

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL HIGH COURT
CIRCUIT HELD AT KAMWENGE

HCT-01-CR-SC-61/2021

5 **UGANDA.....PROSECUTOR**
VERSUS
OPOLOT JOSEPH.....ACCUSED

BEFORE: HON. JUSTICE VINCENT WAGONA

10 **JUDGMENT**

The indictment in this case is that of Aggravated Defilement c/s 129 (3) and (4) (c) of the Penal Code Act.

15 Section 129 of the Penal Code Act that creates the offence of defilement provides as follows:

(1) Any person who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment.

20 *(2)*

(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.

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

(a)

(b)

(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).....; or

(e)”.

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It was alleged that Opolot Joseph since the year 2017 unlawfully had sexual intercourse with his daughter Ikiring Agnes a girl aged 16 years.

10 It was the case of the prosecution that the accused stayed with his daughter the victim then aged 16 years and another daughter Katusiime Doreen then aged 7 years, in a single room at the Workers’ Quarters at Kasunga Tea Estate where he worked as a Security Guard. The victim, who did not know her mother, had been brought from the village by her father the accused, to live with him at Kasunga. His wife, the mother of Katusiime Doreen and stepmother of the victim, had since
15 separated with the accused and left him. For 3 years since 2017, the accused would leave his bed in the night and cross over to the bed that his daughter shared with her young sister Katusiime Doreen, and have sexual intercourse with her while Katusiime Doreen was asleep or would not know. She felt bad about this conduct of her father but did not report to any one because she feared that the accused
20 could beat her or kill her and that he had warned her never to speak about it anywhere. When she got fed-up and could hold or stand it anymore, in June 2020 she reported it to PW1 a female neighbour and also reported to the Chairman of the Casual Workers at the Tea Estate. The accused was eventually arrested and referred to the police where he was charged with this offence. In his unsworn
25 statement, the accused denied the offence and attributed the claims of the victim to his claim that he had caught the accused in their bathroom with one Baraka and when he confronted the victim about what they were doing, she ran away.

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**).

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By his plea of not guilty, the accused puts 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
10 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**).

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

1. That the victim was below 18 years of age.
2. That a sexual act was performed on the victim.
- 20 3. That the accused was a parent of the victim.
4. That it is the accused who performed the sexual act on the victim.

Representation:

The prosecution was represented by Naboth Atuhaire the Kamwenge Resident State Attorney while the accused was represented by Counsel Amon Aruho on
25 State Brief.

The Evidence:

The prosecution called 4 witnesses, namely: PW1 Namuganza Anet a neighbour; PW2 Agaba Edison; PW3 Ikiring Agnes the victim; and PW4 No. 29421 D/SGT. Olepus Michael a police officer. The accused in his defence gave an unsworn
5 statement and called no witness.

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

The prosecution relied on medical evidence contained in Police Form 3A (Prosecution Exhibit PE1), the evidence of the victim as well as the evidence of the
10 personal observation of other witnesses and submitted that this element had been proved beyond reasonable doubt. The defence conceded that this element was proved beyond reasonable doubt.

The age of a child can be proved by the production of her birth certificate, the
15 testimony of the parents, or by the court's own observation and common sense assessment of the age of the child. (See for example **Uganda versus Kagoro Godfrey HCCS No. 141 of 2002; R versus Recorder of premisby Ex-parte Bursar [1957]2 ALL.ER. 889**).

20 The most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive, such as the court's own observation and common sense assessment of the age of the child. (See for example **Uganda versus Kagoro Godfrey HCCS No. 141 of 2002; R
25 versus Recorder of premisby Ex-parte Bursar [1957]2 ALL.ER. 889**).

In this case we have medical evidence and the evidence of other witnesses as well as the victim herself. The whereabouts of her mother are unknown. The accused is the father of the victim.

