

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**HCT-00-CR-SC-0047-2020**

**UGANDA**

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**PROSECUTOR**

**VERSUS**

**TWESIGYE SIMON**

**aka Tadius**

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**ACCUSED**

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

**JUDGEMENT**

The accused, **TWESIGYE SIMON aka TADIUS**, is charged with 4 counts of the offence of Aggravated Defilement, contrary to section 129 (3) and (4) (a) of **the Penal Code Act, Cap 120**.

For count 1, it is alleged in the particulars of offence that the accused person, between the year 2016 and 3<sup>rd</sup> July 2019, at Kamwokya Church zone in Kampala district, performed a sexual act on M.K. a boy aged 13 years.

The particulars of offence in the 2<sup>nd</sup> count are that the accused person, between the year 2016 and 3<sup>rd</sup> July 2019, at Kamwokya Church zone in Kampala district, performed a sexual act on A.O. a boy aged 8 years.

In the 3<sup>rd</sup> count, the particulars of offence are that the accused person, between the year 2016 and 3<sup>rd</sup> July 2019, at Kamwokya Church zone in Kampala district, performed a sexual act on L.S. a boy aged 8 years.

The particulars of offence in the 4<sup>th</sup> count are that the accused person, between the year 2016 and 3<sup>rd</sup> July 2019, at Kamwokya Church zone in Kampala district, performed a sexual act on M.R. a boy aged 9 years.

The accused person pleaded 'not guilty' thus bringing all the elements of the offence into issue.

The brief facts for the prosecution are that M.K., A.O., M.R. and L.S., all lived in Church area zone, in Kamwokya of Nakawa Division in the Kampala capital city. The accused person is also alleged to have lived in the same zone for several years where he earned a living selling water, soda and passion fruit juice.

The first victim, M.K. was 13 years old at the time and lived with his grandmother, PW 1, Tokosa Mariam. PW 1 had a two roomed house in which she stayed with 9 other people all of whom were female. M.K. was the only male in the home. At one time the accused, who is 27 years old and was a neighbour, asked PW 1 to let M.K. come and live with him and she accepted.

As soon as the M.K. went to reside with the accused, he forced M.K. into having anal sexual intercourse with him. Whenever M.K. resisted the accused would threaten to kill him.

A.O. was 9 years old in 2019. He is the son of PW 2, Lillian Obonge, and was born in 2010. His mother sold charcoal not far from where the accused sold his soda and water.

It was stated that the accused had sexual intercourse with the victim on at least three different occasions.

That the accused warned AO that if he reported the matter to anyone he would beat him. That A.O. was frightened and never did report to anybody.

The third boy was M.R. who lived with his grandmother in Kamwokya Church zone. His evidence is that the accused placed his penis between his thighs on two occasions.

The fourth child was L.S. who was aged between 7 and 8 years in 2019 and 11 on the day he testified.

That he knew the accused who at one time called L.S. and his friends into his room and showed them porn. On another occasion the accused asked L.S. to remove his trousers. He then put his penis between the victim's thighs till the victim felt a wetness between his thighs. He repeated the did on two other occasions.

L.S. told his mother, PW 7, who reported the matter to the late area chairman called Kakooza. The accused was arrested and taken to Kira Road police station.

The police took the children for medical examination. M.K. was found to have signs of anal sexual intercourse.

A.O., M.R. and L.S. showed no symptoms of anal or penile injury.

The accused denied the commission of the offence. It was his evidence that these children lived in the same neighbourhood with him.

That he did not own a Smart phone and had never showed the children pornography.

In respect of A.O., the accused retorted that the charges may have been prompted by a grudge A.O.'s elder sister Doreen had against him. That she had wanted the accused to get her a job, when he failed she developed a grudge. That M.R. and L.S. were friends of A.O.'s sister and were all part of the ploy to frame him.

That M.K. and his grandmother lived next to him. He had once employed M.K to run his shop at a time he was sick but M.K. did not remit any of the proceedings from the sales he made. As a result, the accused beat him and that annoyed M.K.'s

grandmother. Otherwise he had never lived with M.K. or threatened him with a panga.

It was also not true that he run a shop selling passion fruit juice and water. Rather, his business was dealing in electrical goods like woofers. That he also had a coca cola branded fridge in which he kept soda and passion fruit juice. In 2019, he had switched to dealing in fish.

He also denied attempting to flee at the time when the LC official wanted to arrest him. What happened instead, was that he had wanted to inform his employer, the owner of the shop, that he was going to the LC offices and she should come and mind the shop. On his way he was arrested and that is why the witnesses thought that he was running away.

