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

CRIMINAL SESSION CASE NO. 66/94

UGANDA :: PROSECUTION

VERSUS

SAIDI BAWALANE :: ACCUSED

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

J U D G M E N T

The accused person Saidi Bawalane is indicted for defilement contrary to section 123(1) of the Penal Code Act. The Indictment alleges that the accused person between the months of September and October 1993 in diverse places in the district of Jinja unlawfully had sexual intercourse with Rose Nalubega who was by then under the age of 18 years.

The accused pleaded not guilty to the indictment. His story was that he knew nothing about the girl except that his friend Ali Higyi was in love with the girl and the accused was being suspected because he used to move with Ali. As for the confession Ex. PII he said he did not make it, the policeman wrote his own words.

It is the law that prosecution bears the burden of proving the guilt of an accused person beyond reasonable doubt and the accused has no burden of proving his innocence: Okethi s/o Okale V. R. (1965)EA 555 at page 559. In the instant case the prosecution has the burden of proving beyond reasonable doubt that an unlawful sexual intercourse took place and that the age involved was below 18 years and that the accused was directly or indirectly involved in that act of unlawful sexual intercourse.

Prosecution called the evidence of 3 witnesses to establish the age of the girl being below 18 years. The 3 witnesses were: Fred Byekwaso (PWI), father of the girl who testified that the girl was born in 1979, the 2nd witness was Margret Byekwaso (PW2) the mother of the girl she testified that Rose was born on the 4/2/1979 and the 3rd witness to testify on this issue was Dr. Israel Ahimbisibwe

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(PW5) who testified that on 29/10/1993 he examined one Rose Nalubega whom he found to be 14 years old. The evidence of these 3 witnesses was not seriously challenged. I accept it as being truthful and I make a finding that at the time of the alleged defilement Rose Nalubega was about 14 years old and therefore she was below the age of 18 years.

The next issue which requires consideration is whether or not there was any such a thing as defilement; direct evidence tending to prove this issue would have come from the complainant Rose Nalubega who for some unclear reasons did not attend court; there is however the evidence of Dr. Ahimbisibwe who testified that when he examined this girl Rose Nalubega he found that her bymen had been ruptured a long time ago and that she was 6 weeks pregnant.

The accused in his confession, the details of which I shall have to deal with later on in this judgment, stated that he had been having sexual intercourse with Rose Nalubega before his arrest. In view of that confession and the doctor's evidence I hold that prosecution has proved beyond reasonable doubt that there was sexual intercourse and therefore the offence of defilement was committed.

The next matter to be considered is whether or not the accused took part in that defilement. The defence made a serious attack on the issue of the complainant in this matter not having testified to tell the court as to who actually defiled her. It is not the law that in all the cases complaints must testify in order to secure a satisfactory conviction, although it is desireable that in cases of this nature every effort should be made to get the evidence of the girl who believes that she was defiled. The prosecution case is essentially based on the confession which the accused made before Inspector Yahaya Ali Seyimbe (PW4). The confession was later repudiated by the accused who denied ever having made the confession and he said that what appeared in the confession were the words of the policeman who wrote it. The law regarding repudiated confessions was stated in the case of R. v. F. Kinene & ors (1941)8 EACA 96 as follows: that when an accused person who makes a confession which is later on repudiated the court must make a finding as to whether or not as a matter of fact such a confession was ever made. In the present case the evidence of PW4 D/Inspector

Yahaya Ali Senyimbe shows that the accused in fact had been cautioned and charged. The learned counsel for the defence Mr. Masiga in his submission argued that the statment made by the accused was nothing but an admission. He further argued that the accused could only be bound by the Luganda version ofthe admission which he signed but not the English version which he did not sign; since the accused spoke Luganda it would have been unfair to make him sign the English version which he apparently did not understand.

After considering the evidence of PW4 and accused's statement I find as a matter of fact that the accused actually did make the confession to Detective Yahaya. I cannot see any reason as to why this policeman should have imagined the event which he had never witnessed.

Having resolved that the confession was actually made the next matter that requires consideration is the issue of the effect of a repudiated confession. There is a long list of authorities stating that when an accused person makes a confession and later repudiates it such a confession does not require corroboration and the court may draw an reference that the confession is being denied of its truth: R. v. Labasha Bin Maganga (1936)3 EACA 48, R. v. Bira s/o Kusa (1944)11 EACA 77, R. v. Erieza Muhudwa (1949)16 EACA 148 and Gathunga s/o Migwe V. R. (1953)20 EACA 294. What is in issue in the present case is whether or not this court can proceed to convict the accused on his own confession which is uncorroborated and more so when this offence is of sexual nature. I have already stated that repudiated confession does not require corroboration but it is our rule of practice that in sexual offences the court should be catious in basing a conviction on uncorroborated evidence as a matter of practice: R. v. Kostant Kirimunyo (1943)10 EACA 64. In the present case I find that the accused's statement in his confession that he had been having sexual intercourse with the complainant between September and October 1993 has been sufficiently corroborated by the doctor's evidence that the complainant had in fact been having sexual intercourse prior to his examining her, and the existence of pregnancy of 6 weeks suggests that the intercourse was between September and October.

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Looking at the evidence generally and considering all the circumstances of this case I am satisfied that prosecution has proved beyond reasonable doubt that the accused person in fact participated in the defilement of Rose Malubega. As I have already pointed out it is not the requirement of the law that the complainant must testify in all cases of this nature, each case must be taken on its own merits.

In all these circumstances and in full agreement with lady assessor Mrs. Tuma I find the accused guilty of defilement and I do convict him of that offence under section 123(1) of the Penal Code Act. I have not agreed with the advice of the second assessor who advised me to acquit the accused because he did not seem to have properly evaluated the evidence on record.

C.M. KATO
JUDGE
9/12/1994