**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT AT MOROTO**

**HCT-09-CR-SC-0055-2021**

**UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: PROSECUTION**

**VS**

**WALUGEMBE SHAFIK:::::::::::::::::::::::::::::::::::::::::::::::::::: ACCUSED**

**BEFORE: HON. JUSTICE VINCENT WAGONA**

**JUDGMENT**

The accused stands indicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the Penal Code Act. It is alleged that the accused on the 30th day of September 2020 at Nakala center, Nakomoliwaret village, Tapac sub-county in the Moroto District, performed a sexual act with one SAMBAZI JOY MERCY a girl aged 13 years old.

The brief facts as gathered from the evidence are: on or about the 30/9/2020, the victim Sambazi Joy Mercy (PW2) was at home at night. She was with her younger sister Purity Nambafu (PW3) in the room that the two shared. Their mother (PW1) was in her separate room sleeping. The accused Walugembe Shafik, who was well known to the family members and was from the same village, came to their home and knocked at the door and they opened for him. He asked for water to drink but when he was handed the water, he did not receive it. Instead, in the process, he got hold of the hand of the victim, and forcefully pulled and took the victim to a place estimated to be 50 meters away, behind the house of a neighbour, one Cherop. There, he forcefully had sexual intercourse with the victim. She felt pain in her vagina and her thighs. In the meantime PW 3 went and

reported to their mother that the accused had had taken away PW2 and that they left following the kadodi dancers who had passed by the home at the material time. The victim had tried to resist and she made an alarm but it was not heard because of noise from the kadodi. PW1 attempted to pursue them but failed to find them and returned home and slept. The following morning, she realized that PW2 had returned. The father of the victim got annoyed with the victim and wanted to beat her up and she ran away. PW1 reported the matter to Kosiroi police post. The victim and the accused were taken to Kosiroi police post. When PW1 met the accused at the police, the accused apologized to PW1 regarding what had happened. Both the victim and the accused were taken for medical examination and the accused was later charged with the offence of aggravated defilement. The defence of the accused was a total denial. He said he could not have committed the offence because on 30/9/2020 when he is alleged to have defiled the victim, he was already in police custody on the allegation that he had abducted the victim.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not on the weaknesses in his defence; **(See: Ssekitoleko v. Uganda [1967] EA 531).**

By his plea of not guilty, the accused has put in issue each essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of those ingredients beyond reasonable doubt. **(See: Miller v. Minister of Pensions [1947] 2 ALL ER 372)**. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. However, it is trite law that any doubts in the case should be resolved in favour of the accused person (**Mancini Vs DPP(1942)AC and Abdu Ngobi Vs Uganda; Uganda Supreme Court Criminal Appeal No. 10/1991).**

For the accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt:

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.

I now turn to the evidence in relating to the 3 ingredients of the offence:

1. <u>That the victim was below 14 years of age</u>.

The age of a child can be proved by the production of her birth certificate, the testimony of the parents, or by the court's own observation and common sense assessment of the age of the child.

In this case, the age of the victim when the offence was committed is not in dispute. The evidence of age of the victim was admitted by way of agreed facts by the parties under Section 66 of the TIA and a *Memorandum of the Matters Agreed* was signed and filed to that effect, after it had been read and explained to the accused. It was in the agreed facts between the parties that the victim was aged 13 years at the time of the offence. This was supported by the baptism card of the victim Sambazi Joy Mercy showing her date of birth to be 30th November 2007. The baptism card was admitted in evidence as **Prosecution Exhibit P1.** Additionally, PW1 MUNAYO LINET the mother of the victim testified that the victim was born on 30/11/2007 and is now 14 years of age. PW2 SAMBAZI JOY MERCY, the victim testified that she was born on 30/11/2007. PW4 ABIMA PETER the Clinical Officer who examined the victim following the commission of the offence told court that in his findings, the victim was at the time aged 13 years. In his defence, the accused did not dispute the evidence of age of the victim.

Therefore the court has no difficulty in finding and hereby finds that it has been proved beyond reasonable doubt that the victim Sambazi Joy Mercy was aged below 14 years at the time of the offence.

