

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE**

CRIMINAL CASE NO. HCT-04-CR-SC-0017 OF 2009

UGANDA ::: PROSECUTOR.

VERSUS

BONYO ABDU ::: ACCUSED

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGMENT

The accused Bonyo Abdu stands indicted for the offence of Aggravated Defilement contrary to Section 129 (3) and (4) (a) and (b) of the Penal Code amendment Act 2007. It is alleged that on the 30th November 2008, the accused performed an unlawful sexual act with Nakiryia Jesca, a girl aged 14 years. The law stipulates that a person convicted of this offence shall be liable to suffer death.

Prosecution's evidence can be summarised as follows: PW1(Nakiryia Jesca) the alleged victim testified that she was 14 years at the time the accused had sexual intercourse with her. That on the 30th November 2008, she was taken to Banuli's house and the accused inserted his penis in her vagina. PW1 stated that she felt a lot of pain in her lower abdomen. Further, that when the accused heard her brother Byenaku searching for her, he withdrew his penis and ran away. PW1 stated that she was taken to hospital for Medical examination and that she had had sexual intercourse with the accused, over six times.

PW2 (Naita David), Detective Sergeant O/C CID Kasasira Police Post, who arrested the accused, testified that he extracted a statement from the accused where the accused stated that the alleged victim is his girl friend and that he had sexual intercourse with her several times. PW2 stated that the accused was taken to Pallisa Hospital for Medical examination to find out his HIV status. He testified that he arrested the accused on 2nd December 2008.

PW3 (Nasine Moses) stated that on the 30th November 2008 at about 9:00 p.m. he was called by Gutumula who informed him that Nkomba Michael had caught Nakiryia Jesca with a boy. That he moved to the scene of crime only to find that the accused had ran away. PW3 testified that he called Police.

PW4 (Nkomba Michael) testified that he found Nakiryia Jesca (PW1) having sexual intercourse with the accused in the house of Zubairi and that the accused escaped from him. That upon interrogation of Nakiryia Jesca (PW1), she stated that she was having sexual intercourse with Bonyo. PW4 also testified that he saw Bonyo come out of the house and run. That he was able to see Bonyo in the moon light.

PW5 (Detective ASP Migido Bruhan) testified that in December 2008, while he was working at Pallisa Police Station as a District CID Officer, as such, he took a Charge and Caution Statement for Abdu Bonyo and charged him with Aggravated Defilement C/S 129 (3) and (4) of the Penal Code Act. However, the Defence challenged the Charge and Caution Statement and the Court conducted a Trial within a Trial but in exam-in-chief of the Trial within a Trial, PW5 stated that the accused told him that he had sexual intercourse with one Esther Nakiryia in the house of one Gabiri. The State Attorney notified Court that the Charge and Caution Statement is in the names of a different suspect: Nakiryia Esther hence prayed to abandon her witness and Court granted the request. Defence Counsel, Mr. Fred Mudhanga did not object.

Doctor Angiro John (PW6) a Medical officer from Pallisa Hospital examined the victim and made a Medical Report made on PF3 and PF3 Appendix admitted as (P Exh. 1). The Report which was dated 1st December 2008 indicated that the victim was 14 years of age at the time of the commission of the offence. PW6 stated that the victim had a ruptured hymen and that this had occurred sometime back. Dr. Angiro also found bruises and inflammations on PW1's vagina, on the thighs, legs, elbow and the back.

PW7 (Kalere Kasifa) testified, inter alia that she carried out the HIV test on the accused. She explained the process of testing and methods she used. She found out that the accused is HIV positive.

