

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT LIRA  
CRIMINAL SESSION CASE No. 06 OF 2020**

**UGANDA .....PROSECUTION**

**VERSUS**

**ENGOLA NEBUCHADNEZZAR.....ACCUSED**

**BEFORE: HON. JUSTICE DUNCAN GASWAGA**

**JUDGMENT**

- [1] **Engola Nebuchadnezzar (accused)** is indicted on two counts of aggravated defilement C/S 129 (3) and (4) of the PCA. In the amended indictment the particulars of offence allege that;

**Count I**

Engola Nebuchadnezzar on the 19<sup>th</sup> day of May, 2019 at Atali village in Alebtong district unlawfully performed a sexual act with Akao Rebecca, a girl below the age of fourteen years.

**Count II**

Engola Nebuchadnezzar on the 19<sup>th</sup> day of May 2019 at Atali village in Alebtong district, unlawfully performed a sexual act with Acio Racheal, a girl below the age of fourteen years.

- [2] The accused denied the offences and prosecution presented five witnesses in a bid to prove the charges. After the closure of the prosecution case the accused person elected to give his evidence on oath and presented evidence from four witnesses.
- [3] The brief facts of this case are that on the afternoon of 19/05/2019, at Atali village, the victims left their mother at home while they went to the bush near their garden to collect and eat wild fruits locally known as “Opobo”. That while eating the fruit, the accused arrived with a catapult and stick in his hands and grabbed both of them. That he laid Akao Rebecca down and after having sexual intercourse with her, ejaculated in her mouth and thereafter also had sexual intercourse with the second victim Acio Racheal. The accused immediately warned the two victims not to tell anyone about what had transpired. That on 30/05/2019, Acio Racheal disclosed to their mother what had happened. When the mother checked the private parts of the victims she saw some bruises on the genitals of the younger victim (Acio Racheal). She informed the victim’s father who reported to the L.C.1 Chairperson and eventually to police. The victims were examined on PF3A and found to be 9 and 5 years of age respectively and with reddish and bruised genitals which had pus-like substances. The accused was later arrested and examined on PF24A and found to be 36 years of age and mentally sound.
- [4] 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 be convicted on the strength of the prosecution case and not on the weakness of the defence case. See

also Miller Vs Minister of Pensions [1947] 2 ALL ER 373, Luboga Vs Uganda [1967] EA 440.

- [5] 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 on the victim
  3. That the accused participated in the offence.
- [6] **Regarding the age of the victims**, it must be noted that; *the most reliable way of proving the age of a child is by the production of their birth certificate, followed by the testimony of her parents. It has however been held that other ways of proving the age of a child can be equally good such as the court's own observation and common sense assessment of the age of the child. See Uganda Vs Kagoro Godfrey H.C.Crim. Session Case No. 141 of 2002 and Uganda Vs Mabike Athanasious Crim. Session Case No. 065 of 2017*
- [7] From the medical evidence admitted into court as **PE1** and **PE2** respectively, and the evidence of Dr. Okello Amos PW4, it was found that the victims (Acio Racheal and Akao Rebecca) were seven years and nine years respectively. Further, it was the evidence of **PW3 Opaka Nelson** (father to the victims) that **Acio Racheal (PW1)** was born on 14/04/2012 while **Akao Rebecca (PW2)** was born on 07/09/2010 which birth dates places them both below the age of 14 years at the time of commission of the offence. I therefore find that the prosecution has proved this ingredient to the required legal standard.
- [8] **Regarding performance of a sexual act**, it was the testimony of **PW1 Acio Racheal** that the accused had splashed semen in the mouth of her elder sister Akao Rebecca before coming to her and sleeping with

her. That while sleeping with her, **the accused used a stick on her to press her umbilical cord and she started feeling pain in her lower abdomen.** That they later informed their mother about it who then informed their father. They were later taken to Amugu Health Centre where they were checked by a nurse and concluded that something had gone wrong with them. That they had been raped. It was the testimony of **PW2 Akao Rebecca** that while standing under the Opobo tree the accused person had pulled them and raped her and her sister. That the accused had laid on top of her, put his penis in her vagina and afterwards ejaculated in her mouth. That the accused person afterwards strangled PW2 and her sister warning them not to report to anyone. **PW4 Dr. Okello Amos** also examined the victims and stated that PW1 had a perforated hymen but there was no injury in the vulva nor vaginal discharge and this was indicative of an attempted penetration with a blunt object. Further, that PW2's genitals were normal however she had a perforated hymen which was evidence of partial penetration through a sexual act.

