

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT LIRA**  
**CRIMINAL SESSION CASE No. 27 OF 2004**

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

-VERSUS-

REV. FATHER AMBROSE OWINY ::::::::::::::::::::::: ACCUSED

**BEFORE:    HON MR JUSTICE RUBBY AWERI OPIO**

**J U D G M E N T:**

Reverend Father Ambrose Owiny was indicted for defilement contrary to section 123 (1) of the Penal Code Act (now section 129 (1) of the Revised Laws of Uganda). The particulars of the offence alleged that the accused between 16<sup>th</sup> and 18<sup>th</sup> March 2001 at Awe- Ikwo village, Odike Parish, Loro sub-county, Oyam County in the Apac District had unlawful carnal knowledge of one Apio Marion, a girl under the age of 18 years.

The background facts of the case are that the accused is a priest belonging to Lira Catholic Diocese while the victim Marion Apio is a senior six student. She was formerly an altar girl of various churches including Lira Cathedral. On 12<sup>th</sup> March 2001 the victim aged 16 years and a student of St Theresa Girls Secondary School in Masindi went home in Lira Municipality for presidential elections, which was scheduled for 13<sup>th</sup> March 2001. On 14<sup>th</sup> March 2001, after the elections she left home for school and was escorted to the taxi park by her father, one Apunyo Silver who left her seated in a Masindi bound taxi.

After the father had left, the victim instead went to Loro Core Primary Teachers college where her friend and sister to the accused person, one Stella Anyango was a student and stayed there for two days. On the 16<sup>th</sup> March 2001, the two went together to the home of Reverend Father Ambrose Owiny, the accused, in Iwe-Ikwo village, Loro-Odike, where she stayed and had sexual intercourse with him during the night. On the 18<sup>th</sup> March 2001 the victim left for her uncle's home at Atapara Parish. The uncle, a one Reverend Father Moses Ecat became suspicious as to why she was not at school. He summoned the victim's mother and when the victim was interrogated she revealed that she had been at the home of the accused and that the two had had

sexual intercourse. The matter was reported immediately to police, investigated and the accused was arrested and accordingly charged with defilement. He denied the charge.

It is important to state at this juncture that the burden to prove the charge against the accused lies squarely on the prosecution. This is a cardinal principle of our criminal procedure which has evolved since the decision in **Woolmington Vs DPP**. The standard of proof required to secure a conviction is beyond any reasonable doubt. Any reasonable doubt is to be resolved in favour of the accused. The rationale for the above standard is that it is safer to let go 99 criminals than to convict one innocent person. As to what amounts to proof beyond reasonable doubt, it is instructive to refer to what Lord Denning, the once famous English Judge said in **Miller Vs Minister of Pension [1947] 2 All ER 372 at page 373-374**;

***“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence “of course it is possible but not in the least probable” then the case is proved beyond reasonable doubt nothing short will suffice”*** emphasis added.

The above quotation has been followed by our courts of record for decades. It puts the position of what amounts to proof beyond reasonable doubt very lucidly: See **Ssekitoleko Vs Uganda [1967] EA 531**.

It is also trite law that all essential ingredients of the offence charged must be proved beyond reasonable doubt. For defilement like in this instant case, the following are the ingredients, which must be proved before a meaningful conviction can be registered:

- 1) That between 16<sup>th</sup> and 18<sup>th</sup> March 2001 the complainant was below 18 years old.
- 2) That between 16<sup>th</sup> and 18<sup>th</sup> March 2001 she was involved into an act of unlawful sexual intercourse.

3) That the accused participated in the unlawful act of sexual intercourse.

See **Bassita Hussain Vs Uganda, Supreme Court Cr. Appeal No. 35 of 1995.**

In an effort to discharge the above duties the prosecution called the evidence of seven witnesses.

Dr Opio Patrick, PW1.

Ms Apio Marion, PW2

Mrs Margaret Odongwen, PW3

Mrs Beatrice Apunyo, PW4.

Reverend Father Ecat Tom Moses, PW5.

Mr Silver Simon Apunyo, PW6.

D/IP Ayo Mark, PW7.

The prosecution further relied on the following exhibits:-

- Police form 3.
- Letter from the accused.
- Photograph of the accused.
- Birth certificate.
- Immunization card.
- Charge and caution statement of the accused.
- Statement of sister of the victim.
- Letter from Bishop.
- Statement of Mr Obong Leo.

The accused on his part made a sworn defence and called four witnesses.

1) Ms Auma Agatha, DW1.

2) Ms Nyana Christine, DW2.

3) Obong Leo DW3

4) Father Pule Desderius DW4.

The defence further relied on the following exhibits:-

- Statement of the victim.
- Additional statement of the victim.
- Additional statement of the victim.
- Statement of the Reporter.
- Statement of Reverend Ecat.
- Letter from Ladwar Oneka & Co. Advocates.

