

5 **UGANDA** **PROSECUTION**

MBEINE JORAM :::::::::::::::::::::::::::::: ACCUSED

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Introduction:

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The victim Gonza Mariam, is a female Juvenile aged 8 years old and was born blind. The victim is a daughter to Naigaga Prossy and Afanda Majidu residents of Mende Central Zone, in Wakiso District.

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they sat down for a drink. The table had five people including the victim, the accused Majorine 20 years, Emma and the victim's mother.

2. The victim's mother together with other people then started searching for the victim until it was morning.

5 3. The next morning the victim was discovered in the accused's house. The victim's mother then called the L.C officials to witness and police was notified.

4. The accused person was ordered to open the door and refused, until it was broken. The victim was found in the house, the accused was found in
10 the house too while naked.

5. The victim then told the mother that the accused had inserted his penis in the buttocks and that it was painful.

6. The accused was also medically examined on PF24A and was found to be male adult aged 29 years of age with a sound mind.

15 The accused denied committing the offence and prosecution produced five witnesses in bid to prove its case and the accused gave unsworn evidence and called no witness.

M/S Ddamba Ramulah State Attorney appeared for the State and Counsel Nshemereirwe Peruth represented the accused on state brief.

20 According to Section. **129 (7) (a) and (b) of the Penal Code Act** as amended defines a sexual act as penetration of the vagina, mouth or anus however, slight of any person by a sexual organ.

(b) The lawful use of an object or organ by a person or another person's sexual organ where sexual organ means a vagina or penis

BURDEN OF PROOF

It is settled Law that in criminal matters, the burden of proof lies on the
5 Prosecution to prove its case beyond reasonable doubt, as held in the case **Woolmington Vs. DPP (1935) AC at page 462.**

However, in **Miller Vs. Minister of persons (1947) ALLER 372**, it was held that much as the standard of proof in criminal cases should be beyond reasonable doubt this is a very high standard. And it does not mean that to meet it, the
10 state must adduce such evidence as would prove its case to the hilt that is "beyond a shadow of doubt" instead it means that the state must present a strong case that reflects a high degree of probability that the accused committed the offence in question.

Meaning that the standard is satisfied once all evidence suggesting the
15 innocence of the accused at its best creates a mere forceful probability but not a probability that the accused is not innocent.

In an attempt to prove its case, prosecution must prove the ingredients of Aggravated Defilement.

The ingredients of Aggravated Defilement were illustrated in the case of
20 **Uganda Vs. Adinan Faham Criminal Session Case No. 016812020**

- i) That the victim was below 14 years of age.
- ii) A sexual act was performed on the victim
- iii) It is the accused who performed a sexual act on the victim

i. The victim was below 14 years of age.

In Uganda Vs. Kagoro Godfrey HCCS NO. 141/2002, it was held that, the age of a child may be proved by the production of birth certificate or by the testimony of the parents.

- 5 But, it has also been held that there are other ways to prove the age of a child and it can be equally conclusive such as courts, own observation and common sense assessment of the age of the child.

PW3 the clinical officer who performed the examination on the victim stated that on examination he noted that the victim was about 8 years old based on
10 27 sets of teeth and blind. Examination is done on the 6/12/2019.

Her assertion was ably corroborated by PW2's testimony that is Kaka Sasiri the assistant defence of Mende Bugga that, the victim was indeed between the age of 7-8 years and blind.

Although court did not have an opportunity to physically look at the victim,
15 but the age of the victim was proved beyond reasonable doubt by PW2 and PW3

ii. 2. That a sexual act was performed on the victim.

The testimony of PW1 and PW2 that on the 29th day of August 2019 at night time the two along others were called upon by the mothers of the victim
20 Naigaga Prossy that her daughter Gonza Mariam was with the accused in his house.

PW1 then went to the house of the accused person with the mother of the victim Naigaga Prosy who called the victim by name and she answered. When she answered, PW1 called PW2 to come to the house of the accused as there was a problem.

- 5 PW2 came along and found PW1 and others at the scene of crime. PW1 told PW2 to call police since the accused had refused to open his door.

PW2 went to Mende police post and came with police officers, who ordered the accused to open but refused until when PW2 kicked the door to the accused's house and it swung open.

- 10 That PW1 and PW2 alongside police entered into the house of the accused where they found the accused naked with the victim in his bed. They led both the accused and victim to police that same night.

- PW3, Oligo Michael confirmed to Court that he knows the victim as Gonza Mariam whom he examined on PF3A on the 30th day of August 2019 and
15 found her to be about 8 years old, blind on both eyes and that she had redness in her private parts with a collection of blood though with an intact hymen. The collection of blood he termed ~~its~~ Hypereamia

- This witness explained to Court further that, the injury was about 24-28 hours showing superficial penetration and that the victim was defenseless,
20 vulnerable as she could not put up any resistance. He put her on PEP.

During his testimony PW3 further explained to Court what he meant by the word "Hypereamia" which he termed as a type of injury in the private parts of the victim and he stated that it is the collection of blood in an area due to constant rubbing and in this case it was the private parts of the victim that

had this injury and that, it is normally done to victims of tender years to whom perpetrators find it hard to penetrate.

