

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**HCT-00-CR-SC-62-2020**

**UGANDA** ..... **PROSECUTOR**

*Versus*

**JUMBA FRED** ..... **ACCUSED**

**BEFORE: THE MR. JUSTICE MICHAEL ELUBU**

**JUDGEMENT**

The accused **Jumba Fred**, 32, is charged with the offence of Aggravated Defilement contrary to sections 129 (3) and (4) (a) of **the Penal Code Act**.

It is alleged in the particulars of offence that on the 21<sup>st</sup> day of May 2019 at Ndeeba Nsike Zone, in Makindye Division in Kampala District the accused being a person infected with HIV performed a sexual act on NM, a girl aged 6 years.

The accused pleaded ‘Not Guilty’ at his arraignment.

The prosecution adduced evidence to show that NM was 6 years old at the time and lived with her grandmother in Ndeeba Nsiike I zone located in the Rubaga division of Kampala district. The grandmother, Tuhaise Margaret, had a room at the back of a building which had a shop at the front and several other rooms at the back. The accused person shared one of those rooms with his wife Nassimbwa Mariam, also known as Mercy, and an aunt of NM’s mother.

The room had a bed and a decker. Nassimbwa and the accused used the bed while the decker was used by Mercy's children who at the time were away in boarding school. There was a white curtain across the room that provided privacy, cutting off Mercy's bed from the decker, and dividing the room in two.

On the night of the 21<sup>st</sup> of May 2019 it stated that NM and another young child NA then aged 10 asked to spend the night with their aunt Mercy. The two slept on the decker. The victim took the upper bed while NA slept on the lower part of the decker.

In the middle of the night, NM woke up to find the accused on top of her and felt him push something into her vagina. She cried out to her Aunt, Mercy and asked her to take her back to her grandmother's room.

Meanwhile, NA had seen the accused wake up and pick his phone which he then put to charge. He thereafter got on the bed. That he first tried to remove NA's skirt but she resisted. It was at that point that he climbed to the upper decker and where NM was.

The next morning a neighbour noticed that NM was walking with difficulty and notified the grandmother. NM told her grandmother that she was defiled by the accused. The matter was reported to the LC I chairman and then to the police. After a number of days, the accused was arrested and charged.

The victim was medically examined on the 17<sup>th</sup> of June 2019 and her vagina found intact. Her perineum however had a healing wound. The accused was also medically examined where it was established that he was HIV positive. These medical forms were tendered as exhibits.

The accused denied these charges.

He stated that he lived with Nassimbwa who was his wife on one side of the block while Tuhaise, the complainant, lived on the other. They lived in a small room he estimated to be 9ft by 10 ft.

The accused knew both children who spent a lot of time around his room. That indeed both girls spent a night with them that night. That he got up to charge his phone. Though he heard the victim cry, it was because she wanted to return to her grandmother and not because she was defiled.

He states that he was called to the police after about two weeks and released. That the complainant told him that she did not want him living with Mercy. He accordingly left the premises. After about 2 weeks the accused went to pick cloths he had left at Mercy's house. That when the complainant saw him there, she arrived with soldiers and had him arrested.

It was alleged that DW 3 the secretary for women affairs in the area examined the victim immediately after the allegation of defilement emerged but found no sign of sexual activity.

The accused and Mercy (DW 2) also alleged that PW 1 harboured a grudge against them.

The accused stated that he was innocent and these circumstances prove it.

### **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.

In a case of Aggravated Defilement, the ingredients are:

- i. That the victim was below the age of 14 years
- ii. That there was a sexual act performed on the victim

iii. That it was the accused responsible.

**a) The first element is whether the victim was below the age of 14 years at the time that this offence was committed.**

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.

At the time she testified, NM said that she was 9. Her grandmother, PW 1, told the Court the victim would be 10 in March this year. PE 3, her medical examination report, states that she was found to be 6 years of age in 2019. The medical officer made that conclusion by reason of the presence of milk teeth and eruption of her lower central incisors. Lastly, it was clear from her physical appearance that the victim was about 10 years of age at the time she testified.

The defence did not dispute the age of N.M.

From all the above this court finds that the victim was below 14 years of age.

It is therefore my finding that the first element has been proved beyond reasonable doubt.

**b) The second element is whether a sexual act was committed 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 woke up to find the perpetrator on top of her. Then he pushed something into her vagina. The next morning a neighbour, Hasifa Namaganda, noticed the victim was walking in a strange manner and notified PW 1. That was when PW 1 (her grandmother) interviewed NM who told her she had been defiled by the accused. The matter was eventually reported to Police. PW 3, Detective Sargent Nanfuka Janet took the victim for medical examination. As stated earlier, the report is on record as PE 3. It shows the vagina is intact and both the labia and external vulva are normal. However, the victim had a healing wound on the perineum. The medical examination report pictogram on page 4 illustrates that the wound is on the tissue located between the anal opening and vagina.

The court treated the victim as a child of tender years. After a *voire dire* she was determined to be an intelligent child who understood the duty to tell the truth. She however did not appreciate what an oath was. As a result, her evidence was received unsworn. For this reason and by operation of the law, all assertions of fact she gave, that have a bearing on the guilt of the accused, must be corroborated before they are relied on to prove guilt (see Section 40 [3] of the **Trial on Indictments Act**).

