

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT**  
**KAMPALA**  
**HIGH COURT CRIMINAL SESSION CASE NO. 0091 OF**  
**2013**

**UGANDA ::**  
**PROSECUTION**

**VERSUS**

**MUGAMBA STEVEN ::**  
**ACCUSED.**

***JUDGEMENT BY HONOURABLE MR. JUSTICE JOSEPH MURANGIRA.***

**I. Introduction**

- I.1 The prosecution is represented by Adrine Asingwiire State Attorney working with the Directorate of Public Prosecution.
- I.2 The accused is represented by Nakamatte Esther from Luzige Lubega and Kavuma Advocates on State Brief.
- I.3 The prosecution called seven witnesses whereas the defence called two witnesses
- I.4*** The accused stands charged with aggravated defilement contrary to **section 129 (3) and (4) (a) of the Penal Code Act**

- I.4.1 The particulars of the offence are that Mugamba Stephen on 31<sup>st</sup> March 2012 at Namusaale village Kapeeka Sub-county in the Nakaseke District had sexual intercourse with a girl under the age of 14years to wit 13years
- I.5 The charge was read and explained to the accused. The accused pleaded not guilty to the said charge. He was then put on trial of the said charged offence

## **2.0 Resolution of the Case**

- 2.1 In order to prove its case, the prosecution called seven witnesses who testified against the accused. Under **section 66 of the Trial on Indictments Act Cap 23,** both the prosecution and the defence had a preliminary hearing. The following facts were admitted by the parties:-

**“ The age of the victim at the time the offence was committed was 13years old and the mental status of the accused as the person described under Police Form 24 that it was normal.”**

Further the prosecution adduced evidence from seven witnesses who testified against the accused.

In defence, the accused gave evidence on oath and called one witness who testified on his behalf. The accused raised the defence of alibi

## 2.2 Ingredients of the offence charged.

It should be noted that the ingredients of the offence charged are per **section 129 (3) and (4) (a) of the Penal Code Act Cap 120** and they are that's:-

- a) Unlawful sexual intercourse of the victim**
- b) The victim was below the age of 14 years**
- c) That it is the accused person in the dock who had unlawful sexual intercourse with the victim**

## 2.3 Burden of proof

**In all criminal cases the prosecution bears the burden of proving all the ingredients of the charged offence against the accused person. The burden does not shift to the accused to prove his innocence.**

## 2.4 The standard of proof

**The standard required of the prosecution is proof of all the ingredients of the offence charged against the accused beyond reasonable doubt based on the evidence available on court record from both the prosecution and the defence.**

## 2.5 Unlawful Sexual Intercourse with the victim

On whether there was unlawful sexual intercourse of the victim, the victim PW5 Nakisansa Joan gave

evidence on oath that on 13<sup>th</sup> March 2012 at about 6:00a.m in the morning hours the accused came to their home where she was alone sleeping, the accused fell on her, got hold of her mouth with his hand and removed her knickers. That thereafter, the accused had sexual intercourse with her.

That the accused put his erected penis in her private parts (Vagina), that the accused had sex with her, that as a result she felt a lot of pain and bled in her private parts.

Her evidence was corroborated by that of her mother Nalugo Irene, PW1, Seruma Samuel, the police officer who arrested the accused, PW3 Mukiibi Godfrey, PW6, Dr. Mubeezi Andy Davis and 27 No. 43294 Detective Constable Musana Samuel.

PW2 Ssenabulya Jimmy, the father of the victim, learnt of the incident from PW7 on phone and that when he came back home on 2<sup>nd</sup> April 2012, the victim also told him how she was defiled by the accused person.

The said prosecution witnesses narrated to court how PW5 the victim told them her ordeal with the accused. These witnesses testified in court narrating how the victim told them that the accused had unlawful sexual intercourse with her. The victim PW5 told the same story of the said prosecution witnesses that she was

defiled by the accused on 31<sup>st</sup> March 2012. The sexual intercourse of the victim, PW5, is further supported by the medical evidence adduced through PW6 on police form 3 and its appendix which was admitted in evidence as exhibit P2 without objection from the defence.