2. That a sexual act was performed on the victim.

Sexual act means (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or (b) the unlawful use of any object or organ by a person on another person's sexual organ. Sexual organ means a vagina or a penis**.** To constitute a sexual act, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient. The Supreme Court in **Sccr.No.21 Of 2001 Wepukhulu Nyuguli Versus Uganda** held that it is the law that however slight the penetration may be it will suffice to sustain a conviction for the offence of defilement.

Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. In this case, we have mainly the victim's evidence and medical evidence.

PW2 SAMBAZI JOY MERCY, the victim testified that on 30/9/2020, she was at home at night. Shafik came and knocked at the door and asked for water to drink. In the process, he pulled and took her to a place estimated to be 50 meters away, behind the house of a neighbour, one Cherop. There, he came on top of her and he did some bad things to her. In answer to court, the victim clarified that Shafik came on top of her. She was down on the ground facing up and he was on top facing her. That he used her with his body. He used his manhood in her vagina. That she felt pain in her vagina and her thighs. That, that was what she meant by the bad things he did to her.

The court observed that the witness looked very shy and embarrassed while giving the above details to court in clarification. The victim further told court that she did not tell

anyone about what had happened to her apart from the police. She also said that Shafik tarnished her name because everywhere she passes they call her his wife. The victim said that no one had ever had sex with her before Shafik did; that no one had ever done such bad things to her like what the accused did.

The victim said that she made an alarm but no one responded to it because of the noise coming from the Kadodi traditional dance that was on-going in the area at the time. PW3 PURITY NAMBAFU the victim's younger sister also told court that when she saw Shafik pulling her sister, the sister was making noise but since there was noise from Kadodi no one could hear her.

DW4: WANYAMA NAAYEMBA ROSE said that on 30/9/2020, she had heard a rumor that Shafik had raped Joy on 28/9/2020 the day when there was Kadodi dancing.

PW4 ABIMA PETER the Clinical Officer who examined the victim following the commission of the offence told court that he found two tears on the hymen and the probable cause of the injuries was a hard smooth object such as a penis. The said tears were at the 5 o'clock and the other at 7 o'clock position on the vagina. He explained that when examining the vagina, it is viewed like the shape of a clock, so the tears were at the 5 and 7 o'clock positions in relation to a clock. In cross examination, the witness explained that the victim was brought to him 4 days after the incident. He acknowledged that tears on the hymen can occur without engaging in sexual intercourse. He added that his finding in this case was that the tears were caused by a hard smooth object which could be a penis.

In this case the evidence of the victim that a sexual act was performed on her is sufficiently corroborated by the medical evidence provided by PW4 Abima Peter a Clinical Officer and the medical report tendered by him marked Prosecution Exhibit P2.

I therefore find that this ingredient has also been proved beyond reasonable doubt.

3. That it is the accused who 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 as the perpetrator of the offence.

PW2: SAMBAZI JOY MERCY the victim testified that she knew the accused. He is called Shafik. He comes from the same area with the victim. She had known him since around 2020. She started seeing him in 2020. On 30th/9/2020, at night, she was at home with her younger sister Purity Nmbafu PW3 and her mum PW1. Shafik came and knocked at the door and asked for water to drink. Purity woke up and gave Shafik water. He refused it and said he wanted the victim to be the one to give him the water. The victim gave Shafik the water. He did not drink the water and then he pulled her. She failed to resist or pull back. She made an alarm but no one responded to it because of the noise from the Kadodi. He took her behind the house of Cherop; he came on top of her and had sexual intercourse with her.

PW3: PURITY NAMBAFU testified that she too knew the accused; that he is called Shafik. They were sleeping at night then they heard someone knocking and they went and opened the door. It was Shafik who had come. He requested for drinking water. She went to bring the water. Then she saw Shafik pull Joy. Shafik did not take the water. Then she ran and woke up her mum and reported to her that their in-law Shafik had taken Joy away. When Shafik was pulling Joy, the witness was inside the house. It was dark but one was able to see somebody. She knew Shafik very well because he married her auntie's daughter. The witness said it was her that opened the door when Shafik knocked. He was standing at the door. Before the incident Shafik used to come home when they were loading stones to ask for water to drink.

