

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSIONS CASE NO. 0563 OF 2020

UGANDA.....PROSECUTOR

VERSUS

MUYOMBA ISMAIL.....ACCUSED

Before: Hon Lady Justice Rosette Comfort Kania.

Ruling

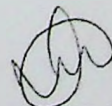
Muyomba Ismail (herein referred to as the accused) is Indicted with the offence of Aggravated Defilement contrary to Section 129 (3) and (4)(a) of the Penal Code Act.

It is alleged that on 9th November 2019 at King Fahad Islamic Primary school, Muyomba Ismail performed a sexual act with B R a boy aged five(5) Years. The accused pleaded not guilty to the charges on the indictment. Court conducted a voir dire owing to the tender age of the victim and found PW1(BR) possessed with sufficient knowledge to testify.

In a bid to prove the indictment against the accused, evidence of the following was admitted during the preliminary hearing; PF3A in respect of the victim, PF24A in respect of the accused, laboratory request form in respect of the victim indicating that he was a five year old male child tested negative for RCT and a laboratory request form in respect of the accused person indicating that he was male adult aged 29 years tested negative for RCT. In addition, the prosecution called seven witnesses and closed its case.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). 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 (See *Wabiro alias Musa v. R [1960] E.A. 184 and Kadiri Kyanju and Others v. Uganda [1974] HCB 215*).

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, could convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v. R. [1957] EA 332*). The evidence adduced at this stage, 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.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] ALL E.R 448 and also applied in *Uganda v. Alfred Ateu* [1974] HCB 179, as follows:-

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

At the close of the prosecution case, it was the submission of the learned defence counsel, Mr. Mututa, that in making the decision on whether or not the accused has a case to answer, court has regard to the evidence of PW1, the victim, particularly as it relates to identification of the accused and the events surrounding the rectal prolapse which resulted in his hospitalization. He in addition drew court's attention to the medical forms exhibited in court and prays that court is guided by them in making the decision on whether or not the accused person has a case to answer. The defence informed court that they do not intend to make written submissions.

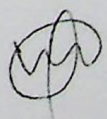
I am required at this stage to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of aggravated defilement, if the accused chose not to say anything in his defence and whether such evidence has not been discredited as a result of cross-examination or is manifestly unreliable that no reasonable court could safely convict on it. It is important to note, that for the accused person to be put on defence, would 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 but not to shift the burden of proof to the accused as any conviction must be based on the strength of the prosecution case but not on the weakness of the defence case. For the accused to be required to defend himself, the prosecution must have adduced evidence of such a quality or standard on each of the following essential ingredients;

- a). That the victim was below 14 Years of age
- b). That there was a sexual act performed on the victim
- c). That the offender was a person in authority over the person against whom the offence is committed
- d). That it was the accused who committed the offence.

Determination of the evidence on each of the essential elements of aggravated defilement

- (a) That the victim was below 14 Years of age

There is no contention against the victim having been below the age of 14 years at the time the offence was committed. It is indicated on PF3A that the victim was five years old in 2019 at the time of committing of the crime and at the time of his testimony in court he indicated that he was 9 years old.



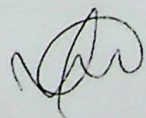
(b) That there was a sexual act performed on the victim

Section 129(7)(a) 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. 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 corroborated by medical evidence or any other evidence.

In this case, PF3A which was completed on 16th November 2019 by Bwire Faizo, the police surgeon, indicated that, the victim reported that he was sodomised and that hot water was poured in his anus by his teacher, Ismail of King Fahad Busega. The victim indicated that the incident had occurred about one week ago. On examination of the buttocks and anus of the victim, the police surgeon noted that, the anus was not tender, did not exhibit redness neither were there any bruises. On performing a rectal digital examination, he noted that the sphincter muscles were intact and that they were not allowing penetration of one digit. On other relevant observations, the police surgeon noted that; Rectal prolapse is noted four times and was managed from Kibuli hospital, it is a medical condition mostly in children under 5 years due to chronic diarrhea. He added that there are no signs of sodomy.

