

THE REPUBLIC OF UGANDA
IN THE HIGH COURT UGANDA AT JINJA
CRIMINAL SESSION NO.129 OF 2018

UGANDA:.....PROSECUTION

VERSUS

AGUMA TOM :..... ACCUSED

HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

RULING ON A PRIMA FACIE CASE

Aguma Tom herein referred to as the accused was indicted with the offence of Aggravated Defilement contrary to Section 129 (3), (4)(a) and (c) of the Penal Code Act (PCA). It is alleged that the accused on the 1st day of September 2017 at Karongo camp in Jinja District, performed a sexual act with Drateru Sharifah, a girl aged 13 years.

At plea taking, the accused pleaded not guilty to the indictment.

Representation

The prosecution was initially represented by the Assistant Director of Public Prosecutions Ms. Gladys Nyanzi Macrina and was later represented by Shallote Kamusiime, a Senior State Attorney in the Office of the Director of Public Prosecution. The accused was represented by Counsel Daniel Mudhumbisi and Delilah Namanda on State brief.

Submissions by the Counsel

At the close of the prosecution's case, the State prayed that the Court finds that the evidence led by the prosecution is sufficient enough to sustain a prima facie case and put the accused on his defence.

Counsel for the accused argued that the evidence adduced by the prosecution does not support the indictment and the charge against the accused person. That the Court had been informed by PW2 (the victim) that she was 14 years from the statement she recorded at Police and that according to the testimony of the victim's mother, PW3, the victim was born on the 15/3/2003 making her 14 years and 6 months by


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the time the offence was committed. That the evidence does not support the offence of aggravated defilement as supported by law since the victim was above 14 years at the time the offence was allegedly committed. Defence Counsel argued that it was the evidence of the victim that she was drunk at the time she was escorted home by the accused which makes it difficult to tell if it is the accused who actually committed the offence. That from the face of the record, the evidence does not support the offence for which the accused is charged and any reasonable person cannot use the evidence on record to convict the accused. Counsel prayed that Court finds that the accused has no case to answer.

In rejoinder, the prosecution submitted that the the victim had clearly informed Court that she knew the accused who was a neighbor and for this reason, she could not be mistaken by his identity. The State invited Court to read the victim's statement in its entirety. The prosecution argued that although the victim had stated that she had drunk alcohol called "Empire" on the day that she was defiled, she did not get drunk. That as a result of not being drunk, she was able to move and was in position to identify her mother to whom she narrated what had happened to her on that day. That she was able to show her mother the toilet behind which she had been defiled. The prosecution concluded by stating that the victim was in control of her mental faculties and therefore was not drunk as alleged by the Defence.

It was argued by the prosecution that with regard to the victim's age, PF3A which is the victim's medical report which had been admitted by the Defence and was the basis for the charge. That although the victim and her mother in their respective testimonies informed Court that Sharifah (the victim) was 14 years at the time of the commission of the offence, Court should apply the provisions of Section 87 of the Trial on Indictments Act (TIA). That should this Court find that the age is resolved by the testimony of the victim and the mother, Court should rely on S.87 TIA and find that an offence was committed against the victim thereby putting the accused on his defence on a minor and cognate offence than that for which the accused is charged in the indictment. That the issue of age does not take away the fact that the victim was a child and that defilement was committed against her. The State prayed that Court finds that a prima facie case exists to put the accused on his defence.

Court's analysis

Burden and Standard of proof

The burden of proof in criminal matters 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.


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Consequently, the prosecution had the burden to prove the ingredients of aggravated defilement as set out in **Uganda V Orem Nicholas Criminal Session No. 459 of 2010** in which case Lady Justice Flavia Senoga in her Judgment discussed the ingredients of aggravated defilement to include;

- a) There was an unlawful sexual act committed.
- b) The victim of the offence was below 14 years of age at the time of the offence.
- c) The accused person is the perpetrator of the unlawful sexual act.

