

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**CRIMINAL SESSION NO. 108 OF 2019**

**UGANDA**

.....

**PROSECUTOR**

**VERSUS**

**NATAMBA ALEX**

.....

**ACCUSED**

**BEFORE: HON. LADY JUSTICE FLORENCE NAKACHWA**

**JUDGMENT**

1. The accused was indicted for aggravated defilement contrary to section 129 (3) (4) (a) of the Penal Code Act Cap 120. It was the prosecution's case that on 29<sup>th</sup> September 2018 at Nyaburungi village in Kyegegwa District, the accused performed a sexual act with Musimenta Loyce, a girl aged 13 years.
2. To prove its case the prosecution called four witnesses. The victim Musimenta Loyce testified as PW1; PW2 was Onesmus Turyasingura; PW3 was Basabose Eridad, the father of PW1; and PW4 was No. 35174 Detective Corporal Nabwera Hilder, the Investigating Officer. Police Form 3A and Police Form 24A were agreed documents admitted in evidence as PE1 and PE2, respectively. The scarf was admitted in evidence as PE3 and the exhibit slip tendered as PE4. The sketch plan made on 2<sup>nd</sup> October 2018 was admitted in evidence as PE5.

3. The accused denied the indictment against him and he made an unsworn statement. He stated that he was at home sleeping and he heard the police waking him up. Upon opening the door, he was arrested and taken to the police station. He was later taken to court where the charges against him were explained to him but he did not commit the offence.
4. On 21<sup>st</sup> February 2022, the assessors Kalimwenjuma Moses and Agaba Anolyn 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 unless 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 standard of proof required in criminal cases was stated in **Bater v. Bater [1950] 2 All E.R. 458** at 459 where Lord Denning said: 'In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.'

This case was followed in the case of **Andrea Obonyo & Others v. R. [1962] E.A. 542.**

In **Sekitoleko v. Uganda [1967] E.A. 531** at page 533 Sir Udo Udoma, CJ said

*"As a general principle of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence*

*set up is an alibi or something else. The burden always rests on the prosecution."*

6. For the accused to be convicted of aggravated defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt:

- (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.**

In **Uganda v. Mansur Omar, Criminal Session Case No. 216 of 2019**, it was held that "the age of a child may be proved by the production of her birth certificate, or 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."

7. PW1 was not sure of her age but it was her evidence that PW3 had told her that she was 18 years of age at the time of giving her evidence. PW3 testified that PW1 was born in 2005 but did not remember the month. He had documents to prove that PW1 was born in 2005 but when he shifted to Rwengaju, he built a small house and later people burnt it down. He insisted that PW1 was born in 2005 because at the time he shifted at Rwengaju in 2006, she was one year old.



8. In PE1, the age of PW1 was estimated to be 15 years because she had 32 teeth, two were not fully developed and secondary sexual characteristics not fully developed."
9. The age in PE1 was estimated. However, PW3 as the biological father of PW1 could authoritatively state when PW1 was born. Therefore, his evidence that PW1 was born in 2005 is believable. Having been born in 2005, the victim was 13 years old in 2008. This ingredient has been proved.

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

10. Section 129 (7) of the Penal Code Act, Cap 120 defines sexual act to mean — (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ;
- (b) the unlawful use of any object or organ by a person on another person's sexual organ.

The phrase "sexual organ" is defined as a vagina or a penis.

11. It was PW1's evidence that after finding her on the way, the accused offered to escort her to where she was going. After they walked a bit, he asked PW1 to give him her private parts but she refused. The accused then pulled PW1 to a banana plantation and by force pushed his penis into her vagina. When PW1 heard motorcycles coming, she made an alarm and PW2 came and helped her. Under Part (b) of PE1, there were no injuries found in PW1's genitals and the hymen was intact. There were no injuries suggestive of recent sexual/physical assault.

12. In **Tigo Stephen v. Uganda, Criminal Appeal No.170 of 2003**, it was held that "it is trite that rupturing the hymen is not a necessary part of legal sexual intercourse. Penetration, however slight, is sufficient."

While PW1's hymen was found to be intact, a ruptured hymen is not necessary in proving a sexual act. PW1's evidence that the accused pushed his penis in her vagina is sufficient to prove this ingredient.