PW3's testimony corroborated well, evidence of PW1, PW2 and PW5 that indeed this victim was defiled by the accused in Court today. The PF3A
5 together with PF24A through PW3 and PW4 were all tendered in Court and marked as PEXI and PEXIJ respectively hence proving beyond reasonable doubt the second ingredient

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

10 The accused Mbeine was placed at the scene of crime by PW1, and PW2 who informed Court that on the fateful night when they forced open the door to the room of the accused person, found him naked in the house with the victim Gonza Mariam.

15 That it was on the 29th day of August 2019 leading to the 30th day of the same month 2019.

PW2 stated to Court that it was him who kicked the door of the accused entered with chairman Bisaso alongside police and found the accused person naked with the victim in his house.

20 PW2's testimony was further corroborated by PW5's testimony the investigating officer that indeed the accused was taken to police together with the victim by PW1, PW2, her mother Naigaga Prossy alongside police officer, proving that indeed it is the accused person who was found with the victim and it is him who committed the offence of Aggravated Defilement to the victim and not any other person.

PW1 and PW2 testified to this Honourable Court that the complainant Naigaga Prossy passed on and that the victim too was taken away by the relatives and was nowhere to be seen and as such she was untraceable.

In the case of ***Kobusheshe Karaveri Vs. Uganda crt of Appeal CR Appeal No. 110 of 2008 arising from High CRT CR Session Case No. 0056 of 2007.***

The appellant in this case appealed against the conviction and sentence of the High Court and Holden ***at Rukungiri before the Hon. Justice Augutine Kania*** that he, erred in Law and fact when he convicted the Appellant in the absence of the victim's testimony among other grounds.

In their reaction to this ground, the Justices of the Court of Appeal did not, agree with the submissions of the learned counsel for the Appellant that the offence of defilement or any other sexual offence for that matter cannot be proved without the testimony of the victim.

They continued to say that, there was sufficient evidence to prove the offence the victim's testimony notwithstanding. In a related development the victim Gonza Mariam did not testify but this does not take away the fact that she was defiled.

In his defence, the accused opted to give unsworn testimony which is his right. However, I find that the prosecution ably put the accused at the scene of crime through the elaborate testimonies of PW2 and all the other prosecution witnesses.

The prosecution therefore proved their case as against the accused beyond reasonable doubt.

I am in total agreement with the assessors' opinion that all the ingredients of the offence have been proved beyond reasonable doubt. The accused is hereby found guilty and is therefore

convicted of the offence **Aggravated Defilement C/S 129 (3), (4) (a) and (b) of the Penal Code Act.**

Sentence and Reasons for sentence:

The convict was found guilty of the offence of Aggravated defilement after full trial. In
5 her submission on sentencing, the learned State Attorney prayed for a deterrent
sentence on the following grounds;

Although the convict had no previous conviction, the offence is, however very grave in
nature, rampant and attracts a maximum sentence of death. That the convict took court
10 into a full trial, well knowing that he committed the offence, that convict abused
Kogonza Mariam, a victim in the case was aged only three 8 years and more so blind.
That convict was an adult who would be able to look for adult women.

Her hymen was ruptured and she suffered lacerations around her reproductive organ.
15 After the commission of the offence, the victim was crying because of pain and the
convicts' selfish evil desires. He premeditated that he took the victim to his home for
entire night and showed no remorse at all. Prosecution prayed for a deterrent sentence
to serve as a lesson to the would-be offenders.

20 In mitigation, defence counsel submitted that the convict has no previous record. A
father of a number of children with an aging father, that the issue of the convict taking
the court through a full trial it's a constitutional right that should not be used against
him.

25 That the convict is now 33 years old, is capable of reforming and can contribute to the
economy of this country. He has been on remand for two (2) years, 11(eleven) months
and prays for leniency.

The offence of Aggravated Defilement is punishable by the maximum penalty of death as provided for under the law, however, this represents the maximum sentence which is usually reserved for the worst of the worst cases of aggravated defilement. This case is not within that category although it is close. For that reason I have discounted the death sentence. Where the death penalty is not imposed, the starting point in determination of a custodial sentence for cases of **Aggravated Defilement has been prescribed by item 1 of part 1 under sentencing ranges (in capital offences) of the third schedule of the constitution(Sentencing Guidelines for Courts of Judicature (Practice) Direction 2013)** as 35 years imprisonment. The sentencing guidelines however, have to be applied bearing in mind past precedents of courts in decisions where the facts have resemblance to the case under trial (**Ninsiima Vs Uganda, Criminal C. A Criminal Appeal no. 180 of 2010**).

I have for that reason taken into account the current sentencing practices in relation to cases of this nature.

From the facts of this case, the convicts conduct demonstrated no respect for the girl – child. Much as I did not observe the victim I believe she underwent through tremor. The torture that goes with it and lack of remorse should be given a deserving sentence. In light of both aggravating and mitigation factors, I consider forty (40) years imprisonment appropriate.

According to Regulation 15(2) of the Constitution (Sentencing Guidelines of the Constitution (Sentencing Guidelines for Courts of Judicature (Practice) Direction 2013), to the effect that the Court should deduct the period spent on remand two (2) years, 11(eleven) months, that leaves the convict to serve thirty seven (37) years and one (1) month term of imprisonment.

The convict is advised that he has a right of appeal against both conviction and sentence within a period of fourteen (14) days.

5 Dated at Entebbe, this.....10th..... August, 2022,



HON. JUSTICE OYUKO ANTHONY OJOK

JUDGE

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