

UGANDA PROSECUTOR

VERSUS

KAHWA DAVID ACCUSED

JUDGMENT

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the first two months and when he asked for his money, Bakabewa Jackson, the father of the victim promised him payment for three months after he had sold his coffee. Instead of paying him, the family assaulted him, and fabricated allegations against him that he had defiled the victim so as not to pay him.

4. On 15th February 2022, the assessors Kasigazi Deogracius and Kalimwenjuma Moses gave a joint opinion to court. In summary, based on the evidence before court, they advised the court to convict the accused.
5. Article 28(3)(a) of the Constitution of the Republic of Uganda, 1995 provides that every person charged with a criminal offence shall be presumed innocent until proved guilty or until that person pleads guilty. The burden to prove the guilt of the accused person is on the prosecution and remains with the prosecution throughout the trial. The prosecution can only secure the conviction of the accused person if it proves his guilt beyond reasonable doubt. Any doubt about the guilt of the accused person must be resolved in his favour leading to his acquittal. (See **Woolmington v. DPP [1935] AC 462.**)
6. The standard of proof is beyond reasonable doubt as discussed in the case of **Miller v. Minister of Pensions (1947) 2 All .ER 372 at 373** where Lord Denning stated as follows:

"that degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man

as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice".

7. During the testimony of PW2, the prosecution applied to tender in the immunization card of PW1 to further prove her date of birth. The defence objected to that prayer on grounds that the immunization card could only be tendered in evidence by a person who authored it or a party to its execution. Its authenticity could not be verified because it does not show who the author is and who had filled in the details. Further that given the fact that the particulars filled on the form contain material alterations, it raises a lot of doubt about its authenticity since the child's name had material alterations. A close observation of the original document shows that the name Susan was inserted with a pen of a different colour. The alteration in the surname of the child and the insertion of the 2nd name with a pen of a different colour can only mean that this document is a forgery and cannot be relied by the court.
8. In reply, the prosecution submitted that PW2 was competent to tender in the immunization card because she was in custody of the card and had pointed out the village of Imiramiranga in Kiruhura District as a feature that would help her identify the card as that of her child. PW2 was also a party to its execution because she told court that she is Twinomujuni, the same name which appears on the card as the name of the mother. By their design, child health cards do not make provision for who the author is and the most it provides is the health unit which issued the card. From practice, the entries are made by many people because the exercise is not a one-day event. If the alterations



or bolding of the letters was only in respect of the name of the child, it would have created suspicion

9. On the alterations, the prosecution stated that they are minor and must have been made purely out of human error because on the entry of the district Kiruhura, we see a similar bolding of some letters like it appears on the surname of the child and even in the entry of the parish - Engani. This was a human error with no intention to forge or alter entries on the document.

10. Section 64 of the Evidence Act, Cap 6 provides that "documents must be proved by primary evidence except in the cases hereafter mentioned." According to section 2 (b) of the Evidence Act, "document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

11. The original health card was adduced in court. A critical look at this document shows that there are alterations at the end of the name Kanamanya and at the beginning of the word Kiruhura. It also shows that the name Suzan was written with a different pen. The child's date of birth is 27th March 2007. The mother's name is Twinomujuni and the father is Bukabeeba J. The child is stated to live in Kanoni Sub-county, Engani Parish in Imiramiringa LC1. The entries showing the dates of immunization are written with pens in different ink.

12. Ordinarily, these immunization cards are issued to the mothers of the children to keep track of the immunization process of a given child. As the mother of the child, PW2 was a competent witness to tender in the

immunization card of PW1. Regarding the alterations, I am given to believe that the alterations in the word Kiruhura and the name Kanamanya was as a result of human error and not as a result of a forgery. This is because there was no reason to forge Kiruhura. The name Suzan seems to have been added later on one of the days the child was taken for immunization. Therefore the Child Health Card under the Ministry of Health has been proved and it is admitted in evidence as PE3.

13. For the accused to be convicted of aggravated defilement, the prosecution must prove each of the essential ingredients beyond reasonable doubt. These are that

- (a) the victim was below 14 years of age;
- (b) a sexual act was performed on the victim; and
- (c) it is the accused who performed the sexual act on the victim.

Issue 1: Whether the victim was below 14 years of age.

