

5

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL CASE NO: HCT-00-CR-SC-0036 OF 2003**

UGANDA ::: PROSECUTOR

VERSUS

10 HASSAN KAFEERO::: ACCUSED

BEFORE: HONOUARABLE JUSTICE LAMECK N. MUKASA

P R O C E E D I N G S:

15

Ms Sarah Kerwegi - State Attorney.
Mr Ali Gabe Akida – Defence on State briefs.
Kafeero Hassan – Accused.
Mr Kato-Sonko – Clerk/Interpreter.

20

Ms Kerwegi:-
For 15/5/2003.

Mr Ali Gabe:-

25 Okay.

Court:-

For plea and hearing on 15/5/2003.
Remanded until then.

30

LAMECK N. MUKASA
AG. JUDGE
12/5/2003.

35 15/5/2003:-

Ms Annette Kangi Mutabingwa for State.

Mr Ali Gabe Akida for Accused.

Accused present.

Mr Kato-Sonko – Clerk.

5

Court:-

What language?

10 Accused:-

Luganda.

15 Court:-

Charge read and explained to the Accused.

Court:-

Have you understood the charge?

Court:-

20 What is your plea.

Accused:-

I know nothing about that case.

Court:-

Plea of NA guilty entered.

25 Court:-

The following Assessors are noted.

1. Mr Bernard Mukane, 24 years. I work with Eversmart Fashion Ltd as Dealer
in Textiles.

2. Ms Elile Juliet, 30 years. Businessman dealing in Textiles.

30

Court:-

Do you have any objection to any of the Assessors.

Accused:-

No objection.

5

Ms Mutabingwa:-

I have 3 witnesses in Court including the victim. I finding difficult to proceed now, I have received a call from Danish Embassy that I am needed to go and fill forms for a Law and Justice Course in Denmark and today is the closing date. I have discussed with my Learned friend who is agreeable to an adjournment to 19/5/2003.

10

Mr Gabe:-

No objection.

15

Court:-

Hearing adjourned to 19/5/2003 at 2.00p.m. Accused remanded until then and witnesses warned to be in Court.

LAMECK N. MUKASA

20

AG. JUDGE

15/5/2003.

19/5/2003:-

Mr Ali Gabe for Accused.

25

Accused present.

State Attorney absent.

Mr Kato-Sonko – Clerk interpreter.

Both Assessors present.

30

Mr Gabe:-

The State Attorney is engaged in yet another Criminal Case before Justice Opio Aweri and it is part heard. We have agreed that hearing be adjourned to 23/5/2003 at 2.00p.m. Accused remanded until then.

5 **LAMECK N. MUKASA**

AG. JUDGE

19/5/2003.

23/5/2003:-

10 Mrs Annette Kalungi Mutabingwa State Attorney for state.

Mr Ali Gabe for Accused.

Accused present.

Mr Kato-Sonko Clerk/Interpreter.

15 Mrs Mutabingwa:-

I have 3 witnesses and ready to proceed.

Mr Gabe:-

Ready too.

20 Court:-

Let us proceed.

PW1:-

25 NAMBAZIRA ASIYA Affirmed and states:-

I am 24 years old. I stay at Mengo Luzige Zone Kisenyi. I am a businesswoman dealing in second hand handbags at Owino Market. I know Sharifa Namujuzi. She is my daughter. She is now aged 5 years and months. She goes to school at Nakasero Primary School in P.1. She is in Court. (Witness points at the girl).

30

On 9/12/2001 I was at home it was a Sunday at daytime at around 11.00a.m. Sharifa was in holidays. I wanted to get her bathed and her father takes her to the village. I sent her to the shop to buy soap so that I bath her. The shop attendant was Hassan Kafeero. He is in Court, he is that one (Witness points at the Accused). The shop is on the same building with where we stay. We stay at the back of the 5 building and the shop is at the front. In February this year we shifted from that house to another one in the same area. We had occupied that house for 5 years. The building is a big one. At the front there is one shop room facing a road. Behind the building there are four rooms, two on each side. I was occupying the second room on the lower side. The room was on the same building and under the same roof with the shop room. To go to the shop from my room you go through a corridor to the 10 outside and then go to the shop. There is no connecting door between my room and the shop room. The Accused was residing in that very shop. The shop was a single room shop. He used to sleep on one side of the shop. The shop counter was directly in front of the door to the shop as you enter and there were bars in the door. I had known the Accused for 8 months, prior to this incident. Originally the shop room was occupied by a Drycleaner when he vacated the Accused and his colleagues took 15 occupation of the room and started there a shop. There are about 5 other shops neighbouring the Accused's shop but not too near his shop.

Those shops are not on the same building with ours. There are other 4 buildings residential from ours to the other shops. The relationship before the incident there was a customer – seller relationship, we 20 used to buy from Accused's shop.

On 9/12/2001 I sent Sharifa to the shop to buy soap. I waited for her to come back but after the period I followed her. As I went calling out her name she was crying. As I reached the door of the Accused's shop I found and saw Accused carrying her from behind the counter and giving her the soap and a 25 sweet. When I asked the Accused why he had delayed to give the soap to the child, he replied that he had been cutting the soap for her. Sharifa continued crying. Whenever I would ask Sharifa why she was not coming back, she only continued crying and naming "Hassan". On observation I saw semen running down her private parts down her legs. I removed her knickers, while outside the shop at the front of the door. I got hold of the knickers and I went and called the father of the girl. I went back to 30 our house with Sharifa. The father was there. He remained with Sharifa and told me to go and call the Accused. I went and called Accused and we came together. When we came with the Accused

Sharifa's father asked him what he had done to her and he answered that he had done nothing to her as he was fasting. When father asked Sharifa what had happened to her, Sharifa led us back to the shop behind the counter where there was a form. On the form we found semen. Sharifa's father stopped people who had gathered from beating the Accused. He directed me to call the Chairman L.C called 5 Kanyike. When the Chairman came, was in company of the LDU, the dispersed the mob and arrested the Accused and took him the Police post at Kafumbe-Mukasa. I went with them. At the Police Post we were directed to take the victim to a clinic for examination. We took her to the Doctors Clinic Mengo. She was examined. She was examined by Dr Mariam. After examining the victim he washed her and directed us to take her back home and instructed us to regularly make the child sit in 10 warm water mixed with some salt. At the time of examining her and taking her there Sharifa was crying.

I also examined her private part. When I removed the knickers I saw semen and some little blood in her private parts. Again I would examine her whenever I was washing her as directed by the doctor.

15

When we went to the Police Post the Accused was detained. Later that day we hired a vehicle and Accused was transferred to Old Kampala Police Station. I made a statement.

At Old Kampala Police Station we were asked to take the victim to a Police Surgeon at Sure House. I 20 took her to the Police Surgeon 2 days after the incident. She was examined.

Since the incident Sharifa has changed her ways. She fears a lot and whenever asked she fears to answer.

Cross-examination by Mr Agabe:-

25 Yes I have been sending the child to buy items from the shop. I have been sending the girl to shop during the day at any time. But not at night. The girl was still very young I would only send her to Accused's shop but not to far shop. I was not sending her to shops at night. She is now 5 years 6 months. In December 2001 she was coming to four years - she was 3 years and some months. She could recognize money say 100/=. She could count money. I was giving her 100/=. She would buy 30 say soap of Shs.100. I used mainly to send her on Sunday for soap as on most days of the week we would not be at home. Is only Sunday when I used to send to a shop for only small things which

would not exceed 100/=. When I was sending her to the shop on the earlier occasions she would go and come back immediately and I would not follow her.

Over the 8 years we had no grudge with Accused. I had never taken any credit from his shop. I had never taken any table cloth from the Accused's shop on credit and he was not selling them. Accused has never sold table clothes, has no table in his house, has no wife to say that she was making them and his mother sells only tomatoes and similar items. I have never taken table clothes from him and have never failed to pay and has never taken them from me on force and have not just fixed him.

10 The shop room is about 10ft x 8ft. If one is passed along the road and she is sitting behind the counter in the shop you can see the upper part of that person. That is a mature person but if it is a kid it can't be seen.

