

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOBOKO

HIGH COURT CRIMINAL SESSION CASE NO. 58 OF 2023

(Arising from Maracha CRB 354 of 2021)

UGANDA:.....PROSECUTOR

VERSUS

MUSEMA INNOCENT alias SSEBO:.....ACCUSED

BEFORE HON. MR JUSTICE ACELLAM COLLINS

JUDGMENT.

Introduction.

The accused in this case is indicted for the offence of Aggravated Defilement contrary to section 129(3) and (4)(a) of the Penal Code Act. The particulars of the offence are that the accused, **Musema Innocent alias Ssebo** on the 4th day of December 2021 at Paranga Aligo Village in Maracha District performed a sexual act with Sakaya Flavia a girl aged 10 years.

The prosecution evidence.

The prosecution case is that on the 4th day of December 2021 at Robutabi Village, Ajikoro Parish, Paranga Sub county in Maracha District in the evening, the victim, in the company of other children namely Bridget, Maureen and others, went to the bush to collect



firewood. She left her friends behind to go and bathe in the stream and as she returned home she met the accused who called her. When she went to him, he grabbed her, threw her down, tore her knickers and forcefully had sexual intercourse with her after which he threatened to kill her if she told anybody. When she got home her aunty/guardian, Driciru Joyce noticed she was bleeding from the vagina and asked her what happened. She told her that she had been pricked by a stick while in the bush collecting firewood. When she examined the victim she found there was a tear on the vagina, and she told the victim that there were signs that someone had sex with her. She then took the victim to Ajikoro Health Centre and that is when the victim revealed that the accused had had forceful sexual intercourse with her when she went to collect firewood in the bush. The medical personnel then advised that the matter be reported to the police, and she did so on 10/12/2021. On the 11/12/2021 the accused was arrested with the help of the LC1 and handed over to the police. The victim was found to have a tear of the vagina with a foul-smelling discharge.

Accused's evidence.

The accused person denied committing the offence. He testified as DW1 on 16/6/23 and told court that on the day of the alleged incident he was alone at the home of his grandmother at Paranga Aligo Village and that he did not reach the scene of the alleged offence. That the previous night he had been to a disco and woke

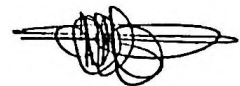
A handwritten signature or mark, possibly a stylized 'S' or 'L', located at the bottom right of the page.

late and started cooking because his grandmother had gone for a funeral.

He attributed the allegation to a grudge he had with the mother of the victim with whom he got problems sometime back when he beat up one of her children for abusing him. That the home of the family of the victim is by the roadside and whenever he would pass by the children would abuse him. On the 5th day of October 2021, a few days before his arrest he had beaten one of the children by the names of Musema alias Muse for abusing him while he passed by their home and their mother threatened that she would cause him problems. That the day he was arrested he was passing by the home of the complainants and when they saw him that is when they called him to settle some issues which they did not disclose to her. He was later arrested and taken to the police. That he was only told of the allegation when he was at Maracha Police. He denied the offence and stated that if he had committed the offence he would have left the village and he would not have passed by the home of the victim.

Burden of Proof and Standard of Proof.

The burden of proof lies on the prosecution. The standard of proof is beyond reasonable doubt. The prosecution has the burden to prove the case against the accused beyond reasonable doubt. This burden does not shift to the accused and the accused can only be convicted of the offence on the strength of the prosecution case and



not on the weaknesses in his defense.(See: ***Ssekitoleko v. Uganda***[1967] EA 531.

By his plea of not guilty, the accused put in issue all the essential ingredients of the offence and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all the evidence suggesting the innocence of the accused , at its best creates a mere fanciful possibility but not any probability that the accused is innocent.(See: ***Miller v. Minister of Pensions***[1947] 2ALL ER 372.)

Ingredients of the offence.

For the accused to be found guilty of the offence of Aggravated Defilement, the prosecution must prove each of the following ingredients beyond reasonable doubt.

- 1. The victim is below the age of 14 years.***
- 2. That a sexual act was performed on the victim.***
- 3. That it is the accused who performed the sexual act on the victim.***

a) That the victim was below the age of 14 years.

The first ingredient of the offence of Aggravated Defilement is proof of the fact that at the time of the offence, the victim was below the age of 14 years. This may be proved by production of a birth certificate, the testimony of the parents or other adult acquainted



with the circumstances of the child's birth. It has however been held that other ways of proving the age of a child can be equally conclusive such as the courts own observation and commonsense assessment of the age of the child.(See: ***Uganda vs. Kagoro Godfrey H.C Crim. Session Case No. 141 of 2002***)

In this case, PW1 Driciru Joyce, the victim's aunt/guardian testified that she is 10 years of age and at the time of the incident she was 9 years. The victim herself testified as PW2 on 13/4/23 and told court that she was 10 years old. By virtue of her age this court conducted a ***voire dire*** and she gave unsworn evidence after court found that she did not understand the nature of an oath. The defense does not contest the age of the victim. The evidence relating to her age is corroborated by the medical examination report comprised in Police Form 3A on which the victim was examined on 13/12/21 by Wadri Moses Chris , a Senior Clinical Officer of Maracha Health Centre IV and found to be of the apparent age of 11 years. Court also had an opportunity of seeing the victim and her physical appearance confirms that she is of the age attributed to her by the evidence. The defence does not contest this evidence of the age of the victim. In agreement with the opinion of the assessors I find that the prosecution has proved beyond reasonable doubt that the victim is below the age of 14 years.

