

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

**HIGH COURT CRIMINAL SESSION CASE NO. 0176 OF 2022
(Arising from Maracha Police Station CRB 0018 of 2021)**

UGANDA:.....PROSECUTOR

VERSUS

ADIMA INNOCENT:.....ACCUSED

BEOFRE HON. JUSTICE ACELLAM COLLINS

JUDGMENT

The indictment in this case is that of Aggravated Defilement contrary to section 129(3) and (4)(a) and (c) of the Penal Code Act. Under these provisions, any person who performs a sexual act with another person below the age of 14 years, where the offender is a parent or guardian or a person in authority over the person against whom the offence is committed commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

The particulars of this offence are that the accused person, Adima Innocent, between October 2021 and November 2021, at Padaa Village, Robu Parish, Nyadri Sub County in Maracha District, being



a guardian of Asibazuyo Brenda, performed a sexual act on the said Asibazuyo Brenda, a girl below the age of 14 years.

The brief facts as alleged by the prosecution are that at the time of the alleged offence the accused was cohabiting with Asuru Hellen, the mother of the victim who had taken the victim aged 12 years along with her to the home of the accused person and the family used to sleep in a house partitioned with a curtain. In late October 2020 in the absence of the victim's mother, the accused person had sexual intercourse with the victim while the other younger children were asleep. He repeated the act again in November 2020 and the victim did not inform anyone about it. On the 28th of November 2020 the accused returned from a drinking spree at around 2:00am and wanted to have sexual intercourse with the victim while her mother was asleep, but the victim woke up her mother and informed her of the earlier incidents. The mother then reported the matter to the area leaders and the accused was arrested and taken to the police where he recorded a statement confessing to have committed the offence. On the 10th of January 2021, the victim was examined from Maracha Health Centre IV and found to be of the apparent age of 13 years with old signs of penetration.

The burden of proof is on the prosecution to prove the case against the accused beyond reasonable doubt. This 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 defense. (See: ***Ssekitoleko v. Uganda [1967] EA 531***)



By pleading "*Not Guilty*" the accused has put 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 beyond a shadow of doubt. However, it is trite law that any doubt in the case should be resolved in favour of the accused.(*Mancini vs. DPP (1942) AC 1 and Abdu Ngobi Vs. Uganda; Uganda Supreme Court Criminal Appeal No. 10/1991*).

For the accused to be convicted for the offence of Aggravated Defilement, the prosecution must prove each and every one of the following ingredients beyond reasonable doubt.

- 1) That the victim was below the age of 14 years of age.**
- 2) That a sexual act was performed on the victim.**
- 3) That the accused was a parent or guardian of or person in authority over the victim.**
- 4) That it is the accused who performed a sexual act on the victim.**

The prosecution called a total of 3 witnesses, namely, PW1 Asuru Hellen, PW2 Afema Philliam, PW3 Asibazuyo Brenda, the victim. Medical Examination Reports comprised in Police Form 3A and Police Form 24A were admitted as agreed facts under the provisions



of section 66 of the Trial on Indictment Act. The accused person on his part opted not to say anything and led no other evidence in his defence.

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

The age of a child can be proved by production of her birth certificate, the testimony of the parents, or by courts own observation and common-sense assessment of the age of the child.

In this case the victim herself testified on 7/6/23 and stated that she is 14 years old. This court also had an opportunity on making a common-sense observation of her to determine her age. Her mother Asuru Hellen testified that the victim was born on 25/9/2007. The prosecution also adduced a medical examination report comprised in Police Form 3A on which the victim was examined by Dr. Arigye Francis, a Senior Medical Officer attached to Maracha Health Centre IV on 10/01/21 who found that the victim was of the apparent age of 13 years. By agreement of both parties the report was admitted as an agreed fact and marked PEX1 on 8/5/23. From the above evidence, since the offence is alleged to have been committed in November 2020, the victim was below the age of 14 years at the time. I am satisfied that this ingredient has been proved beyond reasonable doubt.

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

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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's sexual organ. Sexual organ means a vagina or penis. (See: **Section 129(7) of the Penal Code Act**).

In ***Basiita Hussein Vs. Uganda, SCCA No. 35 of 1995***, that was relied on in ***Uganda Vs. Busuulwa Kenneth***, it was held that: ***“the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victim's own evidence and corroborated with medical or other evidence.”***

From the above definition, this implies that with or without penetration, a sexual act is committed by mere touching in a sexual manner, the private parts of a girl.

