

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**CRIMINAL SESSIONS CASE No. 0700 OF 2019**

**UGANDA** ..... **PROSECUTOR**

5 ..... **VERSUS**

**KASULE DANIEL** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

10 The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It is alleged that the accused on the 21<sup>st</sup> day of October, 2018 at Gganda, Nansana Municipality, in Wakiso District, performed an unlawful sexual act with Namutebi Bridget, a girl aged 7 years.

15 The facts as stated by the prosecution witnesses are briefly that the accused and the mother of the victim, P.W.1 Nakimbugwe Teddy, were tenants on the same building, occupying separate tenements on the opposite sides of the building. Sometime on 21<sup>st</sup> day of October, 2018 during the daytime, while the victim's mother was away at her place of work, the accused gave the victim some money to go buy sweets and afterwards he told her to get into his house. He tied a  
20 piece of cloth across her mouth, told her to lie down on the bed and removed her clothes and knickers. He had sex with her four times after which he left her inside the house and went away. The victim dressed up, untied the piece of cloth that had been used to gag her and went out to play with her siblings and children from the neighbourhood.

25 As the children played outside her tenement, a one Kobusingye, a sister in law to the victim's mother, who was sleeping in the house, overheard the victim tell another child, Giovanni (about five years old at the time) who was then role-playing as the victim's husband, that she did not want a man with beards. The sister in law came out and asked what the victim meant when she said she did not want a man with beards, who was that man? The victim replied that he was Dan,  
30 the accused. She asked her what Dan had done. The victim replied that Dan had called her to his

house and told her he would give her money. He had told her to lie down, undressed her, covered her face with a piece of cloth and slept on top of her. When the victim's mother returned that evening, her sister in law reported that conversation to her. The victim's mother in turn questioned the child again. She told her the same thing she had told Kobusingye. P.W.1  
5 Nakimbugwe Teddy examined the victim but did not see anything unusual. She nevertheless reported to the police and the accused was arrested. Two medical examinations were subsequently done on the victim.

The accused denied having committed the offence. He set up the defence of alibi. He stated that  
10 he spent the whole day of 21<sup>st</sup> October, 2018 at work as a mason at Kabuusu in Lubaga. He attributed the accusation to a grudge nursed by the victim's mother, P.W.1 Nakimbugwe Teddy, when he complained about her poor sanitation to their landlord. Consequent to that complaint the Landlord had given P.W.1 notice to vacate, a week after which this accusation was made.

15 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 the accused is only 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  
20 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  
25 372).

For the accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim was below 14 years of age.
  2. That a sexual act was performed on the victim.
  3. That it is the accused who performed the sexual act on the victim.
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The first ingredient of the offence of Aggravated defilement is proof of the fact that at the time of the offence, the victim was below the age of 14 years. The most reliable way of proving the age of a child is by the production of his birth certificate, 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 such as the court's own observation and common sense assessment of the age of the child (See *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

The victim Namutebi Bridget testified as P.W.2 and stated that she was 9 years old, hence about 7 years old slightly over one and a half years ago when the offence is alleged to have been committed. Her mother P.W.1 Nakimbugwe Teddy testified that the victim was born on 12<sup>th</sup> December, 2012 hence she was two months short of seven years at the time of the alleged offence. To corroborate this, the admitted evidence of D.W.1 Dr. Karyemenya Martin, a Medical Officer at M.K. Medical Centre, who examined the victim on 26<sup>th</sup> October, 2018 (five days after the date of the alleged offence) certified in his report, exhibit D. Ex.1 (P.F.3A), that the victim was aged about 7 years old at the time of that examination, based on her dentition. D.W.2 Dr. Kalungi Sam, a Medical Officer at Mulago Hospital, who examined the victim on 11<sup>th</sup> November, 2018 (twenty two days after the date of the alleged offence) too in his report, exhibit D. Ex.2 (P.F.3A) certified his findings that the victim was aged between 6- 7 years old at the time of that examination, based on her dentition. The court had the opportunity to see the victim in court and had to conduct a *voire dire* before she could testify. In agreement with the assessors, I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Namutebi Bridget was a boy below fourteen years as at December, 2017.

The second ingredient required for establishing this offence is proof that the victim was subjected to a sexual act. Under section 129 (7) of *The Penal Code Act* a sexual act is defined as including; (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or (b) the unlawful use of any object or organ by a person on another person's sexual organ. The offence is constituted by penetration of the named body orifices, however slight by the sexual organ of another or unlawful use of any object or organ on another person's sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence

and any other cogent evidence, (see *Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)*).

5 The victim P.W.2 Namutebi Bridget stated that the assailant gave her money to go buy sweets and he told her to get into his house, he tied a piece of cloth across her mouth, told her to lie down on the bed and removed her clothes and knickers. He slept on her once but had sex with her four times. She was not comfortable. She felt pain in her private parts. The assailant did silly things to her four times. Afterwards he left her inside the house. She went back home after dressing up. She did not see anything unusual with her private parts. That was the first time for  
10 her to experience that kind of thing and it has never happened to her again.

