

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

**HCT-04-CR-SC-79-2008**

**UGANDA.....PROSECUTOR**

**VERSUS**

**KASAJJA PETER.....ACCUSED**

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

**JUDGMENT**

The accused, **Kasaja Peter**, was indicted for aggravated defilement. It was alleged that he, on 04.10.2007 at Bukatikoko Cell, Kakoro sub-county in the Pallisa district had unlawful sexual intercourse with **Namakoye Silvia**, a girl under the age of 14 years.

Briefly the accused was, on 29.01.2009, 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 accordingly entered on court record. In order to prove the offence against the accused the prosecution called three witnesses. At the close of the prosecution evidence **Mr. Madaba Alfred**, learned counsel for the accused on state brief did not make a submission of no case to answer and left court to make the requisite finding as to whether the prosecution had made out a *prima facie* case against the accused to require him to defend himself. In terms of section 73 of the TIA court ruled that there was sufficient evidence that the accused had committed the offence and explained to the accused the various options open to him regarding his defence. The accused opted to make an unsworn statement which he made.

Following submissions of both prosecuting and defence counsel court summed up the case to the assessors who later 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 proved or that person pleads guilty. In cases where the accused denies the offence or pleads not guilty, such as the one before court now, the burden of proving the accused guilty lies upon the prosecution who must prove the offence beyond reasonable doubt. See: **Woolmington v. D.P.P.,[1935] A.C. 462.**

In order to prove the case of aggravated defilement the prosecution has to prove each of the following essential ingredients 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 being infected with HIV or having been previously convicted of defilement or aggravated defilement;
3. The accused being the person who performed the sexual act on or with the victim.

Court has carefully considered the evidence of the three prosecution witnesses. PW.3 (**Dr. B. Rubanza**) stated that on 05.10.2007 he examined the victim and found her to be 5 years old, hymen intact but with a small laceration on the left side of the labia which could have been a result of force having been sexually used. He found no other injuries or bruises. The laceration was about 24 hours old. He filled his findings on PF.3 Appendix which was admitted in evidence as exhibit P.1. In cross-examination the witness stated that sexual intercourse was one of the possible causes of the laceration on the victim's labia. That evidence meant that the witness could not rule out any other possible cause of the laceration. While PW.1 (**Kakhai Rebecca**) told court that she was informed by PW.2 (**Silvia Fangirin Namakoye**) the victim, that in the evening of 04.10.2007 the accused had had intercourse with the victim under the promise of the accused giving the victim shs.100/=, the victim, in her testimony denied ever telling PW.1 such a thing. She further denied the accused ever having had sexual intercourse with her, or ever talking with her. Later in reply to a question by one of the assessors PW.2 stated that a long time ago, on a date she did not remember, the accused pulled out his penis and fixed it in her. However, in clarification to court PW.2 (the victim) denied ever telling PW.1 or her father or the police that the accused fixed his penis in her.

Court finds the evidence of the medical doctor (PW.3) inconclusive as to the cause of the laceration on the victim's labia. Further court finds the evidence of PW.2 (the victim) and that

of PW.1 (**Kakhai Rebecca**) grossly inconsistent in that, firstly, though PW.1 stated that PW.2 is the one who told her that the accused had had sexual intercourse with PW.2, in her testimony PW.2 denied ever telling PW.1 or indeed in any other person such a thing. Secondly, PW.2 at one point, denied that the accused ever had sexual intercourse with her but at another point she stated that the accused, long ago on a date she did not remember, fixed his penis in her, though she stated that she never reported that incident to anybody.

In view of the inconclusive evidence of sexual intercourse and of the gross inconsistencies between the evidence of PW.2 and PW.1 regarding the aspect of the accused ever having talked or had sexual intercourse with PW.2, court finds that the prosecution failed to prove the first essential ingredient of the offence, namely performance of a sexual act. However, from the evidence of the medical doctor (PW.3) and the victim (PW.2) and from court's own observation the victim is obviously aged below 14 years. Therefore court finds that the prosecution proved essential ingredient No.2 beyond reasonable doubt.

With respect to essential ingredient No.3, namely:- whether the accused is the person who performed the sexual act on or with the victim, court has already found that the prosecution has failed to prove beyond reasonable doubt that a sexual act was performed on or with the victim. It therefore follows that the issue of whether the accused is the person that performed such act does not arise.

Nevertheless, even if the prosecution had proved to the required standard that a sexual act was performed on or with the victim, court finds that the only relevant evidence on this essential ingredient is from PW.1 (**Kakhai Rebecca**), PW.2 (**Silvia Fangirin Namakoye**) the victim and the accused. PW.1 did not witness the commission of the alleged offence. PW.2 contradicted herself so grossly that her evidence was rendered valueless. In fact she, at one point, denied ever talking with the accused at all or ever seeing him before until she saw him in court for the first time though at another point she admitted seeing him before at the home of PW.1.

Court, therefore rejects the evidence of PW.2 as inconsistent, unreliable and of no value on the third and last ingredient of the offence which the accused denied.

In conclusion court finds that the prosecution failed to prove the first and third essential ingredients of the offence and hence failed to prove the offence beyond reasonable doubt.

Consequently court, in disagreement with both assessors, finds the accused not guilty, acquits him and sets him at liberty 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** State Attorney for State.

**Wanale** Court Clerk.

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

**E.K. Muhanguzi**

**JUDGE**

**07.04.2009**