The medical report evidence revealed that there were signs of penetration in the victim's vagina by the male organ. That there was a smelly discharge that was coming out of her private parts and that her hymen was ruptured. All this evidence was never challenged in cross examination by the defence.

In defence, the accused and DW1 Agaba Brian never adduced evidence on whether or not any person did have sexual intercourse with the victim. The defence evidence concentrated on the defence of alibi.

The defence through PW7 exhibited the police statement, police statement of PW5 the victim as exhibit DE1, PW1 the mother of the victim as exhibit DE4, PW3 Mukiibi Godfrey as exhibit DE2, PW2 the father of the victim as exhibit DE3. PW4 Seruma Samuel as exhibit DE5. These statements on which the defence is relying on all state that the victim was defiled. That the victim had sexual intercourse.

In her submissions, the prosecutor properly evaluated the evidence on record as opposed to the submission by counsel for the defence. The evidence she adduced for the defence by exhibiting the prosecution witness statements at the police support the prosecution case.

I take it therefore that the defence was satisfied with the investigations that were carried out by the prosecution. The said exhibits corroborate the evidence of the victim PW5 that she was defiled. My proposition is supported by the **case of Kabiso Issah Versus Uganda, Criminal Appeal 81 of 2001** where it was held by the Court of Appeal of Uganda that:-

***“It is well settled that the evidence of the victim of tender age is of great value especially when she makes a statement immediately after a commission of the offence”.***

In his opinion, the assessor Mr. Muhwezi Ben stated that the prosecution proved this ingredient of the offence charged. In the premises therefore considering the evidence on record and the submissions by both counsel of the parties, I am in agreement with the assessor and counsel for the prosecution that the first ingredient of the offence was proved by the prosecution beyond reasonable doubt.

## **2.6 The victim was below the age of 14years**

On whether the victim, PW5, was aged 13years at the time she was defiled. During the preliminary hearing as required by **section 66 of the Trial on Indictments Act Cap. 23, Laws of Uganda**, the prosecution and the defence admitted evidence on Police Form 3 which is to the effect that the age of the victim was 13years. Police Form 3, was exhibited in evidence as admitted by the defence and marked exhibit P1. Therefore the issue of age was settled by agreement of the parties at the said stage. Wherefore the issue cannot arise subsequent in the trial of this case.

In cross examination of the prosecution witnesses by the defence counsel and in her submission on no case to answer and final submissions, she brought up the issue of the age of the victim. She concentrated on the fact that PW5 stated at the time of giving evidence in Court she was aged 15years old. Therefore that when the offence was committed on 31<sup>st</sup> March 2012 the victim must have been 14years and that therefore the charged offence of aggravated defilement was not committed by the accused.

In re examination, PW5, the victim said that she learnt her age from her mother, PW1. I also noted that during her testimony in court she showed signs of being traumatized because of what happened to her on 31<sup>st</sup> March, 2012. Further, PW1, the mother of the victim

gave evidence that her daughter, PW5, at the time the offence was committed was aged 13years. This evidence was never challenged by the defence in cross examination.

Again PW6, the medical officer, stated that at the time he medical, examined the victim, PW5, on 2<sup>nd</sup> April 2012, she was aged 13years. The Police Form 3 was admitted in evidence without objection from the defence which put the age of the victims to 13 years. In cross examination, the defence counsel never challenged this piece of evidence. Further PW7 the investigating officer in his evidence, he stated that the victim at the time the offence was committed against her was aged 13years. This piece of evidence was never challenged in defence by the defence counsel in cross examination.