PW1, who is the victim testified that, that he is 9 years old, He said that he left King Fahad Islamic Primary because he had things in his bum bum and that the thing was a circle, as if it was cut in the middle and it was like blood with colour red. He further stated that he suffered diarrhea before the red thing came out of his bum bum and that he had diarrhea for 3 three days while at King Fahad. He told court that his teacher took him to the class told him to lie on the mat and remove his shorts. That the teacher poured on him urine from kettle and also caned him because he was outside playing instead of coming in to learn. Victim said he didn't remember whether the teacher left the classroom and whether he removed his kanzu. He added that when he was on his bed, he wanted to go the toilet, while he was under washing, he saw the round thing like a ball at his bum bum, it was not so painful because it was the first time. He said he did not report the matter to anyone because he did not want to go to the nurse. The matron saw it when he was going to the bathroom and she said, 'ekyo ekintu kyolina ku kabina eyo mmeeme,' and she forced him to go to the nurse who started to squeeze it until he wanted to vomit, though it didn't go back. The victim's uncle Nkangi Ibra was called and he took the victim to the hospital. When asked whether he remembers the teacher's names, he said the name he remembers the name "Nyanzi" on whether he can recognize him in court he said he does not recognize him in court but he was a brown man. The testimony of PW1 was taken in chambers. The testimony of the victim was taken in chambers and the accused was not too far away from the victim.

During her testimony PW5, Nabasirye Mariam, who was the school nurse at King Fahad Busega at the relevant time, indicated that the victim presented with a protruding mass from the anus which in medical terms is referred to as a rectal prolapse. She explained that a rectal prolapse is when part of the large intestine called the rectum protrudes out of the anal area and it occurs when the muscles around the rectum weaken for instance, when there is prolonged diarrhea, constipation, age, nerve damage, pregnancy and child birth.



In cross-examination Pw5 stated that minors can get rectal prolapse from diarrhea or constipation and she further stated that when she asked the child what happened to him, he said he didn't know.

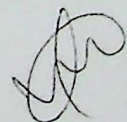
Dr. Victor Kigonya, PW6, a doctor at Kibuli Hospital identified a medical report issued on 27th November 2019, as having been prepared by himself, which was subsequently admitted into evidence and marked PE5. The medical report was in respect of the victim and it indicated that the victim was admitted on 9th November a diagnosis of rectal prolapse with reduced anal sphincter tone recorded. The medical doctor stated that BR was complaining of a rectal mass which he said started at 6am that day and that he was from the toilet that morning, then he ran to the matron complaining of a rectal mass. PW6 reported that the uncle who was with victim said that he had suffered from diarrhea recently. The doctor said it was not his first time to meet a case of rectal prolapse and that rectal prolapse in 50-60% of the cases are due to straining when in the toilet. He further said that in his years of experience, it is possible that trauma to the anus can injure the sphincter which keeps a key role in keeping the rectum intact. It could be sexual activity of repeated anal penetration or forceful anal penetration, it can also be due to perineal and pelvic structures infections which destroy the structures of the rectum hence resulting into prolapse. When asked to inform court what usually happens when an allegation of sexual assault has been made by a child, PW6 stated that, when allegations of such a nature are made they usually notify the authorities, but in this case, they were still perplexed on what course of action to take due to the conflicting stories. PW6 added that, on day 1 and 2 the issue of sexual assault did not come out it only came out on the third day. He added that the family decided to take the child away while the authorities were still analyzing the report of sexual assault to see what course of action to take.

Attached to the report was a case sheet, on which it was indicated that in the "history of the present complaint" section that the victim was reportedly from the toilet that morning he was admitted, he then went to the matron complaining of a rectal mass. It is also indicated that the victim had diarrhea of recent and that there was no clear hx (in medical terminology, hx means history) of abuse.

