

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL SESSION CASE NO.83/2003

UGANDA:.....PROSECUTION

VERSUS

SSALI ROBERT:.....ACCUSED

BEFORE: THE HON JUSTICE V.F. MUSOKE-KIBUUKA

The accused in this case is called Ssali Robert. He is a young man aged just over 20 years. He was indicted for defilement contrary to section 123(1) of the Penal Code Act. The particulars of the offence stated that on 5th April, 2002 at Kibanda village in Masaka District, Ssali Robert had unlawful sexual intercourse with Nuriat Nalubega a girl under 18 years.

By law, the prosecution bears the burden of proving the case against an accused person beyond any reasonable doubt before a conviction is recorded against the indictment by the Court *Ssekitoleko vs Uganda [1967] E.A. 531.*

The prosecution led evidence from six witnesses. The defence consisted of evidence given upon oath by the accused.

In summary, the prosecution's case was that the complainant Nuriat Nabibuga during the year 2002, resided at Butenzi village in Buwunga Sub-County in Masaka District with her parents, one Kalifam Ssekimpi her father and PW4, Fatuma Nassali, her step mother. She was in primary 4 at Kyabbumba Primary School.

On 5th 2002, Kyabbumba Primary School had a Music festival which ended at about 6.00 p.m. as the complainant and a friend called Betty Njjuko walked home, the accused, who resided in the neighbouring village of Bulenge, came along riding his bicycle on which he carried one Stephen Kasekende. The accused knocked the complainant down with the bicycle. He then pulled her by the hand along the village path and had sexual intercourse with her. After satisfying himself, the accused invited Stephen Kasekende to take his turn. He did.

The complainant arrived home unusually late at about 8.00 p.m. and her stepmother, PW4, was suspicious. On 7th April, the complainant told her father that the accused and Kasekende had trapped her on her way from school and only had sexual intercourse with her and that was the reason she had arrived home late.

PW5, Ponsiano Luwamba, Secretary for defence, LC1 of Butezi in conjunction with the General Secretary for Bulenge arrested both the accused and Kasekende. The two were taken before the complainants and her father. The accused admitted before PW4 and PW5, to the defiled the complainant. The accused claimed to have told the father of the complainant “*Muzeyi Tusonyiwe! Omusango Twaguzza tuwe ekibonerezo ekirala byonna tujja kukikola naye totusiba*”

The accused was handled over by PW5 to PW6 No. 23774, PC Buyingo at Masaka Police Station. PC Buyingo re-arrested and placed the accused in Police Custody.

PW1, Doctor Mulokola of Masaka hospital examined the complainant against Form 3, on 10th April 2002. He found her aged 14 years. Her hymen had ruptured about 6 days previously. The doctor also found lacerations on the complainant’s introitus and vaginal walls. The injuries were consistent with force having sexually been used against the complainant. The doctor also found that the complainant had externally sexual transmitted disease as a result of the sexual attack upon her (Exh P1).

In his evidence in defence, the accused, who was subjected toexamination, by PW2 Doctor Lukwago of Masaka Hospital against Police Form 24 and found normal physically and of manual mental status (Exh P2) denied the charge of defilement. He put up an alibi the effect that on 5th day of April, 2002, he was at Nyendo within Masaka Municipality and not at the scene of crime as the complainant alleged.

The offence of defilement, as located by section 123 (1) of the Penal Code, has three essential ingredients:

- (a) age of the complainant at the time of the commission of alleged offence
- (b) act of unlawful sexual intercourse involving the complainant; and
- (c) participation of the accused

the prosecution must prove, with evidence each of the three essential ingredients of the offence of defilement beyond any reasonable doubt in order to secure a conviction upon the indictment.

In the instant case, however, the defence has conceded that the prosecution has proved two of the three essential ingredients of the offence of defilement beyond any reasonable doubt in order to serve a conviction upon the indictment.

In the instant case, however, the defence has conceded that the prosecution has proved two of the three essential ingredients of the offence of defilement beyond any reasonable doubt. The age of the complainant at the time the alleged offence is said to have been committed is not in contest. Similarly, the defence does not contest the allegation that the complainant was on 5th April, 2002, involved into an act of sexual intercourse.

In circumstances, such as these ones in which the defence concedes to some of the issues as proved by the prosecution, the duty of the Court to make specific findings on each one of them is not negated by the fact that they have been conceded. I will, therefore, proceed and state this Court's finding upon each one of the two essential ingredients of this offence that the defence has concede to. On age, the complainant stated that she was 14 years old though she could not recall the date of birth. Doctor Murokora who examined her on 10th April, 2002 found her about 14 years old. The complainant's appearance in Court and the fact that she gave her testimony not upon oath clearly shows that she was a child of tender years. This Court is, therefore, satisfied that on 5th April, 2002, the complainant in this case was aged below 18 years.

Regarding the alleged act of unlawfully sexual intercourse, the complainant, was the only eye witness, she gave very elaborate and consistent evidence doubt how the accused first had sexual intercourse with her and when he had finished, invited Stephen Kasekende to take his turn. Her testimony, which must be corroborated as a matter of law by virtue of section 40 (3) of the TID (formerly 38 (3), has as been duly corroborated by the medical evidence of Doctor Musoke, PW1 and exhibit P1 the medical report written by Doctor Murokora.