In defence the accused and his only one witness, DW1, never gave evidence to negative the age of the victim. I thus take it that the accused never challenged the prosecution evidence as to what is the real age of the victim at the time the offence was committed against the victim. Therefore, in agreement with the assessor's opinion, the prosecution witnesses' evidence record and considering the submissions on that ingredient by both counsel for the parties, I find that the prosecution proved this second ingredient of the offence charged



beyond reasonable doubt. The victim was aged 13years at the time she was defiled.

**2.7 That it is the accused person who defiled the victim PW5.**

2.7.1 On whether it is the accused person who defiled the victim, PW5, Nakisansa Joan, the indictment was read and explained to the accused. The accused pleaded not guilty to the charged offence of aggravated defilement contrary to **section 129 (3) and (4) (a) of the Penal Code Act.**

In his defence on oath, he maintained that he was innocent. He put up a defence of alibi that at the time of the alleged commission of the offence on 31<sup>st</sup> March 2012 at 6:00a.m he was not in Namusaale where the crime was committed.

His only one witness Agaba Brian gave evidence that him and the accused and others at the alleged time and date they travelled and reached Namusaale at 9:00a.m and had breakfast at the hotel of the victim's mother.

2.7.2 In her submissions counsel for the accused, Ms. Nakamatte Esther, submitted that there are so many contradictions and inconsistencies in the prosecution case. That the prosecution in evidence failed to put the accused at the scene of crime.

She also relied on the alibi raised by the accused as a defence that the accused is being victimized because of the grudge the accused had with Mukibi Godfrey, PW4. In his opinion, the only assessor Muhwezi Ben, the second assessor having failed to attend the subsequent Court hearing, majorly based himself on the account of the alleged accused's grudge with Godfrey Mukiibi, PW4 and advised court to acquit the accused of the charged offence.

2.7.3 In her submissions in reply, the prosecutor, Ms. Adrine Asingwiire, State Attorney, submitted that the prosecution adduced enough evidence that proved the charged offence against the accused beyond reasonable doubt. She relied on a few authorities.

2.7.4 It is important to note that in all criminal cases apart from the statutory offences, the prosecution bears the duty to destroy or weaken the defence case by adducing the evidence which puts the accused person at the scene of crime.

My duty as a Judge is to consider both the evidence of the prosecution and the defence before making a finding to acquit or convict the accused.

Equally important to note is that the Trial Judge is not bound by the opinion of the assessors in a criminal trial.

2.7.5 The victim Nakisansa Joan, PW5, gave evidence that it was the accused who defiled her on 31<sup>st</sup> March 2012. She narrated her story to Court very well how she was defiled by the accused. She stated that on 31<sup>st</sup> March 2012 at about 6:00a.m the accused came to their house where she was sleeping in the sitting room, fell on her forcefully held her mouth with one hand while the accused removed her knickers. That he put her knickers down and inserted his erect penis into her vagina and felt pain.

That she could not make an alarm as the accused held her mouth with one hand. That after the accused finished defiling her, he warned her not to tell any person what has happened to her unless she faces bitter consequences and that he run away from the house.

She further told Court that she could not tell her parents as they were not at home until 2<sup>nd</sup> April 2012 when they came back from where they had gone and told them what happened to her.

My observations about the victim, PW5, while she was narrating her ordeal with the accused in court are;

- i) When questions both in examination- in -chief and cross examination were put to her, she could take some time to respond to such questions.

- ii) When such questions were put to her, she could develop anger and her eyes full of tears as if she wanted to cry.
- iii) Whenever she could look at the accused in the dock, she could want to cry.
- iv) The questions and bitter remarks from the counsel for the accused reminded her, her worst time with the accused person.

Otherwise she composed herself and told Court what happened to her on 31<sup>st</sup> March 2012 in the morning hours.

While at the Police, PW5, Nakisansa Joan told PW1, PW2, PW3, PW4 and PW7 that she was defiled by Mugamba Stephen. The victim was consistent in her story, she told the said Prosecution witnesses.