[9] Section 129 (7) of the Penal Code Act Cap 120 defines a sexual act;

***“Sexual act” means;***

*(a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ,*

*(b) the unlawful use of any object or organ by a person on another person's sexual organ; “sexual organ” means a vagina or penis.*

A sexual act can be proved by the direct evidence of the victim or circumstantial and or medical evidence. See **Remigious Kiwanuka Vs Uganda S.C. Crim. App. No. 41 of 1995 (unreported).**

- [10] From the testimony of PW1 Acio Racheal, aged 8 years, it becomes clear that although the accused lay on top of her he did not insert his organ or any object in her private parts. Her evidence is to the effect that when he came off her he used a stick to point and press at her umbilical cord and she started feeling pain in the lower abdomen. Much as the medical evidence shows a perforated hymen in her private parts, in these circumstances where the direct evidence by the victim herself contradicts the medical evidence, I am unable to hold that a sexual act, as defined in Section 129(7) (supra) was performed on her. However, as for PW2 Akao Rebecca, aged 9 years, her sister Acio Racheal corroborated her testimony that the accused started with her by laying her down and putting apart her legs before inserting his organ into her private parts and subsequently removing it and splashing semen into her mouth. The medical evidence PE1 and PE2 offered further corroboration when the doctor confirmed that Akao's hymen had been perforated which was indicative of partial penetration although the genitals were normal. The court therefore finds the prosecution to have proved beyond reasonable doubt that a sexual act was performed on PW2 Akao Rebecca but not on PW1 Acio Racheal.
- [11] **Regarding participation of the accused in the crime**, it was the testimony of **PW1 and PW2** respectively that the accused had indeed defiled them while they were under the Opobo tree where they had gone to eat wild fruits. **PW3** was informed by his wife that the accused person had defiled his daughters. Upon seeking confirmation from the victims (PW1 and PW2) he proceeded and reported the matter to the L.C.1 chairperson. That after the chairman confirming with the children about the incident, PW3 then reported the matter to Amugu Police Post

from where the children were taken to the hospital and it was found that the elder daughter had an injury in her vagina while the younger one had many sperms in her vagina. **No. 29106 Owani Francis PW5** stated that after the matter being reported on 02/06/2019, he recorded the statements of the complainant, victims and other witnesses. Later, he went to the scene of crime on 04/06/2019 and drew a sketch plan and afterwards effected the arrest of the accused person in Atali village, Alebtong district.

- [12] It was the evidence of **DW1, the accused person**, that on the 19/05/2019 he had gone to the trading centre from where the L.C.1 chairman sent him to buy local brew for a gathering scheduled to take place on Wednesday. That he looked for the local brew and when he failed to find it, returned at around midday to report to the chairman. He further stated to court that he did not know the accused person and had only found out about them at the police station. Also, that there was a grudge between him and the complainant for having ended his marriage with the complainant's older daughter. **DW2, Chairperson L.C.1** informed court that the accused person went to him at midday to report about his failure to find the local brew and he left the accused person at the drinking joint at around 5pm. That he had started drinking with the accused at around 1pm. **DW3 Angulo Moses** testified that he had been with the accused person at the drinking joint until 5pm when they closed the group. He left the trading centre at that time. **DW4, Ogolo John** stated that the accused arrived at around 5:00pm to 6:00pm and they left the trading centre to return home at about 8pm. That they moved with two other boys Willy and Ogwang. Each

branched off at their respective places and the accused person went to his home.

