

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**CRIMINAL SESSION NO. 338 OF 2019**

**UGANDA**

.....

**PROSECUTOR**

**VERSUS**

**BAGARUKAYO INNOCENT**

.....

**ACCUSED**

**BEFORE: HON. LADY JUSTICE FLORENCE NAKACHWA**

**JUDGMENT**

1. The accused was indicted for aggravated defilement contrary to section 129 (3) (4) (a) of the Penal Code Act, Cap 120. Section 129 (3) states thus: "Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in sub-section (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death."
- Subsection (4) provides that "The circumstances referred to in sub-section (3) are as follows:

(a) where the person against whom the offence is committed is below the age of fourteen years;

(b).....;

(c).....;

(d).....; or



(e).....

2. It was the prosecution's case that on 30<sup>th</sup> December 2018 at Kaburasoka village in Bunyagabo District, the accused performed a sexual act with Akankunda Eunice aged 4 years.
3. The Prosecution called five witnesses to prove its case against the accused. Ninsiima Monica, the victim's mother testified as PW1; PW2 was Amon Ivan; PW3 was Byamukama Alex, a brother to PW2 and brother-in-law of the accused; PW4 was Inspector of Police Muhwezi Saverino Masiko; and PW5 was the victim Akankunda Eunice. Police Form 3A was an agreed document admitted in evidence as PE1. The sketch plan dated 31<sup>st</sup> December 2018 was admitted in evidence as PE2.
4. The accused denied the indictment against him and made an unsworn statement during his defence. He stated that it was a grudge because he asked his sister to tell her husband, that they should look for another house and leave the house at home. They even had a land matter at police which he won. The accused's sister then connived with her husband (PW3) and they suggested that the accused marries the mother of the victim which he refused. The accused got a wife he wanted and took her home. On 30<sup>th</sup> December 2018, PW3 called and informed him that he had bought a tomato garden and asked him to help him harvest the tomatoes and take them to the road. When the accused went there, he found his sister, the mother of the victim and other children harvesting tomatoes. He was told to carry the tomatoes to their destination and his brother-in-law handed his keys to the motorcycle.



5. He ferried the tomatoes to Rwimi. At 7:30 p.m., he was at Rwimi when PW3 called him saying that the work was not finished and he should hurry up. When the accused reached, PW3 asked for the keys and told the accused to wait a bit. As they were still there, a friend to the PW3 came carrying the victim and PW3 called the accused's sister and said "we have arrested Innocent, hurry up and come with the mother of the child." The accused then asked PW3 "you have arrested me, what have I done, we have been working together the whole day." As he was still asking, PW3 got sticks and started beating him. The accused started bleeding, he was taken to hospital for treatment and thereafter taken to Police. In summary, the accused relied on the defence of alibi.

6. On 22<sup>nd</sup> February 2022, the assessors Kasigazi Deogracius and Kalimwenjuma Moses gave a joint opinion to court. In summary, based on the evidence before court, they advised the court to convict the accused.

7. Article 28 (3) (a) of the Constitution of the Republic of Uganda, 1995 provides that every person charged with a criminal offence shall be presumed innocent until proved guilty or unless that person pleads guilty. In **Uganda v. Okumu Steven Criminal Session No. 42 of 2020**, it was held that

*"the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and he can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See Ssekitoleko v. Uganda [1967] EA 531). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove*



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

In **Sekitoleko v. Uganda [1967] EA 531** it was stated that

*"As a general principle of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. That burden always rests upon the prosecution."*

8. For the accused to be convicted of aggravated defilement, the prosecution must prove each of the essential ingredients beyond reasonable doubt. These are that

- (a) the victim was below 14 years of age;
- (b) a sexual act was performed on the victim; and
- (c) it is the accused who performed the sexual act on the victim.

**Issue 1: Whether the victim was below 14 years.**

9. In **Uganda v. Mansur Omar Criminal Session No. 216 of 2019**, it was held that "the age of a child may be proved by the production of her birth certificate, or by the testimony of the parents. It has however, been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child."



10. A birth certificate was not produced in this case. However, it was PW1's evidence that PW5 was born in 2012. As a mother, PW1 was in position to know when her child was born. Having been born in 2012, PW5 was aged 6 years in 2018. Under Part (b) of PE1, PW5's age was estimated to be four years "using the formula  $2n+8=$  weight where her weight = 16kg."