As I approached the shop on that day the door was open. The shop building/front of the shop is between 2 ½ to 3 metres. The area is called Luzige Zone. It is an area with a thick population. Many people pass by that road. Though many people pass and the door was open the Accused had the child behind the counter and on a bench under the counter. The child was crying. I do not know whether he was holding her mouth or as she had given her a sweet in hand and he was handing her the soap. It was the delay of the child to come back which led me to follow the child to the shop. I was calling her name so that she could come and meet me on the way. As she was not answering and crying I continued to the shop calling the name. At that material time I had not been frightened or feared anything. It was day time. Yes I took the child after confronting the Accused. When I was called to call the accused he came. When I came with the Accused, the Accused did not have anybody in the shop. I know Kiggundu. He is the elder brother of the Accused. When I went to the shop to get Sharifa Kiggundu was not in the shop. When people had gathered and making noise Kiggundu came out of the curtain which was separating the portion where the Accused's bed was from the shop area. The curtain is made of papyrus carpet. I did not see Kiggundu in the shop, I do not know whether he was there. The room was partitioned into two by the papyrus carpet. The shop area and the area used as a bedroom. I am mature woman I can tell semen if I see it even the kid was you kid. I differentiate the semen from substance squeezed from the nose. Semen is whitish. The substance from the nose is creamish. The cough substance is thick and creamish. I did not collect the substance. I told the police

and it did not see the substance on the child because I had not washed her. It is the Chairman who saw the semen on the bench. The Police did not see it. I informed the Police about the substance on the bench. The Police did not visit the scene.

5 In out neighbourhood there are children. There was a teacher who used to coach some children but as it was a Sunday those children were not there. She doesn't normally go out to pray with other children as there no children near.

10 Re-examination:-

Nil.

Ms Mutabingwa:-

I seek an adjournment as it is already after 5.00p.m.

Court:-

15 Adjourned to 27/5/2003.

Accused further remanded. Witnesses warned to attend.

LAMECK N. MUKASA

AG. JUDGE

20 **23/5/2003.**

27/5/2003:-

Ms Annette Kangi Mutabingwa for State.

Mr Ali Gabe Akida for Accused.

25 Accused present.

Mr Kato-Sonko – Clerk.

PW2:-

MOSES BBAALE Moslem affirmed and states:-

30 I am 29 years old. I reside at Mengo Hill, Luzige Zone, Mengo Kisenyi. I am a tailor. I operate at Nkuruma road Plot 27. I know Sharifa Namujuzi. She is my daughter. She is 5 years old. She is

Court:-

(Witness points at the victim). She was born in 1996, August 15th. She goes to school at Nakasero Primary School in P.1. I know Hassan Kafeero. He is in Court. He is that one (Witness points at the Accused). He ceased to be my neighbour on 9/12/2001. I have known him for about 2 years. His home was about metres from mine. He was a shop attendant. Where I stay there is a corridor there 4 rooms. In front of those rooms there is a shop in which Accused was working. Behind that shop room there is a room. After the Accused's shop there are no other shops but there are shops at a distance. The other shops are about 30 metres from the Accused's shop. The Accused had been running that shop for about one year. He was not residing in that shop and I do not know where he was exactly residing but in Mengo. I had ever been to that shop. I had gone to that shop for about 5 times. The shop is one room but partitioned by timber into two partitions.

On 9/12/2001 I was at home in my house. Sharifa (victim) was outside with her mother washing clothes. I was in the house ironing my clothes when my wife came and she was calling me. She is called Nambazira Asiya. She told me that Hassan (Accused) has defiled my daughter. On receipt of this information I examined the child. I found that she had semen in her private parts. The child was crying. I asked her what had happened to her but she was crying and only saying Hassan I directed my wife to call Hassan. She called her and I asked him why he had defiled my daughter. Hassan denied having done so. I again asked the child who again said "Hassan". I told her to take me there. I held Hassan in one hand and Sharifa (victim) in another. Sharifa led us to the shop of Hassan and led us directly behind the shop counter. In the shop behind the counter the victim showed me a place on a chair and on it there was water sperms. I shown the sperms to Hassan. I also noticed that on his trousers at the from where there is a fly it was wet with sperms. When showed Hassan that he wanted by by-pass we and escaped. I stopped in and made him stay in the room. I directed my wife to call the Chairman. At that material time the Accused was shaking. People started to gather and demanded for him to beat him. I stopped them from entering the shop. The Chairman came and I told him what happened and I handed him over to the Chairman LC1. The Chairman is Mr Kanyike Hassan. With the Chairman we took him to Kafumbe-Mukasa Road Police Post. After reporting at the police post I took Sharifa (victim) to Doctor's Clinic at Mengo. She was examined and she was given treatment. She was at the time in pain and crying. From the clinic I met the Chairman who told me that transport was needed to transport to transport the Accused from the Police Post to the Police Station. I hired a

vehicle and the Accused was transferred to Old Kampala Police Station. I made a statement. At the Police Station we were told to take the victim to the Police surgeon. Since it was a Friday we took her the following day. We took her to Sure House Bombo Road. She was examined.

5 Before this incident our relation with the Accused was that we are used to go to his shop to buy items for his from his shop.

Cross-examination by Mr. Agabe:-

I made a statement on 9/12/2001. It is correct that I made a statement that while in my home I heard people making noise and my wife saying that someone had defiled our daughter. I did not say that I
10 saw Hassan crying when I came out and people questioning him and he denied. The statement is not different from what I stated.

What I stated at the Police is the true statement that while in my house I heard noise and my wife saying that Hassan had defiled my daughter. I was not telling lies when I said in Court that I was in
15 Court that I was in my house and my wife came and told me that our daughter had been defiled.

When I came out it was my wife questioning Hassan and other people. I also questioned him. We were all questioning him.

20 Court:-

During Cross examination the witness became and he was made to sit down. He was taken out of Court as he had fainted.

Ms Mutabingwa:-

25 In the circumstances I am finding it difficult to proceed I therefore seek an adjournment.

Court:-

Matter adjourned to 6/6/2003 to give the witness time to recover and compose himself. Accused further remanded until then.

30

LAMECK N. MUKASA

AG. JUDGE

27/5/2003.

6/6/2003:-

5 Ms Anglina Marian Namakula State Attorney for State.

Mr Ali Gabe for Accused.

Mr Kato-Sonko Clerk/Interpreter.

Accused present.

Both Assessor present.

10

Ms Namakula:-

The case has come up for further hearing.

PW2; Continued.

Cross-Examination by Mr Ali Gabe:-

15 It is not true that when I came out I saw Hassan coming and crying and being questioned as appears in the statement of 9/12/2001. The particulars on the statement of 9/12/2001 are mine. I made a statement at the Police with those particulars. I was not in my house resting but I was ironing cloths. I told the recorder that. The words “ Okugolola engoye” and “Kuwumula” are not similar. I can’t mistaken these two words. I did properly pronounce the words “ Okugolola engoye” as I was making
20 the statement. It is wrong in that statement to record I was resting because I was ironing.

It is not true that I stated in that statement that “when I came out I saw Hassan crying when they questioned him he denied”.

25 It is correct that I stated that “when I saw the girl with watery substance between her thighs I went with her and Hassan to his shop”.

It is correct I said I saw semen in Court in my examination in chief.

Both statements are correct because I saw semen between the legs of the child. When making the statement in Luganda I used the word: “Yalina amazzi gekisajja mumaguluge”. “Sperms” means male sexual water fluids from private parts.

5 I opened the child’s thighs to examine her. I did this at my door way outside. I had already got out of the house, This is where I met my wife and the daughter. I did not say that the wife and the daughter found me in the house. She called me and I came out of the house and I found her with the child.

I know how sperms look like. I am an adult person I know how sperms look like. Sperms are whitish
10 and not thick. That was not my first time to see sperms. I went to school up to senior four. I can differentiate sperms from a substance squeezed from the nose.

The incident occurred on 9/12/2001 mid-day - recorded the statement about 5 hours thereafter. On that day I was dressed in white (kanzu) tunic with blue strips. I was dressed in that tunic up to
15 Kafumbe Road Police Station. But I cannot remember what I was putting on when I went to Old Kampala Police Station. Yes it was on 27/5/2003 when I gave evidence in court. I can remember the date I gave evidence because this was only a few days past but when I made a statement to the police it was in which have

What happened on 9/212/2001 because it was very important were then the clothes I was
20 putting on, on that day.

Statement of 29/12/2001 was not read back to me. I signed the statement. It is wrong for the recorder to state that he read back the statement to me.

25 Mr Ali Gabe:-

I apply to tender this witness’s statement as defence exhibit.

Ms Namakula:-

No objection.

Court:-

30 Witness’s statement to the Police dated 9/12/2001 received as Exhibit D1.

Cross-examination continued:-

I remember having made another statement. I was requested by the Police to make that additional statement. I do not know why they requested me to make the additional statement. When I made the first statement I knew the date of birth of my child but I was not asked about it. I made the 5 statements by answering what the Police was asking me. The statement was read over to me and I signed.

Mr Ali Gabe:-

I apply to tender this second statement as defence exhibit.

10

Ms Namakula:-

No objection.

Court:-

15 Witness's second statement dated 12/12/2001 received as Exhibit D2.

Cross-examination continued:-

Yes there are other people called Hassan.

Re-examination:-

20 I have not had time to study the witness's evidence in chief. I need some time for re-examination.

Mr Ali Gabe:-

No objection.

25 Court:-

Witness to come back on 12/6/2003.

