

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT LIRA
HCT-10-CR-SC-0193-2016

UGANDA :::PROSECUTOR

VERSUS

ECONGA SOLOMON :::ACCUSED

BEFORE: HON. JUSTICE DUNCAN GASWAGA

JUDGMENT

- [1] **Econga Solomon, 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 **Econga Solomon** on the 7th day of June 2015 at Ogogong village in the Alebtong District had unlawful sexual intercourse with Atim Marion, a girl under the age of fourteen years. The accused person denied the charge 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 and also presented four witnesses in his defence.
- [2] The brief facts of this case are that the accused person is the paternal uncle of the victim. That on 07/06/2015, the victim's mother took her and her brother to their grandmother's home where the accused person was also staying. That while they were playing, the accused person came and took the victim inside his house, put her skirt up and

parted her thighs wide. He also removed his trouser and lay naked on the victim and eventually having sexual intercourse with her. The victim felt a lot of pain and cried out loud as a result. Her brother Okwir Emmanuel was at the scene and he witnessed the accused's actions and reported to their mother later in the evening. The victim's mother questioned her about the incident and also checked her. Upon confirmation, the accused was reported to the local authorities and later handed over to the police. The victim was examined on PF3A and she was found to be 4-6 years of age and her vagina severely torn with fresh edges.

- [3] The burden to prove a case against the accused person lies entirely on the prosecution and the case should be proved beyond reasonable doubt. See Woolmington Vs DPP (1935) AC 462. It therefore follows that an accused person should only be convicted on the strength of the prosecution case and not on the weaknesses of the defence case. See also Miller Vs Minister of Pensions [1947] 2 ALL ER 373, Luboga Vs Uganda [1967] EA 440.
- [4] In order to prove the offence of aggravated defilement, the prosecution ought to prove the following ingredients beyond reasonable doubt;
1. That the victim was below the age of 14,
 2. That a sexual act was performed
 3. That the accused participated in the offence.
- [5] Regarding the first ingredient that **the victim was below the age of 14**, 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. However, there are other acceptable ways of proving the age of a

person/ victim for instance through; medical examination and observation by court. See **Uganda Vs Kagoro Godfrey H.C. Crim.Session Case No. 141 of 2002**. The prosecution and defence agreed to and tendered in PF3A in respect of the examination of the victim Atim Marion which was done in Alebtong Health Centre IV on 08/06/2015. The victim was found to be 4years. By the time of this testimony, the victim stated to this court that she is 12 years of age and this was not disputed by the defendant. The 1st ingredient was therefore proved by the prosecution beyond reasonable doubt.

- [6] Regarding the second ingredient of **performance of a sexual act**, it has been held in the case of **Bassita Hussein Vs. Uganda, Supreme Court Criminal Appeal No 35 of 1995** that ;

“The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by Medial evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim’s evidence must always be adduced in every case of Defilement to prove sexual intercourse or penetration. Whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt”.

- [7] It was the testimony of **PW1 Atim Marion** that while she was playing with her brother at the home of the accused, the accused got her and put her inside the house and slept on her. That he used his private part to assault her. She demonstrated how the accused had slept on her using dolls. This evidence was corroborated by the medical evidence (**PE1**) tendered into court where the findings showed that the victim’s hymen was severely torn with fresh edges which was consistent with

forceful penetration. The medical examination had been done on the 08/06/2015 a day after the incident. **PW3 Okwir Emmanuel** also further stated to having seen the accused defile the victim. The defence has not disputed this ingredient. I find that the prosecution has proved this ingredient beyond reasonable doubt.

- [8] Regarding the last ingredient of the **participation of the accused**, the victim **PW1** put the accused person squarely on the scene of crime and so did **PW3 Okwir Emmanuel**. On his part, **DW1 the accused person** stated that on the said date he had travelled to his sister's village in Teyao village, Amuria parish in Aloi sub county, where he had gone to pick a piglet. DW1 further stated that this charge arose out of a long standing grudge between his family and the family of the victim which had even earlier on in 2009 led to the death of his brother. In support of this version, Alaba Agnes, **DW2** stated that on the said date, the accused went to her home to pick a piglet between 9:00am to 10:00am and left the home at around 4:00 to 5:00pm.