PW8 was the Investigating Officer (Detective Sergeant Okiria James) and handed on HIV Aids Results Card to the Police officer who had brought the accused to the Hospital. He was attached to Pallisa Police Station in November 2008 and had been assigned papers concerning Abdu Bonyo on 8th December 2008. He filled Part I, PF 24 on 9th December 2008 but saw Part B “*Examination by Medical Officer*” admitted into evidence as (P. Exh. 2). He stated that he had put his Police number on the Form but the Form bore the signature of Migido Bruhan (Detective ASP, District CID Officer) who was at the rank of AIP, only such Officers to sign). PW8 was not such an Officer at the time. PW8 saw the PF 24 with the positive results for HIV Aids annotated by Dr. Angiro on 9th December 2008. He also inscribed the file CRB 1364/08 tendered by the Prosecutor as a true photocopy of the original copy of Ministry of Health HIV Test Results Card. PW8 stated that he saw the original Ministry of Health Form and that the original belongs to the accused. He identified the photocopy of the original (P. Exh. 3). PW8 made a copy of the Medical Form on which Kalere indicated the results and gave the original to Bonyo. He attached the copy to Bonyo’s file.

DW1 (Abdu Bonyo), the accused, gave an unsworn statement in which he stated that there is a grudge between him and Nasine Moses originating from land, which his uncle called Scania had bought. The accused also stated that he had gone to rescue his uncle from the problem he was facing DW1 (Bonyo Abdu) stated that he did by using his witchcraft. Furthermore, that he never saw the HIV Aids test Results because the Police officer who took him kept the original card and told him that it was “*Government Secret* “. DW1 Also stated that he was never counselled in any way about his sero status so he did not know that he has HIV Aids. The accused (DW1) called two witnesses in support, namely DW2 and DW3.

DW2 (Zaituni Kadondi), a woman counsellor, stated that she was informed by the CID officer in charge of Pallisa Police Station that there was a grudge between the accused and other people and that she was advised to find a bribe to pay for Bonyo’s release.

DW3 (Sowali Gonsia), the LCI Saala Zone testified that Abdu Bonyo was arrested from Saala Trading Centre on 2nd December 2008 and that Bonyo Abdu would always inform him of his movements because being a witch doctor their movements are supposed to be monitored as per instructions issued by Government. The burden of proving the guilt of the accused lies upon the

Prosecution throughout the trial. It never shifts to the Defence. (*See: Oketcho Richard vs. Uganda, SCCA No. 26 of 1995 (un reported)*). If Court is to convict an accused, it must base such conviction on the strength of the Prosecution case and not on the weakness of the Defence case.

In the case of Aggravated Defilement contrary to Section 129 (3) and (4) (a) and (b), Prosecution is required to prove that: -

- (i) The complainant was below the age of 18 years.
- (ii) That the accused is the person who performed the sexual act.
- (iii) That the offender is a person infected with the Human Immune deficiency Virus (HIV).

First to prove the age of the victim, Prosecution relied on the evidence of Nakiryia Jesca who testified that she was born in 1994. This was corroborated by PW 6 (Dr. Angiro John), who indicated that the victim was 14 years at the time of the commission of the offence. The Defence did not challenge this evidence. Age can be proved by relying on a Birth Certificate, opinion of experts to, wit, Medical Doctors or by relying on the evidence of people who know when the victim was born or through observation by Court. In the circumstances, Court is of the opinion that Prosecution has proved beyond reasonable doubt that PW1 Nakiryia Jesca aged 14 years at the time the alleged offence was committed was a person who is below the age of eighteen (18) years.

In regard to whether the victim experienced a sexual act what is needed to be proved is the fact that there was penetration, however, slight within the ambit of Section 129 (7) of the Penal Code Act provides that a sexual act occurs where there is a penetration of the vagina, mouth, or anus, however, slight, by a sexual organ or alternatively, a sexual act may occur by the unlawful use of any object or organ by a person or another person's sexual organ. "sexual organ" is defined to mean a vagina or penis. In *Uganda vs. Rurahukayo John, Criminal Case No. 260 of 1979 of the High Court*, it was held that "in a sexual offence, the Court must find corroboration of the complainant's testimony on all ingredients. This corroboration is required as a matter of judicial caution and practice ". It may be adduced from direct and or circumstantial evidence. A sexual act needs corroboration. It may be proved by the victim's own evidence and/or corroborated by