As this is a criminal case, it is trite law that the burden of proof rests with the prosecution and never shifts to the accused person (**Okethi Okale vs R [1965] E.A 555**). The degree of proof on the other hand is to a standard beyond reasonable doubt (see **Kamesere Moses vs Uganda S.C.C.A 8/1997** (unreported)). In sum, it means that the prosecution should prove each of the elements of the offence to a standard beyond reasonable doubt.

It should be noted that an accused person is convicted on the strength of the prosecution case and not the weakness of the defence.

The essential elements in a case of Aggravated Defilement are that:

- a) The victim was below 14 years of age.
- b) That there was a sexual act performed on the victim.
- c) The Accused person participated in the commission of this offence.

**a) The victim was below 14 years of age.**

Age, just like any other issue or fact in dispute, must be proved by cogent direct or circumstantial evidence. As set out earlier, onus remains on the prosecution to establish that the victims were below the age of 14 years at the time the offence was alleged to have been committed.

In the case of M.K., he stated that he was 17 years old at the time that he testified. When he was medically examined in 2019, his age was established to be 13 years. In this court's observation, M.K. certainly looked like he was less than 14 in 2019. On the other hand, there is no evidence or other circumstance in this matter to challenge the age of M.K.

I therefore find as a fact that M.K. was below 14 years of age in 2019 and this element of the offence has been proved.

Regarding the age of A.O., PW 2 his mother, stated that he was born in 2010. The medical examination done on the 6<sup>th</sup> of July 2019 put his age at 9 years (based on a dental formula of 22 teeth). On the 27<sup>th</sup> of October 2022, when he testified, he said he was 11 years old. Additionally, from this Court's observation, he was clearly about 11 years of age and certainly below 14.

M.R. stated he was 13 years old, on the 27<sup>th</sup> of October 2022, the day he testified. He was also medically examined in July 2019 when he was found him to be 9 years of age (based on a dental formula of 22 teeth). There is nothing on record to dispute the age of the victim and I find that the prosecution has proved him to be below 14 years when the offence was committed.

As for, he L.S. stated that he was 11 years of age on the 27<sup>th</sup> of October 2022 – the day he gave evidence in Court. His mother, PW 7, said her son was born in 2011. The medical examination of L.S. which was done on the 6<sup>th</sup> of July 2019 put him at 8 years of age at the time. The defence did not contest the age of the L.S. In the result I find that he was indeed below the age of 14 years in 2019.

In the result, this Court finds that the first element of the offence, which requires proof that the victims were below the age of 14 years, has been proved to a standard beyond reasonable doubt.

I will now handle the next elements collectively.

- b) That there was a sexual act performed on the victim.**
- c) The Accused person participated in the commission of this offence.**

The accused person admitted knowing all the victims in this case. He also did not dispute, that he used to live in the Church Area zone of Kamwokya, where all the other prosecution witnesses stayed in 2019. The Church Area witnesses all identified him as Simon. The accused also admitted being arrested by the area local leaders on allegations of defiling the victims. When these facts are views collectively, they clearly establish that the question of identity is not in issue here.

What is in contention is whether the accused performed a sexual act on any of the victims?

Under Section 129 of **The Penal Code Act**, a sexual act is defined as the penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; OR the unlawful use of any object or organ by a person on another person's sexual organ. The term sexual organ in this section refers to a vagina or a penis.

The section makes it clear that only the slightest contact of whatever kind, by a perpetrator with the sexual organ of the victim, is sufficient to establish a sexual act.

I will start here with M.K.

The accused completely denied that he had ever stayed with M.K. He attributed these charges to the anger of PW 1, the grandmother of M.K., whom he said bore

a grudge because the accused had once beaten M.K. On that occasion, the accused had asked M.K. to mind his shop as the accused would be away for a short while. Because M.K. did not hand over all the proceeds from the sale, the accused had beaten him.

Allegations of a grudge are a serious matter as they point to a motive to give tainted evidence. The court is therefore under a duty to have them examined closely.

In this case the allegations were never put either to PW 1 or M.K. and only arose at the stage when the accused was testifying in his defence. It would appear that the claim was an afterthought and not true.

The accused also stated that M.K. had never lived with him. On the other hand, both PW 1 and all the victims said that at the time, M.K. lived with the accused. None of these witnesses were challenged by the defence on this aspect or probed in cross examination, and again the denial only came up at the stage of the defence evidence. I dismiss the claim as belated and false.

It was the evidence of M.K. that when he first went to live with the accused, he tried to force M.K. to have anal intercourse. The victim resisted and struggled with the accused who pushed him out of the house at midnight. PW 2 happened to come out of her house and saw MK. That when the accused heard PW 2 ask M.K. why he was outside at that time of the night, the accused let him back into the room.

