

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0003 OF 2015

UGANDA **PROSECUTOR**
VERSUS
TYEKA OSCAR **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused are jointly 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 6th day of May 2014 at Andhaka village, Gamba Parish, Kango sub-county in Zombo District, performed a sexual act with Aduba Lilian alias Adubango Lydia, a girl below fourteen years.

The prosecution case is that the victim in this case, P.W.2 Adubango Lydia was on 6th May 2014 asked by her mother to escort back to their home, the children of her sister who had been visiting their home. On arrival at her sister's home, she asked her to stay a while to help her with her business of brewing and selling alcohol and also with harvesting beans from the garden. During the mid-morning hours, the accused came together with three friends of his and they began drinking alcohol until 8.00 pm. She and her sister retired to bed at 9.00 am, her sister in the main house and P.W.2 in the kitchen. At around 3.00 am, P.W.2 awoke to find someone lying on top of her and having sexual intercourse with her. She raised an alarm and grappled for her torch. When she flashed it, the assailant was at the door escaping from the scene and she only saw her back. She recognised the assailant by the stripped black and white shirt, the same shirt he had been wearing earlier that evening. On hearing the alarm, her sister and cousin came out of the main house and ran after the suspect.

P.W.4 Opakrwoth Collin, testified that on the night of 6th May 2014, at around 3.00 am he heard an alarm with the name Oscar being mentioned. He came out of the house and squatted on the veranda of his house. Shortly thereafter, he saw the accused ran past at a distance of about ten

metres, coming from the direction of the alarm. He saw his uncle Okello Waciba, husband to the victim's sister, giving chase and he joined him. Together they went up to the home of the accused where they found him outside his door, pacing. The L.C.1 arrested him and he spent the rest of the night at the home of the L.C.1 Chairman. The following morning the case was forwarded to the police.

P.W.5 Letaro Beatrice Edreni, the Nursing Officer at Alangi Health Centre III examined the victim on 6th May 2014 and in her report, exhibit P.Ex.2 (P.F.3A) stated her findings that the victim was thirteen years old at the time of that examination, based on information provided by an undisclosed brother of the victim, that the hymen was "not there" and the possible cause was forceful penetration leading to the breaking of the hymen.

P.W.3 Mengu Celestino the father of the victim testified that she was born at home on 18th June 2001. He came to know about the incident on 6th May 2014 at around 5.00 am when the L.C.II Chairperson rang him.

In his defence, the accused stated that he was surprised when on the morning of 6th May 2014 at around 3.00 am the L.C.1 Chairman Okumu Tino and a one Okello Waciba called him out of his house accusing him of having committed an offence that night. He spent the rest of the night at the Chairman's home and in the morning a few men were nominated to examine him in order to determine whether it was true he had had sexual intercourse during the night. The men examined him and found it was not true he had had sexual intercourse during the previous night. The previous day he had visited Okello Waciba's home but only for a brief moment to buy cigarettes. It is not true that he had been drinking with friends since he had stopped drinking on medical grounds. He was being framed because of an incident in from the past where cows belonging to his father had destroyed a few plants of Okello Waciba's cassava and the latter had vowed that one day his father would have to pay.

D.W.2 Okumu Sylvio Tino the L.C.1 Chairman of the village testified that at around 3.30 am on 6th May 2014, Okello Waciba reported a case of suspected defilement of his niece by the accused. The two of them proceeded to the home of the accused where they found the accused

asleep inside the house. He informed the accused of the nature of the accusation made against him and asked him to follow him to his home where he spent the night. The following morning he commissioned a couple of men to physically examine the accused and they reported back that they had not found any evidence of recent sexual intercourse on his genitals.

D.W.3 Ringu Ijiru the L.C.1 Secretary for defence of the village testified that on the morning of 6th May 2014 he was called on phone by the Chairman D.W.2 and when he arrived he was asked to check the accused and when he together with two other people checked the male sexual organ of the accused, they found no signs of recent sexual activity. They instead found that he was not circumcised and that there was dirt under his foreskin. The group of females assigned to check the victim found that she had been sexually assaulted. The matter was then referred to the police.

In her submissions, the learned State Attorney argued that all ingredients of the offence had been proved. The age of the victim was proved by her testimony, that of her father and the medical examination. That a sexual occurred involving the victim occurred was proved by the testimony of the victim and the results of the medical examination. That it is the accused who committed the act was proved by the testimony of the victim and that of P.W.4 Opakrwoth Collin who saw the accused escape from the scene. She prayed that the defence of the accused be rejected and that he should be convicted as indicted.

In response, defence counsel on state brief, Mr. Onencan Ronald conceded the first two elements of the offence but argued there was no evidence of participation by the accused. The identification evidence of both the victim and P.W.4 was not free from error considering that the conditions prevailing at the time were not favourable to correct identification.

In their joint opinion, the assessors advised the court to find that the first two elements of the offence had been proved beyond reasonable doubt. They however opined that the conditions which prevailed that night were not favourable to correct identification. There was also an inconsistency between the testimony of P.W.4 and D.W.2 which rendered the evidence of the accused believable. They advised that the accused should therefore be acquitted.

The burden lies on the prosecution to prove the case against the accused person beyond reasonable doubt. The burden does not shift to the accused person and the accused can only be 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 the ingredients of the offence 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 are innocent, (see *Miller Vs 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.

