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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE

CRIMINAL SESSION NO. 0047 OF 2020

(Arising from Kisoro Criminal Case No. 0002 of 2020)

(Arising from Kisoro CRB 010 of 2020)

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UGANDA :::::::::::::: PROSECUTION

VERSUS

KWITONDA RONALD :::::::::::::: ACCUSED

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BEFORE: HON. JUSTICE SAMUEL EMOKOR

JUDGEMENT

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The Accused Kwitonda Ronald is indicted for Aggravated Defilement Contrary to **Section 129(1(3) (4) (b)** of the **Penal Code Act**. It is alleged that Kwitonda Ronald on the 01/01/2020 at Busenyangabo village Busengo Parish, Nyarubye Sub County in Kisoro District performed a sexual act with Nkakirutimana Jenipher a girl aged sixteen years old knowing that he is HIV positive.

The Accused pleaded not guilty.

Representation.

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Mr. Ainomugisha Christopher (Senior State Attorney) appeared for the Prosecution while Mr. Bakanyebonera Felix represented the Accused on state brief.

The Assessors in this trial were Mr. Rwengeyo Joseph and Mr. Tumushime Emmanuel.

5 **The burden and standard of proof.**

This being a criminal trial it is one whose proof lies squarely on the Prosecution and never shifts to the Accused. It is also proof beyond reasonable doubt. Any doubts must be resolved in favour of the Accused and the Accused must only be convicted on the strength of the Prosecution case and not on the weakness of the
10 defence case.

See (Sekitoleko versus Uganda (1961) EA 53.

Ingredients of the offence.

The Prosecution must prove each of the following ingredients beyond reasonable doubt.

- 15 a) That the victim is below 18 years.
 b) That a sexual act was performed on the victim.
 c) That the Accused participated in the act.
 d) That the Accused is HIV positive.

a). Age of the victim.

20 To prove this ingredient the Prosecution relied on the evidence of the victim Ntakirutimana Jenipher (PW2) who testified that she was born on the 26/06/2003, is presently 20 years old and was 16 years in 2020 when the offence was committed against her.

To corroborate her evidence the Prosecution presented her father Bizimana Didas
25 (PW3) who testified that Jenipher was born on the 26/06/2003 and presented as

5 evidence her child health card/immunisation card and her baptism card that both indicated her date of birth as being 26/06/2003.

The defence did not contest the age of the victim as not being below 18 years at the time of the commission of the offence. I accept the evidence of the Prosecution.

I therefore find that the Prosecution has proved beyond reasonable doubt that at
10 the time of the commission of this offence Ntakirutimana Jenipher was below the age of 18 years.

b). That a sexual act was performed on the victim.

Section 129(7) of the **Penal Code Act** defines a sexual act to mean penetration of the vagina, mouth, or anus however slight of any person by a sexual organ.

15 It is the evidence of Ntakirutimana Jenipher (PW2) that on the night of the 01/01/2020 she was returning from night prayers at Kyihanira Catholic when on her way home with her siblings who had moved ahead of her when she was attacked by a man who she identified as the Accused who wrestled her to the ground and proceeded to have sexual intercourse with her. It is also her evidence
20 that she injured her head on a stone when the Accused threw her down. The victim (PW2) testified that she informed her father that very night when she got home that she had been sexually assaulted by the Accused. Her evidence is corroborated by her father Bizimana Didas (PW3) who testified that on the night in issue the victim Jenipher (PW2) returned home at around 3:30Am crying and
25 that she was dirty, her clothes were full of soil annoyed and disorganised. It is his evidence that the victim (PW2) told him that the Accused Kwitonda Ronald had sexual intercourse with her by force and that the next morning she led him to the

5 scene where she had been defiled and it was a garden of sweet potatoes and that he observed that the soil around the sweet potatoes had been disturbed and that it showed that there had been a struggle.

The Prosecution presented unique corroborative evidence in this case and unique in the sense that two medical professionals both filed the same PF3A with one
10 signing after his medical examination and the other making comments on it and providing clinical notes on the victim and owning his handwriting even though he did not sign.

