

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**CRIMINAL SESSION NO. 005 OF 2011**

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**UGANDA.....PROSECUTOR**

**VERSUS**

10

**KISADHA MUZAMIRU.....ACCUSED**

**BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

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**JUDGMENT**

The Accused is charged with Aggravated Defilement contrary to Section 129 (3) and (4) (a) of the Penal Code Act.

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The Accused is alleged to have committed the offence on 29/6/2010 at Bugugwa LC.I Kagawa Parish in Kamuli District when he performed a sexual act on Nangobi Jovia a girl aged 1 ½ years.

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The Accused pleaded not guilty to the charges hence requiring the prosecution to prove the charges beyond reasonable doubt as required in the celebrated case of **Woolmington Vrs. DPP.**

The prosecution is required to prove each of the ingredients of the offence beyond reasonable doubt.

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In the instant case the following ingredients must be proved:

- The age of the victim.

- That a sexual act was performed on the victim.
- That it is the Accused who performed the said sexual act on the victim.

The prosecution produced 4 witnesses to prove the charges.

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To prove Ingredient No. 1, i.e. the age of the victim, PW1 the mother testified that the victim was born in 2008 and hence was 1 ½ years at the time of the offence.

- 10 This was confirmed by PW2 Dr. Isabirye who examined the victim and filled PF.3 – wherein he reported that the victim was aged 1 ½ years at the time of the commission of the offence.

In respect of Ingredient No. 2 – sexual act performed on the victim.

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The prosecution relied on PW1 the mother of the victim who testified that when she was at her home, at around 1.00pm -2.00pm, she took one of her children into her premises to sleep.

- 20 When she came out she found the victim missing and asked the Accused who was in his room next door whether the said victim was in his room to which he answered in the affirmative.

25 She picked the child from the Accused's room who she found lying on the accused's bed. When she placed the child on her bed the child's skirt rolled up and that is when she saw semen in the girl's private parts. She confronted the Accused and according to her he asked for forgiveness. She locked the Accused in his room and made an alarm. He was arrested by those who responded.

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PW2 Dr. Isabirye who examined the victim reported on the PF.3 that the victim had inflammation of the vulva, but her hymen was not ruptured. That

the inflammation was consistent with force having been used and that the injuries were less than 24 hours old. On cross-examination he stated that penetration was manifested by the inflammation of the vulva.

- 5 PW3-the chairperson of the area testified that he was called to the scene by one Kowa. He found the accused arrested by residents. He saw semen on the thighs of the victim.

10 It has been submitted for the defence on the evidence above in respect of penetration that the prosecution did not prove penetration within the meaning of Section 129 (7) (a) of the penal Code Act.

That the Doctor's evidence did not prove that there was penetration by the sexual organ of the accused person.

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Further that the semen if it was there was not verified scientifically. Final that whereas the PW1 says the semen was on the private parts of the girl PW3 says what he saw as on the thigh of the victim (if at all it was semen). Counsel cited the case of **Katende Vrs. Uganda (1970) ULR 10.**

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The issue at this stage is whether there was an unlawful sexual act performed on the victim. Section 129 (7) (a) of the Penal Code Act defines **sexual act** as:

- 25 (a) Penetration of the vagina, mouth or anus, however slight of any person by a sexual organ.  
(b) The unlawful use of **any object** or organ by a person on another person's sexual organ.

30 In the case of **Uganda Vrs. Rwabulikwire Moses, High Court Criminal Session case 66/2001**, Justice Kania held that sexual intercourse is said to have taken place when there is the penetration of the female sexual organ by the male sexual organ.

The very slightest penetration will amount to sexual intercourse. It is not required that the hymen be ruptured or that there should be the emission of the male seed for sexual intercourse to have taken place.

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On the basis of the evidence of PW1 and especially that of the Doctor and the Law and authorities cited above, I am satisfied that indeed there was a sexual act performed on the victim in this case.

10 **Ingredient No.3 - Participation of the accused:**

The prosecution has relied on the evidence of PW1 who found the victim in the accused's premises and when she saw semen on the girl's private parts she took the necessary steps to ensure that the accused was apprehended. PW3 responded to a call, found the accused arrested by residents who  
15 wanted to lynch him.

