

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA KAMPALA**  
**HCT-00-CR-SC-513-2019**

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

*Versus*

**KIMODERA MOSES** ..... **ACCUSED**

**BEFORE: THE MR. JUSTICE MICHAEL ELUBU**

**JUDGEMENT**

The accused **Kimodera Moses**, 44, is charged with the offence of Aggravated Defilement contrary to sections 129 (3) and (4) (a) of **the Penal Code Act**.

It is alleged in the particulars of offence that on the 6<sup>th</sup> day of September 2018 at Juba Lorry Park in Kakajjo Zone, Kisenyi II Parish, Central Division in Kampala District the accused performed a sexual act on Natasha Janat, a girl aged 3 years.

At his arraignment, the accused pleaded ‘Not Guilty’.

It was alleged by the prosecution that Kimodera Moses used to make wooden stands in Juba Park in Kakajjo zone Kisenyi II Parish in Kampala district. PW 2, Nasaku Josephine, was a business woman selling tea and chips in same place. Her daughter, Natasha Janat, PW 3, who was born on 31<sup>st</sup> of August 2015, was always with her mother at the Park. That on the 6<sup>th</sup> of September 2018, the accused was hired to make a wooden stall right next to where PW 1 made her tea. At about 12.00 pm, Nasaku went to serve her customers tea and left Natasha playing near her stall. When she

returned, Natasha told her that the accused had placed her on his laps and smeared cooking oil in her genitals using his finger. PW 1 informed her neighbour before the matter was reported to the defence secretary who arrested the accused and took him to the Police.

The victim was medically examined on the 10<sup>th</sup> of September 2018 by a doctor who found that her genitals were normal, intact and had suffered no injury. There were no clinical signs of previous sexual intercourse.

The accused denied these charges.

He stated that he worked at Juba Park. It was his evidence that on the 6<sup>th</sup> of September 2018 he was hired to make a stand. At 11.00 am he went to buy timber and returned at 2.00 pm. He then went off to have lunch returning at 3.00 pm. At that point he started working on the stand which was less than 4 metres from Mama Janat's stall.

At about 4.00 pm a person he knows as Kanyankole, came to where he was working and told him that there was an allegation by Mama Janat, that the accused had defiled her daughter by touching her private parts with cooking oil. Kimodera denied the allegation saying he had spent the whole day working. Secondly he did not use cooking oil for his work. The accused went to test for HIV as some people made the allegation that he was HIV positive and wanted to infect the child.

That he was arrested on Sunday, four days after the alleged incident and yet he continued reporting for work daily from Thursday when the incident was first alleged to have happened. He added that the whole place was teeming with people doing various business activities including the buying of maize floor and chicken feed, selling food and making chapatti for sale to people going to Juba. That it was not clear why the child was examined after several days or PW 1 waited till Sunday to report the matter.

## **Determination**

The burden of proof against an accused person lays on the prosecution. The onus was on the prosecution, as it is always on the prosecution in all criminal cases, except in a few statutory offences, to prove the guilt of the accused beyond any reasonable doubt. [See **Ojepan Ignatius vs. Uganda Cr. App. No. 25 of 1995 (unreported)**]

The prosecution must prove all the essential elements of the offence charged. In the case of Aggravated Defilement the ingredients are:

- i. That the victim was below the age of 14 years
- ii. That there was a sexual act performed on the victim
- iii. That it was the accused responsible.

**a) The first element is whether the victim was below the age of 14 years at the time that this offence was committed.**

The mother of the victim informed the Court that her daughter was born on the 31<sup>st</sup> of August 2015. The victim was also medically examined and found to be 4 years of age as at September 2018. The victim testified and was seen by this court. It was evident that she was below 10 years of age today. The accused also stated the victim was born while the mother worked the park and he had been seeing her. He does not dispute her age.

From all the above this court finds that the victim was below 14 years of age.

It is therefore my finding that the first element has been proved beyond reasonable doubt.

