

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT IGANGA**

**CRIMINAL SESSION CASE NO. 037 OF 2011**

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**UGANDA.....PROSECUTO  
R**

**VERSUS**

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**KASULE MUSTAPHA.....ACCUSED**

**BEFORE: THE HONOURABLE LADY JUSTICE FLAVIA SENOGA  
ANGLIN**

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**JUDGMENT**

20 The accused person KASULE MUSTAPHA was indicted for Aggravated  
Defilement c/s 129 (3) & (4) (a) & (c) of the Penal Code Act.

The prosecution's case was that the accused on the 16.02.10 at  
Malongo "A" village, Malongo sub-county in Mayuge District had  
25 unlawful sexual intercourse with Namayanja Jalia a girl aged 14 years  
over whom he had authority. The victim was staying with the accused  
and his wife. She is a sister to the accused's wife.

The accused person denied ever having had sexual intercourse with the  
30 victim. He said that on the date in question he was at home when he  
was arrested at about 10.00pm. He was only informed of the alleged  
offence the next morning.

To sustain the charge against the accused person, the prosecution had to prove the following ingredients of the offence.

- (1) There was an unlawful sexual act committed.
  - (2) The victim of the offence was below 18 years of age at the time of the offence.
  - (3) It is the accused person who performed the unlawful sexual act.
  - (4) Under Section 129 (4) (c) that the accused person was a parent, guardian or a person with authority over the victim.
- Refer to the case of **Bassita Hussein vs. Uganda Criminal Appeal 35/95.**

Court is mindful of the principles of law that an accused person does not bear the burden of proving his innocence. He only needs to raise a defence that may raise doubt in the mind of the court. The burden of proof is accordingly on the prosecution, to prove all the ingredients of the offence beyond all reasonable doubt. The burden never shifts except in some exceptional cases fixed by law. Refer to **Woolmington vs. DPP [1935] Ac 322, Miller vs. Minister of Pensions [1947]2 ALL ER 372 & Sekitoleko vs. Uganda [1967] EA 531.**

To prove the first ingredient of the offence, that is, that an unlawful sexual act occurred the prosecution relied upon the evidence of PW1 Dr. Mwima Patrick who examined the victim on 18.02.10 and that of PW2 Bogere Paddy Paul who took the charge and caution statement of the accused person, and PW3 Kibwika Patrick the arresting officer.

The doctor's evidence shows that the victim's hymen had been ruptured although it is not clear when that had happened. There were no injuries

or inflammations around her private parts. However, it was evident that she had had sex before although there were no injuries consistent with use of force. The evidence was admitted under Section 66 T.I.A.

5 However, the accused while admitting making a statement, denied that he ever admitted to have had sexual intercourse with the victim. But the defence did not dispute this ingredient. Court accordingly finds that the act of sexual intercourse was proved beyond all reasonable doubt.

10 To prove that the age of the victim was below 18 years the prosecution also relied upon the evidence of PW1 the medical report - Exhibit P<sub>1</sub>. The report shows the victim was 14 years.

The victim and her mother did not testify. But since the report of the  
15 doctor was not objected to save from the fact of accused having had sex with the victim, the defence agreed that this ingredient had also been proved to the required standard. Court therefore finds that it was proved that the victim was below 18 years at the time of the alleged offence.

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Court now proceeds to determine whether it was the accused person who performed the sexual act with the victim.

On this ingredient the prosecution relied upon the evidence of PW2 who  
25 recorded the charge and caution statement of the accused person; and PW3 Kibwika Patrick who arrested the accused person.

The statement recorded by PW2 was admitted in evidence as Exhibit P<sub>3</sub>. In the statement the accused admitted having sex with the victim when

his wife had taken their child Umaru to the Clinic. It is indicated that the wife of the accused returned and caught accused red handed in the act. That the matter was reported to LC.1 chairperson and then to Nawango police post. The suspect was arrested and later charged.

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The accused retracted his alleged admission saying that, although he made the statement, he never admitted having had sex with the victim.

PW3 Kibwika Patrick received the report of defilement from the wife of the accused one Kamiyati. He went with the complainant to her home at Malongo 'A' Trading Centre.

The witness contends that, when accused saw him with his (accused's) wife, he ran away. But the witness followed and arrested him and took him to Nawango police post. The accused denied having sex with the victim.