**Issue 3: Whether it was the accused who performed the sexual act**

13. It was PW1's evidence that on 29<sup>th</sup> September 2018, PW3 had sent her to Kyachwampale to take money to a savings group at around 6 p.m. While on her way, she met the accused with his wife and the accused took his wife to his friend, told her to remain there as he escorts PW1. The accused's friend was downwards the road where she was going to pass. The accused and PW1 started moving and when they reached somewhere, the accused told PW1 to stop because he wanted to tell her something. The accused then asked PW1 to give him her private parts but she refused. He then pulled PW1 to a banana plantation and by force pushed his penis in her vagina. When PW1 heard motorcycles coming, she made an alarm and PW2 came and helped her. By the time PW2 went to help her, the accused was on top of her and held her tight but he thereafter run away. The accused left behind a scarf and when PW2 asked her whether she knew the person who had defiled her, she replied that she did not know his name but before it got late, she had seen him and could even show him to PW2.

14. PW2 told her to go with him and he showed her the accused's home. As they were going, they kept talking and it was PW2 who told PW1 the name of the accused whom they found at home sleeping. The police of Bujubuli was called and when they asked PW1 whether the accused was the one who had raped her, she confirmed that he was the one. They spent an hour with the accused before he defiled her and the scarf he left behind had red and yellow colours. It was PW2 who remained with the scarf.
15. In cross examination, PW1's evidence was that she left at 6 p.m. when PW3 gave her money to take to the savings group. The distance between PW1's home and Kachwampale was 5 miles and she did not reach there. By the time she met the accused and his wife it was already dark. It was the accused who told PW1 that the person he was with was his wife and it was the first time PW1 was seeing the accused. The accused lied to PW1 that he was going to accompany her. She did not know PW2 before and she heard others calling him Onesmus. It was the police who woke the accused up and he admitted committing the crime.
16. In re-examination, it was her evidence that it was not dark when she met the accused and it was the accused who asked her where she was going and she replied Kachwampale. The police came to the accused's home and found them there. In answering questions from court, PW1 testified that she did not know when she was born but it was her father who told her that she was 18 years. She gave birth to her child on 12<sup>th</sup> February 2022 and the child's father was Nuwabini Nuwamanaya though she was not married to him.



17. It was PW2's evidence that he knows the accused as a resident of his parish. On 29<sup>th</sup> September 2018, he was with Oscar and Clever coming from Nyamurungi Trading Centre leading to Kinoni on a motorcycle. When they reached around Kinoni Catholic Church, there was a banana plantation belonging to Godfrey where he heard an alarm of a person saying "help me, help me someone is killing me here." PW2 instructed Oscar to stop riding so that they find out what was happening. He flashed his torch and asked 'who are you' but they did not recognize the voice of the person and as they went closer, someone took off and ran away. On reaching there, they found PW1 wearing her knickers and when they asked her what was wrong, she said that a man called Natamba has taken off but he has left his scarf. She also told them that the man had removed her knickers and raped her. PW2 asked for the scarf so as to ascertain the identity of the man and they discontinued their journey and went back to Nyaburungi.
18. On their way back, they interviewed PW1 about her details and she replied that she was PW3's daughter. They went to the LC1 Chairman to report and also asked whether the owner of the scarf could be identified, which Ronald identified as belonging to the accused. They all looked for the Defence Secretary called Mwerinde Fred and Katweri Jackson, after which they went to the accused's home and found him there. The accused first refused to open the door but when the Defence Secretary threatened to harm him if he did not open the door voluntarily, he opened while holding a small panga.
19. The accused first denied committing the offence but when PW1 was called inside the house, she confirmed that he was the one who had defiled her. The accused denied but PW2 observed the mud on his elbows and knees and at

this point admitted and pleaded to be forgiven. The accused even tried to convince PW1 to give her money and they settle the matter which PW1 refused. He was arrested. They took the scarf to police as an exhibit and it had multiple colours including red and black. Before this incident, PW1 used to see the accused with a scarf which had the colours mentioned.

20. In cross examination, PW2 said that there was a trading center called Kachwampale which is 2 kilometers from Nyaburungi Trading Center. The incident happened between Kachwampale and Nyaburungi. He could not tell the owner of the scarf the first time he saw it but the scarfs were not common. The scarf had Uganda Flag colours of black, yellow and red. It was PW1 who told them that it was the accused who defiled her and she picked the scarf from the ground and gave it to him. The spot where the victim was defiled was about 30 meters away from the road and it was in a well looked after banana plantation. There were about 50 people who surrounded the accused's home.

