

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT LIRA
CRIMINAL SESSION CASE No. 07 OF 2004

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

-VERSUS-

APUNYO HUDSON::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON MR JUSTICE RUBBY AWERI OPIO

J U D G M E N T:

HUDSON APUNYO hereinafter called the accused was indicted for defilement contrary to section 123 (1) of the Penal Code Act. The particulars of the offence alleged that the accused from January 2000 to June 2001 at Kirombe North, Adyel Division in the Lira District, had unlawful sexual intercourse with Akello Eunice, a girl under the age of 18 years. The accused pleaded not guilty to the charge. Having pleaded not guilty, it became incumbent upon the prosecution to prove the charge of defilement against the accused beyond any reasonable doubt before any meaningful conviction could be registered against the indictment; See **Ssekitoleko Vs Uganda [1967] E.A. 531.**

The prosecution led evidence of five witnesses: Eunice Akello PW1; Sylvia Obira PW2; Dr Andrew Opio PW3; Mr Elesu PW4 and Dr Patrick Odongo PW5.

The defence consisted of evidence given upon oath by the accused supported by two witnesses: Ongwen James DW1 and Wilfred Opaka DW2.

The prosecution case was as follows:

PW2 the girl victim testified that she knew the accused since 1998 when he started working with the Monitor Publications. She knew him better because he was her boyfriend. The accused approached her for love whereupon she accepted in 1999. They proceeded to have sexual intercourse from her hut in Teso bar. The accused got there at 11.00p.m. The accused left after several rounds of sexual intercourse. She testified further that in 2001 the accused sent a boda boda cyclist to pick her from Boroboro Health Centre where she was training as Nursing

Assistant. The cyclist took her to Goodhope Lodge where she met the accused. They had sexual intercourse throughout the night. As a result of the sexual intercourse she became pregnant.

When the school found that she was pregnant, she was discontinued. She reported her fate to the accused who advised her to abort. The accused went ahead and took her to a certain woman near Lira Hospital where he paid her shs.10,000/= . That lady gave her some drugs which however failed to procure abortion. The accused took her to another lady called Molly who carried out abortion successfully. The accused paid her shs.60,000/= . After the abortion, she developed some complications which resulted in a mental breakdown whereupon she was rushed to Ayira Nursing Home where she was admitted. The accused followed her there and promised to pay her medical bill. She concluded that the accused gave her his business card, diary book and success card as proof of their love relationship.

Sylvia Obira PW2, testified that she was the mother of the victim. She stated that the victim was born on 26/6/1984 from Nsambya Police Barracks, Kampala. She confirmed that on 7/8/2001 the victim got a mental breakdown whereupon she took her to Ayira Nursing Home. On examination it was discovered that she had recently aborted. She got information from Dr Opio that a certain Apunyo had offered to pay the victim's bill. After a few days Apunyo (whom she had not known before) went to her and apologized to her that he was the one who had impregnated the victim. The accused then offered to treat the victim. The accused promised to go back to her in the company of an elderly person. However, that very evening she heard Apunyo abusing her on FM Radios that she was trading on her elderly daughter for defilement. She maintained that the victim was below 18 years because she could not even vote during the elections of 2001.

Dr Andrew Opio PW3, testified that the victim was admitted in his Nursing home with a mental breakdown. He stated that the victim had a recent history of abortion. He concluded that the victim was a young lady. Clinical notes from the Nursing home was put in as exhibit P1.

Mr Eresu PW4 was a police officer who took the charge and caution statement of the accused. In that statement the accused admitted having sexual intercourse with the victim who was above 18

years old. He stated that after seeing the medical examination by Dr Odongo PW5 who indicated the age of the victim at 17, he decided to charge the accused with the offence of defilement. He stated further that he saw immunization card of the victim, which indicated that the girl was born in June 1984.

Dr. Patrick Odongo PW5 testified that he examined the victim and found her to be 17 years old with signs of penetrative sex because her hymen had ruptured (exhibit P2).

The accused made a sworn defence where he denied the offence. He stated that he knew the victim because she was his business agent. The victim used to sell his success cards. He denied ever giving his property to the victim as a sign of love relationship. He testified that those items were stolen by the victim from their studio. This was confirmed by James Ongwen (DW1). He concluded that in 2000 the victim was 19 years old as per UNEB records. This was confirmed by Wilfred Opaka, DW2, who stated that the victim registered for UNEB exams in the year 2000 under index No. U0235/059 where she indicated her age at 19. He concluded that he was framed by the police because he used to expose them for corruption in his reporting.

The offence defilement under section 123 (1) of the Penal Code Act (now Section 129 (1) of the Penal Code Act, Revised Laws of Uganda) has three essential ingredients to be proved beyond any reasonable doubt. They are:

- 1) That the victim experienced sexual intercourse.
- 2) That the victim was below 18 years at the time of the alleged sexual intercourse.
- 3) That the accused participated in the alleged sexual intercourse: See **Bassita Hussain Vs Uganda Supreme Court Criminal Appeal No. 35 of 1995** (unreported).

