accused is uncorroborated, I find her evidence to be truthful and it can be acted upon.

Though the prosecution has not proved the fact of sexual intercourse with the complainant, it has proved that her complaint attempted to defile her beyond reasonable doubt that the complainant was below the age of 18 at the time. The prosecution having further proved beyond reasonable doubt that it was the accused who attempted to defile the complainant, in agreement with the unanimous opinion of the assessors, I find the accused Rwabulikwire Moses guilty of the attempted defilement of Nyabongo Rachael contrary to section 123 (2) of the Penal Code Act and convict him accordingly.

AUGUSTUS KANIA

JUDGE

11/11/2002.

Right of Appeal explained.

AUGUSTUS KANIA

JUDGE

11/11/2002.

Mr Ngabirano:-

The convict has no previous conviction. He has been on remand for two years, three months and twenty-one days. The offence he is convicted of is a serious offence. I pray for a sentence of 18 years, which is the maximum.

Mr Komunda:-

I don't agree that the accused should get 18 years. He is a first offender. He is married with five children. I pray that he be given a sentence that will enable him reform.

Court:-

Sentence reasons for the same:-

Attempted defilement is a serious offence with its maximum sentence being 18 (eighteen years) imprisonment. The laws regarding defilement and attempted defilement are intended to protect the girl child so that they grow in dignity. In this instant case the complainant was lucky in that the attempt did not actualize. As already stated in a previous here if deterrent sentences are not given to the likes of the accused who don't respect dignity of the girl child the law remains theoretical. Such people deserve to be put away for long periods from the rest of society.

An aspect of this case which makes it all aggravating is that the accused is 47 years and he was attempting to have sexual intercourse with a 5½ year old child who was really fit to be her grandchild.

The accused however is a first offender, which is a factor in his favour. Besides he has been on remand for 2 years three months and twenty-one days, which I am constitutionally enjoined to take into account when passing sentence.

Having considered that the accused is a first offender and having taken into account that the accused has already spent 2 years three months and twenty-one on remand, he is sentenced to 14 (fourteen) years imprisonment.

AUGUSTUS KANIA

JUDGE

11/11/2002.