HON JUSTICE TSEKOKO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 170 OF 1993

UGANDA ..... PROSECUTOR

VERSUS

MUGOYA WILSON ..... ACCUSED

BEFORE: THE HON. MR. JUSTICE C.M. KATO

J U D G M E N T

The accused Wilson Mugoya, whom I shall hereinafter refer to as the accused, is indicted with two counts each of which is for defilement contrary to section 123(1) of the Penal Code Act as amended by Act No. 4A of 1990.

The first count alleges that the accused during the month of August, 1992 while at plot 19B Lubas Road in the District of Jinja defiled one Joy Namuwaya who was under the age of 18 years. The second count alleges that on 7th November, 1992 the accused defiled one Babura Nakiranda a girl who was under the age of 18 years; this second defilement took place at the same place as in the first count. The accused pleaded not guilty to both counts.

Prosecution called a total of 4 witnesses in support of their case. The first witness to testify on behalf of prosecution was Joy Namuwaya (PW1). She told the court that one day in August in 1992 she was alone at home as her father had gone to work and the mother had gone to the village. The accused whom she knew very well as a neighbour called her to his room, on entering his room the accused told her to remove her nicker but she refused and she started running out of the room as she was doing so the accused grabbed her and dropped her on the bed he then had sexual intercourse with her.

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After he had had sexual intercourse with her he warned her not to tell anybody about what had happened otherwise he would kill her. The girl went away and it was quite sometime before she gathered couriage and told her father what had happened she was finally taken to the hospital where she was examined.

The second witness called upon by prosecution to give evidence was the tearful Babura Nakiranda (PWII). She told the court that on 7/11/92 at about 4.00 p.m. the accused requested her to go and help him to bake his chapati. She went and assisted him but after the baking was over the accused called her to his room where he ordered her to lie on the bed when she resisted and wanted to run away the acused seized her and dropped her on the bed where he defiled her. A neigbour known as aunt Grace then came in and the accused rose up. When she tried to raise an alarm the accused put his hand on the mouth and threatened to kill her if she did not stop shouting. When her father returned he took up the matter and the accused was arrested while she was taken to the doctor for treatment.

The third witness called by prosecution was W/D/IP. Balidawa (PWIII). In her evidence this police officer stated that on 12/11/92 she recorded a charged and caution statement from the accused person. In his statement the accused denied ever having had anything to do with PW1 (Joy Namuwaya) but he admitted having had sexual intercourse with Babura Nakiranda who approached him in his own room and induced him to play sex with her.

The fourth and last prosecution witness was Dr. Muki Musa (PWIV) whose evidence was materially that on 11/11/92 he medically examined both complainants (Joy Namuwaya and Babura Nakiranda).

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His finding in respect of each complainant was that each of them had had sexual intercourse because each of them had had her hymen ruptured and had a perineal tear in a region between the vagina and the anus. At the time of examination Joy was found to be 8 years old and Babura was found to be 9 years old. On the same day this same doctor examined the accused Wilson Mugoya whom he found with no injury and he was mentally normal.

On his part the accused in his unsworn statment denied ever having defiled any of the two complainants. According to him the two girls told lies against him because of an existing grudge between himself and the parents of the girls. He however stated that one day when he was in his room preparing to go and bathe Babura went to him and when he asked her as to what she wanted she replied by asking him what he was doing it was at that time that aunt Grace came and told him that there was somebody who wanted to buy chapati by then Babura was still standing by the door. He went and sold his chapati but at about 10.00 p.m. a man called Kairu arrested him and took him to RC officials who in turn took him to the police. As for the confession he admitted having made it but he did so when his head was not working properly as he had never been to any police station before, he further stated that in his charge and caution statement he had denied ever defiling the two girls.

The law places a heavy burden upon prosecution to prove its case against an accused person beyond reasonable doubt. It is also the law that an accused should never be called upon to prove his innocence: Woolmington v D.P.P /1935/ AC 462 and Oketh Okale v Republic /1965/ EA555 at page 559.

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It is also trite law that an accused person should be convicted on the strength of the case as established by prosecution but not on weakness of his defence: R v. Israili Epuku s/o Achietu [1934] EACA 166 at page 167.

In a case of defilement the prosecution is enjoined to prove beyond reasonable doubt, inter alia, unlawful sexual intercourse and the age of the victim being below 18 years and that the accused did in fact participate in the act of unlawful sexual intercourse directly or indirectly. (See section 123 (1) of the Penal Code Act as amended by statute 4A of 1990).

Prosecution relied on the evidence of all the four witnesses called in court to prove that the accused in fact had unlawful sexual intercourse with both Joy Namuwaya and Babura Nakiranda. The evidence of each witness has already been outlined elsewhere in this judgment, but here it is necessary to point out that the two little girls said that each of them had had sexual intercourse with the accused in his room at a different time. I accept their testimony as truthful. The evidence of the two victims was sufficiently supported or rather corrobarated by that of Dr. Muki Musa who found that each of the two girls had actually had sexual intercourse because he found the hymen of each child ruptured and each girl had a tear around the area between the vagina and the anus. The doctor's evidence was quite consistent with the evidence of the two complainants because in the case of Joy he said the rupture was old and Joy herself told the court that it took quite some time before she could be medically examined as she feared to reveal to anybody what happened.

