

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-0106 OF 2022**

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

VERSUS

TUHAISE JULIUS=====ACCUSED

10

BEFORE: JUSTICE DAVID S.L. MAKUMBI

JUDGMENT

INDICTMENT AND CASE BACKGROUND:

15 The Accused Tuhaise Julius 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 19th day of February 2022, at Nyabusozzi Ward in Fort Portal City, the Accused performed an unlawful sexual act on Shallom Shilloh Atuhura, a girl of 8 years old.

20 The Prosecution case in brief is that on the 19th day of February 2022 the Victim was returning home from school at about 4PM when she met the Accused at Mukubo, Nyabusozzi. The Accused got hold of her, pulled her into a banana plantation, removed her underwear, and proceeded to perform sexual intercourse on her. After the act she had proceeded home limping from pain and had told her grandmother what had
25 transpired and described her assailant as a man with a black scar on the face. The Victim and her grandmother subsequently reported the matter to police. On 2nd March 2022, the Accused was detained at Mukubo Child Development Centre and while he was at

Fort Portal Central Police Station he had been identified by the Victim who also happened to be at the premises following up their case. The Accused was subsequently
30 arrested and charged. A medical examination of the Victim was done at Fort Portal Regional Referral Hospital and she was found to have injuries around her genitals.

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
35 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.
40 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
45 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.”*

50 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,

55 *“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.”*

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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:

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

DETERMINATION OF ISSUES:

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

PW1 Kabajwisa Peninah grandmother to the Victim testified that the Victim is a daughter to her own daughter Linda Delilah and that the Victim was born on 15th December 2013, which meant she was 9 years old, by the time of the offence.

75 The Prosecution tendered in evidence of a Medical Examination Form PF3A which Court marked as **PE 1**. The age of the Victim indicated therein was 8 years old.

The Victim appeared in Court as **PW2** and testified that was 10 years old and I observed from her appearance that she was a child of tender years.

This issue is therefore resolved in the affirmative.

80 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.”

90 In this case **PW2** the Victim appeared in Court and being a child of tender years the Court conducted a *Voire Dire* in chambers. From my assessment of **PW2** it was clear that she understood the duty of speaking the truth and was of sufficient intelligence to give evidence. However, **PW2** could not understand the nature of an oath and to that extent, I determined that her evidence would be received without oath.

95 **PW2** testified in Court that on the day in question that a man with a mark on his cheek pulled her into the garden and put his penis in her private parts. She further testified that a brown man came and told her assailant to get off her and move away. This person told her to put on her underwear and leave. **PW2** then
100 told her grandmother what had happened and her grandmother had taken her to hospital the following day. **PW2** testified that she was examined at the hospital and that she saw the man who defiled her at the police among many people. **PW2** also testified that she had not seen the man before he defiled her. **PW2** pointed out the Accused in Court as she was testifying.

105 Section 40(3) of the Trial on Indictments Act requires that some other material evidence against the Accused corroborate unsworn evidence of a child of tender years.

In that regard the Prosecution tendered in Police Form 3A being the Medical Examination Form of **PW2** entered in evidence as an agreed fact and marked as
110 **PE 1**. The medical report prepared by Medical Clinical Officer Bulyengero Nzenda on 20th February 2022 detailed the injuries to **PW2**'s genitals in the following terms,

“Sores/Bruises seen on the Genital due to forced sexual intercourse and premature genitals.”

115 The report further details the probable cause(s) of the injuries in the following terms,

“The cause of the above injury is due to forced sexual intercourse and premature genitals being exposed to sexual behaviours.”

PW1 the victim's grandmother testified on cross-examination that she had
120 checked the Victim and observed bruising around her private parts.

PW3 Ruth Tumusiime, a social worker at Mukubo Child Centre testified that she had accompanied the Victim and her grandmother for the medical examination and she had observed dried blood in the victim's private parts and had also seen that the opening in her genitals was larger than that of a child her age.

