

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
CRIMINAL SESSION CASE NO. 58 OF 2001
UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR
VERSUS
KASAIJJA DAVID::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE AUGUSTUS KANIA

PROCEEDINGS

01/10/2002

Mr. Kiboneka – for the accused on state brief.

Mr. Ngabirano – Resident State Attorney

Mr. Kibubuta Mathew – Court Clerk.

Court – The indictment is read and explained.

Accused – I deny the charges against me.

Plea Not Guilty entered.

Assessors. Mr. Zefania Bwambale

Mr. Kamuthengania Gresom Muharama.

The accused – No objection

Mr. Kiboneka – No objection.

Mr. Ngabirano – No objection.

Mr. Ngabirano – I am ready to proceed and I pray for a hearing date on 17/10/2002.

Court: - The case is adjourned to 17/10/2002 for hearing. The accused is remanded till then.

A. Kania

JUDGE

1/10/2002.

17/10/2002

Mr. Kikomeko – for the accused.

Mr. Ngabirano – Resident State Attorney.

The accused is in court.

Mr. Kibukuta. – Court/Clerk.

Assessors present.

Ngabirano – We have preliminary points under 64 of the T.I.D.

PWI Dr.Muhindo Joy of Bwera Hospital – Received Police File 3 from Bwera police post requesting her to examine Biira Kawumi who was a complainant in a defilement case.

Request was dated 6/6/2000.

She did the examination and her findings were:

1. Biira Kawumi was 4 years old
2. The hymen had a lateral fresh tear.
3. The tear was recent
4. There were bruises in the inner aspect of the labia majora.
5. Injuries or bruises consistent as the force having been sexually used.
6. No medication of injuries were on legs, thighs etc.
7. The female was not capable of putting up resistance.
8. Injuries in 4 were recent
9. No sign of venereal diseases.

Bruises and rapture of the hymen were classified as harm.

The accused Kasujja David. **Sgdn.**

Mr. Kikomeko **Sgdn.** For the accused

Mr. Ngabirano Sgdn Resident State Attorney.

A. Kania Judge. **Sgdn.**

Court: Police Form compiled by Dr. Joy Muhindo is tendered and marked PI

A. Kania

Judge

17/10/2002.

Mr. Ngabirano.

PW2 Dr. Mairuha received a request on police form 24 dated 27/06/2000 from Byekwaso AIP.

O/C in charge of C.I.D. Kasese requesting the doctor to examine the accused. He was examined on 2/7/2000 and found to:

1. Have no bruises, scratches or other injuries or scars on his body.
2. He was 19 years old.
3. His mental condition was normal.

Signed Dr. Mamuha mo Kasese medical clinic and Laboratory services.

The accused Kasaija David

Mr. Kikomoko for the accused.

Mr. Ngabirano Resident State Attorney.

A. KANIA

JUDGE.

Court: Police form 24 is tendered and marked P2.

A. KANIA

JUDGE

17/10/2002.

Mr. Ngabirano.

The third agreed matter is the statement of No. 22088 P/C Ochuna the arresting officer dated 6/6/2000. He was attacked to Bwera police post and he states.

On 5/6/200 one Mbambu Rehema reported to the police post the defilement of her daughter Biira Kabuki by one Kasaija. I went to look for Kasaija but I did not find him that time. In the afternoon we went to his place and found him sleeping and drunk. I arrested him and took him to the police post where he was detained. Self accorded.

Signed _____

No 22088 P/C.

The accused Kasaija David.

Mr. Kikomeko for the accused.

Mr. Ngabirano Resident State Attorney.

A. KANIA

JUDGE.

Court:- The statement of No. 22088 P/C Ochum the investing officer is tendered in evidence and marked P3.

A. KANIA

JUDGE

17/10/2002.

Assessors sworn.

PW4 Mbambu Rehema Protestant sworn, 24 years old of Muchoti Barracks in Fort portal Municipality, house wife.

Biira Kavumi is my daughter she is now 5 years old – she was born 1997. In June 2000 she was born 1997. In June 2000 she was 4 years and I was staying with her at Bwera before my husband was transferred to Muhoti. We were in Bwera at Serengeti village.

4/6/2000 I had gone to pay a visit at Nyamambuka about 3 kilometres away. I had left Biira at home. I came back at about 6.00 pm. Before even settling at home Scovia told me that Kasaija called Kavumi to go to an incomplete brick house which was near my house. When she followed Kavumi she found her crying. I examined Kavumi and found there was blood and slimy liquid in her vagina. I then reported to the Chairman LCI. Before going to the LC I asked Biira what happened to her. She told me that it was Kasaija who had sexual intercourse with her. I knew the Kasaija she was talking about. I knew him from 1998 he was staying at Katadoba which is 1½ kilometers from Kaserengete. He was a wheel barrow pusher the Chairman forwarded me to Bwera police post. The following morning I went to police, I was given a police form to take to the

doctor. I took the form to Bwera Hospital and gave it to the doctor who examined the victim and I returned the form to the police. It is the police who arrested Kasaija on 5/6/2000. I saw him at the police. Kasaija is that man in the dock (She points him out).

