

- 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
- 5 d) That it was the accused who committed the offence.

The prosecution relied on 4 witnesses in an effort to prove the above ingredients to wit; - PW1, Kayega Joan, the medical officer who examined the accused person on PF24 which was admitted as PE1 having been agreed upon by the prosecution and defence.

10 PW2; Kyaligonza Florence, the victim's mother, PW3; (KE) the victim and PW4; NR the victim's stepsister who was a minor as well.

The Law

At the close of the prosecution case, **Section 73 of The Trial on Indictment Act (TIA)**, requires this court to determine whether or not the evidence adduced has
15 established a prima facie case against the accused.

It is only when a prima facie case has been made out against the accused that he should be put to his defence.

Section 73(2) of the TIA provides; - '*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.*' Reference is made to the case of **Wabiro alias Musa V R [1960] E.A 184.**
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A prima facie case was defined in a land mark case of **Rananlal T Bhatt VR [1957] E.A 332** that has been followed in a plethora of cases in Uganda as; -

25 ***"One where a reasonable tribunal properly directing its mind on the law and evidence would convict the accused if no evidence or explanation was set up by the defence."***

In other words, the evidence adduced by the prosecution at this stage should be sufficient to require the accused to offer an explanation or else he runs the risk of being convicted.

The learned Judge in the case of Bhatt went on to state 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***
5 ***such a determination can only be made after hearing both the prosecution and defence.***

In the case of **Uganda versus Alfred Ateu [1974] HCB 179**, considerations that justify a finding that no prima facie case was made out against the accused were stated as follows:

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

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It is important to note, that for the accused person to be put on defence, court 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
20 ***strength of the prosecution.***

In the instant case, having admitted PF24 for the accused, the victim’s mother testified as PW2. She told court that at the time of the incident she was residing at Kiganda, Kireka B with her husband, the accused person and their children. That on 26th October 2019, KE the victim went to her and told her that “daddy has
25 said we repeat it, it is sweet.” The witness did not ask her what she meant by that but simply told her not to accept. That the previous day, however, her step daughter PW4 had told her that KE had a lot of money at school and when she asked her where she had gotten all the money from, KE had told her that her father played sex with her and gave her money thereafter. That when she probed
30 further, KE told her that it was the accused who had given her the money. That

when she confronted KE and asked her about the money, she first refused to talk but later said it was her father, the accused who had given her the money.

She further told court that the accused had told her that he was always taking time to advise his daughters so that they don't end up with boda boda men, so after hearing what PW4 had said, she waited for the accused to return home from work and confronted him. She asked him to start advising the children in her presence because she was a woman and they were girls. That the accused quarreled over the issue the whole night and even decided to move out of the bedroom and sleep in the corridor.

10 That on Saturday, the accused sent KE for detergent and they spent the whole day washing chairs and that he did not go to work.

When court asked her if she had asked the child what she was being asked to repeat, she stated that when she asked her, the child was just shaking and didn't tell her anything. That this prompted her to take KE with her to the director of Eden school where she was studying and when she explained what she had got from PW4 to him, he asked her to take KE for medical checkup. That at the clinic, it was established that the child was sexually abused. That she took the medical report to police, however the officers told her that they would perform another examination by their police doctors.

20 That KE was consequently taken to Nakawa Clinic where she was examined.

PW2 was then given a contact to call once the accused was home which she did and he was arrested. That she then asked KE who had defiled her and she said it was her dad, the accused who had done it and that he had already done it to her twice. That Saturday was going to be the 3rd time.

25 In cross-examination, PW2 emphasized that she had never got the accused and KE having sex and she never asked the accused about the alleged sexual act with KE. She also did not see KE with any money however, she was just informed by PW4 that the money had been spent at school.

Court having performed a voire dire and found PW3 (KE) to be possessed with sufficient knowledge to testify, her testimony was as follows:

That at the time of the incident, she was 12 years old and living with her mother, siblings and step father (the accused). That the house had a go down and whereas all the children slept together in the shop, the parents slept in their bedroom in the go down. She said she knew she was in court because her father had raped her and he was in jail.