In the instant case, the defence conceded to the first two ingredients of the offence as proved beyond reasonable doubt. The two ingredients are that the victim was below 18 years and that she experienced unlawful sexual intercourse. Notwithstanding the above concession, it is trite law that court must make specific findings on each and every ingredient of the offence charge. Therefore as far as the age of victim is concerned, the victim herself (PW2) testified that in 2001 she was 16 years old. The victim's mother and father PW4 and PW5 respectively, testified that the victim was born in Mulago Hospital on 2/9/1984. A baptism certificate and immunization card exhibit P4 and P5 were tendered in as evidence showing that the victim was born on 2/9/1984. Furthermore, Dr Opio Andrew (PW1) who examined the victim in respect of this offence estimated her age at 16 years old.

Lastly, during cross-examination the victim stated that she did not vote owing to her under age. According to section 19 (1)(b) of the Electoral Commission Act, 1997 it is only citizens of 18 years and above that can be registered to vote. There is therefore overwhelming evidence to prove beyond reasonable doubt that between 16<sup>th</sup> and 18<sup>th</sup> March the victim was a girl below 18 years old.

As to whether the victim was involved in an act of unlawful sexual intercourse, the complainant/victim testified that she had sexual intercourse with the accused three times. The first encounter was in December 2000. The second one was in January 2001 and the last one was on 16<sup>th</sup> March 2001 in a grass-thatched house at Odike, Loro. From her evidence it is very clear that she knew what sexual intercourse is. This matter came to limelight because Mrs Margaret Odongwen (PW3) visited St Theresa Senior Secondary School where her daughter was studying

together with the victim. Mrs Odongwen went there on 28/3/2001 and found that the victim was missing at school. She reported the matter to the parents of the girl who were shocked. While still wondering what might have happened to the victim, they got a note from Father Moses Ecat, (PW5) calling them to Atapara Parish. One of the parents Mrs Apunyo Beatrice (PW4) went to Atapara where the girl revealed that she had not gone to school because she had been having sexual intercourse with the accused. On 5/4/2001 the victim was examined by Dr Opio Andrew PW1 who remarked inter alia that her hymen had ruptured showing penetrative sexual intercourse. Her vagina had injuries, which were in a resolving inflammatory process. On top of that she had vaginal candidiasis. It is my finding that the doctor's report exhibits P1 clearly corroborates the testimony of the victim that she experienced sexual intercourse. The fact that there was sexual intercourse was further buttressed by the defence witnesses (DW2), (DW3) and (DW4) that the victim was involved in sexual intercourse between 14<sup>th</sup> March 2001 to 26<sup>th</sup> March 2001.

Before I take leave of the above ingredients I would like to add my voice on the requirement of corroboration in sexual offences. The position of the law relating to corroboration of evidence of female complainants in sexual offences, according to Louis Odongo, counsel for the accused, was restated by Defunct Court of Appeal for East Africa in the famous case of **Chila and another Vs Republic [1907] EA 722** as follows:-

“the Judge should warn the assessors and himself of the dangers of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that the evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice”

It is instructive from the above passage that proof of corroboration is not mandatory but a mere rule of practice. The court can still convict in the absence of corroboration if satisfied that the complainant was a truthful witness.

However, since the decision in the above case, circumstances have changed with the promulgation of the 1995 constitution of the Republic of Uganda. A new brand of judicial

opinion is that the law of corroboration as it relates to the evidence of a female complainant in sexual offences is no longer relevant in view of Article 21 of the constitution, which provides for equality before and under the law. It has been argued that the requirement of corroboration in sexual offences discriminates against women. This view has been expressed vigorously by Hon. E.S. Lugayizi in several cases among which is the case of **Uganda Vs Peter Matovu Criminal Case No. 146 of 2001**. The above view was supported by Hon. Musoke-Kibuuka in **Uganda Vs James Luboyera HC Criminal Session Case No. 107/2003**. the Learned Judge had this to say:-

“On a highly persuasive basis, recently, on 6<sup>th</sup> August 2003, the Court of Appeal of Kenya sitting at Mombasa, in **Mukungu Vs Republic**, selected for reporting in [2003] 2 E.A. did declare the law of corroboration, as applied in Kenya in relation to the evidence of complainants in sexual offences, to be in conflict with section 82 of the Constitution of the Republic of Kenya. The declaration put a final nail to the coffin in which the rule appears to have been befittingly buried as far as Kenya jurisprudence is concerned”.

In that case, the Court stated:

“The requirement for corroboration affecting adult women and girls is unconstitutional to the extent that the requirement is against them as women or girls ..... We think that the time had come to correct what we believe is a position which the courts have hitherto taken without proper basis. If any basis existed for treating female witness differently in sexual offences, such basis cannot properly be justified presently”.

