

**THE REPUBLIC OF UGANDA.
IN THE HIGH COURT OF UGANDA,
HCT-00-CR-JSC-0610/2022**

UGANDA=====PROSECTOR

VERSUS

1. A. M

2. M. M===== JUVENILE OFFENDERS.

BEFORE HON LADY JUSTICE MARGARET MUTONYI. JHC.

RULING ON PRIMA FACIE CASE.

A.M and M.M herein after referred to as the Juvenile Offenders were indicted with the offence of Aggravated Defilement C/S 129 (3) and (4) (a) of the *Penal Code Act*. It is alleged that on the 9th and 10th day of June 2022 the Juvenile Offenders while at Social Centre, Cultural Division in the Kampala District performed an unlawful sexual act on S.A (the victim), a boy aged 09 years.

At plea taking, both juvenile offenders denied the offence thereby putting all the essential ingredients of the offence in issue.

The prosecution was represented by Ms Kyomugisha Barbra from the office of the DPP while the juvenile offenders were represented by Counsel Winfred Adukule on state brief. M/S Jacqueline Nabuufu and Mr.Ben Mukhwezi assisted court as assessors. Both the Learned State Attorney and the learned defense Counsel did not make any submissions on no case to answer.

The burden of proof in criminal cases rests squarely on the prosecution and does not shift to the accused unless it is exempted by statute.

The standard of proof is high; the prosecution must prove all the essential ingredients of the offence beyond reasonable doubt.

Consequently, the prosecution had the burden to prove the following ingredients:

a) That the victim was below 14 years of age.

b) That there was a sexual act performed on the victim.

c) That it was the accused who committed the offence.

- 5 The prosecution led the evidence of 3 witnesses; Ayebale Briton a Medical Clinical Officer, the victim S.A and his mother a one Haawa Mursal in an effort to prove the above ingredients.

The Law

At the close of the prosecution case, **Section 73 of The Trial on Indictment Act (TIA)**,
10 requires this court to determine whether or not the evidence adduced has established a prima facie case against an accused person.

It is only when a prima facie case has been made out against the accused that he/she should be put to his defense.

Section 73(2) of the TIA provides; - “*where at the close of the prosecution case a prima facie case has not been made out, the accused would be entitled to an acquittal.*” Reference is made to the case of **Wabiro alias Musa V R [1960] E.A 184.**
15

The evidence adduced by the prosecution at this stage should be sufficient to require an accused person to offer an explanation or else he/she runs the risk of being convicted.
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In the case of **Uganda versus Alfred Ateu [1974] HCB 179**, the court laid down the considerations justifying a finding that no prima facie case has been made out against the accused as follows:

- 1) ***When there has been no evidence to prove an essential ingredient in the alleged offence***
25
- 2) ***When the evidence adduced by the prosecution has been so discredited as a result of cross examination, or is so manifestly unreliable that no reasonable court could rely on it.***

It is important to note, that for the accused person is to be put on defense, court must be ready to convict if he offers no explanation on the credible, admissible and high quality evidence in support of each ingredient of the offence.

Evidence

- 5 In accordance with **section 66 of the Trial on Indictments Act**, Police Form 3A for the medical examination of the victim S.A carried out on 11/07/2022, Police Form 24A for the examination of A.M and Police Form 24A for the medical examination of M.M both carried out on 12/07/2022 were agreed upon by the defense and prosecution and accordingly admitted in evidence as PE1, PE2 and PE3 respectively.
- 10 All examinations were carried out by Ayebale Briton a Medical Clinical Officer at Pearl Medical Clinic, he became PW1 in the trial.

The victim's mother testified as PW2. She told court that she knew the two juvenile offenders because they had been her neighbors for almost 4-5 years. She further told the court that she knew the victim A.S as her son and that he was 9 years old.