That while she was home with her sisters and PW4, the accused called them into his room and asked them to remove their clothes and even knickers. That he looked at them and told them that when they grow up, they will get pubic hair. That he told them to put their clothes back on and then the accused touched her breast and asked them to leave the room.

That after one day when KE was coming from the bathroom and her mother PW2 was in the shop, the accused called her again into his room and told her to sit on his laps after which he had sex with her and there after she went outside and sat on the verandah. She did not tell her mother because she feared that she would get annoyed and that the accused might kill her.

That the following day when she was going to school, the accused gave her ugx.1000/= and gave her sisters 500/= each.

That the accused played sex with her 3 times and the 3rd time he gave her Ugx. 5000/=. Her mother PW2 saw her with the money and asked where she had got it from but she did not tell her.

That on the 4th time however, she told her sister PW4 where it had all started. That PW4 asked her one question, I quote; - "why don't you tell mummy?" that in response, she told PW4, that if she told their mum, she might get annoyed with her and because at the time she knew that the accused was her real father, she was scared that he would deny her.

That she told PW4 while they were at school and PW4 told their mother everything in her presence, after which her mother took her to hospital. That her mother asked if what PW4 had stated was true and she answered in the affirmative and the same was also confirmed by hospital to be true and the matter was reported to police. That police then went and arrested him.

In cross-examination, she emphasized that whatever she was saying had happened to her and it was not just a story. That the accused had defiled her 4 times in the space of one week. That it was the first time she was having sex and her private parts were paining and she also saw a water like liquid there. That it took some days before the matter was reported to police.

The victim also told this court that she recorded a statement while at police and it was admitted as DE1 wherein contrary to what she stated on oath in court, she had stated that, I quote; -

“in October 2019, on a date I don’t recall, my father came back from work around 2100 hours. ***I was in the kitchen with other sisters cooking as my mother was attending the shop. He called my name that he wanted to send me, he was seated in their bedroom which is very close to the kitchen. I went to him and he sent me to the shop to go and get drinking water. I went to the fridge and picked drinking water, but as he got it he appreciated and then requested to carry me up. Before I responded he pulled my hand then made me to sit on his thighs with my legs wide across. Since I had just showered I had no knickers he opened his trouser and pushed his penis into my vagina and used me (had with me sex). He cautioned me not to reveal to anybody even my mother. I was feeling too much pain in the vagina and I still feared to mention it. He continued calling me to his bedroom in the evening hours when he is from work and ordering me to sit on him using the same method to play sex with me. On 24/10/2019 he called me for the same and it was around 2000 hours but this time after using me he told me to clean myself properly and most times he would give me money around 1500/= but on 24/10/2019 he gave me 5000/= where by I removed 1000/= and gave to my mother and told her who gave that money to me but asked why my stepfather gave me all that money but I feared to reveal as he had cautioned me not to show the money to anybody. On 25/10/2019 at around 1600hours as I came back from school with Nyafamba Rosemary my step sister we talked of how our father one day opened our dresses and saw our private parts that he was advising us to be clean by removing some things from vagina (pubic***

hair) if we had them. He said he was doing so because he was aware our mother does not advise us of the right thing to do. I now got courage and revealed to my mother everything my step dad has done to me and it was in the presence of Rosemary. The following morning on 26/10/2019, my mother went with me to my school that she wanted to take me to boarding section and from there, came to police. That's all I can state. Statement read back to me and I find it correct."

PW4 N R told court that she knew PW2 as her step mother, PW3 as her stepsister and the accused person as her father who was in prison because he had raped PW3. That she got to know this after KE told her the whole truth while at school that the accused used to give her money so that she could sleep with her. That KE did not give her all the details. When she returned from school, she told PW2. When asked what she had told PW2 she stated and I quote; "I told her that dad used to call me to his bedroom and check whether we had pubic hair after that, I told her that one day when my step mother was in the village, he called her and told her that I don't love her children. That I like beating them. After that, she came back and daddy told me he doesn't love me and he was taking me back to the village. He burnt all my books. I woke up and I went to Makerere Kubili and reported at the police. The police called him but he did not come."