5 **PW1 NAMUGANZA ANET** testified that she knew Ikiring Agnes because they were neighbours at Kasunga Tea camp where the witness was employed as a casual worker. That she knew the father of the victim Opolot Joseph the accused as they were neighbours for about 8 years as he was a watchman at Kasunga Tea Camp. **PW1** testified that the victim then was 14 years old while Katusiime was
10 only 7 years old. The witness said that she knew their ages because the mother of Katusiime used to talk about it. The witness added that the victim was in P5 at Kasamba Primary School. In cross examination the witness said that she had known the victim for about 5 years; that the victim is now 16 years old. That she too had a son who was her age mate. The witness said that it was the accused that
15 told her in 2020 that the victim was 14 years at that time. In answer to court, the witness stated that in her observation, the victim was 14 years old in 2020. In answer to questions from the Assessors, the witness clarified that both the accused and the step mother of the victim used to speak about the age of the victim and that she also had a son of the same age.

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PW2 AGABA EDISON testified that he knew the accused Opolot Joseph because they had worked together in the tea estate at Kasunga where the witness was the Chairman of the Casual Workers, appointed by the Estate Manager, while the accused was a security guard. That he had known the accused for about 7 years.
25 **PW2** testified that the accused had a family of 3 children and a wife. The witness told court that he knew the victim Agnes who appeared to be the eldest child. That

in his observation Agnes the victim was about 14 years at that time in 2020. In cross examination he stated that he used to see the accused with 3 children.

PW3 IKIRING AGNES the victim testified that she is now 16 years old and goes to school in P.7 at High Hope Primary School in Kyenjojo and lives at Home Again Child Care Center in Kyenjojo. The victim said she knew her age because her father told it to her. She said she did not remember the name of her mother or when she last saw her. In cross examination the witness maintained that she is now 16 years old and that her date of birth is 8/10/2006.

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Police form 3A (Prosecution Exhibit PE1) in respect the medical examination of Ikiring Agnes the victim carried out on 2/7/2022 from Kyenjojo General Hospital established that the victim was aged 16 years of age based on primary dentition.

15 I also observed the victim as she testified in court and formed the opinion that she was below 18 years when the alleged offence occurred.

The defence did not contest the proof of age of the victim being below 18 years at the time of the offence. The evidence of the prosecution on this element was straight forward and clear and remained consistent throughout the cross examination and was not controverted. I am satisfied that the prosecution proved beyond reasonable doubt that the victim was aged below 18 years when the alleged offence was committed.

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

The prosecution contended that this element had been proved beyond reasonable doubt, relying on the evidence of the victim, medical evidence, as well as the evidence of PW1 and PW2. The defence conceded that this element had been proved beyond reasonable doubt.

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

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PW3 IKIRING AGNES testified that her father was using her when she used to share a bed with her young sister Katusime Doreen. That her father the accused would come to her bed and wake her up and would force her to sleep with him while her sister would be asleep. With the aid of a male and female anatomical doll, the witness demonstrated and illustrated that the accused used his penis in her vagina to have sexual intercourse with her. The witness explained that this had been going on for 3 years. In cross examination the witness stated that her father started defiling her in 2017. In answer to court, the witness said that it all started in 2017 and that the accused used to come and have sexual intercourse with her like 2

times in a week. The victim testified that whenever the accused had sexual intercourse with her, she felt pain in her private parts, in the vagina.

Police form 3A (Prosecution Exhibit PE1) in respect of the medical examination of
5 Ikiring Agnes the victim carried out on 2/7/2022 from Kyenjojo General Hospital established in respect of her genitals that she had an old ruptured hymen, attributed to habitual penetration.

The defence conceded that this element was proved. I was satisfied based on the
10 above evidence, that the prosecution proved beyond reasonable doubt that a sexual act was performed on the victim.

3. That the accused was a parent of the victim.

The prosecution relied on the evidence of the victim as well as the evidence of
15 PW1 and PW2 and submitted that this element had been proved beyond reasonable doubt. In his defence the accused also referred to the victim as his daughter. The defence conceded that this element had been proved beyond reasonable doubt.