- 15 That she operates a shop in Kisenyi and on the date of the incident, the 10th of July 2022 at around 6: 30p.m to 7:30 p.m while at the shop, she sent her son home during Iddi Festival. That her son went back to the shop crying while saying that the 2 juveniles had done something to him and he mentioned their names as A.M and M.M. That they had a small knife which they used to threaten him, took him to the
- 20 corridor and started raping him especially A.M.

- That she removed his trouser and when she looked at it, it was covered by feaces. That she then went to Musajjalumbwa Police Post/Station from where she was sent for medical examination at the Hospital. That the Doctor told her that her son had been raped. That she in fact saw two doctors who did a test on the victim and they
- 25 both confirmed that the child had been raped. She told court that while the doctor examined her child, she stayed outside the room.

In cross-examination, she told court that the incident occurred on 10th July 2022. That she examined the victim on that day and saw that his trouser was covered with feaces. It was on the same night that she reported the matter to police and also had the victim medically examined. That the Juvenile offenders were arrested
5 on 11th July 2022 in the afternoon. She also emphasized that two families are close neighbors.

When questioned by this court about her allegation that she had taken the victim for 2 medical examinations, she told court that she had taken the child to the 2nd doctor to confirm what the first doctor had said because she did not believe her
10 child had been defiled.

For PW3, the victim, this Court performed a voire dire and found him to be possessed with sufficient intelligence to testify, his testimony was as follows:

He told court that he was 9 years old and a pupil at Faith Primary School in P.3.

That he knows the two Juvenile Offenders as A.M and M.M and they are his
15 neighbors. That they used to be his friends before the incident happened.

That the Juvenile offenders herein defiled him when he was going to his mother's shop. They found him on the way and they both defiled him. That the incident happened during day at around 4:00p.m. and there were no people.

That A.M had a knife which they used to threaten him after which they removed
20 his trouser and defiled him. That he could not scream because they covered his mouth, threw him down and put their penis into his anus. That A.M did it first followed by M.M.

They told him not to tell his mother and that if he ever did they would kill him. He went and told his mother what they had done to him. That he started feeling pain

and then he felt pain for another one day then his mother decided to go to police.
That She did not do anything else about the issue.

They then left the police and came back home.

I did not find anything substantive in cross-examination save for the fact that the
5 relationship between the juveniles' parents who are in fact neighbors had gone
sour.

Resolution

As already noted, ***Section 73 of The Trial on Indictment Act (TIA)***, requires this court
to determine whether or not the evidence adduced has established a prima facie
10 case against the accused.

It is only when such a prima facie case has been made out against the accused
person that he should be put to his defense.

Suffices to note that at this stage, the court is expected to evaluate the prosecution
evidence and determine whether it is sufficient, credible and capable of proving all
15 the ingredients of the offence of aggravated defilement and whether such evidence
has not been discredited during cross examination or that it is manifestly unreliable
that no reasonable tribunal or court can safely convict on it.

In other words ,court has to evaluate the evidence to satisfy itself that the
prosecution has led evidence proving the essential ingredients as mentioned
20 above.

**The apparent age of the victim as being below the age of 14 years at the time of
the incident was not contentious.** Both the prosecution and defense agreed to the
age of 9 years as that of the victim.

The first ingredient is therefore resolved in the affirmative.

25 What was contentious and therefore requiring proof was the performance of the
sexual Act and participation of the juvenile offenders.

Whether there was a sexual act performed on the victim.

Section 129 (7) (a) of the Penal Code Act defines a sexual act to mean penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ. **Sexual organ means a vagina or a penis.** Emphasis mine.

The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or any other cogent evidence.

In that regard and as earlier on noted, Police Form 3A for the medical examination of the victim S.A was admitted in evidence as PE1. It shows that on 11/07/2022, the juvenile was examined by one Ayebale Briton a Medical Clinical Officer (PW1) who observed in Part 5 of the report that S.A was well-nourished and in a good general condition, in part 7(f) which is the area of our concern being that it deals with the buttocks and the anus, he stated that, "noted mild fecal matter on the anal region, no bruises, no lacerations, intact anal muscle tone."