Pursuant to the above passage, Hon. Musoke-Kibuuka concluded that in view of Article 21 of the 1995 Constitution of Uganda, the rule requiring corroboration to the evidence of a female complainant in sexual offences could not be justified in a free and democratic society like Uganda. I am highly persuaded by the above reasonings. In light of the clear provisions of Article 21 of the Constitution, there is no basis for requiring corroboration in respect of female complainants in sexual offences. The above opinion was settled recently on 22<sup>nd</sup> April 2004 by the Court of Appeal in **Basoga Patrick Vs Uganda Criminal Appeal No. 42 of 2002** where the decision in **Mukungu Vs Republic** (Supra) was confirmed as good law. In the circumstances, I

agree with Mr Mulumba Principal State Attorney that the evidence of complainants in sexual offences can now be acted upon with or without corroboration. So the case of **Child Vs R** (Supra) is no longer the law.

In the instant case evidence of corroboration was in form of medical examination report by Dr Opiyo Andrew (PW1). In the circumstances, I would conclude that the first and second ingredients have been proved beyond any reasonable doubt.

The remaining essential ingredient of the offence of defilement, which I have to decide on, is whether it was the accused who participated in the unlawful sexual intercourse with the complainant. The prosecution relied heavily on the complainant's evidence, Marion Apio (PW2). She testified that in 1999 the accused approached her for love affairs whereupon she rejected the idea for about two weeks. Later she conceded but remained as lovers for the whole of 1999 without sexual intercourse until in December 2000 when they had sexual intercourse from the Bishop's residence. By then she was 15 years old and in senior two. From there they started exchanging letters and photographs (exhibit P2 and P3).

In January 2001 there was another sexual encounter, again from the Bishop's residence. In March 2001 she came home for vacation during elections period. After the elections she was escorted to the bus park by her father Silver Apunyo PW6 who left her seated in a Masindi bound taxi. When her father had left the accused came and told her to go to Loro Core PTC where she would meet his sister, a one Stella Anyango. That was on the 14<sup>th</sup> March 2001. She went and met the said Stella Anyango and spent a night with her.

On 16<sup>th</sup> March 2001 the accused went to Loro PTC and talked to his sister Anyango Stella. After that Anyango took her to the home of the accused whereupon they arrived at 3.00p.m. Stella left her there together with the accused with whom she spent the night together in a grass-thatched house where they had sexual intercourse. Then on 17<sup>th</sup> March 2001 the accused left his home for Lira but promised to send her money for transport to Masindi. But in the evening of 17<sup>th</sup> March 2001 the accused sent a message that he had not got the money for her transport. He told her to go and borrow money from her sister Agatha Auma (DW2) which he would replace later. On

that information she went to her sister's place at Oryang Memorial School where she was doing her teaching practice. On presenting that message to her she told her that she had no money but told her to keep around. In the meantime, she decided to visit her uncle a one Father Moses Ecat PW5 on 28/3/2001 where she spent the night. On 29/3/2001 she was surprised to see her mother PW4 and brother. They asked her where she had been but she told them that she had been at her sister's place. She did not disclose exactly where she had been. In the evening of 29<sup>th</sup> March 2001 the Late Father Leo Odongo called her and interrogated her. She then told him what had exactly happened. Then on 30/3/2001 she told her mother the truth. After that she was taken to Lira Central Police where she wrote her statement in which she denied having sexual intercourse with the accused. She told court that she denied because she was under the influence of her sister Auma Agatha DW2.

It was in her second statement that she told the truth about what took place between her and the accused. On 15/5/2001 Father Ojuka Carlos, Engwaru and Lawyer Ladwar approached her and took her to Alidina Guest House where they deceived her that her parents had consented that she should write another additional statement. Because she was alone she agreed to write an additional statement under their guidance. When her parents learnt of that they took up the matter with police authorities and disciplinary action was taken against Mr Engwaru who was by then the OC CID.

Another evidence implicating the accused was from Beatrice Apunyo and Simon Apunyo PW6. Both are the parents of the victim. PW4 stated that on 4/2/2001 she approached Bishop Oyanga in connection with a letter, which she had found with the victim saying "You come and find me at the residence". She testified that that letter had been written by the accused. She conferred with the Bishop and accused and asked the Bishop to restrain the accused from having relationship with her daughter who had disappeared from home for three days. On 6/2/2001 Father Carlos Ojuka and Father Moses Ecat of Atapara returned her daughter whereupon she told them to inform the accused to leave her daughter who was still young and aged 16 years. After that the victim returned to school. On 28/3/2001 she was informed by Mrs Margaret Odongwen PW3 that the victim was not at school. She was shocked. On 29/3/2001 she went to Wirao Catholic Parish on the instructions of Father Moses Ecat PW5. On reaching there she met Rev.



Ecat who told her that Marion had been to his place on 28/3/2001 to borrow money for going back to school. On 30/3/2001 they took Marion back home where she revealed to them that she had been having sexual intercourse with the accused on 16<sup>th</sup> and 17<sup>th</sup> March 2001. Marion also gave them a letter and photograph of the accused.

