

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

CRIMINAL SESSION CASE NO. 087 OF 2011

5

UGANDA.....PROSECUTOR

VERSUS

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NGOBI MOHAMMED alias KARADIO.....ACCUSED

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

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JUDGMENT

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The Accused was indicted of the offence of Aggravated Defilement contrary to section 129 (3) and (4) (b) of the Penal Code Act.

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It is alleged that on 9/7/2010 the Accused performed a sexual act with Zania Kantono - a girl aged 14 years, while he the accused was infected with HIV.

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The Accused denied the charges hence requiring the prosecution to prove all the ingredients of the offence beyond reasonable doubt.

The burden of proof is on the prosecution and does not shift. The accused does not have any duty to prove his innocence **(See: Woolmington Vrs. DPP).**

The ingredients are:

- The victim was below 18 years of age.

- There was a sexual act on the victim.
- The accused committed the offence.
- He was HIV positive.

5 On Ingredient No.1, the evidence of PW2, the father of the victim shows that the girl was born in 1996 and was therefore 14 years of age at the time of the offence.

10 This is corroborated by PW1 herself and the Medical Report - PF.3.

Ingredient No.2 - A sexual act on the victim:

15 In this, PW1 testified that she was grabbed by the Accused, who carried her to a garden and forcefully had sexual intercourse with her.

20 PW2 and PW3 testified that the victim disappeared from home at around 11.00pm. PW3 reported to PW2, the father. They went searching for the victim.

PW5 Kauda Hadija, the Stepmother testified that the victim reported to her at home are around midnight. She was crying and disheveled. She was smelling of cigarette smoke and had a cigarette burn on her cheek.

25 The medical evidence given by Dr. Joseph Katende in PF.3 which was admitted as PEx.1 under Section 66 T.I.A revealed that the victim had a healed ruptured hymen.

30 However, she had injuries on the thighs, a cigarette burn on the cheek all consistent with forceful sexual intercourse.

This ingredient has been proved and was also conceded by both counsel.

The evidence of Dr. Katende and Medical Form PExh.2 (PF24) and the results of the ART Clinic prove ingredient No.4, that the Accused was HIV positive at the time the offence was committed.

Ingredient 3 i.e. Participation of the accused is hotly contested by both the prosecution and the defence.

PW1 Zania Kantono narrated in her evidence that she was reading her books and decided to go to bed at around 11.00pm. She entered the room which she shares with her uncle and other children.

Before she could go to bed someone knocked on the door and when she opened it she saw the Accused. He asked her what she was doing outside. She told him she had been reading her books. He asked her to bring the books and as she tried to hand over the books, he grabbed her head, held her mouth and carried her to a garden some distance away where he tore her knickers and forcefully had sexual intercourse with her. A motorcycle passed by and he abandoned her and ran away. She ran back home where she found her stepmother and reported to her what had happened.

It is to be noted here that she was the only identifying witness whose evidence must be handled with the greatest caution. In the case of **Frank Ndahebwe Vrs. Uganda-SC Criminal Appeal 2/93**, it was observed as follows: **“In a case resting entirely on identification, the Court has a duty to satisfy itself that in the circumstances of the case, it is safe to act on such evidence which must be free from mistake or error on the part of the identifying witness. The evidence of such witness must be tested as to its**

truthfulness and any possibility of a mistake or error excluded where conditions for correct identification are favourable, such task will be easier. But where the conditions are difficult, it would be unsafe to convict in the absence of some evidence, connecting the Accused to the offence.”

In the instant case, the victim PW1 says she was able to see the Accused by the use of a security light in the compound given that the **assailant** also took time carrying the victim and then defiling her, there was enough time, closeness and interaction to enable the victim to observe and hence identify the **‘assailant’**.

The Accused raised the defence of alibi, that he was at his place of work until morning when he went to his residence and was arrested as he was walking back to his work place.

The defence has submitted that the prosecution evidence does not place the Accused at the scene and that the evidence of PW1 is as unlikely as it is unbelievable. First that the Accused does not smoke and yet the victim came home smelling cigarette smoke and had cigarette burns.

Secondly, the scene of crime as described by PW1 and D/Sgt. Kitutu (PW4) is very far and in a different village where you have to reach by passing a swamp, some houses and a cemetery. That it is unlikely that the events described could have taken place without anybody noticing.

It is also submitted that a stranger could not have knocked on the door, demanded for the victim’s books and the victim tamely entered the house, collected the said books and handed them over without informing her uncle who was in the

room. Further that there were no exhibits found on the Accused or in his house connecting him to the offence and that the Accused's conduct of normally going about his ordinary activities were not consistent with a guilty
5 conscience.

I have considered all the evidence and the alibi raised by the defence.

10 The most important issue here is the credibility of the evidence of PW1 and whether she is truthful.

It is also on record that the father - PW2 beat up the victim when she returned home demanding to know who she had
15 been with.

It is not far-fetched as submitted by the defence that she could have implicated the Accused or 'karadio' as he was commonly known to save herself from further punishment.
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PW1's evidence raises more questions the closer one looks at it apart from those raised by the defence which in my view are valid and raise a lot of doubt as to whether it is the Accused person who defiled the victim-PW1.
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- Considering the distance from the victim's home to the scene of crime, is it possible that no one saw or heard the events?
- Was it possible that the victim through all that distance could not make an alarm?
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- How come the uncle (PW3) with whom the victim stays with and was in the room did not hear the interaction between the victim and the assailant, but was able to

notice her absence, a few minutes later and reported to the father?

- Why did she open for a stranger and was ready to handover her books instead of waking up or reporting to her uncle who was in the room?

In short, is her story credible or truthful?

The Assessors gave an opinion based on identification, that the victim was long enough with the assailant and that using the security light, she was able to identify the Accused.

Given the doubts raised as observed by the defence and those I have pointed out, I must respectfully disagree with the Assessors' opinion.

Much as the victim was defiled, the explanation she gives of the events does not add up and does not place the Accused at the scene of crime.

For reasons she has kept to herself, the victim chose in my view to tell a tale much different from what actually happened.

For those reasons, I find that the evidence adduced by the prosecution does not prove beyond reasonable doubt that it is the Accused who defiled the victim.

I accordingly find him not guilty. He is acquitted of the charges and set free accordingly.

Godfrey Namundi

Judge
11/11/2013