14. In **Uganda v. Apunyo Hudson, Criminal Session case No. 07 of 2004**, it was held that "It is trite law that the best evidence in proof of age is the birth certificate, immunization card or baptism certificate whichever is available." (See also **Uganda v. Wasolo Charles, HCT-04-CR-SC-0025-2010**)

15. On PE3, PW1's date of birth is stated as 27th March 2007. It was PW2's evidence that PW1 was born on 27th March 2007 at Imiramiranga in Kiruhura District. This is credible evidence that was not discredited. Having been born in 2007, PW1 was 11 years in 2018. This ingredient of the offence has been proved.

Issue 2: Whether a sexual act was performed on the victim.

16. In **Basita Hussein v. Uganda, S.C. Crim. Appeal No. 35 of 1995**, the Supreme Court held that *"the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victim's own evidence and corroborated by medical or other evidence. Though desirable it is not a hard and first rule that the victim's evidence and medical evidence must always be addressed in every case of defilement of proof of sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."*

17. PW1 and PW2 both gave evidence that a sexual act was performed on PW1. Under Part (b) of PE1, the genitals of PW1 were found normal though the hymen was ruptured. It is further stated that *"there was absence of the hymen which ruptured long ago."* The probable cause of the above injuries is stated as human penis. This proves that a sexual act was performed on PW1. This ingredient has been proved.

Issue 3: Whether it is the accused who performed the sexual act on the victim

18. PW1 testified that she knows the accused and he used to stay at their home. On 27th October 2018 at 5p.m., the accused defiled her when she had gone to collect cassava. The accused held her hand, made her lay on her back, removed her knickers and put his penis in her. When she was asked where he put the penis, she pointed to her private parts. After the incident, she went home and did not tell anyone because she feared that she would be beaten.

Her father and mother reported the matter to police because PW2 overheard Kamukama, PW1's sibling and the accused's grandmother saying that the accused usually called PW1.

19. After over hearing the conversation between Kamukama and the accused's grandmother, PW2 asked PW1 what they were talking about. PW1 told PW2 that the accused had told them that he was going to give them money, buy them shoes and when they reach the age of 13 years, he would impregnate them and thereafter escape. PW1 also told her about what had happened in the cassava garden and when PW1's father Bukabeeba Jackson returned, PW2 informed him of what PW1 told her. Both PW1 and the accused were called and when the accused was told about the allegations, he first denied them but later accepted. The accused was then told to pack his things and they took him to the Chairperson. The accused was beaten, he broke the rope he was tied with and he ran away. On Saturday, they went to Kakabara Police Station and they found the accused there. Further that the accused had sex with PW1 three times, that is, the time in the garden, when PW1 had gone to the well to fetch water and when she was at home in the accused's house.

20. In cross examination, PW1 testified that the accused is not related to her and the accused's grandmother was at their home because she had sick legs and had come to the church to be prayed for. She decided to stay at their home. The accused had worked at their home for a week. She did not know whether her parents were paying the accused. After the court used a tape measure to ascertain the distance between PW1's home and the cassava plantation, it was ascertained that the distance between the two was 36 meters. PW1 also told court that when in the garden, you can see and hear someone at home.

PW2 had sent PW1 to the garden but at that time PW2 was at church and it was Kamukama, aged 13 years and the accused's grandmother who were at home.

21. PW1 did not make an alarm while in the garden and did not tell PW2 because the accused promised to buy her shoes. The accused never bought PW1 the shoes and that is the reason she disclosed what happened. During cross-examination, she confirmed that had the accused bought the shoes, she would never have told anyone. The accused was tied and beaten by her father at their home but PW2 did not beat him. The accused accepted having committed the offence when he was about to be beaten. She maintained that the accused had defiled her. PW1 denied her parents asking her to lie that the accused had raped her because they owed him money.
22. In re-examination, PW1 maintained that the accused had been at their home for a week and he informed PW2 about what the accused had done to them because the accused had said that he was going to impregnate her and Kamukama. In answering questions from court, PW1 said that she wanted court to imprison the accused because he defiled her and not because of shoes.
23. PW2 testified that the accused was staying at her home for about three weeks and he had come following his grandmother whom they used to call Mukaikuru. The accused's grandmother went to Bathesaida Healing Church in Mercy Land near PW2's home and PW2 prayed for her. She went back and came back again saying that her legs had healed and that God had revealed to her that she should stay there and keep praying from there because her healing was at that church. The church belonged to the family of