From there she reported a case of defilement against the accused. After the report she accompanied D/IP Ayo Max and D/Sgt Abor to the Bishop's residence to arrest the accused. On seeing them the accused went and locked himself in one of the rooms. The Bishop also refused to release the accused to them. The accused was however arrested after a long struggle.

She stated that the Bishop sent several people to apologise to her but she rejected because she wanted the accused to apologise to her personally.

Reverend Father Ecat Tom Moses PW5 testified that on 28/3/2001 Marion Apio went to his home at Atapara Parish and told him that she wanted money for transport back to school and some pocket money. He told her to wait because he did not have money. In the process she fell sick and he took her to Atapara Hospital. That was on 5/2/2001. On 6/2/2001 he took her back home. On 29/3/2001 he wrote a letter calling Marion's mother (PW4) to Atapara. Marion later told them in the presence of the Late Father Leo that she had been to the home of the accused. He decided to take her back home. They passed via Bala where they spent the night at the home of the victim's grandmother. On reaching the diocese he reported the matter to Father Ojuka who promised to handle the issue. After that he went back to his parish and resumed his normal duties. Then on Sunday 29<sup>th</sup> March 2001 the police came for his statement. He told them to wait for him to complete his mass. They took the girl with them. He went with them to the parish for his statement. He accompanied the police to the scene where they got LC1 Chairman of the area. They interrogated the victim who admitted being there with the accused. He stated that Father Ojuka wanted to solve the matter because he was related to the victim's father.

During cross-examination he stated that Marion went to him on 28/3/2001 and he asked her after the third day. He stated that they went to the scene in the late evening and not at night. He testified further that the victim pointed the grass-thatched house where she slept with the

accused. He concluded that he discussed this issue with the accused one time but he denied the same.

Silver Apunyo PW6 and D/IP Ayo Max PW7 testified in the same pattern as PW4. It is of no use to repeat their testimonies here.

The accused made a sworn defence where he denied having sexual intercourse with the victim in December 2000 and January 2001. He stated that on 2/2/2001 Mrs Apunyo went to his office and he received her. He asked for her name but she refused to tell him. She told him that she wanted to see the Bishop. He went to inform the Bishop about the visitor. As he was coming back to invite her to the Bishop's residence, he saw her walking away. That was on a Friday. The next day on 3/2/2001 the lady again came back at 12.00midday. She told the Bishop that she had gone there because she had been informed that he (the accused) was running her daughter who had disappeared from home. However, she could not verify the source of her information. It was discovered that the girl had been staying at the residence of Reverend Ecat Moses who took her back to her parents on 6/2/2001. Father Carlos Ojuka confirmed that he went together with Reverend Ecat to the home of her parents.

About the events of 16<sup>th</sup> March 2001, he testified that on 13<sup>th</sup> March 2001 they invited Priests from Soroti Diocese for a football match. So they organized themselves to go to Ngetta to camp for practice. He testified that because of the above programme he was in Ngetta between 13<sup>th</sup> to 17<sup>th</sup> March 2001. He did not move outside Lira because he was the captain and organizer. They had expected the visitors to come on 15<sup>th</sup> March 2001 but they failed. He stated that on 16/3/2001 in the morning they went for practice in Ngetta opposite Ngetta Police Post. They had breakfast at 8.30a.m. The visitors arrived at 3.00p.m. and he went to receive them near UEB offices, Lira. He went together with Father Pule and Father Peter Cleaver Ajer. At 3.30p.m. they had a light lunch in Ngetta CPC where they had volleyball game in which they offered Ngetta Youth Team because they 12 priests did not have players among the priests.

At 5.00p.m. they had football, which was played beyond 7.00p.m. Their referee was one Omoding from Ngetta NTC while their coach was one Bua Richard Head Master Ngetta Boys

Primary School. The match was being relayed live through Radiowa and he was playing number 5. He testified that those who tuned that Radio must have heard his name being broadcast on the Radio. After the match they took showers and had supper at 8.00p.m. which took them up to 9.00p.m. Later on they gathered for entertainment. They had indoor games like omuweso, drafts. They also had traditional dancers. After that he went and slept at CPC in Ngetta in Matia Mulumba Dormitory together with Father Martin Okello, Father Okwir, Father Desdarius, and Father Carlos Ojuka. In total they were 23 priests in that dormitory. The visitors slept in a separate block with cubicles/rooms. The following morning they went for breakfast and later for pastoral sharing, which was led by Father Carlos Ojuka. At about noon they took the visitors around Ngetta Hill starting with Radiowa and they left Lira at around 3.00p.m. on 17<sup>th</sup> March 2001. They left without lunch. After that he left for the Bishop's residence that very day of 17<sup>th</sup> March 2001. On 18/3/2001 the Bishop asked him to represent the diocese at Aboke for celebration of St Joseph's day at the Seminary. After the celebrations he went back to Lira with one Okullo Patrick. On 19/3/2001 he went to Aber to collect charcoal at a place called WIDAM. On his way back he passed via home to check on his mother who was said to be sick. He spent about 30 minutes there while in the company of a teacher from Loro Secondary School called Kenneth Ayuko. After that he carried on his normal duties until 30/3/2001 when he was arrested by the police. He denied locking himself in the room. He testified that he locked himself because he was directed by the Bishop after the victim's brother had attacked him. He denied exchanging any photos or letters with the victim. He further denied negotiating with or apologizing to the parents of the victim.

