

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CRIMINAL SESSION CASE NO 0504 OF 2016**

**UGANDA**

**PROSECUTOR**

**VERSUS**

**YAWE DENNIS**

**ACCUSED**

**BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI**

**JUDGMENT**

The accused was indicted for Aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act. It is alleged by the Prosecution that on the 14<sup>th</sup> May 2014, the accused performed a sexual act with Nagadya Danilah then aged 2 years.

At the commencement of the trial the Prosecution and Counsel for the accused agreed to admit in evidence Police Forms 24A and 3A in respect of the medical examination of the accused and the victim respectively .The accused was examined by Dr.Barungi on the 19<sup>th</sup> May 2014.He was found to be mentally sound and with no body injuries. The victim on the other hand was examined by Dr.Male Mutumba on the 15<sup>th</sup> May 2014 and found to be below six years of age at the time. The Medical Officer did not see any bruises, abrasions or tears on the victim's genitals.

Nanteza Jacqueline(PW2) is the mother of the victim who stayed on the same block of rental units with the accused at Lugoba village. On the 14<sup>th</sup> May 2014 at 8.00pm the victim left the house for five minutes. PW2 stepped out calling out her name and she emerged from the room occupied by the accused. The victim was allegedly walking abnormally and staggering which prompted PW2 to check her private parts. According to PW2,she saw semen on the victim's private parts and knickers. This was confirmed in the testimony of Kaligijo Sentongo the victim's father (PW3).

The Victim was immediately taken to a Clinic at Lugoba where a medical officer confirmed that she had been defiled.PW2 and PW3 returned home and informed the accused 's father who advised them to file a complaint with Police.The accused was arrested on the same day and D/AIP Alupot Alice who received the case file on the 15<sup>th</sup> April 2014 recovered the knickers with the sperms, had the accused and the victim medically examined and took statements from witnesses. The accused is said to have confessed to the defilement in a Charge and Caution statement recorded at Kawempe Police station.

In his unsworn statement from the dock, the accused denied defiling the victim and told Court that he returned home at 8.30 pm on the 14<sup>th</sup> April 2014.On reaching home he took his phone to his father's house for charging and thereafter left for the trading center. The accused narrated that he spent time talking with a friend on phone but on reaching home,PW3 accused

him of defiling the victim. He was arrested by PW3 and his friend who took him to the Police.

The Prosecution is required to prove the following ingredients in order to secure a conviction;

1. That the accused 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.

Prosecution has the burden to prove all the ingredients of the offence and this duty does not shift to the accused save in a few statutory offences. The standard of proof required is that of beyond reasonable doubt which is met only when upon considering the evidence adduced, there is a high degree of probability that the accused in fact committed the offence. Any conviction is based on the strength of the Prosecution evidence and not on the weakness of the evidence adduced by the accused.

It is also pertinent to note that where an accused fronts an alibi as a defence, the Prosecution bears the burden to adduce sufficient evidence to place him at the scene of the crime as the perpetrator of the offence he is charged with. The accused bears no duty to prove his alibi.

The age of the victim was not contested by Counsel for the accused. She was stated to be under six in PF3A (Exh.PE2) admitted in evidence under Section 66 of the Trial on Indictments Act. PW2 confirmed that she was 2 years at the time the offence was allegedly committed. Much as the victim did not appear in Court as a witness, she was present at the trial and I observed her. I have no doubt in my mind that she was below the age of fourteen at the time the offence was allegedly committed. This ingredient of the offence was sufficiently proved by the Prosecution.

The occurrence of a sexual act on the victim is the second ingredient of the offence that must be proved by the Prosecution. Section 129(7) of the Penal Code Act defines a "sexual act" to mean", *penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or the unlawful use of any object or organ by a person on another's sexual organ.*"

The evidence adduced in proof of this ingredient of the offence is that of PW2 and PW3 who claim to have seen sperms on the victims private parts, thighs and knickers. Court was told that the victim was not cleaned after PW2 saw the evidence on her body. The fact of a sexual act was according to PW2 and PW3 confirmed by a medical officer at a clinic where the victim was rushed to on the same day. No documentary evidence of the findings from the clinic was presented to Court and the examining officer was not called as a witness.

The Police form 3A on which Dr.Barungi reported his findings on examining the victim did not show any evidence of the sperms on the body of the victim or any signs of penetration. This is contrary to the alleged findings by the medical officer at the Clinic where the victim was examined first and who is alleged to have observed signs of penetration of the victim's genitalia.

The Charge and Caution Statement in which the accused is alleged to have confessed to the offence was without explanation not produced in evidence. The recovered knickers were not exhibited in Court and no evidence was adduced to show that they had been forwarded to the Government Analytical Laboratory for forensic examination the results of which could possibly link the accused to the offence he is charged with.

I am alive to the fact that penetration can occur without any signs of injury on the victim's private parts but since the first examining officer saw such signs, it would logically follow that Dr. Male Mutumba who also examined the victim on the next day should have observed the same. The evidence of the sperms allegedly seen by PW2 and PW3 in the victim's genitals and thighs was also surprisingly not seen by Dr. Male Mutumba yet the victim had not been cleaned according to the evidence of PW2 and PW3. The disparity in the two opinions was not explained away by the Prosecution.

PW2 did not give a logical explanation as to why the medical evidence of penetration seen by the medical officer soon after the event was not exhibited. All she told Court was that it was at her home yet this should have been evidence on the Police file. I also found it rather strange that PW2 chose to run to the clinic first before confronting the accused about the alleged abuse of the victim.

The accused put up an alibi stating he came home at 8.30 pm and saw the victim and her mother in the compound. He offered a mango to the victim but PW2 refused her to take it. The accused then left for the shops only to be accused of the offence and arrested on return. In view of the doubt created by the Prosecution evidence relating to the second ingredient of the offence, I am inclined to believe the alibi fronted by the accused.

For any Court to convict on circumstantial evidence, it must be strong and irresistibly pointing to the guilt of the accused person. The ingredient of the occurrence of a sexual act was not proved by the Prosecution and I have found other co-existing circumstances that weaken any inference to the guilt of the accused in this case.

For the reasons stated herein above, I differ from the opinion of one of the lady assessors who advised me to convict the accused.

I accordingly find the accused not guilty of Aggravated defilement and acquit him forthwith unless he is held on any other lawful charge.

Moses Kazibwe Kawumi

Judge

30<sup>th</sup> January 2018.