PW1 NAMUGANZA ANET testified that she knew Ikiring Agnes because they
20 were neighbours at Kasunga Tea camp where the witness was employed as a casual worker. That she knew the father of the victim Opolot Joseph the accused as they were neighbours for about 8 years as he was a watchman at Kasunga Tea Camp. That they all resided in the Camp Housing Quarters; each housing block had 3 rooms where each room had a person. That the accused occupied a whole
25 block alone as the other 2 rooms had no doors and were empty. The witness said she occupied a room on another block with other rooms having other occupants;

that the accused's block and hers were only separated by a path. The witness told court that the accused lived with his 2 daughters Ikiring Agnes the victim and Katusiime.

5 **PW2 AGABA EDISON** testified that he knew the accused Opolot Joseph because they had worked together in the tea estate at Kasunga where the accused was a security guard. That he had known the accused for about 7 years. **PW2** testified that the accused had a family of 3 children and a wife. The witness told court that he knew the victim Agnes who appeared to be the eldest child of the accused.

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PW3 IKIRING AGNES the victim testified that the accused was her father. That originally she lived in Kasunga in the Tea comp with her father the accused, her step mother and her step sister Katusime Doreen who was 7 years old. In cross examination the witness explained that her father the accused brought her from the
15 village and she started staying with but that she did not recall when it was as she was young.

OPOLOT JOSEPH the accused in his unsworn testimony referred to the victim as his daughter.

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The above evidence was neither challenged in cross examination, nor controverted by the defence. In their submissions, the defence did not contest the proof of this element and conceded that it had been proved beyond reasonable doubt. I am satisfied that the prosecution proved this element beyond reasonable doubt.

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

Both sides submitted at length on this element. The prosecution submitted that the accused and the victim lived together in a single room where the accused defiled the victim over a period of 3 years since 2017 until she decided to report to a neighbour. That the victim explained that she delayed to report because the accused had threatened to kill her if she reported. That she eventually reported to PW1 and PW2. PW4 visited the scene and it's set-up tallied with the description of the victim. The accused had separated with his wife and lived alone with the victim and her other daughter of 7 years. The victim knew the accused who was her own father. That although the accused denied the offence and attempted to shift the blame to one Baraka, the role of Baraka was ably explained by the victim as innocent. The prosecution submitted that the conduct of the accused in bringing Baraka into the case was attributed to jealousy on his part because he was defiling his daughter and was suspicious that other men may have been having sexual affairs with the victim. The prosecution suggested that the accused did not persue the Baraka incident where he alleged that he had found the victim and Baraka in a bathroom, that sparked off this case, because it was false. The prosecution submitted that the only reason why the victim would bring such a serious allegation against her father was because it was true; that there was no grudge. The prosecution invited court to believe the prosecution witnesses because they were consistent and their evidence remained unshaken in cross examination.

The defence responded that it was incredible that the accused was defiled by the accused for 3 years and she could not report it to anyone. That the victim only came up with the allegation after her father found her in a bathroom in the evening with one Baraka. It was submitted that the victim conspired with PW1 to implicate the accused in order to protect Baraka. That the victim only complained to PW1 after the accused had caught her with Baraka in the bathroom. That it was

incredible that the accused could have sexual intercourse with the victim in a bed that the victim shared with her sister without the knowledge of her sister. The defence contended that the victim contradicted PW1 who claimed that she first received the complaint of the victim about her father defiling her before she
5 learned about the incident involving Baraka and went to the scene, while the evidence of the victim was that she only ran to report to PW1 after she was found with Baraka. That this contradiction shows that the victim and PW1 connived to implicate the accused. The defence concluded that the prosecution had failed to prove beyond reasonable doubt that the accused committed the sexual acts against
10 the victim.

