

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-0066 OF 2022**

5 **UGANDA=====PROSECUTOR**

VERSUS

ALIFUNSI JERRY=====ACCUSED

10

BEFORE: JUSTICE DAVID S.L. MAKUMBI

JUDGMENT

INDICTMENT AND CASE BACKGROUND:

15 The Accused Alifunsi Jerry was indicted for Aggravated Defilement contrary to Section 129(3) and 129(4)(a) of the Penal Code Act.

It was alleged that on the 22nd day of April 2021 at Rwengoma Cell in Fort Portal Tourism City, Alifunsi Jerry alias Bidco performed an unlawful sexual act with Nakitende Teopista, a girl below the age of 14 years, that is, 13 years.

20 The Prosecution case in brief is that on 22nd day of April 2021, the Accused asked the Victim to accompany him to his residence at 7.30PM where she spent the whole night. The Victim subsequently returned to her home on 23rd April 2021 and upon her mother learning what had transpired the matter was reported to the police and was arrested. The Victim was medically examined and it was determined that her hymen had been
25 ruptured.

BURDEN AND STANDARD OF PROOF:

According to the time-honoured case of **Woolmington v DPP (1935) AC 462**, the Burden of Proof in criminal trials is always on the Prosecution. In that regard the Prosecution always has the duty to prove each of the ingredients of the offence and generally speaking the burden never shifts onto the accused except where there is a statutory provision to the contrary.

The Standard of Proof in criminal trials is proof beyond reasonable doubt and is met when all the essential ingredients of the offence are proved beyond reasonable doubt. The *locus classicus* in this regard is the case of **Miller v Minister of Pensions (1947) 2 All ER 372** wherein Lord Denning stated at Pages 373-374 that,

“The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a 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.”

The legal standard in the determination of whether or not the burden and standard of proof has been properly met will be done in accordance with the Supreme Court decision in **Abdu Ngobi v Uganda – Criminal Appeal No. 10 of 1991** where it was held that,

“Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole,

apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt.”

55 **ISSUES ARISING:**

The issues in this matter are based upon the ingredients of the offence of Aggravated Defilement contrary to Section 129(3) and 129(4)(a) of the Penal Code Act.

The ingredients of the offence specified in the Indictment are as follows:

- 1) A Victim below the age of 14 years of age.
- 60 2) A sexual act performed on the Victim.
- 3) The participation of the Accused in the sexual act.

DETERMINATION OF ISSUES:

1) Whether the victim was below the age of 14 years old:

65 The Prosecution tendered in evidence of a Medical Examination Form PF3A which Court marked as **PE 2**. The age of the Victim indicated therein was 13 years old.

The Prosecution further tendered in evidence of a Baptism Certificate No. 3716 from St Charles Lwanga Church dated 28th December 2008 stating the date of birth of the Victim as 22nd December 2007. The Certificate was entered in
70 evidence as **PE 3**.

The combination of the two documents placed the age of the victim at the time of the alleged offence as just below 14 years.

This issue is therefore resolved in the affirmative.

2) Whether a sexual act was performed on the victim:

75 Section 129(7) of the Penal Code Act defines a sexual act as penetration of the vagina, mouth or anus however slight, of any person by a sexual organ which organ means a vagina or penis.

In terms of proving a sexual act the Supreme Court held in the case of **Hussein Bassita v Uganda – Criminal Appeal No 35 of 1995** that,

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

The Prosecution placed reliance upon **PW1** the Victim and **PW3** Komuhendo
85 Teopista the mother to the Victim and the Medical Examination Report **PE 2**.

PW1 testified that she had spent the night of 22nd April 2021 at the Accused’s
home and that she had had sexual intercourse with him once and that it had
been her first time to go to his house. Upon cross-examination, she repeated that
she had had sex with the Accused once and that she had had intercourse with
90 two other persons before the Accused.

PW3 stated that her daughter had been away the whole night of 22nd April 2021
and had returned at 8AM the following day. She further testified that her
daughter had informed Kagote Police that she had been to the Accused’s home
and had sex with him.