PW5 told Police and her parents that she was defiled by Mugamba Steven before even the accused was arrested. In her evidence, she maintained that she knows the accused very well that she has seen the accused for a long time in Namusaale trading center where she lives. She told the police where the accused was working using that information, the accused was arrested from a lorry carrying firewood from among his workmates who totaled up to about six or seven people.

She definitely knew who defiled her. Who defiled her was none other than the accused person.

The other prosecution witnesses confirmed her story. In defence the accused and his witness told Court that they knew the victim very well. That they could eat from her mother's "hotel" outside the house where the victim stays with her parents. That the accused and his colleagues used to eat from the victim's mother's hotel for a long time. This piece of evidence corroborates the victim's evidence that she knows the accused very well. This also confirms that the accused knew the house where the victim stays and the entire geography of the area and the house of the victim's parents.

Further the accused and DW1, Agaba Brian, gave evidence that on 31<sup>st</sup> March 2012, at 9:00a.m they were at Namusaale trading center where they had their breakfast. That also corroborates PW5's evidence that she saw the accused at her home in the morning hours and that it is the accused who defiled her.

One can pose a question of why she did not point at Agaba Brian or any other male person as a person who defiled her? In her evidence, PW5, the victim and the other witnesses stated that they have no grudge against the accused person. The accused person's

evidence in defence did not state that he has a grudge with the victim nor her parents.

My finding on that is that there are no reasons why the victim, PW5, and the other witnesses could tell lies against the accused.

Consequent to the above, from the time PW5, the victim, was defiled up to the time she gave her testimony in Court she remained consistent. The victim's evidence therefore did not require corroboration. In the **case of Kabwiiso Isah Versus Uganda CIPRA** it was held that the evidence of the victim of tender age is of great value especially when she makes a statement immediately after the commission of the offence. That her evidence is useful in as far as it points to the appellant as the culprit. That may also provide the necessary corroboration.

See also the **cases of Ndahura John Versus Uganda Criminal Appeal number 22 of 2000, Supreme Court of Uganda unreported, Andrex Versus Shaban Bin Ronald 1940 VOL.7 EACA page 66.**

2.7.6 On the issue of identification, it is the submission of counsel for the defence that the prosecution failed to put the accused person at the scene of crime. PW5, the victim, Nakisansa Joan, gave evidence that she knows

the accused and that the accused is called Mugamba Stephen. In defence the accused stated that he has been seeing the victim at her mother's so called "hotel". That she used to see the accused in Namusaale trading center.

In defence, the accused also gave evidence that PW5 is a daughter of PW1 and PW2. PW5 the victim described the work of the accused. In defence the accused and his only one witness confirmed that work of the accused person. All this evidence shows that the victim, PW5, knew the accused very well.

In addition, PW5, the victim gave evidence that she was defiled on 31<sup>st</sup> March 2012 at about 6:00a.m at their home in Namusaale. In qualifying the time she was defiled in her evidence, she said that she was still sleeping in the house and that her siblings had already woken up and were outside playing with other children in the neighborhood.

To state that it was about 6:00a.m, she was estimating the time but meaning the early hours in the morning. The defence counsel tried in her submission to fault her on the time but in my considered analysis the victim cannot be faulted on that at all. There is no doubt in my mind, therefore, that there was enough light that enabled the victim to properly identify the accused

person as the person she knew very well and the person who defiled her.

Even assuming the time of the alleged entry of the accused into the victim's parent's house was about 6:00a.m, the time taken by the accused to hold the victim by the mouth, removing her knickers and had sexual intercourse with the victim must have taken some time because this is human nature and by the time the accused finished his dirtiest business, there must have been more light in the house that allowed the victim to properly identify the accused.

