

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

HOLDEN AT KYANGWALI

CRIMINAL CASE NO. 0290 OF 2022

UGANDA ::: PROSECUTOR

VERSUS

TUMUKUNDE AMBROSE ::: ACCUSED

Before: Hon. Justice Byaruhanga Jesse Rugyema

Judgment

- [1] The Accused **Tumukunde Ambrose** is indicted with the offence of **Aggravated Defilement** contrary to **S.129(3) & (4) PCA**. It is alleged that on the 1st December, 2019 at **Kanyegaramire** village in the Kikuube District, the Accused performed unlawful sexual act with **Ajuna Patience** a girl aged 12 years.
- [2] The prosecution case is that the Accused person used to be a neighbor of the family of the Victim. On the 1st December, 2019 at around 7-8 p.m., the accused came to the Victim's home and requested for food. The Victim gave him food and in return, the Accused person offered the Victim his phone so that she could play games thereon together with her siblings.
- [3] Later, the Accused person left for the bedroom of the Victim's brother and lied on his bed. When the Victim also felt sleepy, she left for her bedroom and slept. It was in the due course that the

Victim was awakened by the Accused person who was on top of her playing with her, sex. She raised an alarm which attracted the attention of her siblings as the Accused fled the scene.

- [4] The parents of the Victim were operating a bar and as a result, they used to usually return in the morning. When the Victim's mother returned from her business place, the Victim reported to her how the Accused person, a neighbour raped her. When the Accused person was confronted with the claims, he denied though he admitted visiting the children (the Victim and her siblings) during the absence of their parents.
- [5] The matter was reported to the Area LC I Chairman upon which it was decided that the Victim be taken for medical examination. The medical examination of the Victim revealed that the Victim was of an apparent age of 13 years and had white discharges from her genitals.
- [6] In his unsworn statement to Court, the Accused the put up a flat denial of the prosecution allegations.
- [7] The prosecution was led by **Ms. Becky Seera** of the office of the Director of Public Prosecution while the defence was led by **Ms. Dorothy Mushabe** on state brief.
- [8] In this case, the prosecution has the burden of proving the case against the Accused person beyond reasonable doubt. The burden does not shift to the accused person and he can only be convicted on the strength of the prosecution case and not on the weakness of his defence, **Sekitoleko Vs. Uganda [1967] EA 531**.

[9] For the Accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt:

1. The Victim was below 14 years of age.
2. A sexual act was performed on the Victim
3. It is the Accused who performed the sexual act on the Victim.

(a) The Victim was below 14 years of age.

[10] The prosecution adduced evidence of PF 3A upon which the Victim **Ajuna Patience** was medically examined. It was exhibited under **S.66 TIA** and admitted in evidence as **P.Exh.1**. Upon examination as per **P.Exh.1** dated 4th December, 2019 the Victim was found to be of an apparent age of **13 years**, basing on her Baptism Card and her number of teeth.

[11] The Victim **Ajuna Patience** herself testified as Pw1 and at the time of the trial of the Accused i.e. on 13th December, 2023, she was aged 16 years. The offence was allegedly committed on 1st December, 2019. The implication is that at the time of the alleged commission of the offence, she was aged around 12-13 years. Upon observation of the Victim in the witness box, she still appeared a child, a fact the Accused himself admitted in his defence during cross examination.

[12] On the basis of the above evidence, I find that the prosecution proved beyond reasonable doubt that the Victim **Ajuna Patience** was a girl under the age of 14 years by 1st December, 2019 when she was allegedly defiled.

(b) That a sexual act was performed on the Victim

- [13] According to **S.129(7) PCA** a sexual act is defined inter alia to mean penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ and a sexual organ means a vagina or a penis.
- [14] In this case, the prosecution led evidence of the Victim **Ajuna Patience** (Pw1) herself who testified that she was asleep but to be awakened by the Accused who was on top of her playing sex with her. When taken for medical examination after a period of about 3 days her genitals had a whitish discharge and the hymen appeared absent signifying that it was ruptured long time ago. See **P.Exh.1**.
- [15] However during cross examination, the Victim (**Pw1**) claimed that this was her first time to have sex and therefore she felt a lot of pain. This was in contrast with her medical examination report (**P.Exh.1**) which revealed that the hymen was absent. Though the absence of the hymen does not necessarily mean that no sexual act was performed on the Victim, the contradiction of her evidence and that of her medical evidence report affect the integrity of her evidence. It portrays her as an untruthful witness.
- [16] Secondly, whereas as per the medical report, **P.Exh.1**, her genitals were after 3 days found to have whitish discharge, there is no evidence adduced by the prosecution that the whitish discharge was of male fluids or semen discharged from a male organ. An examination of the genitals of the Victim after 3 days creates doubt about the integrity of the results.

[17] Thirdly, other than the whitish discharge observed from the genitals of the Victim, no wounds, lacerations or tears of the Victim's genitals were observed. In brief, considering the age of the Victim, instances where a medical report (P.Exh.1) does not even reveal any evidence of some friction on and in the Victim's vagina to suggest some penetration creates doubt as to whether the Victim's claims that a sexual act was performed on her are true.

[18] For the reasons above, this Court is not satisfied that a sexual act was performed on the Victim.

(c) That it is the Accused who performed the sexual act on the Victim

[19] The Victim (Pw1) testified that though it was night, she was sleeping in the bedroom with a child aged 3 years. The Accused was their neighbor. She was asleep but was awakened by finding the Accused on top of her playing sex. She explained that they usually sleep when lights are on and therefore, there was no problem of or in identifying the Accused person.

[20] Though in cross examination the Victim revealed that they were 3 in total in the house, we are not told whether she was the eldest of the other 2 or how old they were and therefore properly access why no other of her siblings testified in Court to corroborate her claims. Though the Victim claim to had alarmed, no evidence is available that any other neighbor heard the alarm or was notified of the Accused's act of defiling the Victim.

[21] For the above reasons, I find doubt as to whether the offence was in the first instance committed and in the second instance, whether the Accused had anything to do with the commission of

the alleged offence. In disagreement with the Honourable Assessors, I find that the prosecution has not proved its case beyond reasonable doubt. The Accused is found not guilty of the offence and is acquitted and discharged accordingly.

Dated at Kyangwali, Hoima this 23rd day of **January, 2024.**



Byaruganga Jesse Ruyema
Judge