She further told court that she was staying with PW2 however unlike PW2 who stated that she was a resident of Mukono- Wantoni, PW4 told court that they were living in Mbuya.

When cross-examined on the same, she stated that they had earlier lived in Mukono but then shifted to Mbuya.

When asked by this court about the incident of the defilement, she had this to say, "we were in the kitchen cooking and my daddy called her to their bedroom. She stayed there and she had 5000/= yet we had 500/=. I asked her where she got all that money and she asked me why do I want to know. After she told me why do I want to know, I told her I will tell mummy because she had a lot of money. After telling her that, she called me aside and told me that daddy gives me money every day so that I can play with him sex. After telling me that, I told my mother

but I did not pass direct. She is the one who told my mother the truth. I told her about checking our private parts... we were together; Peace was sitting as I was telling my mother. She feared and denied. She knelt down and started crying and told my mother the truth.”

5 **Resolution**

As already noted, **Section 73 of The Trial on Indictment Act (TIA)**, requires this court to determine whether or not the evidence adduced has established a prima facie case against the accused.

10 It is only when such a prima facie case has been made out against the accused person that he should be put to his defence.

Suffices to note that at this stage, the court is expected to evaluate the prosecution evidence and determine whether it is sufficient, credible and capable of proving all the ingredients of the offence of aggravated defilement and whether such evidence has not been discredited during cross examination or that
15 it is manifestly unreliable that no reasonable tribunal or court can safely convict on it.

The prosecution therefore has the duty to prove all the ingredients of the offence preferred as below; -

- 20 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.

25 The apparent age of the victim as being below the age of 14 years at the time of the incident and the fact that the accused was a step father of the victim and therefore a person in authority over her was not contentious. Ingredients (a) and (c) there to are therefore resolved in affirmative.

What was contentious and therefore requiring proof was the performance of the sexual Act and participation of the accused.

Whether there was a sexual act performed on the victim.

Section 129 (7) (a) of the 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.

5 Sexual organ means a vagina or a penis.

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 and corroborated by medical evidence or any other cogent evidence.

10 Whereas this is the basic standard, the Supreme court in the case of **Hussein Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995**; observed that,

15 “though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.”

Emphasis mine.

20 In the instant case, there is no medical evidence on file as proof of the commission of a sexual act. PF3A which is the medical evidence was neither agreed upon nor tendered into court by the prosecution. Despite the mention by PW2 that two medical examinations were performed on the child, which led to the arrest of the accused person, one by a private medical doctor and another by the medical officer referred to by the police,, none of them had been submitted to this court as evidence at the time the prosecution closed its case.

25 This leaves us with the victim's evidence and the evidence of the other 2 prosecution witnesses as the only available corroboration for this ingredient.

The victim KE in her evidence told court that she was defiled by her stepfather the accused person herein several times. That the very first time, he called her when she was returning from the bathroom and when she went into his room, he told her to sit on his laps, he removed his trouser and played sex with her. that after

the incident, she went outside and sat on the verandah. She did not tell anyone about the fateful incident. The following day when she was going to school he gave her 1000/= while he gave her other siblings 500/=. That this went on for 3 times in the same way and in the same room until after the 4th incident when she
5 decided to tell her sister PW4 while at school what was happening to her. Her sister then advised her to tell their mother. And yet even then, she could not tell their mother because she feared that her mother could get annoyed with her and beat her and that her father would deny her. That it was her sister PW4 who took it upon herself and told their mother PW2 everything although she did it in the
10 presence of KE. That PW2 then asked her if it was true and she said yes, that was when she was taken to the hospital for a medical examination which also confirmed that she had been sexually abused and the accused was accordingly arrested.

