THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MOROTO

CRIMINAL SESSION CASE NO. 160 OF 1993

UGANDA ..... PROSECUTOR

VERSUS

GIDOI JAMES ..... ACCUSED.

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

J U D G M E N T:

Gidoi James is indicted for defilement contrary to section 123 (1) of the Penal Code Act. It is alleged that on 29.12.92 at the Rest House, Moroto Municipality in the Moroto District had unlawful sexual intercourse with Nansubuga Gladys a girl under the age of eighteen years. 5

The essential elements of the offence aforesaid include the following:-

(a) The age of the victim must be under 18 years.
(b) Sexual intercourse by the accused must have taken place.

The prosecution is inclined to prove the above ingredients 10 beyond reasonable doubt.

To set the ball rolling, the prosecution called the evidence of Cosia Muluya, PW5 who is the father of the girl. He testified that his daughter, PW3 now the victim, was born in November, 1977 and put her age at the trial to be 15 years old. In the absence of a 15 birth certificate as in the instant case, a parent is the best witness in that regard. The victim herself who is a P5 pupil of the Municipality Primary School also confirmed her age. In addition, Dr. Megere who examined the girl on 15.1.93, just 17 days after the alleged incident found her to be aged between 14 and 15 years. 20

At the trial the gentlemen assessors and the court had the chance of looking at the girl and from her appearance, an opinion was formed accepting the age given by her father and the doctor. In the light of all that the defence also conceded that Gladys Nansubuga is a girl under the age of eighteen years. In that context therefore, 25 the prosecution has proved the first ingredient regarding the age of the victim beyond reasonable doubt as proof of the age of the girl can be by a birth certificate with some identification or by some other persons who know the girl: R Vs. Cox (1898) QBD 179.

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In order to establish the second ingredient of the offence, the legal burden lying on the shoulders of the prosecution to be discharged beyond reasonable doubt is that evidence of the slightest penetration suffices and it is not necessary to prove that the hymen was raptured: Archbold's CRIMINAL PLEADING EVIDENCE AND PRACTICE (38th Ed.) PARAGRAPH 2878. It is also immaterial that ejaculation was not accomplished.

In her testimony after being subjected to a "voire dire" which satisfied the court that she understood the sanctity of an oath, she said that on 29.12.92 at around 11 a.m. she was at the home of her parents. A girl by the name of Goretti from a neighbouring house of one Stephen called her and when she reached there Goretti requested her to fetch some drinking water inside the house. Before she could reach the water pot, somebody from behind pushed her into the bathroom and threw her down on her back. She raised an alarm for help but even Goretti did not rescue her. In her description, the bathroom was like a police cell in structure so that her alarm could not be heard and consequently nobody answered it.

As the incident happened in broad day light at 11 a.m. she recognised the accused as her attacker whom she had known before. She says the accused is a relative of the said Stephen their neighbour and the accused had been frequenting that home. The accused lay on top of her and quickly unbuttoned his trousers. He pulled out his missile which she termed "kasolo" (meaning the penis) and inserted it into her vagina. She did not have any knicker on at the time as she had washed most of her clothes including knickers. In that easy access the accused started a rhythm of shaking for about five minutes which provoked much pain in the vagina.

On the day of the incident at about 11 a.m. her brother, Geoffrey Waswa, PW4 also saw the accused enter Stephen's house and heard Goretti call his sister, PW3. When Gladys went to Goretti, she was left behind and Goretti came to talk to him. After about 5 minutes Goretti saw their father returning home and started going away while singing, "Father is coming, Father is coming." The victim says Goretti went and knocked at the door to the bathroom with her song in those words still on.

It appears from her conduct that Goretti and the accused had preplanned their trap and targeted it on the girl. On receiving the tip-off, the accused set the girl free and she went out straight to her brother, PW4 whom she informed of her ordeal, leaving the accused still in the bath-room. PW4 observed that his sister had red eyes which indicated that she had been crying.

PW4 on receiving the story, was enraged by anger and declined to eat lunch. The girl and her brother did not tell the parents the story immediately because they had visitors in the house. Later, however, PW4 picked courage and called the father behind the house and broke the news to him. He advised the father, PW5 to play it cool which he did by swallowing the bitter pill until the visitors left at around 4 p.m.

