

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA**

**HIGH COURT CRIMINAL SESSION CASE NO. 0167 OF 2022**  
**(Arising from Madi-Okollo Police Station C.R.B. 0073 of 2021)**

**UGANDA:.....PROSECUTOR**

**VERSUS**

**OKOT ROBERT:.....ACCUSED**

**BEFORE: HON. JUSTICE ACELLAM COLLINS**

**JUDGMENT**

The accused is indicted for the offence of Aggravated Defilement contrary to section 129(3) and (4) (a) and (c) of the Penal Code Act. The particulars of the offence are that the accused, Okot Robert, on the 31<sup>st</sup> of May 2021 at Adribu Village, Endebu Parish, Okollo Subcounty in Madi-Okollo District, being a stepfather of Awekonimungu Emmaculate, performed a sexual act with the said Awekonimungu Emmaculate, a girl below the age of 14 years.

The facts as alleged by the prosecution are that the accused person was cohabiting with one Onziri Emmily, the mother of the victim



who was four years old by then. The said Emmily who was pregnant had gone to their home to deliver and had taken her children with her and the accused followed her. On the night of 30<sup>th</sup> May 2021, they all went to bed but later in the night at about 2:00am, one Adriko Patrick who was on his way home from a nearby trading centre heard a child crying in a nearby bush by the roadside a distance of about 30 metres from the house where the mother of the victim and the accused slept. He flashed a torch and saw the victim lying down and the accused who was naked was on top of her. He then arrested him and took him back home where he found the mother of the victim was still sleeping. He informed the neighbors, and the accused was taken to the Chairman LC1 where he was kept till morning when he was handed over to the police. The victim was examined and found to be of the apparent age of 4 years with a reddened appearance on the labia minora. The accused in his defense opted to remain silent and did not call any witnesses.

The prosecution has the burden of proving the case against the accused person beyond reasonable doubt. An accused person has no duty to prove his innocence. Every person charged with a criminal offence is presumed innocent until proved guilty unless he has pleaded guilty. If the accused does not plead guilty, the prosecution must prove beyond reasonable doubt that the accused committed the offence. This conclusion follows from the general principle that, he who asserts must prove and the presumption of innocence contained in Article 28(3)(a) of the Constitution, 1995.

In ***Kabali Vs. Uganda (2004) KALR 23***, the court held that in all criminal cases, the burden rests on the prosecution. It never shifts to the accused except in few statutory exceptions.

In criminal cases the prosecution must prove the guilt of the accused beyond reasonable doubt, but this is not certainly beyond a shadow of doubt. This standard has been given a definition by the courts. In ***Miller v Minister of Pensions [1947] ALL ER 372***, Denning J. as he then was said:

***“That the degree is well settled, it need not reach certainty, but it must carry a high degree of probability, proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”***

In ***Ssekitoleko v Uganda, (1967) EA 531***, Sir Udo Udoma C.J. said ***“as a general rule, the burden of proving the guilt of the prisoner beyond reasonable doubt never shifts whether the***



***defence set up is an alibi or something else. The burden always rests on the prosecution and the standard is high."***

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

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

To prove their case, the prosecution led the evidence of 3 witnesses. The mother of the victim Onziru Emmily testified as PW1, Adriko Patrick testified as PW2 and Anibo Isaac testified as PW3. The victim in this case did not testify. On 7/6/23 the prosecution informed court that they could not secure the attendance of the victim because she had lost a brother and could not come to court and the matter was adjourned to 19/6/23. On the adjourned date the prosecution informed court that they could contact the victim because she had gone with her mother to do farming in a place, and they had no telephone. They then opted to close their case.

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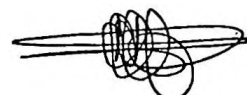
The accused person on his part opted to exercise his right to remain silent. He did not testify and did not call any witnesses.

At the preliminary hearing medical evidence was tendered in as agreed facts with the Medical Examination Report comprised in Police 3A in respect of the victim admitted as PEX1 while Police Form 24A in respect of the accused person admitted as PEX2.

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

The age of a child can be proved by production of her birth certificate, the testimony of her parents, or by the court's own observation and commonsense assessment of the age of the child. In this case the victim did not testify but her mother did. There is also medical evidence that was admitted as an agreed fact. According to the medical report, the victim was of the apparent age of four(4) years based on the observation by Ajio Joyce Agulinia, the Nursing Officer who examined her at Okollo Government Health Centre III, that her milk teeth had not fallen off. The mother of the victim, Onziru Emmily testified as PW1 on 5/5/23. She testified that her daughter was four (4) years at the time of the incident. Both PW2 and PW3 testified that the victim was about 5 years old.

From the above evidence I am satisfied that the victim in this case was below the age of 14 years at the time the alleged offence was

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committed. I find that the prosecution has proved this element of the offence beyond reasonable doubt.

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

Sexual intercourse 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.