A sexual act is complete when any person either uses their sexual organ or any object on the victim's sexual organ. There appears to be no evidence to corroborate the evidence of the victim that something was pushed into her vagina. That evidence would have come from the medical evidence in such circumstances.

In addition, on the day the victim told her grandmother mother that that she had been defiled, the matter was brought to the attention of the LC I Secretary for women affairs who testified as DW 3, Nakitende Hadijja. She stated that, together with PW

1, they examined the victim but found her intact. The two went to police together and Nakitende confirmed to Police that she had found the child unharmed.

That was when DW 3 suggested they both take the child to the Police Surgeon for examination. PW 1 however seemed reluctant and disappeared with the child in the crowd that had gathered. DW 3 did not see PW 1 again till she was informed that the victim has been medically examined with results showing penetration.

It should be noted that the medical evidence was not obtained until the 17<sup>th</sup> of June 2019. The victim was alleged to have been defiled on the 21<sup>st</sup> of May 2019. This is a period of almost a month. In these circumstances other intervening events cannot be ruled out as causing the wound on the perineum. PW 1 also remained mute when asked why she took this long to report the case or go for medical examination. It was my conclusion, that in the circumstances, her silence could be imputed to indicate ill motive as the reason for the delay.

The evidence of NA is not helpful in this regard. She stated she did not see what happened to the victim but that she heard her cry. The victim told her that she thought it was NA who was with her the bed. And saw someone on the bed.

That evidence does not provide independent confirmation of the allegation that a sexual act was committed on the victim. It would ordinary stop at showing that there was someone on the bed.

The net effect of this evidence is that the sexual act has not been proved to the required standard. In the result, the second element of the offence was not proved.

**c) Whether the accused persons committed this offence (Participation)**

The victim in this case, NM, stated that together with her young aunt, NA, they spent a night in the room of her aunt Mercy. It was during that night the accused had climbed into the victim's bed and pushed his penis into her private parts.

This court has already found that as a child of tender years who did not take the oath, it was mandatory for her evidence to be corroborated in every aspect that points to the guilt of the accused person. Therefore, the court would need to look at other evidence, including surrounding circumstances, to make a determination of whether the accused participated in the offence as stated.

It is alleged that the very next morning the NA, who was on the bed with the victim, reported this matter to Hasfa Namaganda. It was Hasfa who asked PW 1 to speak to the victim. Hasfa was not called as a witness.

DW 3 was the secretary for women affairs in the village. When she attempted to speak to the victim as she examined her, PW 1 prevented her from doing so.

It appears PW 1 did not enjoy a cordial relationship with her sister in law Mercy (DW 2). DW 2 testified that as soon as she began a relationship with the accused PW 1 turned against her. That PW 1 testified that the accused used to be married to a friend of hers.

On the other hand, PW 1 denied harbouring a grudge. However, both DW 2 (Mercy) and DW 3 (Nakitende) stated that when the accused was taken to the police station, PW 1 said she would forgive him provided he ended his relationship with DW 2. She also demanded that DW 2 leave the premises. Indeed, at the time of her testimony, DW 2 had left the home. This is pertinent considering she has always lived in the building which belonged to her aunt but was evicted by PW 1 who was an in law.

The Supreme Court noted in **Haji Musa Sebirumbi vs Uganda SCCA 10 of 1989** that the trial Judge should give proper consideration to allegations of grudges, and ensure prosecution witnesses were not influenced by the grudges in question.

Certainly evidence of grudge if proved would lower the credibility of a witness as it may turn out to be a motivation to lie. It may point to the young children being persuaded or conditioned into pointing at the accused person.

According to PW 1, the accused is alleged to have committed the offence on the 21<sup>st</sup> of May 2019. He was first arrested on the 31<sup>st</sup> of May 2019, detained briefly and released. The accused stated that is then that PW 1 gave him an ultimatum to vacate Mercy's room. He moved out but left his cloths in the room. The SD ref according to the sketch plan is 19/15/06/2019. It means the matter was reactivated on the 15<sup>th</sup> of June 2019. It is the evidence of both the Accused and DW 2, that when the accused went to pick his cloths, PW 1 saw him and thought he had moved back. She immediately had the police and army arrest him. It was this second time that he was charged.

In such circumstances the court should evaluate all the evidence, carefully balancing all sides or versions, that is both the prosecution and the defence. Considering that the accused was released from custody as stated by both DW 3 and himself, and then compelled to leave the room appears to point to a sour relationship. His conduct does not appear to be that of a guilty person. He remained available even between the 21<sup>st</sup> and 31<sup>st</sup> of May 2019 after the allegations first arose.

I have also accepted the evidence that PW 1 did not want the Secretary for Women affairs to accompany her to the Police surgeon or to speak to the victim. These circumstances all appear to point to cracks in the prosecution case. They point to malicious intent from PW 1 and water down the allegations.

The assessors advised this court to find that the accused did not participate in the commission of this offence and he should be acquitted.

In view of the reasons given, and in agreement with the assessors, I agree.

It is therefore the finding of this court that **Jumba Fred** is *not guilty* of the offence of Aggravated Defilement contrary to section 129 (3) and (4) (a) of **the Penal Code Act** and is hereby *acquit* him.

Dated at Kampala this 08<sup>th</sup> day of August 2023





**Michael Elubu**

**Judge**