95 **PW2** Jackson Mugarura, a retired Medical Clinical Officer testified that he had
examined the Victim and found that the rupture of her hymen took place about
five to seven days earlier. He documented his findings in Police Form 3A entered
in evidence as **PE 2**.

The combined evidence from the Victim alongside the medical evidence proves
100 beyond reasonable doubt that a sexual act was performed on the victim.

This issue is therefore resolved in the affirmative.

3) Whether the Accused participated in the Sexual Act on the Victim:

With regard to the participation of the Accused, the evidence here can be either
circumstantial or direct.

105 The Prosecution argued that both the Victim and her mother **PW3** knew the Accused. The Prosecution further argued that the fact that the Victim had two other sexual encounters prior to the Accused did not remove his responsibility.

Counsel for the Defence argued that Court should not rely on the direct evidence of the Victim because whereas she claimed that she had been defiled around
110 Kisenyi in Fort Portal City she could not recollect where exactly the incident had taken place.

Counsel for the Defence further argued that the Accused's residence was never visited for investigative purposes and that the Victim had never actually told the police where she was allegedly defiled.

115 When **PW1** testified before Court, she testified under cross-examination that she could not recall exactly where the Accused's house was in Kisenyi. For his part, the Accused testified that he was resident in Kitumba and denied ever taking her to his residence. He testified that he knew her from having seen her at Kabundeire Market where she would vend fruits with her mother. He further
120 stated on cross-examination that he found a prepared statement at police indicating that he was resident in Rwengoma.

PW4 D/IP Murungi Elizabeth testified that she was the investigating officer in the matter. She testified that she had not visited the scene with the Accused as she was fearful for his safety and that she had only recorded his statement and
125 received the Victim's Baptism Card. She testified that she had received the file from Kagote Police who had arrested the Accused.

Upon cross-examination, **PW4** admitted that it was an error not to have visited the scene of the crime. **PW4** further stated under cross-examination that the Victim had told her that the Accused was resident in Rwengoma. She also

130 testified that he was arrested at his place of work at a garage at Kabundeire
Market.

The Accused testified in his own defence and stated under oath that he did not
reside in Kisenyi or Rwengoma and denied having spent the night with her.

135 The evidence of the participation of the Accused in the sexual act against the
Victim is also dependent on the same standard as cited in the Bassita case as
cited above and requires the evidence of the Victim. However, it has also long
been held by the defunct East African Court of Appeal with regard to sexual
offences that,

140 *“The judge should warn the assessors and himself of the danger of
acting on the uncorroborated testimony of the complainant, but
having done so, he may convict in the absence of corroboration if he
is satisfied that her evidence is truthful. If no warning is given, then
the conviction will normally be set aside unless the appellate court is
satisfied that there has been no failure of justice.” (Chila v R [1967]
145 EA 722)*

In this matter, the following is clearly apparent from the evidence.

- 1) There is the evidence of the Victim **PW1** who testified that she had sex with
the Accused. She also testified to being sexually involved with two other
persons prior to the Accused. Furthermore, she could not recall exactly where
150 the Accused resided and testified that it was in Kisenyi.
- 2) There is the evidence of **PW2** the Medical Clinical Officer who testified that he
had examined the victim on 24th April 2021 and documented his findings in
Police Form 3A. PF 3A was entered into evidence as **PE 2** and according to the
report it was found that *“Hymen was ruptured long ago (above 5-7 days)”*.

155 3) **PW4** the investigating officer admitted to not having been to the Accused's residence and had recorded his residence as Rwengoma.

From the above, it becomes clear that the medical evidence only established that the Victim is sexually active. The evidence that the rupture of the Victim's hymen took place about a week earlier than the time of the offence does not rule out
160 the Accused but for the same reason it is impossible to rely upon it to determine the Accused's responsibility. This is because the only thing the medical report can reliably establish is that the rupturing of the Victim's hymen happened earlier than the time of the alleged defilement. The medical evidence does not point to the Accused in terms of timeframe.