The same witness recorded a statement from Kamiyati and from the victim Jalia.

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Kamiyati is said to have told him that she took the children to school leaving the victim behind. That when she returned the victim told her that accused had forced her into sex.

25 The victim confirmed this in her statement.

The two statements were admitted in evidence for identification pending the appearance of both Kamiyati and the victim. However the two never appeared to testify.

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PW3 also tendered in the sketch plan of the place where the act is alleged to have taken place - Exhibit P<sub>4</sub>.

In his defence, the accused totally denied ever having had sex with Jalia.

5 He said that on the date in question he spent the day at home and was arrested at about 10.00pm. The statement he first made on 17.02.10 was admitted in evidence as Exhibit D<sub>1</sub>. The accused denied the allegations against him.

10 As earlier pointed out, the accused also retracted the charge and caution statement. Claiming he was tortured and beaten and that the statement was never read back to him although he thumb printed.

Counsel for the State submitted that the prosecution had adduced  
15 sufficient evidence against the accused to sustain the charge. And while the victim did not testify her evidence made to the police officer was admissible as to the identity of her assailant - relied upon the case of **Mayombwe Patrick vs. Uganda Criminal Appeal 17/02.**

20 Further that the conduct of the accused i.e. running away on seeing police was not conduct of an innocent person and is circumstantial evidence against the accused - cited the case of **Magezi Joseph vs. Uganda SC. Criminal Appeal 08/93.**

25 I agree with counsel for the accused that the evidence against the accused person solely depended on the confession and the evidence of PW3; which remained hearsay as the victim and Kamiyati never appeared to testify.

Decided cases have repeatedly stated that repudiated or retracted confessions must be accepted with caution. And before a conviction can be based on such a confession, court must be fully satisfied in all circumstances of the case that the confession is true. The court will  
5 only act on the confession if it is corroborated by independent evidence accepted by the court - **Festo Androa Asenwa & another vs. Uganda SC Appeal 01/88 and Tuwamoi vs. Uganda [1967] EA 84.**

The accused in the present case made 2 statements. In the first one he  
10 denied committed the offence - Exhibit D<sub>1</sub>.

Two days later, 19.02.10 he is alleged to have made another statement admitting the charge. In the circumstances there was need for independent evidence to corroborate in material particulars what the  
15 accused is alleged to have stated.

The apparent change of mind of the accused person within 2 days, from what he stated in his earlier statement casts doubt on the reliability of the confession. The doubt would have been explained if the victim and  
20 her sister Kamiyati the wife of the accused had testified.

Without their evidence, the prosecution evidence becomes the word of PW2 against that of the accused person.

25 Even if the evidence of PW2 were to be relied upon, it totally contradicts that of the accused person. While accused is alleged to have told police that he was caught red handed, the wife of the accused is alleged to have claimed that she was told by the victim.

This is a major contradiction in the prosecution evidence which was never explained. Major contradictions if not explained lead to the evidence of the witness being rejected.

- 5 Upon considering all the material points in his case and the surrounding circumstances, I am not satisfied that the confession can be relied upon. The act of sexual intercourse itself is also highly doubtful as the Doctor's evidence did not indicate that a fresh act had occurred. What is on record is that the victim is believed to have had sex before.

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Without independent evidence pointing to the accused as the perpetrator, I am in agreement with the assessors that there is no sufficient evidence to sustain the charge.

- 15 It is trite law that a conviction must depend upon the strength of the prosecution case and not upon the weakness of the defence.

- For those reasons I find that the prosecution failed to prove the 3<sup>rd</sup> ingredient of the offence to the required standard. The accused is accordingly found not guilty as charged and he is acquitted. He should be set free forthwith unless otherwise held on other legal charges.
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**Flavia Senoga Anglin**

25 **JUDGE**

**01.10.13**

01.10.13:

Accused present

Katami Lydia for State present

5 Balidawa Ngobi holding brief for Kyoziira Sam for accused present

Counsel for State: Matter is for Judgment.

Court: Judgment delivered in open.

10 Accused acquitted of the charge and should be set free  
forthwith unless otherwise held on other legal charges.

**Flavia Senoga Anglin**

15 **JUDGE**

**01.10.13**