The prosecution led the evidence of three witnesses; Drateru Sharifah the victim/complainant (PW2), Rafa Chandiru mother to victim (PW3) and Kazibe Sirive (PW4) the Investigating Officer. Both the Prosecution and Defence agreed to Police Form 3A (PF3A) on which the medical examination for the victim was recorded. PF3A was tendered to Court as PEX1 thereby admitting Kanabiro Robert, the Medical Clinical Officer who conducted the examination as PW1.

The Law

At the close of the prosecution's case, **Section 73 of the Trial on Indictments Act (TIA) Cap 23** as amended, requires this Court to determine whether or not the evidence adduced by the prosecution has established a prima facie case against the 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 or her defence.

Section 73(1) of the TIA provides that; - *"When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is no sufficient evidence that the accused or any one of several accused committed the offence, shall, after hearing the advocates for the prosecution and for the defence, record a finding of not guilty".*

Prima facie case.

By law it is expected of the prosecution that, at the close of its case, it has made out a *prima facie* case, one which on the face of it, is convincing enough to require that the accused person be put on his defence. Justice Stephen Mubiru in the case of **Uganda Vs Obur Ronald & 3ors Criminal Appeal No. 0007 of 2019 (HC)** stated that: - *"A prima facie case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See Rananal T. Bhatt v R. [1957] EA 332). The evidence adduced at this stage,*


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should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a prima facie case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

According to **A Guide to Criminal Procedure in Uganda** B.J. Odoki 3rd Edition at page 120 it is stated that in order for the Court to dismiss the charge at the close of the prosecution's case, Court must be satisfied that: -

- a. There has been no evidence to prove an essential element of the alleged offence or;
- b. The evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

The Evidence

In determining whether the prosecution made out a prima facie case, the Court analysed the State's evidence in respect of the ingredients of the offence of Aggravated Defilement.

1. There was an unlawful sexual act committed

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.

Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. In the case of **Hussein Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995**; Court 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."

Furthermore, in **Mugoya Vs. Uganda [1999] 1 E.A 202**, the Supreme Court held that;

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'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 implicating the accused in the commission of the offence.'

In the instant case, PF3A (the medical form) in respect of the victim, was admitted after it was agreed upon by both prosecution and defence and was tendered into Court by the prosecution as PEX1 and its author Kanabiro Robert was admitted on record as PW1.

According to PEX1 dated 2/9/2017, PW1 stated that on examination of the genitals of PW2, Drateru Sharifah, he observed mild hyperemia on the vulva, abrasion of the inferior vulva, laceration at the lateral vaginal orifice and old hymen rapture. PW1 further observed on PEX1 that the probable cause of the above injuries to the victim was possibly due to recent physical activity to the victim's vagina by a smooth erect object, possibly a male penis.

PW2, Drateru Sharifah (the victim) testified that on 1st September, 2017, she went to the well and the accused grabbed her and pulled her to the bush where he slept with her. That he removed his clothes and lay on her. PW2 further clarified that the accused removed his penis and inserted it into her vagina and that she felt a lot of pain.

Despite the minor contradictions by PW2 as to the time when the offence was committed and where it happened which can be explained due to the lapse of time since the offence was committed six years ago, a medical examination was conducted on PW2 which clearly corroborates PW2's testimony that an unlawful sexual act was committed on her.

I therefore find that sufficient evidence has been adduced by the prosecution to prove the ingredient of an unlawful sexual act.

2. The victim of the offence was below 14 years of age at the time of the offence

In the case of **Uganda v Kagoro Godfrey (High Court Criminal Session 141 of 2002) [2003] UGHC 67 (28 April 2003)** Hon. Justice Augustus Kania stated that: -

"It is true the most conclusive way of proving the age of a child is by the production of his/her birth certificate and possibly followed by the testimony of the parents. It has however, been held that other ways of proving the age of a child can be equally conclusive and of these is the observation of the child, by and the common sense



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assessment of the age of the child See R Vs Recorder of premisby Ex-parte Bursar [1957] 2 ALL ER. 889."

