

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT- 00 – CR – SC - 0376 OF 2014

UGANDA ----- PROSECUTOR

5

VERSUS

MUWAYIRA CYRUS ----- ACCUSED

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

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Muwayira Cyrus, the Accused before court was indicted for aggravated defilement contrary to Section 129 (4) (a) and (c) of the Penal Code Act.

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The Prosecution case was that between the month of February and April, 2014, at Kyebando, Kisalosalu, Kitabulik Zone, in Kampala District, the Accused performed sexual acts with Nabatte Peace, a girl then aged 12 years, over whom he had authority as a guardian.

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The Accused pleaded not guilty to the charge.

In a bid to prove its case, the Prosecution called nine witnesses where the Accused testified in his defence and also called eight witnesses.

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For court to return a conviction in a case of aggravated defilement, the following ingredients must be proved beyond reasonable doubt.

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- 1) An unlawful sexual act occurred.
- 2) The victim of the offence was below fourteen years of age at the time.
- 3) It is the Accused who performed the unlawful sexual act.
- 4) Accused was a person with authority over the victim.

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In determining this case, I wish to bear in mind the Constitutional presumption of innocence of an Accused person until proven guilty or pleads guilty.

5 Further that, it is not the Accused person to prove his innocence. He only needs to put up a defence that may raise doubt in the mind of court.

10 The burden of proof is therefore on the prosecution, to prove all the ingredients of the offence beyond all reasonable doubt. The burden never shifts except in a few exceptional cases set down by law: See **Woolmington vs. Director of Public Prosecutions [1935] AC 322.**

15 It is the duty of court to evaluate the evidence of both the Prosecution and the defence and determine whether the burden and standard of proof have been discharged by the Prosecution.

In determining this case, I will deal with the ingredients one by one.

20 **Whether there was an unlawful sexual act committed:** The Prosecution relied upon the evidence of PW1 the alleged victim, and PW2 the Doctor. At the time of hearing, the victim was fifteen years of age. She testified that she got to know the Accused person when she joined a group he was working with, known as African Children God's
25 Image. She was taken to the group by her two friends Beatrice and Robinah whom she was studying with at Eden Primary School.

At first the Accused chased her away from the group, and took her friends from Eden Primary School, to Lower Nsooba Primary School.

30 The victim was eventually readmitted to the Accused's group after Pastor Israel sought permission of the Accused to allow her to return to the group.

35 The Accused then also took her away from Eden Primary School to Lower Nsooba Primary School, with permission of the parents. He began paying her school fees, but she remained a day scholar, staying with her parents in Katanga.

40 The Accused used to take her to Great Army Church for singing and dancing, together with many other children like PW6 Melisa.

When PW9 Joana came to the school and spoke with the Accused, the Accused told the students that Joana was going to buy them a home as she had been told they were orphans.

5 After consulting parents, the children were taken to Kyebando to stay. They stayed with Joana the first day. When some of the children proposed to show their parents photographs to Joana, they were assaulted by the Accused.

10 When they apologized, he forgave them and they remained at the home. There was an old woman called Jjaja to take care of them.

The Accused was staying in the same home. He told the students at a meeting that they had to wake up at 3am for prayers.

15

The next day, PW1 woke at 3am and went to the living room to pray. The Accused was sleeping in the living room. He also got up to pray. Moved towards Pw1. Eventually, he lifted her from where she was and began kissing her, after which he asked her to go to the food store with him.

20

When they got out of the house, he told her he had a secret to tell her and that if she ever told anyone, he would kill her. He then asked her for sexual intercourse took her inside the garage and told her to remove her knicker. When she refused, he removed her knicker by force, laid her on the floor, removed his trouser half way and inserted his penis into her vagina but did not do much.

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PW1 says she did not shout or make any alarm since he had threatened to kill her.

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Thereafter, she went back to sleep and went to school the next morning.

35 The second time when she got up for prayers, PW1 went with Melisa, Efrance and Dora. Accused joined them. After prayers, the Accused told her friends to go back to bed but required PW1 to remain behind as he had something to tell her. She remained behind. The Accused then asked for forgiveness for what he had done the previous day. But thereafter he took her to his bed in the living room, took off her knickers, removed his trouser and had sex with her. She felt pain but Accused told her not to cry.

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After that, PW1 went back to her bedroom, checked herself and was bleeding. She washed herself and went back to sleep.

5 The next day Accused came to the girl's room at night and asked Jjaja to call PW1. PW1 refused to go out. The Accused came and called her himself. Although she told him he did not like what he was doing to her, he asked her to do it for a little while. She refused and he let her go back to sleep.