I will examine the next two elements jointly. They are:

**b) The second element is whether a sexual act was committed on the victim.**

**c) Whether the accused persons committed this offence (Participation)**

PW 1 stated that on the 6<sup>th</sup> of September 2018 she examined the private parts of her daughter, the victim, and found cooking oil. There was nothing else there. When the victim was called to the stand, she first of all denied knowing the accused person or whether he had ever done anything to her. The prosecution sought a break. It was when court resumed, that the victim said a man had smeared cooking oil in her genitals. I note that the victim was an intelligent child who spoke very cogently. Even before the break she spoke fluently without difficulty but not directly about the offence or the accused.

However, it was argued by the defence that the evidence of the victim was inconsistent because she first testified that a man had smeared her susu with cooking oil but did not say it was the accused who had done it.

The victim's medical report, dated the 10<sup>th</sup> of September 2018, was tendered as PE 1. It shows no evidence of sexual activity whatsoever.

The accused denied committing this offence and set up an alibi in the sense that, between midday and about 3.00 pm, he was not at the scene of crime.

When the investigating officer visited the scene, he found that it was directly in front of several kiosks with people selling maize flour. That it was about a meter away from a busy road with people and cars passing by. In his police statement, the investigating officer noted that if court visited the scene, it would see and verify this. That the nature of many businesses in the area was people working with cooking oil. It was also an entry to a busy lorry park.

PE 3, the sketch plan of the scene of crime clearly demonstrates what the IO was saying. The scene is between a road and a line of maize flour stores. There is a chapatti stall at the end of the line of maize stores. There appears to be a clean line of sight from the maize stores to the scene of crime.

The sexual act in this case is also disputed. It was submitted by Counsel for the accused that the evidence cast doubt on whether indeed a sexual act was committed. That that when the victim stated that she felt pain it could have been due to the oil in her private parts. There were several theories on what could have transpired including the victim playing with the cooking oil that was readily accessible at the scene. In that case the doubt should be resolved in favour of the accused.

I have carefully considered these pieces of evidence alongside the submissions.

Under S. 129 (7) (b) of **the Penal Code Act** a sexual act includes the unlawful use of any object or organ by a person on another person's sexual organ.

A court is obliged to evaluate the evidence as a whole. In **Okethi Okale vs R [1965] EA 555,**

In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence.

Here the victim is alleged to have told her mother that accused put oil in her private parts. In court however she did not state it was the accused who did it. She said that she did not know the accused and that a man had put oil in her private parts. I note in addition that the victim had no difficulty expressing herself and was pressed on this issue but did not state it was the accused.

The medical evidence supports the submission of the defence that there was no offence committed. It also lends credence to the observations made by the

Investigating Officer that the scene was in a very busy area where it was impossible for the act not to attract attention.

It is pertinent that while the offence was allegedly committed on the 6<sup>th</sup> of September 2018, it was not until the 10<sup>th</sup> that the accused was arrested. According to the IO, PW 1 was trying to extract money from the accused person in that time.

In **Hajati Mulagusi v Pade (Civil Appeal No. 28 of 2010) [2013] UGHCLD 94** it was stated that,

**Evidence** denotes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved and includes statements by accused persons, admissions, judicial notice, presumptions of law, and ocular observation by the court in its judicial capacity.

The evidence before this court is that the victim did not identify the accused person as the perpetrator. That the circumstances at the scene of crime indicate that it was highly unlikely that the offence could have been committed in that open busy place at that time. That no action seems to have been taken against the accused person, who was always available at Juba Park, until 4 days had lapsed. It is likely that a three year old child could have had access to cooking oil in a place where several persons were using it to fry different foods.

It is trite law that the burden of proof in criminal cases rests upon the prosecution which must establish all the elements of the offence beyond reasonable doubt. Where any doubt arises, it must be resolved in favour of the accused person. In this case, the last two elements namely whether a sexual act was committed and whether the accused was culpable have not been proved to the level of certainty required in a criminal case. There are several plausible explanations for the evidence before this court.

The lady assessor advised this court to acquit the accused person.

In view of the reasons given, and in agreement with the lady assessor, I find **KIMODERA MOSES** not guilty of the offence of Aggravated Defilement contrary to section 129 (3) and (4) (a) of **the Penal Code Act** and hereby acquit him.

Dated at Kampala this 15<sup>th</sup> day of July 2022

.....

**Michael Elubu**

**Judge**