Auma Agatha DW2 who was the victim's sister testified that on 14/3/2001 the victim left Lira for Masindi where she was studying. She was escorted up to the taxi park by her father (PW6). She testified that she also left for Loro PTC on 15/3/2001. On reaching Loro PTC she bounced on the victim who told her that she had gone there to pick her dress which was in her (witness) bag and also secondly that her transport money to Masindi had got stolen from the taxi park when she got out to buy sugar. She asked the victim why she could not go back home for more money instead of going to Loro PTC. The victim then replied that she was fearing their mother who was a very cruel mother. She told the victim to wait until she could get some funds to give her to proceed to Masindi. She testified that that very day the victim started interacting with college

boys very freely. She testified that he colleagues who were matured students were not comfortable with sharing accommodation with the victim who was a young girl. Because of that she requested her friend Anyango Stella who reported on 16/3/2001 to accommodate the victim, which she accepted. So from 16<sup>th</sup> to 17<sup>th</sup> March 2001 the victim was with Stella where they were sleeping in dormitory for first year students. On 18<sup>th</sup> March 2001 the college posted them for Teaching Practice. She left together with the victim to Father Oryang Memorial School. That evening the victim borrowed a bike from someone and rode to Odike Primary Seven School and only came back on 21/3/2001. She again went back and came on 26/3/2001. During that time she received verbal message from Nyana Christine (DW3) that the victim was messing with a certain student called Okwany. She pressed the victim to go back to school but she was adamant. On 27/3/2001 the victim boarded a pick-up and she thought she was now on her way back to school. She was wrong. She discovered later that the victim had gone to the residence of Father Ecat who later revealed the secret to their mother. The two then stated that the victim had been having sexual intercourse with the accused. Father Ecat then told her that the accused had cheated his money and denied him promotion. She stated that because of her stand on the issue her parents hated her and even banished her from home.

She testified that both parents beat her up because she had refused to implicate the accused. Her father beat her from the police station but she was rescued by DIP Ayo who had recorded the statement. She continued that when she went back to school her mother followed her because she had discovered that she had taken Marion's letter to the Bishop. From there her mother beat her in front of the pupils she was teaching. She concluded that they visited the scene of crime at 9.00p.m. together with Father Ecat. Lastly she stated that Marion was a very loose girl who started messing with boys right from primary in Ambalal where she was sharing a boy with a certain girl who became jealous and organized boys to beat her up but she was rescued by her father. After Ambalal the victim was taken to Kotido where she studied for one year before she was shifted to Ngetta Girls where she sat for her PLE. From there she joined Aboke St Mary's but she was chased away for misconduct. She was taken to Ikwera Girls in 1999. However, it was discovered that she was escaping from school to Aduko Township where she was loving a shopkeeper. That is why she was removed from that school and transferred to Masindi. She denied informing accused to go and follow the victim. She denied being their mediator. She

denied influencing the victim not to implicate the accused. She stated that the victim was fearing to tell the truth because she was fearing to be banished like her and that would end her education.

Nyana Christine (DW3) testified that she was formerly a student at Loro Core PTC. She stated that she saw the victim for the first time on 14/3/2001 and she thought she was a new student. She slept in the same dormitory with her. She stated that on 15/3/2001 Auma Agatha (DW2) reported to college and introduced Apio Marion, the victim as her sister. She testified that when the victim reported on 14<sup>th</sup> March 2001, she started interacting with many boys from Lira but she became very close to a boy called Okwany Innocent.

