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The Republic of Uganda
In the High Court of Uganda at Soroti
Criminal Session Case No. JA 16 of 2023

Uganda Prosecutor

Versus

10 E. E. A Juvenile

Before: Hon: Justice Dr Henry Peter Adonyo

Judgement

1. Background:

The juvenile suspect E.E, was indicted with the offence of Aggravated
15 Defilement c/s 129(4)(a) of the Penal Code Act.

The particulars of the offence are that E.E on the 14th day of February
2023 at Mutukula Cell in Soroti City performed a sexual act with A.N, a
girl aged 4 years. E.E pleaded not guilty to this offence and the matter
proceeded to trial.

20 The brief summary of the case is that A.N, a child estimated to be of four
(4) years was staying with her mother called Amulen Gladys at Mutukula
Cell, Pamba ward, western division, Soroti City.

On 14.02.2023 A.N. was taken by her mother Amulen Gladys to a make
shift restaurant at Pamba Ward trading center where her mother worked.

25 Upon the victim's mother completing her usual work around 7:00 p.m.,
she left the victim playing with other children around the makeshift
market and went to a nearby shop to buy some commodities.

When Amulen Gladys, the mother of the victim returned to the market,
she found the victim missing from where she had lefty her playing.

30 Amulen Gladys then mounted a search for the victim in vain till E.E., the
juvenile offender came to her and informed her that he knew where the

5 victim was. Amulen Gladys was then led by E.E. to where the victim was at near a rubbish dumping site with people gathered.

There Amulen Gladys found the victim crying and when the victim saw the juvenile suspect she pointed at him while explaining that the offender was the cause of her distraught because he caused the pain in which she
10 was having in the area which she uses for urinating.

Immediately, the juvenile suspect was questioned by the L.C.1 Chairperson of the area who was called around but the juvenile offender denied the allegations of having committed any sexual assault on the victim. The juvenile suspect was then reported to the Police which visited
15 the scene and discovered one old pink flowered knickers and red slippers which were identified by Amulen Gladys, the mother of the victim as belonging to the victim.

The Juvenile suspect was arrested and interrogated but still denied committing the offence of sexual assault on the victim. He was
20 subsequently charged and committed for trial before this court.

During his trial, the juvenile offender denied committing the offence of Aggravated Defilement c/s 129 (4)(a) of the Penal Code Act.

2. Burden and Standard of proof:

The juvenile suspect herein is charged with a criminal offence and
25 according to criminal law, which is the body of law that relates to crime and proscribes conduct perceived as threatening, harmful, or otherwise endangering to the property, health, safety, and welfare of people inclusive of one's self and which ordinarily is established by statute, the state of Uganda which is prosecuting this criminal offence has the burden
30 of proving the case against the accused beyond reasonable doubt.

5 Generally, in any legal dispute, one party has the burden of proof to show that they are correct, while the other party had no such burden and is presumed to be correct. The burden of proof requires a party to produce evidence to establish the truth of facts needed to satisfy all the required legal elements of the dispute.

10 The burden of proof is usually on the person who brings a claim in a dispute. It is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, which is translated to mean that "*the necessity of proof always lies with the person who lays charges.*"

See: Transnational Principle of Law: Trans-Lex.org Archived 2016-10-07.

15 In civil suits, for example, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the plaintiff, and the defendant bears the burden of proving an affirmative defense.

The burden of proof in criminal matters is on the prosecutor for criminal cases and the accused / suspect is presumed innocent. If the claimant fails to discharge the burden of proof to prove their case, the claim will be dismissed.

The burden does not shift and the accused/suspect can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence. (*See: Ssekitoleko v. Uganda [1967] EA 531*).

25 Evidence is information that is used in the courts that are presented to persuade the courts of the probability of the truth, based on some fact asserted in the case.

Equally, the standard of proof refers to the amount of evidence that is necessary and needed to prove an assertion or claim in a trial in court.

30 The party must establish the facts to prove and support the case for it to succeed. '*Beyond reasonable doubt*' is an example of a very high standard

5 of proof because the court has to be convinced that there is '*no doubt*' that something is true. The higher the stakes are, the higher the standard of proof will be. The highest stakes arise in criminal cases, where the conviction can mean imprisonment.

The level of certainty and a very high degree of evidence is necessary to
10 establish proof in a criminal proceeding. The preponderance of the evidence in criminal matters must be clear and convincing and thus is proof beyond a reasonable doubt which is the standard which must be met for a criminal conviction to result.

