

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

HIGH COURT-CRIMINAL SESSION CASE-NO.0002-OF 2007

UGANDA.....PROSECUTOR

VERSUS

NGOBI PETER.....ACCUSED

BEFORE: HON: JUSTICE BENJAMIN KABIITO.

JUDGMENT

The accused, Ngobi Peter, was indicted for Defilement C/S 129(1) of the Penal Code Act. It was alleged that on the 7th day of September 2006, at Namazaala village, in the Jinja District, the accused had unlawful sexual intercourse with, Mugala Sharon, a girl under the age of 18 years.

The accused denied the offence. In these circumstances, all the ingredients of the offence of defilement were put in issue.

The prosecution must prove its case beyond reasonable doubt. All the ingredients of the offence must be proved to that standard. In the event of any doubt, such doubt must be resolved in favour of the accused with an acquittal. The indictment must be proved on the basis of the strength of the prosecution case and not on the weakness of the accused's case.

The brief facts of this case were as follows. On the 7th day of September 2006, at around 11am the victim, Mugala Sharon, (herein after referred to as PW5) was approached by the accused, one Ngobi Peter, her uncle, to help with some cooking. PW5 did not go as she was feeling dizzy. The accused gave her a tablet and advised her to go and sleep. PW5 proceeded to her grandmother's room, where she slept on a bed. Moments thereafter, PW5, heard the accused, order and chase her younger brother, one Lorraine to go away and play outside.

The accused came into the room, found PW5, resting while facing up and then proceeded to lie on top of her. The accused then removed PW5's pant and inserted his "Kasolo" into her private parts. When PW5, cried out, the accused then left her. Immediately, PW5 saw blood coming from her private parts and experienced pain. She put on her pant and then called out to Lorraine to go and call her grandmother; one Robinah Isabirye, PW4. When PW4, came she found PW5, crying and blood coming from her private parts. PW5 then reported to her that it was the accused who had defiled her.

PW4, testified in court and noted as follows; **"From what I could see, I believed what PW5, reported to me to have indeed happened"**. At about this time, PW4 then saw the accused, who was a close neighbor, preparing to go for work at the time. She reported the incident to the L.C. Chairman, of the area, one Balyejusa Charles, PW6, who, in turn reported the incident to the police at Namasinge Police Post. The accused was arrested at Kulusambia trading center, as he headed to Kakira for work. From Namasinge the accused was brought to Bugembe Local Administration Police, before being brought to Jinja Central Police Station. At, Jinja Central Police Station, the accused recorded a charge and caution statement before D/Ip Gumi Bosco, PW8.

The accused raised objections to the admissibility of this statement on grounds that it was procured by force. In effect, the accused retracted his statement. In the circumstances, the court conducted a trial with a trial to resolve this issue. It was the court's finding, after the conduct of the said trial, that the statement of the suspect (now accused) was voluntarily made and given. The court will now give the reasons for its decision.

The accused claimed to have been slapped once by D/c Malinga Charles, PW7, the investigating officer in the case, after he delayed to come out of the police cell. However, the said officer vehemently denied to have assaulted the accused. According to the accused, the slap was administered on account of his delay to respond to a lawful order to come out of the police cell. In these circumstances, the court did not find this alleged incident to have been intended to influence the outcome of the investigations, in the case.

The court did investigate the circumstances under which this statement was recorded. The statement was recorded by D/Ip Gumi Bosco, PW8, at the time attached to Jinja Police Station. This officer, who spoke the language of choice of the suspect, namely Lusoga, first recorded the statement in lusoga and then translated this version into English. It is the court's finding that, PW8, exhibited true professionalism, in the handling of the suspect, before, and during the recording of his statement. The recording of the statement in the accused's language first and then into English, removes any claim of misunderstanding. The said officer did not need an interpreter and there was no issues relating to miscommunication raised by the accused. The Lusoga and English versions were exhibited as Prosecution exhibits No's 5 and 6, respectively.