MK states the accused persisted and on the 4<sup>th</sup> day he forced MK to have anal sexual intercourse. He thereafter went on to have anal sexual intercourse with the victim on several occasions by inserting his penis into the anal opening of the MK. That whenever M.K. tried to escape back to his grandmother, the accused



would persuade her that M.K. was unruly and she would force him to return. The accused would also beat M.K. whenever he put up any resistance.

PW 1 eventually realised that M.K. had been trying to escape when the other victims came up to report the incidents.

When MK was medically examined after the matter was reported to the Police, it was established that he had mild loosening of his anal sphincter muscle. The doctor concluded that these were signs of having been involved in anal sexual intercourse, although not recently. The medical examination report was tendered as PE 1.

PW 1, was eventually told the details by her grandson when the matter was collectively reported by PW 7.

I watched this witness testify and did not form the opinion that he was lying. He was calm, consistent and steadfast in his testimony.

Although the evidence did not require corroboration as a matter of law, I find evidence of corroboration of the sexual act in the medical evidence in PE 1.

Additionally, Section 156 of **the Evidence Act** stipulates,

In order to corroborate the testimony of a witness, any former statement made by the witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

The other evidence, especially of participation, is corroborated by the report made by MK to PW 1, his grandmother, about the sexual acts the accused was performing on him.

Having considered all the above, I find that the denial made by the accused is untenable and find that the accused committed a sexual act on MK.



I now turn to the case regarding A.O., the second victim. The accused stated that A.O.'s elder sister, Doreen, and his mother, PW 2 harboured a grudge against him. That it arose when they asked the accused to get Doreen a job. When he failed they developed a grudge which resulted in these false charges against him.

The question of a grudge was never put to PW 2, Lillian Obonge, when she testified and neither was A.O. probed if he had a sister called Doreen.

It was also the evidence of A.O. that M.R. and M.K. were his friends.

It was stated that one day when AO was playing football with his friends, the accused called them into his room and showed them pornographic content on his Smart phone. M.K. was also in the room on that day.

Thereafter the accused told A.O. to remove his shorts and go behind the fridge which was in the room. There the accused pulled out his penis and placed it on the penis of the victim and then warned A.O. that he would beat him if he ever told anybody what had happened.

That the second time, the accused called A.O. into the room. He removed the victim's trousers and again put him behind the fridge. Then he placed his penis in A.O.'s anal opening.

The third time he again called A.O. into his room alone. Then he removed A.O.'s trousers and placed his penis between AO's thighs.

As seen earlier, Section 129 of **Penal Code Act** makes it clear that only the slightest contact of whatever kind (penetration or otherwise), by a perpetrator, with the sexual organ of the victim, is sufficient to establish a sexual act.

The accused denied committing the offence saying it was trumped up. However, this court dismisses the question that the evidence was fabricated. I have seen no evidence to rebut the evidence that the accused either placed his penis on that of the victim or penetrated the anal opening of the AO with his penis. The question

of the grudge is untenable here. It appears to have been an afterthought and that is why it was never put to PW 2 or A.O. The accused only brought it up during his defence.

The medical evidence did not find any sign of anal penetration on this victim. However, the manner in which the victim testified persuaded me that he was telling the truth. Besides the medical evidence would have showed penetration and not the slightest contact.

The evidence of A.O. as a child of tender years required corroboration as matter of law. I find that the report made to his mother immediately after L.S. reported the case furnished that corroboration under Section 156 of **the Evidence Act** (supra)

In the result, I find the accused placed his penis on that of the victim, and secondly that on another occasion, his penis came into contact with the anus of the victim.

For these reasons the second and third element of the offence are proved in respect of the second count.

The third count names M.R. as victim.

M.R. stated that he knew the accused well from Church Zone. But in his defence, the accused person stated that M.R. is a friend of Doreen, the sister of A.O., whom the accused said was responsible for concocting the charges against him.

It was the evidence of M.R. that once when he was playing football with his friends, who included L.S., the accused called them into his room. He got out his phone and showed them pornographic movies. He thereafter got out his penis and took turns on each boy by placing his penis between their thighs. M.R. stated he saw a white discharge from the penis of the accused. It appears that the accused ejaculated.

On another occasion, the accused called M.R. into his shop and asked him to sell water for him. He took the victim behind his fridge and asked him to bend over. The accused placed his penis between M.R.'s thighs and started rocking his waist back and forth.

That there another time when the accused again called him to his room. On that occasion M.K. was also in the room. He again put his penis between the thighs of the victim.