In contrast to the above, KE in her statement recorded at police on 26/10/2019,
15 which has been reproduced verbatim above, she stated that the accused called her and sent her for drinking water and then as he appreciated her for it, he grabbed her and had sex with her and there after cautioned her not to tell anyone, not even her mother. She went on further to state that on 24/10/2019 when she received the 5000/= from the accused, she took off 1000/= and gave it
20 to her mother PW2 and even revealed to her who had given her the money. That PW2 asked why the accused could give her that much money but she still did not reveal the reason because she was scared. That it was not until she had a conversation with PW4 while at school that she picked the courage and revealed to her mother what the accused had done to her. She did this in the presence of
25 PW4.

In her testimony on oath before court it was her sister who narrated her ordeal to her mother because she was scared of the consequences. In her statement at police however, she had even shared the money with her mother and also revealed the truth to her herself although she did it in the presence of PW4.
30 On the issue, PW4 who was seemingly at the center of this, informed court that other than the one time when they were both called by the accused person and

told to undress so he could advise them, she was never summoned by her father again over the same, she had never seen the accused sexually assaulting KE. Everything she told court was what had been told to her by the victim purportedly after probing having seen her with a lot of money. Also, in her narrative, she told court that she was the one who told PW2 about the incident. I quote; -

“I told my mother but I did not pass direct. She is the one who told mother the truth. I told her about checking our privates.”

Upon further cross-examination, she stated that; - “we were together, Peace was sitting as I was telling mother. She feared and denied. She knelt down and started crying and told my mother the truth.”

I cannot sufficiently decipher from these statements who of the two girls PW3 or PW4 revealed the events of the incident to their mother. Also PW4 according to her evidence did not in essence even tell PW2 about the sexual act at all. This testimony already does not align with the testimony of PW3 and therefore does not suffice as corroboration for the victim’s narrative on the fact that a sexual act was ever performed on her by the accused person.

Court also found that PW4 had personal issues with the accused. Her conduct before court revealed a lot. She was a child who exhibited bitterness towards her father the accused. She seemed to be close to PW2 her step mother more than her dad who allegedly burnt her books some time and was rude to her.

Her evidence was treated with a pinch of salt. She was biased witness or compromised from courts observation.

This leaves us with one witness PW2 whose evidence would ordinarily have been very vital in the corroboration of this case being that she is the victim’s mother with whom she was staying and the first adult to have received information about the sexual act. In her testimony on oath, she told court that on 25/10/2019, PW4 told her that KE had a lot of money at school and when she asked her about it, the victim told her that it was the accused who had given it to her. that she wondered why the accused would give her such money but did not ask him about it. That on 26/10/2019, KE went to her and told her that the accused person had told her

that they should repeat it because it was sweet. She did not bother to ask KE what she meant by the statement but simply told her not to allow. She also did not ask the accused person about it. PW4 then told her that KE had told her that the accused played sex with her and gave her money thereafter.

- 5 When court asked her if she had asked the child about what she was being told to repeat, she informed court that the child was just shaking, something that prompted her to take her to school wherefrom she was advised to seek medical attention.

10 In cross-examination, she emphasized that she did not even see the money that the accused person gave to the victim as the same was spent at school. She was only informed about the same by PW4.

15 She never discussed the sexual act with the victim and neither did she examine her to establish her state at the time. She also gives no description of the victim's state of life at the time. She did not even ask the accused about it. The accused must have been shocked with the arrest where the complainant was his wife.

Other than the hearsay evidence that she narrates as having obtained from PW4, her testimony had no value as it does not prove anything with regards to the fact that a sexual act was indeed performed on the victim. See **section 59 (a) of the Evidence Act.**

- 20 In **Hussein Bassita V Uganda, supra**; It was held that it was not a hard and fast rule that medical evidence must be produced to prove a sexual act. Their Lordships also added, that the prosecution was at liberty to bring all other evidence as long as the same had the effect of proving the fact beyond reasonable doubt.

- 25 Furthermore, In **Mugoya Vs. Uganda [1999] 1 E.A 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 that implicating the accused in the commission of the offence. **Emphasis mine.**

From the evidence on record and in view of the above authorities, it is clear that not a single prosecution witness saw the accused in the act of defiling the victim. Also despite being given the information, none of the witnesses examined the victim save for the medical personnel whose evidence is not on record.

