

THE REPUBLIC OF UGANDA
IN THE CENTRAL CIRCUIT HIGH COURT OF UGANDA HOLDEN AT
MUBENDE SITTING AT KAWERI.
CRIMINAL SESSION CASE NO. 270 OF 2001

UGANDA..... PROSECUTOR

Versus

KANAABI LIVINGSTONEACCUSED

BEFORE: HON. MR. JUSTICE V. A. R. RWAMISAZI-KAGABA

JUDGEMENT

Kanabi Livingstone, who I shall refer to as “the accused” the rest of my judgement, is indicted for the offence of defilement contrary to section 129(1) of the Penal Code Act. It is alleged, in the indictment, that Kanabi Livingstone on the 27th day of August 2000 at Buganti village, Butologo Sub-county, Buwekula County, Mubende District had unlawful sexual intercourse with Nabate Maria Gorretti, a girl under the age of eighteen years old age. The accused denied the charge and was represented by Mr. Kanya Senyonga while the prosecution was conducted by Niyonzima Vincent, a State Attorney based at Mubende.

The prosecution relied, on six witnesses to prove its case. The story brought out by the six witnesses is that, the victim — Nabate Maria Gorretti, who was also called Nakamya (twin name) (PW3) was staying with her aunt Jane Nalongo Nanteza (PW6). According to Nabate (PW3) she went to the well on the 26/8/2004. She found the accused, Kusubiiza and Namuwanga at the well. While at the well, the accused called her to the bush where enguli (crude waragi) was being distilled. He gave her Shs. 50/= before grabbing her and pushing her to the ground. He then inserted his penis into her vagina for as long as two hours. She felt pain. He ejaculated into her vagina twice.

She went home but did not tell anyone about the defilement because she feared her aunt would beat her. Next day, on the 27/8/2000, Nabate returned to the same well. She found the accused at the well. Kanabi (accused) grabbed her, took her to the bush, threw her to the ground and had intercourse with her. He ejaculated into her vagina once.

As the accused was still defiling Nabate Najjita came to the same well and called Nabate by the name. The accused ran away into the bush leaving Nabate being questioned by Najjita (PW4).

Nabate told Najjita that Kanabi had been having sexual intercourse with her in the bush. She was crying. Najjita took the victim to her home where she also told her aunt Jane Nalongo Nanteza (PW6) and Serubidde (PW5) that Kanabi had had sexual intercourse with her.

On leaving the bush, Nabate observed blood in her (Nabate) vagina and on her dress. The blood on her dress was also observed by Nanteza (pw6) Serubidde (PW5). Nanteza also told court that the victim vagina was injured and bleeding. She was shy and crying. Her (Nabate's) dress was soiled and blood stained at the back.

Serubidde and Semwanga arrested the accused and brought him to Nanteza's house. He (accused) appeared worried. He was returned to Butologo Police custody under the charge of No. 10368 P.C. Patrick Kigozi (PW2). But the accused escaped from the cells at night and was arrested by Kikanolwa Police. P.C. Kigozi visited the scene of defilement and drew a sketch plan of the scene — exh. P.2.

Nabate was taken to Mubende Hospital where Dr. Obuku examined her on P.F. 3 on the 7/9/2000. His findings are on exhibit P.1.

In his defence, the accused denied having sexual intercourse with Nabate. He, however admitted being at the well and his jerry can being picked up and taken away by Najjita while he was in the bush having a long call. He alleged the case as “planted” on him by Najjita, who he refused to have sexual intercourse with when she made love advances to him. he told court that he was rearrested at Wakayiba, twenty miles from Butologo five days after. he was heading for John's farm at Makonzi.

In this and other criminal trials, the burden to prove every offence with which an accused person is charged, together with the accused's guilt rests, throughout, on the prosecution. The prosecution must prove the two beyond reasonable doubt. This burden never at any time shifts to the accused except in a few statutory cases, this being more of those. Any doubt created by the evidence, whether of the prosecution or the case as a whole that doubt must be resolved in favour of the accused. The prosecution is proving its case, must rely on the cogency and strength of its evidence. The prosecution shall not rely on the weakness of the defence or lies, told by the accused to bolster its case, though such told by an accused person, may in some cases be taken into account as corroboration evidence of the prosecution testimony. I addressed the assessors and I now warn myself on what the burden of proof means and the standard of proof required in order the prosecution to succeed. I also explained to the assessors what reasonable doubt means in law.