LAMECK N. MUKASA

AG. JUDGE

30 **6/6/2003.**

Court:-

Let us proceed with the evidence of other witnesses available.

LAMECK N. MUKASA

5 **AG. JUDGE**

6/6/2003.

PW3:-

MARIAM KANAABI Muslim affirmed and states:-

I am 34 years. I reside at Kitebi. I work at Doctor's clinic Mengo Kisenyi. I have worked there for
10 four years. I am Midwife since 1990. My duties involving looking after women from pregnancy up to
delivery and for the new born child up to 6 years. I also cater for unstable pregnancies and handle
other gynecological problems. Gynecological problems include those of women who want to become
pregnant, those who have unstable pregnancies, those with stable pregnancies. With regard to
15 children we immunize them, advise parents on children's feeding and child care especially before 6
years of age. And any other problem that may occur to a child or woman. Most especially problems
affecting women's private parts.

I know why I am in Court today. It is because of a child called Sharifa who was brought to the clinic
with her father while lifted by her father seeking for help. The child was crying. At the reception the
20 was referred to me. When I inquired why the child was crying the father told me that he had found the
child coming from a shop crying. The father told me that he suspected the child had been defiled I
removed the child's pair of shorts. When I removed the shorts I found seminal fluids in between her
thighs and on top of her private parts. When I parted her legs in the examining position I found she
was bleeding. I tried to put her labias apart I found there were lacerations and slightly bruises. When I
25 tried to press her vagina entrance down it was where were also lacerations. I advised the father to
take the child to surgeon for further examination. I told the father that the child was likely to have had
been interfered by a man. I put on gloves when examining the child. I made a report with regard to
my findings. I gave him a medical form to take to the surgeon. I put my findings on the medical form.
This is Form 5, it is headed Mayo Doctor's Clinic and that is where I filled.

30

Ms Namakula:-

I do not have this form on the file. I need to contact the Police Investigators whether they have. If I get it I will have to recall the witness.

Cross-Examination by Mr Ali Agabe:-

5 Nil.

PW4:-

Mr Ali Agabe:-

I object to the witness because throughout the hearing the witness has been seated in Court.

10

Ms Namakula:-

Seated in court? It is unfortunate the witness has been in Court.

Court:-

15 Objection upheld and witness chassed.

LAMECK N. MUKASA

AG. JUDGE

6/6/2003.

20 Ms Namakula:-

I seek for an adjournment to the 12/6/2003 for the Medical Surgeon's evidence.

Mr Ali Gabe:-

No objection.

25

Court:-

Adjourned to 12/6/2003. Accused further remanded.

LAMECK N. MUKASA

30 **AG. JUDGE**

6/6/2003.

12/6/2003:-

Ms Namakula for State.

Mr Ali Gabe for Accused.

5 Accused present.

Both Assessor present

Mr Kato-Sonko Clerk/Interpreter.

10

PW4:-

Dr NSEREKO MUKASA catholic sworn and states:-

I am aged 47 years. Resident of Kampala. Stationed at Mengo Hospital working as Consultant
15 Pathologist/Police Surgeon. I hold MBCD Makerere University 1980 Master of Medicine N.O 1987.
Worked as Police Surgeon since 1995. As Police Surgeon I am required to examine persons who are
either complainants or Accused. Complainants are sent to me along with a request for Medical
examination and report which appears on PF3. In the particular category of sexual offence there is an
appendix to the request form. Following my examination I prepare a Report which appears at the back
20 face of PF3 and on the front of the appendix. Such a report is signed by me and affixed with the
official clinic stamps before it is returned to the investigating officer.

These two documents of the type I have talked about – PF3 and the appendix issued from Old Kampala
Police Station on 9/12/2001 in respect of Shalifa Namujuzi who was a complainant in a case of
25 defilement. I examined her on 10/12/2001. My findings were:-

1. Complainant was a female of an apparent age of 4 years.
2. Examination of her private parts revealed fresh bruising and small lacerations at the left side of the
embouchure – entry to the vaginal canal. This constituted a fact of penetration. The hymen had
freshly been ruptured. My remark was that the injuries were consistent with attempted sexual
30 intercourse.

I signed the report and returned it to the investigating officer.

Ms Namakula:-

5 I apply to tender the Medical Report as an exhibit.

Mr Ali Gabe:-

No objection.

10

Court:-

Received as Exhibit P1, PF3 and Exhibit P2 Appendix.

PW4 Continues:-

15 This is a set of request form PF3 and PF 24 were issued from Old Kampala Police Station on 12/12/2001 in respect of Hassan Kafeero who was an Accused in a case of defilement.

I examined him on the same day 12/12/2001 and my findings were as follows:-

- He had no injuries upon his body.
- Specific examination of his private parts reveal normal external genetaria.
- 20 ▪ He was of sound mind and of an apparent age of 19 years.

This was consistent with his stated age and an examination I confirmed the same age though he had removed two teeth.

25 Ms Namakula:-

I apply to tender the PFs as Exhibit.

Mr Ali Gabe:-

No objection.

30

Court:-

Received PF3 as Exhibit P3 – P24 as Exhibit P4.

Cross- examination by Mr Gabe:-

Sperms looks very much like a tadpole. The tadpole is the farm of a frog. The tadpole is black but the
5 sperm is white they only share similarity in the physical appearance when you look at the two of them.
The sperms are similar from one person to another but not similar factionally or unimunologically – or
body discharges coming immunologic which vary from individual to individual and
sperms are one of them. The transmission of venereal diseases is not connected directly with the
10 change the colour of the sperms. However they can change the colour of the fluid. If I came across a
substance on a table or cloth it is not possible for me to tell on sight that this is a sperm. As to the
semen if it was on cloth it appears as a stain and depending on the area where it appears it might lead
me to investigate further whether that substance is a semen. I would make a microscopic examination.
It is not done. I would not tell with certainly as to whether the fluid was semen or not.

15 Re-examination:-

Nil.

Ms Namakula:-

I apply for the case to be stood over.

20

Court:-

Case stood over for about 30 minutes.

LAMECK N. MUKASA

25 **AG. JUDGE**

12/6/2003.

12/6/2003 at 11.00a.m.:-

30 Parties as before.

PW5:

No. 25443 D/Constable WAFULA ANTHONY, catholic sworn and states:-

I am attached to Busia Police Station. I reside in Busia Police Barracks. I have been in Busia for 6 months. Before going to Busia I was attached to Old Kampala Police Station where I served for three 5 years. I have been in Police force for 15 years, I am 34 years old.

At Old Kampala Police Station I was in CID Department and duties were to carry out investigations, arrest criminals and prosecute criminals. I have been in the CID Department for 10 years. The Accused is Kafeero, there one in the dock. It was on 12/12/2001 while I was at Old Kampala Police 10 Station, I was allocated a Police file SD9/9/12/01 and the complainant was Nambazira Aisa. The suspect was Kafeero Hassan. The offence was defilement. The victim was Namujuzi Sharifa. After allocation of the file I read through. The statement of the convict was already attached and that if the victim was also attached. I interviewed complainant who led me to the scene where the offence was committed. The scene was at Luzige Zone Mengo III Parish. I reported to the LC1 of the area in the 15 company of the complainant who led me to the scene. At the scene was at a shop of the Accused, where the defilement occurred. The complainant together with the victim led me to the exact place which she had been defiled. The victim led me to where she was residing with the mother which was about 25 metres. Among the buildings there were also other buildings of the tenants. I drew a sketch plan indicating the movement of the victim from her home to where she was defiled in the shop. 20 There was a bench inside. After drawing the sketch plan I put a key on it and described the sketch plan. Afterwards I went back to Old Kampala Police Station. I interviewed the Accused who was already in the cells. Later I put him before D/WAIP Alweko for a charge and counterstatement. Later I filled PF 24 and extended Accused on Bombo Road for Medical Examination in Dr Nsereko Clinic.

25 This is the sketch plan which I drew at the scene of crime.

Part a – is where the victim was staying with her mother.

B – were rooms occupied by the other tenants.

Arrows show the movement of the victim from her home to the shop of the Accused.

X – is the entrance to the shop of the Accused.

30 C – is a bench where defilement took place.

Sketch plan was drawn at Luzige Mengo III Parish on 12/12/2001. I indicated the reference of the case and the direction of how I was standing. I indicated my names and time of visiting the scene.

Ms Namakula:-

5 I apply to tender the sketch plan.

Mr Ali Gaba:-

No objection.

10 Court:-

Sketch plan received as Exhibit P5.

PW5 continues:-

I do not recall the date I made my statement.

