

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0182 OF 2016

UGANDA **PROSECUTOR**

VERSUS

ANYOLITHO DENIS **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused in this case is indicted 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 14th day of October 2013 at Dei village in Nebbi District, performed a sexual act with Kayeni Pacia, a girl aged four years.

The facts as narrated by the prosecution witnesses are briefly that P.W.3 D/Sgt. Wathum Mabernga Gelasyous, the Investigating Officer was at Dei Police Post as the Officer in Charge of that police post when the Chairman of Dei village L.C.1 brought him the accused together with the victim on suspicion that the accused had defiled the victim. On checking the accused, he found wet semen on the underpants of the accused. He directed the accused to remove the pants, which he exhibited and referred both the accused and the victim to PW1, Mr. Amule Lynus, a Medical Officer at Panyimur Health Centre III whereupon he found the victim to be aged four years and she had stains on the victim's panties but with no evidence of penetration. He characterised his findings as evidencing attempted defilement. At the trial, the evidence of P.W.1. was admitted at the preliminary hearing and only P.W.3 testified. The prosecution closed its case and the accused was put on his defence. In his unsworn statement, he denied having committed the offence.

For the accused to be convicted of Aggravated Defilement, the prosecution had to 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 burden of proof is always on the prosecution. It has the duty to prove each of the ingredients of the offence and generally this burden never shifts onto the accused. The standard of proof is “proof beyond reasonable doubt.” All the essential ingredients of the offence are to be proved beyond reasonable doubt. This standard does not mean proof beyond a shadow of doubt. It is achieved if court is satisfied that having considered all the evidence from a perspective that is most favourable to the accused, all evidence in favour of or pointing to the innocence of the accused, at best creates a mere fanciful possibility but not any probability that the accused is innocent. The evidence must be evaluated as a whole. The court is required to consider evidence of both the prosecution and the defence relating to each of the ingredients before coming to a conclusion. The prosecution evidence should not be considered in isolation of that of the accused

Regarding the first ingredient, 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. In this case neither the victim nor her parents testified. However, the admitted evidence of P.W.1. Senior Medical Clinical Officer Mr. Amule Lynus, who examined the victim on 15th October 2013, a day after the date on which the offence is alleged to have been committed, indicated in his report, exhibit P.E.1 (P.F.3A) that the victim was about four years at the time of that examination. He came to this conclusion based on the fact that victim’s sixteen milk teeth had not been replaced yet. Counsel for the accused conceded this element and in agreement with the joint opinion of the assessors, I am satisfied as well that on basis of that medical examination, it was proved beyond reasonable doubt that as at 14th October 2013, Kayeni Pacia was a girl aged four years and therefore under the age of fourteen years.

The second element of the offence requires proof that a sexual act was performed on the victim. Under section 129 (7) of *the Penal Code Act*, sexual act means (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or (b) the unlawful use of any object or organ by a person on another person’s sexual organ. Sexual organ means a vagina or a penis. Proof of penetration is normally established by the victim’s evidence, medical evidence and any other cogent evidence.

The victim in this case did not testify. There is no eyewitness account either. The prosecution relies only on the admitted evidence of P.W.1. Senior Medical Clinical Officer Mr. Amule Lynus who examined the victim on 15th October 2013, a day after the date on which the offence is alleged to have been committed, and in his report, exhibit P.E.1 (P.F.3A) stated that the hymen was not ruptured and there were no injuries seen on the vulva or vagina of the victim. To constitute a sexual act though, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient. In absence of proof of penetration, however slight, and in agreement with the joint opinion of the assessors, I find that the prosecution did not prove this element beyond reasonable doubt.