21. In re-examination, he confirmed that when the victim picked the scarf from the ground, he was there. He told court that people had surrounded the accused's home because they were surprised to hear the information of the incident.

22. It was PW3's evidence that on 29<sup>th</sup> September 2018, at around 6 p.m, he sent PW1 to his sister called Jailes in Kinoni. PW3 went to Rwengaju and when it reached 7 p.m. Bugembe called him on phone and told him that his daughter had been defiled. After hearing that information, he told a pastor called Eric that his daughter had been defiled and asked him to come with him. When they reached Nyabirungi, he asked people he found who had



defiled his daughter. He found his daughter outside the house of the accused with other people. When he asked PW1 who had defiled her, she did not know his name but when they opened the door and asked her among people who had defiled her, she pointed to the accused. Immediately, police arrived and the accused was handcuffed and taken away. They were also given a form which they took to Bujubuli Hospital and PW1 was examined. PW3 had seen the accused before as he used to pass by heading to Kasambya.

23. In cross examination, he testified that he had given PW1 20,000/= to take it to his sister who stays in Kinoni which was later changed to Kachwampale because people would get drunk and sleep there. He used to see the accused but learnt his name that day after Turyasingura Michael told him the accused's name.

24. PW4 testified that in September 2018, he was attached to Kyaka II Police Station and while at the station, PW1 and PW3 went there to report that the accused had defiled PW1. PW1 told him that she was going to check on her grandmother at Sweswe Kikoni, then she met the accused person who begged to escort her but on their way, he grabbed her, dragged her to a banana plantation and performed a sexual act. PW2 then arrived with a scarf saying that it was picked from the scene. By this time, the accused had already been arrested and he was handed over to him. PW4 then exhibited the scarf with its initials DMA,11 in its colours of red, black and yellow. PW4 confirmed that the scarf in court was the one brought by PW2 and after exhibiting it, he handed the scarf over to Detective Sergeant Sanyu at Kyegewa Central Police Station. It was further PW4's evidence that he visited the scene of crime in the banana plantation and everything at the

scene showed a sign of struggle. He drew a sketch plan and attached it on file.

25. In cross examination, PW5 gave evidence that he went to the scene of crime with PW2 and PW1 on 2<sup>nd</sup> October 2018 and he received the scarf on 29<sup>th</sup> September 2018. He made the exhibit slip on 1<sup>st</sup> October 2018. He wrote the PW1's statement on 30<sup>th</sup> September 2018 and she did not know the accused's name at the time which she leant at the police station. When the accused was brought to the station, he looked disorganized and was saying uncoordinated things. He was not beaten but his clothes were not clean.
26. In re-examination, PW4 clarified that it was the accused's knees and shirt around the elbows which were not clean. There was wet soil on the shirt and trousers.
27. From the above evidence, it can be deduced that PW1 did not know the accused's name and only knew him by face. However, the time PW1 spent with the accused was enough to properly identify him as her assailant. There are inconsistencies in the evidence of PW1 and PW2 about who told the other the name of the accused. While PW1 said that it was PW2 who told her the name of the accused, PW2 said that it was PW1 who told him the accused's name. These are minor inconsistencies which the court will ignore because they are immaterial to the issues in this file. Who told the other the accused's name does not affect or change the fact that it was the accused who defiled PW1.
28. The evidence of the accused making a money offer to PW1 to sort the issue, the scarf identified as belonging to the accused and the dirt on the accused's

knees and elbows is all circumstantial evidence which point to the accused's guilt. This corroborates PW1's evidence that it was the accused who had sexual intercourse with her on the fateful day. This ingredient has been proved.

29. Based on all the above, the prosecution has proved beyond reasonable doubt that the accused performed a sexual act with PW1 when she was below the age of 14 years. In agreement with the opinion of the assessors, this court finds the accused guilty of aggravated defilement and convict him accordingly.

This judgment is delivered this <sup>10<sup>th</sup></sup> ..... day of March 2022 by



**FLORENCE NAKACHWA**

**JUDGE**

*In the presence of:*

- (1) Mr. Kwesiga Michael, State Attorney, Prosecution Counsel;*
- (2) Mr. Bwiruka Richard, Defence Counsel on State Brief;*
- (3) Mr. Natamba Alex, the Accused;*
- (4) Ms Irakunda Assumpter Priscilla, Court Clerk / Interpreter.*