15 Cross-examination by Mr Gabe:-

I was the Investigating Officer in this case. I carried out investigations in this case. I organized the evidence which I forwarded to the State Attorney. I read through the statement of Moses Bbale (Exhibit D1). If I came across a statement indicating that there was a watery substance on a piece of cloth I would exhibit that cloth. I took over the file on 12/12/2001 when the offence took place on
20 9/12/2001. That is three days after. I did not examine the dress the victim was putting on when she was brought to me.

I examined the bench in respect to the watery substance. I did not find anything abnormal on the bench. I did not find any stain on the bench. When I read the statement it was conclusive because it
25 was corroborated by other witnesses like the LC1 of the area called Kanyike, the mother of the victim, the father of the victim.

This statement (Exhibit D2) was recorded by me. I did not read the first statement (Exhibit D1) back to Bbale Moses before I recorded the second statement (Exhibit D2). The purpose of the second
30 statement was to get the age of the victim because the date of birth had not been indicated in the first statement.

As an investigating Officer when a file is allocated to me I have to go through all the statements and documents on the file. I also study the minutes to finding out the actions take. I read the file to know what happened in the matter I am investigating. I also look for points which are missing which I
5 would need to collect to make any case strong. I looked at the statement of Moses Bbale and found that what was missing was the age of the victim. It is required in practice that before I record an additional statement from the make I should read the first statement back to him. In this case I did not read it back to him but I re-interviewed him. I re-interviewed him on the allegation of the defilement. I found the interview was fine with the statement he had earlier made.

10 Re-examination:-

To read back the statement when requiring an additional statement is just a practice.

15 **PW6:-**

KANYIKE HASSAN Moslem affirmed and states:-

I am 34 years. I reside at Luzige Zone LC1 . I have stayed there for 19 years. I am the Chairman LC1 Luzige Zone and I am also a Special Police Constable at CPS. I have been Chairman since 1988 up to now. The Accused in this case is the one in the dock (points at Accused). He was my resident
20 and I know his names. He is Kafeero Hassan. He has grown up in that zone even his mother resides in that zone. The Accused committed a case of defiling a child of 4 years. On 9/12/2001 at around 2.00p.m. while at my home a resident lady came to my home crying. I not remember the name of the lady. She reported that a young an has defiled my child. She told me she had been sent by her husband to collect me and take me to the shop where the defiler was. Asker her whether I should go to
25 collect the Police Officer as it was a serious offence. She replied that we should go straight away as there were many people gathered and that they might even kill him. "Might even kill him?" I agreed to go with her since I was dressed in a Police Uniform. I was accompanied by my Secretary called Juma Mugisha. At the scene there were very many people who had gathered. There were armed with sticks and stones and were requesting that he should be handed over to them to kill him. I cooled them
30 down and managed to gain entrance to the shop. At the entrance of the shop I found there the father of the victim and the brothers of the Accused trying to stop people from gaining access to the shop. I

entered the shop and I found Accused seated on a bench. I asked him two questions. I asked Hassan whether he had defiled the child. He kept quiet. I asked him a second time to tell me the truth as people outside intended to kill. He still kept quiet. Accuse was in great fear he did not answer anything. I examined the victim. She had sticky water in her thighs. There was also sticky which had
5 dropped on the bench and on the floor down.

After what I had seen and realizing that Accused had committed the offence I planned how I could get him out of the shop, which was very small. It was a struggle to take the Accused out, a table was broken, some items on the table like a weighing scale fell down and I was beaten. I got hold of
10 Accused by his trousers and we ran with him from the scene as my friend was guarding. I took the Accused to the Police which was a distance away. This was Kafumbe Police Post. I took him to the Police post. At the Post I reported to the Police woman on duty that the Accused had defiled a child and that the child was being brought.

15 The sticky water I observed was whitish. It was male sexual fluid. I suspected that the fluid wer sperms/semen. The fluid was on her private parts and the thighs. I felt the fluid by touching it. Some of the fluid was within her private parts and some was flowing down.

Cross-examination by Mr Gabe:-

20 I am 34 years now. I am a Special Police Constable attached to CPS Kampala. When I came I found the victim inside the shop. The victim was dressed in a dress and while examining her I pulled it up. I found the girl standing up, I did examine the dress but I pulled the dress up. I did not see any knickers of the child. I saw watery substance on the bench. At that material time I could not keep the bench my interest as to save the Accused's life from the mob who wanted to kill him. Accused could not
25 answer my question and he appeared frightened. I think he was frightened because of what he had done and the fear of the mob. That is my opinion.

Re-Examination:-

30 Nil.

Ms Namakula:-

That is the close of the prosecution case.

Mr Ali Gabe:-

5 I intend to make a submission of no case to answer. However I seek an adjournment.

Court:-

Adjourned to 16/6/2003 at 3.00p.m. for submission of no case to answer. Accused further remanded.

10 **LAMECK N. MUKASA**

AG. JUDGE

12/6/2003

16/6/2003:-

15 Ms Anglina Marian Namakula State Attorney for State.

Mr Ali Gabe for Accused.

Accused present.

Both Assessor present.

Mr Kato-Sonko Clerk/Interpreter.

20 **SUBMISSIONS OF NO CASE TO ANSWER:-**

Mr Ali Gabe:-

I beg to submit on a no case to answer. Accused was indicted for defilement.

Prosecution alleges that the Accused on 9/12/2001 at Luzige Zone Mengo Kisenyi Kampala District
25 defiled one Namujuzi Sharifa a 4 year old girl then Contrary to Section 120 of the Penal Code Act.

Prosecution produced 6 witnesses to prove its case and thereafter closed its case. The issue is whether
the prosecution has established a prima facie case against the Accused.

According to the case of BAHATI Vs R [1957] EA 332; Attorney Vs Ally Kleast Sykes [1957] EA 257 a prima facie case is that case which a reasonable individual properly directing its mind to the law and evidence could convict if no explanation is offered by the defence.

5 The main consideration is whether an evidence before this Court, the Court can convict the Accused if the Accused chose to keep quiet.

In Uganda Vs Onyang and other [1979] HCB 40 it was held:

10 “that a submission no case to answer can be upheld either where there is no evidence to prove an essential elements in the alleged offence or where the prosecution’s evidence has been discredited in cross examination or is so manifestly unreliable that no reasonable tribunal can safely convict thereon”

15 In this case the Accused is alleged to have committed the offence of defilement. According to Section 123 (1) of the Penal Code Act defilement is committed when a person has carnal knowledge with a girl below the age of 18 years. According to People (Attorney General Vs Dermody [1956] 1 RAT 82, Carnal knowledge circulates at least some degree of penetration into the vagina by the defiler for a mere act of penetration amounts to sexual intercourse.

20 In this case the Prosecution has failed to establish a prima facie case against the Accused.

Whereas the Prosecution has proved that the victim is under the age of 18 years it has failed to show that the victim was actually defiled.

25 PW1 , PW2 and PW3 testified that they saw semen on the private parts of the victim – i.e. on top of the private parts and on the thighs and somewhere on a stool in the Accused’s shop but none testified that there was semen inside the vagina of the victim.

The mere spraying of semen on the kid doesn’t amount to defilement, at least would indecent assault. In any case there is no evidence before Court that whatever fluid that was sprayed on the
30 girl was semen.

It was never asked by the Police for Scientific examination to confirm it to be semen.

Dr Nsereko a Medical Officer testified that even himself would not say on site that it is semen unless it was subjected to medical examination. Therefore all the three witnesses merely gave their opinion
5 about the fluid. None has competently testified that semen has got an appearance quite distinct from other fluids.

PW3, a Nurse by profession testified that she saw semen on top of the private parts of the girl and her thighs. She doesn't show by which means she established that it was semen.

10

Prosecution mishandled this case the girl ought to have been cleaned or washed before seeing the doctor who was well qualified as to test the substance. The substance should have been collected by the Police, Exhibit, taken for Scientific examination and later exhibited in court.

15 Whatever the case even if it were to be semen by what method was it established that the semen belonged to the Accused person. Assuming the semen was sprayed on her by someone else. The issue of semen is just a conjuncture which should be ignored by the Court. It should not fill any part of evidence in this case at all. The Police messed up the case.

20 PW1, PW2, PW3 and PW4 testified that the victim's private parts were hurt. That the labia was lacerated as well as the vagina, that the hymen were ruptured but this also begging. The question is what was the cause of the rapture, how was it ruptured. Was it by use of a hard object like toe or finger nail, a thumb or penis. PW4 testified that he examined the Accused and found the penis body intact, it had no injuries. Could fresh rapture fresh or bruises fresh without surfacing any bruises.
25 This is a position which should have been clarified by the Doctor who examined the Accused's penis. This was not done.

There is no evidence to prove that the Accused person's penis lacerated the alleged victim's vagina. The Police failed completely in their duties in carrying out proper investigations and for
30 the Prosecution has failed to adduce this evidence before this Honourable Court for consideration.

The best witness would have been Dr Nsereko to testify on the part having examined the Accused person.

