

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL SESSIONS CASE No. 0060 OF 2017**

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

**VERSUS**

**AYUNGARACH PATRICK alias PIRUNGU** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (b) of the *Penal Code Act*. It is alleged that the accused on the 5<sup>th</sup> day of January 2013 at Namrwotho village, in Nebbi District, performed a sexual act on Biyika Foska, a girl under the age of 18 years, while infected with HIV.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the fateful day, the victim went together with other girls, to visit his Aunt who lives on the same village with the accused. At the home of her Aunt, the visitors were offered a goat and the accused was invited to help slaughter the goat. Later in the evening at around 10.00 pm, the accused asked the victim to take a walk with him and along the way at an isolated spot, the accused threw her down, tore her clothes off and had forceful sexual intercourse with her. He was found in the act by PW5 who went out searching for the couple after he got concerned by their delayed return. He pulled the accused off the victim, returned with the victim home and reported the incident to the victim's Aunt following which the accused was arrested. In his defence, the accused admitted having participated in slaughtering the goat but denied having seen the victim at all that day. He left that home at around midday and spent the rest of the day in Nebbi Town where he had to wait until after midnight for a truck whose driver he had negotiated with to load bricks for a certain man. He was surprised to be arrested the following morning on allegations that he had defiled the victim.

Since the accused in this case pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against him 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*). The accused does not have any obligation to prove his innocence. 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 before it can secure his conviction. 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 PW3 (Aiyiocan Immaculate) who said she was 12 years old. Her mother, PW4 (Joyce Akumu) stated that she could not remember when the victim was born but that she was 12 years old at the time she appeared to testify in court. PW1 Mr. Edema Gasper, an enrolled comprehensive nurse at Alangi Health Centre who examined the victim on 30<sup>th</sup> August 2013, the day after the date the offence is

alleged to have been committed, indicated in his report, exhibit P.Ex.1 (P.F.3A) that the victim was 9 years at the date of examination. The court as well had the benefit of observing the victim when she testified in court. 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. Ayiyocan Immaculate was a girl under 14 years as at 29<sup>th</sup> day of August 2013.

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 PW3 Ayiyocan Immaculate who described the nature of the act. She awoke to find a man lying on top of her and she was wet from the waist up to her private parts. PW4 Joyce Akumu, the mother of the victim, testified that she examined the victim and found her private parts were wet with semen. There is also the evidence of PW1, Mr. Edema Gasper, who on examining the victim medically found that the victim's vaginal opening was wider than normal although the hymen had not been ruptured. She had lower abdominal pain and difficulty in walking. This evidence corroborates that of the victim. The evidence is further corroborated by her reaction immediately after the act. She ran out of the house terrified into the nearby bush, even though it was nighttime, from where her mother retrieved her. On checking her private parts, she found them wet with semen. Although counsel for the accused contested this ingredient during the trial and in his final submissions, in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Ayiyocan Immaculate was the victim of a sexual act on 29<sup>th</sup> day of August 2013.

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. In this case we have the direct evidence of the victim, Ayiyocan Immaculate, who explained the circumstances in which she was able to identify the accused as the perpetrator of the act. 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 her testimony PW3 Ayiyocan Immaculate said she recognised the accused while he was on top of her and called him by name. She knew the accused before that day and had seen him shortly before she went to bed. Although it was dark in the room, she called her by name before he jumped off her in a bid to escape. The victim's mother, PW4 Joyce Akumu, who responded to the victim's screaming, testified that she held the accused by the doorway as he fled out of the house. In his defence, the accused did not deny having been at the home that evening and having been arrested there but states he had gone there to demand for his share of his late father's land only to be falsely accused. Although Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions, in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. There is no possibility of mistake or error in the evidence placing the accused at the scene of this offence as the perpetrator of the offence. As a result, his defence has been effectively disproved and is hereby rejected as implausible.

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 evidence of PW2 Kevio Jacob Waringwe, a Senior Clinical Officer at Paidha Health Centre who on 3<sup>rd</sup> September 2013, five days after the incident, medically examined the accused and found him to be HIV positive. The sero-status of the accused on the date of examination is certified by documentary evidence in the form of exhibit P.Ex.2 (P.F. 24A) certifying those findings. It is now common knowledge that HIV is not detectible 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. This research supports PW6’s testimony regarding the duration of the window period. In the instant case, since the HIV diagnostic test done on the accused on 3<sup>rd</sup> September 2013, five 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 May 2013 and was therefore carrying the virus by 29<sup>th</sup> August 2013 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 Arua this 10<sup>th</sup> day of July, 2016.

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Stephen Mubiru  
Judge.  
10<sup>th</sup> July 2017