

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

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

VERSUS

10 **TURINAWE TOMASI=====ACCUSED**

BEFORE: JUSTICE DAVID S.L. MAKUMBI

JUDGMENT

INDICTMENT AND CASE BACKGROUND:

15 The Accused Turinawe Tomasi 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 3rd day of April 2021 at Rwenkuba Village in Kabarole District the Accused, being HIV positive and a maternal uncle to the victim, performed an unlawful sexual act on Ainembabazi Irene Jonah a girl of 16 years of age.

20 The Prosecution case in brief is that on 3rd day of April 2021, the Accused who was living with the Victim and his sister who is mother to the victim asked the victim to serve him supper in his bedroom at about 9PM. When the Victim had served him his supper he closed the door and forcefully performed sexual intercourse with her. The Victim then fled the house and reported to an uncle next door who then informed the police.

25 **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
30 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,

35 *“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*
40 *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
45 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
50 *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.”*

ISSUES ARISING:

55 The issues in this matter will be determined based upon the ingredients of the offence of Aggravated Defilement contrary to Section 129(3) and 129(4)(b) and (c) of the Penal Code Act.

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

- 1) The Victim was below 18 years of age.
- 60 2) A sexual act was performed on the Victim.
- 3) The Accused was HIV positive.
- 4) The Accused was a parent, guardian, or person in authority over the Victim.
- 5) The participation of the Accused in the sexual act.

DETERMINATION OF ISSUES:

65 **1) Whether the victim was below the age of 18 years old:**

PW1 the Victim in this offence appeared in Court and testified that she was 18 years old and was therefore below the age of 18 by the time of the offence in 2021.

PW3 the victim's biological mother testified that the Victim was born in 2005
70 which put her age at 16 around the time of the offence in 2021.

The Victim's age was medically determined to be 16 as per Police Form 3A tendered in evidence as Prosecution Exhibit 1 (**PE 1**).

The Defence did not contest any of the evidence above.

This issue is therefore resolved in the affirmative.

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

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,

“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.”

85 **PW1** the Victim testified that on the day in question she was home alone with the Accused where she was staying with him and two other Aunts of hers. She told Court that the Accused is a brother to her mother and he had returned home around 7PM and requested her to serve him his supper in his bedroom instead of the sitting room. She went on to testify that upon taking the food to the bedroom
90 he had taken her forcefully by the hand and closed the door. The Accused had then proceeded to put her on a mattress and inserted his penis in her vagina. **PW1** testified that she had made an alarm but nobody responded. She then made her escape through a window and went to report to her Uncle Matigomali next door.

95 **PW1** went on to testify that upon informing her Uncle he had told her that he would handle issues the next morning and that the following morning he had mobilized people to arrest the Accused. **PW1** testified that she was taken to Kasenda Health Centre for immediate treatment to prevent her contracting HIV and then to Buhinga Hospital for medical examination.

100 Upon cross-examination, **PW1** testified that it was her first sexual encounter. During cross-examination, **PW1** also testified about the circumstances of her coming to stay with her Aunt and told Court that she had left because her Aunt considered her rebellious. She denied having many boyfriends while staying at

105 her previous Aunt's home and insisted that her cousins were the ones with
boyfriends.

110 **PW2 Matigomali Medson** the Victim's maternal Uncle testified that on the day in
question the Victim had come to his house distraught and had said she wanted
him to give her transport money to leave. He stated that when he inquired
further the Victim had told him that the Accused had defiled her while they were
alone in the house. He subsequently told her not to return to the house as her
Aunts were not there. **PW2** went on to testify that the Victim had spent the night
at his home with his wife and daughters. He had then mobilized local authorities
the following day and traced the Accused at the trading centre where they
detained him. The Accused denied the allegations but the Victim narrated the
115 story and **PW2** had then taken both the Accused and Victim to the police after
initially taking the Victim for emergency treatment to prevent HIV.

The only evidence of the sexual act in this matter is that of the Victim and the
circumstantial evidence of her Uncle **PW2** who saw her immediately after the act
had taken place.

120 The approach of the Court concerning sexual offences is guided in part by the
decision of the defunct East Africa Court of Appeal which held that,

125 *"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]
EA 722)*

130 The question of what amounts to sufficient corroborative evidence was
determined in the case of **R v Baskerville (1916) 2 KB 658** where Lord Reading
said,

135 *“We hold that evidence in corroboration must be independent
testimony which affects the accused by connecting or tending to
connect him with the crime, that is, it must be evidence which
implicates him, meaning that the evidence confirms in some
material particular, not only the evidence that the crime has been
committed, but also that the accused committed it.”*

140 In this case the evidence of material importance that would ideally give the
strongest corroboration of the Victim lies in Police Form 3A her medical
examination form tendered in evidence as **PE 1**. However, this form casts an
element of doubt on the Victim’s story. By her own testimony, the sexual
encounter between her and the accused was her first sexual encounter. It was
also her account that the encounter was forceful.