In reply, the prosecution submitted that no evidence of connivance between PW1 and the victim had been adduced. That there was evidence that Baraka was not a friend of PW1. That the victim's failure to report the offence had been explained
15 by the victim. The prosecution invited court to consider the hindering factors in the victim's ability to report the case promptly: she had no mother; her step-mother had left; she was living with the accused her only parent and could not easily go against him; the other sister was very young aged only 7 years and did not know what was going on. It was submitted that the inconsistencies if any, were minor
20 and should be ignored.

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

25 **PW1 NAMUGANZA ANET** testified that on 28/6/2020 she was in her house sleeping at around 7:00-7:30 PM when the victim came to her room while crying and called her aside and told her that she did not want anyone to hear what she was

about to share with her. That the victim then narrated to her that she was tired of her father mistreating her; that her father was beating her and accusing her of loving men. The witness told court that she promised the victim that she would speak to her father about it. That the victim said that it was not all. That the victim
5 went on and narrated to her that she was tired of her father having sexual intercourse with her. That it had been going on since 2017. The witness said that she asked the victim why she took a long time to report. That the victim responded that it was because the accused had threatened to kill her if she ever spoke about it. The witness said that she shared this information with an elder woman called
10 Kemigisa who was a neighbor on her block and then went and slept. **PW1** testified that after she had received the victim's complaint and gone to bed, she later heard noise outside. That she got out and found people gathered including the accused who was holding a stick and panga. That the accused was alleging that he had caught the victim with one Baraka in the bathroom. The witness said that at that
15 moment, the victim was not present as she had ran and gone to the Camp Chairman of the Casual Workers (PW2). The witness explained that Baraka was a Congolese man who was resident in the Camp. The witness told court that she advised the accused to ignore the matter and she went back to her house. That on that night the victim slept at the house of the witness at the request of the Chairman (PW2) after
20 the victim had reported to the Chairman. The witness testified that the next day the Estate Manager summoned her together with Agaba Edison the Camp Chairman of the Casual Workers (PW2) for a meeting. The meeting included the accused and the victim. The witness testified that at the meeting, she told the Camp Chairman what the victim had reported to her that her father was having sexual intercourse
25 with her; that the victim also reported in the meeting that the accused had been having sexual intercourse with her; that the accused denied. The witness told court that the LC.I Chairman one Mwesige was also called to the meeting and the victim

repeated her complaint against her father to the LC1 Chairman. Then the accused was arrested and taken to police. The victim and the witness went along to the police where they both repeated the reports against the accused. The accused was detained. The witness stated that she later heard that MP Faith took the victim and was taking care of her. The witness told court that she did not have any grudge with the accused. In cross examination in answer to assertions put to her, the witness made it clear that she had never asked Opolot to get a job for her brother in the factory and that she had never had any love affair with the accused; also that Baraka was not her friend and that she did not know his age. The witness said that she had advised the accused to ignore the Baraka incident because she wanted to remain focused on the report of the victim who in any case had denied sleeping with Baraka. The witness said that at the meeting with the Estate Manager, the accused did not raise the matter of the Baraka incident.

PW2 AGABA EDISON testified that on 28/6/2020 he was at work. At about 8:00 PM, the victim came to his house while crying and reported to him that her father disrespects her and has sexual intercourse with her. That he had threatened to kill her if she reported it. That he called PW1 and requested her to accommodate the victim for the night pending resolution of her report against the father. That he told PW1 what the victim had reported to him. In cross-examination the witness explained that he requested PW1 to accommodate the victim because she was the only woman in the Camp and he accepted that it was true that PW1 was her lover; but that Baraka was not his friend and was also not a friend of PW1. The witness testified that the next morning he reported the matter to the Estate Manager. Then they called the LC.I Chairman Mwesige Stephen and the accused was arrested and taken to police. The witness made it clear that he had no grudge with the accused; that he did not know the mother of the victim; and that the accused came with the

victim to live and work in the tea estate. That the wife the accused had was not the mother of the victim and that the accused had later separated with her and remained alone with the children. In cross examination the witness made it clear that he had never heard of a report before, that the accused was engaging in sexual intercourse with the victim; that he was not aware that PW1 had ever asked the accused to find a job in the estate for her brother; and that he had never heard about any love affair between the victim and Baraka.