The Supreme Court in ***Wepukhulu Nyuguli Versus Uganda, SCCA No. 21 of 2001 (Unreported)*** held ***that whether or not sexual intercourse took place in a particular case is a matter of fact to be established by evidence. Normally in sexual offences, the victim's evidence is the best evidence on the issue of penetration and even identification, but other cogent evidence may also suffice to prove acts of sexual intercourse.***
See also: Patrick Akol Vs. Uganda, Supreme Court Criminal Appeal No. 23 of 1992 (unreported).



Proof of penetration is normally established by the victim's evidence and any other cogent evidence. For purposes of this indictment, it is alleged that the accused performed a sexual act on the victim between the months of October and November 2021. To prove this element of the offence, the prosecution led the evidence of the victim, as well as her mother and medical evidence was admitted as an agreed fact. Medical Examination Report comprised in Police Form 3A admitted and marked as Annexure PEX1.

According to the victim who testified as PW2, the accused person was known to her as the husband of her mother. She lived with him for about 4 years at Adaa Village in Maracha District. She told court that the accused person had sexual intercourse with her twice in the absence of her mother. The first time her mother had gone to their home and the second time she had gone to a funeral and on both occasions she would leave her home with the other younger children with whom they would sleep in the same house and it is the same house where the accused and her mother slept.

According to her the first time the accused came and opened the door when they had already slept. She noticed when he had already undressed her and was lying besides her. He put his penis into her vagina, and she was totally naked because her knicker was off. When she woke up he was already lying beside her and that she realized what was happening when she woke up. She wanted to shout but he threatened her that he would kill her. She also told court that when she woke up he had already had sex with her



because there was some discharge on her. That he had sexual intercourse with her when she was still asleep.

The second incident the victim said the accused came when they were asleep, and she did not hear him knocking the door. Her brothers opened for him the door. she woke when he was undressing her. When she woke up that time he also had sexual intercourse with her in the presence of her brothers who were awake. The children who were with her are by the names of Atandu Fred and Munguci Daniela. She told him that she would report but he threatened to kill her if she did so.

Apart from the above two incidences the accused attempted to have sexual intercourse with her the third time in the presence of her mother. They served him food near their bed but her got the food and came to eat from where they slept and attempted to undress her. She then woke her up and told her that the accused was undressing her and that he always does that to her. When her mother asked him why he was doing that he told her that he would tell her the reason the next day. The matter was then reported to the mother of the accused.

The mother of the victim Asuru Hellen testified as PW1, Asuru Hellen, that on the 28th day of November, 2020 she went to bed while the accused had gone to pass time at the trading center. He returned at about 1:00am and when she opened for him she told him that his food was on the table, and he told her he was not



eating so they both entered bed and slept. After a while she woke up because she realized someone was calling her and discovered that the accused was not in bed. She opened the curtain and found him seated on the papyrus mat where the children sleep, and he was eating with another child by the names of Mayani Alfred aged 7 years.

There was light from a lamp. She could not tell why he was there but noticed that the victim was crying. When she inquired why she was crying she did not tell her anything but only complained that she had started calling a long time ago. She asked her again and she told her that the accused came to eat from where they sleep and started extending his legs towards hers. She asked the accused why he was doing such a thing he said he would tell her the next day.

She then reported the matter to the accused person's mother who lives in the same homestead. When his mother inquired whether the victim told her that the accused had sexual intercourse with her she admitted that the victim told her that the accused did not have sexual intercourse with her. She then advised that since the accused did not have sexual intercourse with the victim they should keep quiet. She later reported the matter to the victim's biological father and when they held a meeting with their family the victim told them that the accused had sexual intercourse with her and later disclosed that he had sexual intercourse with her on another



occasion when she had gone to a funeral 2 years before this incident and that he had done it twice.

PW2 Afema Philliam, a brother to the victim's biological father testified that sometime in January 2021 the mother of the victim came to their home with Driciru and told them that her current husband wanted to turn Driciru into a wife. That the victim herself told them that on the fateful night the accused came to their bed and started opening her legs slowly and removing her knickers. She asked him what he was doing and called out her mother who took long to respond. She also told them that the accused had sex with her on a previous occasion when her mother had gone to a funeral in Maracha. They later set a date and met with the relatives of the accused and at that meeting, in the presence of the accused the victim told them that the accused had sex with her twice but on the last occasion he did not because her mother was there.

