

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA, AT MASAKA
CRIMINAL SESSION CASE NO. 0074 OF 2002

UGANDA :::::::::::::::::::::::::::::::::::::::

PROSECUTION

VERSUS

KAYIJJA IBRAHIM :::::::::::::::::::::::::::::::

ACCUSED

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

JUDGMENT

The accused Kayijja Ibrahim is indicted for the offence of Defilement C/S 129(1) of the Penal Code Act. It is alleged that the accused on or about the 4th day of July 2001 at Naisoza Cell, Lukaya in the masaka District had unlawful sexual intercourse with Namukasa Jane a girl below the age of 18 years.

He pleaded not guilty to the indictment.

The offence of Defilement is constituted by the following ingredients:-

- (a) the age of the victim which must be below the age of 18 years.
- (b) The act of sexual intercourse which means penetration, however slight of a male sexual organ into a female sexual organ.
- (c) Participation of the accused in the act of sexual intercourse.

In all Criminal trials the prosecution is required to prove the offence committed and participation of the accused beyond reasonable doubt. This burden does not shift to the accused to prove his innocence and he cannot be convicted on a weak defence but only on the strength of the prosecution case.

In brief the case for the prosecution was that the accused and victim who were relatives stayed in the same home. They shared a room. There were other people staying in the same room. On the night of 4th July 2001, the accused sneaked to the bed where the victim was sleeping and had sexual intercourse with her. The victim realized that someone was on top of her when she felt pain in her private parts. The person on top of her talked and she recognized his voice as that of the accused. The following day an aunt of the victim observed that the victim was bleeding and when she asked her what was wrong she told him that the accused had defiled her. The accused was arrested and taken to Lukaya Police Post where he was detained and later charged.

The victim was examined on Police Form 3 and its appendix and the medical officer found that blood was dripping on her thighs and private parts. The hymen was freshly ruptured. There were lacerations inside her introitus and blood clots in her vagina. He concluded that there was evidence of forceful sexual intercourse.

On the other hand the accused denied having defiled the girl. He stated that the only time he went to the victim's bed during the night was to remove a bat which had fallen on the victim's bed. After removing the bat he went back to sleep and the following day left for his work when there was no problem. He was arrested when he went back home to pick a spanner which he had forgotten. He was told of the defilement which he denied. He was taken to Lukaya Police Post where he was detained.

I will now proceed to evaluate the case for the prosecution and that for the defence and determine as to whether or not all the ingredients of the offence have been proved beyond reasonable doubt.

On the issue of the age of the victim the prosecution relies on the testimony of Dr. Bawakanya Stephen who examined the victim and established her age as ten years. The victim herself testified during the trial and gave her age as 12 years at the time of the trial and her physical appearance points to the fact that she is indeed below the age of 18 years

and the defence did not contest this fact. I make a finding that she was below the age of 18 years.

On the act of sexual intercourse the prosecution adduced the testimony of the victim herself, that of the medical officer and that of two Local Council Officials who saw her immediately a complaint of her defilement was raised. The victim herself narrated the story of her defilement. Both Sekataba Gerald, Vice Chairman L.C.I and Basasira Kimera, General Secretary L.C.I, saw blood dripping out of the girls private parts. Her clothes were also blood stained. When she was examined by the medical officer the examination revealed a freshly ruptured hymen which was still dripping of blood. He also found inflammations around her private parts that were consistent with forceful sexual intercourse.

Although the accused himself testified that they had shared a room with the victim and to his knowledge she had not been defiled. Defence Counsel conceded that the fact of sexual intercourse had been proved by the prosecution beyond reasonable doubt. Indeed given the injuries that were found around the girls private parts and her own testimony about the pain she felt in her private parts when someone was lying on top of her there is no doubt that the victim experienced penetrative sexual intercourse.

The last question to be resolved is as to whether or not the accused was the person responsible for the act of sexual intercourse. The sexual intercourse took place at night and the defence counsel's contention was that the victim did not recognize or identify the person who defiled her. On the other hand the prosecution contends that the victim recognized the accused's voice and was the only male adult who could talk as the other male who was in the room is dumb.

On the issue of the voice the victim testified that the person who was lying on top of her uttered words to the effect that he was removing a bat from her. The accused himself admits having uttered words to that effect because according to him there was a bad disturbing the victim and was told to go and remove it from the victim by Nakato. So if

the person who removed the bat from the victim is the same person as the one who defiled her then the person is the accused. The victim was familiar with his voice as they had been living together.

The other issue that came out during the trial was the issue of the males that were sharing a room with the victim that had opportunity to defile her. These males were the accused himself, Micah who is younger than the victim and one Kisoro who is dumb. The prosecution contended that the person who defiled the victim could talk and therefore Kisoro was ruled out on account of the fact that he is dumb. The prosecution urged court to exclude Micah on account of his tender age. If both Kisoro and Micah are ruled out the accused is left as the only person that could have defiled the victim. This provides additional evidence to the victims evidence of identification of the accused by his voice which is in line with the Supreme Court decision in the case of *Moses Kasana Vs. Uganda Criminal Appeal No. 12 of 1981 where it was held that*

“Where the conditions favouring correct identification are difficult, there is need to look for other evidence whether direct or circumstantial which goes to support the correctness of identification and to make the trial Court sure that there is no mistaken identification...”

In this instant case this ‘other’ evidence strengthens the girl’s own evidence and more especially when the accused himself admits having gone to her bed to remove a bat.

The prosecution adduced evidence of a Government analyst who examined items of clothing that were found with blood stains. The significant of this evidence was lost when it was found that all the items contained blood from the victim and a trouser which was recovered and identified as that of the accused was not taken for examination. The examination of this trouser would have enhanced the prosecution case but even without it the case remains strong.

In his defence the accused stated that apart from being awakened by Nakato to remove a bat from their room he never went to the victim's bed to defile her. The following day he left early for work and only went back home to pick his spanner. That is when he was arrested and told of the defilement which he denied having done. The accused's story that he had already left for work when the issue of defilement of the girl arose does not seem to be correct. According to Sekataba Gerald Vice Chairman LCI the accused was not dressed up when he was arrested. He was wearing only a pair of shorts without a shirt and according to the victim the accused was arrested immediately it was discovered that the victim was bleeding and by that time the accused was still at home. I will reject the accused's story that everything in the home was fine during the night and the morning following the defilement of the girl because that is not true.

The assessors were unanimous in their opinion which was that the prosecution had established that the victim in this case had been defiled and that it was the accused that did it. I agree with their opinion. I consequently find the accused guilty of the offence of Defilement C/S 129(1) of the Penal Code Act and convict him accordingly.

Eldad Mwangusya

Judge

5.08.04