It was shortly after this that the accused was arrested and taken to police when on one particular day L.S. fled the room and reported to his mother. After that M.R. was also taken to police and medically examined but the results were unremarkable. He did not suffer any injury to his penis or anus.

From his demeanour and consistency of evidence, this court has no doubt that M.R. was a reliable witness telling the truth. Besides the evidence followed a consistent pattern with the testimony of A.O. who said the accused always called a number of his friends into the room.

In the result I am persuaded that the accused called M.R. into his room and placed his penis between his thighs and ejaculated.

The second part of the definition of a sexual act in Section 129 of the PCA describes it as the unlawful use of any object or organ by a person on another person's sexual organ. The term sexual organ in this section refers to a vagina or a penis.

While a narrow interpretation of the section may appear to indicate that the definition of the offence requires that it is the perpetrator who uses an object or organ on another's sexual organ, it would look like the section allows for more than one restricted interpretation.

It would seem that the offence is also complete when a perpetrator uses any of the victim's body parts, or maneuvers the victim to use any object, on the perpetrators sexual organ. That in my view would be the broader interpretation of Section 129 of the **PCA**, which is a sexual offence, meant to address the mischief (and vice) of using under age children for the sexual gratification of adults.

According the **Merriam-Webster online dictionary** an organ is a bodily part performing a function. **The Oxford online dictionary** defines it as a part of the body that has a particular purpose.

The thighs for example are part of the legs forming an integral part of the limb used for walking and support. They are clearly an organ as they form part of the human anatomy.

In this case therefore, when the accused placed his penis between the thighs of the victim for his sexual gratification he clearly performed a sexual act.

The corroboration of the evidence of M.R. is to be found in the testimony of M.K. who testified that he saw the accused perform this act on the victim. He was an eye witness to the act.

In the result, for Count 3, I find the second and third element of the offence proved.

L.S. did not testify on oath. Because he was a child of tender years whose evidence was received unsworn, his testimony would require corroboration as a matter of law (Section 40 [3] of the **TIA**).

He stated that in 2019 he was between 7 and 8 years old and 11 on the day he testified. His mother informed the court that he was born in 2011.

He knew the accused well because he lived very close to their home. He also says the accused once called them (his friends and him) into his room and showed

them pornography. The next day L.S. went to visit M.K. who lived with the accused. That the accused sent M.K. away and remained alone with L.S. He then shut the door and asked L.S. to remove his trousers. That the accused put his penis between the thighs of L.S. till the victim felt a wetness between his thighs. It appears the accused ejaculated between the thighs of the victim. The accused is said to have repeated the deed on two other occasions.

L.S. also saw him do the same to his friends M.R. and A.O. Most times he would put them behind the fridge that was in his house. He would then go on to do it to each of them in turns.

On one occasion while the accused was busy with his friends, L.S. ran off before the accused could get to him. L.S. immediately went and reported the matter to his mother, PW 7, who informed her neighbours. The matter was reported to the LC I chairman called Kakooza who immediately mobilised and arranged to arrest the accused. That the accused was apprehended trying to escape and taken first to a container Police post in Kamwokya and then moved to Kira Road police station, and charged with several counts of aggravated defilement.

Although he was the youngest victim and his evidence was not taken on oath, L.S. was the most steadfast of the victim witnesses in this case. He struck me as intelligent and truthful. His evidence was never shaken in cross examination. It was he who reported the matter to his mother leading to the arrest of the accused. It was only after the arrest that the other victims rose up to speak.

I therefore find that L.S. was truthful and his evidence was corroborated, under S. 157 of **The Evidence Act** (supra), by the report he made to his mother.

L.S. was medically examined but his results were unremarkable. There was no evidence of penetration or other injury on any of his sexual organs. That can be properly explained by the way the sexual act was committed in this case. It did not involve any penetration.

The defence that L.S. is part of the group that trumped up charges against the accused cannot stand.

This case is similar to M.R. above. In the result I find that the accused performed a sexual act on L.S.

It was reported by all the prosecution witnesses that the accused was arrested at a point when he was trying to escape. On the whole, that is not the conduct of an innocent person.

The assessors have advised this court to find the accused guilty on all counts

I therefore find, **TWESIGYE SIMON aka TADIUS, *guilty***, on all four counts, of the offence of Aggravated Defilement contrary to Sections **129 (3) and (4) (a)** of the **Penal Code Act** and **convict** him.

A handwritten signature in black ink, appearing to read 'Michael Elubu', is written above a horizontal dotted line.

**Michael Elubu**

**Judge**

**13.4.2023**