When the visitors had left, PW5 instructed the mother to sheck on the girl as he is traditionally prohibited as a father from seeing his daughter's downstairs. The information he got was that there was damage on the private part of the girl. The following morning 30.12.92, the parents and the victim reported the matter to the Police at Moroto Police Station. A Police man was deployed to take the girl for medical examination at Moroto Hospital meanwhile a team of 2 Policemen led by PW2 went to arrest the accused who after his arrest was also taken to the same hospital for examination on the very day.

When the Medical Assistant, PW6 requested for the laboratory tests on both the accused and the girl, he found that the accused had a number of pus cells which was a sign of urinary infection (UTL) and the girl had dead spermatozoa drained from her uterus. In other words, the accused was found infected with gonorrhae but the girl had dead sperms drained from her vagina. PW6 then explained that gonorrhae infection could not be detected on the girl because the germs needed more time to breed. However, he put the accused and the girl under treatment where the girl received seven injections of antibiotics.

On further examination by the doctor, PW1 on 15.1.93 seventeen days after the alleged incident, the accused was found to be of an apparant age of 23 years with no signs of recent physical injuries and his mental state was normal. The victim who was examined on the same day by the same doctor found that she was aged between 14 and 15 years. Examination of the genitation revealed a broken hymen (not freshly broken) and there were no tears or bruises around the genital region.

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In a nutshell, the accused defence is a total denial and pleaded the defence of an alibi. He says that on the material day at the time stated, he was on duty at his place of work in the Ministry of Works & Housing, Moroto Headquarters. He knows the girl and her brother, PW4 whom he treated as his sister and brother. However, he attributed the allegation against him to a grudge which existed between him and their father, PW5 since September, 1992 before the alleged incident. He alleges that he found PW5 talking to his wife under a tree infront of his house but when they saw him each went his or her way simultaneously. He therefore out of that suspected PW5 to be having love affairs with his wife.

In the light of all that, it is submitted by the learned defence Counsel that evidence adduced by the prosecution is not sufficient to support the charge of defilement for the following reasons:-

In the first place, the victim alleges that Goretti asked her for some drinking water but instead of getting that water from her parents' house, she went to get it from Stephen's house which means, it is submitted, that she knew of the arrangement and therefore should be treated as a liar - which renders the whole of her evidence useless.

In reply, the learnt State Counsel invited the court to treat all the prosecution witnesses including the girl as witnesses of truth. The accused, it is submitted, was known by the family including the victim before the incident and the accused also agrees that he treated PW3 and PW4 as his sister and brother. In the absence of any grudge there is no ground for the prosecution witnesses to lie about the incident.

The court treats the above issue fairly differently in that even if the victim knew of the alleged arrangement, according to the ingredients of the offence of defilement, consent is immaterial. In the instant case, Goretti and the accused diligently tricked the girl to get inside the house for drinking water which led to the commission of the offence. Goretti's song and also by knocking at the bath-room door was to alert the accused that the father of the girl had returned home. That was a target beyond the imagination of the poor young girl. She raised an alarm which nobody answered indicative of her unwillingness to submit to sexual intercourse. During cross-examination, she stood a barricade of questions with firmness except that she cried when asked to detail exactly what the accused actually did to her. That alone was not untruthfulness on her part but was overtaken by emotions and bad feelings about what the accused did to her.

Sentence: Children of the like of the complainant in this case must be protected against sex maniacs in the like of the accused. This bears great importance on the grounds that sexual organs of the children at that age will have not yet matured. They end up being damaged, humiliated and embarrassed in the society. In addition the killer disease AIDS is rampant in the country which can endanger the life of the victim in the instant case.

The accused claims he has 2 wives and one wonders why those wives cannot satisfy his sexual lust! Although the accused is first offender but by no means it is not a justification for the offence he has committed.

Accordingly, accused sentenced to 5 years' imprisonment with 3 strokes of the cane in order to deter birds of the same feathers.

STEVEN GEORGE ENGWAU

J U D G E

16.11.93.

Court: R/A against conviction and sentence explained to the accused.

STEVEN GEORGE ENGWAU

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