

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT LIRA

HCT-10-CR-CSC-0085-2021

UGANDA :: PROSECUTOR

VS

AKELLO DORCUS :::ACCUSED

BEFORE: HON JUSTICE DUNCAN GASWAGA

**JUDGMENT**

- [1] The accused has been indicted for the offence of aggravated defilement c/s 129(3) and (4) (b) of the Penal Code Act. The particulars allege that **Akello Dorcus** on the 18/01/2018 at Oyito Dero village in the Lira District being HIV positive performed an unlawful sexual act with Ojok Sam, a boy below eighteen years. Accused denied the offence and the prosecution led evidence from four witnesses. After the closure of the prosecution case, the accused was invited to put up a defence, and he elected to give his evidence on oath.
- [2] The brief facts of this case are that on the 18<sup>th</sup> day of January, at Oyito dero village Onywako parish, the victim went to the home of the accused to take back her broom. The accused then invited the victim to enter her house where he found her naked. That she pulled his trousers down and had sexual intercourse with him well knowing she was HIV positive and the victim was a juvenile. After three weeks of the incident, victim started feeling itchy on his penis and reported to one Oming Brian who then reported the matter to Abeja Mirriam, a sister to the victim. Obong Allan



was informed and he reported the case to police. Accused was arrested and subjected to medical examination on PF24 and found to be an adult of sound mind and HIV positive. The victim was also examined on PF3 and found to be a juvenile with sores on his penis.

- [3] In criminal cases, the burden of proof rests solely with the prosecution to prove the guilt of the accused person beyond reasonable doubt and this burden does not shift save for a few exceptions this case not being one of them. See Woolmington vs. DPP (1935)AC 462, 481 & 482. This position has also been quoted with approval by our Courts in a number of cases; See Paulo Omala vs. Uganda criminal Appeal No. 6 of 1977 Reported Vol 1 1978 Judgment of the Court of Appeal for Uganda May/August 1978 and Okale V R 1965 EA Page 555. According to the case of Uganda Vs Bosco Okello alias Anyanya [1992-1993] HCB 68, "beyond reasonable doubt" means that the evidence adduced must carry a reasonable degree of probability of the accused's guilt leaving only a very remote possibility in his favour. I shall now evaluate the evidence adduced in its totality against the ingredients that comprise the offence of aggravated defilement.
- [4] For the offence of aggravated defilement, the following ingredients must be proved. It is therefore incumbent upon the prosecution to prove the following ingredients;
- (i) The victim was below the age of 14 years**
  - (ii) There was unlawful sexual intercourse with the victim**
  - (iii) That the accused person participated in the commission of the offence**
- [5] The prosecution and defence agreed on and tendered into evidence **PF3A**. The report indicated that examination had been done on Ojok Sam the victim by Dr. Olwa Francis on 01/02/2018. The victim was found



to be below 18 years of age and his genitals had evidence of multiple sores which were consistent with recent sexual intercourse. He was further examined for HIV on 02/02/2018 and found negative. Prosecution and defence further agreed on and tendered into evidence **PF24A** which was a medical report on the examination done on the accused. It was conducted on 03/02/2018 on charges of aggravated defilement and accused was found to be an adult of sound mind and 37 years of age. There were some injuries seen in her genitals as well and further she was found HIV positive and a slip was attached to that effect.

- [6] As such, it is beyond contention that the first two ingredients of this offence have been proved beyond reasonable doubt. That there was a sexual act committed and that said act was committed on a child below 14 years. What now remains to be determined is the participation of the accused in the offence.
- [7] **Ojok Sam (PW1)** the victim testified that on 01/01/2018 while helping the accused's co-wife to cultivate, he went to the accused's home to take back a broom and was invited by accused inside the house. That she pushed him on top of the bed and opened his zip and pushed his penis in her vagina while strangling him. That when he managed to escape and get out of the house, she warned him not to report to anyone or else she would kill him. The victim later reported the matter and an L.C.1 meeting was called where the accused denied the offence. She was then taken to Onywako Police station.
- [8] **PW2 Obong Allan testified** that on 26/01/2018 he was informed by Ojok Sam that he had been defiled by the accused. He went and reported to the chairman L.C.1 who called the accused. When he asked accused about the incident, accused denied having any knowledge about it. The chairman then gave them some forms and they went to Onwako Police Post where they were sent for medical examination.