medical evidence (*Hassan Bassita vs. Uganda SCCA No. 035 of 1995*), (un reported). In this case, the victim, PW1 (Jesca Nakiryra) testified that she experienced a sexual act on 30th November 2008 and that when DW1 had sexual intercourse with her, she felt a lot of pain her abdomen, This is corroborated by PW4 (Nkomba Michael) who attested that PW1 had confessed to him that she experienced sexual intercourse on 30th November 2008. PW4 also testified that he found the accused having sexual intercourse with Nakiryra Jesca but he ran off. Further, corroboration is found in the evidence of PW6 (Dr. John Angiro). Dr. Angiro, the MD Pallisa Hospital carried out examination of the victim (PW1) 1st December 2008 and recorded his findings. He found that the hymen had been ruptured sometime back and that there were inflammations around PW1's vagina with bruises on the thighs, legs, elbow and back.

The Defence Counsel, Mr. Fred Mudhanga submitted that the element of sexual act had not been proved by Prosecution because the evidence of the victim PW1 (Nakiryra) was so inconsistent as to be relied upon. I do not share the same view with that of the Defence considering the evidence before this Court. Based on the Prosecution evidence PW1 testified that on 30th November 2008 she was taken to Banuli's house where the accused inserted his penis in her vagina and she felt a lot of pain in her lower abdomen. PW1 also stated that she had had sexual intercourse with the accused for over six times. PW2 stated that DW1 had stated in his statement that the victim, Jesca Nakiryra was his girl friend and had sexual intercourse with her several times. PW4 testified that he found PW1 having sexual intercourse with the accused in Zubairi's house but Bonyo ran out and he was able to see him using the moonlight.

Dr. Angiro John (PW6), the Medical Officer from Pallisa hospital who had examined the victim on 1st December 2008 made a Report on the same day on PF 3 and PF 3 Appendix (P. Exh. 1). He found that Jesca Nakiryra had a ruptured hymen which occurred sometime back. He found bruises and inflammations on PW1's vagina, on thighs, legs, elbows and the back.

It is trite law that the evidence of the victim is the best evidence. (*See: Badru Mwindu vs. Uganda Court of Appeal No. 001 of 1997*). I observed PW1 and found her to be candid, straight forward and truthful. Although the Defence has issues with the number of times, the victim is said to have had sexual intercourse with the accused only one of those occasions or times is relevant.

Furthermore, medical evidence is good independent evidence to corroborate a complainant's evidence as proof of penetration. (*See: Uganda vs. Aijo Cipiryano, Lira Criminal Session Case No. 007 of 1996*) (un reported). The distressed condition of the victim is also valuable. (*See: Sam Buteera vs. Uganda Sc. Criminal Appeal No. 021 of 1994*). PW1 told PW4 about what happened to her and the pain she was feeling. Undoubtedly, this proves the sexual act and for the foregoing reasons, Prosecution has proved beyond reasonable doubt that Jesca Nakiryra experienced a sexual act.

Concerning the question whether it is the accused person who performed the sexual act, the accused raised the defence of alibi. DW1 stated that he was in Saala Trading Centre. It is not the duty of the Defence to prove his alibi. The burden lies on the Prosecution. (*See: Alfred Bumbo and others vs. Uganda SCCA 28 of 1994*) (un reported). However, once a person has been positively identified at the scene of crime the alibi crumbles. Prosecution has a duty to place the accused at the scene. (*See: Uganda vs. Dusman Saburu [1981] HCB 1 and Bogere Moses, Katumba Robert vs. Uganda, Supreme Court Criminal Appeal No. 0001 of 1997*) (un reported).

PW1 (Jesca Nakiryra) testified that she saw the accused on 30th November 2008. She stated that at first Bonyo sent Banuli to take her and she refused and later Banuli and Bonyo came to take her. She was taken to a house where the sexual act was performed upon her. PW1 stated that her brother Nkomba Byenaku found her inside Banuli's father's house. She knew Banuli's father called Zubairi. PW1 stated that she had had sexual intercourse in the same house before.

On the other hand, when the Prosecution evidence is considered, a different but convincing story ensues. (PW2) Naita David, the Investigating Officer stated that he received a complaint regarding the defilement of Jesca Nakiryra from Moses Nasine. He investigated and found that the accused had fled to Kirika sub-county after committing the offence. He searched for him and eventually arrested him on 21st December 2008 at Saala Trading Centre as already stated above.