11. The age stated in PE1 was an estimation and since it is inconsistent with the year of birth stated by PW1, I find PW1's evidence on when PW5 was born more reliable. Based on common assessment, when PW5 came to give evidence, it was clearly evident that she was still young even in 2022. It is therefore my finding that she was 6 years old in 2018. This ingredient has been proved.

**Issue 2: Whether a sexual act was performed on the victim.**

12. Section 129 (7) of the Penal Code Act defines 'sexual act' to mean —
- (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ;
  - (b) the unlawful use of any object or organ by a person on another person's sexual organ.

The phrase "sexual organ" is defined as a vagina or a penis.

13. Under Part (b) of PE1, PW5's hymen was found not intact with a bruise seen on the labia minora. The probable cause of such injuries was stated as human body part. It was PW5's evidence that after the accused bought her bread, he took her to some structure where he removed her knickers, his trouser and



defiled her. She clarified that the accused pushed his penis into her. When asked where the penis was pushed, the victim pointed to her vagina.

This is credible evidence which proves that a sexual act was performed on the victim (PW5). This ingredient is proved.

**Issue 3: Whether it was the accused who performed the sexual act**

14. It was PW1's evidence that she knew the accused as a neighbor in Rusona where she was married and the victim, born in 2012 was her daughter. PW1's husband passed away and she now stays in Nyabwina. On 30<sup>th</sup> December 2018, PW1 and PW5 were going to a garden at PW5's grandmother's home in Rusona and they had a polythene bag which had their clothes. They met the accused on the way who also had clothes in his hands and was going to Rusona. He asked them to put this clothes in their polythene bag and they move together. PW1 put the accused's clothes in the polythene bag. When they reached the playground of Kasunganyanja, the polythene bag got torn and as PW1 was picking the clothes, the accused suggested that he goes ahead with PW5, buy her bread and PW1 would find them ahead.
15. The accused went ahead with PW5 but when PW1 followed, she did not find them where the accused had said he would buy bread for PW5. She continued because she believed that they had gone home. When she reached the home of PW5's grandmother called Kikara, PW5 and the accused were not there. She then went to the accused's home where she found his sister called Turyamu but they were also not there. PW1 and



Turyamu decided to go back to Kasunganyanja to look for the accused and the child victim (PW5). On their way, PW1 heard PW3, the husband to Turyamu call her. PW3 was among those who found the accused defiling the victim (PW5) and he arrested him and took him to police. PW5 told her mother (PW1) that the accused defiled her. PW5 was examined in hospital and the documents were taken back to police.

16. In cross examination, she maintained that PW1 was born on 30<sup>th</sup> December 2012 and they were neighbours in Rusona. The accused and PW5 left PW1 at 2:30 p.m. and she found out about the defilement at 3 p.m. She did not reach the place where PW5 was defiled from but she checked her the day after they returned from hospital and she found that PW5's vagina had reddened and changed. She left PW5 at the police station because she was told that if she took her home, she would bath her with water yet she was to take her to hospital the next day. PW1 was left with Rutaraka, a police officer married to PW1's sister. The accused did not look drunk at the time of the incident. In re-examination, she clarified that the police told her to leave PW5 with the wife of Rutaraka called Evas.
17. PW2 testified that the accused used to work where he was working in Kyanaka Kaburaisoke and he knew him for about two weeks. He knew PW5 because the accused took her where he was cultivating from. It was about 4 p.m. and PW2 was at Jawa Charles' home Jawa Charles was his boss. Monday and Nyendo were also at this home and they were leaving to go to their homes. On their way, they were to pass the accused's home because one of them was charging his battery from there. When they reached the accused's home, they found a young child in his house crying and one of

them called PW2. Upon reaching there, the child was crying and they first listened from outside while peeping through the wall. The house was made of wooden off-cuts and they saw the accused holding the child and having sex with her. They then opened the door and entered and the accused got shocked and held the child on his chest. They removed the child from him and asked him what he was doing to the child but he kept quiet. The accused had removed his trouser and unbuttoned his shirt. They took the child and called PW3, the accused's boss who took him to police.

