

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

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HCT-01-CR-SC-0278-2022

UGANDA.....PROSECUTOR

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VERSUS

MATSIKO JOSEPH.....ACCUSED

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BEFORE JUSTICE DAVID S.L MAKUMBI

RULING ON SUBMISSION OF NO CASE TO ANSWER

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REPRESENTATION:

- Senior State Attorney Amy Grace for Prosecution
- Counsels Victor Businge and Julian Nyaketcho for Accused

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BACKGROUND:

The Accused Joseph Matsiko was charged with the offence of Aggravated Defilement contrary to Section 129, Subsections 3 and 4(a) of the Penal Code Act.

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The facts of the case in summary are that on the 16th day of September 2021 at Rwano Zone in Bunyangabo District, Joseph Matsiko performed an unlawful sexual act with Kansiime Lenet, a girl below the age of 14 years, that is, 10 months old.

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It was alleged that on the 16th day of September 2021 at about 7.00AM, the victim's mother went to fetch water at a nearby tap and left the victim asleep in the house. Upon returning from collecting water the victim's mother encountered the accused running out of her house and when she entered the house she found the victim crying with fluids in her private parts that she suspected to be semen.

40 The victim's mother immediately reported the matter to the Local Council authorities who mounted a search and the accused was arrested and taken to police.

The victim was medically examined and the findings recorded on Police Form 3A. The accused was also medically examined and the findings recorded on Police Form 24A.

45 The accused was produced in court and pleaded not guilty to the offence.

Trial was commenced and the Prosecution led evidence to prove that the accused committed the offence. At the close of the Prosecution case the Defence submitted that
50 the accused had no case to answer as the prosecution had failed to adduce evidence of a prima facie case against the accused.

For its part the Prosecution submitted that the offence had been proved against the accused and prayed for court to put the accused to his defence.

55 **ISSUES:**

The central issue here is whether the Prosecution has established a prima facie case against the accused requiring that he be put to his defence.

60 In determining the central issue due regard must be had to the ingredients of the offence of Aggravated Defilement. In order for the offence of Aggravated Defilement to be proved the following ingredients must be proved.

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- 1) A victim below the age of 14 years (Aggravating Factor)
 - 2) An Unlawful Sexual Act
 - 3) The Participation of the Accused

SUBMISSIONS OF THE PARTIES:

70 **The Prosecution Case:**

The Prosecution produced a total of four witnesses to wit:

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- 1) Kwalikunda Evas – Mother to Victim (PW1)
 - 2) Bright William – Father of Victim (PW2)
 - 3) Namanya Edison – Medical Clinical Officer (PW3)

4) D/ASP Nansereko Phoebe – Police Investigating Officer (PW4)

80 PW1 testified that the victim was her daughter and stated that as of 16th September
2021 the victim was only 9 months old. She testified that on the day of the alleged
defilement she had met the Accused about 10 metres away from her residence around
7AM as she proceeded to fetch water a short distance from her house. PW1 went on to
testify that she had returned from fetching water and found the Accused standing in the
85 doorway of her house and could hear the victim crying. She went on to testify that upon
entering the house she found the victim with fluids around her private parts which she
claimed that upon closer inspection appeared to be “sperms”.

PW1 continued her testimony saying that she proceeded with the child to report to the
90 police but that prior to that she took the child to the father who was in the garden and
told him what had happened. She testified that the father did not see the fluids on the
child as the child was wrapped in a “lesu”. She went on to state that they were initially
referred to Editine Clinic for medical examination and then on to a government hospital.
She further claimed that while at police she was told to go away and return after two
95 weeks for examination of the child which she said was eventually done after two weeks
at Kibiito Health Centre.

PW1 testified that the Accused was a friend who would always come to her home and
that it was not strange for him to be at her home. She further testified that there was
100 another child in the house of 6 years old called Amanyire Marvin who was allegedly
asleep in the house at the time of the alleged defilement.

Upon cross-examination PW1 stated that she found the victim asleep, wrapped her and
took her to her father and then to the police. She further testified that she had been
105 away from the house for one minute to fetch water. She also testified that the child had
injuries in her private parts. However, upon being challenged with the medical report on
Police Form 3A from Editine International Medical Centre (Defence Exhibit 1) she
changed her testimony saying that she did not say that child was injured. She went on to
testify on cross-examination that the doctor at Editine did not touch the child.

110 PW1 was also shown a medical report on Police Form 3A from Kibiito Health Centre
(Defence Exhibit 2) and admitted to being aware of the form. She denied having a
grudge against the accused.

115 Upon re-examination PW1 stated that when she examined the child the private parts,
while uninjured were enlarged. She then went on to state that the doctor at Editine had
examined the victim.