The said officer was not the investigating officer in the case, had not interrogated the suspect and had no prior knowledge or details of the case. The accused, did not make any complaints against this officer' conduct, at all, except to allege that, he was still in fear owing to the slap administered by PW7, at an earlier time and even then at the cell door. The court was satisfied that once the suspect was handed over to PW8, by PW7, who promptly left his office, the alleged fear, was totally removed and did not obtain, in terms of section 25 of the Evidence Act. The court was satisfied that, in these circumstances and for the reasons stated, the accused's statement was freely and voluntarily given and made.

It was also noted that the suspect had been detained at the police station, for two days before the statement was recorded, which is not, an unreasonable time, in the circumstances.

The accused denied the allegations. In his statement, made under affirmation, the accused testified how on the day in question he was arrested at Kulusambiya as he headed to kakira for work. The arrest was carried out in the presence of the LC chairperson of the area, one Balyejusa Charles, PW6. While at the police post, the accused saw one Mugala Sharon, whom he used to see in the village at Namazaala. The accused vehemently denied being related to PW5 as her uncle and to one Mzee Isabirye, the husband of PW4. He denied that one Aidah, the mother to PW5 was his sister. The accused admitted that PW4 was a close

neighbor, who, lived opposite across the road. He however testified that he usually goes to work early. He testified that he was delayed at Kulusambiya by a flat tire of his bicycle and had stopped to repair it. He denied having returned home on the morning of that day. The accused admitted to making a charge and caution, statement before PW8 but denied its contents hence retracting it.

The accused in effect, set up an alibi. The word "Alibi" means "elsewhere" and in the context of his defence it would mean that the accused pleaded that at the occurrence of the alleged incident, he was elsewhere and thereby, rendering it extremely improbable that he would have participated in the crime.

The general principle of law to a defence of an alibi is that an accused who puts forward an alibi as an answer to a criminal charge does not assume the burden of proving it. The burden of proving his guilt, by disproving the alibi, or destroying it remains on the prosecution throughout. (See; **Sekitoleko vs. Uganda [1967] EA 531**). Once an alibi is set up it is the duty of the court to find out whether the alibi is true or not. (See; **Nyanzi Steven vs. Uganda Criminal Appeal No 16/98**)

In respect to the accused's retracted statement or confession, the position of the law on this point, is set out in the case of **Tuwamoi vs. Uganda, [1967] EA 84**, where the **Court of Appeal for Eastern Africa**, noted thus on this point;

"A trial court should accept any confession which has been retracted or repudiated or both retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all circumstances of the case that the confession is true". The Court noted further that;

"The same standard of proof is required in all cases and usually a court will only act on a confession, if corroborated in some material particulars by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances, that the confession, cannot but, be true".

The ingredients of the offence of defilement are:

- a) That the victim of the sexual act was under the age of 18 years of age; In this case that Mugala Sharon is aged below the age of 18 years.
- b) That there was a sexual intercourse performed on the victim. In this case that Mugala Sharon experienced sexual intercourse.
- c) That it was the accused who participated in the sexual act with the victim. In this case that it was the accused, Gobi Peter that participated in the sexual intercourse with the said, Mugala Sharon.

Whether the victim was aged below 18 years of age?

The age of a person can be proved by various means; the evidence of the victim herself or by a person such as a parent or other relative, who knows when that person was born or received information from her parents ,or by observation in court.

In this case, we have on record the evidence of PW5, Mugala Sharon. She stated, at the time of giving evidence that she was 13 years old. That would put her age at 9 years in September 2006.

PW4, Robinah Isabirye, testified that she is the grandmother of PW5. She gave her granddaughter's age as between 12 and 13 presently. She confirms that the victim was about 9 years, at the time of the incident.

Dr Katende, of Jinja Regional Referral Hospital, PW 1, examined the victim on the 8/09/2006, on PF No3. He determined that the victim was about 9 years old at the time of examination.

The court had opportunity to see the victim as she testified and to make its own assessment, on this issue.

The defense did not contest the fact of age of the victim.