In the instant case, the defence has specifically conceded to one of the three essential ingredients of the offence as proved beyond any reasonable doubt. That ingredient is that the victim had experienced sexual intercourse. Notwithstanding the above concession, it is trite law that court

must make specific findings on each and every essential ingredient of the offence charged. I now proceed to execute the above duty.

In regard to whether the victim experienced sexual intercourse, as alleged, the leading authority on proof of sexual intercourse and penetration is the case of **Bassita Hussain Vs Uganda** (supra). In that case the highest court of record in Uganda had this to say on 28th November 1996;

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, sexual intercourse is proved by the victim’s own evidence and corroborated by medical or other evidence. Though desirable, it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce must be such that it is sufficient to prove the case beyond reasonable doubt” emphasis added.

In the instant case the complainant’s evidence was very elaborate. She stated that she started engaging in sexual intercourse with the accused in 1999 when the accused went to her hut at 11.00p.m. and they had sexual intercourse. Then in 2001 the accused took her to a lodge called Goodhope where they had unprotected sexual intercourse, which resulted in her pregnancy. Her evidence was strongly corroborated by that of Doctor Patrick Odongo, PW5, and his findings set out in exhibit P2 where he stated that the victim had signs of penetrative sex since her hymen had ruptured. The above evidence was supported further by direct and circumstantial evidence that the victim had a mental breakdown as a result of abortion. From the above evidence I am fully satisfied that the prosecution has duly proved beyond any reasonable doubt, that the complainant was involved in an act of unlawful sexual intercourse as alleged in the indictment. The above concession was therefore inevitable.

From the evidence on record, I am also satisfied beyond any reasonable doubt that the accused participated in the sexual intercourse with the victim. The victim was emphatic that the accused seduced her and she accepted him as her lover. They cemented their love in 1999 when the

accused went to her hut at 11.00p.m. whereupon they had sexual intercourse. Then in 2001 the accused sent a boda boda cyclist to pick her from where she was studying. The accused took her in a lodge where they had sexual intercourse until the following morning. As a result of the same she became pregnant. The accused decided to remove the fetus. There was therefore along running relationship between the two. There could not therefore be any question of mistaken identity. The accused total denial cannot stand in view of the above evidence adduced against him by the prosecution during the trial. Even the second defence of frame up by the police cannot stand. The victim's mother made her formal report to the police about the defilement of her daughter whom she believed was below 18 years. She had nothing to do with Apunyo's career as a journalist.

This second ingredient was the actual bone of contention in this case. the victim's mother stated that the victim was born on 26/6/1984 from Nsambya Police barracks. The victim stated that she did not know her age although she stated it at 19 when she was registering for UNEB examinations in 2000. The accused in his defence stated that the victim was 19 years old in 2000 by UNEB records. He was supported by Wilfred Opaka DW2, UNEB examination coordinator who stated that the victim registered her age at 19 years during UNEB registration in 2000.

It is trite law that the best evidence in proof of age is the birth certificate, immunization card or baptism certificate whichever is available. However, in the absence of the above, court can rely on the evidence of a close relative of the victim who is well acquainted with her age. The court can also rely on observation and application of common sense in determining the age of the victim for forensic purposes. See **R Vs Recorder of Grimsby Exparte Purser [1952]2 All ER 889.**

In the instant case there are two sets of evidence. The prosecution evidence is that the girl victim was below 18 years old, having been born on 26/6/1984. The defence story is that the victim was 19 years old in 2000. That would mean that during the time of the alleged offence the victim was above 18 years old.

Sylvia Obira PW2 testified that the victim was born on 26/6/1884. She testified that she had the victim's birth certificate. However the same was not tendered in evidence. On the other hand Mr Eresu testified that he charged the accused with defilement despite his charge and caution statement where he stated that the victim was 19 years old. He stated that he based his decision on the victim's immunization card which indicated her age at below 18 years during the time of the alleged offence. Again that important piece of evidence was not produced in court to prove the real age of the victim.

From the above evidence it is doubtful whether the victim was indeed born on 26/6/1984. The prosecution should have tendered the alleged documents in proof of age of the victim. Having failed to do so would mean that those documents could be stating a different age of the victim.

I agree with the defence story that the victim was above 18 years at the time of the alleged offence. This was confirmed by the UNEB coordinator DW2.

For the above reasons I find that the prosecution has failed to prove this case beyond any reasonable doubt.

I do not agree both assessors who advised me to find the accused guilty. They might have not followed my summing up properly. The evidence on record falls short of the required standard. I therefore find the accused not guilty and acquit him accordingly.

RUBBY AWERI OPIO

J U D G E

28/7/2004.

Judgment read in open court.

RUBBY AWERI OPIO

J U D G E

28/7/2004.