120 PW2 the father to the victim testified that he was in the garden working at around 6AM
when he was called by the LC1 Chairman who informed him that there was a problem at
his home and that his child had been defiled by the accused. He was told that the
suspect was at the police station and PW2 testified that he proceeded to the police
station after the call. He stated that he was given a document and forwarded to Kibiito
125 Health Centre. However, he also testified that the victim was also taken to Editine
International Medical Centre.

Upon cross-examination PW2 stated that he had examined the child and that she had
severe injuries. However, upon being pressed further in cross-examination about
inconsistencies between his evidence and that of his wife he stated that his wife was
130 lying and also that he never examined the child.

PW3 the Medical Clinical Officer at Editine International Medical Centre testified that he
received the victim and her mother PW1 on 16th September 2021 and that the mother
had told him that she had observed sperms on the victim's legs and seen the Accused
135 leaving her house. PW3 testified that he did not observe any injuries to the private parts
of the victim and that the victim's hymen was intact. He further testified that he had
only observed a small injury on the victim's right lower limb which appeared to be two
days old. PW3's findings were laid out in Police Form 3A which was entered in evidence
as Defence Exhibit No. 1.

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PW4 the investigating officer from Kibiiti police in this matter testified to having been
assigned to investigate the matter and that she issued the police forms for medical
examination of the victim and the accused. She testified though that she never recorded
any statements and did not even visit the scene. She further testified that she was
145 unable to interview the accused due to language barrier.

On the basis of the evidence above it was the submission of the Prosecution that PW1's
evidence alongside the medical report (Defence Exhibit 1) had established the age of the
victim as being below 14 years.

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The Prosecution also submitted that PW1 had in her testimony placed the accused at
the location of the sexual act and that the victim was crying and had semen on her
private parts and that the private parts were enlarged.

155 The Prosecution finally submitted that the accused was well known to the mother and
she had clearly seen him at the door to her home.

To the extent of the evidence and submissions above, the Prosecution was of the view that there was a prima facie case warranting the accused being put to his defence.

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The Defence Case:

Upon the closure of the Prosecution case the Defence submitted that the Prosecution had failed completely to establish a prima facie case against the accused. The Defence pointed out a number of inconsistencies in the testimony of the Prosecution witnesses to wit:

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- 1) The evidence of PW1 directly contradicted the medical evidence as testified by PW3 and also contained in the medical report exhibited as Defence Exhibit 1. Whereas PW1 stated that the victim had semen on her private parts and that the said parts were enlarged the medical report DE 1 clearly stated that there were no injuries seen and that the hymen was intact.
- 2) PW2 claimed to have seen evidence of severe injuries and yet PW1 stated that the father did not examine the child as she was wrapped in a lesu.
- 3) Upon cross-examination about the inconsistencies between his evidence and that of his wife PW2 capitulated and stated his wife was lying.
- 4) PW4's evidence as investigating officer was completely inadequate as by her own testimony she never visited the scene and did not record any statements
- 5) The small injury seen on the victim's right lower limb was found by PW3 to be about two days old having occurred prior to alleged defilement.
- 6) PW1 contradicted herself stating during examination in chief that she found the victim crying and then on re-examination that the victim was found sleeping.
- 7) PW1 claimed that she was away from her home for about one minute which the defence contended was not realistic for a defilement to have taken place.

LEGAL CONSIDERATIONS:

In criminal trials it is trite that the burden of proof is always on the Prosecution and never shifts save for specific statutory exceptions of which the offence of Aggravated Defilement is not one such exception. The burden of proving criminality is founded upon the Article 28(3)(a) of the Constitution which states that every person who is charged with a criminal offence shall be presumed innocent until proven guilty or until that person pleads guilty.

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Section 73(1) of the Trial on Indictments Act provides that upon the closure of the prosecution case if the evidence of the prosecution is found not to be sufficient then the

court shall record a finding of not guilty after hearing from the advocates for the prosecution and the accused.

200 Section 73(2) of the same Act conversely provides that where the evidence of the prosecution is found to be sufficient then the accused is informed of their rights and accordingly given the option to commence their defence.

205 The sufficiency or insufficiency of the evidence as referred to in Section 73 of the Trial on Indictments Act is central to the determination of whether or not there is a prima facie case against the accused by the close of the prosecution case. While the standard of proof criminal trials is proof beyond reasonable doubt the standard for determining whether an accused person has a case to answer is evidence of a prima facie case. It is also trite that a prima facie case is established when the evidence adduced is such that a
210 reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence.