PW1: MUNAYO LINET stated that she knew the accused. He is called Shafik Walugembe. Her daughter Purity reported to her that Shafik came and asked them for water to drink and after they gave him the water he instead left with Joy. On going to the police post following the arrest of Shafik, she found Shafik there. Shafik apologized to her for what had happened. Before this incident the witness knew Shafik because he bore a child with her in law's daughter. He was also a loader of stones where the witness used to crash stones. She first knew him in 2019 when they came to Kosiroi. He used to come by her home. He was an in law to her daughters.

DW4: WANYAMA NAAYEMBA ROSE said that on 30/9/2020, she had heard a rumour that Shafik had raped Joy on 28/9/2020 the day when there was Kadodi dancing.

The defence is an outright denial. The accused said he could not have committed the offence because on 30/9/2020 when he is alleged to have defiled the victim, he was already in police custody on the allegation that he had abducted the victim. An accused who denies the indictment and claims it is based on a fabricated accusation does not have a duty to prove it, but it is the duty of the prosecution to disprove it by adducing evidence to discredit such a claim. The prosecution must disprove it by adducing evidence proving that it is indeed the accused and no one else that defiled the victim.

Notably, the only reason why the accused was in custody was in connection with the offence committed against the victim in this case. It suggests that the case was first reported as one of abduction.

According to prosecution witnesses, and it is not disputed by the accused or his witnesses, there they were not aware of any misunderstanding between the mother of the victim and the accused that one could impute a grudge to fabricate a case against the accused.

All that the defence witnesses testified about were the movements of the victim after the occurrence of the offence and they were unable to assist court on whether or not the accused committed the offence.

There were some inconsistencies, such as, when the offence was committed – whether 28th, 29th or 30th September 2020; and whether the victim reported to her mother that the accused had defiled her; also, whether or not the victim attended kadodi.

PW1 MUNAYO LINET started by stating that the accused came to her home on 29th/9/2020 or on 30th/9/2020. She later appears to have settled for 30th/9/2020 as the date on which Shafik came to her home, based on how she was led by the prosecution. Other prosecution witnesses placed the date as 30th September 2020. However, there is also consistent evidence that the offence was committed on the day when there was kadodi and kadodi took place on 28th and 29th September 2020. The accused said he could not have committed any offence on 30th September 2020 because he was already under arrest. I believe the offence took place on 28th or 29th September 2020 and the reference to 30th September 2020 as the date of the offence was a mistake but not a deliberate lie.

Another inconsistency is that PW1 said she asked the victim if she had sexual intercourse with Shafik and she accepted stating that Shafik had forced her. But the victim said she did not tell her mother for fear of being beaten. She said she did not tell anyone about what happened to her apart from the police. DW4 Wanyama Rose testified that she asked the victim about the rumour she had heard that the accused raped her, and the victim denied. I believe that the victim told the truth that she did not disclose to her mother because she feared she would be beaten. I do not believe the evidence of PW1 that the victim disclosed to her.

It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being

rejected. Minor ones unless they point to deliberate untruthfulness will be ignored. What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case. The law also allows a court to accept parts of a witness's testimony that it finds truthful and reject those parts that it finds untruthful. It is open to the Judge to find that a witness has been substantially truthful even though he/she had lied in some particular respect **(Nasolo v Uganda [2003] 1 EA 181 (SCU); Tajar v Uganda [1969] EACA 167).**

**T**he defence pointed out some contradictions between the police statements and court testimonies in respect of PW2 the victim and her sister PW3 Purity Nambafu. I am reluctant *to use the police statements to discredit the court testimonies of the two witnesses given on oath, when the police statements were not properly proved against the witnesses, by calling the police officer(s) who recorded the statements* ***(Ojede s/o Odyek - vs- JR. (1962) EA 494)***.