Turyatunga Jethso (PW5) testified that on the 02/01/2020 while at Nyirubuye Health Centre II he examined the victim in this case Ntakirutimana Jenipher
15 (PW2) who at the time of examination came with a knicker that she was holding and that it was torn in several places and could not be worn. That he examined her and found that she had bruises and laceration on the left part of the head and neck. That there was a swelling also and that in his opinion a walking stick or fist could have caused the injuries.

20 That he examined her genitals and found no discharge or injuries and that her hymen was missing.

He identified his signature and stamp on the report but made also reference to Dr. Ndagishimana a retired doctor making comments that he described as reviews on the same form but which he states were merely confirmations of his findings
25 with no contradictions.

The PF3A was received as Exhibit P4. Dr. Ndagishimana Damiaono (PW6) testified that he is a retired Gynaecologist and that on the 06/01/2020 he

5 examined the victim Jenipher and explained that on Exhibit P4 he made comments on the findings of “Nil” written thereby writing “ad demonstrandum” which he explained to mean no pathology found or no disease found and these appeared on paragraph 7 of Exhibit P4. PW6 testified that at the time of examination the victim (PW2) she was on the 2nd day of her menstruation and he
10 commented on the Exhibit P4 that no hymen or absence of a hymen does not rule out defilement or rape.

Clinical notes made by PW6 were received as Exhibit P5.

The victim in this case testified to being wrestled to the ground and injuring her head in the process. The medical examination in Exhibit p4 corroborates these
15 injuries. Bizimana (PW3) testified that she returned home crying, her clothes were filed with soil and dirty and told she him that she had been forced into sexual intercourse and even led him to the garden where the assault took place and he found that the soil and potatoes had been disturbed and there were signs of a struggle. DC Oyiki Monica (PW1) visited the scene on the 07/01/2020 that is about
20 6 days later it is no surprise that she did not report findings of any disturbance at the scene.

I accept the evidence of the victim in this case Jenipher (PW2) that she was engaged in sexual intercourse and I find the same to have been well corroborated. The Prosecution has therefore proved beyond reasonable doubt the 2nd ingredient.

25 **c). Participation of the Accused.**

5 It is the evidence of Mtakiritimana Jenipher (PW2) that she knows the Accused and that he is a youth leader at Kyinanira Catholic Church and that she is a member of the same church.

It is her evidence that on the 01/01/2020 she had gone for night prayers at Kyinanira Catholic church with her silblings that included Nyambwa Lilian and
10 Nsengunva Bruno and her cousin Nizeyimana. That they left the church at around 1:00AM together and on the way home they met the Accused who was with a girl called Flavia and another man. That the Accused was wearing along jacket and holding a stick. It is her testimony that Flavia requested her to wait so that they go home together and that her siblings went ahead of her leaving her with Flavia
15 and that Flavia suggested that they walk with the Accused and the other man and that the Accused held her hand as they walked. When they reached a junction they separated and she took the route home leaving Favia, the Accused and the other man standing together. It is the testimony of PW2 that she was half way home when she saw someone following her and she thought that the person was going
20 on their own way but that the person kept moving very fast and she got frightened and decided to run but the person hit her with a stick on the calf and she was forced to kneel down. That the person was a man. That she asked him what he wanted from her and he replied that he wanted to sleep with her.

That she asked him what sleeping with him meant and that he said that is a hug
25 inside the knickers.

That she asked him what a hug inside the knickers was because she did not know it. That the man then began to touch her and they wrestled and she saw that he was stronger than her so she began to raise an alarm but that he covered her

5 mouth and threw her down where she injured her head on a stone and that she left him to do what he wanted to do and that he proceeded to have sexual intercourse with her and when he finished he left her. According to the victim she was hurt because she did not know anything about sex and that she informed her father Bizimana Didas (PW3) and it is her testimony that when the man
10 demanded for a hug in the knickers she recognised him as the Accused who she had just left behind with Flavia and that she also had with her a torch that night that she used to identify the Accused.

Her evidence is corroborated by that of Nyizeyimana Jeremiah (PW4) who testified that on the 01/01/2020 they went for night prayers at Kyinanira Catholic
15 church and that they left for home at around 2:00AM together with the victim Jenipher, Nsengeyunva Bruno and Lilian.