165 This therefore leaves only the word of the Victim as the direct evidence linking the Accused to the offence. However, this evidence is also unreliable, as the Victim appeared not to know where the Accused resided exactly. She testified that he stayed in Kisenyi but did not know exactly where.

PW4 the investigating officer then testified that the Victim had said he stayed in
170 Rwengoma and that she had not been to the Accused's home. Finally, the Accused himself testified that he did not stay in Kisenyi but rather in Kitumba.

The inconsistency evident in the testimony of the Victim with what she told police concerning where the Accused resided is a major inconsistency that calls into question the rest of her testimony.

175 In the case of **No. 0875 Pte Wepukhulu Nyuguli v Uganda (2002) UGSC 14** the Supreme Court in reference to the defunct EACA case **Alfred Tajar v Uganda - Criminal Appeal No. 167 of 1969** held that,

"It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness of the part of the prosecution witness,

180 *should be ignored and that major ones which go to the root of the
 case, should be resolved in favour of the accused.”*

Furthermore, in the case of **Sarapio Tinkamalirwe v Uganda - Criminal Appeal
No. 27 of 1989** the Supreme Court held that,

185 *“It is not every inconsistency that will result in a witness testimony
 being rejected. It is only a grave inconsistency, unless satisfactorily
 explained, which will usually, but not necessarily result in the
 evidence of a witness being rejected. Minor inconsistencies will not
 usually have the effect unless the Court thinks they point to
 deliberate untruthfulness.”*

190 The inconsistencies concerning where the Accused resided at the time of the
 offence are major in as much as they go to the root of establishing the
 participation of the Accused in the crime. Indeed as **PW4** the Investigating Officer
 admitted, this was not just an error on her part, it was a grave error because
 without reliable confirmation of where the offence took place, there is no way to
195 draw a conclusion about the participation of the Accused.

 By **PW1’s** own testimony, she had been sexually involved with at least two other
 persons prior to the Accused. The medical evidence shows that her hymen had
 been ruptured almost a week before the alleged offence. When these two
 aspects are considered side by side they cast considerable doubt about the
200 Accused’s participation in the offence. The only way this doubt could have been
 resolved beyond reasonable doubt would have been to establish the location of
 the scene of the crime and place the Accused at the scene whether by the
 Victim’s own testimony, other witnesses or other forensic evidence secured from
 the scene.

205 **PW4's** excuse about being concerned about the safety of the suspect is not sufficient reason for failing to visit the scene of crime. She ought to have arranged for sufficient reinforcements to enable her to visit and secure the scene in order to confirm whether the location was consistent with the Victim's statement to police.

210 This case is in my view an example of how not to investigate a criminal case because the casual approach taken in the investigation left far too much room for doubt which doubt obviously has to be resolved in favour of the Accused.

Apart from the inconsistency going to the root of the case, it is also evident that the Victim's testimony bears an element of untruthfulness. This is because
215 whereas she stated in Court that the Accused resided in Kisenyi in Fort Portal City, **PW4** testified that she had told police that he stayed in Rwengoma. The Prosecution never reconciled this inconsistency most likely because there was deliberate untruthfulness on the part of **PW1**.

It is therefore my finding that the inconsistencies in the testimony of **PW1** and
220 that of **PW4** concerning the location of the scene of crime are grave inconsistencies and point toward untruthfulness of the Victim. Considering that the burden of proving the Accused's guilt always rests on the Prosecution this Court is of the view that the available evidence does not resolve the participation of the Accused beyond reasonable doubt.

225 This issue is accordingly resolved in the negative.

CONCLUSION:

In light of all the evidence brought before this Court I agree with the Assessors and I do hereby acquit the Accused Alifunsi Jerry of the offence of Aggravated Defilement contrary to Section 129(3) and 129(4)(a) of the Penal Code Act and accordingly release
230 him unless he has other pending charges.

David S.L. Makumbi

JUDGE

28/03/24