The defence witnesses told court that they knew nothing about the allegation that the accused had defiled the victim. Further, the defence witnesses testified about events that happened after the incident and the prosecution witnesses were never cross-examined about those vents when they testified. For example, PW1 testified and she was cross examined about it, that following the incident when the victim was taken away in the night, early the following morning she found her in the house at home. The victim testified that after the incident, she returned home and slept and early in the morning, her mother PW1 asked her where she had slept. It was never suggested to the prosecution

witnesses in cross-examination that the victim was found by DW3 AKOT JOSEPHINE under a tree in the night and spent the night in the home of DW3 as claimed by DW3. PW1 testified that in the morning, after the incident, the father of the victim wanted to beat her and she ran away. DW4 WANYAMA ROSE tends to corroborate this evidence when she stated that on 30th September in the morning at around 6.00am, the victim came to her house and told her that she had left home because her mum had wanted to beat her for attending kadodi. DW3 AKOT JOSEPHINE must have lied when she told court that she met the victim in the night under a tree and took her to her house where the victim spent the night.

It was never suggested in cross-examination to PW1, that DW2 SAUM KALEMA helped PW1 in the search of the victim as claimed by DW2.

The case law is that whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross – examination it must follow that he believed that the testimony given could not be disputed at all, therefore an omission or neglect to challenge the evidence-in–chief on a material or essential point by cross- examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible **(Kabengevs Uganda UCA Cr App. No. 19 of 1977 (Unreported), and James Sowoabm&Anorvs Uganda (SC) Cr App No. 5 of 1990 (Unreported) See also Eladam Enterprises Ltd vs. SGS (U) Ltd &Ors. Civil App. No. 05 of 205, reported in [2007] HCB Vol 1 and Sakaar on Evidence Vol. 2, 14t Edition, 1993 by Sudipto Sarkar & V.R Manohar Pg. 2006 -2007).**

This being an offence of a sexual nature, and as I had warned the assessors, I am aware that there is a rule of practice of courts not to convict an accused on the uncorroborated evidence of the victim of a sexual offence. Corroboration means additional independent evidence connecting the accused to the crime. Corroboration is also required as a matter of fact when relying on the testimony of a single identifying witness. There is need to

find other independent evidence to prove not only that the sexual act occurred but also that it was committed by the accused. Further, identification evidence should be considered with caution. However, I can proceed to rely on the evidence of a single identifying witness even without corroboration, if I am satisfied that the witness was truthful and there is no possibility of error in the identification of the perpetrator. I can also proceed to rely on the evidence of the victim in a sexual offence even without corroboration if I am satisfied the witness was truthful. **(Chila v. R [1967] EA 722; Abdala bin Wendo & Anor v. R (1953) 20 EACA 166).**

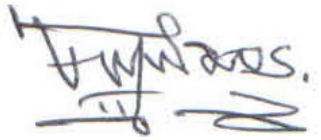
I am satisfied that the evidence of PW2 SAMBAZI JOY MERCY was truthful; and additionally, in relation to identification, that there is no possibility of error in the identification of the accused. The said evidence is adequately corroborated by the evidence of her sister PW3 in relation to identification; and by PW4 the Clinical Officer in relation to the sexual act. The immediate report by PW3 to their mother PW1 placing the accused at their house as the person who had taken away the victim immediately before she was defiled demonstrates the consistency of the evidence of PW3 on this material aspect.

In my final analysis of all the evidence adduced before this court, I am satisfied that the prosecution has proved beyond reasonable doubt that the accused person Walugembe Shafik was the one that performed the sexual act on the victim Sambazi Joy Mercy.

In agreement with the Lady and Gentleman Assessors, I find that each of the ingredients of the offence has been proved beyond reasonable doubt.

I therefore find the accused person Walugembe Shafik guilty of the offence of aggravated defilement Contrary to Section 129 (3) and 4(a) of the Penal Code Act. I convict him accordingly.

**Dated** at Moroto this **18th** day of **November 2021.**



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**Vincent Wagona**

**Judge**

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**UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: PROSECUTION**

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**BEFORE: HON. JUSTICE VINCENT WAGONA**

**SENTENCE AND REASONS FOR SENTENCE**

The accused has been convicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the Penal Code Act,

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the Penal Code Act, is death. However, this punishment is by sentencing convention reserved for the most extreme circumstances of perpetration of the offence such as where it has lethal or other extremely grave consequences. Examples of such consequences are provided by Regulation 22 of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013to include; where the victim was defiled repeatedly by the offender or by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS, or resulting in serious injury, or by an offender previously convicted of the same crime, and so on. These factors imply that the offence committed had life threatening consequences, meaning death was eminent. I have considered the circumstances in which the offence was committedwhich were not life threatening, for which reason I will not hand him the death sentence.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the Penal Code Act, the Constitution (Sentencing

Guidelines for Courts of Judicature) (Practice) Directions, 2013 stipulate under Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule,that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors.I have to bear in mind the decision in **Ninsiima v Uganda Crim. Appeal No. 180 of 2010**, where the Court of appeal held that the sentencing guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial.

