

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA KAMPALA
HCT-00-CR-SC-328-2019**

UGANDA **PROSECUTOR**

Versus

KAFEERO KOSIYA **ACCUSED**

BEFORE: THE MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

The accused person **Kafeero Kosiya, 80**, is charged with the offence of Aggravated Defilement contrary to sections 129 (3) and (4) (c) of **the Penal Code Act**.

It is alleged in the particulars of offence that sometime in the month of February 2018 at Miika village Namayumba sub county in Wakiso District, the accused repeatedly performed acts of sexual intercourse with his own biological daughter NS, a girl being 16 years of age at the time.

Kafeero pleaded 'Not Guilty' at his arraignment.

The victim (who will be referred to as NS in this judgment) is the biological daughter of the accused and his wife Nantale Janet, PW 2. The two were separated. The victim originally lived with her mother until she reached Primary 6, then she moved to live with her father in Wamika village located in Namayumba sub county in Wakiso district. She was 16 years old at the time.

When she got to Primary 7, the victim was sent home on several occasions because her school fees remained unpaid. She was in a school called Nagulumeya Primary School.

It was the testimony of the victim that in 2017, her father used to come to her room in the night, tie both her hands and legs and then he would have sexual intercourse with her. Then he would give her a little money for school fees. This went on for a while.

The victim told the teacher in charge of girl's affairs that her father was defiling her. That the school wrote to the accused calling him for a meeting but he ignored the invitation. The victim also told her mother and sisters. When PW 3, **Justine Nakintu**, the victim's elder sister, was told by the victim what was going on, she confronted the accused with the allegations but he denied them.

The matter was reported to the police. The victim was found to be pregnant when she was medically examined and eventually gave birth to a baby girl. The medical examination report was exhibited as PE 1.

A DNA examination to determine the parentage of the child was done. It was established that the accused was the father of the baby. The DNA report was tendered as PE 3.

Kafeero Kosiya opted to remain silent when he was put to his defence.

Determination

The onus was on the prosecution, as it is always on the prosecution in all criminal cases, except in a few statutory offences, to prove the guilt of the accused beyond any reasonable doubt. [See **Ojapan Ignatius vs. Uganda Cr. App. No. 25 of 1995 (unreported)**]. That burden never shifts. In addition, the prosecution can only succeed on the strength of its case and never on the weakness of the defence.

The prosecution must also prove all the essential elements of the offence charged to the standard laid out above. The elements in this case have all been brought in issue by the accused pleading not guilty.

The defence opted not to make final submissions in this matter.

In a case of Aggravated Defilement, the ingredients are:

- i. That the victim was below the age of 18 years
- ii. That the victim was the daughter of the accused
- iii. That there was a sexual act performed on the victim
- iv. That it was the accused responsible.

i. That the victim was below the age of 18 years

Age like any fact in issue is proved by evidence which can be direct or circumstantial.

In Hajati Mulagusi v Pade (Civil Appeal No. 28 of 2010) [2013] UGHCLD 94 it was stated that,

Evidence denotes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved and includes statements by accused persons, admissions, judicial notice, presumptions of law, and ocular observation by the court in its judicial capacity.

NS, when she testified, stated that she was born on the 8th of August 2002. This date of birth was confirmed by PW 2 the mother of the victim. The medical examination on 5th February 2019 found that the victim had not developed the third lower molars which confirmed that the victim was 16 years.

In view of the above, the victim was 16 years in 2018, at the time the acts of sexual intercourse is alleged to have happened.

This court accordingly finds and holds that the 1st element of the offence has been proved to a standard beyond reasonable doubt.

ii. That the victim was the daughter of the accused

The victim stated that the accused was her father. It was also stated that her mother sent her back to live with the accused, her father, so that he could pay her school fees.

It was also the testimony of PW 2, Janet Nantale, that the accused is her husband. That the victim is her daughter and the accused is the father of the victim. This court carefully weighed this evidence and also noted that there was no evidence adduced to disprove this assertion. In the absence of any rebuttal or evidence to the contrary of this assertion, it is my finding that the accused is indeed the father of the victim.

The second element is proved.

iii. That there was a sexual act performed on the victim

S. 129 (7) of the **Penal Code Act** describes what amounts to a sexual act. It includes any penetration of the vagina, of any person by a sexual organ, however slight; OR the unlawful use of any object or organ by a person on another person's sexual organ.

The victim testified that she suffered repeated sexual acts over a period of time. That she eventually conceived. When she was examined on the 5th of February 2019, the victim was found to be 24 weeks pregnant. On the 1st of May 2019, she gave birth to a baby girl. The child was produced in court at the time the victim testified.

The medical evidence also established that the victim had an old rupture of the hymen.

The fact that the medical examination found the victim had a hymen which had long been ruptured, was pregnant, and that she eventually gave birth, is incontrovertible proof of sexual intercourse.

In the result, the third element is proved.

iv. That it was the accused responsible.

The accused in this matter pleaded not guilty. That meant that all elements of the offence were brought into issue. Secondly although no evidence was adduced in his defence, the burden of proof was always on the prosecution to prove all elements of the offence particularly whether the accused committed this offence.

PW 1, NS, stated that she was repeatedly defiled by the accused. That she reported this to her teacher and told both her mother and sisters. It is clear that the victim kept reporting to various people but no one was taking action until PW 3 reported the matter to the police. By then she was pregnant.

This court ordered a paternity test of the victim's daughter, NR, who was 4 years old by the time the matter came up for defence hearing in August 2023.

Following the court order, the Government Analytical Laboratory carried out a DNA parentage test by analysing and comparing a samples of blood from the accused person and the child - NR.

Nabwowe Jane a Senior Government Analyst testified as PW 5 and is the one who carried out the tests. She stated that she holds a Master's Degree in Biological Sciences. That she has done a course in DNA profiling from the HID University in South Africa. She also holds a certificate in Quality Management Systems from the National Institute of Science and Technology in India. These courses are all related to the study of DNA.

It was her evidence that she was the one who did the DNA analysis on the 2nd of August 2023. She stated that according to what she called Mendallian Laws of

inheritance, which are the guiding principles employed, a child inherits half of its DNA from the biological father and the other half from the biological mother. That by examining and comparing the DNA profiles of the biological parents with those of the child, it is possible to determine the biological parents.

From the results, it was determined that Kafeero Kosiya, the accused, cannot be excluded from the paternity of the child NR. PW 5 stated that she found half the DNA from the father, the accused, existing in the child. Such half of the DNA can only be contributed by the biological father.

The analyst explained that the DNA profile obtained was for parentage. If it had been that done for a grandfather, a different relationship would have been seen in the results. In the case of a father he always contributes half of the DNA, with the other half coming from the mother.

The conclusion therefore was that the outcome strongly supports the proposition that the accused is the biological father of the NR.

The above results conclusively prove that the accused is the father of the victim's child. As such, we have the bizarre situation where he is the father of his own grandchild.

Because the DNA examination proves the accused is the father of the victim's child, it corroborates the victim's testimony that the accused used to defile her repeatedly. It is also this court's conclusion that the victim's consistent reports and complaints to her teacher, her mother and her elder sisters carried a high probative value and were truthful.

The assessors advised this court to find that the prosecution had proved all the elements of this offence.

In view of the reasons given, and in agreement with the assessors, I find that the accused committed this offence.

It is therefore the finding of this court that **Kafeero Kosiya** is *guilty* of the offence of Aggravated Defilement contrary to section 129 (3) and (4) (c) of the **Penal Code Act** and is hereby *convicted*.



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Michael Elubu

Judge

16.10.2023