

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT LUWERO**

**CRIMINAL SESSIONS CASE No. 0175 OF 2015**

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

5 **VERSUS**

**KATUMBA MATAYO** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

10 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 during the year 2014 at Lukenku L.C.1 in Nakaseke District, performed an unlawful sexual act with Nantongo Sharon, a girl aged 12 years.

The facts as narrated by the prosecution witnesses are briefly that P.W.1 Ms. Nambuya Rebecca  
15 her former class teacher of the victim, detected a foul odour emanating from the victim and noted that she was walking with an uncharacteristic awkward gait. Upon interviewing her, the girl confided in her that it is the accused who had defiled her and she the foul odour and awkward gait were as a result of repeated acts of sexual intercourse. The class teacher notified P.W.2 Mr. Isiko Francis, the then Head Teacher of the school, who upon receiving the report to he too  
20 interviewed the girl and she told him that she had been defiled by her paternal uncle Matayo Katumba, at home. The matter was reported to the girls father who reported to the police. P.W.3 No. 59722 D/C Edikoi Michael, the Investigating Officer stated that that when he interviewed the girl she told him that it is the accused Matayo Katumba, her paternal uncle, who had defiled her. On that basis the accused was arrested. At his trial, he has chosen to remain silent and not to  
25 call any witnesses in his defence.

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  
5 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).

10 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.

15 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  
20 *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

In this case the victim did not testify and was not produced in court and therefore the court did not have an opportunity to see the victim and form an opinion as to her age. There is no medical evidence or other documentary proof relating to the age of the victim. None of the three  
25 prosecution witnesses who testified stated her age apart from saying that she was at the material time a primary four pupil at Magoma Orthodox Primary School. I find that the evidence before me falls is incapable of proving this element of the offence. Since the prosecution has failed to prove one of the essential ingredient of the offence, it is not necessary to evaluate the evidence relating to the rest of the ingredients.

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Suffice it to mention that the evidence as narrated by the three witnesses is largely hearsay and violates the provisions of s 59 of the *Evidence Act* which requires that oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. It is for that reason that *Seru Bernard v. Uganda C.A. Crim. Appeal No, 277 of 2009*, the Court of Appeal decided that the only witnesses that could have testified to the fact of sexual intercourse were the victim and her mother who would also be liable to cross examination. The Police Officers who recorded their statements were not qualified to testify about the sexual act because they knew nothing about it and quite predictably none of them was cross examined about their testimony. I am fortified further in this view by the decision in *Junga v R* [1952] AC 480 (PC) where the accused was charged and convicted with the offence of being armed with the intent to commit a felony. The police witness gave evidence at the trial, saying that they had been told by a police informer of the alleged attempted offence. The informer was not called to give evidence and his identify was not revealed. The accused was convicted. On appeal it was held that the trial magistrate had before him hearsay evidence of a very damaging kind. Without the hearsay evidence the court below could not have found the necessary intent to commit a felony and that being the case the Court of Appeal allowed the appeal against conviction

I have considered the decision in *Mayombwe Patrick v. Uganda C. A. Crim. Appeal No.17 of 2002* where it was held that a report made to a third party by a victim in a sexual offence where she identifies her assailant to a third party is admissible in evidence. Although the court decided that such evidence is admissible, it did not hold that on its own, it is evidence capable of sustaining a conviction. It is my considered opinion that such evidence can only corroborate other credible evidence. I am also aware that failure by the victim to testify is in itself not fatal to the prosecution case (See *Patrick Akol v Uganda, S.C. Cr. Appeal No. 23 of 1992*). However in such cases, such failure is not fatal only if there is other cogent evidence pointing irresistibly to the accused as the defiler.

For example in *Nfutimukiza Isaya v. Uganda C.A. Crim. Appeal No.41 of 1999*, although the victim did not testify, the appellant was last seen with the victim when she was walking with a normal gait as they entered the plantation. A few minutes later when the victim emerged from

the plantation she was walking with an awkward gait and her skirt was wet on the rear. This aroused her sister's suspicion that she might have been defiled. That suspicion was confirmed by their mother and the doctor who examined the victim. Similarly in *Uganda v Orem H.C. Crim. Session Case No. 459 of 2010*, although the victim did not testify, her police statement, tendered  
5 in evidence by the police officer who recorded it, was used to corroborate the evidence of a witness to the effect that she found the accused person and the victim red handed having sex.

In the case before me, there is no direct or circumstantial evidence other cogent evidence pointing irresistibly to or showing that it is the accused that had sexual intercourse with the victim, leading to her pregnancy. I am faced rather with weak evidence of reports made to third  
10 parties which evidence is sought to be corroborated by the police statement of the victim.

It is a principle of common law that hearsay evidence which is incapable of being tested by cross-examination to determine its veracity is not admissible to determine the guilt of an accused person. The accused in a criminal trial should be confronted by his accusers in order that he may  
15 cross-examine them and challenge their evidence. My assessment of the entire prosecution evidence is that it is hearsay of a very damaging kind. There is no independent direct, circumstantial or other cogent evidence pointing irresistibly to the accused as the defiler. Such evidence cannot stand on its own to sustain a conviction. In the absence of substantive evidence, reliance on evidence of the quality I have evaluated above in order to establish any of the  
20 substantive elements of the offence such as this, would in my view be an affront on the integrity of administration of criminal justice. It is unsafe to convict on the basis of such evidence. The evidence available is incapable of proving any of the ingredients of the offence beyond reasonable doubt.

25 In the final result, in agreement with the opinion of one of the assessors and in disagreement with the other, I find that the prosecution has not proved the case against the accused beyond reasonable doubt and therefore find the accused not guilty. I hereby 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 reasons. I so order.

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Dated at Luwero this 8<sup>th</sup> day of February, 2018.

.....  
Stephen Mubiru

Judge.

8<sup>th</sup> February, 2018