In agreement with the Assessors, the court finds that the prosecution has proved beyond reasonable doubt that the victim was aged below 18 years.

Whether the victim experienced sexual intercourse?

The victim testified, that on the day in question, at about 11 am, the accused had called out to her to go and cook some beads for him. PW 5, did not go as she was feeling dizzy. The accused gave her a tablet and advised her to go and sleep. While she was sleeping in PW4's room, PW5, saw the accused come into the room. When Lorraine and the other children attempted to come into the room, PW5 heard him chase them away. The accused ordered them to go and play outside. The accused lay on top of her, removed her pant and then put his "KASOLO" into her private parts. She felt pain in her private parts. After the act, she saw blood flowing from her private parts.

This being a sexual offence, the evidence of the victim requires corroboration. The need for corroboration is an established practice that courts of law have adopted out of prudence, in cases of this nature. The court did warn the Assessors, just it now cautions itself, against the danger of acting upon the uncorroborated testimony of the victim to found a conviction of the accused.

What is corroboration?

Corroboration means some other independent evidence rendering it probable that the story of the victim must be true and reasonable safe to be relied upon. Corroborative evidence would strengthen the victim's evidence in some material respects. Such evidence, would confirm, not only that the offence was committed but that it was the accused that was responsible for its commission.

In this case, the victim, although, a child of tender age, gave evidence on oath after the court was satisfied she understood the nature of an oath. PW5, impressed the court, during the conduct of the *voire dire* with the strength of belief and understanding of her chosen faith. This witness exhibited calmness, composure and maturity far beyond her age. She left the court with an impression that she was reliable, dependable and convincing in her testimony.

In fact, PW5's evidence, by itself, is sufficient to prove that a male person's sexual organ penetrated her sexual organ thereby completing the act of sexual intercourse. However, the court will determine whether there is other evidence in support of PW5, testimony.

For corroboration, the prosecution relied on the following instances;

- a) Medical evidence of PW1 who examined the victim, the following day, on 8th September 2006. PW1 found that PW5, had injuries on her leg and thigh measuring 1cm each which he classified as harm. He also noticed that there were signs of sexual penetration of her private parts and that her hymen had been ruptured and that the rupture was one day old. In the doctor's opinion, the injuries were consistent with some resistance having been put up. PF3 and its appendix were tendered as Exhibits No Pex 1 and Pex 2. This finding, would be consistent with what PW5 described as happened to her.
- b) PW4 testified that when she was called by Lorraine, she found PW5 crying in pain while lying on her bed with blood coming from the victim's private parts. This situation would amount to a distressed condition. In the case of **Abasi Kibazo vs. Uganda** [1965] EA 507, the **Court of Appeal for East Africa** noted thus on this point; **"In sexual offences, the distressed condition of the complainant, is capable of amounting to corroboration of the complainant's evidence, depending on the circumstances and the evidence"**.
- c) According to PW4, PW5 complained of pain in the hips and from her private parts. This pain according to this witness was on account of the victim being forced to do what she could not manage. PW4 stated thus: **"From what I could see, I believed what the victim had reported to me"**. It is noted that PW4 is a mature woman and courts of law can rely on mature woman to establish that sexual intercourse had occurred. (See; **Sebuliba Haruna vs. Uganda C.A. Criminal Appeal No 54 of 2002.**)
- d) The scene of crime and opportunity. The victim had gone to sleep on her grandmother's bed. The room with a closed window was a convenient place for performance of the act in the absence of PW4, the owner of the house.

