

5 **THE REPUBLIC OF UGANDA**
IN THE HIGH COURT OF UGANDA AT KABALE
CRIMINAL SESSION CASE NO.0104 OF 2022

KISORO CRB 135/2022

UGANDA=====PROSECUTOR

10 **VERSUS**

HABIYAKALE WILSON=====ACCUSED

BEFORE: HON. JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

15 Habiyakale Wilson (**hereinafter referred to as the accused**) was indicted for the offence of Aggravated defilement contrary to sections 129)3),4(a) and (c) of the Penal Code Act.

The Particulars of the offence are that between 2019 and February 2022 at Chuho Village, Gasiza Parish, Nyakabande Sub County in Kisoro District, the accused being a person in authority over Twinobusingye Daphne as a headmaster at Chuho Primary School unlawfully
20 performed a sexual act with her when she was below the age of 14.

The accused denied the offence on 12th April 2022. I will hereinafter refer to Daphne Twinobusingye as the “**victim**”.

Brief Facts:

25 The Prosecution case is that the victim had been a pupil at Chuho Primary School between 2018 and 2019 where the accused was the headmaster. She left the school and in 2022 joined Mother Mary Primary School where she enrolled for Primary Seven in the Boarding Section under the sponsorship of Compassion, a Charity Organization.

That on 28th February 2022 the victim got permission to visit a hospital which was granted and she had to get a referral note from her sponsors before proceeding to the Hospital. On the way

5 she met the accused with whom they talked about her studies. It started raining and the accused advised her to take shelter at his home. The accused had sexual intercourse with the victim subsequent to which he gave her shillings 5,000 and a packet of doughnuts.

The victim fearing that she could have conceived later informed her school matron about what transpired. The case was reported to Police leading to the arrest and charging of the accused.

10 **Representation.**

Grace Nabagala Ntege (CSA) appeared for the Prosecution while the accused was represented by Solomon Saddam on private brief.

Burden and Standard of proof:

15 The burden to prove the charge against an accused person lies on the prosecution. This right stems from the presumption of innocence enshrined in Article 28(3)(a) of the Constitution. Any conviction must be based on the strength of the prosecution case and not on the weakness of the defence case. The accused further carries no burden to prove his innocence save in a few statutory cases. Aggravated defilement is not among the exceptions.

Woolmington V DPP [1935]AC 462 ;Ssekitoleko V Uganda [1967] EA 531.

20 The standard of proof is that of proof beyond reasonable doubt. It was stated to be met once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent.

Miller V Minister of Pensions [1947]2 All ER 372.

Elements of the Offense.

25 For the Prosecution to secure a conviction on a charge of Aggravated defilement, the following elements of the offense must be proved:-

1. That the victim was below the age of 14
2. That a sexual act was performed on the victim
3. That it was the accused who performed the sexual act on the victim

30 **Age of the victim.**

5 The most reliable way of proving the age of a child is by production of a birth certificate or through the oral evidence of the parents. Other evidence including the court's own observation of the child can also be relied on to ascertain the age of the child.

Uganda V Kagoro Godfrey. HCCC No.141/2002.

10 On 3rd March 2022 the victim was examined by Ndagyijimana Julius at Shaza Health Center and stated to have been 14 years. Prosecution further exhibited her birth certificate which indicated 18th July 2008 as her birth date and both documents were by consent of Counsel admitted in evidence.

The fact that the victim was below the age of 14 was thus proved to the required standard by the prosecution.

15 **Proof of a sexual act.**

A sexual act is codified under **section 129(7) of the Penal Code Act** as:

a) 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 person's sexual organ.

20 A sexual organ is defined as a penis or a vagina.

Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.

Uganda V Kalema David. HC Criminal Session Case No.165/ 2015; Bassita Hussein V Uganda SC Criminal Appeal No.35/1995.

25 It was the evidence of the victim that while she was a pupil at Chuho Primary School in 2019 the accused had sexual intercourse with her. That he sent her to take keys to his home claiming that his wife wanted them. The accused is said to have followed the victim to the home and had sex with her after which he gave her shillings 20,000/=.