See Woolimington v. D.P.P. (1935) A. C. 462

Oketh: Okale & others vs. R. (1965) E.A. 555

Ojapan Ignatius vs. Uganda — Criminal Appeal 25/1995 (S C.)

I also warned the assessors on the need for corroboration which is required sexual offences before an accused is convicted on the basis of the evidence of the prosecutrix. But I also pointed out that the court could convict on uncorroborated evidence of the prosecutrix after warning itself of the danger of convicting on the uncorroborated evidence of the victim, if it is satisfied that the testimony of the prosecutrix is truthful and reliable.

See: (1) Charles Katende vs. Uganda (1971) 2 ULR 10

(2) Remigious Kiwanuka vs. Uganda — Criminal Appeal 41/1995 (S. C.)

As PW (Nabate) was a witness of tender age, though the court had found her possessed of sufficient intelligence, and capable of giving evidence on oath it will be unsafe to act on her testimony without the same being corroborated.

See: (1) Solomon Ouma Mgele vs. Republic (1978) LRT 53

(2) Uganda vs. Benedicto Kibwami (1972) 2 ULR 29

(3) Section 40(3) of the Trial on Indictments Act.

The offence of defilement involves three ingredients, namely: lie

- a) That the prosecutrix Nabate was under the age of 18 years on the 27/8/2000
- b) She was subjected to sexual intercourse

c) That it is the accused, who had sexual intercourse with her

The age of the victim was testified upon by herself. She said she was now twelve years and attending P.IV at Ngabano Primary School. She was supported by her aunt Jane Nalongo Nanteza who stated Nakamya (Nabate) was baptised on the 7/3/1993 as per Nabate's Baptism Certificate which the court looked at but the same was not exhibited. The same Certificate read that Nabate was born on the 26/5/1992. Further evidence of her age came from Dr. Obuku ho examined her on the 7/9/2000 and found her aged seven years old: *See: exhibit Pi.*

Both the prosecution and defence agreed that the victim was a female aged below eighteen years.

The court had the opportunity to view Nabate in court and I am satisfied, going by her looks and physical appearance, she is a person below the age of eighteen years as she gave evidence in April 2004.

I also explained to the assessors what sexual intercourse means. The slightest penetration of the male penis into the vagina. Whereas the rupture of the hymen, the inflammation of the vaginal area and the ejaculation of semen may be strong evidence of sexual intercourse having taken place, their absence does not necessarily mean that sexual intercourse did not take place. It must always be borne in mind that the best evidence intercourse having taken place comes from the victim. Other evidence simply corroborative of her testimony.

It was the testimony of Nabate that the accused, on the 27/8/2000 in the bush near the well, the accused pushed her to the ground, pushed his penis into her vagina and ejaculated inside once. She consistently reported Kanabi having defiled her to Najjita (PW4) Serubidde (PW5) and Nanteza (PW6).

Her story of sexual intercourse having taken place is corroborated by the injuries to her vagina which led to her bleeding in her private part. The blood in her private parts was seen by the victim and Nanteza

On her coming from the bush, Nabate was crying and weeping according to all witnesses mentioned above. Her dress was both soiled and bloodstained in the hind part. She appeared

shy.

The observations made by PW4, PW5 and PW6 about the conduct of the victim and the condition of her body and dress are strong corroborative evidence of sexual intercourse having taken place.

See: David Kizito Bogere vs. Uganda — Criminal Appeal 23/1995 ('S. C.)

The doctor examined Nabate on the 7/9/2000, nearly ten days after the date on which Nabate was said to have been defiled. It is not surprising that the doctor's report on exhibit P1 does not present the accurate information. Between 27/8/2000 and 7/9/2000, there must have been an interference with the parts of Nabate, such as washing them. Secondly, any injuries if they were likely to have healed and hence invisible. The only aspect of the doctor's report which is helpful to the prosecution is the age of Nabate as being seven and her hymen having been found ruptured sometime back.