- e) The accused' conduct, before, and after could provide corroboration to the victim's testimony. The calling out to PW5 to help him cook, giving PW5 some medicine for her condition; following her into the sleeping rooms while knowing that she would be there; ordering Lorraine to go and play outside, would point to preparation ,while, the accused hurriedly leaving his home immediately after the act and being arrested, at around 11am, while on his way to work, would point to an attempted get away.PW4, testified to the court, how she saw the accused quickly preparing to go away from his home, immediately after she became aware of what had happened to PW5.
- f) The accused in his own statement made under charge and caution, stated: **"I followed her inside the said house and got her in one of the rooms' got her standing doing nothing. I was tempted and I decided to pull her down, removed her knickers' whitish in colour, remove from my trouser my erect penis and started penetrating into her vagina.I tried very much to penetrate inside but she was narrow used force but still failed decided to abandon the whole deed after failing penetration. I didn't ejaculate"**.
- g) The accused own charge and caution statement, can provide corroboration of what PW5 described.

It the court's finding that the accused's charge and caution statement amounts to a confession and is a true account of what he did and what transpired on that day. The court notes that the statement was;

- a) Very detailed and so detailed as to leave no doubt on the court's mind that the maker knew what he was talking about.
- b) It is based on personal knowledge by the maker of the various relationships he had with his own mother, one Nuru Naluwolo (deceased).his sister, Aidah, who is the mother of the victim, Sharon Mugala and James Isabirye, as one of my uncles and Mugala's grandfather. It is the court's finding that such personal relationship details cannot be faked.

- c) The court finds that PW8, the police officer who recorded the statement, would not have secured such personal information from any other source.
- d) The court finds that this statement is corroborated in a material particular by the medical report of PW1, as contained in Prosecution Exhibit No. 1. In his report, the said doctor did not find any semen which position is consistent with what the accused states in his own statement that; **"I did not ejaculate"**.

The defence did not contest the fact that the victim experienced sexual intercourse.

The court finds that PW5 experienced sexual intercourse and that there is supportive evidence of an independent nature confirming that the act did occur.

In agreement with the Assessors, the court finds that the prosecution has proved beyond reasonable doubt, the fact that the victim experienced sexual intercourse.

Whether the accused's participated in a sexual act with the victim?

The accused testified that he had left home for work early that day and was arrested at Kulusambiya at around 11am, before getting to Kakira. In his statement however, the accused admits to have returned at home at 11am having earlier left at 6am. He however denies the offence. PW5, testified that the accused come into the room at around 11am.

PW5 knew the accused as her maternal uncle. The accused had been introduced as such by her mother. PW 5, testified that she would meet and talk to the accused whenever she visited her grandmother during school holidays.

On this point the accused in his charge and caution statement states the following: **"I have brothers and sisters and among them is Aidah, who is**

the mother of the victim in this case, one Mugala Sharon. The said Mugala is about nine years it's my belief. She sometimes stays in Namaganga with her father whose names I don't know and also at Namazaala village, where I stay at the home of one Mutaki Zadok, my late grandfather".

Upon returning at home on the 7th September 2006, after experiencing a stomach ache, the accused states as follows: **"Sharon, the victim was as well at home among others. Sharon was near the main road playing. Shortly, the said Sharon Mugala went to the main house of James Isabirye, one of my uncles and Mugala's grandfather".**

There is the evidence of this close interaction between the two when the accused called PW5 to assist him cook some beads. Further, the fact that the accused gave and she took some medicine for her dizziness from him, meant that the two knew each other well and that she did not regard him as a stranger at all.

Besides relationships, the accused lived across the road from PW4 house. The accused himself admitted being a close neighbor and to have seen the victim on a number of times at PW4 home. PW5, herself testified that she would visit her grandmother during school holidays'.

The accused states thus; **"The said Mugala, is about nine years. It's my belief. She sometimes stays in Namaganga, with her father, whose names I don't know and also at Namazaala, where I stay at the home of one Mutaki Zadok, my late grandfather".**

The court accepts the prosecution submission that on top of being a close neighbor, the accused was an uncle to PW5, as he was a brother to one Aidah, PW5's mother.

The issue which arises, then, is whether PW5 had the presence of mind to identify the accused in conditions that were described and to rule out the participation of anyone else in the defilement.

Since conditions appear to have been dark, on account of a closed window in the room where the incident occurred, although it was about 11 am in the morning, the court will narrowly examine the evidence of PW5 to ascertain whether her identification evidence is reliable and if she was truthful.

