THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

5 **CRIMINAL SESSION CASE NO. 0139 OF 2013**

UGANDA……………………………………………………....PROSECUTOR

VERSUS

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BUYINZA EMMANUEL ALIAS GAYULA…….…..…..……ACCUSED

JUDGMENT

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

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The accused person **BUYINZA EMMANUEL ALIAS GAYULA** stands indicted of the offence of aggravated defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act Cap. 120 LOU. The particulars of the indictment are briefly that on 5th April 2013, at Sinde Village, Buhemba Sub
20 County in Namayingo District, the accused performed a sexual act with Ajambo Meryvine, a girl aged three and a half years.

The accused denied the offence and a plea of not guilty was recorded on 09/01/19. He was represented by Counsel Asiimwe Anthony while Wasajja
25 Robert, represented the State. Prosecution was eventually taken over by Nabende David and the defence by Baliddawa Ngobi. Prosecution presented three witnesses, and the accused gave a sworn statement but called no witnesses.

30 The state is expected to prove the charge beyond all reasonable doubt and that burden will remain upon them throughout the case. See for example,

Kizza Samuel vs. Uganda Criminal Appeal No. 102/2008 (C/A). According to **Woolmington vs. DPP (1935) AC 462,** the degree of proof expected must be one that carries a high degree of probability. This is because a meaningful conviction can be achieved only after proof beyond all reasonable doubt on each and every ingredient of the offence, for failure to prove one is failure to prove all. See for example, **Uganda Vrs Balikamanya Criminal Case No. 25/2012** following **Bassita Hussein Vrs Uganda SCCA 35/1995 (Supreme Court) and Walakira Abas & Ors Vrs Uganda SCCA 25/2002 (unreported)**

The facts born of the prosecution case are that Melvin Buheri Ajambo, was aged three and a half years and resident with her mother, Bagume Eunice. On an unspecified date during 2013, at around 2 pm, Bagume left the victim and her brother Mukisa Jonathan at the home of the accused in charge of Namusoga, the accused's wife. Both Namusoga and the accused were at home when the children were dropped off. Bagume returned to collect them at 5pm and found that both children were sleeping inside the accused's house with the accused. She retrieved and carried away both children to her home.

Later the same evening, as Bagume was bathing the victim, the child begun crying and when questioned, stated that Gayula (the accused) had put something in *her googo* (meaning her private parts). Bagume checked and noticed injuries and a white substance on the victim's vagina and thighs. The victim was subjected to medical examination and the matter was reported to Namayingo Police Station, which resulted into the accused's arrest.

On a charge of aggravated defilement, the prosecution has the burden to prove the following elements beyond reasonable doubt: -

i. The victim was a child under the age of 14 years. In this case, the charge indicated that the victim was three and a half years.
ii. That the victim experienced carnal knowledge (sexual intercourse).
iii. It is the accused person who had sexual intercourse with the victim or, that the accused person participated in the commission of the offence.

Proof of age

The first ingredient of age was not seriously contested. (PW2) Bagume Eunice stated in Court that the victim her daughter, was born on 15/4/2010. The child health card for the victim which was admitted with no contest as **PEX1** recorded PW1 as the birth mother of the child and the birth date given is 13/4/2010. The victim was in court on 21/1/19 and gave her age to be eight years. Her physical appearance supports that evidence.

I would accordingly positively consider the child's birth year as 2010 making, her three years and four months in 2013.

The first ingredient was proved beyond reasonable doubt.

Proof of carnal knowledge

It was submitted for the prosecution that sexual intercourse of the child was proved with evidence of PW2 and corroborated by the medical report of PW3. Defence counsel strongly disagreed. He contended that none of the prosecution witnesses adduced sufficient evidence to prove this ingredient.

That the child was totally useless and PW2 was a liar whose earlier report to police was contrary to her evidence in Court. Those inconsistencies were not specifically pointed out, but counsel emphasized that PW2 was inconsistent on whether court would believe what she stated in Court or at police. Counsel also considered PW3 inconsistent. He pointed out that when recording the child's injuries after examination, she did not indicate their cause as penetrative sex and also mentioned bruises in the chest which were not mentioned by PW2 at all. That she could not even recall whether the child had a raptured hymen or whether it was the child's father who brought her in for examination, as claimed by PW2

In their decision of **Private Wepukhulu Vs Uganda Criminal Appeal 21/2001 (unreported), t**he Supreme Court held that "….*whether or not sexual intercourse took place in a particular case is a matter of fact to be established by evidence".* I would add that normally in sexual offences, the victim's evidence is the best evidence on the issue of penetration and identification but other cogent evidence may also suffice to prove acts of sexual intercourse.

The assessors agreed with the defence. They too found the child's evidence useless, and the two other witnesses inconsistent and downright untruthful. They concluded that sexual intercourse had not been proved.
I would agree with the assessment of both the defence and the assessors that the evidence of PW1 the victim was not useful at all. That said, I fear that they came to the wrong conclusion that the incident never took place and was being concocted by PW2. I may for that reason require to recount what took place on 21/1/2019.

On the above date when the matter was called to hearing, the prosecutor indicated to Court that after inter viewing the child, he formed the opinion that she could not recall the incident which took place when she was only three years old. I did not find that a strange submission. Victims of sexual abuse and indeed those who have suffered physical or psychological trauma, may react to it differently. Some do recall the minute details and others, nothing at all. This was an incident that took place when the victim was only three and a half years. She called to give her testimony five years later. It is understandable that she could not recall the incident.

