

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

HCT-00-CR-SC-0076 OF 2007

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

VERSUS

SANDE RICHARD ::::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

JUDGMENT:-

The accused SANDE RICHARD was indicted for defilement contrary to section 129 (1) of the Penal Code Act. Upon the commencement of the Penal Code (Amendment) Act 2007 the accused tried for Aggravated Defilement contrary to section 129 (4) of the Penal Code Act.

The particulars of the indictment were that the accused during the month of January 2005, at Namawojja village Ziobwe sub-county in Luweero District, did unlawfully and carnally know Nakigozi Justine, a girl under the age of 18 years.

When the accused was arraigned, he denied the offence whereupon the prosecution had to align evidence to prove the offence charged. The essential ingredients of the offence of aggravated defilement are:-

- (1) That the victim was a girl below 14 years old.
- (2) That acts of sexual intercourse was performed against the victim.
- (3) That the accused participated in the above sexual intercourse: See Section 129 (4) of the Penal Code Amendment Act, 2007.

In an attempt to prove the above ingredients the prosecution relied on the following evidence:

Merida Kabasa (PW1) who testified that she was the mother of the victim and that the victim was five years old by the time she was

allegedly defiled. She testified that it was the victim who narrated to her that the accused had defiled her. When she was bathing the victim told her that she was feeling pain in her private parts. She noted that the victim was not walking properly. She took the victim for medical examination where it was confirmed that she had been defiled.

Edward Nsobya (PW2) on the other hand testified that he was the father of the victim. He told court that that on 7/1/2005 at 1800 hours he was playing omweso within his home area when the victim approached him and told him that the accused had befriended her, "meaning that the accused had had sexual intercourse with her". He felt ashamed and referred the victim to her mother. The victim told her mother the same story that Sande had befriended her. He noticed that the victim was not waling normally. He called his elderly neighbour Namalwa Hanifa who checked the victim and found that she had been defiled but it was not grave. Later he took the victim to Kalagala Dispensary where it was confirmed that she had been sexually abused. Later he came back home to inform the accused of who was his tenant

about the incident but found that the accused had gone into hiding. The accused disappeared leaving only his wife at home but was subsequently arrested by the police.

Justine Nakigozi 9 years (PW3), told court that the accused took her to his house and did bad thing on her private parts after removing her knickers. After that the accused gave her passion fruits. She reported the incident to her parents. After the incident the accused disappeared from his home but used to return at night.

Kiwanuka Bhurhan (PW4) told court that he was the arresting officer. He testified that he went with other police officers to arrest the accused but could not get him since he had gone into hiding. It took them three days before they could arrest the accused. They arrested the accused between midnight and 10.00a.m because the accused was avoiding arrest.

Lastly the prosecution adduced the medical evidence under a memorandum of agreed facts. The medical examination report

had been prepared by Dr. Kasoga Sarah of Kalagala Health Centre. The report was made on 9/1/2005 in respect of Justine Nakigozi who was about 5 years old. The victim had signs of penetration. Her hymen was ruptured 4 days ago. There were injuries and inflammations around her private parts and those injuries were consistent with force sexually used.

The accused on his part relied on the defence of total denial and alibi. He made unsworn defence and told court that during the alleged incident he was not at home. He used to spend all his time in his farm and had nothing to do with the alleged defilement. He concluded that he had just been framed.

As far as the age of the victim is concerned, the prosecution relied on the medical evidence, which estimated the age of the victim at 5 years. It is trite law that medical evidence alone is sufficient to establish the age of a person unless it has been discredited: See ***Omuroni Francis Vs Uganda: Court of Appeal Criminal Appeal No. 2 of 2000*** (Unreported).

In the instant case, the medical report was admitted under memorandum of agreed facts during the preliminary hearing under Section 66 of the Trial on Indictment Act. The learned counsel for the accused challenged the above evidence contending that it was not proper for the same to be admitted without calling the doctor who examined the victim. With due respect to counsel, it is trite law that any fact or document admitted or agreed in a memorandum filed during the preliminary hearing is deemed to have been duly proved.

Section 66 of the Trial on Indictment Act is very clear on that point and it states as follows:-

“Any fact or document admitted or agreed in a memorandum filed under this section shall be deemed to have been duly proved”.

Provided that if, during the course of the trial, the court may is of the opinion that the interest of justice is deemed, the court may

direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.

The above section was duly interpreted by the court of Appeal in the case of ***Kamanzi Fred Vs Uganda Criminal Appeal No. 18 of 1997.*** In that case the style of recording the admitted evidence was rather irregular and unsatisfactory but it was signed by the accused and his counsel signed it. The court held inter alia that the proper procedure should have been to record all the evidence that was sought to be admitted as narrated by the state counsel from his records. After recording, it should be read to the accused who should then sign it together with his counsel and state counsel. The court held that the rationale behind the above procedure was to enable the accused to know what sort of evidence was being admitted without calling the witness who was the source of that evidence. in the instant case, the court went through a proper ceremony of recording the admitted evidence. Therefore, the accused and his counsel were deemed to have agreed to what was stated in that report and there was no view of calling the doctor who had prepared the report.

Apart from the medical evidence, there was also the evidence of Merida Kabasa (PW1) who was the victim's mother who told court that her daughter was 5 years old in 2005. The victim gave her evidence after voire dire. She appeared visibly young, fact, which might have convinced the defence to conclude that ingredient. For the above reasons I do conclude that the prosecution has proved this ingredient beyond reasonable doubt.

