

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT-01-CR-SC-0328-2022**

**UGANDA.....PROSECUTOR**

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**VERSUS**

**NYAKOOJO EDWARD.....**

**.....ACCUSED**

**BEFORE HON. DAVID S.L. MAKUMBI**

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**JUDGMENT**

The Accused, Edward Nyakoojo, is indicted for the offence of Aggravated Defilement contrary to Section 129(3) and 129(4)(a) of the Penal Code Act.

15 It is alleged in the indictment that on the 2<sup>nd</sup> day of March 2022, the Accused performed an unlawful sexual act on Nalugo Sofia a girl then aged 13 years old. The incident is said to have taken place at Kalyango Cell, Ibonde Ward, North Division at Fort Portal City. The Accused pleaded not guilty to the indictment.

20 The Prosecution case is that on 2<sup>nd</sup> March 2022, the Victim's guardian and her children left home at about 6.30AM leaving her asleep. The Accused then sneaked into the house around 7AM and forcibly performed a sexual act on her. During the process the Victim struggled and got a panga which she used to cut the Accused on the forehead and the right arm while making an alarm. The Accused was arrested at the scene by persons responding to the alarm and was subsequently handed over to the Police.

25 The Defence case in this matter is that the Accused did not defile the victim and that he was attacked by the Victim when he attempted to access the house to retrieve farming implements which had been stored at the house.

The law governing proof at criminal trials, as established by the time-honoured case of **Woolmington V DPP (1935) AC 462**, is that in criminal cases, the burden of proof is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt. In this matter it is upon the Prosecution to prove that the Accused is guilty of the offence of Aggravated Defilement by proving the following beyond reasonable doubt.

- 1) The Victim was below the age of 14 years at the time of the alleged offence;
- 2) A sexual act was performed on the Victim; and
- 3) The Accused was responsible for the sexual act.

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.”*

55 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,

60 *“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*  
65 *doubt.”*

With regard to the question of the Victim’s age there was no dispute concerning this matter as evidence was put forward in the form of a medical report as well as testimony from **PW5** the Victim and her maternal aunt **PW2**. All the evidence was consistent with the fact that the Victim was below the age of 14 as at the date of the  
70 incident.

As concerns the sexual act and the involvement of the Accused in the same, the Prosecution argued that according to the evidence of **PW5**, the Accused entered her room on the fateful day at around 8AM and had forcefully performed sexual intercourse on her. The Prosecution further argued that **PW5**’s testimony in this  
75 regard had been corroborated by the Medical Report **PE 1** which indicated that the Victim had injuries in her private parts which injuries could only have been the result of forcible sexual intercourse performed on the Victim by the accused. The prosecution further placed reliance on a Charge and Caution Statement by the accused admitted in evidence as **PE 3**. In the said statement the Accused had  
80 supposedly confessed to performing sexual intercourse in exchange for a promise of Ten Thousand Shillings (UGX 10,000) and that the Victim had cut him because he had failed to pay up after the act.

The Prosecution further relied on the testimony of **PW5** with respect to proving that the Accused had been properly identified and argued that **PW5** had seen the  
85 Accused at least two other times prior to the act and that the offence was committed in broad daylight. The Prosecution further relied upon the testimony of **PW4** who was the first to respond to the alarm of the Victim and had witnessed the accused standing in the doorway to the Victim's house with bleeding injuries to his head and arm. The Prosecution averred that all this evidence was consistent with the accused's  
90 own statement, **PE 3**, in which he confessed that he had been cut by the victim after he denied her the money he had promised her after performing a sexual act with her.

The Prosecution contended that the evidence presented proved beyond reasonable doubt that the Accused was guilty of the offence for which he was indicted.

95 Counsel for the Accused argued that the Prosecution had not proved the sexual act and insisted that the Prosecution case was based upon grave inconsistencies. The Defence argued that **PW5's** explanation of the events of that morning did not add up. **PW5** had stated during examination in chief that the Accused had accosted her in her room where she had been asleep in a petticoat but upon cross-examination she  
100 stated that she had heard someone knock at the gate and had woken up. She had explained that prior to this she had woken up and gone outside to release the chickens and had also been left with a baby in her care which baby she said she had left outside and gone back inside the house to sleep as she was still feeling tired. Counsel for the Accused argued that it did not make sense for a rational person to  
105 leave a baby outside unattended and go back into the house to sleep. Counsel for the Accused contended that while Section 133 of the Evidence Act requires no particular number of witnesses for the proof of any fact, what mattered was whether the testimony of **PW5** was truthful. To that end, Counsel cited decisions of the Supreme Court in **Livingstone Sewanyana v Uganda - Criminal Appeal No 19 of 2006** and  
110 **Ntambala Fred v Uganda - Criminal Appeal No 34 of 2015** where in both cases the

Court emphasized the need for single witnesses in sexual offences to be reliable and truthful.

