

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CRIMINAL SESSION NO. 198 OF 2019

UGANDA

.....

PROSECUTOR

VERSUS

TURIBAMWE ISAAC

.....

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. It was the prosecution's case that on 4th December, 2018 at Rwibale Butunduzi Town Council In Kyenjonjo District, the accused performed a sexual act with Kasemire Daniella aged 12 years. Initially, the indictment against the accused was that he was HIV positive and had sexual intercourse with Kasemire Daniella. After medically examining the accused and finding him HIV negative several times, on 18th January 2022, the court was informed by Counsel Acellam Collins, counsel for the accused that the prosecution would be relying on the age of the victim as the aggravating factor and they had agreed with Counsel Kashaija Andrew, the State Attorney to proceed with the hearing. The State Attorney addressed court and said that he had no objection.



2. To prove its case the prosecution called three witnesses. Akugizibwe N. Fred, a Clinical Officer who examined the victim testified as PW1. The victim testified as PW2 and Twinomugisa Grace, the victim's grandmother was PW3. Police Form 24A was admitted as PE1 and Police Form 3A was admitted in evidence as PE2. The medical result slip dated 13th January 2022 was admitted as DE1.
3. The accused denied the indictment against him. His testimony was that while he saw PW1 and her brothers going to Rwibale on that day, he did not have sex with her. On that day, he went to Migongwe to the garden and returned to his home at 2 p.m. He left his home at 3 p.m. to go to Denis's bar to see Denis' wife, who was related to him though he had forgotten her name. From the accused's home to the bar, a boda boda charges Ug. shs. 500/= (Uganda shillings five hundred). He met PW1 and her brothers while he was walking but they just bypassed each other and he was at the bar from 3p.m. to 9 p.m. when he was arrested by the Defence Secretary and the Chairman of Rwibale who told him that he was being arrested because he had sex with a young girl. It was further his evidence that PW3 had asked the accused for banana suckers and he refused saying that he had pruned his bananas and he could not give out what was left. However, PW3 found Simon, another neighbor uprooting suckers with the accused's permission. This made her unhappy and she told the accused that he would not stay in that plot and four days later, he was arrested for defiling PW2.
4. In cross examination, the accused admitted meeting PW1 on 4th December 2018. He came to the village in May 2018 and had known PW1 since then. He admitted that he walked to Denis' bar which was very near his home. He



walked for thirty minutes and reached there at 3 p.m. His mother had told him that Denis' wife was his auntie and she was called Juliet.

5. On 17th February 2022, the assessors Padda Paul Amooti 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.
6. 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. The burden to prove the guilt of the accused person is on the prosecution and remains with the prosecution throughout the trial. The prosecution can only secure the conviction of the accused person if it proves his guilt beyond reasonable doubt. Any doubt about the guilt of the accused person must be resolved in his favour leading to his acquittal. (See **Woolmington v. DPP [1935] AC 462.**)
7. The standard of proof is beyond reasonable doubt. In **Miller v. Minister of Pensions (1947) 2 All ER 372 at 373** Lord Denning stated as follows:
"that degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice".



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

- (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. Kagoro Godfrey Criminal Session No. 141 of 2002**, it was held that "it is true the most conclusive way of proving the age of a child is by the production of his or her birth certificate and possibly followed by the testimony of the parents. It has however, been held that other ways of proving the age of a child can be equally conclusive and of these is the observation of the child, by and the common sense assessment of the age of the child."
10. It was PW1's evidence that he examined PW2 and estimated her age as 13 years basing on the dental formula of 28 teeth. He testified that age can be determined by radiography and dental formula though radiography is more accurate. In re-examination he stated that the age group that has 28 teeth is twelve to 14 years. He changed it to twelve to seventeen years. He again changed it to twelve to fourteen years. He concluded that PW1 was thirteen years because she had the 1st pair of molar teeth which begin erupting at thirteen years. PW1 was unsure about what age group has 28 teeth and why he concluded that PW2 was 13 years at the time. His evidence about the age of PW2 is unreliable.