Both PW1 and PW3 saw semen one on the private parts of the girl and PW3 on the thighs of the victim. PW1 is a married woman and I am sure she knows what semen looks like. PW3 is also a mature male adult who should  
20 know semen as opposed to other substances. Infact he stated so in his evidence.

The accused happened to be the only male at the locality at the material time and secondly, in his own evidence in Court, he stated that the victim  
25 was indeed in his room at the material time.

The accused's defence is that he was framed by PW1 and her boyfriend - Balista so that he is forced to move away as he was likely to inform PW1's husband about the raging love affair between the two. That indeed he even  
30 one day found them having sexual intercourse outside their house.

Secondly that even if the victim was in his house on the material day, the said child was playing on the mat near his bed, while the accused was seated on a bench, preparing his meal.

5 It has been submitted by the defence that first, the semen if it was there was not linked to the accused by scientific evidence.

Secondly, that there was no corroboration between the chairman and the mother's evidence (PW1). He cited the case of **Katende Vrs. Uganda (1970) ULR 10** where it was held that in sexual offences, there is need for  
10 corroboration by either direct or circumstantial evidence.

Thirdly, the fact that the accused was beaten and his phone taken during the process of arresting him shows that he was set up so that he gets into problems.

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The prosecution on the other hand has submitted that the authority cited has been overtaken by the decision in **Uganda Vrs. Njilu**.

In sexual offences, there is need for corroboration, although the Court may  
20 still convict on the uncorroborated evidence once it has so cautioned itself on relying on such evidence.

I have considered the submissions and the evidence by both the prosecution and the defence. A lot of the evidence against the accused is  
25 circumstantial, for example, the evidence by the Doctor about the inflammation of the private parts of the victim, the evidence of the semen found on the victim by PW1 and PW3, the evidence that indeed the victim was found in the accused's room, which is not denied by the accused, I have also considered that of the two adults at the scene at the material time, the  
30 accused was the only adult male who was capable of discharging semen. The said circumstantial evidence can only lead to the conclusion that the accused is the culprit and indeed defiled the victim.

I have failed to find any substance and credibility in the story by the accused that he was framed by PW1 in order to get him away from the premises. His allegation that he found PW1 and one Batista making love against the wall sounds more like fiction and there is no connection between the said story and the available evidence pointing to the accused's guilt.

The inculpable facts available are incapable of explanation upon any other hypothesis other than that of guilt.

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I also found no co-existing circumstances that point to the innocence of accused. The position on circumstantial evidence has been laid out in a host of authorities including the one cited by the prosecution viz: **Simon Musoke Vrs. R (1958) EA.**

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The Assessors' opinion was that on the evidence available there was no other conclusion other than that of guilt.

It is my finding therefore as is that of the Assessors that the accused committed the offence he is charged with.

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I accordingly find him guilty as charged of the offence of Defilement, contrary to section 129 (3) and (4) (a) of the Penal Code Act, and convict him accordingly.

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**Godfrey Namundi**  
**Judge**

30 **12/11/2013**

12/11/2013:

5 Accused in Court

Prosecution: Kitimbo

Defence: Aguma

Court: Judgment delivered in open court.

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**Godfrey Namundi**

**Judge**

15 **12/11/2013**

20 Prosecution: The offence carries a maximum sentence of death. The Sentencing guidelines show the things should consider in aiming at the sentence. The victim was only 1 ½ years – while the accused was 19 years at the time, a deterrent sentence is called for.

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25 Aguma: The accused person deserves leniency in this matter while sentencing due to:

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- He is a first offender,
- He has been on remand for a very long time,
- The manner in which his rights were violated during his arrest and even the circumstances have a cloud before this Court, and are not clear.
- He is a young man who deserves a corrective sentence rather than a punitive one.

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- He is in the productive age.
- He should be given a lenient sentence. Life imprisonment is not lenient. 5 years would be sufficient.

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Court:

**Sentence**

The court has taken into account the period of remand, the age of the victim and that of the accused.

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He is a young man who has a long productive age ahead of him. However, the victim is so young that there is no excuse for the accused to have been tempted into what he did.

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The maximum sentence for this offence is 12 years. However, I find a term of 12 years appropriate in the circumstances.

20 **Godfrey Namundi**

**Judge**

**12/11/2013**

Right of appeal explained.

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**Godfrey Namundi**

**Judge**

**12/11/2013**

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