Proof beyond reasonable doubt though does not mean proof beyond a
15 shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (*see: Miller v Minister of Pensions [1947] 2 ALL ER 372*).

In the instant matter, the juvenile suspect is charged with the criminal
20 offence of Aggravated Defilement c/s 129(4)(a) of the Penal Code Act. Defilement is the offence where a person (offender) performs a sexual act with a child (victim). A child under the law is a person that is below 18 years of age. An adult is one who is 18 years and above.

Offenders that can be arrested and charged are those above 12 years. It
25 is assumed by law that a child of 12 years and below is not capable of knowing the difference between right and wrong and therefore is not held criminally liable. In cases of defilement, issues of consent and pregnancy are irrelevant.

Consent to the sexual act and/or someone not getting pregnant are not
30 defenses. This means that whether one has agreed to it or has not ended up pregnant is not a defence. The sexual act is itself seen as a crime by

5 law. Even the attempt to commit defilement is an offence and therefore punishable.

So even where one tries to perform a sexual act with a child below 18 years and does not succeed, the matter can still be reported to police and the culprit arrested and convicted if found guilty.

10 The offence of Defilement is classified by the Penal Code Act law into two (2) different categories. This is based on the specific age of the child and special circumstances surrounding the persons involved in the sexual act. These forms are;

a. Simple Defilement which is the sexual intercourse between an
15 adult and a child above 14 years which is a an offence whereof the adult is liable on conviction, to imprisonment for 18 years.

b. Aggravated Defilement which is the sexual intercourse between an adult and a child above 14 years which is a an offence whereof the adult is liable on conviction, to imprisonment for 18 years but is
20 aggravated if the adult performs sexual intercourse with a very young child (between days old to 14 years) or these other special circumstances are prevalent such as where the offender (adult) is HIV positive or AIDS; where the offender is a blood relative to the victim and/or is in authority over the child e.g. a parent, an uncle,
25 aunt etc., where the offender is a person with authority over the victim e.g. a teacher, where the victim (child) is a person with a disability e.g. physical disability, deaf, speech impairment/ disability, mental health conditions etc., where the offender is a serial offender i.e. has committed the offence more than once.

30 These circumstances are taken to be severe and therefore carry a more serious punishment which is a maximum sentence of death.

5 Therefore, in this case, the prosecution has the '**onus**' in proving its case against the juvenile offender and so it has the burden to prove that the juvenile offender herein committed the offence he is charged with and not the juvenile offender and that proof must be beyond a reasonable doubt in all elements of the offence.

10 3. Evidence:

In its attempt to prove its case, therefore, the prosecution led by Senior State Attorney Emasu Michael produced two witnesses, to wit, the Amulen Gladys, the mother of the victim and No. 27849 D/SGT Onyait Beatrice.

15 The Juvenile suspect (j/s) was represented by Counsel Olobo Felix on state brief and he testified as DW1.

For the Juvenile suspect to be convicted to aggravated defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

- 20 a. That the victim was below 14 years of age.
b. That a sexual act was performed on the victim.
c. That it is the juvenile who performed the sexual act on the victim.

The agreed on documentary evidence PF 3A and PF 24A and they were marked as PEX1 and PEX2 respectively. The slippers and knicker
25 recovered at the scene of the crime were also exhibited as PEX3 and PEX4 respectively.

Both the prosecution and the defence do not contest ingredient 1 and 2, what is left for determination is whether the Juvenile suspect is the perpetrator of the offence.

5 PW1 Amulen Gladys, the mother of the victim testified that on the 14/02/2023 she was with her daughter and she sent her to school on boda boda where studies up to 4:00pm.

That at around 7:30 pm the victim was playing with other children in the market where she operates her restaurant and she went to buy salt and
10 returned, the child was still playing outside. After about 10 minutes she asked one of her workers called Esther and she told her that the child was around and moving with her.

That she was still moving around asking other parents of the children around whether they had seen her daughter playing around she got
15 information that an unknown person had taken away the child but nobody knew who it was.

That while she was still thinking about what to do, the juvenile suspect came to her and told her that her child had been got going to town and many people were there so she followed him. That the juvenile suspect
20 then took her to a place which was under construction and where there was a dustbin for rubbish but she did not see any gathered people and when she entered a house which was nearby she found some young girl who informed that there was no child or gathering.

That the juvenile suspect then took her where the child was and she saw
25 the child who was crying and one of her customers rebuked her for not dressing the child for the whole day to which she replied that she had dressed the child even with a panty.

That when she asked the child as to what happened the child pointed at the juvenile suspect and said he had told her to follow him so that they
30 look for money he had been lost with the child then taking them to the

5 exact place where the juvenile suspect had taken her near a dust bin and that at that place they recovered the panty and shoes of the child.