Although the doctor's report was not useful circumstantial evidence of sexual intercourse having taken place and when, I find there is other abundant testimony from the conduct of the victim, the conduct of the accused who Serubidde described as looking worried, and the observations of Najjita, Serubidde and Nanteza on the victim which points irresistibly to sexual intercourse having taken place to the prejudice of Nabate.

Dr. Obuki was called as an expert witness whose evidence was to corroborate that of the victim. But the evidence of an expert is like any other evidence. It must be tested as to its reliability. The judge can act upon it or part depending how that evidence assist to prove or disprove the facts in issue.

If the evidence of the expert does not tally with the prosecution case, such discrepancy must be investigated.

See: (1) *Kii Smile Mugisha vs. Uganda (1976) HCB 246.*

(2) *Abdu Ngobi vs. Uganda — Criminal Appeal 10/1991 (S.C.)*

As I have already observed, the doctor's report does not state whether victim had injuries on her private parts and how far back the penetration into the victim's vagina and rupture of her hymen had taken place. The explanation, for absence of such findings lies in the long period between 27/8/2000 and 7/9/2000 when the doctor examined her and filled exhibit P1.

See (2) *Abdu Ngobi vs. Uganda — Criminal Appeal 10/1991 (S.C.)*

As to who defiled Nabate, the prosecution relies on the prosecutrix and that of Najjita, Serubidde and Nanteza (PW3, PW4, PW5 and PW6). In matters of identification of the assailant by the witness or victim, the court may consider the factors favouring proper identification that were in place at the time of the attack. Such factors include (a) the light and its intensity at the time (b) the past knowledge of and association with the attacker (c) the duration of the commission of the crime (d) the proximity, between the witness and attacker during the commission of the crime (e) any distinguishing features on the attacker, such as physical appearance, tribal marks or scars and dress.

See (1) Abudulla Nalubere & 2 ors vs. Uganda Criminal Appeal No. 9/1978 (C.A)

(2) Constatino Okwel alias Nagendo vs. Uganda — Criminal Appeal No. 12/1990 (S.C)

(3) Sam Buteera vs. Uganda — Criminal Appeal No. 21/1994 (S.C.)

The accused was common person known to all the village folk of Nabate's village. He was regularly seen when he went to fetch water for his master, the O.C Police at Butologo Police Post. He stayed at the Police Station. The offence was committed at about 9.00a.m. in broad day light. The accused was already known to the victim because he had sexual intercourse with her the previous day and in the neighbourhood of the same well. The victim was consistent in reporting to Najjita, Serubidde and was Kanabi who had defiled her in the bush.

The participation of Kanabi as the defiler is further established by Najjita who saw the accused walk to the well with a jerry can. The victim had also gone to the same well shortly before. Upon trailing the victim to the well, Najjita found the accused's jerry can by the path while the victim was in the bush. The victim emerged from the bush to tell Najjita that she had been having sexual intercourse with Kanabi. Kanabi ran away while Najjita led the victim home with the accused's jerry can

The participation of the accused is further confirmed by his conduct both before and after the event. He (accused) gave Nabate Shs.50/= (mistaken for 500/=) on the 26/8/2000, abandoned his jerry can by Najjita ambushed them in the bush, appeared worried when he was arrested and escaped from custody at Butologo to Wakayiba, a place, twenty miles away.

Lastly, the accused admitted going and being at the well when Najjita went there and took away his jerrycan. Though he said he was in the bush for a long call, he has put himself at the scene of crime in terms of time and place.

The conduct of an accused before or after the commission of a crime may provide useful circumstantial evidence to implicate him in the commission of a crime and or may provide useful corroboration to prosecution evidence tendering to prove his guilt.

See (1) Safari Innocent v. Uganda — Criminal Appeal 20/1995 (S.C.)

(2) Constantino Okwel (alias Magendo vs. Uganda - Criminal Appeal 12/1990 (S.C.)