PW2 because it was in their land. One day, she was coming from the kitchen and when she entered the house, she found Kamukama and her young sister Karugabirwe talking to the accused's grandmother who told them to be quiet. After PW2 called the children and asked them what they were talking about before they were told to keep quiet. They first kept quiet but when she took Kamukama outside and asked her again, she told her that the accused was telling them that Kamukama and PW1 should be his wives. He will give them money and buy for them shoes. When Kamukama makes 13 years, he was going to take her and make him his wife. PW2 also asked Kamukama whether she had seen PW1 entering the accused's house because she suspected that the elder sister knew something about it. Kamukama responded that the accused would call PW1 who used to go to his house.

24. When she called PW1 and asked her why she went to the accused's house, she said that it was the accused who used to call her. When she asked PW1 about the accused promising to buy them shoes and giving them money, she admitted that it was true. She then asked PW1 whether the accused had slept with her, PW1 tried refusing but when PW2 threatened to tell PW1's father, PW1 accepted that she had slept with the accused when she went to collect cassava. PW1 also told PW2 that the accused had always used her. When her husband returned she told him about what she heard and then her husband called PW1 and the accused and started asking them.
25. He first asked PW1 whether it was true that the accused had slept with her, she said yes. He then asked the accused why he had slept with PW1. The accused first denied but later accepted after which PW1's father got a rope and tied the accused's hands and then took them to the Chairperson's place.

The Chairperson was called Kabajanjabi Beatrice. At the Chairperson's home, people asked the accused why he had slept with PW1 and he wanted to deny but later accepted. They laid the accused down and the Chairperson ordered Muleju to beat him because he slept with a young child. The accused ran away and since it was late, they told them to go back home and report to police the next day. The next day, PW1, PW2, PW1's father and Muleju went to Kakabala Police Station and they found the accused and his sister Nakato at the police station. They were informed that the accused reported that they had beaten him and refused to pay him yet he had worked for them.

26. PW2 further testified that the accused was not their employee and they did not owe him money. He sometimes worked in their banana plantation and he was at their home because of his grandmother who asked that they let him stay at home so that she could always send him. They let him stay at their home as a son. When they reached at the police station, the Chairperson first explained and PW1 also explained how she had been sleeping with the accused. The accused was then arrested and locked up. They were then given papers and they took them to Kakabala Hospital and PW1 was examined. She asked PW1 whether the accused had sex with her because Kamukama said that she would see PW1 enter the accused's house.

27. In cross examination, it was PW2's evidence that the accused had stayed at their home for about three weeks and his grandmother had stayed for two months. She did not know whether the accused was working for her husband. The accused would work in the banana plantation with them and they did not pay him for the work he was doing. They had cows at their home but the accused never looked after them. It was her husband or other people who

used to look after the cows and on the day the accused found PW1 in the garden, he had gone to cut grass for the cows. When PW1 was telling her what happened, she was alone with her but when her husband was asking, PW1, the accused, Kamukama, the accused's grandmother and PW2 were all present. When she was asking PW1, the accused was in his house sleeping and when her husband returned, they called him from his house. She did not go to the Chairperson's home which is about two kilometers away from her home because she could get pressure on her way since she felt her head spinning. The accused was beaten at the Chairperson's place and if a person came and said that they say him being beaten at PW2's home, they would be lying. PW1 could be saying the truth that the accused was beaten when PW2 left them.

28. Further that PW1 was examined at Kakabala Health Centre III. She denied framing the accused because they failed to pay him for the work done and insisted that he defiled PW1. She testified that the doctor had said that if PW1 was big enough, she would have conceived. In re-examination, she maintained that the accused was not working for a pay in their home and they had not framed the accused. As Born Again Christians, they could not frame someone over such a thing that even ashes the church.

29. It was PW3's evidence that he is attached to Mpara Police station but in November 2018, he was attached to Kakabala Police Station in Kyegegwa District. On 3rd November 2018, he registered a case of aggravated defilement and issued Police Form 3A to PW1 and also recorded PW1 and PW2's statements. He also arrested the accused at Kakabala Police Station where he had gone to report a case of assault against the father of the victim.