11. Under Part (b) of PE1, PW2 is stated to be of the apparent age of 13 years based on the dental formula of 14 teeth and 14 teeth in the oral cavity. In cross examination, PW2 testified that she was born in 2006 and would be making 16 years on 17th July 2022. PW3 testified that when PW2's mother was going to do exams for senior four, she weaned and gave her PW2 when she was five months old. Since then, PW2 was staying with her.
12. PW2's evidence on when she was born was not challenged and she did not waiver in her testimony about her age. I find her evidence credible and believable. On observing her and following the common sense assessment of PW2, she still looked young even when she was testifying in 2022. I therefore find that in 2018, PW2 was 12 years of age. This ingredient has been proved.

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

13. 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.

In **Mutumbwe William v. Uganda, Criminal Appeal NO. 252 of 2002**, the Court of Appeal held that "in order to prove a charge of defilement, it must be proved that the accused person had sexual intercourse with the victim. It is not, however, necessary that full sexual intercourse should have taken place. It will be enough if there is evidence showing that some penetration

of the male sexual organ into the victim's vagina took place. It has been repeatedly held in our superior courts that in sexual offences, the slightest penetration will be sufficient to constitute an offence. (See **Mujuni Apollo v. Uganda Cr. Appeal No.26 of 1999.**")

14. While crying, PW2 said that the accused had sex with her forcefully. She tried to rescue herself but she failed. When she checked the victim (PW2) PW3 saw that she had a lot of water but she did not touch her private parts with a lot of force to cause injuries. It was PW3's evidence that she held both thighs of PW2 when checking her and she saw a whitish fluid and water which a child is not supposed to have. She checked at about 7:30 p.m. and she used a lamp to provide light.
15. Under Part (b) of PE1, the genitals of PW1 were found to have lacerations noted along the Bartholin's edges and the hymen was not ruptured. The probable cause of those injuries was stated as a blunt object.
PW1 testified that the victim was traumatized and had pain around the loin region which is between the lower limb and the abdomen. There were lacerations noted along the genitals and there was no rupture of the hymen. In re-examination, he maintained that he only came across lacerations and the hymen was intact. He concluded that this was attempted sexual penetration. He explained the blunt object as smooth, hard and rough in nature and that had the accused forcefully had sexual intercourse with PW2, the hymen would not survive.

16. In **Tigo Stephen v. Uganda, Criminal Appeal No.170 of 2003**, it was held that "it is trite that rupturing the hymen is not a necessary part of legal sexual intercourse. Penetration, however slight, is sufficient."

PW1 gave evidence that there were lacerations noted along the genitals of PW2 and it was PW3's evidence that there was whitish fluid and water in PW2's genitals. This implies that there was sexual intercourse in PW2's genitals. This medical evidence corroborates PW2's evidence that the accused had sexual intercourse with her forcefully. Although PW1 found PW2's hymen intact, It does not disprove that there was sexual intercourse because penetration, however slight is enough in proving that a sexual act was performed on the victim. This ingredient has been proved.

Issue 3: Whether it is the accused who performed the sexual act on the victim

17. PW2 testified that she knew the accused who was in prison because he raped her. On 4th December 2018 at 4 p.m., she was coming from her mother's place with her siblings when the accused called her to his house. She was with Karungi Monica and Mugisa Jordan who stayed in the accused's house for a long time and the accused called her to go and pick them but she refused. The accused carried her, took her to his house and put her on his bed. She was putting on leggings but the accused tore them in the middle and did shameful things to her. When the accused stopped, PW2 ran to PW3 but she was not there. When PW3 returned, the victim (PW2) told her what happened and PW3 reported to the Chairman after which she was taken to Butunduzi Health Centre where she was checked in her private parts.



