

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL HIGH COURT
CIRCUIT HELD AT KAMWENGE
HCT-01-CR-SC-215/2022

5 **UGANDA.....PROSECUTOR**
VERSUS
NUWAGABA FELEX.....ACCUSED

BEFORE: HON. JUSTICE VINCENT WAGONA

10 **JUDGMENT**

The accused stands indicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the Penal Code Act. It was alleged that Nuwagaba Felex on the 8th day of February 2021 at Bukonderwa Cell, Kitonzi Ward, Kamwenge Town
15 Council in the Kamwenge District, performed a sexual act with Kebirungi Justine a girl aged 10 years.

It was the case of the prosecution that the accused and the family of the victim as well as the other prosecution witnesses were neighbours on the village and the
20 accused used to go to the home of the parents of the victim to charge his phone or phone battery and he would talk to the family members including the victim and her siblings. On the day of the alleged offence, he brought his phone battery for charging as usual. He left the phone battery charging and the father of the victim advised him that when he returned to collect the battery and did not find him, the
25 victim would give it to him. The father of the victim then left to go and attend a burial. Most people on the village had gone to attend the same burial. The mother of the victim was away in Fort-portal. When the accused returned, he found the

children home alone and sent the others away, purportedly to go and call another girl named Ruth. He remained with the victim and defiled her from the veranda of the house where he was found in the act by an old woman, a neighbour commonly called Jaja. The victim reported the incident to her mother, which resulted in the
5 arrest of the accused who was charged with the offence. The accused accepted that he had gone to the home of the victim in connection with charging and collecting his phone but denied committing the offence.

The prosecution has the burden of proving the case against the accused beyond
10 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
15 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
20 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:

- 25 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.

The prosecution called 5 witnesses, namely, PW1 Kamanyire Herbert the father of the victim, PW2 Kasande Teopista the mother of the victim, PW3 Mugabirwe Rose a neighbour, PW4 Kebirungi Justine the victim, and PW5 Tindimuzara Kosilata another neighbour. Medical evidence was tendered as Agreed Facts. The accused gave evidence on oath and denied the offence.

1. That the victim was below 14 years of age.

10 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 there was medical evidence and the evidence of the parents of the victim as well as the victim herself. PW1 Kamanyire Herbert the father of the victim told court that the victim was born on 4/6/2010. PW2 Kasande Teopista the mother of the victim stated that the victim was born in 2010 but could not recall the date and month. The medical examination report of the victim (Prosecution Exhibit PE1) established the age of the victim to have been between 10 and 11 years at the time of the alleged offence, basing on her dental formula, and lack of secondary sexual characteristics. PW4 Kebirungi Justine the victim at the time of giving her evidence told court that she is now aged 12 years. I also observed the victim as she testified in court and formed the opinion that the victim was below 14 years when the alleged offence occurred. The defence did not contest the proof of age of the victim being below 14 years at the time of the offence.

I am satisfied that the prosecution proved beyond reasonable doubt that the victim was aged below 14 years when the alleged offence was committed.

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

5 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 (See **Section 129 (7) of the Penal Code Act**).

10 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 **Wepukhulu Nyuguli Versus Uganda, S.C.C.A No.21 of 2001** 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.

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PW4 Kebirungi Justine the victim testified and demonstrated with the aid of a male and female anatomical doll, that the accused had sexual intercourse with her by inserting his penis in her vagina. The medical examination report of the victim dated 10th February 2021, concerning the genitals of the victim, stated that her
20 hymen was broken, and cited erythemataus vulva with vaginal discharge. The probable cause of these injuries was stated to be probable sexual contact. PW5 Tindimuzara Kosilata (Jaja) a neighbour told court that she found the accused on top of the victim having sexual intercourse with her. The defence did not contest the proof of this element.

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I was satisfied that the evidence available proves beyond reasonable doubt that a sexual act was performed on the victim.

3. That it is the accused who performed the sexual act on the victim.

5 This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as the perpetrator of the offence.

PW4 Kebirungi Justine the victim testified that it was the accused that had sexual intercourse with her. The victim knew the accused as they resided in the same
10 village as neighbours. He used to bring his phone battery for charging. She knew his home. He had come earlier, bringing his phone battery for charging and committed the offence when he returned to collect the phone battery. He had sent away the siblings of the victim saying that they should go and call Ruth for him. Her father had gone for a burial. Most people on the village had gone to attend the
15 same burial. Her mother was away in Fort-portal.