Her mother P.W.1 Nakimbugwe Teddy testified that on return from work in the evening of 21<sup>st</sup> October, 2018, the victim told her that the accused had defiled her. He examined her private parts but did not find anything unusual. The suspicion had been sparked off when a neighbour  
15 had overheard the victim as she played with other children say she did not want a man with beards for a husband. It is on inquiry that she had told the neighbour that the man she was referring to was the accused, who had called her into his house, undressed her and had sex with her. D.W.1 Dr. Karyemenya Martin, a Medical Officer at M.K. Medical Centre, who examined the victim on 26<sup>th</sup> October, 2018 (five days after the date of the alleged offence). His report,  
20 exhibit D. Ex.1 (P.F.3A) certified his findings that the exterior of her genitals was normal and her hymen was intact. D.W.2 Dr. Kalungi Sam, a Medical Officer at Mulago Hospital, who examined the victim on 11<sup>th</sup> November, 2018 (twenty two days after the date of the alleged offence). His report, exhibit D. Ex.2 (P.F.3A) certified his findings that the victim's genitals were normal, the hymen intact but the wall of her vagina was hyperaemic. No injuries were seen in her  
25 genital but she was on treatment for vaginal / urinary tract infection.

Although the offence is of a sexual nature, the court ordinarily may proceed to rely on the evidence of the victim, even without corroboration, if it is satisfied that the victim was truthful and there is no possibility of error in his identification of the nature of the act and of the  
30 perpetrator of the act. However, section 40 (3) of *The Trial on Indictments Act* requires that where evidence of a child of tender years is given on behalf of the prosecution following a *voire*



dire, the accused should not be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her. There is no need for corroborative evidence to prove that the sexual act occurred or that it was perpetrated by the accused is premised the potential for suggestibility that is highly probable with child witnesses. On account  
5 of a large body of experimental research about the suggestibility of children, it has been found that as a result of repeated or misleading questions, the memory of a child may become distorted. It is possible for a child who has been subjected to repeated, suggestive questioning to develop "memories" of events that did not in fact occur. While children, especially young children, are more suggestible than adults, there is great variation between individuals of the same age in  
10 suggestibility and in resistance to suggestion.

On the other hand, this court is alive to the fact that this statutory skepticism in section 40 (3) of *The Trial on Indictments Act* about children's testimony, especially in sexual abuse cases, makes it very difficult to obtain a conviction in cases where children were victimized, since these  
15 offences typically occur in private and there is often no physical evidence of abuse to support the allegation. Children can be as reliable in what they recall about an incident as adults, which would be justification enough for rejection of the stereotypical but suspect views about child witnesses. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, and that this does not mean that they have misconceived  
20 what happened to them and who did it, I find in this case that the victim's account of the nature of the act to which she claimed to have been subjected, was stated too vaguely to justify the finding desired by the prosecution. She could not explain what the "four times" meant within the context of her statement that she had sex once with the accused once. This is compounded by the fact that

25 Corroboration is independent evidence which implicates the accused by connecting him or her with the crime. It must be evidence which confirms in some material particular not only the evidence that the offence was committed, but also that the accused committed it (see *R v. Baskerville (1916) 12 Cr App R 81; [1916] 2 KB 658* and *James v. R (1971) 55 Cr App R 299 at*  
30 *302*). Where found necessary, corroboration could be provided by medical or other scientific examination, circumstantial evidence of relevant events and observations by other persons that

occurred around the time, the conduct of the accused around the time of the incident, etc. If the victim's evidence is unbelievable, corroboration is valueless. It is only when the victim is believable, that corroboration can have the effect of confirming or supporting what he has said.

5 In the instant case, the medical examination by D.W.1 Dr. Karyemenya Martin, done five days after the date of the alleged offence established that the exterior of her genitals was normal and her hymen was intact, which is inconsistent with the description of the act the victim claims to have experienced. The examination done by D.W.2 Dr. Kalungi Sam twenty two days after the date of the alleged offence yielded the same conclusion, the victim's hymen was intact and no  
10 injuries were seen in her genitals. Although the doctor found that the wall of her vagina was hyperaemic, the victim was on treatment for vaginal / urinary tract infection and that is a probable cause of the hyperaemia which the prosecution never ruled out. That hyperaemia cannot be attributed exclusively to the sexual act alleged to have occurred twenty two days earlier. There is no evidence which confirms in some material particular not the claim by the victim that  
15 the offence was committed. In agreement with the assessors, I find that this element has not been proved beyond reasonable doubt.

That being the case, it is unnecessary to evaluate the evidence with regard to the last ingredient. The testimony of the victim being so un-reliable, and there being no evidence which confirms in  
20 some material particular not only the evidence that the offence was committed, but also that the accused committed any of what would have been the minor and cognate offences, I find that the prosecution has not proved the offence beyond reasonable doubt. I accordingly find the accused not guilty and he is hereby acquitted of the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. Consequently he should be set free forthwith unless there are other  
25 lawful reasons for keeping him in custody.

Dated at Kampala this 17<sup>th</sup> day of February, 2020.

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Stephen Mubiru  
Judge.  
17<sup>th</sup> February, 2020.

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