

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT MOROTO**  
**CRIMINAL SESSIONS CASE No. 0123 OF 2015**

**UGANDA** ..... **PROSECUTOR**

**VERSUS**

**FRENDO ABUBAKR LOLEM** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It is alleged that the accused on the 13<sup>th</sup> day of October 2014 at Kaabong Hospital Female Ward, Kaabong Town Council in Kaabong District, had unlawful sexual intercourse with Hamida Joan, a girl under the age of fourteen years while he was HIV positive.

The prosecution case briefly is that on that some time during late September 2014 the victim, P.W.4 Hamida Joan, then an orphaned Primary six pupil in at Nabilatuk Primary School, went to her Auntie's home situate in Kaabong Town Council to ask for her help with school fees. During her stay there, one day the accused met her at home and asked for drinking water which she gave him where after he gave her his phone contact and asked her to call him any time. The victim did not call but on 13<sup>th</sup> October 2014 when she complained of malaria, her aunt P.W.3 Joyce Ilukori sent her to Kaabong Hospital to receive treatment. At around 4.00 pm while on her way to the hospital, she met the accused within the hospital premises repairing a motor vehicle. He did not talk to her but later followed her into the ward after she had been admitted and offered to be her attendant. The victim declined the offer but was surprised when deep into the night she awoke to find someone on top of her performing an act of sexual intercourse. She flashed her torch and recognised the person as the accused. The accused soothed her, asked her not to tell anyone about the incident and promised to marry her. They had another episode of sexual intercourse where after he advised her to go and take a bath. On the way to the bathroom she realised semen and blood were oozing from her private parts. She returned from the bath room and spent the rest of the night with the accused on the hospital bed until the following morning at around 6.00 am

when the accused bid her farewell. The medical personnel who met the accused on his way out became suspicious and asked her whether the accused had done anything wrong to her. When she bowed her head they became suspicious and upon being pressed further she revealed what had taken place during the night. She was instantly provided with PEP meant to prevent HIV transmission from the accused to her since the accused was known to be HIV positive. The accused was arrested two days later and both of them were subjected to medical examination. In his defence, the accused denied the accusation, put up an alibi and attributed the false accusation to political differences between him and the victim's auntie P.W.3 Joyce Ilukori.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitooleko v. Uganda* [1967] EA 531). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

For the accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

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.
4. That at the time of performing that sexual act, the accused was HIV positive.

The first ingredient of the offence requires 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, the court was presented with the oral testimony of the victim P.W.4 Hamida Joan who said she was 17 years at the time she testified, thus placing her age at 14 years nearly three years ago when the offence is alleged to have been committed. Her Auntie, PW3 Joyce Ilukori stated that the victim was born in 1999 and that would imply that she was 15 years old at the time the offence was committed. The admitted evidence of P.W.2 Dr. Kenneth Nyombi, who examined the victim on 15<sup>th</sup> October 2014, two days after the day the offence is alleged to have been committed as contained in his report, exhibit P.Ex.2 (P.F.3A) is to the effect that the victim was of the estimated age of 15 years at the date of examination, based on her dentition. The court had the opportunity to observe the victim in court as she testified and is thereby in position to form an opinion as to her age from personal observation. Counsel for the accused did not contest this ingredient during cross-examination of these witnesses and neither did he do so in his final submissions. From all that evidence and in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Hamida Joan was a girl under 18 years as at 13<sup>th</sup> October 2014.

The second ingredient required for establishing this offence is proof 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 by the sexual organ of another or unlawful use of any object or organ on another person's sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence, (See *Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)*). The slightest penetration is enough to prove the ingredient.

In the instant case, the court was presented with the oral testimony of the victim of P.W.4 Hamida Joan, who testified that she awoke from her sleep on the hospital bed to find that a man was lying on top of her and his entire male sexual organ was inside her female sexual organ. She felt pain as it was her first sexual encounter. After the act, she saw blood and semen on her thighs and on her panties as she went to the bathroom to bathe. This is corroborated by the

admitted evidence of P.W.2 Dr. Kenneth Nyombi, who examined the victim on 15<sup>th</sup> October 2014, two days after the day the offence is alleged to have been committed. Although in his report, exhibit P.Ex.2 (P.F.3A) his findings were that there was "no sign of recent trauma on the *mons pubis* (the rounded mass of fatty tissue found over the pubic bones) or thighs and that "the intra-ovitus is normal, the hymen is broken but not of recent. The *frenulum* (where the *labia minora* meet at the back) is non-haematoma....." he observed that "the girl reports penetration of her vagina by a penis two days ago. Her hymen is already broken but not just recently. Consider the girl's testimony and that of the witnesses." His other observations were that " a young girl, sad with a low affect, not easily releasing information....emotionally downcast with a low affect...the girl is downcast."

