

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT LIRA

HCT-10-CR-SC-0054-2020

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

OTIM KIZITO :::::::::::::::::::::::::::::::::::::::ACCUSED

BEFORE: HON. JUSTICE DUNCAN GASWAGA

JUDGMENT

- [1] **Otim Kizito, (the accused)** hereinafter has been indicted for the offence of aggravated defilement c/s 129(3) and (4) (b) of the Penal Code Act, Cap 120. The particulars allege that **Otim Kizito** between the 8th and 14th day of August 2019 at Ogengo Cell in Lira district, being a person with the Human Immunodeficiency Virus (HIV) performed a sexual act with **Apili Flavia Dillish** a girl aged 15. The accused person denied the charges and the prosecution presented four witnesses in a bid to prove its case. After the closure of the prosecution case the accused person elected to give evidence on oath.

- [2] The brief facts of the case are that the accused person lured **Apili Flavia Dillish** into sexual relations around the month of July 2019 when she was aged 15 years. That around 08/08/2019, the victim left her parent's home and went to cohabit with the accused at his house in Ogengo Cell, Lira District where the police arrested them on 14/08/2019. The victim was given PF3A at Lira Central Police station and was subsequently examined at Victoria Barogole clinic where she was found to be of apparent age of 17 years. The accused was also examined at Lira Regional Referral Hospital and found to be an adult of sound mind.
- [3] In criminal cases the burden lies on the prosecution to prove the said offence beyond reasonable doubt. See the case of **Woolmington Vs DPP [1935] AC 462**. It should be noted further that the accused person has no duty to prove his innocence and as such the accused person is only convicted on the strength of the prosecution case. **See Insrail Epuku s/o Achietu Vs R [1934] 1 166 at page 167.**
- [4] The prosecution is required to prove the following ingredients of the offence of aggravated defilement;
1. That the victim was below the age of 18,
 2. That a sexual act was performed on the victim,
 3. That it is the accused who performed the sexual act on the victim and further that he was HIV positive.
- [5] Regarding **the age of the victim**, it is important to note that the best evidence to prove age is that of a birth certificate and or the testimony of the parents of the child. Also the court's own observation can be good evidence on the age of the victim. See **Uganda Vs Kagoro Godfrey H.C. Crim.Session Case No. 141 of 2002**. It was the

testimony of **PW1 Amolo Janet** that in 2019 her daughter was only 14 years when she disappeared and was later found with the accused person in Ogengo Cell, Lira District. She stated that her daughter, the victim was born on 28/08/2004. According to the medical evidence admitted as **PE1**, it was found that she was about 17 years of age basing on physical development of secondary sexual characteristics and the wisdom teeth which were still missing. When before court to testify on oath the victim informed this court that she was 17 years of age meaning that by the time the offence was committed she was 15 years old. Further, upon arrest the victim had admittedly given to the police wrong information regarding her age that she was above 18 years. While testifying she stated that she had done so intentionally to avoid being detained by police. This corroborates the accused's testimony that indeed the victim had stated a wrong age to him and she is somehow unreliable. Probably, that is why she had refused to come and testify in court and when she finally accepted special leave had to be granted to the prosecution to re-open their case.

- [6] From the evidence above, it is apparent that there are inconsistencies with the age of the victim. These would have been cured easily if at all the birth certificate of the victim had been presented in court. In her evidence the victim's mother PW1 stated that the family of the accused had deceived the victim and she took her birth certificate and some of her clothes to the accused's home. On the same aspect, the victim testified that she had stolen the birth certificate from her parent's home because she had been asked to steal it. It is however important to note that;

"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." See **Uganda Vs Frendo Abubaker Lolem Crim. Session Case No. 0123 of 2015, Alfred Tajar Vs. Uganda EACA Cr. Appeal No.167 of 1969.**

"The gravity of a contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case and 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 the 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." See **Uganda Vs Frendo Abubaker Lolem Crim. Session Case No. 0123 of 2015**

- [7] I find these contradictions essential to the determination of the charges preferred against the accused person, age being one of the compulsory ingredients to prove in order for a defendant to be convicted on a defilement charge. However, a simple calculation of the dates basing on the year given by PW1, mother of the victim, it is found that the victim was about 15 years of age at the time this offence was committed. Clearly, at the time of commission of the offence the victim

was above 14 years but below 18 years which still falls within the range prescribed by the law under Section 129 (3) of the Penal Code Act, Cap 120. In conclusion therefore, I find that the contradictions pointed out regarding the discrepancies in the victim's age have been clearly explained away upon a consideration of the entire evidence on record regarding the matter. As such, the prosecution has satisfactorily proved beyond reasonable doubt that the victim herein was below the age of 18 years at the time the offence was committed.