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In the case of Babura the doctor found the rupture of hymen to be fresh this finding is in agreement with what Babura told the court that she was taken to Jinja hospital by her parents the next day following the defilement. I find as a fact that prosecution has proved beyond reasonable doubt that there was unlawful sexual intercourse committed upon the two complainants.

As regards to the age of the two victims, here again prosecution case depends on the evidence of the doctor and that of the two complainants. At the time she gave evidence in court Joy said she was aged only 9 years which means at the time she was defiled in August, 1992 she was 8 years old. In his evidence Dr. Muki says that when he examined her on 11/11/92 he found her age to be 8 years. As for Babura she said at the time of giving evidence she was 10 and the doctor in his report says when he examined her on 11/11/92 she was 9 years old.

The evidence of these 3 witnesses (Dr. Joy and Babura) clearly shows that at the time of defilement Joy was aged 8 years and Babura 9 years respectively. It goes without saying that the age of the victims was far below 18 years. I accept the evidence of the three witnesses in relation to the age of the victims to be truthful and I hold that prosecution has proved beyond reasonable doubt that the two complainants were below the age of 18 years at the time the two offences were committed.

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Having found that there was an act of unlawful sexual intercourse with the two girls who were below the age of 18 years it can safely be said that prosecution has proved beyond reasonable doubt that the two offences of defilement were committed.

One pertinent question that must be answered at this stage is: were the two offences or any of them committed by the accused person now in the dock? It is the case for prosecution that the accused committed both offences; but the accused on his part is quite adamant that he did not commit any of the two crimes.

Prosecution case on this issue hinges on the question of identification. The two young girls stated that they were living with the accused on the same plot for a long time before this incident took place and that they knew the accused very well the accused does not deny these facts. The two complainants also stated that he defilement used to take place during broad day light and for a long time so there were conditions favouring correct identification of the accused. This was not a case of hit and run. The accused in his defence said that the two girls told lies against him because of a grudge which existed between him and the parents of the children, according to him the grudge arose from an incident whereby the landlord prevented the complainants' parents from using a certain way and they thought it was the accused who had induced the landlord to make such a decision. The two complainants in their evidence denied existence of any grudge between the accused and their parents. I agree with the evidence of the two complainants on that point; even if the incident referred to by accused ever took place I do not think it would have created any grudge between the accused and the parents of the complainants to the extent of making the two little children fabricate evidence against the accused for a serious crime of this nature.

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Prosecution tendered a statement made by the accused to D/IP. Balidawa (PWIII) in support of their case. In that statement which was never challenged, the accused denied ever having defiled PW1. While in court the accused said that he in fact did not admit ever having had anything to do with PWII, he further stated that his head was not working well at the time he made the statement.

I find as a fact that the accused voluntarily made the statement to PWIII and the contents of that statement are correct as far as PW11 is concerned. The contents of the statement are so consistent with the evidence of PWII that it would be unreasonable to say that what was contained therein were a fabrication, the accused's story in his statement whereby he denied ever having defiled PWII cannot be true. The accused says he was confused by the time he made his statement because he had never been to any police station before, it may be true that he had never been to the police before but from his statement he was well composed otherwise how did he come to admit the crime in respect of one victim and denied it in respect of the second victim.

The only reason why he admitted the crime in respect of Babura and denied that of Joy is that his mind was quite alert and he knew well that in the case of Joy there was no independent eye witness to contradict him but in the case of Babura aunt Grace had seen what had happened and she might be called upon to contradict him so to avoid that happening he had to admit. The accused's statement does strengthen the case against him in respect of Babura.

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The evidence of Joy and Babura and the confession of the accused (as far as Babura's case is concerned) clearly establish that the accused and nobody else did defile the two girls, the accused was properly identified by both complainants; the accused's contention that he did not defile any of them is rejected for reasons already given.

In his confession concerning Babura the accused tried to establish that he did what he did with Babura's consent but consent of the victim in this type of crime is not a defence. The accused also in his confession stated that he did not go deep into the vagina of Babura and that he did not ejaculate. The slightest penetration is enough so it is not a defence to say that one just stopped at the mouth of the vagina, it is not also a defence to say that the accused did not ejaculate, because ejaculation is not one of the ingredients of the offence; Halsbury's Laws of England Volume 10 3rd Edition paragraph 1438 page 746.

Considering the evidence on record and in full agreement with the unanimous opinions of the two gentlemen assessors, I find that prosecution has proved its case against the accused in respect of both counts beyond reasonable doubt; I accordingly find the accused guilty on both counts and I do convict him of the offences of defilement as charged under section 123(1) of the Penal Code Act on each count.

C.M. KATO
JUDGE

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