

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT MOROTO**  
**CRIMINAL SESSIONS CASE No. 0150 OF 2015**

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

**VERSUS**

**LONGORI APAKURUK** ..... **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 25<sup>th</sup> day of December 2014 at Poet Ward, Nakapelimoru sub-county in Kotido District, performed an unlawful sexual act with Lotyang Lokiru, a girl below fourteen years.

The facts as narrated by the prosecution witnesses are briefly that on that fateful night, the victim was sleeping in her parents' house together with her other siblings. Deep in the night, she awoke to find a man on top of her performing an act of sexual intercourse. She together with her siblings began to shout while fighting off the assailant. Hearing the commotion, her mother P.W.2 Maria Lopera rushed to their room with a torch with P.W.3 Apei Lokolikomol the father of the victim following hot on her heels. They found it was the accused having sexual intercourse with their daughter. P.W.2 pulled the accused off her daughter and was assisted by P.W.3 to arrest the accused. The accused was totally naked. They tied a chain around his waist and detained him in the house until the following morning when they relayed news of the events of the previous night to the relatives of the accused. They brought him clothes and he was taken to the police. The accused chose to remain silent in his defence and did not offer any evidence.

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 14 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.

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 14 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*).

The prosecution relies on the testimony of the victim, P.W.3 Lotiang Nakong, who stated that she was 13 years old at the time she testified, hence 10 years old nearly three years ago when the offence is alleged to have been committed. Her mother P.W.2 Maria Lopera said the victim is now 16 years old and was born at the time the time an army brigade was stationed in the area. She did not specify when this occurred. P.W.3 Apei Loklikomol, her father, did not specify her date of birth either. However P.W.1 Jodukyo Ignatius, a Senior Clinical Officer at Lokitere Health Centre III who examined the victim on 4<sup>th</sup> January 2015, ten days after the date on which the offence is alleged to have been committed, in his report, exhibit P.Ex.1 (P.F.3A) certified his findings that the victim was ten years old at the time of that examination, based on information provided by the mother and the stage of her dental development. The court as well had the opportunity to observe the victim in court. She had to undergo a *voire Dire* before her testimony

could be received. The court observed her mannerisms, timidity, shyness and unease in the presence of strangers. In the court's opinion, these were characteristics associated with tender age not mere socialisation. Although counsel for the accused contested this element arguing the girl may have looked younger than her true age and that the parents could not specify her age, in agreement with the assessors, I find that on basis of that evidence the prosecution has proved beyond reasonable doubt that Lotyang Lokiru was a girl below fourteen years as at 25<sup>th</sup> December 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 P.W.3 Lotiang Nakong who stated that she woke up to find a man having sex with her. Her mother P.W.2 Maria Lopera testified that she woke up after hearing the children making noise. She went to their room with a torch and found a man on top of her daughter performing an act of sexual intercourse. She pulled him off and in fact pulled the assailant's penis out of the victim's vagina. P.W.3 Apei Lokolikomol the father of the victim testified that he too woke up after hearing the children making noise. He rushed to their room following his wife who had a torch and found a man on top of her daughter performing an act of sexual intercourse. Although her did not examine her private parts, he saw blood on the legs of the girl. P.W.1 Jodukyo Ignatius a Senior Clinical Officer at Lokitere Health Centre III who examined the victim on 4<sup>th</sup> January 2015, ten days after the date on which the offence is alleged to have been committed, stated in his report, exhibit P.Ex.1 (P.F.3A) that the hymen was ruptured and the inner lips of the vagina had recent sores and that the ruptured hymen could be due to penetration with a penis. To constitute a sexual act, it is not necessary to prove that there was deep penetration, the use of a sexual organ, the emission of seed or breaking of the hymen. 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). Therefore, in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

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 opted to remain silent in his defence. To place him at the scene of crime, the prosecution relies on the testimony of P.W.2 Maria Lopera who testified that she pulled him off and in fact pulled his penis out of the victim's vagina where after he was assisted by her husband to tie him with a chain around his waist. P.W.3 Apei Lokolikomol the father of the victim testified that he assisted his wife in arresting the accused and tied him with a chain around his waist. He spent the rest of the night naked inside the house and at daybreak his relatives were alerted. they brought him clothes and he was taken to the police station. The victim P.W.3 Lotiang Nakong contradicted them when she said the accused was arrested the following day from his home. Counsel for the accused argued that this and other contradictions and inconsistencies are major contradictions and that the conditions in the house were not favourable to correct identification. I nevertheless find that the tender age of the victim at the time may have affected her recollection of this aspect of the events and is not a deliberate endeavour on her part or that of her parents to mislead court. The accused was caught *in flagrante Delicto* and had no opportunity to escape from the scene which squarely places him at the scene of crime as the perpetrator of the offence with which he is indicted. Therefore in agreement with both assessors, I find that this ingredient 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) of the *Penal Code Act*.

Dated at Moroto this 27<sup>th</sup> day of September, 2017.

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