



THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARA  
CRIMINAL SESSION CASE NO 114 OF 2022  
[DPP NO: MBR-CO-2344/2021, POLICE NO: MBR CRB 1485/ 2021]

UGANDA VS GUMISIRIZA SAILUS

BEFORE: Hon. Justice Nshimye Allan Paul. M.

JUDGEMENT

INTRODUCTION.

The accused **Gumisiriza Sailus** was indicted on the charge of Agg Defilement Contrary to section 129 (3) & (4)(a) of The Penal Code Act. The particulars of the offence are that; **Gumisiriza Sailus on 19<sup>th</sup> September 2021 at Butagasa Cell in Mbarara City performed a sexual Act with NF (victims' names Initialed) , a girl aged 12 years while he is HIV positive.**

The Accused person took Plea on 22<sup>nd</sup> May 2023. He pleaded not guilty and the hearing of the trial started.

BURDEN AND STANDARD OF PROOF.

It is a principle of law that in criminal cases that the Prosecution has a burden of proving all the ingredients of the offence (**Nandudu Grace & anor Vs Uganda Supreme Court Criminal Appeal No 4 Of 2009, Section 101 & 103 of the Evidence Act**). In Criminal cases the standard of proof that is required is to prove all the ingredients

beyond reasonable doubt (See **Miller Vs Minster of Pensions [1947] 1 ALLER 372, Uganda vs Monday Wilson high court Criminal case 22 of 2017**)

### **PRE-HEARING**

5 The prosecution and defence during the pre-hearing agreed on some facts under section 66 of the Trial on Indictments Act. The documents that were agreed upon by both parties were exhibited and made part of the evidence; they are:

1. Police Form 24A, for medical examination of a person accused of sexual assault.

10 The form was exhibited as **PEX1**, In the form a medical officer (**Bumbi Alex**) confirmed on **13 October 2021** that the accused person was **HIV positive**.

2. A birth certificate for the Victim from Bushyenyi district Administration dated 06 October 2021 was exhibited as **PEX2**, in the form the Victim was stated to have been born on **20<sup>th</sup> March 2009**.

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### **WITNESSES**

The prosecution called three witnesses, while the defence produced one witness.

### **ASSESSORS' OPINION**

20 The assessors gave a joint opinion, where in they recommended that the accused, be convicted.

### **SUBMISSIONS**

25 The court issued out a schedule on 08 August 2023 for the parties to file written submissions. The parties did not file any, so the court will consider the evidence on the court record.

## DETERMINATION

It is a principle of law that the prosecution has a duty to prove all the ingredients of the offences as is stipulated in the law in **Section 101 & 103 of the Evidence Act** and confirmed in case law in **Nandudu Grace & anor Vs Uganda Supreme Court Criminal Appeal No 4 Of 2009**.

The question for determination is whether the prosecution has proved all the ingredients of the offence of aggravated defilement beyond reasonable doubt against the accused person.

The prosecution must prove all the ingredients of the offence of **Aggravated Defilement** beyond reasonable doubt. These are ;

1. That the victim was below 14 years of age.
2. That a sexual act was performed on the victim.
3. That it is the accused who performed the sexual act on the victim.

### Ingredient no 1

**That the victim was below 14 years of age.**

The age of a child may be proved by the production of her birth certificate, or the testimony of the parents (*Uganda v Kiyingo Criminal Session 456 of 2015*). It has however been held that other ways of proving the age of a child can be equally conclusive, such as the court's own observation and common sense assessment of the age of the child (See *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

In the case before us, the age of the child was provided by the birth certificate for the Victim from Bushyenyi district Administration dated 06 October 2021 was exhibited as



PEX2, in the form the Victim was stated to have been born on 20<sup>th</sup> March 2009. So ingredient no 1 is proved.

### **Ingredient no 2**

5 **That a sexual act was performed on the victim.**

One of the definitions of a sexual act under section 129 (7) (a) of *the Penal Code Act* is penetration of the vagina, mouth, or anus, however slight, of any person by a sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence, and any other cogent evidence, (*See Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)*). The slightest penetration is enough to  
10 prove the ingredient.

