

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL DIVISION
CRIMINAL SESSION CASE NO.8 OF 2020**

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UGANDA-----PROSECUTION

VERSUS

WERAGA AKIM-----ACCUSED

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BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

The accused person, Weraga Akim was charged with the offence of Aggravated defilement contrary to section 129(3), (4), (a) of the Penal Code Act. It is alleged that on the 25th day of April,2019, the accused person while at Ismael Zone, Makindye, Kampala District unlawfully performed a sexual act with **NAMATA SALIMA**, a girl under the age of 14 years.

At the hearing, the accused person was represented by Counsel Oonyu Vincent while the prosecution was represented by Mr. Amerit Timothy State Attorney.

From the onset, the prosecution bears the burden to prove the offence against the accused beyond reasonable doubt. This burden of proof does not shift to the accused and the prosecution must adduce evidence to discharge its burden of proof. If there is any doubt in the prosecution case, it must be resolved in favor of the accused.

For the accused person to be convicted of the offence of Aggravated defilement, the prosecution must prove the following ingredients;

1. That the victim was below the age of 14 years

30 **2. That a sexual act was performed on her**

3. That it is the accused person who participated in the commission of the offence.

That the victim was below the age of 14 years

The age of a child may be proved by production of a birth certificate or by
35 testimony of the parents, it may also be proved by court's own observation and common sense assessment of the age of the child.

The medical evidence exhibited through Police Form 3 and marked as PExh.2 indicates that the victim was aged three years at the time she was allegedly defiled. This evidence was not contested by the defense.

40 I therefore find that the prosecution proved beyond reasonable doubt that Namata Salima, the victim was a girl below the age of 14 years.

That a sexual act was performed on her.

Section 129 of the Penal Code Act as amended defines a sexual act to mean;

45 **a) Penetration of the vagina, mouth or anus, however slight of any person by a sexual organ;**

b) Unlawful use of an object or organ by a person on another person's sexual organ.

A sexual organ has also been defined to mean a vagina or penis.

50 In this case, the Police Form 3 tendered in and admitted without objection from the defense indicates that the vagina of the victim had a septic lacerated wound and the probable cause of this was a blunt object. The fact that a sexual act was performed on the victim was thus not contested. Section 57 of the Evidence Act provides that facts admitted need not be
55 proved and as such I find that the prosecution has proved beyond reasonable doubt that a sexual act was performed on Namata Salima.

That it is the accused person who participated in the commission of the offence.

The prosecution is required to prove beyond reasonable doubt that it is
60 the accused person who performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial showing the accused as the perpetrator or participant in the commission of the offence

PW1 the victim, in her unsworn testimony told court that she the victim as
65 Weraga Akim, it was her evidence that that on the fateful day the accused found her playing with her friend and took her to an incomplete house wherein he laid her down on a mattress, removed his penis and put it in her private parts.

PW2 the investigating officer, told court that the victim led them to where
70 she had been defiled from and that some exhibits such as a skirt with blood stains and a checkered boxer were recovered from the suspect.

However, it is worth noting that these exhibits were not exhibited in court and as such their existence was not proved.

In his defense, the accused raised a defense of mistaken identity and called
75 two other witnesses namely Lubega Thomas and Isaac Lubowa

The accused person testified that he left his place of work and returned home, that he went to the well to fetch water. That on reaching his place he undressed and remained in his boxers. It was evidence that in the process of pouring water from the jerry can, he heard the small gate to his
80 place being opened. That he saw so many people who later came and dragged him out, started beating him accusing him of having defiled a child. That he told this mob that he knew nothing about it because he had never seen the said child.

During cross examination, he testified that at the time the mob came for
85 him he was the only person in the rentals and that he had not seen any other person entering the place before the mob came in.

In setting up his defense of mistaken identity, the accused called DW2 who told court that when the accused was arrested he was called in as local leader in the area, that he informed them that this was a case of mistaken
90 identity as there was someone else other than the accused who was suspected of defiling girls at a house next to the accused's place. He also adduced evidence of a letter exhibited and marked as DExh.01 addressed to the Director of Public Prosecutions showing that this was a case of mistaken identity.