5 The Prosecution should have established from the doctor whether the kind of injuries the doctor has established on the private parts of the victim could be caused by a penis and that penis despite causing those injuries could remain intact without any injuries on it.

The Defence did not cross examine on these issues as that would be assisting the Prosecution to strengthen its rather a weak case.

10

I would associate with Medical Form Report Exh. P1 when the Doctor's remarks state:

“The injuries are consistent with attempted forceful sexual intercourse”.

15

If anything the Accused should have been charged with attempted defilement or indecent assault on the alleged victim, if there is evidence that the alleged substance came from the victim.

An attempts connotes preparation to commit the offence. Defilement can only be committed if the penis is used but this lacks the prosecution evidence.

20

The Court should consider the inconsistencies and contradictions in the evidence. PW2 who told the Police in his statement that he just came out of the house and found people asking the Accused questions to which the Accused said “No”. Yet in Court he testified that he was called by PW1.

25

In the Police statement he never told the Police that he did question the victim as to who had defiled her. He did not also state in that statement whether he did ask the Accused person whether he had defiled the victim. Yet before this Court he testified that he asked the victim “who defiled you” and the victim would only answer “Hassan, Hassan”. He also alleged that he asked the Accused person whether he had defiled his daughter and that the Accused said
30 “No”. These statements were before this Court were afterthought and brings the integrity of this witness into question. Further in the statement to the Police he said when the incident

took place he was resting in his home. Yet before this Court said he was “Ironing”. The statement Recorder could not have mistaken “Ironing” with “resting”.

5 The Investigating Officer stated that he interviewed the witness before recording down his additional statement. And the answers to his interview confirmed the statement he had earlier made to the Police. And recorded the additional statement only to establish the victim’s date of birth which to him was missing in the first statement of PW2.

10 PW2 discussed the contents of the first statement Exhibit D1, that its contents were not what he stated to the Recording Officer. There is no reason why the statement Recorder could not write down what was stated to him.

15 PW2 is accomplished liar whose evidence should be disregarded. In Uganda Vs Bikamikire [1972] HCB 144 it was observed that where discrepancies or contradictions are found in evidence to be so serious or grave unless it is recorded will result in the objection of that evidence.

20 PW2 for his own convenience decided to be a liar. His Police statement contradicts the evidence of PW1. Say where PW1 says that she went and informed her husband PW2 who also came to where the victim was. She went and entered the house and to call the father and the father sent her to call the Accused and came back to the house with Hassan. This contradicts the statement of PW2 to the Police in that PW2 says that he went out and found people questioning the Accused.

25 It is therefore my humble prayer that the Accused be acquitted on accordance with Section 71 T.I.D for failure by the Prosecution to establish a prima facie case against the Accused Person. I lament the failure of the Police in executing its duties in the investigation of this case.

LAMECK N. MUKASA

AG. JUDGE

16/6/2003.

Ms Namakula:-

I have nothing to reply and leave it to Court to make a finding.

5 Court:-

Ruling on 23/6/2003. Accused further remanded.

LAMECK N. MUKASA

AG. JUDGE

10 **16/6/2003.**

23/6/2003:-

Ms Namakula State Attorney for State.

Mr Ali Gabe for Accused.

15 Accused present.

Both Assessor present.

Mr Kato-Sonko Clerk/Interpreter.

Court:-

20 Ruling delivered. Accused has a case to answer. The Accused's right either to keep quiet, a male on unsworn statement from the dock or evidence on oath and to call witnesses explained to the Accused.

Accused:-

25 I will give evidence not on oath.

Mr Ali Gabe:-

I am ready to proceed with the defence case.

30 Court:-

Proceed.

DW1:-

HASSAN KAFEERO states:-

I am 21 years old. Muganda. Before my arrest I was a shop attendant and residing at Kigali Zone, 5 Mengo Kisenyi.

On 9/12/2001 the child came to the shop and sold her soap and she went home. After about 5 to 10 minutes she came back with her mother. Her mother asked me what I had done to her child. I answered that I have done nothing. She told me to go to the father of the child. I asked her what we 10 were going to do there. She insisted that we should go. While still there some people case. They asked me what I have done. I told them that I had done nothing. They told me to go if I had done nothing. I went to the father of the child. I found him in the house standing. I remained in door way. He was holding a stick. He came out with the stick to beat me. We found there some people. People around asked me, what I had done. Before I could reply the father threw the stick to me. The wife had 15 done back to the shop with a bottle. The father told me to go back to the shop. We went to the shop. We found the wife standing outside the shop, holding the bottle she had. I did not know what was in the bottle. I entered into the shop. I do not know whether she had entered my shop. That is all.

Mr Ali Gabe:-

20 That is the end of the defence case.

Ms Namakula:-

I seek an adjournment for submission.

25 Mr Ali Gabe:-

No objection.

Court:-

Adjourned to 26/6/2003 for submission. Accused further remanded.

30

LAMECK N. MUKASA

AG. JUDGE

23/6/2003.

26/6/2003:-

5 Ms Anglina Maria Namakula State Attorney for State.

Mr Ali Gabe for Accused.

Accused present.

Both Assessor present.

Mr Kato-Sonko Clerk/Interpreter.

10

SUBMISSIONS:

Ms Namakula:-

Accused is charged with defilement the ingredients of which are:-

1. Age of the victim.

15 2. Sexual Intercourse.

3. Participation by Accused Person

To prove the age of the victim prosecution relies on evidence of PW1, the mother of the victim, who states that the child is now 5 years and 6 months old at the time she gave evidence. Evidence of
20 PW2, who states that victim was born on 15/8/96 and doctor PW4 who on examination of victim found her to be 4 years old. It is my submission that the age of the victim is not in doubt. PW2 did point to the victim when giving evidence showing this Court the victim.

To prove Sexual Intercourse prosecution relies on the evidence of PW1, mother of the victim, who
25 stated that on observing her daughter the victim, she saw semen running down her private parts and down her legs.

PW2, father of the victim, also stated in his evidence that he saw semen in the private parts of the
victim.

30

This evidence will corroborate the evidence of PW4 the Medical Doctor who stated that on examination of the victim,s private parts, they revealed fresh bruising and a small laceration at the left side of the inbroitus – The vaginal carnal. The Doctor went to state clearly that this constituted a fact if penetration as the victim’s hymen was freshly ruptured. He stated that these injuries were
5 consistent with related sexual intercourse. It is my submission that the bruises and lacerations compelled with the freshly ruptured hymen and the injuries would only mean one thing that somebody had actually had sexual intercourse with the victim. The issue that the Doctor referred to attempted sexual intercourse in this case was not put before him to explain what he meant by this. By Court with cross-examination the witness. It is my submission that it is well established in case
10 law that matter not brought to a witness while he is giving his evidence in cross-examination I shall not be taken to be part of the evidence and should therefore be disregarded by this Court. I rely on Uganda Vs G.W. Shanihan S/C Criminal Appeal No. 37 of 1995 where their Lordships stated that any suggestions in respect to what was not put before a witness during cross-examination amounting to an impart are forceful theories and should therefore not be asked in arriving at any decision by the
15 Court.

The fact that the Accused person later in his evidence denies the said events is irrelevant if the said evidence of PW4 was never challenged as he was giving his evidence. It is my submission that the Accused had ample time at the time PW4 was giving his evidence to challenge him on scene under
20 cross-examination. Failure to do so meant that the evidence of the doctor went unchallenged and would be taken by this Court as a true version of his examination of the victim.

The Medical doctor clearly differentiated between a sperm and semen. He said a sperm looks very much like a tadpole and that the semen cannot be seen on the site whether it is on a chair, table etc.
25 He however stated that semen appears as a stain on cloth and that he would be likely to tell a semen which in turn would lead him to investigation further through microscopic examination. It is my submission that sperm and semen are different things and cannot be used interchangeably. Therefore the evidence of PW1, PW2 and PW6 that they saw this whitish substances would basically go with the doctor’s evidence that semen appears as stain on a piece of cloth. PW6 in his evidence
30 stated that he saw a sticky watery substance which was whitish and looked like semen both in the thighs of the victim and on the bench in the Accused’s shop. PW1, PW2 both stated that they knew

what semen looked like being mature persons and described it as a whitish substances. PW4 also examined the Accused person and found no injuries on his body and that his private parts revealed normal external genetaria. This can only be expected after all it is not every case that a man after sexual intercourse will develop injuries in his genetaria. It is therefore my submission that the doctor would not have been expected to find any injuries on the private parts of the Accused person after he defiled the victim. My Learned friend's submission in a no case to answer that fresh against fresh should have caused some injuries to the Accused Person's private parts bruises on the ludicrous and the same should therefore be disregarded. The prosecution did prove that the victim was subjected to sexual intercourse resulting in the injuries that the doctor testified about. It is therefore my submission the sexual intercourse has been proved beyond reasonable doubt by the prosecution.