Counsel for the Accused further argued that the evidence of the medical report **PE 1** relied upon by the Prosecution in corroboration of PW5's evidence was unreliable in  
115 as much as whereas the defilement had said to have taken place on 2<sup>nd</sup> March 2022, the medical report indicated that the Victim was examined on 15<sup>th</sup> March 2022 nearly two weeks after the alleged defilement. Counsel further argued that contrary to the submissions of the prosecution the report did not disclose any injuries to the Victim's private parts. Counsel for the Accused also argued that **PW4** had testified  
120 upon cross-examination that she had witnessed the injuries to the accused she had not seen any signs that the victim had been sexually abused. This was because whereas **PW5** had stated that she had felt a lot of pain during the act which caused her to make an alarm, **PW4** had not observed any behaviour on the part of **PW5** consistent with a person in pain after defilement and had even testified that the  
125 accused had gone for a short call which Counsel contended would have been very difficult after defilement. Counsel argued that these inconsistencies were too grave to be ignored and cited the Supreme Court authorities of **Sarapio Tinkalimire v Uganda - Criminal Appeal No 27 of 1989** and **Twinomugisha Alex and 2 Others v Uganda - Criminal Appeal No 35 of 2002** as well as the EACA case of **Alfred Tajar v Uganda - Criminal Appeal No 167 of 1969** in support of the fact that major  
130 contradictions and inconsistencies unless satisfactorily explained will result in the evidence of witnesses being rejected.

The other issue that Counsel for the accused strongly contended was the Charge and Caution statement of the Accused that was admitted into evidence as **PE 3**. It was  
135 Counsel's contention that the statement was not made voluntarily contrary to Sections 23 and 24 of the Evidence Act. She contended that the Accused had testified on oath that he had been coerced into making the statement. The statement was tendered in by the prosecution as evidence in rebuttal of the Accused's claims that

he did not voluntarily admit the offence while in police custody. Counsel cited the  
140 Supreme Court Case of **Mumbere v Uganda - Criminal Appeal No 15 of 2014** in  
which the Supreme Court adopted the case of **Tuwamoi v Uganda** in which the Court  
set the standards for admission of retracted and repudiated statements. She further  
highlighted the Supreme Court decision in **Amos Binuge v Uganda - Criminal Appeal**  
**No 23 of 1989** wherein the Court held that when the admissibility of an extra-judicial  
145 statement is challenged then the Accused must be given a chance to establish by  
evidence his grounds of objection through a trial within a trial via which the court can  
decide upon admissibility of the statement.

Counsel for the Accused also pointed out that the statement had never been read  
back to him and that the Accused had testified that he was illiterate and that despite  
150 the fact that the statement was taken in Rutooro, it had been written in English and  
not read back to him.

Counsel for the Accused contended that on the basis of the evidence adduced the  
Prosecution had failed to prove the case against the Accused beyond reasonable  
doubt.

155 It was the view of the Assessors that the Prosecution had proved the case against the  
Accused beyond reasonable doubt and invited the Court to convict him as indicted.

I have carefully considered all the evidence in this matter as well as the arguments of  
the Prosecution and the Defence. From the evidence and arguments brought before  
the court I am of the considered view that the Prosecution successfully proved  
160 beyond reasonable doubt that the Victim was below the age of 13 years old. There  
was the evidence of **PW5** the Victim herself and that of the maternal aunt, **PW4**,  
which was further supported by the medical report **PE 1**.

There is also no doubt that the Accused was placed at the scene of the alleged  
defilement as **PW4** and **PW5** placed him at the scene and by his own sworn  
165 testimony he actually went to the scene of the alleged defilement but denied the

actual defilement and claimed he was there to collect tools that he and another colleague were using for tree farming. The Accused also bore physical injuries inflicted on him by the Victim **PW5**. This means that there can be no doubt about his physical presence at the scene.