30 The second time was on 28th February 2022 when the accused found her on the road near Chuho Primary School. The medical examination report indicated that her genitalia were normal with an

5 absent hymen as at 3rd March 2022 which confirms her earlier sexual experience and knowledge as to what amounts to penetration.

The victim narrated her sexual encounters to the Senior Clinical Officer Ndagiyimana Julius who prepared the medical report admitted in evidence. The victim was not a virgin and did not sustain any genital injuries according to the 3rd March 2022 medical report but that does not diminish her
10 evidence as to the occurrence of a sexual act on 28th February 2022 as she alleges.

The defense did not also contest the fact that the victim had sexual intercourse on 28th February 2022.

I thus find it safe to conclude that this element of the offense was sufficiently proved by the Prosecution.

15 **Proof that the accused performed the sexual act:**

This element of the offence was hotly contested by the defense. The accused denied meeting the victim on 28th February 2022. He attributed the accusation to the owners of Mother Mary Primary School and to the Politics in Kisoro District. The accused further raised an alibi to the effect that he was at Chuho Primary School performing his normal duties at the time he is
20 alleged to have committed the offense.

There was no independent witness who saw the accused committing the alleged offence against the victim. All evidence led by both sides only served to corroborate the accusation or the denial by the accused. It is however the position of the law that corroboration is not a legal requirement in sexual offences and was rendered unconstitutional.

25 **Mpambara V Uganda.SC Criminal Appeal No....;Basoga Patrick V Uganda Criminal Appeal No.42/2002.Mukungu V R [2003]2 EA 66(K).**

The victim told court that she met the accused while on her way to the offices of Compassion for a referral note to the hospital. The fact of her leaving the school was confirmed by Dushime (PW6) the school matron, Nyiramutuze (PW8) her benefactor and Musagyimana (PW10) the
30 Project coordinator at the Compassion offices.

Iraguha (PW7) the head teacher told court that the victim got the pass towards break time. In cross examination the victim stated that she met the accused “*at the time children were breaking*

5 *off for lunch because she saw them though she did not hear the bell.*” It was further her evidence that she could not estimate how long she spent in the accused’s house but she left when the rain had stopped.

Musagiyimana (PW10) stated that she saw the victim at 3.00pm and she gave her the referral note advising her to go to the hospital on the 1st March 2022 since it was late. It was also the
10 victim’s estimation that it takes about 45 minutes to walk from her school to where she met the accused.

What is evident on the record is that the victim left her school at around 10.30 am. Ashiimwe (DW3) the Deputy head teacher at Chuho Primary School claims to have had break tea and lunch with the accused on the day in question. It was her evidence that break time was from 10.30 am
15 to 11.00am and the lunch break was between 1.00pm and 2.00pm.

DW3 however truthfully told court that she was busy teaching the Primary Five class from 11.00am to 1.00pm and could not know what the accused was doing in the office she claims he had gone to after break. The victim told court that the accused left her drinking a soda in his house and briefly returned to the school. It was when he returned that he defiled her and she
20 stayed until it stopped raining.

DW3 could not remember if it rained that day but was clear about the movements of the accused save for the duration from 11.00am to 1.00pm. The fact that it rained was further alluded to by Dushiime (PW6) who stated that she noticed the victim’s absence from School when Primary Seven pupils delayed to leave class for lunch because it was raining and she did not see her when
25 they came to collect their lunch.

I find no adverse evidence to disbelieve the victim about her movements on the day in question and how she ended up in the house of the accused. The accused told court that his children were at the time in the boarding section of the school and the two relatives were at school at the time. The house was in a fence with a gate and DW3 could not account for his presence between
30 11.00am to 1.00pm and the rest of the afternoon. What is left for analysis is the evidence relating to the whereabouts of the accused’s wife on 28th February 2022.

Sunday Jonas (PW9) the land lord told court that the accused started using the house when he was staying alone but later brought a wife and children. It was further his evidence that he was in

5 the house with the accused staying alone from 7th November 2021 to 10th December 2021 when constructing a perimeter wall.