18. In cross examination, it was his evidence that PW3 was a manager of Jawa Charles. PW2 was with Nyendo and Monday who were also fellow workers and it was Monday who informed PW2 that a child was crying and the accused used to stay alone. The door of the house was closed but not locked. When they peeped, they saw the accused having sex with a child but PW2 did not know the child by then. The accused looked like a drunk person. They did not arrest the accused because they had to involve his boss in the matter and when they left, the accused dressed up. In re-examination he explained that he concluded that the accused looked drunk because he had red eyes. In answering court, he stated that it was himself, Monday and Nyendo who found the accused having sex with a child.

19. PW3 testified that PW2 was his brother who used to work for Jawa Charles. PW3 used to manage Jawa's farm for five years up to 2019. The accused was PW3's worker. He came to know PW5 when the accused took her where he used to reside. On 30<sup>th</sup> December 2018, PW3 was in Bihara and he got a call from Monday at 4:30 p.m. informing him that the accused had defiled a girl. The accused was staying in a house at the farm made of wood off-cuts.





PW3 returned and found the accused inside the house but the child had been taken to Jawa. When PW3 asked the accused about the allegations, he admitted that it was true and begged for forgiveness and promised to accept whatever punishment was imposed on him. He also promised not to drink alcohol again. PW3 refused to forgive the accused and also called the accused's sister Turyamusiima Agnes (also called Turyamu) and informed her. Turyamu responded that the mother of the child had gone to her looking for the child. PW3 then advised Turyamu to look for the mother of the child and they go to him. They delayed to come and he took the accused together with the victim to Kasanganyanja Police Station.

20. In cross examination, it was his evidence that he married Turyamu, the sister of the accused and he was also his manager. The accused had worked at the farm for about a month and he had been paid. The accused appeared drunk at the time because he was staggering and saying a lot of words. PW5 told him that the accused took her to his house, removed her knickers and put his penis into her. By the time she was narrating this, her mother had come. In re-examination he testified that he had a coherent conversation with the accused at the time of the incident. In answering questions from court, he testified that he found the accused in his house dressed and lying on his bed.

21. PW4's evidence was that in January 2019, he was the Officer-in-Charge of Kasuganyanja Police Station and he was an Inspector of Police by then. On 30<sup>th</sup> December, 2018 at around 8:20 p.m., he was at the station when Mubangizi Justus among others, the accused and PW5 went to the station. Mubangizi opened the file of defilement of PW5 by the accused. Because it was late and they could not do much, the victim was kept with one of their

senior ladies, Mrs. Turyagenda, to protect the evidence. The girl was examined and it was true that she had been defiled. He went to visit the scene of crime led by PW1 and the house was made of timber off-cuts with spaces. There was also an old mattress and some dry banana leaves. He documented the scene as per the sketch plan.

22. In cross examination, he confirmed that Rutaraka was his staff at the station then and his real name was Turyagenda Johnson. It was Turyagenda's wife who had stayed with PW5 but he could not tell whether she was related to PW1. He did not go with the victim to the scene. The scene was about 200 meters from Jawa's house and the accused was drunk when he was taken to the police station because he was staggering and smelling of alcohol. The accused's answers were also irrational because when PW4 asked him whether he had committed the offence, he responded that he was in bed resting. They did not have Breathalyzer at the station.
23. In re-examination, he stated that he concluded that the accused was drunk based on how he appeared and he expected the accused to give him positive answers since he was found red handed. Because he gave PW4 answers he did not expect, he judged him irrational.
24. PW5 gave sworn evidence after court conducted a voire dire and ascertained that she knew the importance of telling the truth and was intelligent. It was her evidence that herself and PW1 were coming from her grandmother's home and were going to Rusona with a polythene bag which had clothes. Along the way, they met the accused who had clothes in his hands and he asked them to put his clothes in their polythene. Later the polythene got torn and the accused suggested that they go and he buys her bread. He bought

her bread and after took her to some structure where he removed her knickers, removed his trouser and defiled her. He pushed his penis into her. When asked where the penis was pushed, the victim pointed to her vagina. She made an alarm and some men she did not know came and took her to their home. She was later taken to the Police with the accused.

25. In cross examination, PW5 gave evidence that before the incident, the accused used to stay close to her grandmother's home. She did not remember whether the accused was walking while staggering on that day. They left PW1 mending the polythene when they were going to buy bread. Her mother continued to Lusona because she thought the accused had taken PW5 to Lusona. No one told her to come and tell this story to court. She wanted court to keep the accused in prison.