This Court is also duly satisfied therefore, that the prosecution has proved beyond any reasonable doubt.

The third essential ingredient of the offence of defilement relates to the participation of the accused person in the execution of the unlawful act of sexual intercourse. The prosecution has produced the evidence of the complainant as PW3, that of PW4, her stepmother and that of PW5, the defence secretary of Butenzi village.

The complainant clearly has a slight disability in her intellectual disposition. Her stepmother, PW4, confirmed this. She however appeared to me, in spite of her mentioned disability, to be an honest person. She was not consistent in some respects in her testimony such as whether Betty Najjuko was present throughout her ordeal or whether Najjuko abandoned her immediately she was captured by her attackers on whether the unlawful act of sexual intercourse took place in the middle of the village path or in the bush near that path. In both respects this Court can hardly fault the complaint. In those circumstances, in which she found herself at the time, matters of fine details would not be of significant concern. In any case I am satisfied that those inconsistencies were very minor and were not intended to deliberately deceive the Court. See *Uganda vs. George Kiggundu (1978) HCB 281*. I therefore believe the complainant's evidence as being truthful.

The complainant was very consistent upon the identity of the persons who had sexual intercourse with her. Her consistency runs through the entire story she told from the time she first revealed the identity of the accused and Stephen Kasekende the father on 7th April 2002 up to the time of testifying in Court. She knew the accused very well. She knew one Mbuga of Bulenge village with whom the accused lived at one time. The time of the alleged attack was about 6.00 p.m. which by the law of Uganda is daytime. The people had sexual intercourse with the complainant in turns which means that they took quite a while to accomplish their uncanny mission and the complainant had ample time to understand who they were. The evidence of the complainant must be corroborated in respect of the identity of the by virtue of section 40 (3) of the TID as well. I find corroboration to it in the evidence of both PW4 her stepmother and that of PW5, the defence Secretary, Butenzi village. Both witnesses were present on 7th April 2002 when the accused admitted to the father of the complainant that instead he and Stephen Kasekende had sexual intercourse with the complainant and asked for forgiveness from the complainant's father who refused to give in.

Learned Counsel for the defence, Mr. Kamugundu, has questioned the failure by the prosecution to produce Betty Najjuko to testify in Court since she was an eyewitness to the event constituting this offence.

It is true that the highest Courts in this Country have involved a principle to the effect that although it is not required for the DPP to assemble a superfluity of witnesses, but if the DPP sells evidence which is inadequate and it appears to Court that there as other evidence available which he has not called, the Court is entitled to draw the inference that evidence, if called would have tended to be adverse to the prosecution's case see **Bukenya vs. Uganda [1972] E.A 549 also Kagund Fred vs. Uganda, SCCA No. 14 of 1998.**

In the instant case, however, I find that evidence called by the DPP to establish the identity of the accused is quite adequate. The omission to call Betty Najjuko, in my humble view would not call for a justifiable conclusion that her evidence would have been adverse to the prosecution's case.

The accused put up an alibi as part of his defence. It is the position of the law that were on accused person puts up the defence of an alibi, the burden of disproving the alibi, by evidence placing the accused person at the scene of crime, lies upon the prosecution **Ssebyala and others vs. Uganda [1969] E.A. 204 and Col. Sabuni vs Uganda 1982 HCB1.**

In the instant case, I am satisfied that the evidence of PW3, which I have assessed as very consistent and truthful as far as it relates to the identity of the accused places at the scene of crime. The accused's alibi that on 5th April, 2007 he was not at the scene of crime but at Nyendo, is therefore false. It has no truth in it. It is intended to mislead this Court.

The two gentlemen assessors in this case, Mr. Muwulya Haruna and Mr. Kiggundu Henry gave me a unanimous opinion. Each one of them was of the view that prosecution has proved the case against the accused be convicted as charged. I do agree with each one of them.

I accordingly, convict Ssali Robert of the offence of defilement contrary to section 123 (1) of the Penal Code Act.

V.F. MUSOKE-KIBUUKA

JUDGE

22/12/2003

Accused in Court

Court is constituted as before

Court: Judgment is read and signed.

Ms. Nandawula: the accused is a first offender. He has been convicted of a serious offence. He took advantage of a young girl aged only 14 years. His conduct is dangerous to society. Being a young man he needs to be punished seriously to teach other young men to behave better.

Mr. Kamugunda: the accused is a first offender a young man. A long time imprisonment may not serve to improve his conduct. If given a chance he can reform and be useful to society. He has been on remand for one year and some months. I pray for a lenient punishment I so pray.

V.F. MUSOKE-KIBUUKA

JUDGE

22/12/2003

Accused: I pray Court to be lenient. I am an orphan both my parents are dead. I have two siblings I am bringing up. I can't help them when I am in prison.

Court: Sentence and Reasons

The accused is a first offender. He has been convicted of a serious offence of defilement of a young girl who ended up contracting a venereal disease in the process.

I take into account the accused's own age which is about 20. The fact of being a first offender and the fact that he has been on remand for about one year and some 8 months.

In the circumstances, I sentence him to 5 years and 4 months imprisonment.

V.F. MUSOKE-KIBUUKA

JUDGE

22/12/2003

Court: Right of Appeal to Court of Appeal explained

V.F. MUSOKE-KIBUUKA

JUDGE

22/12/2003