More-so, the defence failed to challenge the victim's evidence in cross examination. See the **case of Nabudele Versus Uganda 1977 High Court Bulletin at page 77** which case laid down conditions for correct identification of the accused person in a criminal trial. These conditions are;

- i) Whether the accused was known to the witness at the time of the commission of the offence.**
- ii) The conditions of lighting in that place**
- iii) The length of time the witness took to identify the accused**
- iv) The distance from which the witness identified the accused.**



In the instant case, all the above conditions were available to PW5, the victim, at the time, during and immediately after the accused committed the charged offence. Thus the defence of poor identification of the accused by the victim is not available to the defence.

Furthermore from the evaluation of the evidence on record herein above in this judgement, the defence of alibi raised by the defence has been totally destroyed or negatived by the prosecution evidence on record. It cannot stand.

On the issue of the grudge between the accused and Mukiibi Godfrey PW4, is inconsequential to this case. Even one doubts whether such a grudge exists between the two. The basis for such a grudge was not laid before Court for consideration.

In his evidence in examination-in-chief, PW4, Mukiibi Godfrey, stated that he has no grudge against the accused person. In cross examination, no such a question as to whether PW4 had a grudge against the accused was asked.

In his defence on oath in examination in chief, the accused never testified that he had a grudge with Mukiibi Godfrey PW4. The so called grudge came up in cross examination by counsel for the prosecution and that was even after a long grilling on the accused in

cross examination. In essence, the allegation of such grudge, to say the least, was an aforethought by the accused.

During cross examination of the accused, I could see that the accused was being pushed far against the wall. Maybe as an escape route he just answered that he has a grudge with Mukiibi Godfrey, PW4, which grudge is not known to the later and Agaba Brian, DW1.

I thus dismiss such an assertion against himself that the accused was having sexual intercourse affairs with Mukiibi Godfrey's PW4's, wife. That was a serious allegation against himself which goes down into his character as far as this case is concerned. This is as if the accused is a habitual sexual offender, but I am of a view that the alleged grudge of the accused with Mukiibi Godfrey, PW4, is not there. That it was a mere statement he made in passing.

I could see the assertion of having sexual relationship with PW4's wife came as a surprise to his defence counsel and his relatives who were in attendance in court. That assertion is far from being truthful.

In the circumstances, I hold that the prosecution proved the third ingredient of the offence beyond reasonable doubt against the accused.

### 3.0

### Conclusion

In the result and for the reasons given hereinabove in this judgement, I hold that there is cogent and impeccable evidence by the prosecution that the victim was not only defiled but the accused is the culprit.

See the **case of R Versus Bech 1982 EAR 801;**

I therefore do not agree with the assessor's opinion. Hence it is my holding that the prosecution proved its case against the accused beyond reasonable doubt. The accused is found guilty of the offence of aggravated defilement **contrary to section 129 (3) and (4) (a) of the Penal Code Act.** The accused is convicted of the said charged offence.

Delivered at Kampala this 27<sup>th</sup> day of August 2013.

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**JUDGE**

**27/08/2013.**

**Court:**

Prosecutor?

**MITIGATION:**

**Adrine (Prosecution):**

In Sentencing my lord, prosecution looked at the police file that I have before me my lord that has all the records so far of the convict, there is no record of previous conviction my lord. But my lord I pray for a deterrent sentence against the convict basing on the sentencing guidelines of courts, practice directions legal notice no. 8 of 2013.

**Court:**

Practice direction?

**Adrine:**

Legal notice no.8 of 2013 my lord. My lord I am looking at rule 35 that points to the degree of injury or harm as an aggravating factor. My lord basing on the trauma

and the injuries the victim suffered as a result of the act of the convict. I pray that this court uses this as an aggravating factor to give a deterrent sentence to the accused person for him to serve as an example to other members of society and to respect girl child.

The rule I cited in 235 paragraph A and my lord I am going to paragraph B of the same rule which looks at the age of the victim. The victim was of tender age who was denied a right of a joyful womanhood and proper sexual accountability in future that will cause trauma forever for having lost her pride in that manner; the way she would never have planned to do so.