- [13] I have noted all the various aspects pointed out herein that have a contributory effect as to whether the accused indeed participated in the crime or did not i.e. the accused person's alibi, the inconsistencies in the time at which the alleged offence was committed and the alleged grudge which the complainant apparently claimed to have against the accused person for rejecting his daughter in marriage.

*"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.**

- [14] The prosecution relied on the evidence of PW1 and PW2 to place the accused at the scene of crime. Although the accused stated that at the time of the commission of the offence he was in the trading centre, I am unable to believe him because the victims knew him very well way back before the commission of the offence. This is further confirmed by the fact that the house of the accused person was a short distance of about 300 meters away from where the crime was committed. See sketch plan PE5. As such, it is unlikely that the two victims would wrongly identify the accused person or fail to recognize him. They were

able to recognize him as a person who lived in the same area with them and yet had even married their big sister although the said marriage collapsed. During the commission of the offence, the accused interacted with both victims by first talking to them and later by warning them not to report him to their parents. So, they were so close to him and it was day time. I also noted during their testimonies that both PW1 and PW2 were confident and indeed truthful about what they were stating and the court believed them as reliable witnesses.

- [15] From the record there is no evidence corroborating that of the victims because both of them are minors who gave unsworn statements. **Section 133 of the Evidence Act** however states thus;

***“Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any act.”***

- [16] Consequently, a conviction can be solely based on the testimony of the victim as a single witness provided the court finds her to be truthful and reliable, as PW1 and PW2 in the instant case. For what matters is the quality and not the quantity of evidence. See **Sewanyana Livingstone vs. Uganda SCCA No. 19 of (2006), Ntambala Fred Vs Uganda Criminal Appeal No. 34 of 2015.** The defence rightly so pointed out the inconsistencies regarding the exact time at which the offence herein was committed. PW1 Acio Racheal stated that it was around midday when the sun was right above her head while PW2 Akao Rebecca stated that it was around 5:00pm when the sun was going down.



*"It is settled law that grave inconsistencies and contradictions unless satisfactorily explain, 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**

- [17] After diligently re-evaluating the evidence on record, especially that of PW1 and PW2 I find that they were both children who narrated the events freely as they saw them unfold. In such circumstances such variances in their testimonies are expected and would not necessarily mean that the witnesses lied or did not witness or experience the incident. This was a rural setting while the victims were taken unawares and had not necessarily prepared for this incident and as

such there was no way they could have been keen on the exact time the assailant struck. This was the normal and natural flow of things. It was not a rehearsal. In fact, I would have been so surprised, and indeed suspicious, if the victims had both stated the same time without approximating. In addition, I want to think that since the victims may not have had a watch to time each event, each ones appreciation of time was certainly not the same. One may not necessarily have been keen at the time or even certain details of the incident which the other may have picked particular interest in and paid more attention at. As such, and given that the most important aspect of this whole event was the defilement under the tree, the inconsistency in the timing was not a material or essential or major contradiction that would affect the determination of the crimes herein.

- [18] Clearly, the offences herein were committed in the afternoon and the accused has put up a defence of alibi where he seemed to have accounted for his whereabouts from around 01:00pm to 08:00pm as indicated above. He even brought witnesses DW2, DW3 and DW4 to support the said alibi. The burden or duty to disprove an alibi is on the prosecution and not on the accused. See Bogere Moses and Another Vs Uganda (SCCA 1 of 1997) that;

***“What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved the court must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence that the accused was at the scene of crime, and the defence not only***

***denies it, but also adduces evidence showing that the accused person was elsewhere at the material time it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and the hold that because of that acceptance per se the other version is unsustainable."***