PW5 Tindimuzara Kosilata a neighbour told court that she responded to the cries of the victim and found the accused on top of the victim having sexual intercourse with her. He had removed his trousers and it was on the floor. She rebuked him
20 before he picked his trousers and ran away. The offence took place during broad day light. In cross examination the witness stated that the accused was in between the thighs of the victim and her skirt was raised.

PW4 Kebirungi Justine the victim, at the earliest opportunity, reported the incident
25 to her mother using the phone of PW3 Mugabirwe Rose implicating the accused and she told her mother that PW5 Tindimuzara Kosilata had found the accused in

the act. PW3 Mugabirwe Rose was present and heard when the victim made the report to her mother. Both the mother of the victim and PW3 stated that the victim got the opportunity to report when the mother of the victim had called PW3 and requested to speak to her children using the phone of PW3. The immediate report
5 of the victim is relevant and is well corroborated by the evidence of her mother and PW3.

It was the submission of the defence that the eyes of the victim were closed and that she could not have seen the sexual organ of the accused and that PW5 also did
10 not see the sexual organ of the accused. I heard the evidence of the victim and that of PW5. Whether anyone saw the sexual organ or not, there was evidence that the accused had undressed, and he was in between the thighs of the victim whose dress had been raised, and the victim was crying. The victim testified that the accused had sexual intercourse with her. When he was found by PW5 he ran away. The
15 medical evidence is that her hymen was broken and the probable cause of the injuries was probable sexual contact.

The accused accepted that he knew the victim and that he had gone to the home of the victim to charge his phone and later went back to collect it, but he denied
20 committing the offence. 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.

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This being an offence of a sexual nature, as I warned the assessors, I now warn myself 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 is also required as a matter of practice when relying on the testimony of a single identifying witness. — See **Chila and another V. Republic 1967 EA 722**. This case lays down the rule of practice that in sexual offences, the judge should warn assessors and himself of the danger of acting on the uncorroborated testimony of a single identifying witness.

The rule of practice has laid down by the EACA with regard to all sexual cases has been expressed thus:

10 *“The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the compliant, but having done so, he may convict in the absence of corroboration if he is satisfied that her evidence is truthful.” (Chila v. R (1967) EA 722.*

15 The Supreme Court of Uganda considered and settled this issue in **Remigious Kiwanuka Vs Uganda Criminal Appeal No. 41 of 1993**. It was held that *it is settled law in sexual offences that though corroboration of the prosecution evidence is not essential in law, it is, in practice looked for, and it is the established practice to warn the Assessors against the danger of acting upon un*
20 *corroborated testimony.*

I can proceed to rely on the evidence of a single identifying witness 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 without corroboration if I am
25 satisfied the witness was truthful. (**Chila v. R [1967] EA 722; Abdala bin Wendo & Anor v. R (1953) 20 EACA 166**).

Corroboration means additional independent evidence connecting the accused to the crime. 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. Corroboration may be in the form of direct or circumstantial evidence or expert evidence (see **R. v. Baskerville [1916] 2 K.B 658, R v. Manilal Ishwerlal Purohit (1942) 9 EACA 58 (p.61).**

In sexual offences the distressed condition of the complainant is capable of amounting to corroboration of the complainant's evidence. The weight to be attached to such evidence as corroboration varies according to the circumstances of the case and the evidence. (See: **R.V. James Henry Knight (1966) SO Crim. Appeal R. 122; Chila V. Republic [1967] E.A 722.**). In this case PW5 Tindimuzara Kosilata testified that she heard the victim crying before she reached the home where she found the accused defiling the victim; that after the incident, she spoke to the victim but the victim was crying.

Section 156 of the Evidence Act provides that in order to corroborate the testimony of a witness, any former statement made by such a witness relating to the same fact, at or about the time when the fact took place, or before authority legally competent to investigate the fact, may be proved. See **Katende Mohammed Vs Uganda, SCCA No. 32 of 2001 which referred to Ndaula. James Vs Uganda, S.C.C.A. No. 22 of 2000 (unreported).** In this case the victim reported the incident to her mother at the earliest opportunity when the mother called on phone to check on them.