26. With the exception of PW4, all the other prosecution witnesses knew the accused very well before this event. The victim (PW5) herself knew the accused before. The nature of the structure to which the accused took PW5 to defile her allowed the witnesses to peep through the gaps and see what the accused was doing to the victim after responding to her alarm. There were conditions favouring proper identification. What the other witnesses saw corroborates PW5's evidence which is very well detailed about how the accused defiled her.

#### **Issue 4: Whether the accused has any defence**

27. Some prosecution witnesses gave evidence that the accused was drunk because he was giving irrational answers, was staggering, and had red eyes. Section 12 (1) of the Penal Code Act, Cap 120 provides that except as

provided in this section, intoxication shall not constitute a defence to any criminal charge.

Section 12 (2) provides that "Intoxication shall be a defence to any criminal charge if by reason of the intoxication the person charged at the time of the act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing and—

- (a) the state of intoxication was caused without his or her consent by the malicious or negligent act of another person; or
- (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission."

28. To successfully prove intoxication, it must be proved that the accused did not know that the act was wrong or did not know what he or she was doing. It must also be proved that the intoxication was caused without the accused's consent or by reason of the intoxication, the accused was insane temporarily or otherwise. Except for the personal conclusions of the witnesses, there is no other evidence led to prove that the accused was intoxicated at the time. Indeed it was PW4's evidence that they did not have Breathalyzer at the station. This means that the alcohol levels in the accused's body, if any, were never measured. There was also no evidence to show that due to the intoxication, the accused did not know what he was doing or that it was wrong. It was also not proved that the intoxication was caused maliciously and without the accused's consent and as a result, he was temporarily insane or otherwise. The accused himself did not raise intoxication as a defence to the charge against him.



29. In **Kiyengo Zaverio v. Uganda, Criminal Appeal No. 35 of 2003**, it was held that

*"In accordance with the holding in ... Illanda s/o Kisigo v. R (1960) EA 780 the onus is on the prosecution to prove beyond reasonable doubt that the appellant's judgment was not affected by the drink to disable him from forming the necessary intention...The test to apply as enunciated... in Ssessawo v. Uganda (1979) HCB 122, was whether having regard to all the circumstances, including those relating to drinking, it could safely be said that the prosecution had proved beyond reasonable doubt that the accused had the requisite intent at the material time."*


30. Having regard to all the evidence before court, the fact that the accused was able to recognize PW1 and PW5 on the way, ask them to put his clothes in their polythene bag and upon it getting torn, suggest to PW1 that he goes and buys bread for PW5 proves that he knew what he was doing. Indeed PW5 testified that the accused bought for her bread after which he took her to the shelter, removed her knickers and his trousers and then defiled her. When he was caught defiling the victim, the child was removed from him by PW2 and later he put on his trousers. These are all actions of a person who fully knew what he was doing. The prosecution has proved that the accused had requisite intent at the material time to defile PW5, reason for which he seized the opportunity of a torn polythene to have PW5 all to himself under the guise of buying for her bread. The defence of intoxication has therefore not been proved.



31. The accused's statement was to the effect that he spent the whole day ferrying tomatoes and was framed because of a wrangle he has with his sister and PW3. I find that the prosecution successfully placed the accused at the scene of crime and proved that he defiled PW5. I therefore find no merit in the accused's alibi and reject it.

32. Based on all the above analysis, this court finds that the prosecution has proved beyond reasonable doubt that the accused defiled the victim who was a child of six years at the time the offence was committed. The assessors' joint opinion was that the accused be convicted of aggravated defilement. I agree. The accused is hereby convicted of aggravated defilement accordingly. I so rule.

This judgment is delivered this 11<sup>th</sup> day of March 2022 by

  
**FLORENCE NAKACHWA**  
**JUDGE**

In the presence of:

- (1) Mr. Kwesiga Michael, State Attorney, for the Prosecution;
- (2) Ms Ruth Ongom holding brief for Mr. Bwiruka Richard, Defence Counsel on State Brief;
- (3) Mr. Bagarukayo Innocent, Accused / Convict;
- (4) Mr. Birungi Boniface, Court Clerk.