A. KANIA

JUDGE

17/10/2002.

Cross examination by Kikomeko

I went up to P4. Biira was born 1997. The child was 4 years in 2000 Biira could talk when I asked her and she said Kasaija took her trousers and did bad things to her she told me this before I examined her.

Re-cross examination NIL.

Cross examination by Mr. Geresoni Muharania by then my husband was in the Congo.

Cross examination by Bwambale.

Court: As it is already 6.00 pm the matter is adjourned to 18/10/2002 for further hearing the accused is remanded till then.

A. KANIA

JUDGE

18/10/2002.

18/10/2002.

Mr. Ngabirano – Resident State Attorney.

Mr. Kikomeko –for the accused.

Mr. Kibubuta – Court Clerk.

Both Assessors in Court.

The accused in court.

Biira Kavumi 5 years old.

Court:- From observations alone the witness is indeed a child of tender years who has to be subjected to a voire dire to determine how evidence will be taken.

I am Biira Kavumi I am 5 years old. I stay at Bwera. My father is called Baba Olivia. I do not know my mother's name – I simply call her mother. I go to school in Bwera – I don't know the class I attend. My father and mother are good parents. I love them and they love me. I obey them they do nothing to me if I disobey them. I know the difference between the truth and falsehood. My parents want me to tell the truth and they don't appreciate when I tell lies. They beat me if I tell lies. I don't know where my parents go for prayers. I am an Adventist and I go to pray with my mother. We pray to God and to Jesus. God or Jesus are Good persons. God and Jesus don't like lies. I tell lies to God he will burn me with fire. I have heard the word Oath.

Court:- Though the witness appears intelligent and understands the difference between the truth and falsehood and appreciates the importance to tell the truth she does not understand the nature of an oath. Her testimony will be taken not on oath.

A. KANIA

JUDGE.

18/10/2002.

PW5 Biira Kavumi, 5 years I don't know the name of the village I stay in. I go to a primary school in upper school. I remember a time when my mother went away she left me to pray with my friends. I know Scovia but I don't know where she is now. I remember the occasions when I was playing with her and something happened to me. Some body did something embarrassing to me. That person was a man called David. He is the man in the dock (points to the man in the dock). He did it to me in the unfinished brick house near our home. He took off my knickers and did something to me shameful. After he had done the shameful thing to me I felt pain in my stomach. I reported to my mother.

A. KANIA

JUDGE

18/10/2002.

Cross examination NIL.

A. KANIA

JUDGE.

18/10/2002.

Mr. Ngabirano – the O/C C.I.D. had gone to try and trace my final witness called Scovia Mulinda. I pray for an adjournment to 21/10/2002. The accused is remanded till then.

A. KANIA

JUDGE.

18/10/2002.

21/10/2002

Mr. Kikomeko – for the accused.

Mr. Ngabirano Resident State attorney.

Mr. Kibukuta Court Clerk.

Accused is in court.

Assessors Mr. Zephania Geresom Muharang.

Mr. Ngabirano – I have been informed by the victim's mother that the victim lacks transport to come to court. I accordingly pray for an adjournment to 23/10/2002.

Mr. Kikomeko – I have no objection.

Court:- The case is adjourned to 23/10/2002 for further hearing. This should be the last adjournment. The accused is remanded till then.

A. KANIA

JUDGE

21/10/2002.

23/10/2002.

Mr. Kikomeko – for the accused

Mr. Ngabirano resident State Attorney.

Mr. Kibukuta – Court Clerk.

The accused in court.

Both Assessors in court.

Mr. Kikomeko – This case is coming for further hearing.

Mr. Ngabirano- I have one witness in court and I am ready to proceed.

PW6 Scovia MUHINDO-11 years old.

Court:- As the witness states she is 11 years old and indeed looks a child of tender years she will be subjected to Voire dire.

A. KANIA

JUDGE.

23/10/2002.

My names are Scovia Muhindo 11 years old of Kaserengete village, Bwera sub-county. I go to P4 Bwera Church primary. My father is Abubakari Safari and my mother is Faria Bura. I live with them. I obey my parents. They appreciate my work. I don't disobey them. They would beat me I disobey them. I know the difference between telling lies and the truth. Telling lies is bad – my parents like me to tell them the truth if I tell lies the beat me.