The conduct of the accused can corroborate the complainant's testimony. For example if the conduct of the accused indicates a sense of guilt on his part; such as

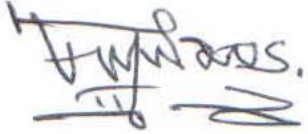
escaping from arrest or running away , can add strength to the prosecution case and to his responsibility. (See: **Bogere Charles Vs Uganda Crim. Appeal No. 10/98 S.C; MuhamedMukasa & anor vs. Uganda-Criminal Appeal 27/95 (S.C.); Telesfora Alex & Anor vs. Republic (1963) EA 140.** In this case PW5 testified
5 that when she foud the accused defiling the victim and rebuked him, he picked his trousers from the floor and ran away naked before dressing up. This was not the conduct of an innocent person.

The accused in cross examination said that PW5 had a grudge against him because
10 he failed to reward her with some money when she made an alarm and saved him from the thugs who had attacked him near her home some time back. But the witness was not asked about this event during cross examination. It suggests that the accused just came up with this as an afterthought during cross examination. Whenever the opponent has declined to avail himself of the opportunity to put his
15 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. (**Kabenge vs Uganda UCA Cr App. No. 19 of 1977 (Unreported), and James Sowoabiri & Anor vs 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, 14th Edition, 1993 by Sudipto Sarkar & V.R Manohar Pg. 2006 -2007).**
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I am satisfied that the prosecution evidence was truthful and credible and it is well corroborated in implicating the accused. The prosecution has proved the case against

the accused beyond reasonable doubt. In agreement with the Lady and Gentleman Assessors, I find the accused person guilty as indicted and convict him accordingly.

Dated at Fortportal this **27th** day of **September 2022**.



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Vincent Wagona

Judge

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SENTENCE AND REASONS FOR SENTENCE

Under the Penal Code Act Section 129 (3), the maximum punishment for the offence of aggravated defilement is a death sentence. Under Act Section 129 (3) an offence of defilement becomes one of aggravated defilement under the following circumstances: (a) where the person against whom the offence is committed is below the age of fourteen years; (b) where the offender is infected with the Human Immunodeficiency Virus (HIV); (c) where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed; (d) where the victim of the offence is a person with a disability; or (e) where the offender is a serial offender.

Section 129B of the Penal Code Act provides for payment of compensation to victims of defilement and states as follows: (1) Where a person is convicted of defilement or aggravated defilement under section 129, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual and psychological harm caused to the victim by the offence; (2) The amount of compensation shall be determined by the court and the court shall take into account the extent of harm suffered by the victim of the offence, the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence.

Under Guideline 33 of the Sentencing Guidelines: (1) The court shall be guided by the sentencing range specified in Part IV of the Third Schedule in determining the appropriate sentence for defilement. The sentencing starting point for aggravated defilement is 35 years' imprisonment and the sentencing range is from 30 years' imprisonment to death sentence; (2) The court shall, using the factors in

paragraphs 34, 35 and 36, determine the sentence in accordance with the sentencing range.

Under Guideline 34 of the Sentencing Guidelines: The court shall take into account the following factors in considering a sentence for defilement— (a) the age of the victim and the offender; (b) the nature of the relationship of the victim and the offender; (c) the violence, trauma, brutality and fear instilled upon the victim; (d) the remorsefulness of the offender; (e) operation of other restorative processes; or (f) the HIV/AIDS status of the offender.

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Under Guideline 35 of the Sentencing Guidelines: In determining a sentence for defilement, the court shall be guided by the following **aggravating factors**— (a) the degree of injury or harm; (b) whether there was repeated injury or harm to the victim; (c) whether there was a deliberate intent to infect the victim with HIV/AIDS; (d) whether the victim was of tender age; (e) the offender’s knowledge of his HIV/AIDS status; (f) knowledge whether the victim is mentally challenged; (g) the degree of pre-meditation; (h) threats or use of force or violence against the victim; (i) knowledge of the tender age of the victim; (j) use or letting of premises for immoral or criminal activities; (k) whether the offence was motivated by, or demonstrating hostility based on the victim’s status of being mentally challenged; or (l) any other factor as the court may consider relevant.

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Under Guideline 36 of the Sentencing Guidelines: In considering a sentence for defilement, the court shall take into account the following **mitigating factors**— (a) lack of pre-meditation; (b) whether the mental disorder or disability of the offender was linked to the commission of the offence; (c) remorsefulness of the offender;

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(d) whether the offender is a first offender with no previous conviction or no relevant or recent conviction; (e) the offender's plea of guilty; (f) the difference in age of the victim and offender; or (g) any other factor as the court may consider relevant.

