

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

HCT-00-CR-SC-0372-2022

UGANDA:..... PROSECUTOR.

VERSUS

MASANJA GERALD JULIUS:..... ACCUSED

BEFORE: JUSTICE MARGARET MUTONYI

RULING ON PRIMA FACIE CASE

1. Masanja Gerald Julius herein after called the accused was charged with aggravated defilement contrary to sections 129(3) and 4 (a), (c) of the Penal Code Act. It was alleged that during the month of February 2021 at Kalina Zone Wabigalo Parish, Makindye Division in Kampala district, the accused performed a sexual act with N.G a girl aged 13 years and the accused was her teacher.

The prosecution was represented by the learned senior State Attorney Caroline Tabaro while the accused was represented by the learned defence counsel Nuwagaba Patrick. Ahebwa Paul assisted by Lilian Alinda. Mr. Ben Muhwezi and Ms Jackline Nafula assisted court as assessors.

When the Accused was arraigned before court, he pleaded not guilty and by that plea, put all the essential ingredients of the offence in issue.

The essential ingredients of the offence of Aggravated defilement under section 129 (3)(4)(a) and (c) are the following:

- a) That there was a sexual act
 - b) The sexual act was performed on a child below the age of 14 years
 - c) That the accused had authority over the child (in this case teacher)
 - d) That the accused participated in the performance of the sexual act
2. In our criminal jurisprudence, the accused person is presumed to be innocent under the law which is a constitutional right as enshrined under Article 28 (3)(a) of the 1995 Constitution of the Republic Of Uganda, Also see the case of **Woolmington V DPP [1935] AC 462** the landmark case where the House of Lords reconsolidated the principle of presumption of innocence.
3. Consequently the burden of proof rests squarely on the prosecution with a very high standard of proof that is beyond reasonable doubt

on all the elements of the offence. In another land mark case of **Miller Vs Minister of Pensions [1947] 2All. ER 372** It was held that **the prosecution evidence should be of such standard as to leave no other logical explanation to be derived apart from the fact that the accused committed the offence.**

This ruling arises out of a submission on no case to answer made by the learned defense counsel Mr. Nuwagaba Patrick on behalf of the accused person Masanja Gerald Julius. To be transferred.

4. The prosecution case.

In execution of its burden of proof, the prosecution relied on evidence of four witnesses to wit P.W.1, Byamungu Charles, the victim's father and also the complainant, P.W.2, N.G who was the victim in this case, P.W.3, Lydia Wanyenze a police officer and P.W.4, Dr. Jackson Kakembo who examined the victim as per PF 3A and the accused on PF24.

In regard to the first ingredient of the sexual Act, the prosecution relied on the evidence of the victim PW2 who was 15 years old then, and the Doctor PW4. The relevant part of the victim's evidence was to the effect that the accused who was her social studies teacher at Uganda Hands of Hope performed a sexual act

on her on a date she does not remember in the month of February 2021. That it was her first time to have sex and she bled in her private parts and had difficulties while walking. However she did not inform any one about it because she was scared about what they would think of her.

She informed court, her sister a one Namande Agnes suspected her to be pregnant following her over sleeping and selective eating after food would smell bad for her.

That her sister took her urine for testing and the pregnancy test turned out to be positive. When asked about the person responsible for her pregnancy, she mentioned teacher Masanja Julius the accused.

PW4 Dr. Jackson Kakembo, examined the victim on 20th March 2021. According to his finding the victim NG was about 13 years old with 23 teeth at that time. Her Hymen had ruptured about six to seven months ago and she had early pregnancy. The blood and urine of the victim was examined in their laboratory where the urine tested positive for pregnancy. Syphilis and HIV were negative. The PF3A and its laboratory test results was admitted in evidence and marked as PE3. The person who narrated to him was the victim herself.

On the second ingredient of the age of victim being a child below 14 years, all witnesses proved that the victim was a child below 14 years. The court was also satisfied that she was below 14 years in 2021. This issue was therefore not contentious.

Apart from the victim and her father, who testified that the accused was a teacher, no other person testified about his qualification and employment as a teacher at Uganda Hands of Hope.

On the last ingredient of participation, it's only the evidence of the victim who informed court that the accused forced her into a sexual act that left her bleeding, walking with difficulty and pregnant which pregnancy was never carried to full term. She was the only identifying witness.

The prosecution closed its case with the above witnesses.

5. After the prosecution had closed its case, Counsel Nuwagaba Patrick submitted that he intended to make a written submission of no case to answer and indeed he filed written submissions which have been put under consideration.

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 established a prima facie case against an accused person. It is only when a prima facie case has been made out against the accused that he/she should be put to his defense.

In the case of **Uganda Vs Alfred Ateu (1974) HCB 179**, the court laid down the considerations justifying a finding that no prima facie case has been made out against the accused person as follows:

- 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.**

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 offense of aggravated defilement and

whether such evidence hasn't been discredited during cross examination or that it is manifestly unreliable that no reasonable tribunal or court can safely convict on it.

Court has to satisfy itself that prosecution has led evidence proving the essential ingredients of the offence of aggravated defilement as mentioned above.

The apparent age of the victim being below the age of 14 years at the time the incident is alleged to have happened is not contentious.

As to whether the accused is teacher or not, this court did not get any other evidence apart from the testimony of PW1 and PW2 who testified that he was her teacher. No witness came from the victim's former school to confirm the relationship of authority over the child victim.

