

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

CRIMINAL CASE NO. HCT-04-CR-SC-0012 OF 2009

UGANDA:.....PROSECUTOR

VERSUS

MAASA SIMON ALIAS WEMESA:.....ACCUSED

BEFORE HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGMENT

The accused Maasa Simon Peter alias Wemesa was indicted for Aggravated Defilement contrary to Section 129 (3) and (4) of the Penal Code Act. Cap. 120. The particulars of the Indictment state that Maasa Simon alias Wemesa on the 24th November 2008 at Bungulya Zone, Namanyonyi, sub-county in Mbale District had unlawful sexual intercourse with Apio Ojoyi a person with disability aged 15 years.

The accused denied the Indictment and a plea of not guilty was recorded. Prosecution called four (4) witnesses to prove its case and also relied on PW2 (Zuena Ojoyi), PW3 (Olupot Muzamiru), PW1 (Dr. Rubanza Barnabas) and PW4 (Hassan Nkutu)

The accused gave unsworn Statement and raised defence of alibi and called no other witnesses. The DW1 stated that he is a church catechist in Aisa Teko Church and on 24th November 2008 was taking Church money to Mbale. He stated that he was having an affair with Zuena Ojoyi who had requested him to give her some of the Church money but when he told her that he did not have any, it did not go well with Zuena Ojoyi. According to DW1 Zuena Ojoyi. According to DW1 (Zuena Ojoyi) stated that she will create a problem against him. DW1 testified that he returned from Mbale at about 12:00 p.m. and as he had diarrhea, he branched and whilst defecating, he heard an alarm. Precisely Prosecution case was as follows:-

On 24th November 2008, the accused had unlawful carnal Knowledge (sexual intercourse) with Apio Ojoyi an imbecile aged 15 years. This offence was allegedly committed in Bungulya

Parish, Namanyoyi sub-county Mbale District. The maximum sentence for this offence is death. Before Court determines whether Prosecution proved its case against the accused I will outline a few guiding principles which are relevant in disposing of this case.

The first principle relevant here is that Prosecution bears the burden of proof against the accused except in a few cases where the law provides to the contrary. *See: Woolmington vs. DPP (1935) AC 462; Bigirwa Edward vs. Uganda Criminal Appeal No. 027 of 1992*. The same principle can be seen in the Constitution of the Republic of Uganda 1995 as amended under Article 28 (3) where it is provided that a person charged with a criminal offence shall be presumed to be innocent until proven guilty.

The second principle is that the standard of proof required in criminal cases is proof beyond reasonable doubt. However, this does not mean proof beyond reasonable doubt. However, this does not mean proof beyond shadow of doubt but rather a reasonable degree of probability that it is the accused who committed the offence with which he is charged. (*See: Miller vs. Minister of Pension [1997] ALLER 372*). Above all where the victim alleges that the accused committed a sexual offence before Court acts upon the victim's evidence it must warn itself and the assessors of the danger of convicting upon the uncorroborated evidence of the victim. Where Court does not find the required corroboration, if satisfied that the victim was a truthful witness it may go ahead and convict. In this particular case, where it is a charge of aggravated defilement, involving a child with disability Prosecution has to prove the following ingredient:-

- (i) That the victim Apio Ojoyi is a person with disability.
- (ii) That the victim Apio Ojoyi experienced sexual intercourse.
- (iii) That the accused Maasa Simon Peter alias Wemesa is the one who performed the sexual act.

With regard to the first ingredient that the victim Apio Ojoyi is a child with disability, PW1 (Dr. Rubanza) in his Medical Report (Exh. P.1) dated 25th November 2008 states that Apio Ojoyi is an "imbecile", retarded, cannot speak and confused. PW2 (Zuena Ojoyi) the mother of the victim testified that Apio Ojoyi does not talk but "*if something is happening to the girl Apio Ojoyi, she can cry if someone beats her.*" In re-examination, PW2 stated that "*the Doctor also asked her about her mental condition, and I told him she was abnormal.*" In answering question

put to her by Court on the condition of Apio Ojoyi, she testified that *“my daughter is fifteen (15) years old, she was born a normal child. She developed an abnormality, she is a twin and the other twin is normal”*.

There was no challenge from the Defence on the victim’s condition. I find that Prosecution has proved this element beyond reasonable doubt. Concerning the second ingredient that there was a sexual act performed on the victim, PW2, PW3 and PW4 all testified that they saw the accused having intercourse with the victim. In fact PW2 the mother of Apio Ajoyi stated that on 24th November 2008, whilst in the kitchen her neighbor Irene Nabwire told her that the accused had come again to her home. When PW2 searched for her daughter she did not find her. She asked Hassan Nkutu and Muzamiru Olupot about her whereabouts. They joined her in the search but could not see any sign of Apio Zeriya Olupot. On further searching PW2 found the accused and her daughter, the victim.

PW2 states “I saw a sign of grass moving as I looked closely to where the grass was shaking, I saw the accused with Zeriya. The accused was fucking Zeriya. The distance where I was and where the accused Maasa Simon Peter alias Wemesa was like from the witness box to the house across the road. I moved closer and barked to the accused in Luganda, “Okola ki ekyo” (what are you doing)? I moved close to where the accused was while making an alarm, but the accused over powered me and slapped me. Some people responded to the alarm. They were Hassan Nkutu and Muzamiru Olupot. There are some contradictions on what exactly ensued when PW2 found the accused having sexual intercourse with her daughter

PW2 testified that she is the one who first saw the victim when a search was mounted, PW3 stated that PW2 was not slapped and yet PW2 and PW4 stated that PW32 was slapped by the accused. Further that PW2 stated that the victim was not crying and did not show any sign of having had sexual intercourse. PW3 stated that the victim was crying and made a sign of having had sexual intercourse. In assessing the evidence of a witness, his or her consistency or inconsistency is a relevant factor in determining whether such evidence should be relied upon. Grave contradictions or inconsistency unless satisfactorily explained will usually though not necessarily always result into the rejection of that particular evidence of a witness. Where inconsistencies, whether major or minor, point to deliberate on truthfulness and go to the root of the case, they shall be resolved in favour of the accused.