That she was then advised to go to the LC1 Chairman which she did and that the LC1 then told her to take the child to a clinic for medical examination where upon examination the doctor told her that he had
10 found soil and white substances in the child's vagina and confirmed that the child had been molested.

That a relative of the juvenile suspect whose names she did not know paid for that examination.

That later she filed a complaint in police after rejecting the LC1's advice
15 to settle the matter outside police. She wrote a statement and the next day, 15/02/2023 the child was examined from the very police station with some samples removed from the child's vagina for analysis in Kampala. During cross-examination this witness told court that she saw the juvenile suspect in Pamba market before her child disappeared and he was also
20 sometimes used to go to her restaurant to ask for drinking water.

That on the fateful day the juvenile suspect did not take her to the boda boda stage where the child was recovered from but to the front the shops where the child was recovered from. That the child told her that the juvenile suspect did remove her panties and inserted his thing into
25 her.

She further stated that she knew the juvenile suspect very well and even his relatives sell food in the market, these relatives are about 4 including an old woman who sells "**eboo**" with whom the juvenile suspect has been staying.

5 She further told court that there was the other boy who grinds groundnuts into paste, Oiko who sells fish and another old woman who sells "eboo" in the same Pamba market when her child disappeared.

That the red slippers and panties were found where the rubbish is dumped on the lower part.

10 That the child was cleaned by the medical officer at the clinic in Pamba but she does not know the name of this doctor, she is not certain whether he is a doctor or not. After the child was cleaned she was taken directly to CPS and after making the statement she went back home with her.

15 PW2 No. 27849 D/SGT Anyait Beatrice stated that she was assigned the victim's file on the 15/02/2023 by the O/C CID and at this point the J/S was already in the cells. She proceeded to record statements of the victim's mother and another old lady. She also interviewed the J/S who denied the charges. When she visited the scene of the crime she found it
20 was in the open with bare ground, the scene was disorganized as if someone had stepped on it and the red slippers and pink knicker for a child were still there. She drew a sketch map and recovered the exhibits which she later marked, tagged and kept in the exhibit store.

During cross-examination she stated that it was the victim's mother who
25 led her and D/Cpl now Lieutenant Eligu Albert to the scene and the spot where the victims items were found was near the rubbish pit, with the rubbish pit on the western side of the exhibits.

That she tried to inquire from the victim when she was at police and she pointed at the J/S and said he defiled her at Pamba, the child then did not
30 tell her much, she did not tell her of the slippers or knicker being hers as at that time she was crying of hunger.

5 During reexamination she stated that the distance from the rubbish pit to where the exhibits were found was about 4 meters and it was the victim's mother who identified them as belonging to the victim. '

The J/S on the other hand testifying as DW1(not on oath) stated that he was staying with his grandmother and he knew the victim and her mother
10 who operates a restaurant. On 14/02/2023 he was working at Olupot Richard's (his boss) place, he had been sent to take five goats to his home in Oderai in the evening around 7:00pm which he did. On his way back he found people gathered where they sell pilau near the "boda boda" stage, asking whose child was that that had been lost. When he asked whether
15 they were looking for the owner of the child they said yes and since he knew the child from the times he passed via the mother's restaurant he told them he knew the child. He ran to where the mother was and found she was stating that Opukoi had stolen her child, he told her he had seen where the child was and took her there. When he showed her the child,
20 the child started pointing at him saying he had defiled her in Ateso.

The mother then started beating and kicking him, she also hit the child on the ground. She then took him to the LC1 of the area where he told the LC1 that he had taken goats only to find people gathered on his way back. People then picked sticks wanting to beat him up and he remained in the
25 LC1s place from where he was later taken to the Police station after being arrested. At the police station he was kicked by the police officers.

4. Assessment of evidence and Conclusions:

Whether the J/S was the perpetrator of the unlawful sexual act requires evidence whether direct or circumstantial, this is usually proved by
30 testimony of the victim, eye-witness accounts, medical or other such forensic evidence.

5 In this case the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531).

10 Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

15 For the accused to be convicted of aggravated defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

- a. That the victim was below 18 years of age.
- b. That a sexual act was performed on the victim.
- 20 c. The accused was a person in authority over the victim at the material time.
- d. That it is the accused who performed the sexual act on the victim.

This standard of proof of "*beyond reasonable doubt*" is grounded on a fundamental societal value determination that it is far worse to convict
25 an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important
30 transactions of life, to pause or hesitate before or taking the represented

5 facts as true and relying and acting thereon" (*see: R. v. Feamley, [1955] 2 All E.R. 918*).

