

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KANUNGU

CRIMINAL SESSION CASE NO. 97 OF 2023

UGANDA:..... PROSECUTOR

VERSUS

TWIMUKYE GODFREY alias KAGODO:..... ACCUSED

BEFORE: HON. JUSTICE TOM CHEMUTAI

JUDGMENT

The accused person, **Twimukye Godfrey** was indicted with the offence of Aggravated Defilement contrary to Contrary to Section 129(3) (4)(a)(b) of the Penal Code Act of the Penal Code Act.

It was alleged that the accused person, Twimukye Godfrey alias Kagodo on the 22nd August, 2019 at Kigarama Cell in Kanungu District being infected with Human Immunodeficiency Virus (HIV) performed a sexual act with Kobusingye Elizabeth a girl below the age of fourteen years.

The accused person pleaded not guilty to the indictment.

The brief facts as narrated by the Prosecution are that on 22nd August, 2019, the victim was at home with her aunt who sent her to fetch water from the water stream at Kigarama Cell at about 10:00 Am. That the victim found the accused person at the water stream and grabbed her and had sexual intercourse with the victim. The victim went back at home and told her Aunt what had happened. The Aunt checked the victim and thereafter, she took

the victim to the stream and found the accused person at the water stream washing clothes.

During the hearing, the State was represented by Mr. Muhendo Peter, Resident State Attorney for Kanungu District while Counsel Erasmus Nabimanya appeared for the accused person on the State brief.

In Criminal matters, the Prosecution has the burden of proving the case against the accused person beyond reasonable doubt. See **Woolmington vs DPP (1935) AC 462**

The burden does not shift and the accused can only be convicted on the strength of the Prosecution case and not because of any weaknesses in his defence. See *Ssekitoleko v. Uganda*, [1967] EA 531.

According to Section 129(3) (4)(a)(b) of the Penal Code Act under which the accused person is indicted, the following ingredients must be proved by the Prosecution beyond reasonable doubt;

- The victim was below 14 years of age
- A sexual act was performed on the victim
- That it is the accused person who performed the sexual act on the victim.
- That the accused person was HIV positive.

In order to discharge the burden of proving the case beyond reasonable doubt, the Prosecution called three witnesses. These were namely;-

Kobusingye Elizabeth, the victim (PW1), Kembabazi Anna, an Aunt to the victim (PW2), and Sgt. Bajurizi Lawrence, the Investigating Officer (PW3).

The accused person gave a sworn testimony and denied the offence.

There was agreed evidence of Police Form 3A, (PF3A) on which the victim was examined at Kambuga Hospital on the 27th August, 2019. The Police Form 24A, (PF24A) on which the accused person was examined on 4th September 2019 and lastly the Baptism Card of the victim.

Proof of age of the victim

The Prosecution is required to prove beyond reasonable doubt that the victim was below 14 years of age. In the instant case, the victim's baptism card indicated that the victim was born on 21st February, 2013. The medical report (PF3A) indicated that the victim was 6 years old.

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 **Uganda vs Kagoro Godfrey, H.C. Crim. Session Case No. 141 of 2002.**

I have considered the prosecution evidence and also did observe the physical appearance of the victim. I find that Prosecution has proved beyond reasonable doubt that the victim was below 14 years old by the time the incident allegedly took place on 22nd August, 2019.

Whether a sexual act was performed on the victim and whether the accused person performed the sexual act on the victim.

The Prosecution is required to prove that a sexual act was performed on the victim. One of the definitions of a sexual act under **Section 197 of the Penal Code Act** is the penetration of the vagina, however slight, of any person by a sexual organ. This can ordinarily be proved by the direct evidence of the victim, but may also be proved by circumstantial and medical evidence. See **Remigious Kiwanuka VS. Uganda, Supreme Court Criminal Appeal No. 41 of 1995.**

In the case of **Bassita Hussein Vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995**, it was held as follows; -

"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 by medical or other evidence. Though desirable it is not a hard and first rule that the victim's evidence and medical evidence must always be addressed in every case of defilement of proof of sexual intercourse or penetration. Whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt"