This finding of an intact anal muscle tone with no bruises or lacerations would mean that the area was not tampered with. This would ordinarily mean that the child's anal area was intact because it is not strange for one to find mild fecal matter in the anal area of a 9-year-old boy.

However, he goes ahead in part 8 on the probable cause of the injuries and he stated "blunt force". This left me wondering if he had even examined the victim or took time to understand his averments in the report. Because where there was no injury as detailed in Part 7 (f) from where did he observe the blunt force trauma? This therefore makes the whole medical report questionable.

Be that as it may, the Supreme court in the case of **Hussein Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995**; observed that,

"Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."

Emphasis mine.

PW3 the victim told court in his testimony on oath that the two juveniles had called him to an isolated corridor at around 4pm and defiled him. That they had a knife which put on his neck threatened him, threw him down, removed his trouser and defiled him. He emphasized that both juveniles defiled him. That they then left him there having cautioned him not to tell his mother. That he felt pain and went to his mother and told her what had happened. He makes no mention of any examination by his mother save for the fact that when he felt pain again for another day, his mother took him along to the police from where they went back home.

PW2, the victim's mother narrated to court that while at her shop, she had sent her son home at about 6pm. However between 6:30 and 7:30 pm he returned to her crying and told her that the two juvenile offenders herein had defiled him. That she removed his trouser and examined him and the trouser was full of feaces.

This fact that she found feaces in the victim's trouser corroborates the findings in PE1 wherein the Clinical Medical Officer also noted that he had observed fecal matter in the anal area.

The witness went on to state that the doctor had told her that her son had been raped, but other than this being hearsay evidence because she did not even stay in the room where the victim was purportedly examined it also neither has a basis nor any supporting evidence.

The police who was investigating the case did not escort the victim for medical examination yet this is part of investigation. .

In my opinion ,this omission leaves room for manipulation of the process.

Falsification of Police Form 3 cannot be ruled out.

What did the examining officer ,mean by intact anal muscle torn?

How can an intact muscle be torn at the same time?

Even the reading is changed to inside torn, how can the inside be torn without bruising the outside of a nine year old boy sodomised/raped by two boys ?

How can two boys penetrate a small boy of 9 years in turns after the other and leave his anus intact?.

How could a mother of a nine year old boy not attend his medical examination ?

With the evidence available on the file, one cannot comfortably say without a doubt that the victim was ever defiled that is to say that a sexual act was performed in his anus as there is no evidence pointing to this fact.

5 In **Mugoya Vs. Uganda [1999] 1 E.A 202**, the Supreme Court held that in cases involving sexual offences, **there was need for corroboration of both the evidence proving that sexual penetration of the complainant took place, and the complainant's evidence that implicating the accused in the commission of the offence.** **Emphasis mine.**

10 From the evidence on record and in view of the above authorities, it is clear that not a single prosecution witness saw the accused in the act of defiling the victim. Also whereas PW2 alleged to have examined the victim, she told court that all she saw was faeces in the victim's trouser. PE1 categorically stated that the victim's anal muscle was intact and with neither bruises nor lacerations. The victim did not
15 mention ever being examined by his mother.

It is trite law that where there is doubt, it has to be resolved in favor of the accused person. See **Obwalatum Francis Vs Uganda Supreme Court Criminal Appeal No.030 of 2015**

Court finds that the evidence is so manifestly unreliable and unsafe to convict on
20 should the juvenile offenders be advised by defense counsel to exercise their right to remain silent.

In the circumstances there is neither direct nor circumstantial evidence that there was a sexual act performed on the victim by the juvenile offenders herein or any other person for that matter on the alleged date or any other date before or after
25 the incident for that matter.

I therefore find that no prima facie case has been made out requiring the accused to be put on defense and accordingly find them not guilty.

I hereby acquit both of them of the offence of aggravated defilement contrary to section 129(3) (4) (a) of The Penal Code Act.

I so direct

Dated at Kampala this 31st day of March 2023

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Hon Lady Justice Margaret Mutonyi JHC

JUDGE.