170 The only issue that remained in contention was whether a sexual act took place for which the accused was responsible.

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,

175 *“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.”*

In this regard, I shall address my mind to two major pieces of evidence in relation to the evidence of **PW5**, the Victim.

180 **PW5** the victim testified that the Accused sexually assaulted her in her room. Her description of events during examination in chief was that she heard the accused knock at the gate and let himself in and had found the door to the house open and entered and made his way to her bedroom where she was lying on her bed in a petticoat. She testified that the accused grabbed her, removed his trousers and put  
185 his legs on hers and forced her legs open and gone ahead to place his sexual organ in her private parts. She testified to feeling a lot of pain and making an alarm which caused the accused to move away giving her the opportunity to get hold of a panga and cut him.

The Prosecution placed reliance upon the medical report **PE 1**, which Prosecution  
190 asserted as evidence of injuries to the Victim which were consistent with forcible sexual intercourse. I have had the benefit of closely examining the medical report **PE 1**. The first point of major concern is the fact that whereas the alleged defilement

took place on 2<sup>nd</sup> March 2022, the medical report clearly shows that the investigating officer **PW3** Detective Constable Turyatunga Simon referred the victim for medical  
195 examination on 15<sup>th</sup> March 2022. This, as rightly observed by Counsel for the Accused, was almost two weeks after the alleged defilement. The reliability of the medical examination in terms of establishing whether a defilement took place almost two weeks ago is extremely suspect especially since the responsible medical officer was never even brought to court to testify as to the reliability of his findings nearly  
200 two weeks after the fact. It is also pertinent to note that the description of injuries to the genitals in the report bears only one word “*hyperemic*” and the probable cause is equally vaguely described as a “*blunt object*”.

The Merriam-Webster medical dictionary elucidates the word *hyperemic* as a derivative of the word *hyperemia* which in turn means excess of blood in a body part  
205 (as from an increased flow of blood due to vasodilation). This in essence describes a swelling which after two weeks could be a result of any number of reasons including the possibility of an infection. In such a situation, the most prudent thing given the passage of time would have been for the prosecution to produce the medical officer in court to explain their findings in court especially given the reference to a vague  
210 medical term in the report.

In terms of corroboration in sexual offences it was held in the case of **Ngobi v R (1953) 20 EACA 56** that medical evidence was good corroborative evidence in the defilement of a young girl. In this particular case though, it is clear that the medical evidence is inconclusive and unreliable to the extent that it was secured two weeks  
215 after the fact. There is also the fact that **PW4** who responded to the alarm testified that she did not observe any sign of the victim being in pain contrary to what **PW5** testified before court. This was despite the fact that **PW4** had responded almost immediately to the victim’s alarm.

The other evidence that the Prosecution sought to rely upon was the Charge and  
220 Caution Statement of the Accused which was admitted in evidence as **Prosecution**



**Exhibit 3.** The Prosecution sought to have the statement tendered in evidence during the cross-examination of the Accused. Counsel for the Accused objected to the admission of the statement as the officer who recorded it was not present and that furthermore her client had raised an issue that needed to be proved. The  
225 Prosecution contended though that there was no need to produce the officer who recorded the statement as the Accused had admitted to the statement and his attempts to distance himself from the statement by claiming he was not in his senses and that he had been led to believe the matter would end when he admitted the offence was a lie.

230 At the time that the statement was taken into evidence, the prosecution sought to disprove the Accused's testimony that his Charge and Caution Statement was obtained under equivocal circumstances. However, I find that in as much as the statement was obtained from the Accused as a Charge and Caution Statement it was in fact a confession within the meaning of Section 23 of the Evidence Act and the fact  
235 that the Accused had raised an issue of a possible inducement to the confession contrary to Section 24 of the Evidence Act meant that the statement ought not to have been admitted in evidence without being subjected to a trial within a trial. The fact that the Prosecution adduced the statement in evidence in rebuttal of the Accused's own testimony discrediting the statement does not remove the need for  
240 the statement to have been specifically proven before Court and this entailed producing the officer who recorded the statement to testify regarding the circumstances under which the statement was recorded. This was not done and therefore the Charge and Caution cannot be relied upon as evidence against the Accused. The requirement for a trial within a trial was well established by the  
245 Supreme Court in the case of **Amos Binuge v Uganda - Criminal Appeal No 23 of 1989** wherein it was held that,