PW1, the victim stated that she knew the accused person as her neighbor and mentioned his name. That on 22nd August, 2019, her Aunt (**PW2**) sent her to fetch water from the stream at Rwebitengye. That at the stream, she met the accused person washing clothes. That the accused person grabbed her by force and took her to the bush and had sexual intercourse with her. That thereafter the accused person threatened her not tell any what happened. That on her way back home, she met **PW2** and she narrated to her, what had

happened. That PW2 poured the water she had fetched and they went back to the stream with the victim. That the PW2 and victim found the accused person at the stream, bathing.

PW2, stated that she was an Aunt to the victim. That she knew the accused person as her neighbor. That on 22nd August, 2019, in the afternoon, she sent the victim to fetch water at the Rwebiteregye stream. That the victim delayed to come back by two hours and she went to fellow her up. That on the way, she met the victim crying, who informed her that she found the accused person at the stream and he defiled her. That she went to stream with the victim and found the accused person. That the accused person had a basin of wet clothes at the stream. That at the stream, the victim showed her the scene of crime, which had banana leaves and grass lying flat land the ground. That in the evening, she examined the victim and saw some white substances in victim's private parts. That after two days, the victim started complaining of abdominal pain.

PW3, stated that on 28th August, 2019, that he was allocated this case file by the OC CID for a defilement case committed by the accused person. That the case was reported the Grandmother of the victim. That he recorded the statement of PW2 and the OC CID recorded the statement of the victim. That accused person was arrested by Police at Bugongi and he denied the allegation. That he forwarded the file to Kanungu Police Station for further management.

The accused person in his sworn evidence stated on 22nd August, 2019, he never interacted with the victim. That he had a grudge with the family over

a piece of land he had rented to the parents of the victim, which he later on rented to another person.

The accused person was well known to the victim and PW2 as their neighbor. The victim in her testimony, clearly explained to the Court how the accused person defiled her at water stream. The victim's evidence was further corroborated by the evidence of the PW2 who saw the accused person at the scene of crime and also checked the victim and discovered a white substance discharge from the victim's private parts.

There is the medical report evidence (PF3A) which indicated that the victim's hymen had been torn and genital lacerations were caused by penile penetration. The medical examination report of the accused person (PF24A) indicated that the accused person was HIV positive.

I, therefore, find that the Prosecution has proved beyond reasonable doubt that a sexual act was performed on the victim.

In the premises, I find that Prosecution has put up a strong case by being consistent and I am therefore inclined to hold that the Prosecution evidence has also proved it was the accused person who defiled the victim as he was clearly identified by the victim and PW2 who saw him at the scene of crime.

In conclusion and in agreement with the Assessors who advised me to convict the accused, I find that the Prosecution has proved all the essential ingredients of the offence of Aggravated Defilement against the accused person beyond reasonable doubt.

I hereby convict the accused person, Twimukye Godfrey of the offence of Aggravated Defilement contrary to section 129 (3) and (4) (a) (b) of the Penal Code Act.

Dated this day.....18th ofOctober2023

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TOM CHEMUTAI
JUDGE

ALLOCUTUS

Aggravating factors:-

Prosecution:-

The victim was very young.

She was destroyed by the convict.

The convict knew that he was sick.

Mitigation:-

Defence Counsel: -

The convict is a first-time offender.

He was remorseful.

The convict should be given a lenient sentence.

Accused person: -

My wife left me and later, she passed on.

She left the children.

Sentence: -

I have taken into account the Aggravating and Mitigating factors in this case.

I find that the conduct of the convict was merciless towards the innocent child.

He should therefore serve as an example to the world.

I, accordingly, sentence the convict to a jail term of 40 years.

Time spent on remand shall be deducted from the sentence (30– 5 years, 1 month and 8 days).

He will serve a jail term of 35 years, 11 months and 22 days.

Right of Appeal explained.

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TOM CHEMUTAI
JUDGE
18/10/2023