125 **PW4 D/Cpl Nahwera Hilda** the investigating officer testified that she had learnt about the defilement on 20th February 2022 and that as part of her investigations the Victim had led her to the banana plantation where she was defiled.

The question of what amounts to sufficient corroborative evidence was
130 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 On the basis of the standard cited by the Supreme Court in the **Bassita** case above and the decision in **R v Baskerville** above, I find that the Prosecution has proved beyond reasonable doubt that a sexual act took place. The medical report along with the eyewitness testimonies of both **PW1** and **PW3** who saw her injuries provide material corroboration of **PW2**'s testimony concerning the sexual act. Furthermore, circumstantial corroboration is also apparent in the testimony of **PW4** the investigating officer who was led to the scene of the defilement by the Victim.

145 This issue is therefore resolved in the affirmative.

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

 With regard to whether the Accused was the one that performed the unlawful sexual act the Prosecution primarily relied on the testimony of the Victim herself.

150 **PW2** testified that a person who she identified as a man with a mark on his cheek attacked her. **PW2** testified that she could not recall the time she was waylaid but that it was in the morning. She testified though that her routine was to go to the Project at Mukubo on Saturdays in the morning and return in the afternoon.

PW2 also testified that she had not seen the Accused prior to the incident.

155 **PW1** testified that **PW2** had returned home around 4.30PM and that during the evening after the incident the Victim had told her that the man who defiled her was tall and slim and had a black mark on the whole cheek. She further testified that while at the Police Station **PW2** had seen the suspect among other persons

at the police station. During cross-examination, **PW1** testified that she knew the accused prior to the allegations.

160 **PW3** testified that she had learnt about **PW2**'s defilement from her caretaker **PW1** who called her on phone the following day saying that, "Julius defiled Shallom".

She inquired how she knew and she had told her that **PW2 Shallom** had told her. At this point **PW3** asked **PW1** to take **PW2** and meet her at Fort Portal Central Police Station and from there they had proceeded for medical examination at
165 Fort Portal Regional Referral Hospital. She further testified that upon **PW1** narrating the ordeal to her she had immediately suspected the Accused as nobody in the village had the kind of scar that he had.

PW3 went on to testify that on the day the Accused was arrested her colleagues
170 at work contacted her and told that the Accused was at their premises. **PW3** had then organized for police officers to accompany her to arrest the Accused. She testified that she knew the Accused as a former beneficiary of the Mukubo Child Centre Project where she worked. She stated that he had been trained in welding and had left thereafter.

175 **PW4** the investigating officer testified that **PW2** had described the Accused as a man with a "black stamp" on the face. Upon cross-examination she testified that they had dispensed with an identification parade because the Victim knew the Accused very well.

PW1 and **PW3** testified that while at the police station, the Victim had spotted
180 the Accused among other persons who were being led past a window within her view and had identified him as her assailant.

For his part the Accused testified on oath as **DW3** and denied defiling the Victim. He testified that on 19th February 2022 he had a job stacking bricks in Buryanyenje and that he had gone there at 9AM. He stated that he walked home

185 with two schoolchildren around 6.30PM. He further testified that around 7PM on
that day one Ayesiga Mark told him that he was being looked for concerning
allegations of defilement. He further stated that a lady called Kabwami had told
him that he was being looked for on account of his scar. **DW3** went on to testify
190 that he did not follow up the allegations till 20th February when he went to the
Chairperson LC1 to report the false allegations against him. He had then
proceeded to PW1s home to confront her about the allegation who told him that
she had not implicated anyone.

The Accused testified that on a day he could not remember he got keys to his
brother's motorcycle and went to the Project Offices to defend himself and
195 contended that he could have run away but he had handed himself in.

Upon cross-examination, the Accused stated that **PW1** was his teacher at the
Mukubo Compassion Project and that he had no grudges against her. He further
explained that the scar on his face was a birth-mark.

The Accused produced two witnesses in his defence.

200 **DW1 Eribankya Majidu** testified that he had worked with the Accused at the
Chairman's home on 19th February 2022 from 9AM to 6.30PM.