PW3 IKIRING AGNES testified that originally she lived in Kasunga in the Tea comp with her father the accused, her step mother and her step sister Katusime Doreen who was 7 years old. In cross examination the witness explained that her father the accused brought her from the village and she started staying with him but that she did not recall when it was as she was young. The witness said that she left home in Kasunga because of this case. In answer to court she said she now leaves under the care of Abwooli Faith (MP); that while at home, her father was using her when she used to share a bed with her young sister Katusime Doreen. That they slept in one room with their father who slept alone on a separate bed. That her father the accused would come to her bed and wake her up and would force her to sleep with him while her sister would be asleep; that at that time, her step mother had separated with the accused and had left. With the aid of a male and female anatomical doll, the witness demonstrated and illustrated that the accused used his penis in her vagina to have sexual intercourse with her. The witness explained that this had been going on for 3 years. In cross examination the witness stated that her father started defiling her in 2017 and that by then her step mother had already separated with her father and she had left. In answer to court, the witness said that it all started in 2017 and that the accused used to come and have sexual intercourse with her like 2 times in a week. That her sister did not

know about it. The witness described her stay with her father as bad; that she always felt bad about his conduct for the 3 years. In answer to the Assessors, the victim said that her father used to come to her and have sexual intercourse with her when he was normal and not drunk. **PW3** testified that she reported the matter to
5 Anet Namuganza PW1 who was a neighbor. She said that it took her a long time before she reported because she feared that the accused could beat her or kill her. That he had told her never to speak about it anywhere. She said she reported to PW1 because she was tired of it all. In cross examination the witness stated that PW1 Anet Namuganzi was their neighbor; that they lived in opposite blocks, and
10 she was her friend; that she used to go to her home often. That she had never told Anet before, that her father was defiling her. The victim testified that whenever the accused had sexual intercourse with her, she felt pain in my private parts, in the vagina; that the accused was the only person having sexual intercourse with her. **PW3** explained in detail, that the claim that her father found her having sexual
15 intercourse with Baraka in the bath-room was mistaken. She stated that she had taken water to the bathroom for her father to bathe when she found Baraka, who was a neighbor, standing in the bathroom. That Baraka asked her if her father was present and she said he was. That she left the water there and on coming out, she met her father coming to the bathroom. That Baraka followed her coming out, and
20 her father saw him and he ran away. That her father then asked her what they were doing, and she responded that they were doing nothing. That he wanted to beat her and she ran away. The witness said that she believed he thought they were having sex in the bathroom. That she ran to Anet's place (PW1) and told her how the accused had been defiling her. That she also went and reported to the Chairman
25 Edison (PW2) and that on that night she slept at Anet's house. Regarding the timing of her report to PW1, in cross examination she stated that it was not true that she reported the defilement to Anet Namuganza after the incident in the bath

room-involving Baraka. The witness testified that the next day her father was arrested and taken to the police. That she was later taken for medical examination. In cross examination the witness said that Baraka was not a friend of Anet Namuganza and that it was not true that she would meet Baraka at Namuganza's
5 home.

PW4 NO 29421 D//SGT OLEPUS MICHAEL testified that he interviewed the victim and that he visited the scene on 8/7/2020. That he found the scene to be a single room with 2 beds and that one bed was used by the victim while the other
10 bed was used by the accused. That the alleged defilement took place inside the room as they all shared one room. That he interrogated the suspect and he denied the offence. In cross examination the witness clarified that 3 people were sleeping in the room, that is, Ikiring Agnes, another girl and the accused.