On the third ingredient of participation by the Accused, I would like to point out that it was 11.00a.m in the morning constitutes for correct identification were very favourably. PW1 stated that she sent the victim to the Accused's shop to soap and she took long in coming back home she went looking for her. The she found her crying. When she went in the Accused's shop she saw the Accused carrying the victim from behind the counter and giving her soap and a sweet. That upon asking the victim why she was not going back home she only continued crying and naming Hassan. PW1 stated that she went back home with the victim to call the father of the victim. Upon reaching home the father of the victim remained with the victim and he told PW1 to go and call the Accused. That she went and called the Accused and went together back to their home. And that while there the father of the victim asked the Accused person what he had done to the victim whereupon he relied that he had done nothing to her. The father of the victim then asked her what had happened to her and the victim led the back to shop of the Accused person where he saw a bench behind the counter on which they found semen. PW1 further stated that PW2, the father of the victim, directed her to go and call the LC1 Chairman Mr Kanyike to come and help them stop the people who had gathered waiting to beat the Accused person. Evidence of PW1 is in this van corroborated by PW2, the father of the victim, and PW6, the LC1 Chairman – stated that PW1 had his place and told him that a youth had defiled her daughter. PW6 stated that he went with PW1 to the Accused's shop where he found the father of the victim and the brother of the Accused person on the door way preventing people from entering into the shop. PW6 went on to state that when he went behind the counter he saw

semen on the bench near where Hassan was seated and that the same had even split down onto the ground.

PW1, PW2 and PW6 knew the Accused person before. PW1 and PW2 having known him two years
5 previously while PW6 knew him before because he was his resident in the area.

There is no issue of a grudge in this case between the complainant and the Accused person. PW1
and PW2 had only known the Accused as a shopkeeper and whose shop they go to buy various
items. The issue of a grudge was never raised by the Accused.

10

Accused in his defence did put himself at the scene of crime when he stated that the victim had come
to his shop and he had sold to her the soap. He actually talks about PW1 having a bottle going back
to the shop with a bottle after the incident had occurred, he went on to state that he did not know
what was in the bottle nor whether PW1 had entered his shop. It is my submission that the Accused
15 person was in his arm admission at the scene of the crime. He was identified as the one who had
actually defiled the victim in this case. PW1 stated in her testimony that there was no one else in the
shop of the accused person when she went looking for her daughter and found her said daughter in
the shop with the Accused person. It can therefore be no doubt that it was the Accused who was in
the shop who actually defiled the victim.

20

I would like to point out that the incredibility in the evidence PW2 when PW2 stated that he was in
his house ironing when he testified before Court and what he stated in his statement at Police that he
was in the house sleeping (resting) was a very minimum inconsistency and doesn't go to the sort of
question before this Court. The fact is that the Accused person defiled the victim. Whether PW2
25 was in house resting or ironing is of no consequence.

It is therefore my submission that the prosecution proved its case beyond reasonable doubt and left
no issue as to the doubt of the Accused participated in this offence. It is therefore my prayer that the
Accused be convicted as charged.

30

The victim was not called as a witness because she is too young clear tantalized by what had happened to her and PW1 stated in her evidence that she just kept on crying when she asked her what had happened and kept on naming Hassan. Prosecution could not take the victim through the adeal again of having her testimony in this case after having gone through the adeal of the Medical
5 examination and the actual defilement itself. For those reasons prosecution could not call the victim as a witness.

Mr Ali Gabe:-

The Accused was indicted with defilement. Prosecution alleges that on 9/12/2001 at Luzige Zone
10 Mengo Kisenyi, the Accused defiled Namujuzi Sharifa a 4 year the girl which is contrary to Section 123 (1) of the Penal Code Act.

When case came for hearing the Prosecution called 6 witnesses to prove its case. The issue is simply whether the prosecution had made a case of defilement against the Accused.

15

According to Section 123 (1) of the Penal Code Act a person commits defilement when he has carnal knowledge of a girl below the age of 18 years. Prosecution must prove the following:-

- i) That the girl was below 18 years.
- ii) The girl was sexually carnally known.
- 20 iii) That it was the Accused who had carnal knowledge with the girl.

The onus of proof is upon the prosecution. This is a principle set down in the case of; Woolington Vs DPP (1935) AC 462.

If there is any doubt such doubt shall be settled for the benefit of the Accused.

25 It is state in Bamanya Vs R [1956-57] ULR 233 that absence of or unsatisfactory explanation of the Accused does not prove it. The prosecution must prove its case beyond reasonable doubt.

According to the testimonies of the prosecution witnesses there is sufficient proof that the victim used is still below the age of 18 years. Biggest handle for the prosecution is whether any person had
30 sexual intercourse with the victim. According to PEOPLE (AG) Vs DERNODY [1956] 1 RAT 32

Carnal knowledge connotes at least some degree of penetration into the vagina by the defiler. A mere act of penetration amounts to sexual intercourse.

5 In the present case the prosecution has not satisfactorily establish or proved that the victim was defiled. There is no any single evidence that the victim had been defiled.

PW1, PW2 and PW3 told Court that they saw semen on the top of the private parts of the girl and on the thighs and somewhere on a bench in the Accused's shop.

10 These testimonies have the follow construal lacuna;

- i) None say they saw semen inside the girl's vagina.
- ii) None has shown the proof which leads them into believing that what they saw is semen, there has been no Scientific examination. Mere observation by naked eyes without any Scientific test is no proof that the fluid was semen.

15

PW4 the Doctor, said in his evidence that even he himself if he looked at the substance he could not say by the naked eye that the substance is semen.

20 To have made the prosecution case stronger or even strong prosecution should have collected some of this substance and carried it for medical examination including the stool upon which the alleged substance was seen and should have been exhibited. That is the substance and the stool in this Court. The fluid could have been anything else even snot from the nose. There is serious doubt as to whether what was seen was semen or something else. PW1, PW2, PW3 and PW4 each gave evidence that the girl's private parts were hurt and hymen ruptured.

25

This evidence also leaves a lot of doubt in the sense that the evidence does not show the object which was used to rapture the hymen and bruise the private parts. Anything can rapture the hymen or bruise the private parts, it could have been a fingure a toe, wood or anything else. It could even include the victim injuring herself.

30

The prosecution should have led evidence to the effect that the bruises on the private parts and the rapture of the hymen was caused by the penis and to have gone further to say that penis could have caused the bruise and the rapture. This is a serious doubt and leaves Court to speculate on what could have been the cause of the rapture. Prosecution did not help Court.

5

The only person who could have helped Court on this issue is PW4, the Doctor, who should have answered a question like can “fresh bruise fresh”. This issue was left in the air. It is therefore my submission that the prosecution unreliable failed to prove that there was any defilement. It has only proved injury to the private parts of the girl but not defilement at all for the rest are assumption. On this point alone I pray that this Honourable Court be please to acquit the Accused.

10

Semen can even accrue before penetration. Semen is not conclusive evidence of penetration. It is possible to have penetrating without discharge of semen.

15

On the third ingredient as to whether the Accused defiled the girl, the prosecution had debacle. PW1 , PW2 testified that the girl was sent to the Accused’s shop where she spent a lot of time, and PW1 testified that she followed and while on the way she found her crying and she entered the Accused’s shop and found the Accused removing the girl from behind the counter to in front.

20

There is no independence evidence available before this Court to corroborate the evidence of PW1, from the particular part of evidence has been denied by the Accused according to the Accused, the victim came into the shop and immediately he gave her the soap she came for. She went out after about 5 to 10 minutes the victim was brought back into the shop by the mother who asked what have you done to my child and he said I did nothing. And that PW1 asked him to go to their house where the husband was. He felt he did not want to go but because of some other people who forced him he went to PW1’s house where they found PW2 the husband in the house. The Accused was in the company of PW1 and other people and PW2 came out from their room with stick and wanted to beat him. This was outside the door of the house of PW1 and PW2.

25

30

While at the same time other people were asking him whether he had defiled the girl or not and he was saying n. The effect of the Accused’s evidence is that he denies that PW1 came into the shop and found him with the victim.

PW1 said whenever she would ask the victim the victim would only say “Hassan Hassan” The issue is what is the evidential value of mentioning the Accused’s name. PW2 in his evidence in cross-examination he said there were other people called Hassan within the area. Over the LC1 Chairman
5 is called Hassan. This statement is hearsay because the matter was not called in Court. It would have been wiser on the part of the prosecution to have called the victim as a witness to make it possible for this Court further hold voire dire so that we could hear from the victim’s mouth what actually happened to her and I believe victim could have led us to what actually caused the bruise to her private parts and the rapture of the hymen.