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The sentencing guidelines have to be applied bearing in mind past precedents of courts in decisions where the facts have a resemblance to the case under trial (see **Ninsiima v. Uganda Crim. C.A Criminal Appeal No. 180 of 2010**). A review of past precedents tends to show that the Court of Appeal has time and again reduced sentences that have come close to the sentencing starting point suggested by the sentencing guidelines, as being harsh and excessive, and upheld those that were lower than the starting point.

In **German Benjamin vs Uganda, CACA No. 142 of 2010** the Court of Appeal set aside a sentence of 20 years imprisonment for the offence of aggravated defilement committed against a child aged 5 years, and substituted it with a sentence of 15 years imprisonment. He had spent 4 years and 6 months on remand.

In **Byera Denis vs. Uganda, Court of Appeal Criminal Appeal No. 99 of 2012**, the Court of Appeal substituted a sentence of 30 years imprisonment with one of 20 years imprisonment it considered appropriate in a case of aggravated defilement. The victim in that case was aged 3 years. He had been on remand for 1 year and 8 months.

In **Anguyo Siliva v. Uganda, Criminal Appeal No. 0038 of 2014**, the Court of Appeal reduced a sentence of 27 years to ***21 years and 28 days imprisonment. He had been on remand for 2 years, 11 months and 2 days.***

In **Tiboruhanga Emmanuel vs. Uganda, Court of Appeal Criminal Appeal No. 0655 of 2014**, the Court of Appeal stated that the sentences approved by this Court in previous aggravated defilement cases, without additional aggravating factors, range between 11 years to 15 years. The Court considered the fact that the appellant was HIV positive as an additional aggravating factor in that he had, by committing a sexual act on the victim while HIV positive, exposed her to the risk of contracting HIV/AIDS. The Court imposed a sentence of **25 years** imprisonment; after deducting 3 years spent on remand, the convict was to serve **22 years**.

In **Apiku Ensio vs. Uganda, Criminal Appeal No. 751 of 2015** the Court of appeal reduced a sentence of 25 years to 20 years. he had been on remand for two years and 11 months.

Each case must be treated on its own merits. In this case the prosecution pointed out these aggravating factors: the maximum sentence in cases of this nature is a death sentence. The convict abused the trust of his friend the father of the victim who freely allowed him into his family to charge his phone. The victim was only 10 years of age. The charge sheet states that the convict was 22 years. Cases of aggravated defilement are rampant and deserve a deterrent sentence. The victim deserves compensation because of the injuries and psychological harm sustained. The sentencing starting point is 35 years and the range is 30 years up to a death sentence. The prosecution proposed a sentence of 40 years imprisonment. I have additionally considered: the convict did not demonstrate any kind of remorsefulness. The convict had knowledge of the tender age of the victim because he knew and was used to the family and used to go to the home. Force or violence

was used against the victim. The age difference of about 12 years between the accused and the victim. The relationship between the accused and the victim. PW5 testified that the victim and the accused are related. That the grandfather of the victim (Paternal) is the brother to the mother of the accused. The accused is an
5 uncle of the victim. In mitigation, the the defence pointed out that: the convict is a first offender with no record of previous conviction. He did not infect the victim with any STD. He has been on remand for 1 year, 3 months and 4 days from 22/6/2021. He was 22 years at the time of the offence and can reform. He is now 23 years old. He has a wife and a child of 2 years to look after. He was the sole
10 bread winner of the family. The defence proposed 10 years' imprisonment. In allocutus, the convict stated that he had nothing to say. I have considered all these factors.

Under Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the
15 court should take into account the period spent on remand from when sentencing the convict.

I therefore sentence the convict as follows:

- 20 1. In the circumstances of this case, I consider a sentence of 26 years' imprisonment to be appropriate.
2. After taking into account the period of 1 year, 3 months and 4 days already spent in custody, the convict will now serve a sentence of imprisonment of 24 years, 8 months and 26 days starting today.
- 25 3. The convict will pay compensation of UGX 2 milion to the victim to atone for the physical, sexual and psychological harm caused to the victim by the offence within a period of 12 months from today or in default serve an

additional 2 years' imprisonment.

The convict is advised that he has a right of appeal against both the conviction and sentence with 14 days from today.

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Dated at Fort-portal High Court Circuit sitting at Kamwenge this 27th Day of September 2022.

A handwritten signature in black ink, appearing to read 'Vincent Wagona', with a horizontal line underneath.

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10 **Vincent Wagona**
Judge