15 The defence evidence in this case:

In his unsworn statement **OPOLOT JOSEPH** the accused stated that he worked as a security guard at Kasunga Tea Estate where he resided in the Estate Camp. That on 28/6/2020 his daughter the victim was cooking at 6:00 PM. That he left her and went for work without having super and returned at 7:30 PM to have super;
20 that as he was having super the victim asked for a torch to go behind the house. That after his super he wanted his torch to go back to work but she was delaying. That he got concerned and moved out to check and he heard a voice of a man and that of his daughter; that they came out and Baraka run away. That he asked Agnes what she was doing and she ran away. That he went and reported to the Camp
25 Chairman before he continued and went for his work. That while at work, he received a call from the same Chairman telling him that Agnes had returned and she wanted to enter the house. That he went to the Chairman but that he refused to

release the girl to go home. That he left and went back to work. That he later learnt that she went and slept in the house of Anet Namuganza. That the next morning, he went with his other daughter to work in his maize garden; that later his supervisor Mwesige called him to report to him in his office; that there he found the
5 Chairman, Anet Namuganza and Agnes Ikiring his daughter; that the Estate Manager also came and called the LC1 Chairman and he was referred to police. That they did not want to listen to his complaint against Baraka and he was not given a chance to speak. The accused concluded that he was innocent; that he did not commit the offence. That it was committed by Baraka, not him.

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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
15 else that defiled the victim.

Corroboration:

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
20 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
25 single identifying witness.

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

5 *“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.*

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*
10 *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*
corroborated testimony.

15 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 satisfied that the witness was truthful. (**Chila v. R [1967] EA 722; Abdala bin**
20 **Wendo & Anor v. R (1953) 20 EACA 166**).

I have evaluated the truthfulness or otherwise, of the victim as a witness. I found no reason for her to lie or fabricate evidence against the accused her own father with whom she had no other problem. In this case **PW1 NAMUGANZA ANET**
25 testified that the victim came to her room while crying and called her aside and told her that she was tired of her father mistreating her; that her father was beating her and accusing her of loving men. That the victim went on and narrated to her

that she was tired of her father having sexual intercourse with her. That it had been going on since 2017. The witness said that she asked the victim why she took a long time to report. That the victim responded it was because the accused had threatened to kill her if she ever spoke about it. **PW3 IKIRING AGNES** the victim testified that her father would come to her bed and wake her up and would force her to sleep with him while her sister would be asleep; that the accused used his penis in her vagina to have sexual intercourse with her. The witness explained that this had been going on for 3 years. In cross examination the witness stated that her father started defiling her in 2017 and that by then her step mother had already separated with her father and she had left. In answer to court, the witness said that it all started in 2017 and that the accused used to come and have sexual intercourse with her like 2 times in a week. That her sister did not know about it. That she always felt bad about his conduct for the 3 years. In answer to the assessors, the victim said that her father used to come to her and have sexual intercourse with her when he was normal and not drunk. **Police form 3A (Prosecution Exhibit PE1)** in respect of the medical examination of Ikiring Agnes the victim carried out on 2/7/2022 from Kyenjojo General Hospital established in respect of her genitals that she had an old ruptured hymen, attributed to habitual penetration. **PW3** the victim testified that she reported the matter to Anet Namuganza PW1 who was a neighbor. She said that it took her a long time before she reported because she feared that the accused could beat her or kill her. That he had told her never to speak about it anywhere. She said she reported to PW1 because she was tired of it all. In cross examination the witness stated that PW1 Anet Namuganzi was their neighbor; that they lived in opposite blocks, and she was her friend; that she used to go to her home often. That she had never told Anet before, that her father was defiling her. The victim testified that whenever the accused had sexual intercourse with her, she felt pain in my private parts, in the vagina; that the accused was the

only person having sexual intercourse with her. **PW3** the victim explained in detail, that the claim that her father found her having sexual intercourse with Baraka in the bath-room was mistaken. She stated that she had taken water to the bathroom for her father to bathe when she found Baraka, who was a neighbor, standing in the bathroom. That Baraka asked her if her father was present and she said he was. That she left the water there and on coming out, she met her father coming to the bathroom. That Baraka followed her coming out, and her father saw him and he ran away. That her father then asked her what they were doing, and she responded that they were doing nothing. That he wanted to beat and she ran away. The witness said that she believed he thought they were having sex in the bathroom.