My parents are Muslims – I am also Islam – I go to the Mosque on Friday I go to pray to God – God is a good person, God likes me to tell the truth and if you tell lies he will put you in fire. I have heard if the word to make an oath. If some body swears he means he is going to tell the truth. If some body takes an oath to tell the truth and tells lies God will punish him.

Court:- I find this girl not an intelligent, able to distinguish between the truth and falsehood and to understand the necessity of telling the truth, I also find that she understands the nature of an oath. She will therefore give her testimony by affirmations.

A. KANIA.

JUDGE

23/10/2002.

PW6 SCOVIA MUHINDO 11 years Moslem affirmed of Kaserengete village. I know Biira Kavumi who is my friend. In June 2000 she was staying at Kaserengete village. I don't know where she stays now. I know her mother but not the name. She is in court (points at the mother of Biira Kavumi).

4/6/2000 in the evening when I was in the village Kavumi and asked her where her mother was. Kavumi replied that her mother had gone to Nyamambuka village to her grandmother's place. David lay on Kavumi in Kaheru's block – which was incomplete without doors and windows. I heard Kavumi crying and I went to check what was wrong with her. On reaching the scene I saw David putting on his trousers and Kavumi was bleeding through the private parts. We were playing near the block at the back of it I knew David because he was our neighbour renting on the same block with us but his room was behind ours. David is the man in the dock. David told us we should not disclose what happened because he was going to buy us a bun. David then ran towards one Mawa's place which is below our place.

Kavumi was crying but when I told her to keep quite we continued playing. Kavumi's mother came back and I told her that David had defiled Kavumi so she checked Kavumi:- I was present when she checked Kavumi in the private parts. She brought tablets and put them in the vagina of Kavumi. That is all but I also recorded a statement at the police. I went with my father and Kavumi's mother.

A. KANIA

JUDGE

23/10/2002.

Mr. Kikomeko – Kavumi is here in court but she has just come out. We were playing near Kaheru's block where there was a foot path. David's other name is Kasaija. I knew him as David Kasaija before the incident. David had stayed there for long he was a wheel barrow pusher. I did not know any other occupation of his. He did not promise us sweet bananas.

A. KANIA

JUDGE

23/10/2002.

Mr. Ngabirano – that is the close of the Prosecution case.

Mr. Kikomeko – I don't propose to make a submission.

Court:- From the evidence so far our record I find that the prosecution has made out a prima facie case against the accused which requires him being put on his defence. The accused is called upon to give his defence.

A. KANIA

JUDGE.

23/10/2002.

Court:- Section 71 of the T.I.D. completed with.

A. KANIA

JUDGE

23/10/2002.

The accused – I will give an unsworn statement.

I am Kasaija David, 21 years It was the year 2000 June 4th I was at my house sleeping in my house when I saw men and one policeman. This was at 3.00 pm. I was asked to open and I opened my door. The close neighbours gathered and asked what was wrong and the police replied that the matter were at the hands of the police. I was arrested and taken to police station where I spent the night. The following Wednesday before I knew what was happening and without knowing the complainant a woman who was my neighbour asked me why I could not admit and the matters end. I told her that since Sunday I had never been told of a charge against me – so she left.

On 7/6/2000 my statement was recorded and I was transferred to Kasese. I was then brought to court, charged and remanded till to-day. Up to now I don't know why I am in court.

A. KANIA

JUDGE

23/10/2002.

Mr. Kikomeko – This is the close of the defence case.

Court:- The case is adjourned to 24/10/2002 for final submissions. The accused is remanded till then.

A. KANIA

JUDGE.

23/10/2002.

24/10/2002

Court as before.

Court:- This matter is adjourned to 25/10/2002 for final submissions. The accused is remanded till then.

A. KANIA

JUDGE

24/10/2002.

25/10/2002

Mr. Kikomeko – for the accused

Mr. Ngabirano – Resident State Attorney.

Mr. Kibubuta – Court/Clerk

The accused in court.

Mr. Zephania Rwambale

Mr. Kamutegania Geresoni } Assessors.

Mukaranca }

Mr. Ngabirano –

The facts of this case are that on 4/6/2000 the victim Biira Kavumi was at her home playing with her friend Scovia Muhindo. Her mother Rehema Mbambu had gone to another village to pay a visit. The accused came to where the kids were playing and took the victim to an uncompleted house belonging to one Kaheru and had sexual intercourse with her. Scovia heard Kavumi crying and went to the scene and found the accused putting on his trousers and the victim was bleeding from her private parts. The accused was arrested and accordingly charged.