The conduct of the accused on 26/8/2000 and 27/8/2000 is relevant in establishing both his guilt and participation in the crime. Under sections 4 to 13 of the evidence Act, facts which tend to show the existence of a fact, forming the same transaction, showing preparation motive or state of mind are said to be relevant. What all these section are about is circumstantial evidence which may be considered or relied upon to prove a fact in issue.

The behaviour of Kanabi in giving the victim Shs. 50/= on the 26/8/2000 was in preparation for defiling her again on the 27/8/2000. His abandoning his jerrycan and running away when Najjita “caught” him in the act could not be anything but that accused had been defiling Nabate. Lastly his escaping from custody after his initial arrest to Wakayiba, some twenty miles from Butologo points irresistibly to the accused’s running to escape the long arm of the law after defiling Nabate.

On the basis of the prosecution and defence evidence together with the conduct of the accused before and after the commission of the crime, I find the prosecution has proved the participation of the accused in the defilement of Nabate beyond reasonable doubt.

In his defence, the accused denied having sexual intercourse with the victim though he admitted being in the neighbourhood of the well easing himself when Najjita walked away with his jerrycan. He admitted leaving Butologo after being arrested with the permission of a Police officer called Innocent and being re-arrested at Wakayiba, twenty miles away. The accused alleged the case was engineered against him by Najjita, who he refused to love when she made love advances to him. But he did not allege any grudge against the other prosecution witnesses including the complainant.

Where it is found that a certain witness has told lies against an accused person, such evidence must be approached with caution. He becomes “a tainted witness”. I warned the assessors about the test to be applied to the evidence of a witness for a motive. In *R vs. Beck* found to 74 Criminal Appeal Reports 221 Lord Ackner L.J emphasised the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness’s evidence may be tainted by an improper motive.

See also: (1) Lt. Mike Ochiti vs. Uganda — Criminal Appeal 7/88 (C.A.) (J)

Archbold -1997 Edition- paragraph 16-17.

(3) Paulo Mrimi vs. Republic (1977) LRT 34 I

In the instant case, Najjita testified as PW4. No mention of this failed love affair was put to her. I find it is a baseless allegation which the accused has manufactured to tarnish the image and evidence of Najjita. I reject the allegation as lies.

By saying he did not defile the victim, the accused was raising the defence of alibi. Where an accused person raises that defence the prosecution has the duty to negative it (alibi). But if the alibi is found lacking in merit and truth, then it must be rejected.

The accused has by his own admission put himself at the scene of the crime. He has in fact, corroborated the victim and Najjita that he was at the well about 9.30 p.m. By his conduct after the crime, the accused has corroborated the prosecution testimony that he was at the scene of crime and defiled Nabate while there. I therefore reject his defence of alibi as being lies.

I have addressed myself to any contradictions in the prosecution case which are few and negligible. The guiding principles in considering the contradictions in the prosecution testimony are set out in several cases as:

(1) *Wasswa Stephen & another vs. Uganda — Criminal Appeal 31/1995 (S.C)*

(2) *Alfred Tajar vs. Uganda EACA — criminal Appeal 167/1967*

(3) *Sarapio Tinkamalirwe vs. Uganda — Criminal Appeal 27/1989 (S.C.)*

The general principle is that not every inconsistency will result in the rejection of the testimony of a witness. It is only grave inconsistency, unless satisfactorily explained, which will usually, but not necessarily, result in the evidence being rejected. Minor inconsistency

will not usually have that effect unless the court thinks they point to deliberate untruthfulness.

It was the testimony of Nabate that her aunt Nanteza (PW6) did not examine- her private parts while Nanteza said she did and observed blood therein.

This is a minor contradiction which can be explained in the context of the youthful age of the victim, the trauma she was going through and the time that has lapsed between August 2000 and April 2004, when she testified about her ordeal in court.

After considering lithe evidence adduced by the prosecution and defence, I find the prosecution has proved all the three ingredients o the offence of defilement beyond reasonable doubt. I believe the prosecution evidence which came from witnesses that I hold were reliable and truthful. I reject the accused's defence as lies.

In agreement will the opinion of both assessors, I find the accused guilty and convict him for the offence of defilement contrary to section 129(1) of the Penal Code Act.

V. A. R. Rwamisazi-Kagaba

Judge

23/7/2004