During the Christmas season up to 3rd January 2022 PW9 did not see the wife or the children. PW9 later returned to the house on 7th March 2022 and left on the 11th March 2022 but did not see the wife or children. PW9 first saw the wife on the day the accused was arrested.

10 The evidence of PW9 was corroborated by Duhimbize Faith (DW6) the wife of the accused who stated that on 10th March 2022 she called PW9 requesting to live in the house since he had brought a caretaker. By implication there would have been no reason for PW9 to get a caretaker when the family of the accused had been living in the same premises for close to six years and he had no problem with the accused.

15 I find that the accused lied about the presence of DW6 at his house on 28th February 2022 when the offence was committed. On the contrary the victim was a composed and articulate witness who clearly narrated the events of the day justifying why from her upbringing she feared to narrate what transpired to PW10 and her benefactor whom she met after the incident.

The accused attributed the accusations to competition between Chuho Primary School and
20 Mother Mary Primary School. It was his evidence that he had raised the standards of his school which reduced the enrollment for the nursery section in the rival school. Surprisingly this assertion was not in cross examination put to Iraguha (PW7) the Head teacher of Mother Mary Primary School.

Iragema Innocent (DW2) who was at one time employed by Mother Mary Primary School told
25 court that he was behind the sponsorship of the victim in the school. DW2 stated that the owners of Mother Mary School had a grudge against the accused because he reported an incident where pupils of their School were struck by lightning when they had gone to sit exams from Chuho Primary School in 2021.

I failed to make sense of the reasoning by DW2 since whatever could have happened was a force
30 majeure and in the public domain. Any one reporting about it would not be begrudged for doing so. Even then, this assertion was not suggested to the headmistress in cross examination.

5 I can only consider the allegation as an afterthought brought up by the defense and cannot attach any currency to it.

Even the assertion that Sunday Jonas (PW9) was a cousin to the owner of Mother Mary Primary School and was used by the school to malign the accused was not suggested to him in cross examination. On the contrary I found PW9 to be a very truthful and consistent witness who told
10 court that he knew no misdeeds about the accused until his arrest.

Even after the arrest of the accused, PW9 allowed his wife to keep the house which does not support the collusion theory raised by the accused. I also found no merit in the allegation that PW9 was planning to compete against the incumbent LCV Chairman of Kisoro District who is a brother to the accused in presumably the 2026 elections.

15 The narrative is that PW9 colluded with the owners of Mother Mary Primary School to frame the accused to taint the image of the Chairman's family.

PW9 was not at all questioned about the politics of Kisoro district in cross examination. PW9 was not specifically questioned about his intention to compete against the brother of the accused in 2026. I wonder how such important issues pointing to the motive for the alleged false
20 accusation against the accused could have been ignored in cross examination. I deem the assertions to be baseless and thus of no evidential value.

The accused told court that he had no grudge against the victim and she held nothing against him. It was the victim's unchallenged evidence that even when she was defiled by the accused in 2018 she only told a class mate and nobody else. It was her evidence that she did not disclose
25 what transpired on 28th February 2022 to PW 10 and her benefactor for fear of rejection being an orphan who grew up in a number of homes.

It was after she got no improvement from the condition diagnosed by PW11 on 1st March 2020 that she revealed to the school matron how she could have got pregnant narrating what the accused did. The head Teacher (PW7) only learnt of it from the school matron. The sequence of
30 the events after the victim returned to school after getting treatment do not point to any collusion by the headmistress to frame the accused.

5 I fail to detect any use of the victim or PW9 by Mother Mary Primary School to settle their scores against the accused as alleged. On the contrary the Prosecution produced credible and uncontroverted evidence to show that the accused committed the sexual act on the victim.

In agreement with the advice of the two assessors, I find the accused guilty of Aggravated defilement contrary to section 129(3) and 4(a) of the Penal Code Act. I accordingly convict him
10 as charged.