DW2 Sande Emmanuel similarly testified that he worked with the Accused
preparing bricks from 9AM to 6.30PM. Furthermore, he was insistent that the
accused did not leave between 4PM and 5PM despite not having a watch. He
205 stated that he just estimated the time.

In matters of alibi it was held in **Sekitoleko v Uganda (1967) EA 631** that as a
general rule the burden of proving guilt of an accused person never shifts
whether the defence set up is alibi or something else. The burden remains on the
Prosecution to prove the Accused's guilt and negate the alibi.

210 Having considered the evidence of both the Prosecution and Defence, I am of the
view that the primary evidence for this Court to consider is that of the Victim

herself. Defence Counsel contended that based upon the cross-examination of **PW2** she was not possessed of sufficient intelligence to identify a person who was not known to her before. Defence Counsel also contended that she did not even know her grandmother's name and could not tell time and that she had failed to distinguish a scar from a birthmark. Counsel also contended that she could not identify a person she had never seen before.

With all due respect to Counsel but I think it is too high an expectation to place on a child of 8 years old especially with regard to recollection of an experience as traumatic as defilement. The fact that she could not recall the exact time of day did not change the fact that she recalled the one distinguishing detail on the Accused, which was the birthmark that stood out prominently on one side of his face. It was also too much to expect a child of 8 years old to know the difference between a scar and a birthmark. This is evident from the testimony of **PW4** the investigating officer who testified that the Victim had described the mark as a black stamp. This is what registered in her young mind. It is also not uncommon for young children to know their grandparents primarily by their respective local titles of grandmother or grandfather as the case may be. These are minor inconsistencies that do not go to the root of the case and as such they can be safely ignored.

What matters in this case is that in the material aspects of what happened to her and who did it to her **PW2** these remained consistent. The fact also that she said in cross-examination that had no previous knowledge of the Accused prior to the incident was actually not a disadvantage. It was confirmation that she was not mistaken about the Accused especially given the very prominent birthmark on his face which I myself observed as extremely pronounced. The nature of the birthmark on the Accused's face was such that even a child of **PW2**'s age would never forget it especially during an ordeal like what she went through.

240 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,

245 *“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,

250 *“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.”*

255 I do note though at this point that as much as **PW4** the investigating officer felt
that there was no need for an identification parade, such a procedure is
necessary to ensure that there is a proper documented process via which the
Victim is on record in terms of how she identified the Accused after his arrest. It
is fortunate that in this case the Accused’s birthmark stood out so prominently
that the omission of an identification parade left almost no risk of
260 misidentification.

There are also aspects of the Accused’s testimony that point toward untruths. He
testified that he learnt about the defilement on the same day he left work at
6.30PM from Mark Ayesiga and that a lady called Kabwami had told him he was
being looked for because of his birthmark. The obvious question here is how

265 these persons he claimed to have alerted him learnt about the defilement when
PW2 testified that she informed PW1 about it upon her return from church. For
her part, PW1 testified that when the Victim returned at 4PM she had initially
said she was limping because she had fallen down. When PW1 returned from
church she had been informed that the Victim was crying from pain urinating and
270 that it was around 7PM. This account of events automatically begs the question
as to how the persons the Accused says informed him about the allegations came
to learn facts that the Victim's grandmother was also just learning for the first
time that very same evening.

It is also a material consideration that despite the Accused turning up at the
275 Mukubo Project Offices on 2nd March 2022, this was nearly two weeks after he
first learnt about the allegations and even then he did not go to the police. This
was despite the fact that in his own testimony he stated that the LC1 Chairman
advised him that the offence was serious.

