

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI**  
**CRIMINAL SESSIONS CASE No. 0010 OF 2018**

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

5 **VERSUS**

**ASUA MUHAMED** ..... **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) (c) of *The Penal Code Act*. It is alleged that the accused on the 3<sup>rd</sup> day of June, 2016 at Odonga West village in Moyo District, being a guardian / person in authority over Sida Ramula, had unlawful sexual intercourse with the said Sida Ramula, a girl under the age of 18 years. The accused pleaded not guilty to the indictment.

15 In a bid to prove the indictment against the accused, evidence of one witness was admitted during the preliminary hearing. It was the evidence of P.W.1 a one Mr. Vule Adams, a Clinical Officer of Obongi health Centre IV who examined the accused on 5<sup>th</sup> June, 2016 and found him to be 31 years old and mentally sound. The prosecution led additional evidence of P.W.2 Mr. Supana Swaibu who testified that the victim is his niece, a daughter of his sister Drichiru  
20 Zainabu. He has known Sida since she was four years old and she is now sixteen years old. On 4<sup>th</sup> June, 2016 his wife told him that she had learnt from the victim that the accused had disturbed her the entire night of 3<sup>rd</sup> June, 2016 at night. On Sunday 5<sup>th</sup> June, 2016 he himself went very early morning to the home of the accused about 200 metres away from his and asked the girl what had happened on Friday night and she confirmed that the accused had attempted to have  
25 sex with her. He asked her whether he had succeeded and she said he had not. Upon threatening her with dire consequences if medical examination proved to the contrary, she eventually admitted to him that the accused had defiled her. She could not scream because the accused had a knife with him and threatened to kill her if she shouted or told anyone the following day. He

searched the room where the victim told him she had been defiled and he found a kitchen knife  
30 above the door near the roof. He reported the case to the police.

The mother of the victim testified as P.W.3 Drichiru Zainabu. She stated that on the fateful day she had left the victim alone with the accused with whom she had been cohabiting for three years, as she had for several days been away at Arua Regional Referral Hospital nursing a  
35 patient. Sida Ramula is her biological daughter and was 14 years old at the time. It is his brother P.W.2 who rang her and told her that the accused had defiled her daughter. By the time she arrived the accused was already under arrest at Obongi Police station. The police told her he had been arrested for defiling her daughter. When she talked to her daughter about the incident she confirmed everything and told her it is true the man had defiled her.

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P.W.1 Mr Vule Adams testified that on 5<sup>th</sup> June, 2016 at Obongi Health Centre IV examined the victim and asked for the age of the girl. The victim's uncle told him she was 16. He examined her dentition and found that she had 28 teeth, which indicated that she was below 18 years. He undertook a vaginal examination and he found some bruises and the hymen was broken. It had  
45 been broken a few days before, roughly two days. The probable cause was penile penetration or in other words an act of sexual intercourse. Having failed to secure additional evidence, the prosecution closed its case.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this  
50 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 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  
55 Others v. Uganda [1974] HCB 215*).

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*).

60 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 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  
65 doubt since such a determination can only be made after hearing both the prosecution and the defence.

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:-

- 70 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.

75 It was the submission of the learned defence counsel, Mr. Ndahura Edward that the prosecution had failed to adduce evidence sufficient to establish a *prima facie* case against the accused. That the accused participated in the commission of the offence has not been proved. P.W.2 testified that he was told by the victim that it is the accused who had sexually assaulted her. That this was after she threatened to cane her. P.W.4 told lies to the court that he found bruises on the victim  
80 yet he did not indicate so on the police form and it is a very important detail. He was also shown to be incompetent and not sufficiently conversant with the female sexual reproductive system details such as what else can cause rupture of the hymen such as tampons. Consequently the accused should be acquitted.

85 The learned Resident State Attorney prosecuting the case, Ms. Bako Jacqueline, in reply submitted that sufficient evidence had been adduced establishing a *prima facie* case against the accused such as would require him to be put to his defence. There is the evidence of P.W.2 who revealed there was sexual intercourse. P.W.4 confirmed that it occurred. He found bruises and the hymen was ruptured and the probable cause was penile penetration. On the participation,  
90 P.W.2 who interviewed the victim has testified that she confirmed it was 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  
95 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 18 years of age.
2. That a sexual act was performed on the victim.
3. The accused is a parent or guardian of or a person in authority over the victim.
- 100 4. 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 production of her birth certificate, followed by the testimony of the parents. It has however been  
105 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*).

In the instant case, there is direct evidence of the mother of the victim P.W.3 Drichiru Zainabu  
110 who stated that Sida Ramula is her biological daughter and was 14 years old at the time. The victim's maternal uncle P.W.2 Mr. Supana Swaibu testified that he has known Sida since she was four years old and she is now sixteen years old. P.W.1 Mr. Vule Adams, a Clinical Officer of Obongi health Centre IV who examined the victim on 5<sup>th</sup> June, 2016, two days after the fateful day, found she had 28 teeth, which indicated that she was below 18 years. His report was  
115 tendered as prosecution exhibit P. Ex.2. This evidence has not been controverted in cross-examination. I therefore find that the prosecution has led sufficient evidence capable of supporting a finding that by 3<sup>rd</sup> June, 2016, Sida Ramula was a girl under the age of 18 years, if the accused chose to remain silent in his defence.

120 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 instant case, the prosecution presented medical evidence of P.W.1 Mr. Vule Adams, a Clinical  
125 Officer of Obongi health Centre IV who examined the victim on 5<sup>th</sup> June, 2016, two days after the fateful day, and found some bruises in her genitals (which he did not state in his report) and the hymen had been broken roughly two days before and the probable cause was penile penetration. His report was tendered as prosecution exhibit P. Ex.2. This evidence though was so discredited as a result of cross examination to the extent that it is now so manifestly unreliable  
130 that it is doubtful that any reasonable court could safely convict on it. I therefore find that the prosecution has not led sufficient evidence capable of supporting a finding that, Sida Ramula was subjected to an act of sexual intercourse, if the accused chose to remain silent in his defence.

As to whether the accused is was a guardian or person in authority over the victim at the time, “a  
135 person in authority” is not defined by the *Penal Code Act*. I however construe it to mean and include any person acting in *loco parentis* (in place of parent or parents) to the victim, or any person responsible for the education, supervision or welfare of the child and persons in a fiduciary relationship, with the child i.e. relations characterized by a one-sided distribution of power inherent in the relationship, in which there is a special confidence reposed in one who in  
140 equity and good conscience is bound to act in good faith with regard to the interests of the child reposing the confidence. The mother of the victim. P.W.3 Drichiru Zainabu testified that by the time of the incident, he had been cohabiting with the accused with whom they lived as husband and wife for approximately three years. By the fateful day, she had been away from home for a few days, leaving the victim in the care of the accused as she attended to a patient at the Arua  
145 Regional Referral Hospital. This evidence has not been controverted in cross-examination. I therefore find that the prosecution has led sufficient evidence capable of supporting a finding that by 3<sup>rd</sup> June, 2016, the accused was a person in authority over the victim, if he chose to remain silent in his defence.

150 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. 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 maternal uncle of the victim.

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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.

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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. 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 P.W.2 and P.W.3 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

185 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  
190 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

195 After a careful consideration of all the available evidence, I have formed the opinion that if the  
accused chose to remain silent in his defence, 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 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) (c) of the *Penal Code Act*. He should be set free forthwith unless  
he is lawfully held on other charges.

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Dated at Adjumani this 1<sup>th</sup> day of March, 2018

.....  
Stephen Mubiru  
Judge,  
1<sup>st</sup> March, 2018.