

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBALE**  
**HCT-04-CR-SC-83-2008**

**UGANDA.....PROSECUTOR**  
**VERSUS**  
**GIZAMBA BIRITIO.....ACCUSED**

**BEFORE: THE HON. MR. JUSTICE E.K. MUHANGUZI**

**JUDGMENT**

The accused, **Gizamba Biritio**, was indicted for aggravated defilement. It was alleged that he on 19.6.2008 at Kichafu Cell, Namakwekwe, Nabuyonga Ward, Northern Division, Mbale Municipality in the Mbale District, had unlawful sexual intercourse with **Nafuna Sharon**, a girl aged 9 years.

The brief background of the case is that on 29.01.2009 the accused was arraigned on the indictment for aggravated defilement c/s 129 (3) and (4) (a) of the Penal Code Act. He denied the offence and a plea of not guilty was entered on court record. In order to prove the offence the prosecution relied on the evidence of a total of six witnesses. At the close of the prosecution evidence **Mr. Madaba Alfred**, learned counsel for the accused on state brief, did not submit on no case to answer and left court to make the requisite finding as to whether the prosecution evidence established a *prima facie* case against the accused so as to warrant putting him on his defence. On 26.02.2009 court ruled under section 73 of the TIA that there was sufficient evidence that the accused had committed the offence. Subsequently, the accused chose to testify on oath. He was examined and cross-examined. He did not call other witnesses. After submissions of defence and prosecution counsel as well as summing up to assessors, the lady and gentleman assessors advised court to find the accused guilty and convict him as charged.

The constitution of Uganda provides in Article 28 (3) (a) that every person accused of a criminal offence shall be presumed to be innocent until that person has been proved guilty or has pleaded guilty.

In cases, such as the one before court now, where the accused denies the offence or pleads not guilty, the prosecution has the burden of proving the offence against the accused beyond reasonable doubt. See: *Woolmington v. D.P.P., [1935] A.C. 462.*

To prove the case of aggravated defilement the prosecution must prove each and every essential ingredient of the offence namely:-

1. Performance of a sexual act;
2. The victim being either aged below 14 years or disabled, or the accused being a parent, guardian or in authority over the victim or suffering from HIV, or a previous convict of defilement or aggravated defilement;
3. The accused being the person who performed the sexual act on or with the victim.

See: Section 129 (3) and (4) (a) of the Penal Code Act, Cap.120 as amended by section 2 of Act No.8 of 2007.

Court has carefully considered the evidence of prosecution witnesses on record. The evidence of **Dr. B. Rubanza** (PW.1) was agreed upon under section 66 of the TIA and the PF.3 Appendix on which he recorded his findings and conclusions upon examining **Nafuna Sharon**, the victim, was admitted in evidence as prosecution exhibit P.1. He found the victim to be 9 years old, a fact confirmed by **Nabuduwa Violet** (PW.5), the mother of the victim. He also found the victim with signs of penetration in form of an old rapture as well as inflammations and lacerations on the victim's labia majora and urethral opening consistent with force having been used sexually. On the basis of the above evidence alone, court in agreement with the assessors finds that the first and second essential ingredients of the offence were proved beyond reasonable doubt.

With regard to the third and last essential ingredient, namely; if the accused is the person who performed the sexual act with or upon the victim, court had to carefully consider the evidence of PW.3, (**Namataka Mary**), PW.4 (**Sarah Kayongo**) and PW.6 (**Nafuna Sharon**), the victim. Alongside the evidence of those three prosecution witnesses court considered the evidence of the accused in his defence.

PW.3 (**Namataka Margaret**) stated that on 19.6.2008 at about 8:00p.m while still preparing supper at the verandah of their house she entered the house twice. On the first time, to collect more water. That on the second time she found the accused having sexual intercourse with the victim and she raised an alarm. That PW.4 (**Sarah Kayongo**) and the wife of the Defence Secretary of their area are among the people who came in response to her alarm. That she, together with those two women examined the victim and found blood and other fluids in the victim's private parts. That she took the victim to the LC.I Chairman who referred her to the police where she took the victim. She specifically stated:-

*“When I went to report the incident to the LCs and police I left **Gizamba** seated in the house where we lived.”*

Further, PW.3 and PW.6 (**Nafuna Sharon**) the victim stated that both of them physically went to police at Nkoma police post and reported the incident and that police personnel from Nkoma escorted them back to their house at Kichafu cell where police found the accused and arrested him.