- [9] When put on her defence **DW1 (accused)** testified that on the 18/01/2018 she went for a wedding at 8:00am and only returned to the village at about 11:00pm when everyone was asleep. That she does not know what happened on that day and did not even see Ojok Sam on the said day. That she later found out about the matter on 28/01/2018. That upon a clan meeting being convened to hear her case, a certain woman came and informed them of an impending arrest. That those gathered to hear her case dispersed without hearing it. She further insists that these charges were brought by Obong Allan because of previous land disputes that started shortly after she had lost her husband.
- [10] It was **DW2 Awor Margaret's** testimony that on the 18/01/2018, the accused was not in the village because she had travelled to Bata for a wedding. That she boarded the vehicle from DW's home and when they returned she alighted from the same place. Further, that Ojok Sam's allegations arose out of misunderstandings that the accused person is having with her co-wives and that Ojok Sam confessed to DW2 that he was sent to accused's place to pretend that she had had sexual intercourse with her. The accused also called another witness **DW3 Aceng Siddy** who testified that on the 18/01/2018 she was at home the entire day but she did not see the accused at home yet from her home one could clearly see all that was going on in the accused's home. That on the same day she did not see Ojok Sam near the house of the accused but only saw him later in the evening when he was returning from his uncle's place. That this allegation is as a result of the misunderstanding that accused is having with her co-wives.
- [11] I have diligently perused the evidence of the prosecution on the record and that of the defence. The defence witnesses insist that the accused person attended a wedding away from the village on the said day. DW2 specifically stated that the accused person boarded a vehicle from her



compound and alighted there from on the evening of the same day. DW2 however cannot account for the whereabouts of the accused person between the morning and evening time of the 18/01/2021 when she allegedly left for a wedding at Bata. The only evidence that tends to place the accused at the scene of crime is that of PW1, the victim himself. There is no other piece of evidence to corroborate the victim's assertion that it is the accused who defiled him.

- [12] In the case of Okello Vs Uganda Civil Appeal No. COA-00-CR-CN-0329-2010, the Court of Appeal, while relying on the Kenyan case of Mukungu Vs R (2003) 2 EA stated that;

*"so the evidence of a victim in a sexual offence is evaluated like any other evidence in a trial and for court to base a conviction on uncorroborated evidence of a victim of a sexual offence, the test to be applied to such evidence is that it must be cogent. The cogency itself is determined after a full evaluation of the evidence including whether or not the victim is a truthful and reliable witness. It goes without saying that if the evidence adduced of the victim is worthless, no conviction can be based on it but that if it is credible, a conviction can be based on it even if there is no corroboration."*

- [13] I have once again fully evaluated all the evidence on record. I particularly noted that the complainant (PW1) was working for the accused's co-wives. Accused and her co-wives were not on good terms. In addition, the accused, a widow, was experiencing some challenges emanating from land wrangles with her deceased husband's relatives. This position had been corroborated by DW2 and DW3 who are neighbours and have lived with the accused in the same area for many years. The accused herself stated that she had been framed by the co-wives while Awor Margaret (DW2) testified that the complainant had earlier confessed to



her that it was the co-wives who had sent her to pretend that she had had sexual intercourse with the accused.

**[14]** With this evidence, the court casts some doubt on the evidence of the complainant who also said that he sustained an erection for some minutes and ejaculated when the accused forced him into the sexual act while at the same time strangling him. I wonder how all this was possible in such hostile circumstances which must have obviously affected the mind and concentration of the complainant. Under normal circumstances one would have expected the complainant to concentrate his efforts and attention in resisting and fight back given his knowledge of the accused's HIV status. It was a life and death situation for PW1 where getting an erection let alone sustaining it and then ejaculating needed a very focused mind on that exercise.

**[15]** Having found as such, I am also inclined to believe that the complainant was not truthful. He was an unreliable witness. Instead I believed the accused's testimony. She put up an alibi which was corroborated by DW2 and DW3 that on the day in question she was not at the alleged scene of crime (her house) but in Bata attending a wedding and only returned home late in the night at 11:00pm. DW2 and DW3 had not even seen her the whole day at her home. Her defence of an alibi was not challenged. There is no way she could have been in two different places at the same time i.e. at her home (scene of crime) and also at Bata where the wedding was taking place.

**[16]** The gentleman and lady Assessor have advised me to convict the accused reasoning that the prosecution had proved all the three ingredients beyond reasonable doubt. Further that the accused's defence of an alibi was a lie because none of the defence witnesses who supported the alibi had travelled with her to the wedding in Bata. I respectfully disagree with the assessor's opinion for the



reasons and explanation that I have already given herein above. I may perhaps add that when the defence of alibi is advanced the burden shifts to the prosecution to lead evidence destroying it and instead placing the accused at the scene of crime at the material time. What mattered here was not necessarily for the accused to produce witnesses who saw her at the wedding. DW2 and DW3 testified that the accused was never at the scene of crime for that whole day. The complainant, PW1 and the victim herein had tried to place the accused at the scene of crime at the material time but his evidence was found untruthful in some material particular with regard to some crucial aspects which created doubts in the mind of the court. It is the law that whenever there are doubts in the mind of the court, the same should be resolved in favour of the accused.

[17] Resultantly, I find the prosecution to have failed to prove all the ingredients of the offence herein. The charge is dismissed and the accused is acquitted.

**Judgment read and signed in open court at Lira this 16<sup>th</sup> day of  
December 2021.**



**Duncan Gaswaga  
JUDGE**