10

At the time PW1 same evidence told was the victim is 5 ½ and P1 at school. She is a girl who could express herself and held Court to arrive at a just conclusion of this matter. With due respect to the prosecution is would appear the prosecution decided to be a Judge in its only case by saying the girl is too young and could not give evidence. This decision could be arrived at judicially and the only
15 competent body to arrive at such a decision is the Court now seating.

The that the child was traumatized again is not a good reason to deny this Court to hear and observe the victim in person. The Court only saw the victim in Court. This omission on the part of the prosecution is fatal perse.

20

The prosecution failed to bring in clearly how isolated is the shop of the Accused that one could pick the courage to have sex with a small girl. On the part of the Defence in cross-examination of PW2 and PW2 the witness stated that the place is clouded and very busy and there is a road that passes three metres from shop.

25

Therefore during day time at 11.00 a.m. where there was even no rain, any shop keeper would effect customer to come and buy something. It is highly doubted whether any man however semester and whatever his motive would be can take such a rich. The prosecution has failed to connect the Victim had sexual intercourse if any with the Accused person. The case for the Accused became stronger on
30 the evidence PW4, the Doctor, when he says that he examined the Accused found his penis clear there were no injuries on it no bruises, so the question can fresh bruises fresh and remain bruiseless.

Could have the penis of the Accused injured the private parts of the victim and remained without any bruises at all. Prosecution has not helped Court on this issue and if there is doubt then it goes to the benefit of the Accused. The lapse of two days could not have healed the injured on the penis of the Accused, to the least there could have been a scar.

5

When you study the Medical Report there are two very important points raised in Court.

First it says there was penetration, then later the same doctor says in his report that there was “attempted forceful sexual intercourse”. It was the duty of the prosecution to make clarification on the Medical report because there are contradictions at one stage the doctor talks of penetration and then concluded that there had been an attempt of forceful sexual intercourse. Prosecution should have sought clarification of the two statements from the doctor. The word “attempt” connotes that the actual offence is not committed.

10

In this case the case of defilement was not committed because it has only been an attempt according to the doctor.

15

The defence has not adequately handle that since and I would like to associate myself with the conclusion of the doctor that there had been an “attempt” of forceful sexual intercourse.

20

In submission of Counsel for state she said that the Accused admitted he was at the scene of crime. There no where in the evidence of the Accused person to show that the Accused admitted he was at the scene of crime. He denied that the crime was never committed in his shop if it was committed. No scene of crime has been established.

25

She also submitted that no grudge had been established. This grudge has alluded to by the defence is cross-examination of PW1 and PW2.

There are several mistakes and contradicting in the evidence of the prosecution. When we came to evidence of PW2 as given before this Court, it doesn't tally with the statements he made to the Police. Both various evidence are before Court. The evidence in the statement of PW2 was given within six hours from the time of the alleged offence was committed.

30

According to J.B. Odoki Justice of Supreme Court of Uganda in his book “The Guide to Criminal Procedure 1-0,” and 2nd Edition page 21 states:-

5 “Evidence is normally given to the final statement when it is presumed that the memory is still fresh. Where there are several inconsistent statements from the same witnesses on the same matter it would be difficult to decide which of the statement to believe and the credibility of the witness would be greatly weakened”.

10 In view of this statement It is my strong submission that this Court should find PW2 most unreliable. Ironing is so different from resting even in Luganda.
If PW2’s evidence disregarded there is no evidence on record that can corroborate the evidence of PW1.

15 The evidence of Accused let to support the statement PW2 made to Police because PW2 talked of the victim and PW1 being outside the door and he to find the Accused being asked by other people about the defilement and the Accused was denying. This is what Accused stated in Court, that PW2 came out of his house and wanted to beat him while the others were asking him whether he had defiled the girl. This Police statement leads to the statement of the Accused in his
20 defence. The Accused’s evidence goes to prove PW2 a liar when he said before this Court that he came out and asked the Accused whether he had defiled the child the Accused denied ant that he went on to check the victim and found sperms. The witness collapsed because he was telling lies.

This leaves the evidence of PW1 uncorroborated. It was stated in the case of Yofesi Pirai Vs. Uganda [1992-93] HCB 33 that it is important the witnesses first report should be put in evidence
25 together with that of the person who made that report and one who reviewed it.

In case of defilement it is very important that consistence events leading to the actual defilement up to Court must be kept.

30

In case of the first report was not put in evidence. We have only the evidence if the purpose who made the result to Police (PW6) the Chairman and the Officer who received this report were not called in to put his evidence on this report. This should be the Officer at the counter who received the first report.

5

In Kasule Vs Uganda [1992-93] HCB 38 it was stated that evidence the witnesses framed the arrest and detention of the Accused is required to be put before Court.

All these are hiding in the evidence for the fact that the victim was found with the Accused person.

10

In Emmanuel Nsubuga Vs Uganda [1992-93] HCB 24 Court said that it is necessary before drawing any inference of guilty from circumstances evidence for Court to be sure that there are other co-existing circumstances which could weaken or destroy the inference.

15 Here the circumstances that would weaken or destroy the evidence are many:-

1. Place is so busy that it would be impossible for any one to play sex, with any person because it would attract the attention of neighbours or passers by. If the child was crying would it only be the mother to hear.
2. Semen was not proved that the substance was semen.
- 20 3. No proof that the rapture was caused by the penis.
4. Accused denied that PW1 ever found him with the victim in the shop.
5. There are more than one Hassan in the area.

At the material time somebody called Kiggundu was in the shop and this was admitted by PW1.

25 Prosecution should have called Kiggundu who would have been a key witness in this case.

It is highly doubtful that the Accused committed the offence he was indicted of. I pray that this Court acquits the Accused.

30 Ms Namakula:-

PW5 was asked why the bench was not exhibited in cross-examination and he stated that he visited the scene some days after the incident - 3 days after. He pointed out that he did not at that time find stains on the bench.

5 PW6 stated that he could not get the bench to keep it as he was trying to keep the mob outside that which wanted to kill the Accused from getting him. It is therefore my submission that the said bench could not have been exhibited due to the above reasons.

10 This Court can't rely on speculating of Counsel as to what could have caused the ruptured hymen and the bruising on the private parts of the victim. Court relies on facts which are brought before it in evidence. Case Law on this is very clear as put in the substance further could Court speculate on whether the substance seen by PW2, PW1, and PW6 was mucus from the nose. These witnesses clearly stated in their evidence that as mature people they saw a white sticky substance both the girl and the bench and their conclusion was that the same was semen. These are the facts.

15

It cannot further speculate on whether fresh could bruise fresh. PW4, the Doctor was in Court and he clearly stated that the girl's hymen had been ruptured and there had been lacerations and bruising. These are facts.

20 A reasonable Court has gone ahead to convict Accused person in case a victim is never called when it looks at the other evidence on record and using the same to convict an Accused person. It can therefore not be fatal for the prosecution not to call the victim in case of defilement.

25 Case Law has held that evidence of the victim is the best evidence in case of sexual nature where there is other strong evidence the same can be used to convict an Accused person.

PW2 described the shop of the Accused person. She said in cross-examination if one passed along the road and one is sitting behind the counter in the shop you can see the upper part of a mature person but if it is a child then it can't be seen.

We cannot speculate into the motive of the Accused person in determining whether he would commit this offence at that time of the day and with people passing by along the road side. The fact is that the Accused did actually commit this offence as the prosecution witnesses testified.

- 5 The scene of crime was established. PW5 told this Court that he drew a sketch plan of the scene as it was admitted in Court as an exhibit and it was never challenged.

The issue of the grudge was put before PW1 in cross-examination and she clearly stated that the months she had known the Accused person she had never taken any credit from him and had never taken any table cloth from the Accused. She had no grudge against the Accused person whatsoever. The Supreme Court had decided many cases that where inconsistencies and contradictions are so union that they do not go to the root of the case the same should be disregarded and the Courts proceeds on the merits of the case itself.

- 15 Statutory Law is the trial Law Case should rely or, presided over various schooling books in which the various scholars are only giving their opinions and the same books are read by Lawyers to guide them in their day to day practice.

Court cannot rely on speculations as to why PW2 collapsed while giving his evidence. It is not fair a Counsel to call him a liar for this reason we cannot speculate on the reasons why he collapsed and this is no ground to call him a liar. It is upon this Court to determine the truthfulness of any witness before Court having observed his demeanor, the way he answer questions and this should be the basis of determining whether a witness is truthful or not.

- 25 Supreme Court has held in a number of cases that circumstantial evidence can be relied upon as long as the same can be corroborated by other evidence . Ref. Constantino Okwero alia Magendo Vs Uganda Criminal Appeal No. 12/99 in which Court stated:- (Counsel reads from the Judgment).

It is my submission that this Court can rely on this evidence as long as the same is corroborated which it was by other independent witnesses when the prosecution called to testify before this Court.