5 Suffices to note that whereas all the incidences of the sexual assault happened at the victim's home and at a time when all the victim's siblings and even her mother were around, she never told anyone of them about these occurrences and none of them ever noticed anything strange about her. It was not until many days later when she purportedly shared it with PW4 having asked her about the
10 lots of money she was receiving who in turn also shared the same with PW2 though not in detail. It is all but mere hearsay.

Whereas, in **Badru Mwindu V Uganda Supreme Court Criminal Appeal No. 15 of 1997**, court held that hearsay evidence is admissible and can be relied upon if the totality of the prosecution evidence points to the guilt of the accused person.

15 The evidence of the prosecution witnesses herein has no evidential value pertaining to the proof of the performance of a sexual act as it is so sharply contradicted that no sober tribunal can rely on it as proof in a criminal allegation. Every witness herein seems to have a different narrative of the occurrence of events something that casts grave doubt on the allegations made against the
20 accused person.

Ordinarily, this would leave us with the evidence of the victim as the sole testifying witness having experienced the ordeal and given that at the time of the incident she was 12 years old and therefore was aware of the events as and when they transpired.

25 To this effect, **section 133 of the Evidence Act** provides that;

“Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.”

Consequently, a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be honest, truthful, reliable and
30 uncontroverted. See **Sewanyana Livingstone vs. Uganda SCCA No. 19 of 2006**

wherein the court noted that what matters is the quality and not quantity of the evidence adduced.

In the instant case however, even the victim's own evidence on its own is so contradictory and its quality so flawed, that it could be perceived as deliberate lies. On one instance she states that she could not tell her mother about the incident and yet in another narrative she stated that mastered the courage to tell her. Whereas the mother PW2 denies ever seeing the money KE received, her narrative was that she even gave some of this money to her mother and also told her where she had gotten it from. Where as in court while on oath she stated that she was from bathing when the accused person called her to his room and for that matter she did not have time to wear any knickers, in her statement that she recorded on the day just before her last alleged encounter with the accused, she states that she was in the kitchen with her siblings cooking food when the accused called her to take for him drinking water that it was there when he grabbed her and defiled her. these are not minor inconsistencies coming from the victim of crime and they consequently cannot be taken lightly. The fact that she is not even sure of the times when she was defiled and as to whether it was herself or PW4 who narrated her ordeal to their mother is absurd. This information therefore seems fabricated as none of them even sufficiently confirms nor corroborates the other's testimony.

It is trite law that where there is doubt, it has to be resolved in favor of the accused person. See **Obwalatum Francis Vs Uganda Supreme Court Criminal Appeal No.030 of 2015**

All these contradictions are very grave and go to the root of the case, given that nobody saw the accused defiling the victim on any of the alleged occasions of the defilement.

Even further, since no medical evidence was led as proof of the case, there is no other credible evidence showing that a sexual act was indeed performed on the victim.

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.

5 In the circumstances there is neither direct nor circumstantial evidence that there was a sexual act performed on the victim by the accused on any of the alleged dates.

10 It is trite law that once an essential element of the offence is not proved, it cannot be said that a prima facie has been established. Proof of a sexual act is an essential element in a charge of aggravated defilement. It is also trite law that where the prosecution omits summoning an essential witness, the presumption is that his or her evidence would be adverse to the prosecution case. It is not known why the medical officer or officers who examined the victim were not called by the prosecution after the accused refused to have it admitted as an agreed fact.

15 I therefore find that no prima facie case has been made out requiring the accused to be put on defence and accordingly find him not guilty.

I hereby acquit him of the offence of aggravated defilement contrary to section 129(3) (4) (a) and (c) of The Penal Code Act.

He should be set free immediately unless held over other lawful charges.

I so direct

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Dated at Kampala this 20th day of March 2023

Hon Lady Justice Margaret Mutonyi JHC

25 **JUDGE.**