

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0143 OF 2012

UGANDA

PROSECUTOR

VERSUS

MALIYA YASSIN

ACCUSED

Before Hon. Justice Stephen Mubiru

RULING

The accused in this case is indicted with one count of Defilement c/s 129 (1) of the *Penal Code Act*. It is alleged that the accused on the 22nd day of January 2012 at Indranogomundi Trading Centre in Koboko District, had unlawful sexual intercourse with Faida Raima a girl under the age of 18 years. The accused pleaded not guilty to the indictment. In a bid to prove the indictment against the accused, evidence of one witness was admitted during the preliminary hearing and the prosecution called one additional witness then closed its case.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v R [1960] E.A. 184 and Kadiri Kyanju and Others v Uganda [1974] HCB 215*).

A *prima facie* case is established when the evidence adduced is such that a 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 (See *Rananlal T. Bhatt v R. [1957] EA 332*). The evidence adduced at this stage, should be sufficient to require the accused to offer an

explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] *ALL E.R 448* and also applied in *Uganda v Alfred Ateu* [1974] *HCB 179*, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence,
or
- b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

It was the submission of the learned State Attorney prosecuting the case, Senior Resident State Attorney Ms. Harriet Adubango, that sufficient evidence had been adduced establishing a *prima facie* case against the accused such as would require him to be put to his defence. On his part, the learned defence counsel, Mr. Ben Ikilai, submitted that although the other elements of the offence were not contested, the prosecution had failed to adduce sufficient evidence in relation to the identification of the accused as the perpetrator of the offence and had therefore failed to establish a *prima facie* case against him. Consequently, he argued that the accused should be acquitted.

At this stage, I have to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of Rape, if the accused chose not to say anything in his defence, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend himself, the prosecution must have led evidence of such a quality or standard on each of the following essential ingredients;

1. That the victim was below 18 years of age.
2. That a sexual act was performed on the victim.
3. That it is the accused who performed the sexual act on the victim.

Regarding the ingredient requiring proof of the fact that at the time of the offence, the victim was below the age of 18 years, the most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child (See *Uganda v Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

In the instant case, there was no direct evidence of the victim who PW2 reported had migrated to the Democratic Republic of Congo. The court was instead presented with medical evidence of PW1 (Musa Noah) a Senior Medical Officer at Koboko Health Centre IV who examined the victim medically on 24th January (two days after the date of the alleged offence) and found her to have been 15 years old at the time. His report was tendered as prosecution exhibit P.E.1. This evidence was admitted during the preliminary hearing and has not been contested in the submissions on a case to answer. I therefore find that the prosecution led sufficient evidence capable of supporting a finding that by 22nd January 2012, Faida Raima was a girl under the age of 18 years, if the accused chose not to say anything in his defence.

The second ingredient requires proof of the fact that the victim was subjected to a sexual act. One of the definitions of a sexual act under section 129 (7) of *the Penal Code Act* is penetration of the vagina, however slight, of any person by a sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. In the instant case, the prosecution presented medical evidence of PW1 (Musa Noah) a Senior Medical Officer at Koboko Health Centre IV who examined the victim medically on 24th January (two days after the date of the alleged offence) and found; scratches on the thighs, abrasions and bruises on the knees, the vaginal introitus was hyperemic (inflamed) and sore. The hymen was ruptured with a white discharge. The victim was in pain and all this was consistent with force having been used sexually in a period less than a week before that examination. His report was

tendered as prosecution exhibit P.E.1. This evidence was admitted during the preliminary hearing and has not been contested in the submissions on a case to answer. I therefore find that the prosecution led sufficient evidence capable of supporting a finding that, Faida Raima was subjected to an act of sexual intercourse, if the accused chose not to say anything in his defence.

The last ingredient requires proof that it is the accused who committed the unlawful act of sexual intercourse with the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. There is no eyewitness account as to who committed the act. All that is available is a report that was made to PW2 (Obiga Safi) a paternal uncle of the victim, who found her and the accused at the police station following the arrest of the accused. It is at the police station that the victim told him that it is the accused that had defiled her. I have considered the decision in *Mayombwe Patrick v Uganda C. A. Crim. Appeal No.17 of 2002* where it was held that a report made to a third party by a victim in a sexual offence where she identifies her assailant to a third party is admissible in evidence. Although the court decided that such evidence is admissible, it did not hold that on its own, it is evidence capable of sustaining a conviction. It is my considered opinion that such evidence can only corroborate other credible evidence. I am also aware that failure by the victim to testify is in itself not fatal to the prosecution case (See *Patrick Akol v Uganda, S.C. Cr. Appeal No. 23 of 1992*). However in such cases, such failure is not fatal only if there is other cogent evidence pointing irresistibly to the accused as the defiler.

For example in *Nfutimukiza Isaya v Uganda C.A. Crim. Appeal No.41 of 1999*, although the victim did not testify, the appellant was last seen with the victim when she was walking with a normal gait as they entered the plantation. A few minutes later when the victim emerged from the plantation she was walking with an awkward gait and her skirt was wet on the rear. This aroused her sister's suspicion that she might have been defiled. That suspicion was confirmed by their mother and the doctor who examined the victim. In the instant case, there is no direct, circumstantial or other cogent evidence pointing irresistibly to or showing that it is the accused that had sexual intercourse with the victim. I have formed the opinion that if the accused chose to remain silent, this court would not have evidence sufficient to hold him responsible for the unlawful act of sexual intercourse with the victim. I therefore find that no prima facie case has been made out requiring the accused to be put on his defence. I accordingly, find the accused not

guilty and hereby acquit him of the offence of Defilement c/s 129 (1) of the *Penal Code Act*. He should be set free forthwith unless he is lawfully held on other charges.

Dated at Arua this 23rd day of August, 2016.

Stephen Mubiru

Judge.