Moses Kazibwe Kawumi

Judge

17th June 2022

SENTENCE AND REASONS FOR THE SENTENCE

15 The accused was convicted of the offence of Aggravated Defilement contrary to Section 129 (3),(4)(a) and (C) of the Penal Code Act. Ms. Nabagala Grace Ntege, The Chief State Attorney prayed for a deterrent custodial sentence of 30 years citing a number of reasons.

It was submitted for the prosecution that the convict being a headmaster of the victim defiled her which amounted to an abuse of his position of responsibility and breach of the trust the victim's
20 guardians, the employer and the victim as a pupil had in him.

It was further submitted that the victim was traumatized by the convict's criminal act and she was still on treatment at the time she appeared in court. The convict was further stated not to have shown any remorse for his actions.

Aggravated defilement committed by persons with responsibility over their victims was also
25 stated to be a rampant offence in the jurisdiction which should be checked by the courts of law through administering severe sentences to deter others from similar acts.

For the convict, Mr. Masereka submitted that the convict is a first offender with a family of six children and a mother to look after. Counsel further pointed out that the convict was going to lose his job as a headmaster which is another form of punishment for his actions which court
30 should take into consideration in sentencing him.

I was referred to **Uganda V Mabike Athanasious. HCC Case No.065/2017** in which the convict in a case with almost similar facts was sentenced to 15 years, 6 months.

5 Counsel suggested 8 years as an appropriate sentence.

Aggravated Defilement is punishable by death as the maximum sentence provided for by Section 129(3) of the Act. This is however reserved for the rarest of the rare cases and the present case does not fit into that category. It is also not the kind of case in which the court can consider sentencing the convict to Life imprisonment.

10 **Regulations 33 to 36 and item 3 of Part 1 of the 3rd schedule to the Constitution (Sentencing Guidelines for courts of Judicature) (Practice) Directions, 2013** provide for a starting point of 35 years when a custodial sentence is considered by the court. This is adjusted on account of the Aggravating and mitigating factors that played out in the case.

The Court is also required to take into account past precedents in cases where facts have a similarity to the case under trial when applying the Sentencing Guidelines. This is intended to build consistency in sentencing.

Ninsiima V Uganda. CA Criminal Appeal No.180 of 2010.

Article 23(8) of the Constitution of the Republic of Uganda, 1995 requires the court to take into account the period spent by the convict on remand while passing the sentence. **Regulation 15(2) of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** reinforces the Constitutional requirement.

The Aggravating factors in this case are that the convict was a school head teacher who held a position of responsibility over the victim whom she defiled twice. The Convict was also 39 years of age fit to be a father to the victim whom he should have protected but not defiled her as he did.

In mitigation the convict is a 1st offender with a family to care for. I do not consider the fact that he will lose his job to be a mitigating factor for he should have thought twice before engaging in the criminality he was convicted of. School girls should be protected from their teachers in whom trust is placed by parents and the Employers to nurture into responsible adults.

30 It is a fact that this offence is rampant in this jurisdiction and should be checked by the courts

In the case of **Kavuma Edward V Uganda, Criminal Appeal No.37 of 2014** the Appellant was sentenced to 18 years for defiling a 7 year old child.

5 In **FabianoMundua V Uganda CA Criminal Appeal No.342 of2014** the Court upheld a sentence of 17 years imprisonment where the victim was 9 years old.

In **Uganda V Barisigara Godfrey, HC Criminal Case No.130 of 2017** the court sentenced the accused to 20 years. He was 38 years old while the victim was 8 years of age at the time she was defiled.

10 Having considered the sentencing guidelines, the current sentencing practice in relation to offences of this nature and the circumstances of the case, I consider a sentence of 18 years imprisonment appropriate..I accordingly sentence the convict to 18 years.

I deduct the 3 Months the convict has spent on remand as required by Article 23(8) of the Constitution. **The Convict shall serve 17 years and 9 months from the 4th July 2022.**

15 The convict is advised that he has a right of appeal against the conviction and the sentence within 14 days from today.

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Moses Kazibwe Kawumi

Judge

20 **4th July 2022**