In *Bassita Hussein Versus Uganda, Supreme Court Criminal Appeal No. 35 of 1995*, the court held that;

***“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, sexual intercourse is proved by the victim’s own evidence and corroborated by medical or other evidence.”***

PW2 Adriko Patrick testified that on the night of 30<sup>th</sup> -31<sup>st</sup> May 2021, while returning home from the trading centre at around 1:00-2:00am he heard a child cry from the bush about 30 meters from the home of Emmily and the accused, when e flashed his torch he saw it was the accused having sexual intercourse with the victim. The girl was lying down and the accused who was completely naked was on top of her. He asked the accused why he was having sexual intercourse with the child, and he said his wife had denied him sex.



PW2 then made an alarm and with the help of people who responded the accused was arrested and taken to the LC1 Chairman where he was kept and was later taken to the police.

PW1, the victim's mother also testified that during that night at about 1:00-2:00am she was woken up by PW2 and one of her brothers by the names of Candia who asked her whether she knew what had happened to the victim. At that time both her husband and the victim were not in the house. When the victim was later brought she asked her, and she revealed that the accused person had taken her outside and performed a sexual act on her.

The LC1 Chairman, Anibo Isaac, PW3, testified that during that night the accused was brought to his home and when he questioned him he admitted having had sexual intercourse with the victim. He then kept him at his home till morning when he took him to the police. He also observed that the girl's back was soiled and when he visited the scene he saw knee marks.

The above evidence is corroborated by the medical examination report admitted as PEX1. The victim was examined by Ajio Joyce Agupinia, a Nursing Officer of Okollo Health Centre III on 31<sup>st</sup> May 2021, the day of the alleged incident. She found that the victim had a reddish appearance on the labia minora which she attributed to possible sexual abuse/attempted rape.

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Proof of a sexual act for purposes of this offence does not necessarily mean there must have been deep penetration. The slightest penetration will suffice. The Supreme Court in ***Wepukhulu Nyuguli versus Uganda, SCCA 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.

Proof of penetration is normally established by the victim's evidence, medical evidence, and any other evidence. In this case the victim did not testify. However, there was the evidence of PW1 who testified that he found the accused having sexual intercourse with the victim in the bush a distance of about 30 meters from their house. He arrested him from the scene of crime and eventually handed him over to PW3, the LC1 Chairman who kept him at his home until he was handed over to the police. The matter was also reported to the mother of the victim who realized that both the accused and the victim were not in the house. The evidence of PW1 and PW3 is corroborated by the medical report which shows that the victim sustain injuries suggesting that she may have been sexually assaulted.

In ***Bassita Hussein Versus Uganda*** (supra) the Supreme Court held ***that though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration.***



I am satisfied that the prosecution has led sufficient evidence to prove that there was a sexual act performed on the victim. This ingredient has been proved beyond reasonable doubt.

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

The Penal Code Act does not define who a parent, guardian, or a person in authority over the victim is in the context of this offence or any other offence. "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 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.

In this case, the accused, though not the biological father of the victim, was in the position of her father as he was cohabiting with her mother, and they lived in the same household. Since he lived with the mother of the victim as husband and wife he was therefore a stepfather to the victim. In light of the above, I am satisfied that



the accused was a parent, guardian, or a person in authority over this victim for purposes of the offence of Aggravated Defilement under section 129(3) and (4)(a) and (c) of the Penal Code Act. Based on the above I find that the prosecution has proved this element of the offence to the required standard.

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

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

The victim in this case did not testify as the prosecution failed to secure her attendance. PW2 Adriko Patrick testified that on his way home from the trading center he heard a child crying in the bush near the house where the accused were living with the victim and her mother. He flashed a torch at them and saw the accused who was naked on top of the victim who was lying down, and he noticed that the accused was defiling the victim. He also noticed that the accused's body was dusty. He asked the accused why he was having sexual intercourse with the girl, and he replied that his wife had denied him sex. He apprehended the accused and took him to his home then some people came, and the accused was taken to the LC1 Chairman.



The Chairman LCI Chairman Anibo Isaac who testified as PW3 told court that the accused was brought to his home at 3:00am on 31<sup>st</sup> May 2021 on an allegation that he had defiled the victim. He admitted that he had sexual intercourse with the victim. He visited the scene and kept the accused at his home. That the accused directed him to the scene where he found knee marks. When the victim was brought to him her back was soiled. The accused admitted to him that he committed the offence due to alcohol and because his wife refused to allow him to have sexual intercourse with her. He then took him to the police.

The evidence against the accused is both direct and circumstantial. PW1 found him at the scene with the victim and according to his evidence he was having sexual intercourse with the victim in the bush near their home. He was arrested at the scene and taken to the LC1 Chairman who took him to the police in the morning. Even in the absence of the evidence of the victim I find that the circumstances are incapable of any other reasonable explanation than that of the guilt of the accused. Having found that there was a sexual act performed on the victim, I am convinced that from the evidence on record the accused is the one who performed a sexual act on the victim and no other person.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt, and

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I hereby find the accused guilty 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 25<sup>th</sup> day of August 2023



.....  
**Acellam Collins**

**Judge.**