The Court of Appeal though has time and again reduced sentences that have come close to the starting point of 35 years' imprisonment suggested by the sentencing guidelines, as being harsh and excessive, and upheld those that were much lower than the starting point of 35 years' imprisonment. In **Birungi Moses v Uganda C.A Crim. Appeal No. 177** of 2014 a sentence of 30 years' imprisonment was reduced to 12 years' imprisonment in respect of a 35 year old appellant convicted of defiling an 8 year old girl. In another case, **Ninsiima Gilbert v Uganda, C.A. Crim. Appeal No. 180 of 2010**, it set aside a sentence of 30 years' imprisonment and substituted it with a sentence of 15 years' imprisonmentfor a 29 year old appellant convicted of defiling an 8 year old girl. In **Lukwago v. Uganda C.A. Crim. Appeal No. 36 of 2010** the Court of Appeal upheld a sentence of 13 years' imprisonment for an appellant convicted on his own plea of guilty for the offence of aggravated defilement of a thirteen year old girl. In **Kayongo Sadam Vs Uganda, Criminal Appeal No. 524 of 2016,** a case involving a Plea Bargain Agreement, the appellant was sentenced to 20 years imprisonment for defiling a girl aged 6 years. The Court of Appeal, after considering the aggravating and mitigating factors, and in line with the principle of parity in sentencing, reduced the sentence to 12 years 5 months and 10 days after removing the 1 year 6 months and 20 days the appellant spent on remand.

In this case the Prosecution has proposed a custodial sentence of 25 years imprisonment citing that: the offence is capital in nature whose maximum punishment is a death sentence; the convict was not remorseful throughout the trial; the offence is rampant in the Karamoja region; the victim was only 13 years of age and vulnerable; the victim was a pupil in P5 at Kasoroi Primary School; she told court that by the offence, the convict tarnished her image and now she is embarrassed to go back to school; it was the first time that the victim experienced sexual intercourse and because it was forceful, she sustained injuries in her vagina and felt pain in her vagina and thighs.

However, the Defence has pointed out a number of mitigating factors to justify a lenient sentence: the convict is a first offender; although the case went through a full trial, the convict was remorseful and showed no arrogance; he is the sole bread winner in his household and was hustling for his family as a stone loader, and was not involved in any dubious activity; he has very young children to care for, who need his parental role; the offence was not life threatening or likely to lead to death; the convict si 24 years, still a young person with high prospects of transforming his life into a better citizen. The Defence proposes a sentence of 8 years imprisonment.

Although these circumstances did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the action such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. The accused was aged 23 years and the victim was 13 year old, at the time of the offence and the age difference between the victim and the convict was 10 years. The convict abused the trust of a child of tender years at whose home he was always given a good reception when he asked for water to drink. He has hurt her and exposed her to the danger of falling out of school following the embracing events.

The seriousness of this offence is mitigated by a number of factors pointed out by the Defence, including the fact that the convict is a first offender. He is a young man and

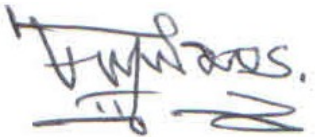
capable of reforming. The severity of the sentence has been tempered by those mitigating factors.

It is mandatory under Article 23 (8) of the Constitution of the Republic of Uganda, 1995 to take into account the period spent on remand while sentencing a convict. Regulation 15 (2) of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, requires the court to"deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account.

After putting everything into consideration, I sentence the convict to 15 years imprisonment which I consider to be appropriate in this case. The convict has been in custody for 1 year, 1 month, and 27 days. I deduct this period from the 15 years' imprisonment. The convict will therefore serve a sentence of imprisonment of 13 years, 10 months, and 3 days with effect from today.

The convict is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.

Dated at Moroto this 18th day of July, 2018.



Vincent Wagona

**Judge**