- [8] Regarding whether there was performance of a sexual act, it was the testimony of **PW4**, the victim that she had indeed left home, in Kole District on 08/08/2019 and moved to the accused's home in Ogengo Cell, Adekekwok Lira District where they started having sexual relations. This evidence was corroborated by **DW1**, the accused person himself who stated that he took PW4 to his home to be his wife under the mistaken fact that PW4 was 18 years old. He confirmed having had sexual relations with the victim. This was further corroborated in the **charge and caution statement (PE4)** tendered into evidence where the accused person confirmed to **PW3 D/AIP Oketayot Simon Lusima** that he had taken the victim to his home to be his wife and they had had sexual relations. The findings in the **medical evidence PE1** also confirmed this as it was stated that she had been having sexual intercourse and her normal menstrual period (LNMP) had ended two weeks prior to the examination. The defence does not contest this issue. As such I find that the prosecution has proved beyond reasonable doubt that a sexual act was performed on the victim.

[9] Regarding participation of the accused in the offence, it was the testimony of **PW2 No.60761 PC Obonyo Geoffrey**, that upon a tip off by the L.C.1 chairman of Ogengo Cell, Lira District, they proceeded to the house of the accused person to effect his arrest. That he was found on the bed with the victim and the accused person agreed to having committed the offence and also willingly followed the law enforcement officers to Adekekwok Police Post. This evidence was further corroborated by **PW3 D/AIP Oketayot Simon Lusima** who confirmed that while recording the charge and caution statement, the accused person stated that he had approached the victim for sexual relations and had subsequently taken her to his home and started having sexual intercourse with her. That he wouldn't have done this if he had known that he was HIV positive. On his part **DW1, the accused** confessed to having committed the crime by having sexual intercourse with the victim but stated that it was a mistake of fact since the victim had lied about her age. In fact the participation of the accused in the crime is not disputed just like his HIV status which is an aggravating factor as per section 129(4) (b) of the Penal Code Act, Cap 120. Of importance to emphasize here also is that it is immaterial whether the accused person had knowledge at the time of commission of the offence that he was HIV positive or not. The relevant provision of the law reads thus;

129. Defilement of persons under eighteen years of age

.....

(3) Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection

(4) Commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

(4) The circumstances referred to in subsection (3) are as follows—

(b) Where the offender is infected with the Human Immunodeficiency Virus (HIV);

- [10] But for his defence, the accused had also pleaded mistake of fact to the effect that he was misled by the victim who lied to him the way she did to the police that she was above 18 years of age. According to Section 9 of the Penal Code Act, Cap 120,

9. Mistake of fact

(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he or she believed to exist.

(2) The operation of this section may be excluded by the express or implied provisions of the law relating to the subject.

See also, **The Uganda Criminal Justice Bench Book, 1st Edition, 2017, Page 214.**

- [11] It is however important to note that the offence herein is Aggravated defilement and as such knowledge of the age of the victim is immaterial whether the accused person knew the age of the victim or not or if he would have acted differently, had he known the age of the victim. See the discussion on this matter in the case of **Uganda Vs Endroma [2020] UGHC 160** where it was held that;

"The defence raised by the accused is that of mistake of fact as to the age of the victim. Unfortunately for him, the accused's knowledge of the victim's age is not an essential element of Aggravated defilement. Mistake as to the age of the victim is not a defence even though the accused had a reasonable belief, had exercised care to find out her age, or had been told by the victim that she was over age. This rule is an exception to the general defence of mistake of fact which states that if the accused believed there existed certain facts, which had they been true would have rendered the action lawful, then he was not guilty because he was incapable of entertaining the intent necessary to constitute the crime. Aggravated defilement is considered a "strict liability" offence; one that does not require proof that the accused knew the victim's underage status. The defense of the accused thus fails."

- [12] In addition, the legislature saw it fit to specifically legislate for this kind of situation vide **Section 144 of the Penal Code Act Cap. 120** which actually puts this whole matter to its final rest in the following terms;

144. Knowledge of age of female immaterial.

Except as otherwise expressly stated, it is immaterial in the case of any of the offences committed with respect to a woman or girl under a specified age that the accused person did not know that the woman or girl was under that age, or believed that she was not under that age.

- [13] Resultantly, the prosecution has proved the participation of the accused person beyond reasonable doubt.
- [14] I am in total agreement with the Gentlemen Assessor's opinion that the prosecution has proved all the necessary ingredients beyond reasonable doubt. As advised, I hereby find the accused

person guilty as charged with the offence of Aggravated Defilement C/S 129(3) and (4)(a) and convict him accordingly.

[15] Right of appeal explained.

Dated, signed and delivered at Lira this 24th day of January, 2022



Duncan Gaswaga

JUDGE