The ingredients of defilement are:-

1. There was unlawful sexual intercourse with the victim.
2. The victim was under the age of 18 years.
3. That the accused committed the offence.

(9) That there was sexual intercourse is confirmed by the evidence of Dr. Muhindo on PF 3 it is that the hymen had a lateral tear of recent origin. The examination was done on day later. There were bruises in the inner part of the labia majora. The injuries were consistent with force having been sexually used. Other injuries were all recent and they amounted to harm.

There was the evidence of Biira Kavumi which was not on oath it was that the accused took her to a brick house removed her knickers and some thing shameful to her. After this she felt pain in the stomach.

The above evidence was corroborated by the evidence of Scovia Mulondo which was on oath. She testified that the accused took the victim into a building. She heard the victim crying and when she went to check she found the accused putting on his trousers and the victim was bleeding through her private parts. This evidence above proves the first ingredient beyond reasonable doubt.

The second ingredient is proved by the medical evidence that the victim was 4 years old. Her mother testified that her child is now 5 year. The victim testified that she is now 5 years and court had an opportunity to see the victim. I submit this ingredient has also been proved beyond reasonable doubt.

Identity of the accused – the victim herself told court she remembers that when she was playing with Scovia a man called David took her into an uncompleted structure and did something shameful to her. She identified the accused as her assailant. This was corroborated by PW6 Muhindo Scovia who told court the accused is David Kasaija and that she knew him by name before the incident the accused was renting premises on the same block where they were staying. He was a wheelbarrow pusher. She was at the scene. I submit that the Prosecution has discharged its duty and proved the case beyond reasonable doubt. I invite you to put the accused guilty as charged and to convict him accordingly.

A.KANIA

JUDGE

25/10/2002.

Mr. Kikomeko – I agree with the facts of the case already narrated. I also agree with the ingredients named by the Resident State Attorney. I don't contest that the victim Biira Kavumi was well below the age of 18 years. It would be comedy to do so.

I however contest the participation of the accused. The victim was at the time aged 4 years. She was unable in court to describe the act. Children of that age in certain areas cannot express themselves the accused was described as a wheel barrow pusher. These children were playing by a foot path used by Maurading not necessarily the accused. There are many wheel barrow pushers in that locality and accused was not the only one. Therefore submit that the victim and her friend Scovia like children are given to do may have been honest but mistaken about the identity of the accused. Children are given to forceful ideas where they tend to innocently tell lies by mistake. In this case the two children may have been mistaken.

Finally it is the law that the burden to prove the guilt of the accused is always on the accused and shifts unless provided by statute. The prosecution is in this case bound to prove the guilt of the accused beyond reasonable doubt. It must prove all the ingredients if it fails to prove even one ingredient it fails to prove the case. See *Woolmington Vs DPP/1935/ AC 462*, *Abalatta Bun Wendo Vs. R/1953/20 ENCA 166* and *Sekitoleko Vs. Uganda/1967/RA 351*.

I conclude by stating that there is a doubt about the identity the accused therefore invite you to find him not guilty and to acquit him accordingly.

A. KANIA

JUDGE

25/10/2002.

Court: Summing up to Gentlemen Assessors done in open court in the presence of the persons above. The matter is adjourned to 28/10/2002 for the opinion of the gentlemen Assessors. The accused is remanded till then.

A. KANIA

JUDGE

25/10/2002.

28/10/2002.

Mr. Kikomeko for the accused

Mr. Ngabirano – Resident State Attorney.

The accused in court.

Mr. Kibukuta – Court Clerk.

Mr. Kikomeko – The matter is for the Assessors' opinion.

Mr. Zephania Bwambale.

It is true Biira Kavumi was under 18 years as ascertained by this court.

It is true according to Joy Muhindo the victim was defiled this ingredient has been proved beyond reasonable doubt.

It is true by the evidence of Biira Kavumi and Muhindo which I agree with the victim was defiled.

Accordingly to the evidence of PWI PW6 I find the accused's guilt and participation has been proved beyond reasonable doubt. I advise to convict the accused Kasaija David.

Mr. Mukarania Geresomi

I concur with my Co-Assessor and I advise you to convict the accused.

A. KANIA

JUDGE

28/10/2002

Court:- This matter is adjourned for judgment on notice. The accused is remanded till then.

A. KANIA

JUDGE

28/10/2002.

12/11/2002

Mr. Kikomeko – for the accused

Mr. Ngabirano – resident State attorney.

The accused in court.

Mr. Kibukuta – Court Clerk

Court:- Judgment read in open Court in the presence of the above persons.

A. KANIA

JUDGE

12/11/2002