*"It is trite law that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to*

250           *establish, by evidence, his grounds of objection. This is done through a trial within a trial.*”

This therefore leaves only the evidence of **PW5**. Section 133 of the Evidence Act provides that subject to the provisions of any other law in force, no particular number of witnesses shall be required for the proof of any fact. This basically means that there is no limit to the number of witnesses one may produce to prove a fact. 255 Even one witness may be sufficient for the proof of a fact. However, in the case of **Chila and Another v Republic (1967) EA 722**, which decision has since been adopted by the Supreme Court of Uganda in its own decisions such as in the case of **Livingstone Sewanyana v Uganda – Criminal Appeal No 19 of 2006**, it was held that,

260           *“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 such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there was no failure of justice.”*

265 In light of the decision above and my analysis of the evidence in this matter, I have to be mindful of the fact that **PW5** the Victim’s evidence in this matter stands uncorroborated and must be carefully weighed in that regard. The evidence of **PW5** was not entirely conclusive or clear in some material regards.

In the case of **No. 0875 Pte Wepukhulu Nyuguli v Uganda (2002) UGSC 14** the 270 Supreme Court in reference to the defunct EACA case **Alfred Tajar v Uganda – Criminal Appeal No. 167 of 1969** held that,

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

280 *“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.”*

As concerns truthfulness, **PW5** stated during examination in chief that she heard  
285 someone knock at the gate while she was asleep in the house and that the Accused had made his way into the house and assaulted her in her room. This version of events left me with some doubt as to what really transpired because during cross-examination **PW5** stated that prior to the Accused arriving and assaulting her she had woken up to go outside and let out the chickens. She also stated that she took a  
290 crawling two-year-old child by the name Tibokina outside at the same time she released the chickens and then went back into the house to sleep. I have difficulty believing that a child at the age of **PW5** (13 years at the time) would leave a crawling two-year-old outside and then retreat into the house to sleep. It is even more difficult to accept that having heard a knock at the gate, **PW5** would continue to  
295 remain in bed knowing fully well that she had left a baby unattended outside. These inconsistencies in **PW5**'s conduct go to the root of the matter and leave her version of events in doubt.

It is also pertinent to note that **PW5** also testified on cross-examination that when she heard the knock, she thought it was the guys who normally come home. This bit  
300 of information tended to corroborate the Accused's testimony that he was there to collect tools that he used to keep at the Victim's maternal aunt's house and that she had cut him when he tried to force his way into the house after she blocked him. There is no doubt that something took place on the day the Accused was cut.

305 However, without the benefit of medical evidence to establish the fact that the accused was there for more than just collecting tools, there is still reasonable doubt as **PW5**'s testimony is not only lacking in corroboration but does not adequately rebut the Accused's defence regarding his presence at her home.

310 It is with regard to the above that I respectfully disagree with the Assessors in this matter. The Assessors indicated in their opinion that the evidence of **PW5** on the sexual act was corroborated by the medical report and bearing that in mind they drew the conclusion that there was no other reason why the Accused could have been at the scene apart from defiling **PW5**. However, as I have laid out in detail above, the evidence of **PW5** remained uncorroborated as the medical report turned out to be vague and inconclusive and furthermore the truthfulness of **PW5** about the events of that day also remained in doubt.

In light of my analysis of the evidence and the law in this case, I am mindful that the burden of proving the Accused's guilt always rests upon the Prosecution and the standard in that regard is proof beyond reasonable doubt. In that regard I draw particular reference from the case of **Miller v Minister of Pensions (1947) 2 ALLER**  
320 **372** wherein Lord Denning held concerning the standard of proof that,

*"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 doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflate the cause of justice. If the evidence is strong against a man as to leave only a remote possibility, in his favour, which can be dismissal 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 this will suffice."*

330 The inadequacy of the medical evidence and the inadmissibility of the Accused's confession left only the evidence of the Victim concerning the sexual act which

evidence does not in my view reach that high degree of probability as to leave a remote possibility of the innocence of the accused.

To that extent therefore I do find the accused not guilty of the offence of Aggravated Defilement and I do accordingly acquit him of the same. The accused is free to go  
335 unless there are other pending charges against him.

**David S.L. Makumbi**  
**JUDGE**  
**28/03/24**

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