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



Under this ingredient the prosecution has to prove that the victim was subjected to a sexual act. A sexual act has the meaning and definition attributed to it under section 129(7) of the Penal Code Act. It means penetration of the vagina, however slight, by the sexual organ of another or the unlawful use of any object or organ on another person's sexual organ. Proof of penetration is normally established by the victim's evidence and any other cogent evidence.(See: ***Basita Hussein vs Uganda, SCCA No. 35 of 1999; Remigious Kiwanuka v. Uganda S.C. Crim. Appeal No. 41 of 1995 Unreported and Muze Imana vs Uganda, CACA No. 85 of 1999(Unreported.)***)

In ***Adamu Mubiru vs Uganda; CACA No. 47 of 1997(Unreported)***, the Court of Appeal held that however slight the penetration may be, it will sustain a conviction of defilement.

The victim in this case is Sakaya Flavia. After conducting a *voire dire* she testified as PW2 and gave unsworn testimony. She testified that on the evening of the incident she met the accused who called her. When she went to him he threw her down, sat on her, removed his shorts, removed his penis, and defiled her. He then told her that he would kill her if she revealed this to anyone. As she narrated this the victim broke down and started crying uncontrollably. She then went home, and her mother found her lying down in the house and there was blood coming from her vagina.

A handwritten signature in black ink, consisting of a series of loops and a horizontal line extending to the right.

PW1, Driciru Joyce is the victim's maternal aunt. She told court that she is the one taking care of the victim since her mother had passed away. On the day she returned from church on 4/12/21 at 7:00pm and found her lying in the house and there was blood flowing from her vagina. When asked the victim said her body was paining and that when she went to collect firewood she was pricked by a stick. She checked her and she found tears on her vagina and her pant was torn and she had used the loose ends to tie it back. When she noticed that she was weak and had no appetite she took her to Ajikoro Health Centre and later they went to Nyadri Health Centre and when they returned home she revealed that the accused had defiled her and warned her that if she told anyone he would kill her just like the way her mother was killed. She then reported the matter to the LCIII Chairperson Osutre Godfrey who advised her to report the matter to the authorities. She returned to Nyadri and she was advised to obtain police forms for examination of the victim. She then went to Maracha Police Station.

The victim was examined on police Form 3A by Wadri Moses Chris on 13/12/21 from Maracha Health Centre IV and she was found to be sickly with ulcerations on the vaginal wall, a torn hymen and a foul-smelling discharge. She was also withdrawn and in the medical officers opinion she was suffering from post eromotic stress. There was tenderness on the lower abdomen, injuries around the vagina. In his opinion the probable cause of these injury was a blunt object. This medical report was admitted as PEX1.



The defense does not contest this ingredient. The evidence of the victim is corroborated by the evidence of her mother and the medical examination report. Although the victim in this case was a child of tender years I find that her evidence is sufficiently corroborated by other evidence to prove the fact that a sexual ^{act} intercourse was performed on her. I find that this ingredient has been proved beyond reasonable doubt.

c) That it is the accused who performed a sexual act on the victim.

The last ingredient the prosecution is required to prove is that it is the accused who performed a sexual act on the victim. This can be satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as the perpetrator of the offence. The Accused denied committing the offence and stated that on the day of the alleged offence he was at the home of his grandmother , a distance of about half a kilometer away from where she stays. He attributed the allegation to a grudge with the victim's mother because five days before the incident he had beaten a child of the complainant by the names of Musema alias Muse because he insulted him while he passed by their home.

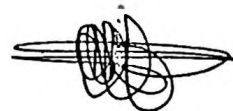
The accused does not have the burden of proving his alibi. The burden is on the prosecution to lead evidence placing him at the scene of crime and to sufficiently connect him to the commission of the offence.



(See: *Uganda vs. Sabuni Dusman*[1981] HCB 1; *Uganda v. Kayemba Francis*[1983]hcb 25; *Kagunda Fred v. Uganda S.C Criminal Appeal No. 14 of 1998*; *Karekona Stephen v. Uganda, S.C. Crim. Appeal No. 46 of 1999*; and *Bogere Moses and Kamba v. Uganda, S.C. Crim. Appeal No. 1 of 1997*) Where the prosecution evidence place the accused squarely at the scene of crime at the material time, the alibi is destroyed. (See: *Uganda vs. Katusabe*[1988-90] HCB 59)

To refute this alibi the prosecution relies on the evidence of identification by the victim. The victim in this case testified that the accused person is known to her as "**Inno**" and he used to stay in their village. That on the day of the incident she had gone to the village to collect firewood. Later that evening she met the accused who called her and when she reached him he threw her down and defiled her and warned her not to tell anyone otherwise he would kill her just like her mother had been killed. When she returned home she tried to hide this information but when her mother PW1 realized she was not well she insisted and she eventually disclosed that she had been defiled by the accused.

I note that the prosecution did not call the evidence of any of the other children who were with the victim when she went to collect firewood. However, the evidence of her mother is that, although she was scared because of the threat by the accused she later revealed to her that it was the accused who defiled her. The report to her

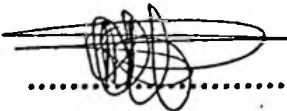


mother corroborates her story that it was the accused who defiled her. I find that the evidence of the mother of the report the victim made to her admissible evidence and is admissible as an exception to the hearsay rule. I find this sufficient corroboration of the evidence of the victim that it is the accused who defiled her. The incident happened in broad day light and the victim knew the ~~accused~~ ^{accused} victim well enough to be able to identify him as her assailant. I accordingly reject the evidence of the accused that he was not at the scene and find that the prosecution has led sufficient evidence placing him at the scene of crime as the perpetrator of the offence.

Order.

In agreement with the opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt all the essential ingredients of the offence against the accused. I accordingly convict him of the offence of Aggravated Defilement contrary to section 129(3) and (4)(a) of the Penal Code Act.

Dated at Koboko this.....^{23rd}.....day of.....^{August}.....2023



Acellam Collins

Judge