

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0109 OF 2017

UGANDA **PROSECUTOR**

5 **VERSUS**

DRAMANI EMMANUEL **ACCUSED**

Before Hon. Justice Stephen Mubiru

RULING

The accused in this case is indicted with one count of Aggravated Defilement c/s 129 (3) and (4)
10 (a) of *The Penal Code Act*. It is alleged that the accused on the 13th day of November, 2016 at
Tioliyo village in Adjumani District, had unlawful sexual intercourse with Eimani Juliet 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, evidence of one witness was admitted during the preliminary
hearing. It is the evidence of P.W.1 Dr. Joseph Ido Atia to the effect that on 16th November,
15 2016 at Adjumani Hospital he examined Eimani Juliet. He found the girl to be below 13 years at
the time of examination and she was mentally normal. She had bruises in her genitals and at the
introitus. The most probable cause was penetration by a blunt, firm object. He also on the same
examined the accused. He found him to be about 18 years old. He was tested for HIV and was
found to be negative.

20
The prosecution called one additional witness P.W.2 Masudio Joyce who testified that the victim
is her biological daughter, born on 26th November, 2005. A few days before 13th November, 2016
she had gone to her garden near the border between Madi and Acholi, when someone called her
on phone reporting an incident that had occurred at her home. Someone went to pick her on a
25 motorcycle from the garden and upon her arrival home she found the accused already under
arrest. The victim informed her that at around midnight, the accused had found the two girls
lying down and he lay between them. They were sleeping outdoors. Dramani then pressed
Eimani Juliet down under the blanket. She uncovered herself and attempted to rise from the
ground. Dramani held her across his chest and using the other hand removed her panties. The

panties got to the knee level and Eimani rose from the ground. She then entered the house while crying. Dramani followed her into the house, flashed a torch at her and then went out. Dramani then went to the direction of his home. The accused had wanted to defile the girl but found her alert. The prosecution having failed to secure the attendance of any additional witnesses, it
5 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 the accused. It is only if a *prima facie* case has been made out against the accused that he
10 should be put to his defence (see section 73 (2) of *The Trial on 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*).

15 A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, 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
20 decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be 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.

25

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:-

- 30 a) When there has been no evidence to prove an essential ingredient in the alleged offence,
or

- 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 any submission as to whether or not a prima facie case had been made out against the accused based on that evidence. 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 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.

15

Regarding the ingredient requiring 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 *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

20

In the instant case, there is the evidence of the victim's mother, P.W.2 Masudio Joyce who testified that the victim is her biological daughter and that she was born on 26th November, 2005. She was therefore 11 years old in November, 2016. This is corroborated by the admitted evidence of P.W.1 Dr. Joseph Ido Atia to the effect that on 16th November, 2016 (three days after the incident) he examined Eimani Juliet and found her to be below 13 years at the time of examination. None of this evidence having been discredited by cross-examination, I therefore find that the prosecution led sufficient evidence capable of supporting a finding that by 13th November, 2016 Eimani Juliet was a girl under the age of 18 years, if the accused chose to say remain silent in his defence.

30

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 established by the victim's evidence, medical evidence and any other cogent evidence. In the
5 instant case, the prosecution presented medical evidence of P.W.1 Dr. Joseph Ido Atia to the effect that on 16th November, 2016 at Adjumani Hospital he examined Eimani Juliet. She had bruises in her genitals and at the introitus. The most probable cause was penetration by a blunt, firm object. His report was tendered as prosecution exhibit P.E.1. This evidence was admitted during the preliminary hearing and has not b having been discredited by cross-examination, I
10 therefore find that the prosecution led sufficient evidence capable of supporting a finding that, Eimani Juliet was subjected to an act of sexual intercourse, if the accused chose not to say anything in his defence.

The last ingredient requires proof that it is the accused who committed the unlawful act of sexual
15 intercourse with the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. There is no eyewitness account as to who committed the act. All that is available is a report that was made to P.W.2 the victim's mother, P.W.2 Masudio Joyce who testified that he found the accused already under arrest and that it is the victim who told her how the accused came to be implicated.

20 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
25 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*
30 *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.

5 Suffice it to mention that the evidence as narrated by P.W.2 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
10 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. In *Junga v. R* [1952] AC 480 (PC) a conviction was based on information given to the police by an informer who was not called to
15 give evidence and his identify was not revealed. 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

20 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. After a careful consideration of all the available evidence, I have formed the opinion that if the 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. I therefore find that no prima facie case has
25 been made out requiring the accused to be 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) of the *Penal Code Act*. He should be set free forthwith unless he is lawfully held on other charges.

Dated at Adjumani this 1th day of March, 2018

30

.....
Stephen Mubiru
Judge,
1st March, 2018.