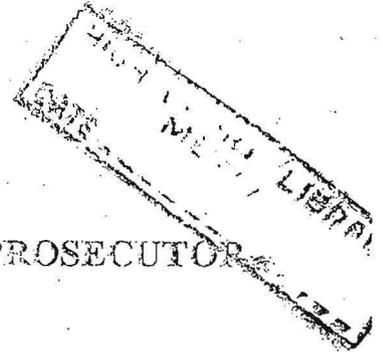


THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT TORORO  
HCT-04-CR-SC-0058-2010



UGANDA..... PROSECUTOR  
VERSUS  
MUSISI RASHID.....ACCUSED

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

The accused person Musisi Rashid is indicted for aggravated defilement contrary to sections 129 (3) and 4(a) of the Penal Code Act. It is alleged by the prosecution that he committed the offence on 11<sup>th</sup> day of August 2009 at Mugungu 'A' village, Busia Town Council on the complainant Tibita Imelda a girl aged 10 years.

The accused denied the indictment. This cast the burden of proving the accused guilty onto the prosecution beyond any reasonable doubt.

It is trite law that in criminal trials court can only convict if the prosecution has discharged its duty satisfactorily.

In a trial for aggravated defilement prosecution has to adduce sufficient evidence to prove the following:-

- (1) The victim was aged below 14 years.

(2) A sexual act was performed on her.

(3) The accused person did it.

While prosecution is executing its duty, it does not shift to the accused person who is presumed innocent till otherwise proved. The accused cannot be convicted because he gave a weak defence.

I will deal with each ingredient separately.

**(1) Whether the victim was below the age of 14 years.**

After carefully evaluating the evidence for the prosecution I am convinced that prosecution adduced sufficient evidence to prove that the victim Imelda Tibita was aged 10 years at the time of offence. Her testimony and my observation satisfied me that this was the case. I was also convinced by the testimony of the mother (PW.4) which confirmed that the victim was 11 years at the time of testimony. This evidence is corroborated by medical evidence adduced by the Doctor Oundo PW.5 who examined PW.1 on PF.3 Exhibit P.I and found that she was 10 years old at the time of examination.

**(2) Whether a sexual act was performed on the victim (complainant)?**

The Penal Code Act defines Sexual Act as penetration of the vagina, mouth or anus of any person by a sexual organ however slight. A sexual organ is defined as a penis or vagina. Therefore, however slight the penetration, even a fraction of a millimeter, is enough. The hymen need not be ruptured and emission of seed is not necessary.

~~PW.1 recounted how she was lured into a maize garden, was lifted up by the assailant whom she said was the accused who had sexual intercourse with her. She says she tried to make noise in vain. She felt pain, saw blood from her vagina and watery things were emitted from the assailant. That the assailant's trousers became wet. PW.1 testified that she immediately reported to PW.2 Wandera. PW.2 confirmed this and said PW.1 came to him running and reported that a man whom she knew had defiled her. PW.4 Samanya Scovia, the mother, found her daughter PW.1 in pain.~~

The pain was being felt by PW.I from her private parts especially when she urinated. The evidence of PW.4 and PW.2 corroborated the testimony of PW.1. The latter's distressful condition was further corroboration that she had been defiled. She immediately reported the incident to PW.2 while crying that a man had had sex with her. This was in the presence of PW.3 Mustafa Issa.

Evidence also has it that PW.1 was examined by Dr. Oundo on PF.3 Exhibit P.1 who confirmed that PW.1 was defiled. He found out that there was evidence of slight penetration although the hymen as intact. He detected inflammation around the private parts. He also found that the offence was committed less than 12 hours before examination. The evidence of the doctor PW.5 corroborated the other prosecution evidence that a sexual act was performed ~~to~~ PW.1.

~~Learned counsel for defence took issue with the failure by the hospital to stamp on the report. I considered this omission as minor since the doctor who performed the examined owned up the report on oath and in open court. He satisfactorily explained why this was the case. After he had done the examination and filed the report it was the hospital administration to stamp the reports. Owing to his busy~~

~~schedule, I am unable to fault the doctor. I will find that this technical omission did not dilute the authenticity of the doctor's evidence.~~

I am satisfied beyond any reasonable doubt that a sexual act was performed on Imelda Tibita a girl aged below 10 years.