In the case of **John Katuramu vs Uganda**, Criminal Appeal No 2 of 1998, the **Supreme Court of Uganda**, stated thus on this point; **"The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should always warn itself of the danger of possibility of mistaken identity in such a case"**.

The court did warn the Assessors, just as it now cautions itself, on the dangers of mistaken identification. The court will accordingly look for corroboration in the identification evidence pointing to the fact that it was the accused and no other that committed the offence.

On this point, the court notes that PW5 had seen and talked to the accused that day and particularly before she proceeded to rest, at about 11 am that day. It is also quite evident that the accused knew that PW5 was sleeping in her grandmother's room as he had just given her some medicine to take for her ailment and advised her to go and rest. The court accepts the evidence of PW5, when she testified that she heard and recognized the accused' voice, while the accused was outside the room she was in, as he ordered, her younger brother, Lorraine to stay outside the house immediately before he launched his attack.

Finally, the fact that PW5 was able to call and summon Lorraine, immediately after the incident, to go and call her grandmother for help, is

the most compelling evidence that she had the presence of mind to seek help. PW5's conduct also demonstrates the urgency with which she appreciated the need to report her Uncle's actions to her grandmother, as the head of the house. The court also notes that PW5, despite her anguish and pain, had the modesty to put on her pant first, before calling on her younger brother, Lorraine to go and call PW5.

The court is convinced that PW5 could identify her assailant, as her uncle on account of the close proximity as he was on top of her, with the aid of some light coming through the ventilators and that, although weak, she was alert, conscious and aware of her surroundings as her actions, immediately after the incident, attest.

The court has also considered the accused' own charge and caution, statement in which he admits to have had sexual intercourse with the victim. The accused stated thus;

"I followed her inside the said house and got her in one of the rooms' got her standing doing nothing. I was tempted and I decided to pull her down, removed her knickers' whitish in colour, remove from my trouser my erect penis and started penetrating into her vagina. I tried very much to penetrate inside but she was narrow used force but still failed decided to abandon the whole deed after failing penetration. I didn't ejaculate".

After the fact, PW4 testified that the accused left her. The accused states; **"I left her inside the house and went outside. It was about midday then went to the bathroom, took a bath quickly and went to the stage waiting for vehicle transport with the intention of going back for duty at Kakira".**

The court finds corroboration of these circumstances in the evidence of PW4, when she stated that she saw the accused, after being called by Lorraine, at his home as he hurriedly prepared to go to work, at about the same time.

In respect to his arrest, the accused testified that on 7/09/2006 at around 11 am, he was arrested at Kulusambiya by police officers in the presence of one Balyejusa. In his statement he states: **"As I was still at the stage waiting, one Balyejusa, the area LC1 chairperson came and arrested me at the stage"**.

Indeed, PW6, Balyejusa Charles, the chairperson L C1 of Namasinga village testified how, upon information received from PW4, he arranged for the arrest of the accused ,at Kulusambiya trading center, as he was heading to Kakira for work.

From the totality of the evidence on record, the court holds that prosecution witnesses PW4 and PW5 have put the accused at the scene of crime and that their evidence has been corroborated sufficiently to destroy the accused's alibi.

In agreement with the Assessors, the court accordingly rejects the accused's alibi and finds that it was the accused that participated in unlawful sexual intercourse with PW5.

Throughout the trial, the accused did not show any emotion or remorse at what he had done. He remained aloof, cold and stone-hearted. During cross-examination, he was hesitant, capricious and vacillating in his responses. I got the impression that he was improvising in his evidence and was an accomplished liar. I do not find the accused to be a truthful person and his overall demeanor quite poor. The fact that the accused was living alone at the time, could have provided the temptation to act the way he did, notwithstanding the fact that PW5 was his niece.