It is his evidence that on the way they met the Accused, Flavia and 2 other men and that the Accused pulled Jenipher's hand and that the Accused had a jacket and was holding a walking stick. That they got scared and they left Jenipher and Flavia
20 behind and he accompanied Lilian and Bruno home and that it was the next day that he heard that the Accused had defiled Jenipher.

According to PW4 they did not intervene when the Accused got hold of Jenipher because those people were older.

Further corroborative evidence is given by Bizimana Didas (PW3) the father of
25 the victim who testified that when Jenipher (PW2) got back home she was crying and told them that it was Kwitonda Ronald who had sexual intercourse with her by force.

5 The Accused in this case in his sworn defence denied the charge of Aggravated
Defilement said to be committed against the victim Jenipher testifying that he
spent the 31/12/2019 at home with his brother Elvis who he spent the night with
in the same bedroom and even on the same bed and that he did not go anywhere
that night. His evidence was corroborated by that of Elvis Nuwagaba (DW3) who
10 testified that on the 31/12/2019 to the 02/02/2020 when the Accused was
arrested they were home together, slept in the same bedroom and on the same
bed with the Accused not going anywhere.

It is trite law that the Accused has got no duty to prove this evidence and the onus
is on the Prosecution to discredit this defence and to place the Accused at the
15 scene of crime.

See Kyalimpa Edward versus Uganda SCCA No. 0010 of 1995.

The evidence on record clearly indicates that the offence with which the Accused
is charged took place sometime between 1:00AM – 3:00Am. The issue of
identification is therefore important.

20 The test of correct identification was explicitly outlined in **Abdala Nabulere &
another versus Uganda (1979) HCB 77** as follows:

*“The Court must closely examine the circumstances in which the identification was
made. These include the length of time the Accused was under observation, the
distance between the witness and the Accused, the lighting and the familiarity of
25 the witness with the Accused. All these factors go to the quality of the identification
evidence. If the quality is good then the danger of mistaken identity is reduced, the
poorer the quality the greater the danger”*

5 The Accused in this case was well known to the victim Jenipher. I accept her evidence and that of Nzeyimana (PW4) that the Accused was a youth leader at Kyinanira Catholic Church to which they also belong and that the Accused was even a youth leader. I do not believe the Accused that he goes to cornerstone church. The Accused even admits to previously belonging to Gachacha Yika
10 Catholic Church and that they only went to Kyinanira Catholic Church on big days. I believe that the Accused is only trying to be evasive. I am satisfied that the victim in this case was familiar with him. The victim Jenipher and Nzeyimana (PW4) both testified to meeting the Accused on the night in issue and that he was in the company of one Flavia and another man. The victim testified that the Accused
15 held her hand as she walked with them.

The Accused had conversations with the victim even as he tried to convince her to have sexual intercourse with him. The victim was in possession of a torch.

I have no doubt in my mind that the factors in place did favour proper identification of the Accused on the night in issue.

20 The victim Jenipher gave her evidence in a candid and forth right manner. She was emphatic that it was the Accused who they met on the night in issue and that the Accused later followed her and forced her into sexual intercourse I believe her evidence to be true.

The evidence of Nzeyimana (PW4) that he informed Bizimana that he had left
25 Jenipher in the company of the Accused leaves no doubt in the same night leaves in my mind that they were both telling the truth.

5 I do not believe the defence of alibi put up by the Accused and his defence witnesses.

In a house that has 5 rooms why would grownup men like the Accused and his brother Elvis (DW3) sleep in the same bed? I doubt this story being true. The defence of alibi was coined by the Accused and is a pure work of fiction intended
10 to distort the Prosecution case. I also do not accept the defence of the Accused that Bizimana (PW3) tried to extort money from his parent over this case and that he told her not to pay anything because he is innocent. Bizimana (PW3) struck me as a serious and honest man. The manner in which he has pursued this case from the beginning cannot have been because he was seeking some sort of
15 financial gain. I find the claims of the Accused to be baseless and I reject them.

I am therefore sufficiently satisfied that the victim Jenipher properly identified the Accused on the night in issue and I find that the Prosecution has proved this ingredient beyond reasonable doubt.

d). That the Accused is HIV positive.

20 Turyatunga Jethson (PW5) testified that he examined the Accused and gave his report in Exhibit P3 under PF 24A and stated that he carried out an HIV test on the Accused who turned out to be HIV positive.