As to whether the victim had experienced sexual intercourse, the act of sexual intercourse is defined under Section 129 (7) of the Penal Code (Amendment) Act, 2007 to mean:

- (a) *penetration of vagina, mouth or anus, however slight, of any person by sexual organ;*
- (b) *the unlawful use of any object or organ by a person or another person's sexual organ;*
sexual organ means a vagina or a penis".

It is trite law as was held by the Supreme Court in the case of ***Private Wepukhulu Nyunguli Vs Uganda Criminal Appeal***

No. 21 of 2001 (unreported) that whether or not sexual intercourse took place in a particular case is a matter of fact to be established by evidence. Normally in sexual offences, the victim's evidence is the best evidence on the issue of penetration and even identification but other cogent evidence may also suffice to prove acts of sexual intercourse: See ***Patrick Akol Vs Uganda, Supreme Court, Criminal Appeal No. 23 of 1992*** (unreported).

In the instant case the evidence relied upon by the prosecution to prove that there was penetration was contained in the evidence of the victim Nakigozi Justine (Pw3), her mother Merida Kabasa (PW1), her father Nsobya (PW2) and the medical report.

Nakigozi Justine (PW3) who was the victim in this case told court that the accused took her to his house and did bad things in her private parts after removing her knickers. After that the accused gave her passion fruits. After that she reported the incident to her parents. Merida Kabasa (PW1) testified that the victim reported to her that the accused had defiled her. The victim told

her that she was feeling pain in her private parts and she noted that the victim was not walking normally. She took the victim to an experienced old woman to examine her and later took her for clinical examination. Nsobya Edward (PW2) also confirmed that the victim reported to him that she had experienced sexual intercourse and that before taking the victim for medical examination, they took her to one Mrs. Malwa who examined her private parts and established that she had been penetrated but not gravely. Medical evidence which was admitted under a memorandum of agreed facts showed that there were signs of penetration. The victim's hymen had ruptured 4 days ago. The victim had injuries and inflammations around her private parts, which were consistent with force sexually used.

After considering the above evidence together as a whole, I have no doubt that the prosecution has proved beyond reasonable doubt that there was penetration of the victim's vagina by another person's sexual organ.

As for the participation of the accused person in this offence the prosecution again live the evidence of the victim together with those of her parents. The victim, Nakigozi Justine (PW3) told court that the accused did bad manners on her private parts after removing knickers. After the incident, the accused gave her passion fruits. She told court that she reported the incident to her father Nsobya Edward (PW2) and her mother Merida Kabasa (PW1) who later took up the matter with the authorities whereupon the accused was arrested by a police officer Kiwanuka Bhurhan (PW4) after trying his best to evade the arrest.

The accused made unsworn defence where he relied on defence of total denial and alibi. He told court that during the time the incident was alleged to have occurred he was away from his home and that he used to spend most of his time in his farm. He contended that he never avoided any arrest and concluded that he had just been framed up. Having relied on the above defence, the prosecution was enjoined to place the accused at the scene of the crime in the manner which was scintly restated by the

Supreme Court in ***Bateganda Peter Vs Uganda, Criminal Appeal No. 10 of 2006.***

“What amounts to putting the accused at the scene of crime? We think the expression must mean proof of the required standard that the accused was at the scene of the crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon evaluation of the evidence as a whole. Where the prosecution adduced evidence showing that the accused was at the scene of crime, and the accused not only denies it, but also adduces evidence showing that the accused was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance for the other version is unsustainable.”

In this case the prosecution relied on the victim's evidence that it was the accused person who defiled the victim after which he gave her passion fruits. Merida Kabasa (PW1) and Nsobya Edward (PW2) who were the victim's parents told court that the victim told them that the accused had had sexual intercourse with her from his house. It is trite law as was held in the case of ***Omuroni Francis Vs Uganda, Court of Appeal Criminal Appeal No. 2 of 2000*** that information by complainant soon after being sexually assaulted as to the identity of her assailant to a third person is relevant and admissible. In this case the victim was emphatic that she knew the accused and that it was not her first time to go to the home of the accused. According to Merida and Kabasa (PW1) and Edward Nsobya (PW2), the accused was their tenant. At the time of the incident the parents of the victim were not at home. The accused took that advantage ravished the young girl. Considering the above pieces of evidence, I cannot believe the defence of the accused that he was away. He was well known to the victim and the offence took place during daylight after which the accused started dodging public

appearance during daytime. That could explain why he was spending most of his time in his farm. That was because he was apprehensive about what was going to happen to him over what he had done to the victim. Kiwanuka Bhurhan confirmed that it took them about three days before they could arrest the accused. That was not the conduct of an innocent person. See:
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Considering the above evidences as a whole I find that the evidence clearly placed the accused at the scene. Therefore the alibi and total denial set up by the accused could not be true. Even the allegation that he was framed could not hold any water. He never even pointed out who had framed him and for what reasons. For the above reasons I do agree with both assessors that the prosecution has proved all the ingredients of this offence and accordingly found the accused guilty as charged and he is convicted accordingly.

RUBBY AWERI OPIO

JUDGE

9/12/2007.

10/12/2007:-

Accused present.

Kote for the state.

Nabukenya for the accused on state brief.

Judgment read in open court.