Beyond reasonable doubt is proof that leaves the court firmly convinced the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of
10 evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime.

This determination is arrived at when after considering all the evidence,
15 the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

First, the prosecution is required to prove beyond reasonable doubt that the victim was below 18 years of age. The most reliable way of proving
20 the age of a child is by the production of her birth certificate, 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 such as the court's own observation and common sense assessment of the age of the child.

25 In the instant case, the victim was a baby, a child of approximately four (4) years and so could not testify .

P.W.1 Amulen Gladys the mother of the victim did not disclose the age of the victim. However, there is the admitted agreed evidence which is Police Form 3A (Pex.1) which is the medical examination by AIP Mulaala ,
30 MCO/PMO practicing at Soroti Police Clinic, of P.O. Box 297 Soroti wherein of one Alupo Noella, victim of sexual assault and which is dated

5 15th February, 2023 Part (b)(3) wherein it is stated that the victim is of apparent age of 4 due to having 10 pairs of milk teeth.

I find that evidence to be conclusive as even counsel for the accused too did not contest this assertion either during the presentation of the document, during cross examination of any of the witnesses and neither
10 did he do so in his final submissions.

I have considered the evidence and find that it has been proved beyond reasonable doubt that by 15th February, 2023, Alupo Noela, was a girl under the age of eighteen years.

The next ingredient which is required in of the offence levied against the
15 juvenile suspect is proof that a sexual act was performed on the victim. One of the definitions of a sexual act under section 197 of the Penal Code Act is penetration of the vagina, however slight, of any person by a sexual organ.

This ingredient is ordinarily proved by the direct evidence of the victim,
20 but may also be proved by circumstantial and medical evidence.

In the instant case, the prosecution relies on the testimony of PW1 who describes the fact of the juvenile offender being pointed at by the victim upon being asked as to the cause of her pain and crying. The juvenile offender was not found *in flagrante delicto*, that is, red handed in the very
25 act of committing the alleged crime.

Exhibit P.Ex.1 (PF3A) which is a medical examination of the victim states that the victim's hymen was open and that blood, vaginal swap and pants were secured and taken for DNA tests.

There is also PEx.2 , Police Form 24A , a medical examination of a person
30 accused of a sexual offence in which the juvenile suspect, EE was examined but no conclusive evidence of any ejaculated semen was

5 reported noticed except for blood samples being forwarded for DNA test which could link him with the victim.

However, both DNA tests result for the victim and the suspect were not exhibited on record and so since PEX1 does not provide any conclusive evidence that links the suspect with the victim, it is difficult for this court
10 to determine conclusively that the open hymen was recent and the source of the mild induration of the genitals of the victim which though is stated to have been caused by a blunt object, resulted from the suspect's action.

As I can deduce here, the prosecution herein was essentially relying on
15 circumstantial evidence which means that for the court to find that the exculpatory facts are incompatible with the innocence of the accused and incapable of any explanation upon any other reasonable hypothesis than that of guilt of the suspect, the prosecution needed to ensure that the circumstances must of the alleged committal of the heinous offence is
20 certain to the exclusion of every reasonable doubt.

This is because, it is necessary that before the court can draw the inference of the suspect was responsible for the mild induration of the genitals of there must be certainty that there are no other circumstances which would weaken or destroy that inference (see: *Shubadin Merali and*
25 *another v. Uganda [1963] EA 647; Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331).*

The circumstantial evidence in this case is that the suspect was pointed out by the victim upon being interrogated by her mother. The circumstances of the questioning is doubtful as no other witness testified
30 to that fact. The suspect himself denies that the victim pointed at him.

5 The victim was medically examined and it was found to have an open hymen with mild induration of the genitals but the medical doctor did not express an opinion as to whether the cause of the mild induration was probably caused by the suspect as he opted for DNA tests to confirm his initial findings. Unfortunately, no DNA test results were exhibited in court

10 The question thus is whether the inconclusive evidence of the medical officer coupled with the uncorroborated evidence of PW1 that semen was found in the victim's vagina proved beyond reasonable doubt that indeed an act of sexual intercourse took place yet in his defence, the suspect denies this element and testifies to his even actually showing the

15 mother of the victim where the victim was which fact was corroborated by the mother of the victim herself when she testified as PW1.