PW.4 (**Sarah Kayongo**) on the other hand, stated that when she heard the alarm raised by PW.3, she came to the house of PW.3 where she saw both the accused and the victim on one bed under a net. That she saw the male organ of the accused dripping wet and exposed as the trousers of the accused were hanging around leg and knee level. That she saw the victim's abdomen was wet. That she, PW.3 and **Mugamba** got the accused from the house and escorted him towards the LC officials and police but that she did not personally reach police. She specifically stated:-

*“While taking the accused to the LCs we met police personnel at a petrol station called “Hared” about 100 metres distance from the house of the accused. All this time I was with Margaret Namataka (PW.3), Constance Nekesa, the wife of the Defence Secretary is the one who telephoned police to come and assist us in the arrest and detention of the accused after we had got him from the house and we were escorting him from home.”*

The first glaring contradiction between the said three, witnesses (PW.3, PW.4 and PW.6) is relating to the arrest of the accused. While PW.3 and PW.6 clearly stated that the accused was arrested by police personnel at the family house in Kichafu cell, PW.4 stated that the accused was arrested by herself, PW.3 and **Mugamba** from the house and while they were escorting the accused they met police personnel 100 metres away from the house. The version of PW.3 and PW.6 was supported by PW.2 (**No. 35673 D/c Namanya Wilson**) while the version of PW.4 is not supported by any other witness. That notwithstanding, the above contradiction raises serious doubt about the circumstances surrounding the arrest of the accused, namely:- whether he was caught “red handed” as suggested by PW.3 and PW.4.

The second area of doubt, in court’s view, is that relating to the circumstances surrounding the alleged commission of the offence. Both PW.3 and PW.6 stated that just before the accused started defiling the victim on the day in issue, he had been verbally quarreling and threatening to destroy all property in the one roomed family house. That he had thrown out a radio from the house. That PW.3 was still cooking supper at the verandah of the house but PW.6 (the victim) told her grandmother (PW.3) that she was going inside that house to sleep. That she went inside the house and to the same bed where the accused was lying before the accused allegedly grabbed her held her mouth and defiled her.

Upon carefully considering that piece of evidence court finds it difficult to believe it. It was about 8:00p.m and the family had yet to eat supper which PW.3 was still cooking at the verandah of their house. In the midst of the quarrel and threats to destroy all the property in the house emanating from the accused inside the one roomed house, PW.6 chose to leave PW.3 (her grandmother) at the verandah and join the enraged and threatening person (the accused) on the bed inside the one roomed house to sleep before eating supper. Court wonders how the victim gathered so much courage as to leave her grandmother at the verandah and join the enraged and quarrelling accused in the one roomed house, especially when her grandmother had been already scared by the threat of the accused to destroy all the property in the house when she went inside the house first time to draw water.

PW.3 state, in clarification to court:-

***“He was not mentioning any names. He only mentioned that he would damage all the property in the house when I entered the house to collect***

*water. On hearing that I walked out. At that moment I had not yet seen him have sexual intercourse with the young girl. I got water and went outside with it. I felt scared and went and sat outside. I later returned to the house and found him having sexual intercourse with the young girl.”*

As to why PW.3 allowed the young girl (her granddaughter) to enter that one roomed house where the accused had sacred PW.3 from at that early time of 8:00p.m before the family had their supper, and in the midst of the quarrels and threats from the accused, is another puzzling aspect. The sum total effect of the above evidence is to render prosecution evidence very doubtful and hard to believe.

On the other hand, the accused, in his defence stated that on the day in issue the complainant (PW.3) asked him for money to go and attend some relative’s funeral but the accused did not give PW.3 the money as he had just lent it to a certain muteso woman. That again PW.3 asked the accused for some money to buy food for supper but as the accused had not expected PW.3 and PW.6 to return home that evening and he had no money, he did not give PW.3 money to buy food for supper. That consequently PW.3 was annoyed and wondered how the accused could not afford to give PW.3 money while he could afford to give the muteso woman money. That thereafter PW.3 went with PW.6 to a neighbouring drinking place and returned shortly with a mob of people to whom PW.3 accused the accused of defiling PW.6.

Court finds this version of the incident more credible and believable. Court therefore disbelieves and rejects the evidence of the prosecution witnesses on this last essential ingredient and believes and accepts the defence evidence.

Consequently, in disagreement with both assessors, court finds that prosecution failed to prove the third and last essential ingredient of the offence and hence the offence beyond reasonable doubt. Accordingly, court finds the accused not guilty and acquits him and sets him free forthwith unless he is held on other charges.

**E.K. Muhanguzi**  
**JUDGE**

**07.04.2009**

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Accused present.

**Mr. Madaba** for accused.

**Ms. Ogwang** Sate Attorney for State.

**Wanale** Court Clerk.

**Court:** Judgment delivered, signed and dated.

**E.K. Muhanguzi**

**JUDGE**

**07.04.2009**