In the case of **Bhatt v R (1957) EA 322**, the East Africa Court of Appeal held that a prima facie case could not be established by a mere scintilla of evidence or by any amount of
215 worthless, discredited prosecution evidence.

The standard of proof for a prima facie case therefore may not reach proof beyond reasonable doubt but equally cannot be established based on whimsical evidence and
220 allegations.

To that extent therefore the evidence so far led by the prosecution must be of the sort which in the absence of any evidence being led in defence of the accused would be sufficient to sustain a conviction.

225 **WHETHER A PRIMA FACIE CASE HAS BEEN ESTABLISHED:**

As mentioned above the question of whether or not a prima facie case has been established rests in determining whether all the ingredients of the offence of Aggravated Defilement.

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Age of the Victim:

While there were some minor inconsistencies in the evidence of PW1 regarding the exact date of birth of the victim, there was no doubt that she was below 14 years at the
235 time of the alleged incident. The victim was brought to court by her mother who said

she was three years old. This therefore put her within the age bracket of 9 or 10 months at the time of the alleged defilement which is consistent with both medical reports exhibited by the Defence as Defence Exhibits 1 and 2.

240 The age of the victim was therefore indubitably below 14 years.

An Unlawful Sexual Act:

245 It was the evidence of both PW1 and PW2 the parents of the victim that their daughter had been defiled. PW1 testified that she had found the child crying and having semen around her private parts and that the private parts were enlarged. However even without comparing her evidence in this regard to that of the father of the child, PW1 significantly contradicted herself upon cross-examination and re-examination. She stated during examination-in-chief that she had found the victim crying after the alleged
250 defilement but then upon re-examination she had stated that she found the child sleeping.

Counsel for the accused contended that it was extremely unlikely that a child would be sleeping peacefully having been violated in the manner PW1 would have the court
255 believe. I tend to agree that PW1s inconsistent testimony is suspect in this regard.

PW1 also testified that there was another six-year-old child asleep in the house by the name of Amanyre Marvin. If indeed the act of defilement had taken place as PW1 would have us believe, it is unlikely that the victim would have endured it silently and
260 would have made enough noise to have probably woken the six-year-old.

PW1 further testified that she was away from her house for one minute during which time her child was defiled. Counsel for the accused again contended that it was extremely unlikely that the act of defilement could have been done in such a short
265 period of time and cast doubt on PW1s description of events in that regard. I do tend to agree that it was extremely unlikely that the mother of the victim could have been away for just one minute and in that short a time found her child to have been defiled in the manner she described. It casts doubt on whether the testimony given in this regard is really credible.

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However, and most importantly, whereas both PW1 and PW2 testified to have witnessed severe injuries during cross-examination and then when confronted with evidence of the medical report Defence Exhibit 1, PW1 backtracked during cross-examination and denied saying that she had seen injuries and only maintained that she
275 had seen semen and that the child's private parts were enlarged.

In testifying as she did PW1s evidence ended up being contradicted by that of PW2 the father of the victim. First, PW2 stated that he had seen the child with grave injuries and yet PW1 had testified that when she showed him the child he could not have seen the semen that she saw because the child was wrapped in a lesu. Secondly, PW2s version of events did not even include PW1 bringing him the child to see after being defiled. He stated instead that he had found out about the defilement from the LC1 Chairperson who called him on phone to alert him about it. Having been alerted about the defilement it was PW2s evidence that he proceeded directly to the police station. He made no mention of PW1 bringing him the child in the garden. This was another material inconsistency in the testimonies of PW1 and PW2 despite being parents of the victim whose stories would be consistent if they were telling the truth.

PW2 actually ended up capitulating during cross-examination and admitting that his wife PW1 was a liar.

In addition to the above the testimonies of both PW1 and PW2 were in stark contradiction to both medical reports tendered in by Counsel for the accused during cross-examination.

The Medical Report tendered into evidence as Defence Exhibit No. 1 was a report detailing the medical examination of the purported victim of the defilement Kansiime Renet at Editine International Medical Centre by PW3 Edison Namanya, a Medical Clinical Officer. In his testimony and findings, he reported that he had not found any evidence of fluid (semen) on the victim and had found the hymen intact. He only found a small injury on the right lower limb which in his observation had occurred two days earlier.

The Medical Report Defence Exhibit 1 was requested by one Detective Corporal Apollo Tibaijuka No. 21407 on 16th September 2021.

Of even more interest was the existence of a second medical report Defence Exhibit No. 2 which also contained findings of the medical examination of the same victim but this examination was requested by one Detective Corporal Nelson K. Arinaitwe No. 28122 on 30th September 2021 two weeks after the alleged defilement.