Counsel for the accused contested this ingredient during the trial and in his final submissions mainly on account of lack of corroborative evidence from witnesses who were present in the female ward or from the hospital administration. According to section 133 of *The Evidence Act*, no particular number of witnesses in any case is required for the proof of any fact. Consequently, the testimony of the victim alone, if believed, is sufficient to establish any fact that requires proof. It is only if some aspect of that testimony is found unreliable or lacking that the court will look for corroboration. In any event, the law regarding corroboration of the victim's evidence in sexual offence cases is that, the trial Judge has to warn the assessors and himself of the danger of acting on the uncorroborated testimony of the victim. However, having done so, the Judge can convict without corroboration of the victim's evidence provided he or she is satisfied that the victim was a truthful witness see *Kibale v. Uganda [1999] 1 EA 148; Mugoya v. Uganda [1999] 1 E.A 202* and *Mohammed Kasoma v. Uganda, S. C. Criminal Appeal No. 1 of 1994*). In the instant case, I observed the victim as she testified. Even under rigorous cross-examination by defence counsel she remained composed and steadfast. I found her to be a truthful witness whose evidence could be relied upon without corroboration.

That said, although the medical examination did not reveal any recent injuries in the private parts of the victim, it should be borne in mind that it took place two days after the event and after the victim had bathed. In any event, her account of the sexual encounters does not suggest that it was forceful. On the other hand, the examination appears to have been limited to the external features

of her genitalia and not the interior where from the account of the victim, the bleeding appears to have originated. It is notable that other details in the report such as the distressed condition of the victim two days after the incident is corroborative of her evidence. In sexual offences, the distressed condition of the victim is capable of corroborating her evidence (see *R v. Zielinski (1950)*, 34 Cr. App. R. 193; *R v. Alan Redpath* 46 Cr. App. R. 319 and *Kibazo v. Uganda [1965] E.A. 509*). Although counsel for the accused contested this ingredient during the trial and in his final submissions, in light of the quality of evidence furnished by the prosecution, and in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt that Hamida Joan was the victim of a sexual act on the night of 13<sup>th</sup> October 2014.

The third essential ingredient required for proving this offence is that it is the accused that performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. The accused denied having committed the offence. He testified that he spent the night of 13<sup>th</sup> October 2014 at Kotido where he had taken passengers with his employer's motor vehicle, a Toyota Noah. The victim's Auntie P.W.3 was one of his passengers that day. He returned to Kaabong the following day 14<sup>th</sup> October 2014 and proceeded to Karena where he spent the night and only returned to Kaabong on 16<sup>th</sup> October 2014 on being summoned by phone by the O/c Station to answer allegations of defilement of the victim in this case. He was not anywhere near the hospital on the fateful day and believes he was maliciously implicated by P.W.3 on account of a personal vendetta arising out of political differences between him and the husband of this witness whose husband he de-campaigned during two previous campaigns for political offices in Kaabong. In short, the accused relies on the defence of alibi and grudge.

Where an accused raises the defence of alibi he has no duty to prove it. The duty lies on the prosecution to disprove a defence of alibi and place the accused at the scene of crime as the perpetrator of the offence (see *Festo Androa Asenua and another v. Uganda, S. C. Criminal Appeal No.1 of 1998* and *Cpl. Wasswa and another v. Uganda, S.C. Criminal Appeal No. 49 of 1999*). To disprove the defence of alibi raised by the accused, the prosecution relies on the testimony of P.W.3 Hamida Joan the victim. Where prosecution is based on the evidence of an indentifying witness under difficult conditions, the Court must exercise great care so as to satisfy

itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R* (1953) E.A.C.A 166; *Roria v. Republic* [1967] E.A 583; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. 1 of 1997*).