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By the fourth time, the Accused had stopped sleeping in the living room and had a room.

15 The girls again woke up at 3am for prayers and went to the Accused's room so that he could see them, otherwise he would assault them.

20 Again, the Accused told PW1's two friends to leave after prayers. He then required PW1 to remove her knickers and when she refused, he kept on insisting. Eventually, he removed her knickers and had sex with her.

After that, PW1 went to the bathroom crying and bathed. She remained in bed until it was time to go to school.

25 The last time Accused had sex with PW1, he sent on Asha to call her to go to his room. Asha remained at the door, and heard Accused asked PW1 why she did not go to church with him. He threatened her (PW1) and Asha then left. When Asha left, Accused closed the door, apologized to PW1 but then insisted that they have sex for the last time.
30 He put her on his bed, used a lot of force and thereafter, she could not walk properly. Although she told Accused she was feeling a lot of pain, he did not listen to her. When he finished, he gave her Shs. 1000/- for break at school.

35 Bleeding slightly, PW1 went to the bathroom, afterwhich she went to school.

She asserted that she did not report Accused as they were staying in the same home.

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When the girls left the home after Joana's intervention, PW1 told her sister about the sexual assault. The sister told their mother who called and then informed Pastor Emma, who also informed Joana.

5 The next day, the matter was reported to Wandegeya Police Station. PW1 was taken to a doctor for checking and Accused was then arrested.

PW2 Doctor Barungi Tadeus is a Police Surgeon. He is the doctor who examined PW1 on 21.05.14. He found her to be of apparent age of 12
10 years. She was in good general condition and her mental status was normal.

Upon examining her genitals, he found no injuries, but the introitus (entrance to the vaginal canal) had a huge tear consistent with
15 penetrative sexual intercourse, but it had healed. There were no infections. The victim informed the doctor that a man had been having sexual intercourse with her and it had last happened in April 2014.

The findings were filled in the Police Form 3A, which was admitted in
20 evidence as Exhibit P₁.

With the above evidence, I agree with the submissions of Counsel for the State, which were conceded to by defence Counsel, and find as a
25 fact that there was unlawful sexual intercourse performed on the victim.

This ingredient of the offence was accordingly proved by the prosecution to the required standard.

The next ingredient to determine is **whether the victim was below
30 fourteen years at the time of the offence.**

This ingredient was also not disputed by the defence.

Exhibit P₁, the doctors report indicates that at the time of examination,
35 the victim age was estimated to be twelve years of age.

PW1 confirmed at the hearing that she was now aged fifteen years.

Although Counsel for the defence pointed out that the victim was
40 thirteen years at the time as indicated on Police Form 3 that was tendered in evidence and that this was also admitted by defence witness

5 and the Accused himself, the fact remains that the victim was below fourteen years at the time of the offence.

5 Therefore court finds that the Prosecution has proved to the required standard that at the time the unlawful sexual act was performed, on the victim, she was below fourteen years of age.

10 It is now left to determine **whether it was the Accused person who performed the sexual act on the victim.**

10 As already pointed out in this judgment, PW1 the victim stated that it was the Accused who performed the unlawfully sexual act on her. She was the only eye witness to the offence.

15 Her testimony as already indicated in this judgment was that, on joining the African Children God's Image Organization, where the Accused was working, she and other children were eventually taken to study at Lower Nsooba Primary School. When PW9 Joana bought them a house, She and other students went to stay in the said home, where Accused was also staying. They were cared for by an old lady known as Jjaja. Joana at first stayed with them at the house.

25 The Accused instructed the children to always get up at 3am at night to pray for him. He was staying in the living room of the house. When PW1 and her friends complied, Accused forcefully had sex with her on at least four occasions after prayers, after requiring the other girls to leave them alone.

30 Eventually when PW1 left the home on PW9's advice, she informed her sister PW8 about her ordeal with the Accused. The sister also informed the mother PW4 who in turn informed Pastor Emma. Pastor Emma informed Joana, the matter was reported to Police and Accused was arrested.

35 PW3 DSgt Anabo Grace was the investigating Officer, who on being allocated the file, interviewed PW1 who informed her that she had been defiled by the Accused person. She escorted the victim for medical examination.

40 After the medical examination, she went back with the victim to the Police station and the victim led her to the children's home at Kyebando.

She was shown the house where Accused person defiled the victim. It was a few meters away from where the children used to sleep.