So for a finding of fact to be made based on circumstantial evidence, the court must be satisfied that there are no other circumstances which would weaken or destroy the inference. In this matter, I find that neither

20 in the testimony of PW1 nor the medical evidence PEx.1 and PEx.2 conclusively proves that sexual intercourse or any other sexual act as defined by section 197 of The Penal Code Act occurred.

In the absence of an explanation as to the cause of mild induration found on the victim's vagina, there is no way that I can make a finding of fact

25 that the same was not occasioned by any other force other than that the suspect had sexual intercourse with the victim. The evidence as a whole casts such doubt as would lead a reasonable uncertainty with respect to this element of the offence charged and a real possibility that actually any unlawful sexual act did take place.

5 Accordingly, I find that the circumstantial evidence too weak to establish beyond reasonable doubt that Alupo Noela was a victim of an unlawful act of sexual intercourse as alleged.

Also in this case the prosecution is relying solely on the witness accounts of the victim's mother and the D/Sgt who investigated the complaint. The
10 prosecution is also relying on the fact that the victim was known to the suspect and pointed at him as the one who defiled her and that the suspect himself confirmed in his testimony stated that the victim accused him of defiling her.

However, there was no eye witness to the act of defilement of the victim
15 and neither was there any corroborative evidence pointing to the fact that the alleged white substances found in the vagina of the victim had relations to the juvenile offender. No DNA report was tendered in court to that effect.

This is because, it was the offender who called the victim's mother after
20 telling court that he was concerned with the cause of a gathered crowd which was talking about a lost child and that when he investigated that cause, he indeed saw that the lost child was the victim and since he knew the victim and her mother he quickly went and summoned PW1, the victim's mother to go and see what was happening to her daughter.

25 The question then that arises is if indeed the suspect was the perpetrator of the alleged heinous, why was it that the victim did not point to him at this point but only pointed at him when now there was no crowd?

Secondly from the conduct of the suspect running to inform the victim's mother to go and pick the victim from where she was, I find that this
30 conduct is inconsistent with that of a guilty person unless it is being

5 proffered that the suspect is a confirmed pervert and a psychopath for which context no evidence is offered in this regard.

The D/SGT also stated that the victim while at police pointed at the suspect and ~~seven~~ said that suspect he defiled her, I find this assertion questionable as per her testimony, the suspect was already in the police
10 cells and so at what point did the child see him and point him out as her defiler?

It is trite that the prosecution must prove its case based on the evidence adduced and not the weaknesses in the defence.

In the instant case, PW1 the victim's mother gave uncoordinated
15 evidence leading up to the time she found the child.

She started by stating that after she came back from buying salt at around 7:30pm after about 10 minutes Esther, one of her workers said the child was moving with her, next she says as she was moving around asking other parents if they had seen her child and that someone told her
20 that an unknown person had taken her child.

It should be noted that the victim's mother knew suspect well to the extent of knowing with whom he was staying because they worked in the same market. It thus would follow that other people in the market would know him and in the event that he had taken the child he would have
25 been recognised.

Furthermore, the victim's mother claims that the suspect first took her to a building where a young girl told her there was no crowd or child, however I find that the suspect's testimony that he took her straight to where the child as more believable.

30 Another questionable issue is the medical doctor the victim's mother first took the victim to after she was found. This unknown doctor, who the

5 victim's mother cannot confirm is a doctor, is said to have examined the child but no report of his findings was adduced in court.

Secondly this so called '**doctor**' is stated admittedly by the mother of the victim that he did clean the child after examining her which puts the samples taken for analysis by the police into question.

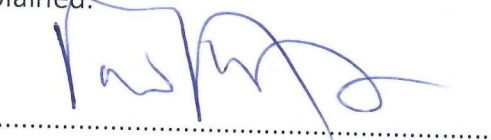
10 From all these inconsistencies, I would conclude and find that the evidence led by the prosecution does not connect the juvenile suspect with the offence he was charged with as the analysis of all the testimonies of both parties creates doubt as to the juvenile suspect's guilt. Given the age of the child and the frequency with which she saw him in
15 the market, specifically at the mother's restaurant, where he would often go to get drinking water, one cannot rule out the possibility that the victim pointing at him was based on characteristic acquaintance.

Since the prosecution has failed to prove one of the essential ingredient of the offence, it is not necessary to evaluate the evidence relating to the
20 rest of the ingredients and so the juvenile suspect would accordingly be found innocent of aggravated defilement.

I accordingly would acquit the suspect of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of The Penal Code Act.

He is to be released from custody with immediate effect unless being
25 held for any other lawful reasons.

I so order. R/A explained.



Hon. Justice Dr Henry Peter Adonyo

Judge

17th August 2023