In the case of **Remigious Kiwanuka v Uganda - Criminal Appeal No. 41 of 1995**,
280 the Supreme Court held that,

*"The disappearance of an accused person from the area of a crime
soon after the incident may provide corroboration to other evidence
that he has committed the offence. This is because such sudden
disappearance from the area is incompatible with innocent conduct
285 of such a person."*

In the same case the Supreme Court also held that it is established practice for
the Court to warn itself against the danger of uncorroborated testimony. I did
consider and address myself to the testimony of PW2 in that regard. However, as
much as PW2 was the single direct witness of her ordeal, her testimony was

290 corroborated in material respects by the testimonies of **PW1, PW3 and PW4**
along with the medical report **PE 1**.

It is also material that the Accused's alibi comes out at trial and there is no
evidence that he advanced this same defence upon his arrest. The standard for
disputing an alibi was laid down by the Supreme Court in the case of **Androa**
295 **Asenua and Another v Uganda - Criminal Appeal No. 1 of 1998** in which the
Supreme Court cited with approval the decision in **R v Sukha Singh s/o Wazir**
Singh and Others (1939) 6 EACA 145 where it was held that,

300 *"... if a person is accused of anything and his defence is an alibi, he*
should put forward the alibi as soon as he can because, firstly, if he
does not bring it forward until months afterwards there is naturally
a doubt as to whether he has not been preparing it in the interval,
and secondly, if he brings it forward at the earliest possible moment
it will give prosecution an opportunity of inquiring into that alibi and
if they are satisfied as to its genuineness proceedings will be
305 *stopped ..."*

In light of the Prosecution evidence, the alibi appears more of an afterthought
prepared with the benefit of hearing the prosecution case.

It is therefore my view that in view of the direct evidence of **PW2** and the rest of
the corroborative evidence already discussed, the evidence is sufficient to rebut
310 the defence of alibi and to that extent the Prosecution has established the
participation of the Accused in the sexual act beyond reasonable doubt.

This issue is therefore determined in the affirmative.

CONVICTION:

In light of all the evidence brought before this Court I do hereby agree with the
315 Assessors and convict the Accused Tuhaise Julius of the offence of Aggravated
Defilement contrary to Section 129(3) and 129(4)(a) of the Penal Code Act.

SENTENCE:

The Convict Tuhaise Julius stands convicted of the offence of Aggravated Defilement of
Shallom Shilloh Atuhura a juvenile of the apparent age of 8 at the time of the offence.

320 I have considered the apparent youthfulness of the convict who at the time of
conviction is 20 years old. I am also mindful that he has grown up as an orphan in
difficult circumstances probably lacking sufficient moral guidance.

I have also considered the fact that this is an offence of a particularly cruel kind with
only the deprivation of life being worse. Defilement involves physical, emotional and
325 psychological damage of the sort that sometimes never even heals in many victims. It is
even worse that the offence was carried out against the most vulnerable in our society
being a child of tender years. As a society there is a natural expectation for us as human
beings not to prey upon our young but to protect them to fullest extent possible. It is
particularly unfortunate that this sort of crime is prevalent in this part of the country
330 and there is therefore need for a strong deterrent message.

I also consider the fact that the circumstances of this case present a tragic irony because
the victim in this matter is a child of someone who at some point extended guidance
and support to the convict only for him to repay her efforts by violation of her child. It
was not clear whether at the time the convict committed the offence he was aware of
335 who he was violating but whether or not he knew it does not change the fact that it was
an abuse of the trust and care extended to him by the very organization which was
trying to help him overcome his difficult upbringing.

I do also take into account the fact that defilement is quite rampant in the region where
the crime was committed and there is also need for a deterrent sentence.

340 In light of the foregoing, I find it appropriate and accordingly sentence the convict to
serve a term of 25 years imprisonment less time spent on remand being 2 years, 1
month and 24 days. The convict shall therefore serve a term of imprisonment of 22
years, 10 months and 6 days.

In not imposing stiffer sentence I hope that the convict will use the time to work on
345 becoming a more productive member of society as he will still be able to rejoin society
at a productive age.

The convict has the right to appeal the conviction and sentence before the Court of
Appeal no later than 14 days from the date hereof.

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David S.L. Makumbi
JUDGE
08/05/24