145 According to the medical examination results in **PE 1** compiled by Medical Clinical
Officer Bulyengero Nzenda, the victim exhibited no injuries anywhere around her
genitals, buttocks, anal area or any other part of her body. I find this particular
detail of the medical report curious to say the least because in most cases
involving forceful sexual encounter there is some form of evidence left behind by
way of fresh injury. It is also pertinent to note that despite the fact that the
150 Victim claimed that it was her first sexual encounter with the Accused there was
no evidence reported at all of rupture of the hymen whether fresh or otherwise.
The absence of this evidence from the medical report creates a significant
contradiction from the evidence of **PW1** which cannot be ignored.

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

160 *“It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness on 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.”*

The inconsistency of the medical evidence with that of **PW1** is a major inconsistency that definitely goes to the root of the case as it raises reasonable doubt as to whether a sexual act ever took place.

165 The inconsistency when considered alongside the evidence of the Accused and his siblings **DW2, DW3** and **DW4** becomes even more significant because all of them consistently testified that **PW2** held a grudge against the Accused over issues to do with land.

170 The Accused stated that **PW2** had wanted to grab his land and had gone so far as to cut down his banana plantation and burnt his personal belongings. **DW2 Nuwagaba Joyce, DW3 Asiiimwe Yoweri** and **DW4 Glorious Nahulira** all siblings of the Accused consistently echoed the fact that **PW2** and the Accused were constantly wrangling over land.

175 Another important detail over which all the defence witnesses were consistent was that their niece **PW1** was of a rebellious character. **PW1** generally denied being rebellious during cross-examination but did admit at some point that she had been sent away from an Aunt’s home over bad behavior prior to coming to the home where she was staying at the time of the alleged offence.

The evidence of the defence witnesses concerning the character of **PW1** and the possible motivations of **PW2** in causing the arrest of the Accused would not

180 ordinarily be significant or relevant in the face of strong evidence that a crime was committed. However, where the medical evidence significantly contradicts the primary evidence coming from **PW1**, the evidence of the defence witnesses becomes even more credible in terms of highlighting the possible motivations of **PW1** and **PW2** in bringing allegations against the Accused.

185 Furthermore, I note must point out that I found the conduct of **PW2** rather unusual when the Victim first reported to him. In circumstances where a victim of rape or defilement especially a niece reports a sexual assault, more so by another relative, it is strange that an Uncle would simply advise her to enter his house and go to sleep and then attend to the matter the following morning. From the
190 testimony of **PW2** it was clear that the Accused's HIV status was well known to him. It does not therefore make sense that he waited till the following morning to take his niece for what should be preventive treatment for HIV exposure. HIV prophylaxis treatment is an emergency intervention and the normal response of any responsible person would have been to take the Victim immediately for
195 treatment and then report to the police. This apparent delay only served to cast more doubt in the circumstances.

In the circumstances, I find that the inconsistency between the evidence of **PW1** and the medical evidence on the sexual act is so significant that it casts doubt on the truthfulness of the victim. It is therefore unreliable for purposes of
200 determining that a sexual act ever took place.

For the reasons laid out above, I disagree with the Assessors who concluded that a sexual act took place. In their opinion among the evidence they considered as proving the sexual act was the medical report but for reasons I have already explained there was nothing in the report to suggest a sexual act took place.

205 This issue is therefore resolved in the negative.

This issue being resolved in favour of the Accused renders discussion of the rest of the issues academic and unnecessary and I shall therefore not delve into them.

CONCLUSION:

In light of all the evidence brought before this Court I do hereby acquit the Accused
210 Turinawe Tomasi of the offence of Aggravated Defilement contrary to Section 129(3)
and 129(4)(b) and (c) of the Penal Code Act and accordingly release him unless he has
other pending charges.

However, before I take leave of this matter, I find this case unfortunate for two reasons.
First, if the contradiction between the medical evidence and that of the Victim is
215 because of lies then it paints a picture of possible perjury and subornation of perjury
contrary to Section 94 of the Penal Code Act. Secondly, and in the alternative, if the
Victim was in fact telling the truth then it means that the medical examination was
botched and as result, it severely undermined the prosecution case. In both scenarios,
the plain and simple fact is that, an injustice ends up occasioned on either the Accused
220 or the Victim depending on who is telling the truth. It is for this reason that the police
should always do thorough investigations before Prosecution sends the matter to Court.
On the side of Prosecution I emphasize something that they already know and this is to
always carefully scrutinize the evidence before moving on to prosecute the matter in
Court. It is unfortunate that so obvious an inconsistency as the medical evidence was
225 not properly interrogated both at investigation and prosecution stages.

In a matter such as this where it is clear that the evidence of the victim is obviously
contradicted by the medical evidence the State had a duty to investigate the
inconsistency and to either do away with it by producing other reliable evidence or
failing that to give the Accused the benefit of the doubt and release him.
230 By going ahead to produce an Accused person in Court despite significantly
contradictory and yet unexplained evidence of a major witness, the State risks the

conviction of an innocent person based on likely falsehoods and implied abetting of perjury for which the Prosecution ends up entangled in subornation of perjury. Alternatively, if such a contradiction is left unexplained and the Victim happens to be
235 telling the truth then the State will have facilitated a situation that leads to an injustice for the Victim, as any reasonable doubt in the case against the Accused must be resolved in the Accused's favour.

I feel it necessary here to echo something I have previously stated and this is that the objective of any prosecution and criminal trial is not simply about conviction and
240 acquittal; it is about the pursuit of justice.

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