In cross-examination, PW6 stated that the patient came to the hospital with the problem of rectal prolapse which was caused by passing of stool. And when asked whether during his examination of BR he found out whether BR had suffered sexual assault, the witness said that he did not. The medical report indicated that while treatment was still on going, the family insisted on discharge which was granted on 11th November 2019.

PW2, Nkangi Ibrahim, the victim's uncle who picked him up from school, testified that when he picked the victim, he had something coming out of his behind and he was not in a good state, the whole anus was out and even the flies were all over him and he was crying. He testified that the school nurse told me that he probably ate something that caused the problem. PW2 added that, at Kibuli hospital, the victim told him that the teacher made him enter the class and poured hot water in his buttocks. By this, PW2 understood that, the victim had been defiled. He added that the victim later told him that it was the teacher who teaches Arabic at King Fahad who had poured hot water in his buttocks.

In cross-examination, PW2 emphasized that the school nurse said that the victim's challenge could have arisen from the food he ate. He added that, the victim didn't tell him the name of the person who poured



hot water in his bumbum but that he only told him that it was the Arabic teacher. He neither mentioned the name, nor took him to the teacher.

PW3, the mother of the victim, testified she was able to join PW1 and PW2 at Kibuli Hospital where PW1, the victim informed her that he was defiled and this incident happened in November 2019. She informed court that at Kibuli Hospital, the doctor told her that it appeared that the child was sodomized. She said that at Kibuli hospital, she was not helped and asked for a referral to Rubaga hospital where the doctor examined the victim and told her that he had been sodomized. Court noted that no medical report was tendered in evidence to support this. The mother stated further that when the victim woke up, she asked him what happened and he said that Sheik Isma told him to go to class and told him to remove his shorts and lay on the form (bench) and he felt that hot water had been poured on him.

In cross-examination, Pw3 emphasized that when the victim told her that the teacher poured on him hot water and that was the last word she heard from him before she fainted.

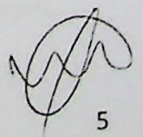
PW4, Buyinza Badru the father of the victim testified that the victim told him that, Ismail Muyomba, who was his teacher took him where they were studying upstairs and used him. In cross-examination Pw4 stated that it is from Nakasero hospital where he learnt that his child had been defiled. No report from Nakasero Hospital was tendered in evidence to support this claim.

In the case of *Ssewanyana Livingstone v Uganda SCCA no. 19 of 2006*, Court held that a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds him or her to be honest, reliable and uncontroverted wherein the court noted that what matters is the quality and not quantity of the evidence adduced.

According to the facts at hand, there was a lot of contradictions with the witnesses who testified in court and the quality of evidence was so flawed, that it could be perceived as deliberate lies. It is trite law that where there is doubt, it has to be resolved in favor of the accused person and this was the position in the case of *Obwalatum Francis v Uganda Supreme Court Criminal Appeal No. 030 of 2015*. It should be noted that all these contradictions are very grave and go to the root of the case, given that nobody saw the accused defiling the victim.

In the case of *Mugoya v Uganda [1999] 1 EA 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 implicating the accused in the commission of the offence.

From the evidence on record, there is no evidence of the accused person being seen performing a sexual act on the victim. The evidence against the accused person is therefore circumstantial. In the case of *Nankwanga Fauza & Ors Vrs Uganda CSC No. 243/2015*, Lady Justice Eva Luswata followed the decision of the Supreme Court of Nigeria sitting at Abuja in *Tajudeen Iliyasu versus The State SC 241/2013* which considered that evidence in great detail. It was held that circumstantial evidence; - ".... is evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics...., this is so for in their aggregate content, such



circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person, caused the death of the deceased person. Simply put, it meant that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence. She went ahead to say that however, the court cautioned that ".... such circumstantial evidence must point to only one conclusion, namely that the offence had been committed.