- [19] A diligent analysis of the evidence as a whole would show that the offences herein were committed before or about 01:00pm i.e. most likely at about 12:00pm as testified by PW1, Acio Racheal and not 5:00pm as stated by PW2 Akao Rebecca. There is overwhelming evidence placing the accused squarely at the scene of crime on the afternoon of that day yet he goes ahead to properly account for his whereabouts between 01:00pm and 8:00pm. The only logical conclusion here is that he committed the offences before embarking on those errands which were assigned to him by the L.C.1 chairman and then joined friends at the trading centre for alcohol. PW2 Akao Rebecca must have gotten her time wrong. She was only estimating and according to her she must have genuinely thought it was 05:00pm. I do not think she nor PW1 intended to deliberately tell lies. I cannot fault any one of them. Resultantly, the defence of alibi presented by the accused is rejected as it was formulated after the offence had been committed otherwise it should have been tendered well in time to enable the prosecution a chance to investigate it.
- [20] For there is no way the accused could have been at the scene of crime and also at the same time be at the trading centre. He was at both places on the same day but at different times. In the same vein, the alleged grudge with the father of the victims (PW3) is also rejected for

lack of connection at all with the crimes herein. No doubt the defilement took place and the victims clearly recognized the accused as their assailant who had initially denied knowing them but later changed his testimony and stated that they were related to his former wife. One wonders why he was initially denying knowing them. Also why would PW3 then implicate accused when it was PW1 and PW2 who pinned him to the crime. This alleged grudge is far-fetched, unsubstantiated and of no consequence at all on the case.

[21] Resultantly, I find that sufficient evidence has been adduced to squarely place the accused person at the scene of crime at the material time. The court also finds that it is the accused, and no other person, that committed the crimes herein against both victims. The prosecution has therefore proved the participation of the accused person beyond reasonable doubt.

[22] The Gentlemen Assessors have advised me to acquit the accused on both counts reasoning that whereas the first ingredient of the offence has been proved beyond reasonable doubt, performance of a sexual act in respect of PW2 and PW1 and the participation of the accused in the crime was not proved beyond reasonable doubt. Although the Gentlemen Assessors doubted PW4 Dr. Okello's evidence, for reasons already stated herein, the said doctor was found to be truthful and reliable, and there was no reason to disbelieve his findings when he conducted the second medical examination on the victims. Moreover, Dr. Okello's evidence was tested on the touchstone of cross-examination and it remained intact. The Gentlemen Assessors have also opined that due to the inconsistencies and major contradictions in the evidence, participation of the accused in the crime was not proved

beyond reasonable doubt. I respectfully beg to differ with their opinion because, and as explained herein above, these contradictions were not major but minor and of no consequence and could not go to the root of the case. In law, not every contradiction or inconsistency is considered fatal to the case. Moreover, the said inconsistencies referred to have been satisfactorily explained away by the prosecution.

[23] In addition, failure to call witnesses thought to be crucial like the mother of the victims Apio Betty to whom a report (first information) had been made as well as the victim's big sister Elizabeth Amono who was at home but did not witness the incident is not fatal to the case. For what matters is the quality and not the quantity of evidence. In addition, according to **Section 133 of the Evidence Act**, there is no specific number of witnesses, required to prove a case or a particular aspect. Even a single witness, as long as long as truthful and reliable as PW1 and PW2 in the instant case, can sustain a conviction. See **Sewanyana Livingstone Vs Uganda** (supra).

[24] In conclusion, the court finds the prosecution to have proved beyond reasonable doubt the offence in respect of Count I. accordingly, the accused is found guilty and convicted on Count I as charged and, acquitted on Count II. However, the evidence on record discloses a minor offence of indecent assault C/s 128(1) of the Penal Code Act in respect of Acio Racheal. The provision states;

***128. Indecent assaults, etc.***


***(1) Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years.***

*(2) It shall be no defence to a charge for an indecent assault on a girl under the age of eighteen years to prove that she consented to the act of indecency.*

*(3) Any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl, or intrudes upon the privacy of such woman or girl, commits a misdemeanor and is liable to imprisonment for one year.*

**[25] Accordingly, the accused is also found guilty of indecent assault c/s 128 (1) of the Penal Code Act and is hereby convicted.**

**Dated, signed and delivered in open court at Lira this 24<sup>th</sup> day of January, 2022.**

  
**Duncan Gaswaga**  
**JUDGE**