On 16/3/2001 at 9.00p.m. Okwany Innocent was caught having sexual intercourse with Apio Marion near the dining hall. From there the watchman who had got them also demanded for sexual intercourse with her or else he would report them to the Principal. He succeeded. His name was Enume. She testified that on 17/3/2001 the victim was with another boy called Adoko James. Because of that there arose conflict between Adoko James, Okwany Innocent and Enume, the watchman over the victim. On 18/3/2001 they were posted for teaching practice. She went to Odike Primary Seven as student Headmistress. Auma Agatha went with her sister Marion to Oryang Memorial Primary School that very evening. Marion returned to Odike and slept with Okwany in the boys' wing. On 19/3/2001 Marion was still at the boys' wing. Because Marion was interfering with their programme, she decided to call a standing meeting for student teachers on 20/3/2001. Marion got wind of the meeting. So she fled to her sister Agatha at Father Oryang Memorial Primary School. In that meeting Okwany was queried why he was keeping Apio Marion against their regulations. Okwany replied that Marion was his fiancée. Okwany then decided to rent a house together with Ogwal Dennis where he continued having sexual intercourse with Marion. She testified that when Marion learnt of the meeting on 20/3/2001 she fled and Ogwal got the only chance of importing his lover a one Grace (who is now married to him). On 21/3/2001 Marion came back from Father Oryang Memorial Primary School and posed as a student from Shimon PTC. She (witness) asked her why she was not on teaching practice, she replied that their system was different. She concluded that later on the issue of defilement involving the accused came whereupon they were taken to Lira for police statements.

DW3 Leo Obong testified that he knew the victim Apio Marion because she had gone to his friend Okwany Innocent. Okwany had introduced her to him as his girlfriend. He testified that on 18/3/2001 Apio Marion was with them at Odike when they were doing lesson planning at 7.30p.m. Apio Marion was assisting Okwany by copying notes. At about 10.00p.m. Okwany entered his bed together with Apio Marion and they immediately engaged in sexual intercourse to his surprise. The girl was crying very loudly. Again the two slept together on 19<sup>th</sup> March 2001. On 20<sup>th</sup> March 2001 they chased Okwany from the house.

Reverend Father Desderious Pule-Olima testified that on 13/3/2001 they were in Ngetta preparing for a football match between them and Soroti priests. The match took place on 16/3/2001. The visitors arrived at 3.00p.m. They took lunch and then went for indoor games. At 4.00p.m. there was volleyball against Ngetta Youth. At 5.00p.m. there was football where he played No.2 while the accused was playing No.5. Their goalkeeper was Father Okeny. After football, they had supper and entertainment. Later on they slept in Matia Mulumba Dormitory together with the accused. The next day on 17<sup>th</sup> March 2001 the visitors left after lunch at around 1.00p.m. Before that they had mass and pastoral experience.

In a nutshell the evidence implicating the accused can be summarized in the following categories:-

- 1) Eyewitness account of the victim herself.
- 2) Circumstantial evidence in form of:-
  - a) Photograph and letter allegedly from the accused to the victim.
  - b) Demolished house.
  - c) Conduct of the accused when the police went to arrest him.
  - d) Subsequent negotiations.
  - e) Subsequent mismanagement of the case.

On the other hand the defence case consisted of complete denial and alibi.

I will start with circumstantial evidence. It is trite law that for court to convict on circumstantial evidence there must be no other hypothesis than the guilt of the accused. In other words the circumstances of the case must be such that there are no other inferences other than the guilt of the accused. It is a well-known fact that circumstantial evidence may be capable of proving certain facts with mathematical precision. However to base a conviction on that type of evidence, court should normally examine all the surrounding circumstances of the case because evidence of this kind may be fabricated. See **Tindigwire Mbone Vs Uganda Criminal Appeal No. 9/1985 Supreme Court** (unreported).

As far as the letter and photograph is concerned PW2 testified that after entering love relationship with the accused, they started exchanging love letters and photographs. She produced a note, which the accused allegedly wrote to her using code names. She also produced photograph of the accused. (Exhibit P4 and P5). I see very little evidentiary value of the two exhibits.

First of all they were not tendered in through police investigations. They were produced during the hearing. The same should have gone through a chain of evidence.

Secondly the letter was not examined by a forensic expert i.e. a handwriting expert to confirm that it was written by the accused person. In fact the father of the victim PW6 agreed with that position himself being a retired senior police officer with Criminal Investigation Department. The above evidence is therefore of a very weak nature and does not point a clear finger at the accused person.

As for the demolished house, I must say that this piece of evidence was also messed up by the police who investigated the matter. First of all the good officer visited the scene very late between 7.00p.m. to 9.00p.m. According to Auma Agatha (DW2) the scene was visited when it was raining. The officer did not go out to see the alleged house. It is therefore hard to tell whether the house had been demolished to evade the crime or at all.

DIP Ayo Max, PW7 testified that he interrogated the mother of the accused and she told them that the house had been demolished in December 2000. Since the officer did not inspect the house physically her version would as well be true.

Another problem with this piece of evidence is whether the said house had been demolished at all. Whereas PW2 testified that it had been demolished, PW5 stated that they found the house standing. PW7 on the hand stated that only the roof had been removed. The accused on his part stated that only the roof had been removed for the purpose of renovation. The above contradictions are so grave so as to point that the prosecution witnesses were not truthful. From the above contradictions it is not clear whether the house had been demolished at all.

For the above reasons no conviction can be based on such a shaky evidence since the alleged demolition could be capable of other explanations as indicated above.