In the instant case, no birth certificate was produced before Court and when PW2 testified, she stated that she was 12 years old at the time the offence was committed and that she is 18 years old this year. However, when PW2 was crossed examined by the Defence, relying on her statement that was recorded by the Police admitted as DEX1, which indicated that she was 14 years old, PW2 insisted that she was 12 years old at the time of the commission of the offence. PW3, Rafa Chandiru, the mother of the victim, testified that PW2 was born on 15th March, 2003. PW1 indicated on the victim's medical form marked as PEX1 that PW2 chronologically looked 12 years old but by dentition she was 13 years old.

With the guidance in **Uganda v Kagoro Godfrey (supra)**, the victim's mother having testified, this Court is in agreement with the testimony of PW3, the victim's mother, that PW2 at that time the offence was committed was 14 years and 6 months old.

Section 129 (3) and 4 of PCA provides: -

(3) Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

(4) The circumstances referred to in subsection (3) are as follows—

(a) where the person against whom the offence is committed is below the age of fourteen years;

(b) where the offender is infected with the Human Immunodeficiency Virus (HIV);

(c) where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed;

(d) where the victim of the offence is a person with a disability; or

(e) where the offender is a serial offender.

In the instant case, Court has come to the finding that the victim was 14 years old at the time the offence was committed. The issue of age plays a pivotal role in matters of aggravated defilement in determining the offence for which the accused is charged. Therefore, in the instant case, Court is of the opinion that the prosecution has proved the offence of defilement and not aggravated defilement against the


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accused since the victim was not below the age of 14 years at the time of the commission of the offence.

3. The accused person is the perpetrator of the unlawful sexual act.

In the case of **Uganda Vs Jawiambe Innocent Criminal Sessions Case No. 0070 OF 2015**, a case of aggravated defilement Hon. Justice Stephen Mubiru stated that:

"The last essential ingredient required for proving this offence is that it is the accused that performed the sexual act on the victim. This is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as the perpetrator of the offence."

PW2 testified that the accused took her to a bush and defiled her. She also informed Court that she knew the accused prior to the commission of the offence since he was a neighbor in Kakira.

It was PW3's testimony that on Eid day, PW2 and her friend Khasifa went out to celebrate Eid. That at around 3:00 am, Khasifa came to PW3's home looking for PW2. That PW3 went out looking for PW2 and at about 4:00am, she saw PW2 walking together with the accused whom she identified with the help of street lights in the camp. That both PW2 and the accused were coming from the direction of the Disco hall in Kakira. That on inquiring from PW2 about where she had been, PW2 informed her that she had been with the accused who had taken off her clothes and slept with her.

To rebut PW2's testimony, the defence relied on PW2's statement recorded at the Police in which she indicated that she had taken some alcohol on that day that the offence was committed and that therefore, she could not have been in position identify the accused since she was drunk. The Defence further argued that according to PW2's statement, she indicated that she had previously had sex with a one Odama and Stephen and therefore it could not have been the accused who had defiled her.

It is true that the PW2 had had previous sexual encounters as per PEX1 which indicated old hymen rapture. However, the medical report of the victim clearly indicates there were injuries in the victim's vulva and vagina had been caused by recent physical activity in the vagina. Being a recent injury to the victim, this would rule out Odama and Stephen with whom the victim had had previous sexual encounters. According to the victim's testimony, it is the accused who had allegedly recently had sex with her by the time the medical examination was conducted.


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Therefore, in conclusion, I find that there is sufficient evidence has been adduced to connect the accused person to the commission of the offence of defilement and not aggravated defilement as charged. Although this would ordinarily be a case tried by the lower court, in the interests of justice and the time the accused has spent on remand and the fact that the Court has already received the prosecution's evidence, this Court shall invoke its inherent powers and proceed to hear the accused's defence.

I so order.



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HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA
JUDGE

Ruling delivered on 5th October, 2023.