In criminal trials, inconsistencies in evidence often arise. They can be minor or major. Minor ones can be ignored or overlooked, unless they point to deliberate untruthfulness. Major ones are those considered to be going to the root of the matter. They may result in evidence being rejected. In this

case there were inconsistencies such as how PW5 was conveyed to the police? Whether she walked on her own or was she taken by bicycle? The other is whether Rose Nandolo, an auntie to PW5, was called by PW4 before or after the arrest of the accused? The other being whether or not PW5 had a pant on when, PW4 first responded to her call for help? and finally, whether it was PW4 or George Makati who escorted PW5 to the police?. In the court's assessment, all these inconsistencies were minor, not deliberate and could be accounted for due to lapse of time.

In agreement with the unanimous opinion of the Assessors, the court finds, that the prosecution has proved, all of the ingredients of the offence of defilement, beyond reasonable doubt. The accused is accordingly convicted for defilement c/s 129(1) of the Penal Code Act.



BENJAMIN KABIITO

JUDGE

13/11/2009

Sewankambo Hamuza ,for the State.

Kabonesa Evelyn, for the accused.

Accused present.

Nabugwire Asinah, Court Clerk.

Judgment read out in open court.



BENJAMIN KABIITO

JUDGE

13/11/2009

Sewankambo Hamuza: The convict is a first offender. He however committed a very serious offence. The offence of defilement carries a

maximum sentence of death. The convict took advantage of his niece who was unwell and resting. Instead of protecting her, the convict, sexually assaulted her. The actions of the convict are a clear manifestation of the rampant abuse of the young girls at the hands of close relatives. Sexual assaults of this nature, subjects young girls to a number of risks, such as contracting of sexually transmitted diseases and unwanted pregnancies and low self esteem. The convict has not shown any remorse throughout the trail. The convict even rejected the blood relationship he has with the victim. He is not repentant. We pray for a custodial and deterrent sentence that will send a signal to our society for others who to learn. We so pray.

Kabonesa Evelyn: The convict is a first offender. He is aged 23 years and is a young man who can be reformed. He has been on remand since September 2006 which is a period of three years and 2 months. The convict is married with three children and he is the sole bread winner for the family. The convict appears to be remorseful. We pray for a lenient sentence that would give the convict an opportunity to reconstruct his life.

Convict: I pray for leniency. I have been on remand for a long time covering three years and 2 months. I have family responsibilities with a wife and children to look after. My father and mother have since died. I seek a light sentence as I have to look after my own children.

Tenywa Moses: I am the father of the victim. The mother of the victim, Sharon Mugala, one Aidah has since died. She was the sister of the convict. I pray for a severe sentence considering what the convict, an uncle to my daughter, did to her.

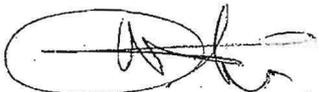
Court: Ngobi Peter stands convicted for defilement c/s 129(1) of the Penal Code Act. The offence was committed against the victim, his own niece, who is a daughter of one Aidah, the sister of the convict. This is therefore, not just a case of defilement, which cases are rampant in most parts of our country now, but also one of defilement of a close relative.

Under the law and in our culture, it is an abomination for one to have sexual relations with members of one own family. This sanction is intended to ensure that one does not get children from one's own relatives. The traumatic experience that the victim suffered will live in the collective memories of her family, in-laws and friends for some time.

Defilement cases are now a reality even in our own homes. There appears to be no limits now. Even male relatives in our homes can succumb to temptation and perpetuate acts of defilement. We have to raise the question as to who shall look after, teach and nurture the young girls that are the future mothers of this nation, if they are at risk of sexual assault by their relatives.

Throughout this trial and even now, the convict has shown not the slightest bit of remorse for his actions. His actions were shameful, repugnant and deserving of a severe punishment. I can find no grounds for the exercise of the court's mercy in this case.

In order to meet the ends of justice in this case and in order to keep the convict away from children, whether related to him or not, the convict shall serve a sentence of life imprisonment.



BENJAMIN KABIITO

JUDGE

13/11/2009

Court:Right of Appeal within 14 days explained.



BENJAMIN KABIITO

JUDGE

13/11/2009