PW1 stated in her evidence regarding one Kiggundu that he is the elder brother of the Accused. When she went to get the victim from the shop Kiggundu was not there and leaves no doubt that PW1 only found the Accused person in the shop at the time that she went to get the victim. It would not be fatal for a first report not to put in evidence nor the need to call the person who received that

5 report. The facts are very clear that the offence was committed and the same was reported to Police and circumstances in which Accused was arrested and detained were clearly brought out by PW6 when he stated that he took the Accused to Kafumbe-Mukasa Police Post. Prosecution ably discharged its duty to prove this case beyond reasonable doubt.

I pray that the Accused be convicted as charged.

10

Court:-

Summing up done to the Assessors.

Court:-

15 Adjourned for the Assessor's opinion on 27/6/2003.

LAMECK N. MUKASA

AG. JUDGE

20 **26/6/2003.**

27/6/2003:-

Ms Anglina Maria Namakula.

Mr Ali Gabe for Accused.

25 Accused present.

Both Assessors present.

Mr Kato-Sonko – Clerk interpreter.

30

ASSESSORS' OPINIONS:-

Ms Elite Juliet:-

Accused indicted with defilement. Prosecution must prove three ingredients.

- (i) That the victim was beyond 18 years.
- 5 (ii) She was suspected to act of sexual intercourse.
- (iii) It was the Accused responsible.

On the age it was proved by PW1, the victim's mother, PW2 the father of victim and PW4, the doctor who all testified that Sharifa was below 18 years, which was conceded by the Defence
10 Counsel. Through my observation of the victim Sharifa was a girl of tender age. I find the prosecution has proved this ingredient beyond reasonable doubt.

On second ingredient I have addressed my mind to evidence of PW1, PW2, and PW6. PW1 saw blood and watery substance running down the victims's thighs and from her private sexual organ.
15 The victim was disturbed and found crying in the Accused's shop by PW1 and Pw6. PW4, the Doctor, findings revealed that the victim had bruises and small lacerations n the left side of her female sexual organ which according to his constituted a fact of penetration. In his testimony he found that the victim's hymen was partially ruptured. With the above evidence I find this ingredient proved beyond reasonable doubt.

20 On whether it was the Accused person responsible I rely on evidence of PW1 on following the victim found the Accused handing soap and sweets to the victim in his shop and victim was crying mentioning Accused's name Hassan.

25 Accused's defence places him at scene of crime and I find the Accused's defence a toto denial.

In view of the evidence of PW1 I find the Accused's defence unreliable and should not be taken in consideration. Accused was known to PW1 and PW6. The incident took place in broad day light. I had opportunity to observe prosecution witnesses and found them to be credible and truthful,
30 especially PW1. I also find that this ingredient has been proved beyond reasonable doubt by prosecution.

Much as PW2 contradicted himself during cross-examination regarding the information he gave before this honourable Court I take his contradiction to be minimum.

5 Finally I find prosecution has proved beyond reasonable doubt and I therefore advise that the Accused be convicted and sentenced according to law.

Mr Bernard Mukone:-

Accused is charged with defilement with a maximum sentence of death.

10

I considered the following ingredients:-

1. Whether Accused had unlawful sex with the victim.
2. Whether age of victim was below 18 years.
3. Whether Accused participated.

15

On first ingredient I find evidence of PW1 and PW2 important in assessing this case. PW1 saw the victim being removed from the shop by the Accused. PW2 saw the victim with fluids flowing from her private parts. I find evidence PW1, PW2 and PW6 corroborating when they all say that the victim was crying. PW3 and PW4 on examining the victim found that her hymen was ruptured and there were lacerations on the left of her private parts. PW1, PW2 and PW6 saw semen on the bench in Accused's shop.

20

Therefore the crime of the victim, the semen seen on her private parts and semen seen on the bench point to the fact that there was penetration and is further explained by victim's crying which I interpreted as crying because she was in pain.

25

On the 2nd ingredient the mother of the victim PW1 testified that the victim was 5 ½ years at the time of her testimony. Father PW2 testified that the girl was born in 1996 August. The doctor found in his examination that the victim was 4 years of age. On victim being produced in Court I observed her and indeed she was below 18 years, she was an infant. There is no doubt the victim was below 18 years.

30

On third ingredient of Accused's participation on PW1 asking the victim why she was crying she lamented Hassan PW2 also asked her and all she could reply was Hassan.

5 The Accused himself testified that the victim came to his shop to buy soap. This leaves no doubt that the girl was in his shop and he participated in defiling.

PW1 saw the victim being removed from behind the counter by the Accused. PW1 stated that at the time she saw the Accused in the shop there was no other person in the shop. PW1, PW1 and PW6
10 saw semen on a bench and PW6 went ahead to feel the substance which he described as sticky and him being mature he could identify it as semen.

However PW5, the I.O on visiting the scene could not find any semen which could have been exhibited and the reason was he visited the scene three days later. On examining the Accused the
15 Doctor found that he had no external injuries, while the victim had bruises on her private parts, In my opinion the Accused being mature and therefore his private parts could not sustain injuries as opposed to the victim's private parts which were still tender.

PW2 and PW6 testified that the Accused was in great fear and looked terrified. In his defence
20 Accused deny having committed the offence and added that PW1 went to the shop with a bottle whose content he did not establish and he did not ascertain whether she entered the shop or not.

I find evidence of PW1, PW2 and PW6 corroborated on the issue of semen on the victim and on the bench. I also find corroboration in evidence of PW3, PW4 on laceration of hymen and the Doctor
25 went further to say that cause of the laceration and rapture was attempted forceful penetration.

Victim's crying was result of pain effected upon her in the process of penetration and evidence in PW3's finding that the victim had some blood.

30 On the basis of the above, I advise this Court to convict the Accused.

Court:-

Judgment on 18/7/2003. Accused further remanded until then.

LAMECK N. MUKASA

5 **AG. JUDGE**

27/6/2003.

18/7/2003:-

Mr Arinaitwe for State.

10 Mr Ali Gabe for Accused.

Accused present.

Both Assessors present.

Mr Kato-Sonko Clerk/Interpreter.

15 Court:-

Judgment not yet ready, to be delivered on 25/7/2003. Accused further remanded.

LAMECK N. MUKASA

AG. JUDGE

20 **18/7/2003.**

25/7/2003:-

Mr Arinaitwe for State.

25 Mr Ali Gabe for Accused.

Accused present.

Both Assessors present.

Mr Kato-Sonko Clerk/Interpreter.

30 Court:-

Judgment delivered and Accused convicted as indicted.

LAMECK N. MUKASA

AG. JUDGE

25/7/2003.

5

ALLOCUTUS:-

Mr Arinaitwe:-

The offence for which the convict has been convicted is a serious offence. It carries a maximum of death sentence. The convict abused the modest of a young kid hardly five years. The tremor that will go in the mind of the victim until her old age need not be over emphasized. The convict's act was beastly and savage. He would have been expected to give normal guidance to this young kid as an older person. He abused his position in Society. I pray that Court as a contrary of Law and Society to give the convict a very strong punitive sentence.

10

Mr Ali Gabe:-

Accused is a young man of 23 years married with a wife with two children. In addition he has nine young sisters and brother he is looking after and two old parents, the mother and father, he is looking after. The period he has been on remand has affected the well-being of his children, wife and other dependants. Further period of detention is likely to cause more suffering to his family members and dependants.

20

A well considered sentence should put these into consideration for the future of the other young ones.

The period he has been on remand of over one year and eight months should be put into consideration. Since the State has not provided any Criminal record of the Accused he is a first offender. The convict is likely to reform. I pray that you consider to exercise leniency. The custodian sentence is not always the best. I pray for a reasonable shot period.

25

30 **SENTENCE AND REASONS FOR IT:-**

I have heard and agree with the submissions of the Prosecution Counsel. Court take a serious view of the offence of defilement. The offence has become one of the leading offences in Uganda. The convict betrayed the respect to children's rights offended of every citizen in Uganda. The Accused introduced the victim to sexual intercourse at a very tender age of about 4 years before her puberty.

5 The victim through an ordeal which might affect her sexual life ever during her mature life. There is even evidence that since the incident the victim has become fearful. Society and especially young children must be protected from the people of the Accused's conduct and type.

However I must consider what has been stated by the Defence Counsel for the convict in utilization.

10 He is a young man with family to look after. The convict has been on remand for a period of over one year and eight months.

Considering all the above and the maximum sentence in respect of the offence which the convict has been convicted which is death, the convict is sentenced to 8 (eight) years of imprisonment.

15

LAMECK N. MUKASA

AG. JUDGE

25/7/2003.

20 Court:-

The convict is informed of his right to appeal against conviction and sentence within 14 days.

LAMECK N. MUKASA

AG. JUDGE

25 **25/7/2003.**