

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0183 OF 2016

UGANDA **PROSECUTOR**

5 **VERSUS**

1. **AYUBU SOLOMON** }
2. **SABIRI MEKI** } **ACCUSED**
3. **KAMISI JAMES** }
4. **OBALIM PATRICK** }

10 **Before Hon. Justice Stephen Mubiru**

RULING

The accused were initially jointly indicted with separate counts of Rape c/s 123 and 124 of *The Penal Code Act*. It was alleged in the separate counts that each of the accused on the 2nd day of October, 2016 at Boroli Refugee Settlement Camp in Adjumani District, had unlawful sexual
15 intercourse with Haba Viola alias Ciocio, without her consent. At a previous session of this court, A3 Kamis James and A4 Obalim Patrick were indicted as juveniles and on basis of their respective pleas of guilty were found responsible and the appropriate orders made.

When the case came up once more during the current session, both A1 Ayubu Solomon and A2
20 Sabiri Meki pleaded not guilty to the indictment. The indictment was subsequently amended to Simple Defilement c/s 129 (1) of *The Penal Code Act* but they still maintained their pleas of not guilty. During the preliminary hearing, the evidence of one witness was admitted. It was the evidence of Dr. Joseph Idro of Adjumani to the effect that he examined the victim on 23rd
25 October, 2016 and found her to be below 18 years old. She had multiple abrasions at the vaginal introitus measuring approximately 0.2. x. 5.0 x 0.1 cms. The hymen was ruptured long ago and in his opinion the probable cause was penetration by a blunt object(s). The same doctor examined A1 Ayub Solomon on 4th October, 2016. He was about 18 years old with normal mental status, had no injuries on the body and was HIV negative. He examined A2 on the same
30 day, he was above 18 years old, HIV negative and of normal mental status. The prosecution having failed to secure the attendance of any additional witnesses, it closed its case.

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 each of the two the accused. It is only if a *prima facie* case has been made out against the two accused that they should be put to their defence (see section 73 (2) of *The Trial on*
5 *Indictments Act*). Where at the 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,
10 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 each of the two accused to offer an explanation, lest they 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
15 established 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.

20 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
- 25 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.

Both counsel opted not to make a submission as to whether a *prima facie* case was made out against any of the two accused, based only on the admitted evidence of one prosecution witness.
30 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 Simple Defilement, if either 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 have led evidence of such a quality or standard on each of the following essential ingredients;

- 5 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.

Regarding the ingredient requiring 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
10 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*).

15 In the instant case, there is no direct evidence of the victim, her parents, guardians or other persons in position to know her age. The court was instead presented with medical evidence of P.W.1. Dr. Joseph Idro of Adjumani to the effect that he examined the victim on 23rd October, 2016 and found her to be below 18 years old. His report was tendered as prosecution exhibit P.Ex.1. This evidence was admitted during the preliminary hearing and has not been
20 controverted. I therefore find that the prosecution has led sufficient evidence capable of supporting a finding that by 2nd October, 2016 Haba Viola alias Ciocio was a girl under the age of 18 years, if the either 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.
25 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 established by the victim's evidence, medical evidence and any other cogent evidence. In the instant case, the prosecution presented medical evidence of P.W.1 P.W.1. Dr. Joseph Idro of Adjumani to the effect that he examined the victim on 23rd October, 2016 and found She had
30 multiple abrasions at the vaginal introitus measuring approximately 0.2. x. 5.0 x 0.1 cms. The hymen was ruptured long ago and in his opinion the probable cause was penetration by a blunt

object(s). His report was tendered as prosecution exhibit P.Ex.1. This evidence was admitted during the preliminary hearing and has not been controverted. I therefore find that the prosecution led sufficient evidence capable of supporting a finding that, Haba Viola alias Ciocio was subjected to an act of sexual intercourse, if either accused chose not to say anything in his
5 defence.

The last ingredient requires proof that it is the accused who committed the unlawful act of sexual intercourse with the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. In the instant case, there is no direct,
10 circumstantial or other cogent evidence pointing irresistibly to or showing that it is one or both of the accused that had sexual intercourse with the victim. I have formed the opinion that if either accused chose to remain silent, this court would not have evidence sufficient to hold him responsible for the unlawful act of sexual intercourse with the victim.

15 I therefore find that no prima facie case has been made out requiring any of the two accused to be put to their defence. I accordingly, find each of the accused not guilty and hereby acquit each of them of the offence of Simple Defilement c/s 129 (1) of the *Penal Code Act*. Each of the two accused A1 Ayubu Solomon and A2 Sabiri Meki should be set free forthwith unless lawfully held on other charges.

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Dated at Adjumani this 1th day of March, 2018

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Stephen Mubiru
Judge,
1st March, 2018.