

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CO-0060-2001

UGANDAPROSECUTOR

- VS -

TUMWESIGYE KASSIM alias TUMWESIGIREACCUSED

BEFORE: THE HON. JUSTICE P. K. MUGAMBA

JUDGMENT

Tumwesigye Kassim alias Tumwesigire, the accused, is indicted for defilement contrary to section 123 (1) of the Penal Code Act. He denied the indictment and thus trial was held.

The prosecution called in all six witnesses. These were the complainant Brenda Kamugisha (PW1), Kamugisha Gaston (PW2), Kamugisha Ghadaffi (PW3), Enid Kamugisha (PW4), Scovia Tumuhimbise (PW5) and No. 17404 D/Cpl. Kalanzi Rauben (PW6). Accused gave his defence on oath but called no witnesses.

It is the prosecution case that accused taught at a school attended by the complainant. During school holidays accused had a programme called coaching whereby he could continue teaching pupils amongst which were PW1 and PW3. That programme had the blessing of the school administrator, PW5. On 14th May 1999 while the complainant was with other pupils sweeping the school compound she was called by accused who took her to the office at school and had carnal knowledge of her. The complainant later reported the incident and accused was arrested and charged.

In his sworn testimony accused denied the offence. He set up an alibi and explained that he was framed because the father of the complainant did not approve of accused's apparent success at Mothercare Nursery School.

Before the prosecution can secure a conviction in a case of defilement it must prove the following ingredients beyond reasonable doubt:

- (a) that the complainant was a girl under the age of 18 years at the time of the alleged offence;
- (b) that the complainant experienced sexual intercourse at the time alleged;
- (c) that the accused was the perpetrator of the crime.

The prosecution bears the burden of proving the guilt of the accused person beyond reasonable doubt.

See Okethi Okale And Others - vs- Republic [1965] EA 555 and

Ntura - vs- Uganda [1977] HCB 103.

The only person who directly witnessed the act of sexual intercourse and testified for the prosecution is PW1. She is a child of tender years whose evidence requires corroboration as it was received under S.38 (3) of the Trial on Indictments Decree. I warn myself of this requirement just like I did the assessors regarding her evidence. The same warning concerns the testimony of PW3.

Regarding the first ingredient, of the offence, a birth certificate would be ideal as proof of age. Nevertheless where this is not available to court as was the case here the testimony of a person who is well acquainted with the age of the individual whose age is in question will suffice.

See Uganda - vs- Enock Babumpabura Criminal Session Case No. 135/92 (unreported).

In his testimony PW2, the father of the complainant said that the complainant was 9 years old, having been born in 1993. This evidence was confirmed by the complainant's mother, PW4 in her testimony. Medical evidence which was admitted under S.64 of the Trial on Indictments Decree shows that in 1999 the complainant was 5 years old. The complainant appeared before court and clearly she was a child of tender years, very much below 18 years of age. I am satisfied the prosecution has proved beyond reasonable doubt that the complainant was less than 18 years of age at the time the offence is alleged to have been committed.

The second ingredient concerns whether or not the complainant experienced sexual intercourse at the time alleged. Sexual intercourse is accomplished where the female sexual organ is penetrated by the male sexual organ, however slight the penetration may be.

See *Archbold, Criminal Pleadings Evidence and Practice. 38th Edition at page 2873 paragraph 2878.*

In her testimony PW1, a child of tender years, told court how she had experienced sexual intercourse on the day in question. The experience must have been harrowing for her but the manner in which she recollected those sordid moments was commendable. Her brother Kamugisha Ghadaffi testified and told court that his sister had told him she had experienced sexual intercourse immediately she returned crying from the office which was the theatre of sexual intercourse on the occasion. PW4 testified that when she returned later in the evening she had examined the complainant and found blood and dirt in her private parts. She testified that the complainant felt pain in her private parts at the time. Medical evidence was admitted under S.64 of the Trial on Indictments Decree. It shows that on 15th May 1999, the day after the date of the alleged defilement, the hymen of the complainant had been ruptured and that the rupture was fresh. It was stated in the report that the complainant had most likely been defiled. I find that the evidence of PW4 and that of admitted medical evidence is sufficient to corroborate the testimony of the complainant and in the process I find the prosecution has proved the second ingredient beyond reasonable doubt.