5 The victim identified the bed sheets on the Accused's bed which she also claimed were hers.

The bed sheets were recovered and were tendered in evidence as Exhibit by PW7.

10 A search certificate was written and signed by people who were present when the search was being conducted and by PW3. The certificate is dated 22.05.14. It was admitted in evidence as Exhibit P₂, upon court overruling Counsel for the Accused's objection that the search was conducted in absence of the Accused, who was already in Police custody
15 by then.

The sketch plan of the scene of crime was also admitted in evidence as Exhibit P₃.

20 The witness also recorded statement from other children who were staying at the home and took the Exhibits collected from the scene (that is bed sheets) to the store man PW7.

25 The witness also recorded statements from other children who were staying at the home and took the exhibits collected from the scene (that is bed sheets) to the store man PW7.

The same witness also recorded a statement from the Accused person and took him for medical examination to Dr. Oligo Michael PW5.

30 After assembling all the evidence and upon getting advice from the Director of Public Prosecutions, the Accused was charged with this offence.

35 PW4, Nabukenya Florence the mother of the victim confirmed that her daughter PW1 joined the singing and dancing group of the Accused person, with her consent. And that she also allowed the Accused to move PW1 to Lower Nsooba Primary School from Eden Primary School.

40 Later the parents were informed in a meeting that a sponsor had bought a house for the children at Kyebando, Kisalosalu, and the children were taken there. The parents later went and saw the house at Kyebando.

PW4 was informed of the misunderstandings with the Accused and that PW9 had left the home and that Pastor Emma had taken away his own child. Further that PW1 had been required by Accused to write a letter indicating that she was an abandoned child. A meeting was held at the home, after which PW4 left with PW1.

About three days later she heard PW1 and her sister PW8 talking. PW1 was telling her sister how Accused had used her and kept on using her and that is why she did not want to go back to the home.

The sister repeated the story to PW4, who then informed Pastor Israel. The matter was reported to Wandegeya Police and Accused was arrested and PW1 taken for medical examination.

PW4 contends that, thereafter she would be attacked at her home by someone saying they had been sent by Accused to give her Shs. 100,000/- so that Accused and PW1 would relocate to another place and Pw4 gives up the case.

PW5, Dr. Oligo Michael examined the Accused on Police Form 24 on 26.05.14, when he was taken to him as a suspect in a case of aggravated defilement. He was of apparent age of 26 years and in good physical and mental condition. An HIV test was carried out and he was found to be negative.

The examination report was admitted as Exhibit P_{4A} and HIV report as Exhibit P_{4B}.

PW6 Nalubwama Melisa confirmed that she was in same organization headed by Accused together with PW1. And that Accused got them a home in Kyebando and requested girls to always pray for him at 3am.

That whenever they used to go for prayers, Accused would ask PW1 the victim to stay in his room as he wanted to tell her something. They would then leave PW1 in the room after prayers. And whenever PW1 went back to the girl's room, she would change her clothes. The witness claims she did not know what was happening as she was young.

Until one day the Accused called her to his room asked her to sit on his lap, hugged and kissed her. He put her on his bed and lay upon her and

continued kissing her until someone knocked on the door and he let her go and told her to go and change.

5 The next day when they went for prayers, Accused again called her to his room, took her to his bed, held her and squeezed her tightly. Thereafter he told her to go and call PW1 for him.

10 PW1 went to the Accused's room and delayed there, later she came out running and PW6 waited for her to go to school.

The witness asserted that PW1's behavior changed. She was crying all the time but would not tell them what the matter was.

15 However, one night, the witness heard Pw1 scream in her sleep **"Cyrus leave me alone. I hate you; do not come close to me"**. The next day PW1 denied having said anything. When they eventually left the home that is when PW1 told PW6 that Accused had had sexual intercourse with her many times. PW6 also told PW1 about her own experience. When the matter was reported to Wandegeya Police
20 Station, the witness and two other girls also went and recorded their statements.

PW7 DC Gidudu Ben Isaac is the store man who keeps exhibits brought by the Investigating Officers. He tendered in the bed sheets taken from
25 the Accused's bed as Exhibits P_{5A} and P5b.

PW8 Nannungi Alexandria recounted how Nabatte Peace (Pw1) her sister told her in 2014, that the Accused had defiled her many times. PW8 told their mother who had heard them talk. The mother asked
30 PW1 and she confirmed that it was Accused who had defiled her. The next time she heard of the matter is when she was called to make a statement at Wandegeya Police Station.