In considering whether the accused indeed participated, regard must be had to issues surrounding the identification of the accused at the scene of crime. (*See: Abdulla Nabulere and others vs.*

Uganda [1979] HCB 77). There are certain factors that have to be considered in deciding whether the accused has been positively identified at the scene of crime. There are:

- (i) Period for which the victim has previously known the accused.
- (ii) Source of light for identification.
- (iii) Period for which the accused was under identification by the Victim.
- (iv) Distance between the victim and the accused.

It was PW1 (Nakirya Jesca)'s testimony that she had sexual intercourse with the accused person six times prior to 30th November 2008. PW4 (Nkomba Michael) testified that he saw Bonyo Abdu come out of the house and run. He also stated that when he demanded to know who was in the house with PW1, PW1 replied that she was having sexual intercourse with Abdu Bonyo.

Additionally, PW1 testified that Abdu Bonyo got his penis and inserted it into her vagina which is refuted by the defence. DW1 (Abdu Bonyo) stated that there was a grudge between his uncle and another man called Nasine Moses which originated from some land his uncle had bought from Nasine Moses and that his arrest from Saala Trading Centre was connected to this grudge.

I will now address the issue of the grudge between the accused and some relatives of Nakirya Jesca. The mere fact that there exists a grudge between the accused and some third party is not a licence for one to commit crimes. PW1 (Nakirya Jesca), refuted any existence of a grudge, so did PW3. This Court observed that PW1 was candid and truthful in her testimony. PW1 (Nakirya Jesca) testified that Abdu Bonyo was a visitor to the area and had come from Kirika to their area in September 2008. She was his girl friend and that they had been boy friend/girl friend for a month.

On the material day, she was taken to a neighbour's house (Zubairi) near her mother's house thus Nakirya Jesca was not in a strange environment.

Although it was night, she could still recognise the person who defiled her. PW1 stated that sexual intercourse with Abdu Bonyo started at 9:30 - 10:00 p.m. and that she had previously had sexual intercourse with him several times. A span of thirty (30) minutes is ample time to

recognise a person who is lying on top of you. Moreover, the perpetrator was previously known to her.

PW1 recounted a similar story to PW2 (Naita David), the Investigating Officer. This Court wonders how she could fail to recognise her lover. She had all the time to recognise him and get to know him. The Defence had challenged PW1 arguing that she had told lies in her Police Statement (See: Exh. D D1) where she stated that she only had sexual intercourse twice. This Court is of the view that it is not the number of sexual intercourse but the performance of the sexual act upon a person below eighteen (18) years. The fact that they were lovers is not a defence in this particular case.

This Court is of the view that this is a minor discrepancy that does not go to the core elements of the offence. The fact that PW1 who was 14 years at the time of the commission of the offence had sexual intercourse with the accused before will suffice. In any event, she can be untruthful in some part and truthful in others (*See: Uganda vs. George W. Yiga [1977] HCB 217*), but overall the Court has found her to have been truthful and straight forward.

This Court does not share the view that PW1's testimony would amount a falsity. Rather it holds the opinion that PW1's testimony, as corroborated by that of PW2 and PW4, underpins the accused as the perpetrator of the alleged defilement. The Prosecution has, therefore, proved beyond reasonable doubt that Abdu Bonyo participated in the defilement of Nakiryia Jesca. With regard to the last ingredient that Abdu Bonyo performed a sexual act with Nakiryia Jesca knowing that he was HIV positive, there is evidence on record concerning this. DW1 (Abdu Bonyo) testified that he was taken for a Medical Examination in December 2008. This corroborates PW8 (Detective Sergeant James Okiria) who stated that he took the accused for medical examination on 9th December 2008 and that he was issued an original HIV Aids Results Card out of which he made a photocopy. This copy was admitted as (P. Exh. 3). PW8 stated that he had surrendered the original Card to DW1 (Abdu Bonyo). The very person who tested the accused of HIV Aids, PW7 (Kalere Kasifa) also testified. She is an Enrolled Nurse working with Grade A, Pallisa Hospital and knew everything about the HIV test the accused underwent. She recognised a photocopy of the Aids Results Card as representing the one which she had made after testing Abdu Bonyo. She identified the details she had filled in and her signature. PW7

stated that the original cards are usually given to Officers who accompany the suspects. Mr. Mudhanga the Defence Counsel, in his closing submission reiterated DW1's stand: that another officer called Charles took DW1 to hospital and that DW1 was never given any HIV Aids Results Card.