Regarding inconsistencies and contradictions, 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. **PW1 NAMUGANZA ANET** testified that after she had received the victim's complaint and gone to bed, she later heard noise outside. That she got out and found people gathered including the accused who was holding a stick and panga. That the accused was alleging that he had caught the victim with one Baraka in the bathroom. The witness said that at that moment, the victim was not present as she had ran and gone to the Camp Chairman of the Casual Workers (**PW2**). The witness explained that Baraka was a Congolese man who was resident in the Camp. The witness told court that she advised the accused to ignore the matter and she went back to her house. **PW3 IKIRING AGNES** explained that she had taken water to the bathroom for her father to bathe when she found Baraka standing in the bathroom. That Baraka followed her coming out, and her father saw him and he

ran away. That her father then asked her what they were doing, and she responded that they were doing nothing. That he wanted to beat her and she ran away. That she ran to Anet's place (PW1) and told her how the accused had been defiling her. That she also went and reported to the Chairman Edison (PW2) and that on that 5 night she slept at Anet's house. Regarding the timing of her report to PW1, in cross examination she stated that it was not true that she reported the defilement to Anet Namuganza after the incident in the bath room-involving Baraka had taken place. **PW1 NAMUGANZA ANET** testified that on 28/6/2020 she was in her house sleeping at around 7:00-7:30 PM when the victim came while crying and reported 10 that her father was mistreating her and alleging that she was having sexual affairs with men and that he had been having sexual intercourse with her. that subsequently after she had gone to bed, she heard noise and that she got out and found people gathered including the accused who was holding a stick and panga. That the accused was alleging that he had caught the victim with one Baraka in the 15 bathroom. The witness said that at that moment, the victim was not present as she had ran and gone to the Camp Chairman of the Casual Workers (PW2). **PW2 AGABA EDISON** testified that on 28/6/2020 he was at work. At about 8:00 PM, the victim came to his house while crying and reported to him that her father disrespects her and has sexual intercourse with her. It is recalled that the victim 20 went to the house of PW1 twice. First when she reported the incident and next when she went there to spend the night after PW2 requested PW1 to accommodate the victim for the night. Also we are dealing with an incident of 2020. There has been some lapse of time. To me, the response of the victim in cross examination, that it was not true that she reported the defilement to Anet Namuganza after the 25 incident in the bath room-involving Baraka had taken place, tallies with the evidence of PW1 to the effect that the Baraka bathroom incident took place after

the victim had reported to PW1 and before she reported to PW2. I consider any inconsistencies minor in this regard.

In the light of all of the above considerations, I found the evidence of the victim to be consistent, not seriously challenged or controverted; there were no major contradictions and inconsistencies in the evidence of the victim; there was corroboration of the evidence of the victim regarding the sexual act; she was straightforward and forthright in the way she responded to questions in court; the conduct of the victim was convincing whereby any features in the evidence that would otherwise be unsatisfactory were satisfactorily explained, such as the delay in reporting the case. I therefore found the victim to be a truthful witness.