Defence Exhibit No. 2 is interesting because while PW1 makes no mention of the first report Defence Exhibit No. 1 and only admits to it after being pressed by Counsel for the accused on cross-examination, she seemed keen to focus attention on the second report

315 which counter-intuitively refers to a medical examination two weeks AFTER the alleged defilement.

Defence Exhibit No 2 also tends to contradict PW1s and PW2s respective testimonies about injuries. The second report is also consistent with the first report in terms of no
320 obvious injuries but does introduce one interesting and potentially disturbing piece of information. The second report disclosed that the hymen of the victim was absent as at two weeks after the alleged incident. That one detail in the report is disturbing because if correct then it begs the question as to how the victim's hymen disappeared between
325 16th September 2021 at the first medical examination and 30th September 2021 at the second medical examination. There are two theories here and both are equally grave. First, that the second report was deliberately falsified or second that the victim may have been violated in some manner after the 16th of September 2021.

In either case it is my belief that a criminal investigation is warranted as the falsification
330 of official records especially for court purposes is a criminal matter as is the possible sexual violation of the victim for some nefarious reason.

What I also find deeply concerning is the quality of evidence that was adduced by the
335 so-called investigating officer PW4. She testified that she recorded no statements and could not even interview or interrogate the accused due to language barrier. Similarly, she did not even visit the scene of crime and I genuinely wondered of what value she was to the prosecution case. As already pointed out above, even the medical reports exhibited in this matter were requested by officers other than herself.

340 In considering the quality of the evidence of the prosecution in this regard, I have in mind the case of **Ntambala Fred v Uganda - Criminal Appeal 34 of 2015 [2018] UGSC 1** where the Supreme Court while considering the weight of evidence of a victim of a sexual offence held that the value of corroboration is rooted in the legal standard (proof beyond reasonable doubt) that must be met by the prosecution in order to secure a
345 conviction. Consequently, the prosecution may find it necessary to adduce evidence for more than one witness in order to prove their case beyond reasonable doubt. The Supreme Court further noted that Section 133 of the Evidence Act does not place a requirement for a particular number of witnesses to prove any given fact and that as such a conviction can be solely based on the testimony of the victim as a single witness,
350 provided that the court finds her truthful and reliable.

In the present case the victim was clearly not able to testify about matters that happened to her at the age of 9 or 10 months old. In such a case the next best thing to the victim was PW1 her mother who from the description of events was the sole witness

355 who claimed to have met the accused leaving the house after the alleged defilement. The reliability and truthfulness of her testimony as a single witness is crucial to establishing whether the sexual act took place especially in light of conflicting medical evidence.

360 However, PW1s testimony is so egregiously inconsistent and sometimes absurd in several material regards that it cannot by any measure be considered truthful and reliable. What should have been corroborative evidence with regard to PW1s testimony only ended up further weakening it so much so that her own husband PW2 referred to her as a liar.

365 It is with due regard to the above that I find that the unlawful sexual act has not by any stretch of imagination been proven.

Participation of the Accused:

370 In light of my finding that the sexual act was not proven there is obviously no need to get into whether the accused participated in the act or not. He could not have participated in something that has not been proven to have taken place.

DECISION:

In determining whether the accused has a case to answer or not in this matter I refer again to the decision of **Bhatt v R** already cited above. The evidence in this matter cannot even measure up to the minimum of a scintilla and is so extremely discredited that in some regards it borders on criminal. I am concerned that the prosecution actually even saw fit to bring such a matter to trial.

I feel it critical at this juncture to emphasize that the commencement of a prosecution is an extremely serious decision as it has far reaching implications especially when one considers the presumption of innocence. In this particular case I noted that the accused entered into the court system on 7th October 2021 and was accordingly remanded to prison pending trial. To date he has been incarcerated for over two years only for evidence of this kind to be brought against him in trial. This kind of case makes me feel that it is important to remind the prosecution that the hallmark of any good prosecution effort is not just about securing a conviction but wholly about ensuring that justice is done. It should have been evident from commencement of the case that there was no realistic medical evidence and/or witness testimony to sustain a prima facie case in this matter. It is my hope that in similar future matters the prosecution will pay keen

395 attention to the medical evidence and the consistency of the witnesses before
committing to trial.

400 It is therefore my decision that in accordance with Section 73(1) of the Trial on
Indictment Act there is no sufficient evidence that the accused committed the offence of
Aggravated Defilement contrary to Section 129 Subsections 3 and 4(a) of the Penal Code
Act and I accordingly find him not guilty of the same.

The accused is accordingly acquitted and is free to go.

405 Ruling delivered this 1st day of February 2024

David S.L. Makumbi
JUDGE

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