In this particular case, Court is of the view that the contradictions and inconsistencies pointed out do not transcend to the root of the case. They are not deliberate and they are minor. All the three (3) witnesses were truthful. PW2 is very consistent and so is PW4. PW3's testimony is also truthful as it relates to the substance of the offence. Moreover, the allegations were confirmed by the Medical Report of PW1 (Dr. Rubanza) who stated that the tly ruptured.

The defence's story of defecation by the accused is just an afterthought and unbelievable. Pw2 stated that it was a lie that the accused was defecating when I saw him the second time. When Court considers PW2's testimony describing what happened, PW2 states in cross-examination that "*there is eucalyptus trees, the grass had been slashed. I heard the accused being called Maasa. I heard his name mentioned at the Chairman's house.*" She states that on examination of the private parts of both her daughter and the accused, they were found to be wet.

In my opinion, the Prosecution has proved beyond reasonable doubt that the accused was at the crime scene and participated in the offence. The assessors' opinion does not vary from mine. We hold the same view that the Prosecution has proved the elements of this offence beyond reasonable doubt.

Regarding the last ingredient that the accused is the one who committed the offence, PW2, PW3 and PW4 testified that they saw the victim having sexual intercourse with the victim having sexual intercourse with thee victim and this was during broad day light. The accused in his defence admits that he was grabbed by PW2 though he denied having committed the offence. This shows that the accused was in close proximity to PW2. PW2 and PW4 testified that they noticed that the accused person's penis wet with sperms. The accused contended that he was suffering from diarrhea and had therefore gone to defecate. Court was not persuaded to believe this story.

Defence Counsel also contended on behalf of the accused that all Prosecution witnesses are related and therefore shared a common ill and unjustified intention against the accused. Court notes that there is no rule of law which bars relatives to the victim from evidence in Court. Court is therefore, satisfied that Prosecution managed to prove beyond reasonable doubt and it is the accused who committed the offence for he was clearly identified by PW2, PW3 and PW4.

DEPOSITION:

I HEREBY, FIND YOU MAASA SIMON PETER ALIAS WEMESA, GUILTY OF THE OFFENCE OF AGGRAVATED DEFILEMENT C/S 129 (3) AND (4) OF THE PENAL CODE ACT, CAP, 120 AS CHARGED AND ACCORDINGLY CONVICT YOU.

Judgment read in Court

HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGE

12TH OCTOBER, 2009

SUBMISSION ON SENTENCING:

Ms. Alpha Ogwang: The convict is a first offender. At the time of the commission of the offence he was 55 years old. The victim was 15 years old, an imbecile who does not talk. The accused is a catechist in a Church, his duty was to guide society, to teach children the right path following life. He has done the exact opposite. Instead he has taken away a child's innocence. He took advantage of the fact that she could not in any way protect herself. The convict was a family friend. He himself told Court that the victim's mother approached him to lend her money. It is a breach of trust on his part to turn around and defile the complainant's daughter. Apio Ojoyi was gravely wronged. We pray that Court arrives at a sentence that is commensurate with what the accused person did. Church leaders like Maasa Simon should not be left roaming around in society. We pray for a custodial sentence where he can be confined and given a chance to reform and then he can come back.

ALLOCUTUS:

Defence Counsel: I pray for leniency. He is so remorseful. He is a first offender. He is a responsible man married with a wife and three (3) children and is the sole bread winner of his family. He has school going children and who need him as a parent. He has been on remand for eleven (11) months long enough to learn something and he is in a position to reform. He is sickly and has TB. He is an old man of 55 years. A church leader where we all need his services and if

he is incarcerated we all miss his services. I pray that he is given a non-custodial sentence such as community services.

Maasa Simon Peter alias Wemesa: I have seven (7) people to look after and three (3) are still of school going age. I am an old man struggling to find school fees for them since I was imprisoned, the children have stopped going to school. I used to cultivate some crops to pay for them school fees but because I am in prison, I am unable to cater for them.

HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGE

12TH OCTOBER, 2009

SENTENCING:

The offence OF Aggravated Defilement is a very serious one, whoever is convicted of it shall be liable offender, the offence is rampant and the girl is young being at the ten years and she is liable, whilst, the convict is a catechist in Church. As a religious person, he should know what is right and what is wrong. The Prosecution submitted that he is expected to teach children to follow the right path. As the Prosecutor submitted, he did the opposite and took away a child's innocence. He took advantage of the victim who could not in any way protect herself.

I have considered the mitigating factors which the Defence Counsel and the accused himself have adduced. He is a responsible man, married to one wife and has three children. The children are still going to school. He has been remanded for eleven (11) months and has contracted TB in the process. He should be given a chance to live and reform and later contribute to society.

However, in view of the gravity of the offence, the eleven months spent on remand, his remorsefulness and considering the young age of the victim and her mental inclination, I will not sentence you to death. I will instead take into account the period of remand and seriousness of the offence and all the other facts enumerated above and sentence you to a custodial sentence. I, hereby, sentence you to life imprisonment

Right of appeal explained.

HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGE

12TH OCTOBER, 2009