

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL DIVISION**

HCT-00-SC-00562 -2021

**ARISING FROM KRA CRIM CASE NO.0037/2021
UGANDA-----PROSECUTION**

VERSUS

BAJJA MICHEAL-----ACCUSED

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT.

Bajja Michael, the accused is charged with aggravated defilement contrary to section 129(1)(3) and 4(a) of the Penal Code Act. It is alleged that between the months of July and August 2021 at Mulawa Kira Municipality, the accused performed a sexual act with Nanwanga Faima a female juvenile aged 12 years

The prosecution had to prove the following ingredients beyond reasonable doubt.

- 1) The girl was aged below 14 years.
- 2) A sexual act was performed on the victim.
- 3) Participation of the accused in the commission of the charged offence.

The prosecution bears the burden of proof to prove the case beyond reasonable doubt against the accused. This burden of proof does not shift to the accused to prove himself innocent. This burden of proof always rests on the prosecution. If there is doubt in the prosecution case, then that doubt must be decided in favor of the accused.

30 To prove its case, the prosecution called three witnesses while the defense also called three witnesses.

Consideration

That the girl was aged below 14 years.

The age of a child may be proved by the production of her birth certificate, or by
35 the testimony of the parents or medical evidence.

In the instance case **Mupere Charles, PW1**, the medical practitioner who examined the victim on PF3A told court that the apparent age of the victim based on his medical examination was 12 years and the same was not contested. I am satisfied that the prosecution has proved beyond reasonable doubt that
40 Nanwanga Faima was a girl under the age of 14 years.

That a sexual act was performed on the victim.

The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims
45 own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. **See: Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995**

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

55 The act of sexual intercourse is proved by the medical evidence of PW1 which was that the victim's hymen was ruptured but had long healed. It was his evidence that external force of penetration was the probable cause of these injuries. I am satisfied that the prosecution has proved beyond reasonable doubt

60 that Nanwanga Faima was subjected to an act of sexual intercourse while still under the age of fourteen years.

That it is the accused who performed the sexual act on the victim.

65 Lastly, the prosecution is required to prove beyond reasonable doubt that it is the accused that performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, showing that the accused as the perpetrator or a participant in the perpetration of the offence. In his defense, the accused denied having committed the offence and denied ever recording a charge and caution statement.

70 A trial within a trial was conducted and this charge and caution statement was admitted. In spite of this, the accused maintained his retraction. Notwithstanding the above, the prosecution relied on this charge and caution statement recorded by P.W.3 AIP Mpatongera Jennifer. In the statement the accused stated as follows; “..... **I came to know a one Nankwanga Faima who was selling**
75 **chips and chicken. In the month of July 2021, I fell in love with her and I performed sexual acts with her twice on the 25th July 2021, and 29th July ,2022.....”** In that statement, the accused clearly confessed to having committed the offence. However, as already noted above, this was retracted.

80 A retracted confession is a statement made by an accused person before the trial of a case begins, by which he admits to have committed the offence, but which he repudiates at a later stage of the trial.

85 It is a rule of practice though that a conviction cannot rest solely upon an uncorroborated confession, especially when retracted or repudiated. Courts will ordinarily only act on a confession if it is corroborated by independent evidence. However, corroboration is not mandatory since court may act on a confession alone if fully satisfied, after considering all the material points and surrounding

circumstances, that a confession cannot but be true. See **Festo Androa Asenwa and another v. Uganda, S. C. Appeal No. 1 of 1988**

Furthermore, section 23 of the evidence Act provides that,
“ -----no person shall be convicted of an offence solely on the basis of a confession made under paragraph (b), unless the confession is corroborated by other material evidence in support of the confession implicating that person.”

Before relying upon retracted confession therefore, the court must satisfy and convince itself completely about the truthfulness of the retracted confession and should corroborate his/her confession as it is unsafe to convict an accused person solely on the basis of the retracted confession. There is no hard and fast rule that corroboration is imperative before convicting anyone but usually as a precautionary measure it has more or less become a standard procedure to not rely on retracted confession alone unless corroborated.

A retracted confession therefore can be acted upon only if substantially corroborated by independent evidence. It is not necessary that it should be corroborated in each material particular. It is sufficient if there is a general corroboration of important incidents mentioned in the confession.

In the instant case, the other evidence that could have been relied upon is that of PW2 &PW3. The victim who would ordinarily be the key witness was not brought to testify in court, there were statements attributed to her that were made by PW2 that the accused is the one who defiled her. The evidence of PW3 was also similar in that regard and in my view amounts to hearsay evidence.

The Evidence Act also stipulates that, oral evidence given in court must be direct, that is "if it refers to a fact which could be seen, it must be the evidence of a

witness who says he or she saw it." **See: Section 59 (a) of the Act.** By that
120 provision of the law, oral hearsay evidence is rendered inadmissible, subject,
however, to the provisions of **Section 30 of the Evidence Act.**

The court of appeal has advanced the legal proposition that in cases where the
victim of a sexual offence is not brought to testify in Court, evidence that she
125 made out of court statements to persons who come to testify revealing that the
accused person committed the offence will be "circumstantial evidence arising
from hearsay evidence. **Ndyaguma David vs. Uganda, Court of Appeal Criminal
Appeal No. 263 of 2006.**

130 Furthermore, the courts have held that the rationale for the hearsay rule is to
guard against the dangers of the miscarriage of justice which may result owing
to the lack of the opportunity to produce a key witness. It has been stated that
the right to confront the witness against the accused in cross examination helps
to test the reliability of the witness's evidence and promotes a fair trial. **See: Apea
135 Moses Vs Uganda Court of Appeal Criminal Appeal No.0653 of 2015**

In the instant present case, PW2 made statements attributed to the victim in
which she told court that the victim had informed her that she had been defiled
by the accused. I have found this evidence inadmissible pursuant to section 59
140 of the Evidence Act.

I have also looked at the Supreme Court decision in **Badru Mwindu vs. Uganda
Criminal Appeal No. 15 of 1997** for the proposition to the effect that in a sexual
offence case, where the victim does not testify at the trial, but the victim made
145 an out of court statement saying; that the accused defiled her to witnesses who
are brought to testify, the statements may be relied on alongside other
circumstantial evidence in the case, in convicting the accused. The Supreme
Court held that what is important is whether there is ample evidence of a

circumstantial nature to justify the conviction. The above case is distinguishable
150 in the sense that there was other evidence of a circumstantial nature implicating
the accused unlike in this case which is solely relying on hearsay evidence.

The consideration therefore in all cases, whether involving hearsay evidence or
not, is that the Court may only convict the accused person if it is satisfied that
155 the evidence adduced justifies such a decision.

In the present case, the fact that the victim was incapable of testifying and being
subjected to cross-examination, left reasonable doubt in my considered view as
to whether the accused participated in the commission of the offence. Save for
160 the medical evidence which in itself doesn't indicate who committed the sexual
act, there is no other substantial corroboration of the retracted confession by
some independent evidence, and as already stated above any doubt should be
resolved in the accused favor.

165 I find that this ingredient was not proved beyond reasonable doubt, and hereby
acquit the accused person. He is set free unless held on other lawful charges.

I so order

170 **JUDGE**
28/06/2022