

THE REPUBLIC OF UGANDA
IN THE CHIEF MAGISTRATES' COURT OF KAMPALA AT BUGANDA ROAD
CRIMINAL CASE NO. 0005 OF 2014

UGANDA ===== PROSECUTOR

VERSUS

CHRISTOPHER MUBIRU KISINGIRI ===== ACCUSED

BEFORE HER WORSHIP LILLIAN BUCYANA - CHIEF MAGISTRATE

JUDGEMENT

Christopher Mubiru Kisingiri hereafter called the accused, is charged on two counts of having carnal knowledge of a person against the order of nature C/S 145 (a) of the PCA.

The prosecution alleged that in December 2009 and during the year of 2004, at Mengo, Kisingiri local council village in Kampala district, the accused had carnal knowledge of Nyanzi Emmanuel and George Oundo respectively, against the order of nature.

The accused pleaded not guilty to the charges.

Prosecution called six witnesses, while the accused testified on oath and called one other witness. Counsel Anthony Kawesi appeared for the accused, while the prosecution was led by State Attorney Peter Mugisha.

The prosecution bears the burden of proving the case against the accused beyond reasonable doubt. Thus all the ingredients of the offences must be proved.

The ingredients of having carnal knowledge against the order of nature are:-

1. Anal sexual act was performed against each of the victims
2. The accused participated in performing the act.

The two counts are similar and they shall therefore be resolved concurrently.

The only issue for determination is whether the accused had anal sex with the

victims?

The victims testified as pw1 (Nyanzi Emmanuel) and pw3 (George Oundo).

From the testimony of pw1, there is no direct evidence of a sexual act. At the invitation of the accused, Pw1 visited the accused's home in 2009 expecting to find a families' get together. He found no people and the accused told him he had come late and the party goers had left for the after party at the beach. The accused allegedly offered a glass of wine to pw1. He took it and lost consciousness. Pw1 and the accused had met the previous evening at Mateos bar, when the accused extended the invitation.

Pw1 testified that he woke up and found himself naked on accused's bed, with pain in the legs and bleeding in the anus which went on for two days. Pw1 testified that accused must have noticed the bleeding because there was blood on the bed sheets. Pw1 further added that he feared to ask the accused about what had happened because he felt ashamed. That the accused asked pw1 to remove the bed sheets and put them in a basket after which accused offered 50,000= to pw1 and asked him to go home. Pw1 went home and told nobody about his pain or suspicion. The next day he went to an unnamed clinic at his village and explained to the doctor what had transpired the evening before. The doctor told pw1 that "it appears the accused sodomised you". That the doctor prescribed pain killers and ointment for the accused to smear in his thighs. Pw1 testified that he wasn't given any medical report at that clinic. At the time of reporting to police, pw1 could no longer trace the clinic or doctor, he had long shifted from the area.

The next victim, Pw3 admitted to being a homosexual since he was 12 years old, allegedly recruited into the vice by a cousin at home. Pw3 gave direct evidence of anal sexual intercourse between him and the accused. He met the accused at Mama Mia restaurant at Speke hotel in 2004 and agreed to his advances. He was taken to accused's home where both had consensual anal sex. Pw3 was paid 100,000= Uganda shillings and he went home. It's his evidence that owing to the size of the accused's penis, he bled and felt a lot of pain but couldn't go to hospital owing to the shame. He treated himself. In 2010, pw3 reformed and became born again. He testified to have contacted Pastor Male around 2010/2011. He confirmed in cross examination that he had a sexual encounter with the accused only once. But he continued his vice with others till 2010. He also confirmed in re examination that he never sought medical help and even when he made a statement at police in 2013, he was told the time lag between the alleged sexual acts and the police report was too long and medical examinations may not be necessary.

Both victims sought the help of pastor Male (Pw2), in the course of his ministry work as an

anti homosexuality advocate, whose call in radio talk shows both victims responded to and showed willingness to reform. Pw2 counseled pw1 who had called in around December/January 2013 crying and seeking vengeance against the accused for sodomising him. Pw2 said pw3 approached him around 2008. It is through pw2's counseling sessions that both victims opened up and got courage to report to police.

The investigating officer (Pw4) conducted a search at accused's home and recovered an assortment of pain killers, an assortment of lubricants, chloroform and other medical items. She also interrogated the accused who denied the charges. Pw4 also referred both pw1 and the accused (Dw1) for medical examination. The search certificate was admitted in evidence as P exhibit 1, police form 17A admitted as P exhibit 2 and the exhibit slip together with exhibits, as P exhibit 3.

Pw6, a medical doctor testified that accused was of normal mental status and his penis and anal regions were normal. In respect to pw1, the medical report did not bring out clear evidence of anal sex having occurred. Pf24 in respect of accused, and pf3a/b in respect of pw1 were jointly admitted in evidence and marked P exhibit 5. Medical evidence is inconclusive. This leaves court with evidence of pw1 and pw3 both victims, against that of the accused.