PW9 Joana Eliasson testified that she got to know the Accused through
35 another volunteer at Watoto Church. The Accused was introduced to her as Director.

PW9 went to the slum and met with about fifty children and began to visit them on weekends. She has an organization known as Steps
40 Foundation located at Makerere Hill.

5 The children told her they were orphans but told different stories about their backgrounds. They showed her the place where they were staying at Katanga. The girls were then sleeping in the Accused's house and others in different places in Katonga. They told her the church was helping them.

On 20.05.14, the witness went to Katanga at the invitation of one of the children. There were many people in the room where PW1 was staying.

10 PW1 told her that she had been defiled by the Accused many times after prayers when he would send away other girls and keep her in the room. Also that the Accused would abuse and assault children, manipulate them and tell them not to say what was going on in the house.

15 Melisa PW6 also told her that Accused had kissed her.

The next day, the matter was reported to Police, statements made and Accused was arrested at Kyebando, Kisalosalalo.

20 The next day, they returned to the home with the Investigating Officer to do more investigations. Thereafter, other girls also opened up and told her they were also victims of the Accused's acts. The cases were also reported to Police.

25 That after the arrest of the Accused, PW1 began having nightmares but she was counseled to help her overcome what she had gone through.

30 The witness adds that she had also discovered that the Accused had told her lies that the children were orphans and that he was paying their school fees, when it was someone else doing so.

35 When she found out that the children had parents and about the Accused abusing the children, that when the misunderstanding between her and Accused arose.

40 As pointed out earlier in this judgment, the Accused vehemently denied the offence. While acknowledging that he was head of the organization that was taking care of PW1 and PW6 and that PW9 sponsored the organization he denied having any grudge with anyone of them.

He told the court how he first met PW9 in 2013 and how she requested to join the organization after being impressed by the dancing performance of the children.

5 She then rented a house for the organization and they moved from Katanga to Kyebando with fifty children. The main house has five bedrooms, sitting and dining room, two stores and a kitchen. The boys stayed in the boy's quarters with the Accused, while the girls stayed in the main house with PW9 and a matron.

10

That everyone was involved in prayers including the matron which would take place in the compound during the day and in the sitting room at night.

15 The Accused denied ever calling PW1 to stay behind after night prayers or ever sexually abusing her. He insisted that, the misunderstanding between him and PW9 arose because PW9 wanted to take over the organization and have authority over the items provided by the sponsor.

20 They tried to resolve the matter by calling a parents meeting and Police from Wandegeya Police Station and Accused was required to register the children and hand them over to Pw9. Some parents handed over their children including Pw1's mother while others refused.

25 PW9 visited parents homes, telling them the organization was going to be closed by the Ministry of Gender and gave them money to convince them to hand over the children to her.

30 A meeting held with the officials from the Ministry of Gender and staff from UPCAN organization, also attended by PW9 tried to resolve the impasse but failed.

35 PW9 insisted that the Accused be thrown out of the organization and the children handed over to her but she was advised to work with the Accused or else set up her own organization.

40 The next day, the Accused was informed that PW9 had spent on a night at Katanga at PW1's home and seemed to be planning something. That the Police also rang him using PW9's phone asking him to meet them at Kyebando. When he got there he found PW9 there with Police Officers. They introduced themselves to him and required him to go with them to answer allegations against him. They all went in PW9's vehicle.

At Police Station, the Accused was informed that there were charges of defilement against him and he was detained.

5 After one week, PW9 appeared at the Police Station with two other people, who told the Police that the case was all about fighting for authority over the organization. However, the Accused was charged and remanded at Luzira so that the organization could be taken.

10 The court was also informed of how the organization was registered in 2010 as an NGO to assist children develop their talents. And how the Board of Directors made PW9 a member, without passing a resolution. It is PW9 who was paying rent of Shs. 1,200,000/- and utilities for the home where the children stayed.

15 But that it was the Board that paid school fees and took care of the children. PW9 was the Coordinator between the organization and its sponsors but did not want to discuss who the sponsors were. And that she also never told the Accused that PW1 had told her that he had
20 sexually abused her.

The charge and caution statement recorded by the Accused at Police was admitted in evidence as Exhibit P₆.

25 DW2 Nazziwa Deborah one of the Parents who have children at Accused's organization has known Accused since 2007 and PW9 since 2014.

30 She testified that her child never used to complain about anything but PW9 approached her asking her for her child. It was sometime in May after the parents meeting. But she refused and two weeks later they were informed that Accused had been arrested for defiling PW1. However that, she did not believe the allegations as PW1 had at first refused to leave the school when picked by her mother.