My lord still on the same on paragraph H, I look at the threat or use of force or violence against the victim. From the evidence adduced before this Honorable Court, the victim was held on the mouth and she could not even make an alarm for her to be able to get any rescue and even after the sexual act she was asked not to reveal to anyone which could be interpreted as a threat and the victim adhered to it. That's why eventually the arrest came up after when police was investigating another case, had it not been for another case probably the victim would never have seen justice.

My lord I submit therefore and my last on this very matter is knowledge of the tender age of the victim. My

lord it is very clear that the convict was aware the victim was young since he had seen her for a long time and besides the age was never contested by the defence and it was never challenged any way. That shows that the accused himself knew this victim was of a tender age and he went ahead to subject her to sexual intercourse at that tender age that has left her traumatized since then God knows up to when.

My lord in the circumstances, having cited all that and looked at the manner in which the offence was committed, I pray my lord that this court gives a deterrent custodial sentence since the accused person himself did not plead guilty and also wasted court's time. I so pray my lord.

**Court:**

So for how long do you, because you are talking about custodial sentence. What is your proposal?

**Adrine:**

My lord I pray that the accused be sentenced to the rest of his natural life in prison, I so pray my lord.

**Court:**

Esther?

**Nakamatte(Defence):**

My lord I pray for a lenient sentence taking into account regulation no. 21 of the Constitutional sentencing guidelines of the courts of judicature practice direction, legal notice no.8 of 2013.

The victim is a first time offender with no previous conviction on relevant or recent conviction.

The offender was remorseful throughout the trial infact he told this Honorable Court that he got saved while in custody, so he would be useful in society.

The offender is of youthful age just aged 18 years, keeping him in custody for the rest of his life would be detrimental to society.

Court should take into account the age of the victim vis-à-vis the age of the convict and give a lenient sentence to the convict. The victim is aged 13 years and the convict is 18 years.

The trauma that has been talked about by the prosecution as posed onto the victim cannot be conclusively decided that this was the first time the victim engaged into sexual act.

**Court:**

Those are the remarks which we used to anger the young girl.

**Nakamatte:**

Pardon?

**Court:**

This is the second time uttering such words which were angering the young girl because we did not put that question to her whether she was repeatedly abused. Then for you as a mother and a lady, you would use that statement sparingly.

**Nakamatte:**

Much obliged.

**Court:**

When I was coming here this morning I heard over the radio, there is a certain MP who was saying that men should rape these ladies who put on miniskirts but they are enticing the male people. So the male MPs were castigating her to withdraw her statement. Did you hear that? Now when I was coming I was listening, so that one is a thing which is like..

**Nakamatte:**

In the premises I pray for a maxim

**Court:**



But you want us to maintain it on record?

**Nakamatte:**

No my lord

**Court:**

Ok

**Nakamatte:**

I pray for a sentence my lord approximately one year considering the fact that the accused has been on remand for a period of one year. I so pray my lord.

**Court:**

In passing the sentence the court has considered the following;

1. The summation by both counsel for both parties, how advanced convincing mitigating factors to consider mitigating factors to consider before sentencing. In the sentence process I shall adopt those factors we have advanced
2. The first offender

3. The age of the victim and that of the convict at the time the offence was committed is taken into consideration
4. Certainly I take note that the victim was violently assaulted by the convict at the time and during the time he had sexual intercourse with the accused / convict.
5. Cases of aggravated defilement are on the increase in our societies through Uganda. There is dire need to curb down this offence by courts through sentencing process so that other potential offenders can fear committing such an offence.
6. The time the accused so convict has been on remand that is from 5th April 2012 up to date 27<sup>th</sup> August 2013 has been taken into consideration when passing a sentence against the accused. Wherefore considering all the above factors, the accused is sentenced to 20 years imprisonment in prison.

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**TRIAL JUDGE**

**27/08/2013**