

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MUKONO**  
**CRIMINAL SESSION NO.438 OF 2019**

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

**VERSUS**

**KIMERA RONALD:.....ACCUSED**

**BEFORE HON. LADY JUSTICE CHRISTINE KAAHWA**

**JUDGMENT**

The Accused in this case was indicted of the offence of Aggravated Defilement c/s 129 (4) of the Penal Code Act Cap 120 as amended. It was alleged that Kimera Ronald during the month of December, 2018 at Butabira Cell in Buikwe District unlawfully performed a sexual act with ZA a girl aged 13 years.

The prosecution alleges that at the time of the offence, the victim was aged 13 years and a resident of Kufa Cell, Nyenga division Njeru Municipality in Buikwe District where she stayed with her parents. That the Accused was a friend to the victim's father and he went to the victim's home and informed the father of the victim that he wants to give them cassava, to which the victim's mother refused, however, upon the victim's mother separating with the father of the victim, the Accused kept on coming to the victim's home promising to marry her.

That during the month of December 2018, the Accused went to the Victim's home in the evening to check on her father, while

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there, he told the victim's father that he wanted to offer them cassava and requested the victim's father to send her the next morning for the cassava and the victim was sent to the Accused's home. However, she found the Accused who told her that the cassava was inside the house, upon entering the house the Accused followed her and told her to go to the bedroom where the cassava was, on entering the bedroom, the Accused told the victim to sleep on his bed, when she resisted, the Accused pushed the victim on the bed, removed her knickers and ordered her to keep quiet. The Accused covered the victim's mouth in a bid to stop her from making noise, removed his trouser and forcefully had sex with her after which he warned her not to tell anyone.

That on one occasion, the victim's Uncle, a one Kibonge got concerned, called her and asked her whether it was true that she had a love affair with the Accused. The victim then revealed to her uncle that she had been having sex with the Accused, the uncle took her to the LC1 who then forwarded the matter to Nyenga Police Station. The Accused was arrested and charged accordingly.

The burden to prove the case against the Accused person beyond reasonable doubt lies with the prosecution. The 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 or her defence as illustrated in the case of **Sekitoleko v. Uganda [1967] EA 531**).

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In the case before, the Accused pleaded not guilty to the offence; this implies that the burden of proof of all the essential ingredients of the offence is vested on the prosecution who has to prove these ingredients beyond reasonable doubt which was a settled principle in criminal law in the case of **Miller v. Minister of 15 Pensions [1947] 2 ALL ER 372**).

Proof beyond reasonable doubt does not infer proof beyond a shadow of doubt and any doubts in the case should be resolved in favour of the accused person. This was the position in the Supreme Court case of **Abdu Ngobi Vs Uganda; Criminal Appeal No. 10/1991**). Therefore, for an Accused person to obtain a conviction of the offence of Aggravated Defilement, the prosecution must prove beyond reasonable doubt each of the following ingredients of the offence.

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

At the hearing, the Prosecution was represented by Senior State Attorney George Bigira together with State Attorney Siratwa Bassajjabalaba while the Defence was represented by Mr. Mujjuni Januario on state brief.

The prosecution led evidence of one witness Detective Constable Sylvia Wanyenze and the Accused exercised his right to remain silent.

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The prosecution proceeded under section 66 of the Trial on Indictment Act, Cap 23 and tendered in Police form 3A and Police form 24A as agreed documents.

Both Parties filed submissions.

**Age of the victim:**

The best evidence of age is a birth certificate. In this case no birth certificate was availed in evidence. However other evidence is considered by the Court where a birth certificate cannot be produced. This will be such age as determined by a Medical Examination of the individual, evidence of a person acquainted with the age of the individual in issue such as a parent and observation of the individual. See **Mwine Caleb versus Uganda HCT 05-CR-169-2002.**

In the absence of a birth certificate, age can be proved by any admissible evidence, age can also be determined by observation and common sense: See **Uganda Vs James Byakatonda; Masaka Criminal Session Case No. 205/1994** per Berko J (as he then was).

In the instant case, the prosecution led evidence of medical examination report of the victim which was admitted during preliminary hearing under section 66 of the Trial on indictment Act, Cap, 23.

PW1, the investigating officer who testified for the prosecution also draws her conclusion about the age of the girl from the Medical Report, in cross examination she attested to the fact that

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she was not able to look at the girl's birth certificate. Since the Police Form 3A was tendered as an agreed document it is my finding that the victim was 13 years old at the time of defilement.

The Prosecution has proved the age beyond reasonable doubt.

**That a sexual act was performed on the victim:**

Sexual act is defined to mean (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 as detailed under Section 129 (7) of the Penal Code Act)

The Police Form 3A which was tendered as an agreed document shows that; there was an old hymen rupture and loose vaginal opening.

Under injuries and probable causes; the state of vaginal opening shows that she has ever had sexual intercourse more than once sometime back.

PW1 testified that she interviewed the victim in this case. She told her that when she went to the Accused's home to pick cassava which he had promised to give her father, the Accused told the victim to lie on his bed, that she did not make noise because she was threatened by the Accused who pushed her on the bed, removed her knickers, had sex with her and later gave her cassava to take home though she did not report.

That upon her interaction with the neighbours at the scene, they informed her that they saw the girl entering the Accused's house,

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that she established sexual abuse because the Doctor told her that the girl had been defiled.

In the case of **Byarugaba Lozio Vs Uganda Criminal Appeal No.168 of 2009**, the Court of Appeal held that, there is no legal requirement that a victim of sexual crime or any other crime must testify before a Court. In the result the prosecution has proved the aspect of a sexual act taking place to the required standard.

### **Participation:**

The last element to be proved by the prosecution is, that it is the Accused who performed the sexual act on the victim. This ingredient is dispensed with by adducing evidence, direct or circumstantial, placing the Accused at the scene of crime as the perpetrator of the offence.

PW1 testified that the case of defilement was reported by the relatives of the victim who used to see her enter the house of the Accused. She went on to state during cross examination that the relatives did not see the defilement. She also testified that she was not aware if a DNA was carried out to prove if it is indeed the Accused who defiled the victim. Neither the victim nor her Uncle who reported the matter was brought by the prosecution to testify in this respect.

In **Badru Mwindu V Uganda Supreme Court Criminal Appeal No. 15 of 1997**, Court held that hearsay evidence is admissible and can be relied upon if the totality of the prosecution evidence points to the guilt of the Accused person.

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In the instant case PW1 stated that the neighbors used to see the victim enter the Accused's house but they did not see him defiling the victim.

The victim and or the complainant who were the key witnesses were not presented by the Prosecution. The reason for failure to present the witnesses was that the Process Server was informed by LC1 that the victim had had moved away from that location and there was no telephone number on the victims statement.

I am alive to the provisions **section 133 of the Evidence Act** provides that;

"Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact."

Where there is doubt, then doubt has to be resolved in favor of the Accused person. See **Obwalatum Francis Vs Uganda Supreme Court Criminal Appeal No.030 of 2015.**

In the instant case the two key witnesses were unable to present their evidence. The evidence on record was not tested by cross examination of any of the two witnesses. The neighbours who saw the victim go into the Accused house were not presented, the evidence therefore remained as hearsay evidence and was not corroborated. This in my view means that the evidence of the participation of the accused was not proved to the required standard. I depart from the Joint opinion of the Lady and Gentleman Assessor on proof of participation. The Prosecution has not proved not proved this element beyond reasonable.

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I acquit the Accused and set him free unless he is being held on other lawful charges.

**Dated at Mukono this 27<sup>th</sup> day of March 2024.**



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**Christine Kaahwa**

**JUDGE**