The Accused in his own defence admitted to being HIV positive.

The 4th ingredient is therefore not in dispute. I find that the same is proved
25 beyond reasonable doubt.

5 After considering the evidence adduced by the Prosecution and defence together and in agreement with the Assessors it is my finding that the Prosecution has proved its case beyond reasonable doubt and I find the Accused guilty as indicted and accordingly convict him of the same.

Before me,

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Samuel Emokor
Judge
10/08/2024

10/08/2023

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Accused present.

Senior State Attorney: Ainomugisha.

Mr. Bakanyebonera Felix on state brief.

Clerk: Irumba.

Assessors present.

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Court: Judgment delivered in open Court.

Before me,

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Samuel Emokor
Judge
10/08/2023

5 **Prosecution:** the offence with which the Accused is convicted is grave and serious. The Convict had knowledge that he is HIV positive and exposed the victim to the risk. I pray for a deterrent sentence.

Allocutus.

10 **Mr. Bakanyebonera:** The convict is a young man of 22 years. He is a first offender. He had responsibilities as a youth leader and was also a student of Babaya Tailoring Institute where he was learning a trade that would benefit him and his society.

The Commission of the offence did not lead to the victim acquiring HIV due to
15 PEP. I pray that the convict is given a lenient sentence so that he can serve and resume his studies. I so pray.

Court: Do you have anything to say?

Convict: I thank God that I am still alive. I pray that when am sentenced God speaks to this Court and gives this Court wisdom and revelation so that you
20 consider me as your son. That is all.

Mr. Bizimana: (father to the convict).

I had a lot of hope in my daughter. She has been traumatized by the fact that she might be HIV positive. She has never recovered. I pray for the Justice.

Court: Sentence reserved for the 11/08/2023.

25 Before me,

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Samuel Emokor
Judge
10/08/2023

REASONS FOR SENTENCE.

I have carefully listened to the recommendations of the Prosecution that the
10 convict be given an appropriate sentence. I have also listened to the prayer for
mercy from the convict and his Counsel.

The offence with which the Accused is convicted of Aggravated Defilement
Contrary to **Section 129(1) (3) (4) (b)** of the **Penal Code Act** is grave and calls
for a maximum sentence of death. It cannot therefore be treated lightly. The
15 aggravating factor in this case is the fact that the convict is HIV positive and that
the victim is sixteen years old.

It is imperative that this Court points out that being HIV positive is not a crime.
The convict's HIV status therefore did not disadvantage him in the trial process
before this Court.

20 Discrimination in any form is unconstitutional and the convict in this case enjoys
Constitutional protection in this regard.

The fact however that the convict knowing his HIV status proceeded to have
sexual intercourse with the 16 year old victim in this case oblivious to the dangers
that he was exposing her to is unacceptable and needs to be punished. The father
25 of the victim in this case Bizimana testified that the victim has suffered
psychological torture as a result of the actions of the convict. It is his evidence
that she has been traumatised by the whole experience.

I therefore hold the firm view that there is need to deter the convict and other
would be offenders of this nature.

5 The defence submits that this Court should take into consideration the fact that the victim in this case tested HIV negative. This is only by the grace of God I will bear this in mind.

In passing my sentence I will take into consideration the provisions of the **Constitution (sentencing guidelines) (Practice) Directions** that place the starting point for consideration at 35 years when passing sentence.

I have taken into consideration the mitigating and aggravating factors in this case.

SENTENCE.

For the reasons advanced above the convict is hereby sentenced to serve ten (10) years imprisonment.

From this sentence I will deduct 3 (three) years, 7 (seven) months and 10 (ten) days that the convict has spent on remand. In the result the convict will serve 6 (six) years 4 (four) months and 21 (twenty one) days of his sentence.

The sentence will commence today 11/08/2023

Right of Appeal entered within 14 days.

Before me,

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Samuel Emokor

Judge

11/08/2023

11/08/202

Accused present.

Senior State Attorney: Ainomugisha.

Mr. Felix Bakanyebonera on state brief.

Assessors presents.

5 Clerk: Irumba.

Court: sentence delivered in open Court.

Before me,

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Samuel Emokor

Judge

11/08/2023