In regard to the conduct of the accused, it is trite law that conduct of the accused in running away can constitute a very good circumstantial evidence implicating him of the offence. Prosecution evidence was that when the accused saw the arresting party he ran and locked himself in one of the rooms in the Bishop's residence. That kind of conduct if not explained is not that of an innocent person.

In the instant case, the accused explained that he ran away because the arresting party was very aggressive to him especially the brother of the victim. Because of that he was ordered by the Bishop to lock himself in one of the rooms. That evidence was not contested. It therefore constitutes a plausible explanation. Where a suspect feels his life is in danger he has the right to behave in such a way that can protect his life. It comes by instinct. In such a situation the conduct of the accused cannot be impeached. His conduct was not inconsistent with his innocence because he was under apprehension that he was about to be mobbed by the brother of the victim. See **Bogere Charles Vs Uganda Cr. App. No. 10/1998 (S.C.)** (unreported).

As for subsequent negotiations and mismanagement of the case, they are not worthy of implicating the accused without other supporting evidence. The accused denied any involvement



in any negotiations and mismanagement. It was however very unfortunate that a number of people tried to frustrate the prosecution of the accused for whatever reason beyond my understanding. Priests are like ordinary citizens who should not be treated above or below the law if they are suspected of any crime. It was therefore bad for Bishop to hold the accused in his residence when the accused person was wanted by the police. I am glad the officer who was used for that purpose was reprimanded accordingly. Law should take its own course in all circumstances without fear or favour, I do commend the parents of the victim for following this case up to the end.

I now move to the evidence of the complainant who was the victim in this case. Having found that the circumstantial evidence is very weak and shaky, this case will stand or collapse with the evidence of the victim. The victim, Apio Marion testified that the accused defiled her in December 2000 and January 2001. She stated further that the accused again defiled her on 16/3/2001 in Odike village Loro Apac District. Her evidence was attacked by the defence for being inconsistent and untruthful. She was attacked for not indicating the dates when she was defiled and that she was not a truthful girl because she had made several contradictory statements at the police and before court. She was further attacked for being untruthful about her sexual life.

I must say that this offence took place very far from the courtroom and it is upon prosecution evidence to convince court that it did occur. To convict the accused court must find that the victim told court the truth. She must therefore be a credible witness. On the other hand the accused must not be convicted on weakness of his defence.

After examining very carefully the evidence on record, I must say that I have got a lot of difficulties in believing the victim's story. There are a number of loopholes, which go to prove that she was not a witness of truth. I offer a number of reasons:

First of all she testified that she had sexual intercourse at the Bishop's residence twice – In December 2000 and January 2001. She did not commit herself to the dates when she sneaked into the Holy see to have sexual intercourse with a celebrity. There are occasions when an exact

date is all important in Criminal Cases: See Sulaiman Ndamagye Vs Uganda S.C. Cr App. No. 1 of 1989.

In the instant case the exact dates when sexual intercourse took place was all important: Having sexual intercourse with a Catholic Priest in the Bishop's residence is a hallmark event, much more than a wedding day. The victim should have been truthful enough to remember the dates she had sexual intercourse with the accused. She did not want to tell the truth. At least she should have remembered either the first or second occasion when she had sexual intercourse with the accused.

Secondly, I find a lot of contradictions and inconsistencies in her stories. In her first police statement she denied having sexual intercourse with the accused. She claimed that she did that because she was under the influence of her sister. But when she was making that statement her sister was not there. She was with her parents and brother. She should have feared her parents and brother who were at the police station to write a favourable statement implicating the accused. Her mother in particular was said to be a very cruel mother according to PW6 and DW2. The victim should therefore have feared her more than her sister who was not at the police station at the material time. In any case, she had already told her the same before. The fact that she denied having sexual intercourse with the accused in her first statement shows that she was not a truthful witness.

Even in her other statements there were a number of contradictions. In one of them she stated that she got the accused at home with a nun but in her statement in court she stated that the accused got them at their home. In another one she stated that she slept at the home of the accused twice and that is also what she told her mother PW4. Yet in court she testified that she slept in Loro during the night of 16/3/2001. All those inconsistencies and contradictions go to prove that the victim was not a witness of truth.

Another important aspect of this case is the medical examination report by Dr Opio Patrick Andrew PW1, which constituted exhibit P1. In that report it was discovered that the victim had experienced penetrative sexual intercourse because her hymen had ruptured. Her vagina had

injuries, which were in resolving inflammatory process. The renowned medical officer stated that such a process would take one week to heal.

