

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT MOROTO**  
**CRIMINAL SESSIONS CASE No. 0086 OF 2015**

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

**VERSUS**

**LOMERIMOE PETER** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (d) of the *Penal Code Act*. It is alleged that the accused on the 28<sup>th</sup> day of August 2014 at Kapilanbar West, Kaabong District, had unlawful sexual intercourse with Napwon Mary, a girl under the age of 18 years who is an imbecile.

The facts as narrated by the prosecution witnesses are briefly that on that fateful evening, Napwon Mary, an imbecile, went missing and her brother, P.W.3 Awala Angelo, got concerned for it was getting dark and she had not returned home. He went out to search for her. As he passed by the house of the accused, he heard voices coming from inside the house. He recognised one voice as that of his sister and the other as that of the accused. His sister was telling the accused not to hold her skirt. He pushed the door open and found his sister naked and the accused half naked; without a shirt and his pair of trousers lowered to around his knees. They were lying on a mattress that had been placed on the floor. When Awala Angelo gained entry into the house, the two got up and sat on the mattress. He suspected that the accused had just defiled his sister. He went back home and briefed his brother P.W.4 Ilukol Saulo. Together they returned to the scene and found the accused and their sister still seated on the mattress. They attempted to arrest the accused but his relatives intervened violently and stopped them from taking him to the police. They proceeded to the police with their sister and reported the case. Together with three policemen they returned to the scene and found the accused had shifted to another house within the same homestead. The accused was arrested. In his defence he denied

having had sexual intercourse with the accused and stated that he was being falsely accused by P.W.4 who had killed his brother and had suddenly gone missing.

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 *Ssekitoleko 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. The victim is a person with disability
3. That a sexual act was performed on the victim.
4. That it is the accused who performed the sexual act on the victim.

The first ingredient of the offence of Aggravated defilement is 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*).

P.W.2 Napwon Mary appeared in court but was incoherent and therefore did not testify about her age. The prosecution instead relied on the testimony of P.W.3 Awala Angelo her immediate elder brother, who stated that he was 17 years old since he was born on 4<sup>th</sup> May 2000 and Napwon Mary is younger than him. P.W.4 Ilukol Saulo, her other elder brother once removed,

was more specific. He testified that Napwon Mary is 15 years old having been born during the year 2002. However, P.W.1 Dr. Angella John Bosco of Kaabong Hospital, examined the victim on 29<sup>th</sup> August 2014, a day after the one on which the offence is alleged to have been committed. In his medical report, exhibit P.Ex.1 (P.F.3A) he certified his findings that the victim was about 17 years old based on the stage of development of her sexual characteristics. Counsel for the accused contested this ingredient during cross-examination of P.W.3 and P.W.4 and in her final submissions. Although counsel for the accused contested this element arguing that none of the two witnesses could specify her age, in agreement with the assessors, I find that on basis of the court's own observation of the victim when she turned up in court and the fact that she cannot have been older than P.W.3 her immediate elder brother, I am inclined to find that the prosecution evidence has proved beyond reasonable doubt that Napwon Mary was about twelve or thirteen years at the time of the offence and was therefore a girl below eighteen years as at 28<sup>th</sup> August 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, P.W.2 Napwon Mary appeared in court but was incoherent and therefore did not testify about the occurrence or otherwise of the alleged sexual act. P.W.3 Awala Angelo, her immediate elder brother, stated that he heard her voice inside the house of the accused as she told the accused not to hold her skirt. When he pushed the door open, he found her lying naked on a mattress placed on the floor with the accused who did not have a shirt on while his pair of trousers was around his knees. The two of them immediately sat upright on the bed. He went to call his brother and together they returned to the scene. They found the pair still seated on the bed. The victim was still naked and the accused was without a shirt on while his pair of trousers was around his knees. P.W.4 Ilukol Saulo, her other elder brother once removed, testified that

when he went to the scene, he saw that Napwon Mary did not have her skirt on. The pair trousers of the accused was down his legs. The admitted evidence of P.W.1 Dr. Angella John Bosco of Kaabong Hospital, who examined the victim on 29<sup>th</sup> August 2014, a day after the one on which the offence is alleged to have been committed, which is contained in his medical report, exhibit P.Ex.1 (P.F.3A) is to the effect that she had a "torn hymen with small lacerations in the vagina." There was "no sign of STI or pus discharge." This evidence corroborates that of P.W.3 and P.W.4. Although counsel for the accused contested this ingredient during her cross-examination of the two witnesses and in her final submissions, it is trite that the slightest penetration is sufficient (see *Gerald Gwayambadde v. Uganda* [1970] HCB 156; *Christopher Byamugisha v. Uganda* [1976] HCB 317; and *Uganda v. Odwong Devis and Another* [1992-93] HCB 70).