95 His other witness, DW3 told court that he knew the accused as his friend and neighbor, he confirmed to court in his evidence that he saw the accused going to the well to fetch water but later on also saw people storming his place wherein he was being beaten and accused of defiling a certain girl in the neighborhood.

100 It was his evidence that he told this mob that it was not the accused who had done it as he had just seen him return from fetching water. He told court that his plea fell on deaf ears as the accused was taken to police.

What if evident from is that this is a case of a single identifying witness who is a child of tender years and gave unsworn evidence.

105 The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should warn itself of the danger of possibility of mistaken identity in such case. This is particularly important where there are factors which present difficulties for identification at the material time. The court must in every such case
110 examine the testimony of the single witness with greatest care and where possible look for corroborating or other supportive evidence. If after warning itself and scrutinizing the evidence the court finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity. **See: John Katuramu versus Uganda**

115 **Criminal Appeal No. 2 of 1998**

A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no

one would suggest that a conviction based on such identification should
120 never be upheld it is the duty of this court to satisfy itself that in all
circumstances it is safe to act on such identification. **See: Roria v
Republic [1967] EA 583**

The court is therefore required to warn itself of the danger of convicting
an accused person on unsworn evidence of a single identifying witness of
125 a child of tender years without corroboration. No amount of self-warning
or warning of the assessors can justify convicting an accused person on
unsworn evidence of a single identifying witness of a child of tender years.
**See: Senyondo Umar Vs Uganda Court of Appeal No.267 of 2002
(Unreported)**

130 In warning itself the court must be also be equally aware that no particular
number of witnesses shall be required for proof of any fact. The single
identifying witness in this case PW1 was a child of tender years and gave
unsworn testimony.

The law on evidence of a child of tender years is provided for under
135 Section 40(3) of the Trial on Indictment Act. It provides that;

***Where in any proceedings any child of tender years called as a witness
does not, in the opinion of the court, understand the nature of an
oath, his or her evidence may be received, though not given upon
oath, if, in the opinion of the court, he or she is possessed of sufficient
140 intelligence to justify the reception of the evidence and understands
the duty of speaking the truth; but where evidence admitted by virtue
of this subsection is given on behalf of the prosecution, the accused***

shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.

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In this case, the victim a girl aged three years at the time gave unsworn evidence as to the participation of the accused person. The evidence of PW2 cannot corroborate her evidence as he did not see the accused defile the girl child. The medical evidence neither proves the participation of the accused nor corroborates this fact.

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The only testimony that links the accused person to the crime is that of PW1 but since she is a child of tender years and did not testify on oath, the danger in convicting him such unsworn evidence moreover uncorroborated is much greater. The exhibits recovered by PW2 which include a skirt with blood stains, a checked boxer and a maroon "***kikooyi***" with yellow, red and blue strips were not exhibited in court.

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Furthermore, the defense of mistaken identity raised by the accused is plausible, DW3 corroborated this defense when he stated that he saw the accused going to well to fetch water and that there is no way he could have defiled this girl. Similarly, the concerted effort by the local leaders of the area as evidenced by DExh.01 a letter addressed to the Director of Public Prosecutions to make a case of mistaken identity for the accused raises strong doubt in the prosecution case. The sketch plan tendered in indicates that the premises in which the victim was allegedly defiled in were vacant but the victim stated that she was placed on a mattress, this contradiction in my view raises doubt as to where the victim was allegedly

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defiled from. Nothing was stated in the evidence to show that the PW1 had known the accused person for some time, the victim only testified to knowing him by name.

170 I therefore find that the evidence of single identifying witness moreover that which was unsworn and uncorroborated is insufficient in proving the participation of the accused person.

He is accordingly acquitted and should be set free unless his being held on other lawful charges.

175 I so order.

JUDGE

19/01/2023

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