- [9] Regarding the defence of alibi;

"It should be noted that when an accused person raises the defence of alibi he has no duty to prove it. The duty lies on the prosecution to disprove a defence of alibi and place the accused at the scene of crime as the perpetrator of the offence." See **Uganda Vs Frendo Abubaker Lolem Crim. Session Case No. 0123 of 2015, Festo Androa Asenua and Another Vs Uganda, S.C. Criminal Appeal No.1 of 1998 and Cpl. Wasswa and another Vs Uganda, S.C. Criminal Appeal No. 49 of 1999.**

[10] From the evidence above, both PW1 and PW3, although children of tender years were living near the accused's home and knew him very well as their uncle. I have no doubt whatsoever that they properly recognized him as the victim's assailant since there was nothing to impede their views. Moreover, they had interacted as the accused picked up the victim to take her to his house in the full view of PW3 who later peeped through a hole under the door and saw the accused having sexual intercourse with the victim. PW1 & PW3 have squarely placed the accused at the scene of crime at the material time although the two could not tell the exact time but just approximated. Therefore, the accused's defence that he had left his sister's home (Alaba Agnes DW2) between 4:00pm and 5:00pm and arrived home at 6:00pm is highly doubted as a fabrication and therefore rejected. According to Awil Vincent George DW3 the LCI Chairman and clan head the incident happened between 4:00pm and 5:00pm and the child was taken to him at about 7:00pm on the same day. That the victim confirmed the sexual assault as well and the accused was immediately arrested although he denied any wrong doing. After thoroughly re-analyzing all the evidence on record I found all the prosecution witnesses truthful and reliable. Even the children of tender years had testified very firmly and brilliantly. The contradictions, if at all any, pointed out by the defence regarding the time of the incident and the aspect of PW3 entering the house were indeed minor and of no consequence to the prosecution case. The main issue was about the accused performing a sexual act on the victim which in my view has been satisfactorily proved. In the same vein therefore the court also rejects the alleged family grudge emanating from a land dispute

between the accused's family and that of the victim as it has no connection at all to the crime at hand. In fact the evidence by accused and his sister DW2 indicated that the accused's brother had not been killed but committed suicide.

[11] On the whole, the defence of alibi advanced by the accused is an afterthought. I do not believe the evidence of the accused. If at all he had visited the sister, Alaba Agnes DW2 on that day then he must have returned to the village before 4:00pm. For witnesses have properly and firmly placed him at the scene of crime at the material time i.e between 4:00pm and 5:00pm when the crime was committed. There is no way the accused could have been in two different places (i.e at the sister's home and the scene of crime) at the same time. The prosecution has successfully discharged its duty of disproving the accused's defence of alibi.


[12] In the circumstances I am however inclined to agree with the prosecution that indeed the accused person was present at the scene of crime at the time the victim was sexually assaulted, having been properly recognized by the two children PW1 and PW3. I equally find that the evidence of alibi and a grudge is an afterthought for the accused person to avoid liability for an offence which he committed. Accordingly, I find the ingredient of participation of the accused in the crime herein proved beyond reasonable doubt.

[13] **I have been advised by the Assessors to find the accused person guilty because the prosecution has proved all the ingredients of the offence herein beyond reasonable doubt. Indeed, I am fully in agreement with the Assessor's opinion that the prosecution has**

proved its case beyond reasonable doubt and hereby find the accused person guilty of the offence of Aggravated Defilement C/S 129 (3) and (4)(a) and convict him accordingly.

[14] Right of appeal explained.

Dated, signed and delivered in open court at Lira this 24th day of January, 2022.


Duncan Gaswaga
JUDGE