In respect of the first ingredient, that the victim was below 14 years of age, 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 the victim herself, Aduba Lilian alias Adubango Lydia, testified as P.W.2 and stated that she was 15 years old, hence 13 years old two years ago when the offence is alleged to have been committed. Her father, Mengu Celestino, who testified as P.W.3 said she was born at home in his presence on 18th June 2001. This was corroborated by the evidence of P.W.5, Letaro Beatrice Edreni, the Nursing Officer at Alangi Health Centre III who examined the victim on 6th May 2014, the day on which the offence is alleged to have been committed. Her report, exhibit P.Ex.2 (P.F.3A) certified her findings that the victim was thirteen years old at the time of that examination, although this was based on information provided by an undisclosed brother of the victim. I also had the occasion of observing the victim as she testified in court and her physical appearance and manner of speech appeared to me to match her stated age. Counsel for the accused conceded this element. Considering the evidence as a whole and in

agreement with the joint opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that as at 6th day of May 2014, Aduba Lilian alias Adubango Lydia, was a girl below fourteen years.

The second ingredient required is that a sexual act was performed on the victim. According to 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 P.W.2, Aduba Lilian alias Adubango Lydia, testified and stated that she woke up to find someone on top of her having sexual intercourse with her. This is corroborated by P.W.5, Letaro Beatrice Edreni, the Nursing Officer at Alangi Health Centre III who examined the victim on 6th May 2014, the day on which the offence is alleged to have been committed. In her report, exhibit P.Ex.2 (P.F.3A, she found that the hymen was "not there" and the possible cause was forceful penetration leading to the breaking of the hymen. To constitute a sexual act, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient. Counsel for the accused conceded this element. Considering the evidence as a whole and in agreement with the joint opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that as at 6th day of May 2014, Aduba Lilian alias Adubango Lydia, was the victim of a sexual act.

The last ingredient requires proof 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. The prosecution led the evidence of P.W.2, Aduba Lilian alias Adubango Lydia, who stated that when was awakened at around 3.00 am only to find someone on top of her having sexual intercourse with her, she grappled for her torch and flashed it. She saw the assailant jump out of the house and by aid of the flashlight, she was only able to see his back and she recognised him by the white and black striped shirt as the accused, since she had seen him earlier that evening wearing the same shirt when he was seated with three of his friends drinking alcohol at that home. On his part, the accused admitted having visited the home but only for buying cigarettes. He said he had quit alcohol on medical grounds and therefore was not part of any group that was

seen drinking alcohol that evening at the victim's home. This version of the accused was corroborated by D.W.3 who testified that the accused had been given medical advice to quit drinking alcohol.

The offence is of a sexual nature and it is the practice of courts not to convict an accused on the uncorroborated evidence of the victim of a sexual offence. Corroboration is also required as a matter of fact when relying on the testimony of a single identifying witness. There is need to find other independent evidence to prove not only that the sexual act occurred but also that it was committed by the accused.

The evidence of P.W.2 is corroborated by that of P.W.4, Opakrwoth Collin, who lives in the neighbourhood. He testified that he saw the accused pass by while running. He recognised him by star light, when he passed by very fast within the proximity of approximately ten metres and due to familiarity with his gait while running; he was positively able to recognise him. Evidence of identification should be considered with caution. It is necessary, especially where the identification is made under difficult conditions, to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. To do so, the Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification. Before convicting solely on strength of identification evidence, the Court ought to warn itself of the need for caution, because a mistaken eye witness can be convincing, and so can several such eye witnesses. There is usually a need to find other independent evidence to prove not only that the offence was committed but also that it was by the accused. Corroboration could be provided by circumstantial evidence of relevant events and observations by other persons that occurred around the time, the conduct of the accused around the time of the incident, etc. Court though may proceed to rely on the evidence of the victim, even without corroboration, if satisfied that she is truthful and there is no possibility of error in her identification of the perpetrator.

I have considered the conditions in which the victim purportedly identified the accused. It was at night, in a dark kitchen, she was deep asleep to the extent that she did not know how the assailant gained entry into the room. She was suddenly awakened by the feeling of a person on top of her having sexual intercourse with her and by the time she realised this, the act was complete with the emission of seed, signs of which she saw by the wet patches on the mat and her skirt. It took

her some time to grapple for a torch and by the time she found it the assailant was jumping out of the door such that she only saw his back. In the circumstances, her recognition of the assailant is based only on attire. The accused was a person she had seen for the first time that day and came to know his name as a result of hearing his colleagues call him by that name. These conditions did not favour correct identification and the fact of mistaken identity cannot be ruled out.

The would be corroborative evidence is that of P.W.4, who testified that shortly thereafter, he saw the accused pass by while running very fast. Although this witness knew the accused before, the fact that he claims to have seen him only by the aid of starlight and while he was running at a fairly fast speed means he only had a glancing view of the assailant. These conditions did not favour correct identification and the fact of mistaken identity cannot be ruled out. Matters are not helped further by his apparent exaggeration in stating that he was together with D.W.2 Okumu Sylvio Tino the L.C.1 Chairman of the village when they went to the home of the accused and found him outside his house pacing by the doorway. To the contrary, D.W.2 said he went only with Okello Waciba and that the accused was found alone sleeping inside his house. This is a grave inconsistency which remained unexplained, for which reason the evidence of P.W.4 is rejected.

In the absence of any corroborative evidence to support that of the victim in implicating the accused as the perpetrator of the offence, I find it unsafe to convict the accused on basis of the available evidence. Counsel for the accused contested this element. Considering the evidence as a whole and in agreement with the joint opinion of the assessors, I find that the prosecution has failed to prove this ingredient beyond reasonable doubt. In the result, I found the accused not guilty and accordingly acquit him of the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. He should be set free forthwith unless he is being held for other lawful cause.

Dated at Arua this 6th day of February, 2017.

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Stephen Mubiru
Judge.