The victim was examined on Police Form 3A by Dr. Arigye Francis, a Senior Medical Officer attached to Maracha Health Centre IV on the 10/01/21. By agreement of the parties this medical examination report was admitted as an agreed fact under section 66 of the Trial on Indictment Act as PEX1. This report indicated that there were no bruises around the genitals. However, the medical officer observed that there was a ***“rugged appearance and partially open introitus suggesting penetration in the recent past.”***



The above evidence suggests that a sexual act was performed on the victim. Her own evidence and that of her mother are supported by the findings of the medical officer. The victim's mother was prompted to raise this matter after the last incident. At this time the victim had told her mother that the accused had always done to her what he was trying to do that night. Even if he did not have sexual intercourse with her that night, there is evidence that he did on a previous occasion. The delay to report the incident can be explained by the fact that he threatened to kill her if she did.

I am satisfied that the prosecution has proved this element of the offence beyond reasonable doubt.

3. That the accused was a parent or person in authority over the victim.

There is no definition of a parent, guardian, or a person in authority over the victim in the context of such an offence. However, a person in authority may be understood to refer to relational power between a family elder and a younger relative. It may also be understood as any person acting in the position of a parent to the victim, or any person responsible for the education, supervision, or welfare of the child.

In Uganda versus Kayinamura Andrew, High Court Kabale Criminal Session Case No 0238 of 2019, Hon. Justice Moses Kazibwe Kawumi held that: My appreciation of the term "A person in authority" in the context of section 129 is that it refers to



the relational power between a family elder and a younger relative. The accused may not have for long interacted with the victim as he contends, but as a grandfather who used to visit their home and who was respected as such, he wielded authority over his granddaughter.”

The judge also cited **Uganda V Fualwak [2018]UGHCRD 110** where Hon. Justice Mubiru Stephen described the **“authority” to reside in: “any person acting in loco parentis to the victim, or any person responsible for the education, supervision or welfare of the child, and persons in a fiduciary relationship with the child characterized by one sided distribution of power inherent in the relationship, in which there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith with regard to the interest of the child reposing the confidence.”**

In this case, at the time of the alleged incidences the victim was living with the accused person at his home since her mother was cohabiting with him as a wife. From the evidence the victim referred to the accused as **“Daddy”**.

From the evidence there is no doubt that the accused was in the position of a guardian or parent to the victim. Being the husband to her mother he was therefore a stepfather to the victim and as the man of the house he was therefore a person in authority as

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envisaged by the Penal Code Act and for purposes of this offence. This ingredient has been proved beyond reasonable doubt.

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

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

To prove participation of the accused in this case this court has to examine the evidence to determine if the accused was the person identified as the perpetrator of the offence. The evidence in this case is also circumstantial in nature. The offence is alleged to have been committed in the house that the accused occupied together with the victim, her mother and two other children who were not called to testify.

According to the victim, on the two occasions when she alleges that the accused had sexual intercourse with her, and he would come when they are sleeping and there would be no light in the house. It is only on the third occasion when her mother was around, and she testified that there was light in the house, and she had seen the accused seated on the mat where the children including the victim used to sleep. That is when she reported that the accused was attempting to undress her, and he usually does that to her. In as far as the earlier two incidences are concerned the victim is a sole identifying witness.



I am alive to the uneasiness caused by relying on such evidence to convict an accused person and the risk of miscarriages of justice. There is always the possibility that a witness, though honest, may be mistaken. For this reason, the courts have over the years evolved rules of practice to minimize the danger that innocent people may be wrongly convicted. The leading case in East Africa is the decision of the former Court of appeal in ***Abdalla Bin Wendo and Another vs R (1953), 20 EACA 166*** cited with approval in ***Roria v. (1967) EA 583***.

The paragraph often quoted from Wendo (supra) is at page 168. The ratio decidendi discernible from that case is that.

- (a) The testimony of a single witness regarding identification must be tested with the greatest care.*
- (b) The need for caution is even greater when it is known that the conditions favoring correct identification were difficult.*
- (c) Where the conditions were difficult what is needed before convicting is other evidence pointing to guilt.*
- (d) Otherwise, subject to certain well-known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.*

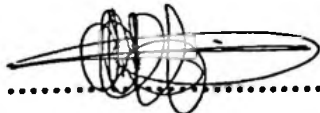
In this case, notwithstanding the difficulty in identification, I find there is circumstantial evidence pointing to the guilt of the accused. The incidents complained of happened three times and the accused



was known to the victim. On both occasions he is the one who was known to have been in the house with the victim and other children. During these incidences she spoke to the accused person. Looking at these factors alongside the ones that make identification difficult, I find there is nothing to suggest that some other person other than the accused person committed the offence.

I accordingly find that the prosecution has proved all the essential ingredients of the offence against the accused person. I convict him of the offence of Aggravated Defilement contrary to section 129(3) and (4) (a) and (c) of the Penal Code Act.

Dated at Arua this...*24th*...day of...*August*...2023



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Acellam Collins

Judge