Both the defilement and the assault cases were reported at Kakabala Police Station. The suspect was transferred to Kyegegwa Police Station and the assault case was still under inquiry at Kakabala Police Station. On 5th November 2018, led by the mother of the victim, PW3 visited the scene of crime which was the bush which he described as "from their home, I stopped through gardens for about 30 metres and there was elephant grass. That is where the offence was committed." He drew a sketch plan when he visited the scene.

30. In cross examination, PW3 testified that he was not the investigating officer for the assault case and he did not know who it was. It was the Officer in Charge of the station who allocated him the defilement case. He had forwarded the file on defilement because it was the only one he was handling. He had forwarded the defilement file to the Officer in Charge of the station because of the urgency and abandoned the accused's case of assault which was reported earlier. The witness said that what was urgent about the defilement case was examination of the victim, arresting the suspect and visiting the scene of crime. When the accused reported the assault case, he did not tell him where he was assaulted from. He did not ask PW1's father about the assault case. The defilement was in between the patches of elephant grass.

31. Further, on the question whether the defilement took place in the garden of cassava mixed with maize, he clarified that the elephant grass is in the garden of maize and cassava and the offence was committed in between two elephant grass plantations. When at the scene of crime, one could see PW2's home through the banana plantation. In cross examination, he clarified that it

was Woman Sergeant Kigundu who made the entry of the assault case and it was her who was supposed to take the file to the Officer in Charge of the station for allocation. He did not know whether she took it.

32. There were inconsistencies in PW1 and PW2's evidence regarding how long the accused had stayed at their home and where he was first beaten from. While it was PW1's evidence that the accused had stayed at their home for one week, PW2 testified that he had been there for about three weeks. PW1 told court that her father had beaten the accused while they were still at their home yet PW2 gave evidence that the accused was beaten by Kaleju on orders of the Chairperson.

33. In **Uganda v. Kavuma Ismail, Criminal Session No. 819 of 2016**, it was held that

"It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002 and Uganda v. Abdallah Nassur [1982] HCB). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case.

Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case."

34. The inconsistencies and contradictions between PW1 and PW2's evidence are not central to the key issues of determination in this case. How long the accused had stayed at their home and where he was beaten from are not material in this case. These are minor inconsistencies that do not discredit the witnesses' evidence. Apart from these inconsistencies, the evidence given by PW1 and PW2 is consistent. It is corroborated by the findings in PE1 that PW2's hymen was ruptured a long time ago.
35. The totality of all the evidence above is that the accused had sexual intercourse with PW1 on three occasions. The first time was in the cassava garden, the second time was when PW1 had gone to the well and the third time was in the accused's house. All this was after the accused had promised PW1 and her sister to buy them shoes, a promise he did not fulfil. This was credible evidence that was not challenged. This ingredient has been proved.
36. The accused denied the indictment against him and explained that these were fabricated allegations made against him by parents of PW1 (the victim) so as not to pay him his due wages of Ug.shs. 300,000/= (Uganda shillings three hundred thousand). However, he contradicted himself when he said that

he had gone to Bakabewa's home to visit his grandmother and had not even been there for a month. In cross examination, the accused testified that his grandmother is called Katusabe Flazio and she used to pray from the home of Kakabewa. She had been there for seven months and he went there on 1st February 2018.

37. The evidence that the accused had gone to visit his grandmother is more believable in the circumstances of this case. As someone staying at a home, it is understandable that the accused engaged in domestic chores while at this home. This is no basis to say that PW1's parents owed the accused money for the work he was doing for them since he was staying in their home and they were taking care of him. While the evidence before court points to the fact that the accused was assaulted, it is an independent offence which ought to be dealt with on its own.

38. Based on all the above, the prosecution has proved beyond reasonable doubt all the ingredients of the offence of aggravated defilement against the accused. He is accordingly convicted of aggravated defilement.

This judgment is delivered this 9th day of March, 2022 by


FLORENCE NAKACHWA
JUDGE.

In the presence of:

(1) Mr. Kwesiga Micheal, State Attorney, Prosecution Counsel;

- (2) Mr. Acellam Collins, Defence Counsel on State Brief;
- (3) Mr. Kahwa David – the accused;
- (4) Mr. Birungi Boniface, Court Clerk.