The above notwithstanding, the victim being a child below 14 years of age, it is unlawful for anyone to perform a sexual act with her.

Section 129 (7) (a) of the Penal Code Act defines a sexual act to mean the penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ. Sexual organ means penis or vagina. The act of sexual intercourse may be proved by direct or circumstantial evidence.

The sexual act is usually proved by the victim's own evidence and corroborated by medical evidence or any other cogent evidence.

Police form 3A for the medical examination of the victim N.A was admitted in evidence as P.E.3, it shows that on 20th March, 2021, the victim was examined by a one Dr. Jackson Kakembo (PW4) who observed in part 7 (e) of the report that the hymen was ruptured over 6 months ago and under part 12 noted that there was an early pregnancy with defilement confirmed.

Performance of the sexual act in my view is also not contentious as medical examination revealed that the victim's hymen was ruptured six to seven months before March 20th 2021 the date she was examined.

What remains contentious is **whether it is the accused person who committed the offense?**

In the case of **Badiru Mwidu Vs Uganda CACA No.1 of 1997**, the Court of Appeal held that **normally in sexual offences, the evidence of the victim is the best evidence on the issue of penetration and on identification.**

However like any other case, it is important to have such evidence corroborated by some other evidence for it to pass the test of credibility.

In this case, PW2 the victim did not report immediately the performance of the sexual act on her, which is very common with children. They very often imagine they are to blame for the sexual assault on them. Failure to report immediately is not a big issue to this court and not fatal at all.

However, the chronology of other events thereafter is very important.

PW2 the victim informed court that her sister a one Namande Agnes is the one who discovered that she was pregnant after taking her urine for a pregnancy test. This was a very key prosecution witness but she was never called to testify.

The arrest of the accused was based on the alleged pregnancy of the victim.

The victim and PW1 stated the victim had a miscarriage. That she was taken to the Hospital. That was the reason why there was no baby.

The prosecution did not adduce any evidence to that effect. So it is not known whether truly there was any defilement which was discovered after the sexual act left the victim pregnant.

I want to make it clear that this court is mindful of the fact that not all aggravated defilement cases result into pregnancies. It is not even one

of the ingredients of the offence. However, once pregnancy is stated to have been one of the means that led to the discovery of the sexual act, it must be proved by way of the child being born, where court can further order for DNA to determine paternity if the accused pleads not guilty like in the instant case, or in case of a miscarriage, medical evidence of such miscarriage must be adduced unless the accused pleads guilty.

The victim claimed she had stomach pain, bled, was taken to the hospital, given an injection and when she woke up, there was no pain and no bleeding.

She had earlier on informed court that that was her first time to play sex that was in February 2021, she bled and had difficulty while walking yet PW4 insisted the hymen was ruptured like six to seven months ago. The victim did not tell court that the accused sexually molested her six months earlier.

There is no way a victim of 13 years, sexually molested for the first time, violently as stated by the victim leaving her in terrible pain, would have no sign of recent penetration.

If indeed the victim was sexually assaulted for the first time in February 2021 and it did not happen again before she was examined in March

2021, then who performed a sexual act on her six or seven months before. Certainly, it was not the accused.

If she was pregnant and the pregnancy was terminated, why was that evidence not adduced before court? It is not possible for any female to have a miscarriage where there's bleeding and pain stops instantly. The evidence of the victim did not suggest that she had a miscarriage because she claims she had stomachache, was given an injection, she slept and woke up when there was no bleeding but just some blood stains.

It is trite law that where a party leaves out important evidence, the presumption is that that evidence would be adverse to its case.

Failure to lead evidence of the sister who allegedly discovered the pregnancy and the evidence of the medical officer who witnessed the miscarriage raises doubt in the prosecution case.

The evidence of the police woman was very useless with no evidential value.

In cases of sexual violence against children who get pregnant and miscarry, it is very important to have the DNA done on the fetus. This kind of evidence can provide very good corroborative evidence against the accused even if the child is a single identifying witness.

The prosecution should have also brought a witness from Remnant Generation, the NGO where the victim was being kept after she was allegedly defiled. PW2 testified that she got a miscarriage while she was in the care of the NGO. She stated that her stomach hurt during the day and at night she was taken to Rubaga Hospital where she was given an injection and she slept. The prosecution didn't adduce any medical evidence from the hospital proving that the victim indeed had a miscarriage.

The complainant who knows very well that a case of aggravated defilement that resulted into pregnancy is still pending is duty bound to inform the police and the medical personnel about the miscarriage and have it properly documented and the relevant forensics done.

It is apparent that this was not done.

It is trite law that once an essential element of the offence is not proved, it cannot be said that a prima facie case has been established. Proof of participation by the accused person is an essential element in a defilement case and in view of my analysis above, the prosecution did not prove the accused's participation beyond reasonable doubt.

The evidence of the victim in this case, much as it is said to be the best evidence needed corroboration by some other independent evidence.

Section 73(2) of the Trial on Indictment Act provides that; “where at the close of the prosecution case a prima facie case has not been made out, the accused is entitled to an acquittal.

I therefore find that no prima facie case has been made out requiring the accused to be put on defense and accordingly acquit him.

Consequently, it is directed that he should be released from custody unless held on other charges.

Dated at Kampala this 12th day of February 2024.



HON.LADY JUSTICE MARGARET MUTONYI

JUDGE OF THE HIGH COURT