Of course that would depend on individual immunity system. If sexual intercourse took place during the night of 16/3/2001 and she was examined on 5/4/2001 such inflammations would not be noticeable according to the above medical explanation. Those are clear 21 days. From the above evidence it would appear that the victim did have sexual intercourse beyond 16<sup>th</sup> March 2001. In fact according to DW2 the victim was taken to a laboratory in town before 5/4/2001 where sperms were discovered in her vagina. During cross examination the victim herself admitted being taken for examination in a laboratory in town before she was subjected to another medical examinations on 5/4/2001. She was silent on the results of those examinations. Why, because she was fearing to tell the truth.

The above evidence therefore corroborates the evidence of DW2, DW3 and DW4 that between 18<sup>th</sup> March to 26<sup>th</sup> 2001 the victim was involved in a series of sexual intercourse with several boys of Loro Core PTC including one Innocent Okwany. This girl was not a credible witness.

The accused raised the defence of alibi that between 13<sup>th</sup> and 17<sup>th</sup> March 2001 he was in Ngetta. Mr Mulumba submitted that once an accused relies on alibi; he has no duty to prove it but it is upon prosecution to put the accused at the scene. But once the prosecution has put the accused at the scene the alibi automatically collapses. He referred to **Uganda Vs Sebyala [1967] EA 204.**

It is true where an accused pleads alibi; he has no duty to prove it. However it is not true that once prosecution has placed the accused at the scene the alibi collapses. The court must still examine all the evidence on record and give reasons why it should not believe the alibi. That position was restated in **Nyanzi Vs Uganda.**

“In light of the decision in **Kagunda Fred Vs Uganda Cr Appeal No. 14/1998 (SC),** (unreported), it is no longer good law to dismiss the defence of alibi merely with the words “it is a pack of lies” or “we do not believe him” without properly evaluating the evidence presented in support of the alibi. Nor is it sufficient anymore to believe that once the accused is placed at the scene of the crime by the prosecution witness anything

said by him or her witness as to the whereabouts he or she was at the time of the crime should be brushed aside as no longer relevant. Justice demands that evidence of both the prosecution and the defence must be equally and fairly evaluated even if at the end of the evaluation a court is entitled to believe one side or the other and come up with a rational decision: See **Bogere Moses and Kamba Robert Vs Uganda Cr. Appeal No. 1 of 1997 (SC)**; (unreported)".

The above decision therefore puts very clearly the position of the law of alibi beyond what I can state in this judgment.

In the instant case the prosecution has failed to place the accused at the scene of crime. The accused testified that between 13<sup>th</sup> to 17<sup>th</sup> March 2001 he was in Ngetta. He was supported by Father Pule Olima DW5. The above defence was supported by the evidence of DW2, DW3 and DW4, which was to the effect that the victim was all along with them and did not go to the home of the accused. The three student teachers testified that between 16<sup>th</sup> March 2001 and 26<sup>th</sup> March 2001 the victim was in their company where she was enjoying sexual intercourse with student teachers. That defence is plausible. The accused put another formidable defence that on 16/3/2001 at 3.00p.m., he was at Lira welcoming his visitors from Soroti. The victim testified that around that same time she was at Loro, with the accused person. I cannot believe that because it is not possible for accused to be at Loro and Lira at the same time as alleged by the victim.

For the above reasons I find it hard to believe the victim. She is not a credible witness.

It could as well be true that she went to Loro Core PTC because she lost her transport money in the bus park as alleged by DW2. There was however no logic in waiting for extra money from the accused as she alleged that the accused used to post her money to school.

In short, it is doubtful whether the victim went to Loro on account of the accused.

In conclusion from the general trend of this case, however, it may be true that the accused was highly suspected of having affairs with the victim. But suspicion however, strong it may be, cannot be a basis for any conviction. It must be backed by a credible evidence, which I am afraid is not on record.

The circumstantial evidence upon which the prosecution relied upon fell short of conclusiveness. The evidence of the victim was tainted with untruthfulness. The victim's evidence was made worse by that of Father Moses Ecat (PW5), who confused the whole case. He stated that he was the one who took the victim to Lira via Bala. That was not true. He also testified that 29/3/2001 the police went for his statement and found him conducting a Sunday mass whereupon he told them to wait for him to complete the mass. But in the history of human kind, 29/3/2001 has never been a Sunday. It was a Thursday. His evidence was also wanting as far as the scene of crime was concerned. The evidence of other witnesses, especially the parents of the victim points a very high suspicion against the accused person. But I have already alluded to that type of evidence in my judgment above.

For the above reasons I do agree with one of the assessors who advised me not to convict the accused for lack of proof of participation. She might have followed my summing up very brilliantly as opposed to her colleague. I do agree with her and find that the prosecution has failed to prove all the ingredients of this offence to the required standard. I therefore acquit the accused and order that he be set free forthwith unless being held for any other lawful purpose. Any bail he must have deposited be refunded to him accordingly.

28/7/2004:-

Judgment read and signed in open court in the presence of counsel Louis Odongo and Kulu for the accused and state respectively.

**RUBBY AWERI OPIO**

**JUDGE**

**28/7/2004.**