In reply, the learned State Attorney, Ms. Alpha Ogwang submitted that the HIV Aids Results Card was authentic and clarified that Detective Sergeant Naita David (PW2) only took the suspect from Kasisira Police Post to Pallisa whereas Detective Sergeant James Okiria escorted the accused to Pallisa Hospital for the testing. It was Prosecution's submission that cogent evidence exists regarding the HIV Aids status of the accused. With respect to a photocopy of the original HIV Aids Test Results (P. Exh. 3), she cited Sections 60 and 62 of the Evidence Act to show that "*secondary evidence*" including copies made from originals by mechanical processes which in themselves ensure the accuracy of the copy is admissible. She stated that the reason for not submitting the primary evidence (original card) had been established by PW8, who testified that when the card was handed to him on 1st December 2008, he gave the original to DW1 (the accused). This Court does not believe DW1's contention that the HIV Aids Results are "*Government Secrets*".

Consequently, this Court does not find DW1's explanation to be true and his claims that it was another Policeman called Charles who took him for testing is tainted with lies in light of the evidence of the Investigating Officer who testified before this Court. Additionally, DW1 did not come out as a truthful witness when he said that because he does not work for TASO and so he does not know his HIV Aids status.

The documentary evidence on DW1's HIV Aids status before Court is more cogent than the oral statement of DW1 denying it and stating that another Officer took him. The Police Officer who testified in respect of the matter was truthful and answered questions in a direct manner. He is more believable than DW1. Kasifa Kalere's evidence was plausible and exuded the professionalism expected of Medical Officers of her caliber. I also found her to be truthful. She did not controvert herself on material issues in cross-examination. In the circumstances, Prosecution has proved beyond reasonable doubt that Abdu Bonyo was HIV positive when he had sexual intercourse with Nakirya Jesca.

The Assessors' opinion was that the ingredients of the offence of aggravated defilement had been proved beyond reasonable doubt by Prosecution and advised me to convict. Since my findings and those of the two Assessors are in tandem, I find that the Prosecution has proved all the essential elements of aggravated defilement beyond reasonable doubt.

DISPOSITION:

For the foregoing reasons, I find you, **Abdu Bonyo, guilty** of the offence of Aggravated Defilement C/S Section 129 (3) and (4) (a) and (b) of the Penal Code Amendment Act 2007 and I accordingly convict you.

Judgement read in open Court.

SENTENCING:

The offence of Aggravated Defilement is a very serious one. The offence is rampant. It is aggravated by reason of the convict having HIV Aids. The fact that the victim did not contract HIV Aids should not be considered as a mitigating factor but should be viewed with seriousness. I have considered the mitigating factors. The convict is a first offender; he has spent ten (10) months in custody. He is fairly young. He should be accorded a chance to live as a useful citizen one day. He has prayed for leniency. For these reasons, I will not impose the maximum death sentence.

I have also taken into account the aggravating factors more particularly the fact that the convict had HIV Aids when the offence was committed, the age of the victim and what lies ahead of her. I have also considered the gravity of the offence and the need to commensurate the sentence with the gravity of the offence. I hereby sentence you to Life Imprisonment.

Right of appeal within fourteen (14) days from the date of conviction and sentence explained.

HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGE

23 OCTOBER, 2009

Present:

Ms. Alpha Ogwang for the State.

Mr. Fred Mudhanga on State brief for the accused.

Accused in the Dock.

One (1) Assessor: Mr. Peter Busuuli present, Ms. Manina sick.

Court Clerk: Akello Lillian.

Interpreter: Vicky Kyabire.