18. In cross examination, it was PW2's evidence that before the accused did those things to her, she did not know much about him because she had just shifted to that area. She confirmed that it was the accused who did those things to her. She admitted that she did not know the accused by name because she was still new in that area and had seen him like for a month. When she had just come to the village the accused told her that he loved her but she did not love him. Monica was five years and Jordan was three years at the time. At the time of assault, both Monica and Jordan were in the same house. They had never gone to the accused's home except that his house was near the road. When they were passing, the accused was outside. She used to see him in the village but did not know him.

19. The victim further stated that when he took her to his house, he was alone there. She did not remember what the accused was wearing because she was fighting for her life. She maintained that the accused used her and when court sought clarification about what that phrase meant, it was interpreted to mean that the accused had sexual intercourse with her. She insisted that it was the accused who had sex with her because she had identified him and his face was familiar to her. In re-examination it was her evidence that on other days, the accused would find her on the way and warn her by saying that if she did not accept him, she would see what he would do. The accused was asking her to accept to sleep with him. Her siblings were in that very house but they did not rescue her because the accused told them that he would cut them if they talked.

20. It was PW3's evidence that on 4th December 2018, the accused raped her daughter. She was PW2's grandmother and by the time of the offence, she



had stayed in Rwibale for two years. On 4th December 2018 at around 4 p.m., PW3 went to see her grandchildren who were discharged from hospital and left behind PW2, Karungi Monica and Mugisa Daniella. She instructed them that they go to the mother's home, eat and then come back. When PW3 returned at around 7:00 p.m., she found PW2 standing at the door way and she informed her that the man she had been telling her about grabbed her, took her to his house and had sex with her. PW2 had always told her that the man had said that if she did not accept him, he would grab her. When PW3 asked PW2 how she was raped yet she was wearing leggings, she responded that the accused tore the leggings. PW3 then checked PW2 and could tell that the child had been used. She reported to the LC1 Kyabagenyi and then went to Police who arrested the accused. She was also given a form which she took to Butunduzi Health Centre III and after examining PW2, returned the form to Police.

21. In cross examination, she testified that her home was about 200 meters from the accused's home. PW2 had told her that the man had been disturbing her for three days and PW3 confronted him and told him to leave PW2 alone. PW3 even threw the soya beans back at the accused which he had given Monica and Jordan. Apart from what happened to PW2, PW3 did not have any grudge with the accused.

22. The summation of all the above evidence is that PW2 knew the accused by face before this incident. On the fateful day, as she was walking with her younger siblings on her way home, the accused lured her siblings to his house which was on the way as a bait to get the victim in his house. He then used that chance to forcefully have sexual intercourse with PW2. It was PW3's

evidence that at one time, she threw soya beans which the accused had given to PW2's siblings back to her. This shows that the accused made efforts to create a relationship with PW2's young sibling and on the basis of that relationship, he could easily lure them to his house.

23. In his own evidence, the accused admitted seeing PW2 and her siblings on that day as they were moving. He admitted that his home was on the way although he denied having sexual intercourse with her. In considering all the evidence before court, there is no doubt that the accused performed a sexual act on the victim.

24. Based on all the above analysis, the prosecution has proved beyond reasonable doubt that the accused performed a sexual act on PW2 who was below the age of 14 years at the time. In agreement with the opinion of the assessors, the accused is accordingly convicted of aggravated defilement. I so rule.

This judgment delivered this 11th day of March, 2022 by


FLORENCE NAKACHWA

JUDGE

In the presence of

- (1) Mr. Kwesiga Micheal, State Attorney, Prosecution Counsel;
- (2) Ms Ruth Ongom holding brief for Mr. Acellam Collins, Defence Counsel on State Brief;
- (3) Mr. Turibamwe Isaac – Accused / Convict;
- (4) Mr. Birungi Boniface, Court Clerk
- (5) Ms Irakunda Assumpter Priscilla, Interpreter.