In the present case, nowhere is it stated unequivocally in any of the medical reports that, the victim suffered a sexual assault, rather all the medical evidence on file links the rectal prolapse to diarrhea which the victim in his testimony mentioned that he had suffered for about three days. On perusal of PF3A, I find that, the police surgeon Bwire Faizo after examining the victim observed that; Rectal prolapse is noted four times and was managed from Kibuli hospital, it is a medical condition mostly in children under 5 years due to chronic diarrhea. He added that there are no signs of sodomy. PW5, who was the school nurse at the time of the incident also informed court that rectal prolapse can be caused by diarrhea. PW6, a doctor from Kibuli where the victim first received treated informed court that the victim presented with rectal prolapse which is attributable to many things including sexual trauma and diarrhea. When asked in cross-examination whether on examination of the victim he found evidence of sexual assault, he said he did not find evidence of sexual assault. And asked why he did not report to authorities as is the practice when sexual assault is alleged, he said that it was because the story of sexual assault was not consistent and kept changing from time to time. Moreover, the allegation of sexual assault came up on the third day and as the medical authorities was still trying to understand the matter, the parents of the victim requested for a transfer and the victim was accordingly transferred. The evidence of the nexus between diarrhea and rectal prolapse was also evident in the testimony of PW1 who stated he had diarrhea for about 3 days before the prolapse. The fact that the matron upon seeing the mass at the buttock of the, PW1 told him that "ekyo ekintu kyolina ku kabina eyo mmeeme" indicates that the matron being a caretaker of young kids had seen such a condition before, it was common and was not an indication of any mischief.

The testimony of PW3 and PW4, who are the parents of the victim, where they stated that the victim had been sexually assaulted is belied by the evidence of not one but three medical practitioners who all upon examining the victim, opine that there was no evidence of sexual assault. The victim himself testified that he suffered diarrhea and that after the diarrhea he saw the mass protruding from his bum bum,, he added that the teacher poured urine on his buttocks and caned him. His uncle PW2 testified that the victim told him that the teacher had poured hot water on his bum. The testimony of the victim did not indicate that there was sexual assault. On interaction with the victim during his testimony, it was clear that the victim was bright and articulate and had there been a sexual act performed on him he would have been able to say so. In the premises, there is doubt whether the victim suffered a sexual assault

It is trite law that where there is doubt, it has to be resolved in favor of the accused person and this was the position in the case of **Obwalatum Francis v Uganda Supreme Court Criminal Appeal No. 030 of 2015**. It should be noted that all these contradictions are very grave and go to the root of the case, given that nobody saw the accused defiling the victim.

Therefore, since the medical evidence proves that there was no any sign of sodomy but rectal prolapse was reported, there is no other credible evidence showing that a sexual act was performed on the victim.



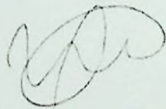
The findings of the medical practitioners, had they indicated that evidence of sodomy was found would have compelling because by their training and experience they are able to make findings of sexual assault upon conducting examination of victims including internal examinations. Therefore, court finds that the evidence is so manifestly unreliable and unsafe to convict on should the accused be advised by his defence counsel to exercise his right to remain silent.

It is important to note that once an essential element of the offence is not proved, it cannot be said that a prima facie has been established and proof of a sexual act is an essential element in a charge of aggravated defilement.

In the circumstances, there is no direct, circumstantial or other cogent evidence implicating or showing that a sexual act was performed on the victim. The allegation of a sexual act being performed on the victim was dispelled by the medical evidence; PF3A (PE2) the testimony of Dr. Victor Kigonya and the medical report he presented (PE5); and the testimony of Nabasirye Mariam who was the school nurse at the time of the incident. Therefore, I am of the view that, had the accused person elected to remain silent, the court would not have sufficient evidence to convict him of the case of aggravated defilement of the victim.

Having found that there was no evidence that a sexual act was performed on the victim, the other elements of the offence of aggravated defilement accordingly are not proved.

Accordingly, I find that no prima facie case has been made out requiring the accused to be put on his defence. Consequently, I find the accused not guilty and hereby acquit him of the offence of aggravated defilement c/s 129 (3) and (4) (a) of the Penal Code Act. He should be set free forthwith unless he is being lawfully held on other charges.



Rosette Comfort Kania
Judge
20th December 2023