

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO.

CRIMINAL SESSION CASE NO. 77 OF 2004

UGANDA PROSECUTION

Versus

KWATAMPOLA PETER ACCUSED

BEFORE: HON. JUSTICE V. A. R. RWAMISAZI-KAGABA

J U D G M E N T

Kwatampola Peter, who I shall refer to as “the accused” in the rest of my judgment is indicted for the offence of defilement contrary to section 129(1) of the Penal Code Act. The particulars in support of the charge are that, Peter Kwatampola, between the 25th and 27th day of August 2001 at Kiyirita village in Mukono District had unlawful sexual intercourse with Nantongo Justine, a girl under the age of 18 years.

The accused denied the charge and was represented at his trial by Simon Wankandya while the prosecution was led by M/s Farida Nakayiza, a State Attorney.

The prosecution called six witnesses to prove its case. In brief, the prosecutor’s case revolved on Justine Nantongo (PW6) the victim in this case.

Nantongo testified that she visited her paternal aunt, Nalwasa Jane (PW4) in the month of August 2001, and while there, Nalwasa directed her to begin cohabiting with the accused who lived a few metres from Nalwasa's house. While there, the accused had penetrative sexual intercourse with her every night for about three weeks. She ran back to her aunt's house but her aunt ordered her to return to the accused's house and continue living with him as his wife. As if that was not enough, Nalwasa went to accused's house to ensure Nantongo was there. Nantongo ran away to her uncle, Ssali but that uncle ordered her to return to the accused and promised to take her to her parents in Wakiso which he never did. Ssali was interested in getting Shs. 30,000/= from the accused as a form of bride price. When her ordeal became unbearable she reported her plight to some people. One of such people was Rose Mbowa (PW5).

She told Rose Mbowa how her aunt had forced her to live with the accused and that the accused had defiled her several times in the course of her stay at his house. With the assistance of Rose Mbowa, Nantongo reported the defilement to Cpl. Olwedo (PW3) at Namataba Police Post. The accused was then arrested and charged with defilement.

Nantongo was examined by Dr. Kagombe (PW1) on P.F. 3 on the 30/8/2001. She was found to be 13 years old, having been penetrated, with her hymen ruptured long ago (exh. P1). The accused was similarly examined on P.F. 24 by Dr. Kasibante (PW2) on the 31/8/2001. He was found to be 30 years and mentally normal. The report is exhibit P2. In his defence, the accused denied

ever having sexual intercourse with Nantongo.

In all criminal cases the burden of proof rests on the prosecution. The prosecution must prove every ingredient of the offence beyond reasonable doubt. If any doubt is created by the evidence on record, that doubt must be resolved in favour of the accused. The prosecution shall succeed on the strength of its evidence and not on the basis of the weakness of the defence or lies told by the accused.

See: (1) Woolmington vs. D.P.P. (1935) A.C. 462.

(2) Sentale vs. Uganda (1968) EA 365

(3) Leonard Aniseth vs. Republic (1963) EA 206.

In trials of sexual offences, and as a matter of practice, the court must look for and obtain some corroboration of the evidence of the prosecutrix implicating the accused in the commission of the offence. This corroboration may be direct or circumstantial. It could be drawn from the conduct and circumstances of the victim and or accused before, during or after the commission of the offence. But the court can convict on the uncorroborated evidence of the victim if, after warning itself about the dangers of convicting basing on the uncorroborated testimony of the prosecutrix, the court finds the evidence of the victim reliable and the victim truthful.

See: (1) Chila and another vs. Republic (1967) EA 72.

(2) Uganda vs. Shah (1966) EA 30.

(3) Richard Gichuku Wameru vs. Republic EACA – Criminal Appeal 20/1973.

The accused is indicted for defilement which consists of three ingredients,

namely:

- . that the victim in the charge was a female under the age of 18 years,
- . the victim was subjected to sexual intercourse, and
- . it is the accused who had sexual intercourse with her.

*See: (1) Bassita Hussain vs. Uganda – Criminal Appeal 35/1995 (S.C.)
(2) Uganda vs. Photo Orugi – Criminal Session Case No. 434/1994*

Sexual intercourse is complete when there is the slightest penetration of the male penis into the female's vagina. Whereas the rapture of the hymen, injuries to the vaginal canal and surrounding areas and the presence of semen in the vagina may be strong evidence of sexual intercourse having taken place, their absence does not exclude sexual intercourse having taken place.