**(3) Whether the accused participated in committing the offence?**

PW.1 testified not on oath that on 11.08.2009, the accused lured the victim into a maize garden with juice and biscuits. That on reaching there the accused lifted her threw her down and had sex with her. During testimony PW.1 sounded emphatic and demonstrated with gestures what befell her. That after the act, the accused is said to have tried to give her money but she rejected it. She tried to make noise but the accused stopped her. PW.1 ran immediately to PW.2 Wandera crying. She knelt before Wandera and reported to him that a man had defiled her. That she knew and could identify the man. Together with PW.3 Mustafa Issa and Kawo Fred, PW.1 led them to the scene. On the way they met the accused who was pointed out by PW.1. On seeing PW.1 with PW.2 and PW.3, he tried to run away but he was arrested.

All the prosecution witnesses knew the accused very well. The offence took place during broad day light leaving no possibility of any mistaken identity. PW.1 said the accused is a neighbour. PW.2 knew the accused before. PW.3 knew the accused before because he hired him land on which he was growing rice. When PW.3 asked the accused why he committed the offence, he said he did not know why.

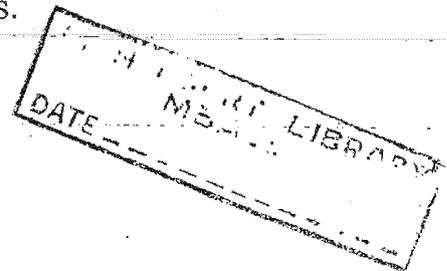
It is trite law that in sexual offences, the evidence of a young victim given not on oath has to be received with caution. It must be corroborated. This caution was communicated to the assessors and this court will warn itself of the dangers of relying on such evidence when not corroborated. I am satisfied that PW.1's evidence has been sufficiently corroborated.

Although the distressful condition of the complainant may be evidence of consistence only on the part of the complainant it all depends on the circumstances of a given case. A conviction can ultimately be founded if court is satisfied that the victim correctly identified the defiler. I am satisfied the accused was sufficiently identified and put at the scene of crime. I am unable to find that this case is a frame up and that the prosecution evidence is exaggerated as submitted by the defence. I did not find any suggestion that the accused was being framed because of a land dispute. I was not satisfied that there existed a grudge between the accused and prosecution witnesses. The prosecution witnesses were truthful and gave a consistent story.

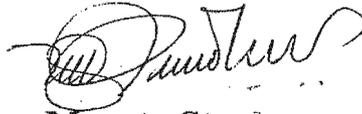
I am satisfied beyond any reasonable doubt that the accused committed this offence.

The lady and gentleman assessors gave a unanimous opinion that the prosecution adduced sufficient evidence to prove the offence against the accused person. They advised to find the accused guilty and convict him as indicted.

I am in total agreement with the opinion of the assessors.



~~Consequently I will find Musisi Rashid guilty and convict him for defilement contrary to sections 129 (3) and 4(a) of the Penal Code Act.~~



**Musota Stephen**

**JUDGE**

**6.12.2010**

6.12.2010

Accused produced.

Bwiso Resident State Attorney.

Khamiza Interpreter.

Assessors in court.

Okwalanga for accused on State brief.

Resident State Attorney: Case for judgment.

Court: Judgment delivered.

**Musota Stephen**

**JUDGE**

**6.12.20**

**Resident State Attorney:**

I have no previous record. But I pray for a deterrent sentence for offences of defilement generally are rampant. Court has duty to protect the young children and eliminate such people from society. Given the age of convict and victim, the

~~victim was a grandchild. The law provides for a death sentence. Surprisingly the courts have been lenient to convicts. The court should give a life imprisonment.~~

**Okwalanga:**

In mitigation we submit this is a court of justice. Visibly the convict is remorseful. We pray the time on remand be taken into account. He was committed on 14.8.09 and it is true the convict is a first offender. He is about 48 years old. He is a relatively young person. There is a way the State can find him useful later. He is a married man and has 4 children the youngest is 3 years. He has an old mother a widow. All depend on him. It is unfortunate. This calamity befell the convict. He regrets it. We pray for leniency.

**Sentence and Reasons**

While sentencing the convict, I will consider submissions by both the prosecution and defence. I will consider the gravity of offence committed and the need for the judicial system to protect the girl child who is threatened by such amorous men as the convict. I will consider the time spent on remand and the purpose for sentence. I will take into account the circumstances under which this offence was committed and note that although the convict is liable to suffer death, nothing will be achieved by that.

The convict will be sentenced to 12 years imprisonment.

Right of appeal explained.



**Musota Stephen**

**JUDGE**

**6.12.2010**