To satisfy myself that there was no possibility of error in the identification, I have considered whether the conditions were favourable or unfavourable for a correct identification. I have particularly examined factors like the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailant, the quality of light, and any material discrepancies in the description of the accused by the witness. In this case the evidence is that the victim knew the accused before because he is her father. They lived together and slept in the same single room. Only 3 people slept in the single room, namely, the accused, the victim, and her young sister aged only 7 years. A sexual act such as was described by the victim, involved physical contact where the accused and the victim would be close together. The sexual acts happened over a period of 3 years. The victim said that there is no other person who had ever had sexual intercourse with her and yet medical evidence established that she had an

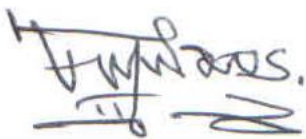
old ruptured hymen, attributed to habitual penetration. The victim testified that over the period of 3 years, the accused on average had sexual intercourse with her 2 times a week, which is supported by medical evidence stating that the victim had an old ruptured hymen, attributed to habitual penetration. I was therefore satisfied
5 that there was no possibility of error in the identification.

I am satisfied that the prosecution evidence was truthful, consistent and credible and and that there was no possibility of mistaken identification. The evidence is well corroborated in proving the age of the victim and the sexual acts committed against
10 the victim. As a result, I do not believe the denials and the story of the accused and reject his evidence. The story and scenario presented by the accused relating to the alleged incident involving Baraka and the victim in the bathroom does not explain away or cast any reasonable doubt on the cogent evidence produced by the prosecution against the accused placing him at the scene of crime as the perpetrator of
15 the offence who repeatedly defiled the victim his own daughter.

I therefore find that 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.

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Dated at Kamwenge this **20th** day of **October 2022**.

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

Vincent Wagona
High Court Judge

25

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. 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.

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.

15

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; (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.

25 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.

5

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. The appellant had been on
10 remand for 1 year and 8 months.

In **Kagambirwe Edward Vs Uganda Criminal Appeal Number 0245 of 2010**, the appellant was a **biological father** to the victim aged 14 years. The court of appeal set aside a sentence of life imprisonment and substituted it with a sentence
15 of **10 years** imprisonment after taking into account 5 years and 6 months being the period spent on remand.

In **Ntambala Fred v Uganda, Criminal Appeal No. 0177/2009** the appellant had defiled his **biological daughter** and had been defiling the said girl aged 14 years
20 for 2 years. He was convicted and sentenced to **14 years** imprisonment. The Court of Appeal upheld the sentence of 14 years imprisonment. In this case the period that the appellant had spent on remand before the time of sentence is not known.

Each case must be treated on its own merits. In this case the prosecution cited the
25 following aggravating factors which I have considered: the offence is serious attracting a maximum sentence of death. The victim was the convict's own daughter. There was abuse of authority by the convict. He took advantage of the

victim's vulnerability as she had no mother or other relatives. The age difference between the convict and the victim was wide – the victim was between 12 and 14 years while the convict was 45 years old. The offence was committed repeatedly over a long period of time between 2017 and 2020. The victim suffered repeated injury. The convict prevailed over the victim not to report the incidents. The grave impact of the crime over the life of the victim. Consequently she now lives in a child care center and has missed the life of childhood and parental care. The prosecution proposed a sentence of life imprisonment. In mitigation, the defence submitted that the convict was a first offender. He was remorseful. He is of advanced age of 50 years now. He has family responsibilities with 12 children. The defence proposed 12 years. in allocutus, the convict begged for forgiveness and promised to become a good citizen. He said he was in poor health arising from an accident. I have considered all these factors.

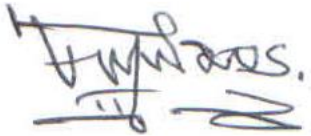
Under Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the court should take into account the period spent on remand from when sentencing the convict. I therefore sentence the convict as follows:

I therefore sentence the convict as follows:

1. In the circumstances of this case, I consider a sentence of 25 years' imprisonment to be appropriate.
2. After taking into account the period of 2 years, 3 months and 22 days already spent in custody, the convict will now serve a sentence of imprisonment of 22 years, 8 months and 12 days starting today.

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

Dated at Fort-portal High Court Circuit sitting at Kamwenge this 21st Day of
5 **October 2022.**

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

Vincent Wagona
High Court Judge
FORTPORTAL

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