*See: (1) Safari Innocent vs. Uganda – Criminal Appeal No. 20/1995 (S.C.)
(ii) David Kizito Bogere vs. Uganda – Criminal Appeal 23/1995*

Justine Nantongo described how the accused had sexual intercourse with her during every night of her three weeks stay at his house. He would push his penis deep into her vagina. She would cry but with no help coming from anyone. Her story is corroborated by her feeling pain and crying during the sexual assaults on her, her reports to D/Cpl. Olwedo (PW3) and Rose Mbowwa (PW5) that the accused had defiled her several times. The accused himself admitted to Nalwasa Jane (Pw4) that he had kept Nantongo at his house for two days. Nalwasa not only sold out Nantongo to the accused as a sex slave but she sent her back when Nantongo escaped from the accused and went to the witness to ensure she was there. As further exposure to sexual intercourse, Nantongo had no knickers on when she reported to Mbowwa

(PW5). Further corroboration is contained in the Dr. Kagombe's report exh. P1 who found Nantongo's vagina had been penetrated and her hymen ruptured.

The defence did not dispute the fact of Nantongo having been aged below eighteen years in August 2001 and the fact that Nantongo was subjected to penetrative sexual intercourse. I therefore find the prosecution has proved that Nantongo was sexually abused on the dates stated in the indictment.

Age:

Nantongo stated she is now 16 years old. She gave evidence on oath. The defence did not challenge her evidence that she was 13 years old in 2001. Dr. Kagombe (PW1) stated her age to be 13 years when he examined her on P.F. 3. I also hold her age of being under 18 years in 2001 proved by the prosecution.

See: Remigius Kiwanuka vs. Uganda – Criminal Appeal No. 41/1995.

Participation of the accused:

Both Nalwasa (PW4), the aunt of Nantongo and the accused lived very close to each other, fifty metre apart. Nalwasa handed over Nantongo to the accused during the day and in broad day light. She lived with the accused continuously for three weeks before running away to safety. He would walk away in the light of day and return home after duty. She (Nantongo) had lived in the village for four days before her aunt sacrificed her to the accused. Her aunt – Nalwasa, went to the accused's house to ensure Nantongo was

there. She, Nalwasa, even forced Nantongo back to the accused's house when Nantongo tried to escape. Finally she reported, no other person to Mbowa and Olwedo than the accused Kwatampola as her defiler, which reports led to his arrest.

Some of the aids which the court may apply to establish proper identification include the light and its intensity available to the witness, the duration of the attack, the duration of the commission of the offence, the proximity of the victim to the attacker during the commission of the offence and the period during which the witness (identifying) has associated with the accused.

See: (1) Constantino Okwel alias Magendo vs. Uganda-.....ppeal No. 12/1990 (S.C.)

(2) Remigious Kiwanuka vs. Uganda – Criminal Appeal No. 41/1995.

Applying the legal principles pronounced in the above cited cases to the facts of this case. I am left in no doubt that the accused is the defiler of the accused. The story of Nantongo has been amply corroborated by the testimony of Nalwasa (PW4) D/Cpl. Okwedo and Rose Mbowa (PW5).

In his defence the accused denied having sexual intercourse with the victim though he admits Nantongo led the arresting police officers to his home. He alleged, he would have infected her with his disease if he had sexual intercourse.

I wish to observe here that when the accused came for his trial he had a tube (catheter) fixed into his bladder, which catheter the accused opened to release urine from his bladder. All the prosecution witnesses did not state that the

accused had this tube when he was arrested. The doctor, who examined him on **P.F. 24 on 31/8/2001 (Exh. P2)** never made any mention of this physical deformity. Moreover, as the assessors pointed out, this catheter did not make the act of sexual intercourse impossible to perform as the tube was pushed between the pubic area and the navel well away from the penis itself.

The court therefore finds that the accused did not have this urinal tract complication when he defiled Nantongo in August 2001. He must have developed it when he was in custody. He was capable of using his penis for sexual intercourse during the period stated in the indictment.

In light of the evidence of Nantongo which is corroborated by the evidence of the Dr. Kagombe, D/Cpl. Olwedo, Nalwasa and Mbowa on all the three ingredients of the offence of defilement. I find the prosecution has proved the offence of defilement against the accused beyond reasonable doubt. I reject the defence version that he (accused) did not defile the victim – Nantongo.

In agreement with the unanimous opinion of both assessors, I find the accused guilty of the offence of defilement and convict him for the same contrary to section 129(1) of the Penal Code Act.

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V. A.R. Rwamisazi-Kagaba
J u d g e
5/1/2005