The third ingredient relates to accused's involvement in the offence. Here again there is the testimony of PW 1 who testified that it was accused who had called her to the office and there had removed her knickers and had sexual intercourse with her. As stated elsewhere this evidence requires corroboration. PW3, another child, testified that he witnessed accused call the complainant into the office and follow her in. He told court also that immediately upon her return she had told him while crying that accused had had sexual intercourse with her and that he had given her a pencil so that she would not disclose what had happened. PW5 the Head Teacher testified that accused was expected to be at the school on 14th May 1999. There is also the evidence of PW2, father of the complainant, who testified he had been told by Police that accused had been in the vicinity that day and that they had arrested him before he escaped from them.

Accused in his defence set up an alibi. He stated on oath that his wife had been sick and that he had taken her to Kambuga Hospital. He said he was nowhere around Ntungamo the day he is alleged to have had sexual intercourse with the complainant. He attributed the allegation against him to the grudge PW2 bore him because a relative of PW2 was to be replaced as director of studies and purchaser of items for the Mothercare Nursing School by accused himself.

When an accused person sets up an alibi as a defence it is not his responsibility to prove it. It is for the prosecution to disprove and destroy the alibi by adducing evidence which puts the accused at the scene of crime.

See *Vincent Rwamwaro - vs- Uganda [1988-1991] HCB 70.*

According to PW6 he arrested accused at Bunyanya village, Kambuga sub-county, Kanungu District at a private house. There was struggle before accused was arrested. The witness further testified that accused tried to destroy his identity papers by chewing them.

I find that the prosecution has put accused squarely at the scene of crime. The defence of the accused is fabricated.

In *Uganda - vs- Mwase & Others [19761 HCB 217]* it was held that proved lies may make the inference of guilt stronger and can amount to corroboration. This ingredient also I find has been proved by the prosecution beyond reasonable doubt.

I do not find contradictions worthy of mention in the prosecution case. I find however that the prosecution has proved all the ingredients of the offence beyond reasonable doubt and in full agreement with the gentlemen assessors I find the accused guilty of the indictment and convict him accordingly.

P. K. Mugamba

Judge

20th August 2002

Mr. Murumba State Attorney

Mr. Kahungu-Tibayeita for accused person

Accused in court

Ms Tushemereirwe court clerk/interpreter

Court:

Judgment delivered in court

P. K. Mugamba

Judge

Allocutus

State Attorney:

The offence of defilement is serious in this country. It carries a maximum sentence of death. The convict is a first offender. The complainant was a child aged 6 years at the time. The convict was a teacher entrusted by parents of the school to look after their children. He preyed on the children. Such cases are many now. There is need for court to enforce this law by giving a deterrent sentence. I pray the convict be given a punishment that can keep him out of circulation for a long time.

Accused has been on remand since 1999.

Mr. Kahungu-Tibayeita:

Accused person is a first offender. He has been in custody since June 1999. He is married with young children. He was the sole breadwinner. His family now is suffering.

He is a teacher and a young man. Three years on remand has been punishment enough.

Convict:

I look after 11 children. Four of them are orphans. Their father died. My wife has neither father nor mother. I take care of everybody. I have spent 3 years on remand. Some of the children are on the street. I pray court to give me a punishment I can serve and then help the orphans. The

period I have spent on remand should be taken into account. Two of my children are disabled and need parental care of father and mother. That is all.

Sentence:

I have listened to both counsels concerning sentence just like I have heard from the convict himself. Defilement is a very serious offence, more so when it is committed by a person who is entrusted as a teacher against a pupil of tender years under his charge. For defilement the law gives a maximum capital sentence. While our heart goes out to the dependants of the convict we should also spare a thought for the innocent complainant whose experiences must have been a nightmare.

Accused is sentenced to 14 years' imprisonment. In reaching the sentence I have considered that he has been on remand for 3 years already.

P. K. Mugamba
Judge
20th August 2002

Court:

Accused has a right of appeal to the Court of Appeal.

Judge P. K. Mugamba
Judge
20th August 2002