The credibility of these two victims is crucial in determining whether or not court can rely on their testimony. For pw1, he was allegedly induced to sleep before he was sodomised. He woke up to pain and bleeding in the anus. The accused told him he drank too much and passed out. Although the act allegedly occurred in 2009 and pw1 opened up around January 2013 to pw2, whose radio talk show pw1 listened to, the explanation given by pw1 for his failure to speak out is understandable. He was a destitute, chased from home by a grandfather owing to misbehavior -escaping from home to go to disco. He had earlier lost a father and forced to drop out of school. He was being housed by an equally young friend. He had no family to open up to. Sex is not a subject many freely speak about. It is worse when it's procured by deceit or involuntary incapacity as in this case where the victim was induced into unconsciousness. Pw1 said he feared to ask the accused what happened because he was ashamed. This is a natural reaction that would come from any person with a broken social background and no network of friends for support. I believed the testimony of pw1 and find it to be true.

The evidence of Pw5 a forensic examiner who examined an assortment of medical creams gels/lubricants recovered from the accused's home by the investigating officer (pw4) corroborated some aspects of evidence of Pw1. Pw1 said he was given a glass of wine and

he lost consciousness. Among items recovered at the home of accused was chloroform. The forensic analysis report (P exhibit 4) in conclusion number 3 established that chloroform is used to induce a person to sleep. Pw5 also explained that chloroform is not a product sold over the counter and is used by specialized medical personnel, usually for anesthesia.

While the accused offered explanation for existence of gels and creams and pain killers recovered, he had no explanation for possession of chloroform. I am mindful that accused is not under any duty to provide an explanation but where prosecution leads evidence to strongly suggest use of an item in an illegal activity a rebuttal becomes necessary. In its absence, I am inclined to infer that evidence of pw1 regarding loss of consciousness is connected to the findings of pw5 in his forensic examination report on the use of chloroform found in accused's home by pw4.

The above notwithstanding, accused said both victims are strangers to him. He said that pw1, might know his home since it was previously used as a church therefore attracting many people there. But was the accused residing there while it was a church? And why would pw1 of all supposed church goers bare false testimony against the accused? Besides Pw1 did not say he knew accused's home before the act. He testified that the accused directed him to his home the first day they met at a bar. The accused did not say whether or not he has a grudge with any of the victims or pw2 for court to doubt the motivation of the victim in testifying against him.

I also observed the demeanor of the pw.1 and the accused person throughout the trial process. The accused avoided eye contact both with court and the victim. He was looking down throughout. Although the video recordings of a person alleged to be accused sodomising young boys were not admitted in evidence for lack of conformity with the Electronic Evidence Act as well as current victims not being party to the recording, the accused did not dispute that it's his face appearing in those videos though he said the lower body in the act is not his. Twice, pw1 broke down and cried in the course of his testimony and the accused, in a rather unusual manner, turned his back to the court facing the exit door of the dock. For an accomplished footballer and coach out to prove his innocence, this reclusion reflected a degree of uncertainty about his conduct or misconduct.

I did not consider the evidence of Dw2, a medical doctor to be material. First, the accused was not a victim of sodomy. He is an alleged perpetrator. It was therefore immaterial to examine his anal region. As for the examination of the sexual organ, Dw2's finding that it was normal was not far from the finding of pw6. Dw2's addition that the accused's penis had no injury or scar consistent with forced anal sex was also not material because pw3

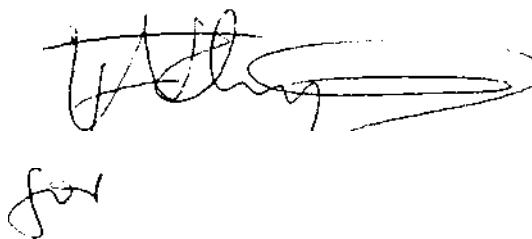
clearly said he was not forced and lubricants were applied to ease penetration. Pw1 was sodomised after being induced into sleep. There is therefore no evidence of force against him as well. Besides, I had already ruled out medical evidence as capable of adequately establishing the occurrence of anal sex given the lapse of time.

There is ample circumstantial evidence that accused had unnatural sexual intercourse with pw1. The evidence of pw1, pw2, pw4 and pw5 has established the guilty of the accused in respect to count one to the required standard. The accused is convicted as charged on count one.

As for count 2, where pw3 is the victim, I note his confession as a homosexual since the age of 12. He willingly went to accused's home and received payment for the service. The alleged act with accused occurred once in 2004 when pw3 was an adult. But it's not until 2010 that pw3 reformed. So why didn't pw3 report all those he was having anal sex with before and after 2004? By taking on a pseudo name as Georgina and willingly permitting himself to be sodomised, pw3 became as much a perpetrator as alleged against the accused. This is the import of section 145(c) of the PCA. The credibility of pw3 as a witness/victim is questionable. Besides pw2 said the accused approached him in 2008 over the sodomy allegations and yet pw3 says he only reformed in 2010. This contradiction is major because it points to the truthfulness of the witness.

I find that prosecution has failed to discharge both the burden and standard of proof required to secure a conviction on count 2.

The accused is acquitted on that count. Quash

A handwritten signature in black ink, appearing to read "Lilian Bucyaffa". Below the signature is a handwritten mark that looks like the letters "J" and "B" intertwined.

Lilian Bucyaffa, Chief Magistrate