**PW1 Nuwasima Zainubu** testified that the Victim NF is her daughter. That a nurse checked the girl and found that she had slept with a man, so they gave her medicine.  
15 This evidence proves that ingredient 2 is proved

### **Ingredient 3**

**That it is the accused who performed the sexual act on the victim.**

The third essential ingredient required for proving this offence is that it is the accused  
20 that performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime performing the act. (*Uganda v Kiyingo Criminal Session 456 of 2015*).

It is a principle of law that an accused person is entitled to a fair hearing as is stipulated  
25 in Article 28 (1) of the Ugandan Constitution 1995. The right encompasses many things that include the right of the accused person to be informed in a language that he understands the nature of offence as is provided in Article 28 (3)(b) of the Ugandan Constitution 1995, which in the case of a trial before the high court mandates the court

to avail the accused person with the indictment, detailing the offence and particulars of the offence that the accused person is expected to defend himself against.

When the prosecution finds that there are aspects in the indictment it would wish to alter it prepares an amended indictment under section 50 (2) of the Trial on indictment Act , and upon this being done, the accused person would be required to take plea on the amended indictment as is stipulated in section 51(1) of the Trial on Indictment Act.

The above procedures in the law are meant to ensure a fair hearing, where the accused is not ambushed and only answers to a charge as put to him or her in the indictment.

The indictment's contents ought to conform to section 22 of the Trial on indictments act which provides that;

*"Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

In my opinion the import of section 22, 50 and 51 of the trial on indictments Act means that an accused person ought to be judged based on the evidence on court record that is weighed against the statement and particulars of the offence that the prosecution put in the indictment. In short, the prosecution is bound by the statement and particulars in its indictment.

The indictment in this case provides that

*The accused Gumisiriza Sailus was indicted on the charge of Agg Defilement Contrary to section 129 (3) & (4)(a) of The Penal Code Act.*

The particulars of the offence are that;

*Gumisiriza Sailus on 19th September 2021 at Butagasa Cell in Mbarara City performed a sexual Act with NF (The initials of the victims name used for her privacy) , a girl aged 12 years while he is HIV positive.*

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This indictment alleges that the accused performed a sexual act **on 19th September 2021**, it does not state that the sexual act was before the month of September of 2021. The accused took plea to that indictment and thereafter prepared his defence based on the indictment prepared by the prosecution.

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The Victim, NF testified as PW2 stating on oath after court carried out a Voire dire stating that, She is 14 years and she knows the accused person. That in **June 2021** her mother sent her to get herbs, while there the accused found her and forced her to play sex, that she started feeling pain and her mother took her to a nurse. That in **September 2021** as she was going to bath the accused called her and as he was forcing her to have sex, when uncle Jib came, and he ran away. that he was forcing her to have sex but they never. That her mother reported the matter to police on 19th September 2021 and the following day he was arrested. That the first time she told her mother , and she was checked by a nurse but she doesn't know why he was not arrested.

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The above evidence on court record does not show that in September 2021 the accused interaction with the victim amounted to what would constitute his participation in the offence of aggravated defilement, but her evidence in respect to the interaction in June 2021, would have possibly amount to proof of the accused participation in commission of the offence of aggravated defilement.

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I note that the indictment that he took plea to, did not state in its statement of offence stated that accused committed an offence at different times within the months of




June, July and September 2021. If it had possibly that would amount to proof of participation.

The indictment as it stands refers to the accused committing the offence in September 2021 and as I stated above, in my opinion, the evidence on court record does not point to acts that would constitute to the accused participating in an offence in September 2021, since the victim was clear that nothing happened, they were standing, and uncle jib found them prompting the accused to leave.

I therefore disregard the advice of the assessors to convict the accused, because the assessors did not consider the right to a fair hearing provided in Article 28 (3)(b) of the Ugandan Constitution 1995, and section 22 of the Trial on indictment Act that governs the contents of an indictment that an accused ought to take plea to.

I find that that the prosecution has not ably proved beyond reasonable doubt that the accused participated in the commission of the offence of aggravated defilement in September 2021 as stipulated in the indictment that he took plea to. The prosecution has thus not proved ingredient no 4 beyond reasonable doubt.

I therefore acquit the accused, Gumisiriza Sailus on the charge of Agg Defilement allegedly committed in September 2021 Contrary to section 129 (3) & (4)(a) of The Penal Code Act. I order that Gumisiriza Sailus be released from custody in respect to this charge, for which he have been acquitted.

  
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**Nshimye Allan Paul M.**  
**JUDGE**  
**12-10-2023**