

IN THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO
(CORAM; MANYINDO, D.C.J., ODER, J.S.C., TSEKOOKO, J.S.C.)
CRIMINAL APPEAL NO. 33/94
BETWEEN

BIMBI PETER ===== APPELLANT

AND

UGANDA===== RESPONDENT

(Appeal from a conviction and sentence of 15 years imprisonment in the High Court of Uganda at a Session held at Mukono on the 29th of November 1994 by The Hon. Justice L.E.M. KIKONYOGO in Criminal Session Case No. 224/9 4)

JUDGMENT OF THE COURT:

The appellant was convicted by the High Court of defilement, contrary to section 123 of the Penal Code. He was sentenced to 15 years imprisonment plus 10 strokes of the cane. He has now appealed against both conviction and sentence.

The case for the prosecution was that the appellant and Wilson Nono the father of the complainant, Lilian Aciro, lived in a labour camp belonging to Kanyogoga Tea Estate where the two men worked as tea pluckers. They were close neighbours in the camp. On the day of incident at about 8.00 a.m. the complainant went into the communal bathroom-cum toilet for a short call. It was then that the appellant followed her there and defiled her, with her “consent” after promising to give her Shs. 100/= after the act. He had done the same thing to her previously but had not paid her the promised cash.

The appellant denied the allegation and contended that at the material time he was at his place of work. There is no merit in the appeal against the conviction as the evidence against the appellant was overwhelming. In the first place the complainant and the appellant knew each other very well. Secondly the incident took place in broad daylight. Thirdly, the appellant was caught redhanded by a neighbour, Rosemary Nantale (P.W.6) who was popularly known as “Mama Ester” after her small daughter, Ester.

The witness testified that as she entered the bathroom in question, she found the appellant and the complainant lying down on the floor. She then stated;

“I noticed that the accused Bimbi Peter was naked.....

The girl was under the accused, Bimbi. Bimbi was on top of her. They were having sexual intercourse. Bimbi was in fact defiling her. When Bimbi saw me he got up and ran away.”

It was also her evidence that the appellant stayed away from his home the whole of that day. When he returned home in the evening the parents of the victim questioned him about the matter in presence of PW6. He admitted having defiled the complainant.

Fourthly, there was the testimony of Luka Andama (P.W.2), a neighbour of the appellant and camp Secretary for defence that when he arrested the appellant on the evening of the fateful day, the appellant informed him that he had spoken to the father of the complainant about the incident and that the matter was going to be settled amicably.

Finally, there was the evidence of Dr. Kagambe (PW5) who examined the 11 year old complainant two days after the incident. He testified that the complainants’ hymen had been ruptured well before this incident (lending support to her claim that the appellant had defiled her previously). It was also his evidence that the complainant had had sexual intercourse on or about the day of incident.

In view of this evidence the trial Judge was in our view quite right to hold that the appellant’s alibi was false. The appeal against conviction is accordingly dismissed.

With regard to the sentence of 15 years imprisonment, it was certainly harsh but we think that the circumstances of the case justified it. The 30 year old appellant had defiled the little girl not once but twice and would most probably have continued to defile her for a long time. The maximum sentence for this offence is death. We see no reason to disturb the sentence.

However, we are unable to uphold the consequential order for corporal punishment.

S. 123 of the Penal Code was amended by Statute No.4A of 1990. The old section 123 was replaced by a new one which provides as follows:-

“123 (1) Any person who unlawfully has sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to suffer death.

(2) Any person who attempts to have unlimful sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to imprisonment for eighteen years with or without corporal punishment”.

Under the repealed Section. 123 there was provision for corporal punishment for both defilement and attempted defilement. But it is now clear that where the court convicts of defilement it has no power to order corporal punishment. It seems to us absurd that the person who commits the offence cannot be sentenced to corporal punishment when the one who merely attempts to commit that offence can suffer corporal punishment. It may well be that the legislature assumed, quite wrongly, that a person convicted under section 123 (1) will always be sentenced to death. Clearly the sentence of death is not mandatory.

Section 108 of the Trial On Indictments Decree empowers the High Court in its discretion, to sentence a person who is under the age of 16 years to corporal punishment if he has been convicted of an offence for which he is liable to imprisonment. That provision could not apply to the appellant who was more than 16 years of age. It follows, therefore, that the order for corporal punishment was illegal. Accordingly, the appeal against sentence succeeds only to the extent that the order for corporal punishment is set aside.

Dated at Mengo this 28th day of July 1995

S.T.MANYINDO
DEPUTY CHIEF JUSTICE

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL,

W. MASALU MUSENE,
REGISTRAR SUPREME COURT.