The court will nonetheless consider whether the available evidence is capable of establishing any of the offences which are minor and cognate to that of aggravated defilement. The usual minor and cognate offences to the offence of Aggravated Defilement are Simple Defilement c/s. 129 (1) of *The Penal Code Act*, Attempted defilement c/s 386 and 129 (1) of *The Penal Code Act* and Indecent Assault c/s. 128 (1) of *The Penal Code Act*. Usually Aggravated Defilement is reduced to Simple Defilement when the prosecution fails to prove the aggravating factor alleged in the indictment but proves all other ingredients including the fact that the victim was at the time of the offence, below the age of eighteen years. Having failed to prove any form of penetration, or unlawful use of any object or organ by a person on another victim's sexual organ, the possibility of the available evidence sustaining a conviction for this offence is non-existent.

Aggravated Defilement is reduced to indecent assault when the prosecution fails to prove the aggravating factor alleged in the indictment and penetration but only the performance of an act of a sexual nature and all other ingredients including the fact that the victim was at the time of the offence, below the age of eighteen years, while attempted defilement is all about failure. It arises if for some reason, the crime went wrong and the perpetrator failed to reach the intended end of a sexual act. It is constituted by; proof of (i) an intent to commit the offence, the intent must be specific, to attempt a crime, a person has to intend to commit that crime, and (ii) a direct but ineffectual act done towards the commission of the offence which went beyond mere preparation. For there to be an attempt, the perpetrator needs to mean to commit the offence and to almost have got it done but failed for whatever reason. It has to be an unequivocal step

towards the completion of the crime and, but for interruption or interference, would have resulted in the commission of the offense. There is no set definition for when exactly preparation ends and attempt begins but courts consider the circumstances of each case. Usually, attempts happen when someone (a) is prevented from completing their intended crime (i) by luck, or (ii) by a flaw in the plan, or (iii) by the intervention of another person, etc (b) or when they decide not to go through with it after they have gone beyond mere preparation.

In the instant case, the vital piece of evidence with the potential to establish either an indecent assault or attempted defilement of the victim would have been circumstantial evidence of the presence of wet semen on both the victim's and the suspected perpetrator's panties'. However, the basis of P.W.3's opinion that what he saw on the underpants of the accused was wet semen was never explored by the prosecution. On the other hand, P.W.1's opinion that there was an attempt to defile was based on the fact that he found stains on the victim's panties. He however did not characterise or classify the nature of stains he found as semen. For those reasons, I find that piece of circumstantial evidence inconclusive and unreliable. The available evidence therefore is incapable of sustaining any of the minor and cognate offences to the one with which the accused is indicted.

The last ingredient required the prosecution to prove 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 not as a mere spectator but as the perpetrator of the offence. In this respect, the prosecution relied principally on the oral testimony of P.W.3. D/ Sgt. Wathum Mabernga, the Investigating Officer who stated that the accused, together with the victim was brought to him at the police post on suspicion of having committed the offence. The only evidence implicating the accused was the finding of what appeared to be wet semen on his underpants. The victim too was found by P.W.1. to have had stains on her panties. I have already found this evidence to be inconclusive and unreliable since P.W.1's opinion did not characterise or classify the nature of stains he found on the victim's panties as semen and the basis of P.W.3's opinion that what he saw on the underpants of the accused was wet semen was never explored by the prosecution.

In a case such as this depending exclusively upon circumstantial 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.

I find the circumstantial evidence in this case to be most unsatisfactory. Not only is it inconclusive but it contains a number of unexplained gaps. There is no explanation as to why the substance suspected to be semen found on the undergarments of the victim and the suspected penetrator were not subjected to forensic examination. The result is that evidence suggesting that it was semen is unreliable. There is no direct evidence as to how and wherefrom the accused was arrested. The result is that the court is not in position to determine whether the suspicion levelled against him was well founded or not. At best, the evidence raises a mere suspicion against the accused, falling short of attaining the level required even to indict and certainly incapable of sustaining a conviction.

Since the prosecution has failed to prove the last two ingredients beyond reasonable doubt, in agreement with the joint opinion of the assessors I accordingly find the accused not guilty. He is hereby acquitted and should be set free forthwith unless he is held for other lawful reason.

Dated at Arua this 2nd day of February, 2017.

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Stephen Mubiru
Judge.