The fact that the recently torn hymen and small lacerations in the vagina had not emitted any pus discharge at the time the victim was examined by the doctor suggests that either the injuries were recent or the victim was very hygienic. I am inclined to find that it is the former considered within the context of the circumstantial evidence of both P.W.3 and P.W.4 who had found her in circumstances suggestive of an act of sexual intercourse having taken place before their intervention. Therefore, in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

The prosecution was further required to prove that at the time of the sexual act, the victim was a person with a disability. According to section 129 (7) of *The Penal Code Act*, "disability" means a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation. P.W.2 Napwon Mary appeared in court but was incoherent. P.W.1 Dr. Angella John Bosco of Kaabong Hospital who examined her on 29<sup>th</sup> August 2014, a day after the one on which the offence is alleged to have been committed, stated in his report, exhibit P.Ex.1 (P.F.3A) when commenting on his findings about the mental status of the victim, that she is an "imbecile - uncoordinated behaviour and emotions." Counsel for the accused did not contest this fact in her final submissions. Having observed the victim in court and on basis of the medical report, the prosecution has proved

beyond reasonable doubt that the victim was a person with a mental disability at the time of the offence.

The last 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 any participation. He stated that his house was incomplete at the time and was without a roof. He was therefore ordinarily resident at the Community Centre where he spent the nights. On the fateful evening, he was at that community Centre only to be surprised with an arrest on allegations of having defiled the victim. He attributed the false accusation to the fact that his brother had been killed by P.W.4 who had now turned against him to evade responsibility for that death.

To place him at the scene of crime in order to disprove the defence set up by the accused, the prosecution relies partly on circumstantial evidence and partly on direct evidence. P.W.3 testified that he found the accused and the victim together inside the accused's house in circumstances which suggested that a sexual act had just taken place. His testimony was corroborated by that of P.W.4. The findings of P.W.1. corroborate the suspicion of the two witnesses that a sexual act had just taken place since fresh injuries were found in the victim's genitals.

Counsel for the accused contested this ingredient during cross-examination of the two prosecution witnesses and in her final submissions. She argued that P.W.2 told court that she knew the accused but she had never been to his home and neither had the accused been to her home and that she had no relationship with the accused and that nothing happened between them. The two witnesses could not have found her at a place she has never been to. The two witnesses said they never witnessed the sexual act. P.W.4 got a narrative from P.W.3. Their evidence of arrest of the accused is contradictory. One said that it occurred at the house of the Aunt while the other said it was at the grandfather's. One said it involved three police officers while the other said that he took him to the police but was intercepted by a crowd. These contradictions leave the evidence uncertain. None of the arresting officers came to court and omission of the arresting officers cannot be ignored. It is possible that someone else committed the act.

I have considered the contradictions regarding the circumstances in which the accused was arrested. It is trite law that that grave contradictions unless satisfactorily explained may, but will not necessarily result in the evidence being rejected and minor contradictions and inconsistencies, unless they point to a deliberate untruthfulness, will usually be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002 and Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. I find the contradictions minor in that it is common ground between the two witnesses that the accused was not arrested at the Community Centre as he claimed in his defence but within the homestead where he and his other relatives lived. He was not arrested at his house where the two witnesses found him in a compromising situation but in another house of one of his relatives within the same homestead. As to whether that other house was that of his auntie or grandfather, in the circumstances is a minor contradiction that does not point to deliberate untruthfulness by either witness. Although the testimony of the arresting officers would have been desirable to clarify this part of the prosecution evidence, its omission is not fatal either.

The accused raised an alibi and the existence of a grudge between him and P.W.4 as his defences. None of these defences were put to any of the witnesses during their cross-examination. They were practically sprung on the prosecution during the defence stage of the case. Consequently, I reject the two defences as a mere afterthought. In their testimony, both P.W.3 and P.W.4. stated that they knew the accused very well before the incident and that they recognised him when they saw him inside his house. P.W.3. recognised him by voice as well before he gained entry into the house. The accused lived approximately 100 metres from their home. The accused claimed that his house was incomplete at the time but he never put this to any of the two witnesses during cross-examination. Where prosecution is based on the evidence of indentifying witnesses, and more so where the conditions were not favourable to correct identification, 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). I have considered the fact that the witnesses saw the accused sometime after 8.00 pm but by reason of the proximity of their home to that of the accused, there were opportunities for frequent interactions between the accused and the two identifying witnesses, since they lived in the same neighbourhood. I am satisfied that in the circumstances, there is no possibility of error in their identification and recognition of the accused.

I have considered the possibility that the victim could have been defiled by someone else based on the evidence that sometime she wandered off alone. This possibility was refuted by P.W.4. who testified that although she once in a while did that, she would never leave the precincts of the neighbourhood. I find that on basis of the evidence taken as a whole, that someone other than the accused could have defiled the victim is a very remote fanciful possibility without any degree of probability. Where the prosecution case rests on circumstantial evidence, it is the requirement of the law that in order for the court to sustain a conviction on basis of such evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Simon Musoke v. R* [1958] EA 715, *Mwangi v. Republic* [1983] KLR 327, *R v. Kipkering Arap Koske and another* (16) EACA 135 and *Sharma Kooky and another v. Uganda* [2002] 2 EA 589 (SCU) 589 at 609). The entire circumstantial evidence in this case irresistibly points to the guilt of the accused. Therefore in agreement with both assessors, I find that both defences of the accused have been disproved and that it has been proved beyond reasonable doubt that it is him who committed the sexual act. 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) (d) 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