35 Also that there were many other children older than PW1 who were in the school but never complained about the Accused. Even at night, he would escort them safely home.

40 That PW1 grew up with her own children but was bad mannered and had even been chased away from the group one time but the witness pleaded with Accused to allow her to return.

Many parents went to Police after Accused was arrested but were not allowed to see him or make statements.

5 DW3 Nabuule Beatrice Mukwaya was a neighbor to PW1's mother at Wandegeya. She also had a child who Accused was helping. She testified that the case against Accused was a frame up by PW9 who wanted to take over the Accused's organization.

10 And that at the meeting with the Gender Officials, PW1's mother threatened to deny her if she did not leave the school. That nothing was mentioned about defilement in the meeting and most parents had refused to give up their children to PW9

15 DW4 Kasolo Dan stated that he was working as a night guard at the home in Kyebando where the children stayed. PW9 was also staying at the home but would never go to sleep as she was always on her computer. Accused would go to sleep about 11pm.

20 He insisted that PW1 could not have been defiled as the children used to be taken to school by PW9. And none of them ever told him about the alleged defilement. And the children never woke up for prayers before 5am after which they would leave for school at 6am.

25 PW5 Ainomugisha Mercy used to stay at the home in Kyebando with other children. That they used to wake up between 7-8am do house work, have breakfast and go practice dancing. In the evening at 6pm they would bathe and then have prayers on weekends. On weekdays they would wake up at 4am, pray for 30 minutes and prepare for school.

30 She denied any sexual misconduct by the accused stating that the case was made up because of the conflict between him and PW9. That prayers were not compulsory and they would be held between 4am-4.30 am, but never at 3am. And also that Accused had a wife who used to
35 come to the home.

As already indicated in this judgment, it is trite law that an Accused who raises a probable defence, does not thereby assume the burden of proving it.

40 While there was no other eye witness to the commission of the offence other than the victim, her evidence that she used to be asked by the

Accused to remain behind after prayers was corroborated by Pw6 Melisa.

5 There is also Asha who once went with the victim to Accused's room and remained outside the door and only left after she heard the Accused threatening the victim.

10 The victim was twelve years at the time of the offence. She knew the Accused very well as her sponsor and the Accused also stayed with them at the home in Kyebando, Kisalosalu. She could therefore not have been mistaken as to the identity of the Accused.

15 It is also on record that there were other boys staying at the home and who were part of the singing and dancing group. But the victim did not point to anyone of them and insisted it was the Accused.

20 While she may have taken a long time to reveal her ordeal to anyone, her evidence that Accused threatened to harm her if she ever disclosed anything about the sexual assault was not controverted.

It was also not disputed that she used to have night mares whereby she would mention the name of the Accused and require him to leave her alone.

25 When she finally left the home, she disclosed to her sister PW8 and eventually to her mother that the Accused had repeatedly had sexual intercourse with her. And matter was reported to Police.

30 The victim was very clear and consistent in her testimony that it was the Accused person who repeatedly sexually assaulted her.

35 The evidence of the Prosecution witness in this respect was consistent and not shaken in cross examination. The victim appeared to me to be a truthful witness and not merely influenced by PW9 as the defence would like court to believe.

40 The conflict between the Accused and PW9 though admitted by PW9, She clearly explained that it arose after she discovered the Accused was assaulting the children sexually, verbally and physically. It was not as a result of her wanting to take over the organization.

For all those reasons, I find as a fact that the Accused's defence was disproved and he was the one who had unlawful sexual intercourse with the victim.

5 Ingredient number three was also proved to the required standard by the prosecution. The defence submissions that the victims telling court about the sexual encounter was an after thought and full of lies is accordingly rejected.

10 The last ingredient is **whether the Accused was a person with authority over the victim.**

It's evident from the evidence and it is admitted by the defence that the Accused had authority over the victim as he was in charge of the
15 organization. Indeed he told court in his defence that he was the one paying school fees and that PW9 paid rent and provided for other needed items. That ingredient was also proved to the required standard.

Looking at the evidence as a whole, the Assessors also agreed that the
20 prosecution proved the case against the Accused person beyond all reasonable doubt. And for reasons already given in this judgment, I have no reasons to disagree with them.

The Accused person is hereby therefore found guilty of the offence of
25 aggravated defilement contrary to Section 129 (4) (a) and (c) of the Penal Code Act as indicted and he is hereby convicted of the same.

30 **FLAVIA SENOGA ANGLIN**
JUDGE
06.08.18