In the instant case, Hamida Joan testified that he knew the accused before the incident when he came to their home and asked for drinking water which he gave him. The accused gave her his phone number and asked her to call him. She met him the second time on 13<sup>th</sup> October 2014 at around 4.00 pm as he repaired a vehicle within the Kaabong Hospital compound on her way to that hospital for malaria treatment. Upon her admission, he followed her into the female ward where he offered to be her attendant which offer she declined. She awoke at around 11.00 pm that night to find a man lying on top of her having sexual intercourse with her. The lights had been switched off. She flashed her torch and recognised the accused. The accused admitted to her that it is him who had switched off the lights. He asked her not to tell anyone what had occurred and he promised to marry her. After the second act of sexual intercourse, he asked her to take a bath. When she returned from the bathroom she found the accused has switched the light on again. He spent the rest of the night with her in the hospital bed until day break at around 6.00 am when he bid her farewell.

Although Counsel for the accused contested this ingredient during cross-examination of this witness and in his final submissions, I find that the witness knew the accused before the incident, he had come into the female ward earlier in the day and they had chatted as he offered to be her attendant, when he lay on top of her she flashed a torch, he talked to her as he made promises to her, on her return from the bathroom he had switched on the lights again and they spent the rest of the night together until day break. I find that she had ample time to recognise the accused both visually and by voice. her evidence is free from the possibility of error or mistake.

It was suggested further that the accused is falsely implicated by reason a grudge that existed between him and the victim's auntie P.W.3 arising from political difference. I find the suggestion of a grudge to be more or less an afterthought in as much as its details were never put to this witness during her cross-examination. Even if the accused were to be extended the benefit of the doubt that indeed such a grudge existed, it is not clear, in absence of a conspiracy, how the

victim at her age would become embroiled in such a grudge involving local politics of an area where she is not ordinarily resident and where she had only been resident for two or so weeks as a visitor to her auntie. I observed both P.W.3 and P.W.4 testify. Instead of the closeness that one would expect between conspirators, I saw open hostility of the auntie towards her niece for the shame and embarrassment this incident caused her. Indeed the victim broke down and shed tears as she recounted how the entire family, including her mother and auntie abandoned her after the incident. That this witness would be involved in a conspiracy to implicate the accused is an outrageous suggestion. Therefore in agreement with the assessors, I find that the defence raised by the accused has been successfully disproved by the prosecution. There is no possibility of mistake or error in the evidence placing the accused at the scene of crime as the perpetrator of the offence and the defence of a grudge is not plausible. This ingredient has been proved beyond reasonable doubt.

The last essential ingredient requires proof that at the time of performing the sexual act, the accused was HIV positive. To prove this element, the prosecution relied on the admitted documentary evidence, exhibit P.Ex.1 (P.F.3A) certifying the findings of Dr. Angella John Bosco of Kaabong Hospital who on 16<sup>th</sup> October 2014, three days following the date on which the offence is alleged he committed. He examined the sero-status of accused and found him to be HIV positive. In his defence, the accused admitted that he has since the year 2002 known his sero-status to be HIV positive. It is now common knowledge that HIV is not detectable immediately after infection. There is a “window period” soon after infection during which the presence of the virus in the human body cannot be detected by diagnostic tests. The window period occurs between the time of HIV infection and the time when diagnostic tests can detect the presence of antibodies fighting the virus. The length of the window period varies depending on the type of diagnostic test used and the method the test employs to detect the virus.

Furthermore, it is still common knowledge that if an HIV antibody test is performed during the window period, the result will be negative, although this will be a false negative since the virus will be present in the body, only that it cannot be detected yet. At page one of his paper published in November 2011 entitled, *The HIV Seronegative Window Period: Diagnostic Challenges and Solutions*, Mr. Tamar Jehuda-Cohen of SMART Biotech Ltd. Rehovot Israel;

and Bio-Medical Engineering, Technion Israel Institute of Technology, Haifa, Israel reveals that scientific research has established that it takes 95% of the population approximately three months to seroconvert following HIV infection. The window period therefore is generally three months. In the instant case, since the HIV diagnostic test done on the accused on 16<sup>th</sup> October 2014, three days after the incident turned out positive, it implies that the window period had elapsed. He therefore must have contracted the virus not less than three months prior to the date of that test, i.e. latest July 2014 and was therefore carrying the virus by 13<sup>th</sup> October 2014 when he had sexual intercourse with the victim, PW3. Counsel for the accused did not contest this during cross-examination of the prosecution witnesses and in his final submissions. In agreement with the assessors, I therefore find that this ingredient too has been proved beyond reasonable doubt.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby convict the accused for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) and (b) of the *Penal Code Act*.

Dated at Moroto this 30<sup>th</sup> day of September, 2017.

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Stephen Mubiru  
Judge.  
30<sup>th</sup> September, 2017