

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI**  
**CRIMINAL SESSIONS CASE No. 0097 OF 2018**

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

5 **VERSUS**

**OPIO ALFRED** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**RULING**

10 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 8<sup>th</sup> day of July, 2016 at Paridi village in Adjumani District, performed an unlawful sexual act with Jelasi Daima, a girl under the age of 14 years. The accused pleaded not guilty to the indictment. In a bid to prove the indictment against the accused, the prosecution called one witness then closed its case.

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At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the  
20 close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v. R* [1960] E.A. 184 and *Kadiri Kyanju and Others v. Uganda* [1974] HCB 215).

A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal,  
25 properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v. R.* [1957] EA 332). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established  
30 by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence.

The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

5 There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] *ALL E.R* 448 and also applied in *Uganda v. Alfred Ateu* [1974] *HCB* 179, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence,  
or
- 10 b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

The evidence of the single prosecution evidence is briefly that on 8<sup>th</sup> July, 2016 she had gone for a a one-day workshop at Adjumani Town Council. Around midday, she received a call from her  
15 neighbour Grace Oroma asking where she was. She told her that something had happened between her house maid Halima and Opio. She returned home by boda-boda and found the accused inside her kitchen, while Daima was outside. Daima's mother Halima was outside seated at the veranda. Halima and the accused were not talking to each other. She thought there was a problem between them. She asked Grace Oroma what the problem was and she told her that  
20 Halima had told her the accused had defiled her daughter. She asked her whether she was referring to the small girl she was holding and she replied in the affirmative. Together with the mother, they checked the girl. They did not see any sign of sexual intercourse. She asked the accused what had happened. He said the girl had been crying for the mother, when the mother left for the market. The mother said when she returned from the market she had found the girl  
25 sweating and there was excreta on her and that had made her to suspect that the accused had defiled her. She told Opio to stay around until her husband returns, and she returned to the workshop. In the evening she returned and found that the accused had been taken to the police by boda-boda riders.

30 Both counsel opted not to make nay submission as to whether or not a case has been made out against the accused. At this stage, I have to determine whether the prosecution has led sufficient

evidence capable of proving each of the ingredients of the offence of Aggravated Defilement, if the accused chose not to say anything in his defence, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend himself, the prosecution must

5 have led evidence of such a quality or standard on each of the following essential ingredients;

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.

Regarding the ingredient requiring proof of the fact that at the time of the offence, the victim was  
10 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 *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

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In the instant case, the single prosecution witness testified that Jelasi Daima was still breastfeeding and she estimated her age to be three years old. Her testimony was not discredited by cross-examination. I therefore find that the prosecution led sufficient evidence capable of supporting a finding that by 8<sup>th</sup> of July, Jelasi Daima was a girl under the age of 14 years, if the  
20 accused chose not to say anything in his defence.

The second ingredient requires proof of the fact 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, of any person by a sexual organ. Proof of penetration is normally  
25 established by the victim's evidence, medical evidence and any other cogent evidence. In the instant case, the prosecution presented a witness who did not witness the alleged act. There is no eyewitness account or other evidence as to what act was committed and who committed it, if it was committed at all. I am cognisant of the principle 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*  
30 *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.

In the instant case, there is no direct, circumstantial or other cogent evidence pointing irresistibly to or showing that it is the accused that had sexual intercourse with the victim. Suffice it to mention that the evidence as narrated by the single witness is largely hearsay and violates the provisions of s 59 of the *Evidence Act* which requires that oral evidence must, in all cases  
5 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. It is a principle of common law that hearsay evidence which  
10 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 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  
15 accused as the defiler. Such evidence cannot stand on its own to sustain a conviction.

I have thus formed the opinion that if the accused chose to remain silent, this court would not have evidence sufficient to hold him responsible for any unlawful sexual act committed on the victim. I therefore find that no prima facie case has been made out requiring the accused to be  
20 put on his defence. I accordingly, find the accused not guilty and hereby acquit him of the offence of Aggravated Defilement c/s 129 (3) and (4) (a) *The Penal Code Act*. He should be set free forthwith unless he is lawfully held on other charges.

Dated at Adjumani this 22<sup>nd</sup> day of February, 2018.

.....  
Stephen Mubiru  
Judge.  
22<sup>nd</sup> February, 2018.