

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 75/1994

UGANDA PROSECUTION

VERSUS

ABDALA TENYWA ACCUSED

BEFORE: THE HONOURABLE JUSTICE C. M. KATO

J U D G M E N T

The accused person Abdala Tenywa is indicted for defilement c/s 123(1) of the Penal Code Act. In the indictment it is being alleged that on 4/11/1993 in the village of Wante in the district of Iganga the accused had unlawful sexual intercourse with one Zamiru Mutesi, a girl who was below the age of 18 years. The accused pleaded not guilty to the indictment.

It is trite law that prosecution bears the burden of proving the guilt of an accused beyond reasonable doubt and the accused does not bear the burden of proving his innocence: Woolington v. DPP (1935)CA 462 and Okathi Okale v. Republic (1965)EA 555 at page 559. It is also part of our law that an accused person should not be convicted on the weakness of his defence but should be convicted on the strength of the case as proved by prosecution: R.v. Israil Epuku s/o Achietu (1934)1 EACA 166 at page 167.

In a case like this one prosecution is required to prove 3 main things:

- (1) That there was sexual intercourse;
- (2) That the complainant or the victim was under the age of 18 years;
- (3) That the accused participated in that intercourse (see sec. 123 (1) of the Penal Code Act).

I will start with the first ingredient first, the case for prosecution has been that while in Wante village the accused had sexual intercourse with the complainant Zamiru Mutesi. Zamiru herself testified that she had sexual intercourse with the accused during the days she was staying with him in that village. Although this witness was not so consistent of what she told the court, I am inclined to believe her when she says that she had sexual intercourse with a man. This being a sexual offence however as a matter of

practice corroboration of the evidence of the complainant is required: R. v. Kostant Kirmunyo (1943) 10 EACA 64. I must say in the present case that corroboration has not been readily forthcoming. The evidence of the other witnesses does not bear any element of corroboration at all. The best corroboration would have possibly come from the doctor's evidence which was not produced in this court. Lack of this corroboration cannot be said to have strengthened the case for prosecution.

Regarding the issue of the age of the complainant, the learned counsel for defence Mr. Okalang made a serious attack upon it. With all due respect I am inclined to agree with him when he says that the age of the complainant was not satisfactorily proved. According to the mother (PW3) the girl was about 19 years and she estimated the girl was born during Amin's rule when the Asians were being sent away. This court takes a judicial notice of the fact that the Asians left this country in 1972 which means by last year the girl was about 19 years or 20 years old. The girl at first stated that she was 14 years but later on she changed her mind and said that she did not know her age and that the age of 14 years had been suggested to her by her uncle (PW5), but her uncle Najibu (PW5) stated the girl was aged 15 years but again during his cross-examination he confessed that the girl was born in Mombasa when he was not there so he cannot be sure of the date when the girl was born. If we are to take her story as true that her uncle told her that her age was 14 years, then how is it that this same uncle told the court that the girl was aged 15 years. According to that evidence of the 3 witnesses one is left in doubt as to whether the girl was below 18 years or above; as Mr. Okalang says the best witness on this point was the mother but since the mother says the girl was about 19 years old and according to her estimate the girl was born during Amin's time that age of 19 years may be taken to be reasonable. It is my finding that prosecution has not conclusively proved that the complainant was under the age of 18 years, on the contrary the age may be 19 years or over as stated by the mother. Mrs. Tuma one of the two assessors who assisted me in this case felt that since the mother was semi-illiterate her evidence should be ignored on the point of age, with due respect to the lady assessor I would like to point out that illiteracy is a misfortune not a privilege.


On the issue of as to whether or not the accused participated in the defilement of the girl I would say the only witness capable of proving this issue is the girl herself. She said this man (accused) went with her to the village and they stayed together for some time. He would leave her there and go to work then return to her. I feel she has told the truth about the identity of the accused although the accused must have been using Tudde as part of his names. She had no reason for telling lies against him. I reject accused's story that he did not have anything to do with the girl.

Considering the evidence generally and in particular the fact that there was no clear evidence as to the real age of the complainant I find that it would not be safe to secure a secure or satisfactory conviction on the evidence available. I hold that prosecution has not discharged its duty of proving accused's guilt beyond reasonable doubt and I find the accused not guilty and accordingly acquit him of the offence of defilement.

Both assessors had advised me to convict the accused but I have not followed their advice because they did not appear to have seriously considered the weakness in prosecution case regarding the important element of the age of the complainant.

Mr. Okwanga invited the court to consider an alternative finding of abduction, I find it not necessary to consider that request in view of the quality of evidence as presented in this court by prosecution.

Accused is to be released from prison forthwith unless he is being kept there for some other lawful purposes.


C. M. KATO

JUDGE

21/12/1994