None the less, the Court undertook to create an enabling environment for her to testify and following *voire dire* proceedings, she was unable to provide much, save for the fact that she knew the accused, and that he once lived in Esinde. She did not know his current address and why he was in court.In my view, PW1 was being very truthful in the circumstances. She did not commit herself on what she could not recall or did not know. It was correct as stated by Bagume her mother, that she once knew, but had now forgotten what happened to her.

Since she could not recall any of the events of her alleged defilement, the Court would have to look elsewhere for proof of sexual intercourse. I say so because even where the prosecution is unable to produce the victim, or where the victim in unable to testify, as was the case here, a conviction can still be secured if there is other cogent and/ or circumstantial evidence to support the charge.

It was held in for **Uganda Vs Bangume CSC NO.0096 0F 2004) [2009] UGHCCRD 3 (5 June 2009) (that cited the Supreme Court decision of**

Hussein Bassita Vs Uganda; S.C. Crim. Appeal NO.35 OF 1995), that "*although desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Any other evidence adduced is acceptable for as long it is sufficient to prove the case beyond reasonable doubt.*'' I would add that if such evidence is circumstantial evidence, then it must follow the rule that it should be of inculpatory facts that are so strong and thus incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See for example **Mbazira Siragi & Another Vrs Uganda S.C.A No. 7/2004.**

Prosecution presented the evidence of PW2 and 3 to prove this ingredient. Defence counsel interpreted the discrepancies between PW2's testimony at police and in court to point to untruthfulness, and found it strange that she reported the defilement five days after it happened. He also found PW3's evidence inconclusive. I respectfully disagree.

Bagume Eunice's statement at police was admitted in evidence as **DEX 1.** It was made on 9/4/13, four days after the alleged offence. She stated therein that she collected the child from the accused's home on Friday 5/4/13 at about 5pm when she was asleep and did not interrupt that sleep until 7.00pm when she woke her up to bathe her. That as soon as she poured water onto her private parts, the child cried out and upon investigation, Bagume saw a whitish dry smear. Questioned when asked the child said *"Gayula entered something in my googo".*(She explained gogo to be the child's private parts or vagina). She suspected the child had been defiled and she immediately proceeded to report to Ouma Job the area chairman (and the accused's father) who she did not find at home.

She later reported the matter to her husband Wanyama Tonic who also reported the matter to the vice chairperson at 9pm and later, to the Namayingo police on Monday 8/4/2013. In my view, apart from what the child narrated to Bagume, the latter saw for herself what she rightly believed were signs of defilement. I do not consider that hearsay evidence.

I see no significant deviation from that statement when Bagume testified in Court. The hours of leaving and picking her children from the accused's home are the same. There is only one minor discrepancy as to whether the accused remained in the house when she called out to him. However, Bagume remained consistent that the child was inside the house with the accused by the time she came to pick her up, and it was one of the accused's children who entered the house and retrieved and handed her over. The other discrepancy was the child's demeanor when picked up. At police, Bagume mentioned that she was sleeping and continued to do so until she was bathed. However, in court Bagume stated that she was crying when picked up and that she cried even more when bathed. I chose to consider this a minor inconsistency since, the testimony that the child cried out when bathed never wavered. The fact that Bagume did not mention the bruised vagina to the police can also be overlooked, because it was a fact later confirmed when the child was medically examined.

I also found the conduct of Bagume when she saw what she considered a possible defilement, consistent. She immediately rushed to report to the LCI chairperson who was not home. She then reported to her husband as soon as he returned home and he too acted promptly by reporting to the vice chairperson. It may appear strange that the child was examined four days later, but Bagume did explain what transpired in those days. She

explained that her husband first took the child to a nearby clinic who referred him to the Namayingo Hospital. When he got there, he was instead referred to police. That meanwhile before a formal file could be obtained, the accused's father who was the area chairperson, brought some police officers to the village to try and mediate or counsel the parties. Only after then was the matter handled professionally by statements being taken, after which the accused was arrested.

I am not prepared to conceive the delay for the child to be examined to be negligence by the parents or an indication of untruth. I am not blind to the fact that many defilement cases, especially in rural areas are never given the seriousness they deserve, and the complainant's may be tossed from one institution to another before the victim is properly processed through the system. In this case, the alleged offence took place on a Friday. Although the victim's parents acted fast in reporting it, there were many interventions that prevented its formal handling. The complaint's father, and LCI chairperson, naturally intervened in defence of his son by attempting to cause a mediation by police. The medical examination was done only after the police opened a file and begun serious investigations, all this caused a delay. That notwithstanding, Bagume's evidence was consistent. She was alerted of the possible defilement by her daughter's distress when being bathed. When she checked the private parts, she noted it was bruised, reddish and there was a whitish dried substance, possibly semen. She had only a few hours previously picked the child from the house of an adult male, her suspicions were justified, and were later to be confirmed by the medical officer.

Both the defence and assessors considered PW3 Nabwire Christine's evidence to be inconclusive. She professed to be a clinical officer and examined the child at the Buyinja Health Centre IV and recorded her findings on PF3A. She stated that she examined the child who she found to be well oriented and in a good mental state. That the child's genitals were slightly swollen, with bruises around the vagina which was tender to touch to the extent that the child would cry when touched. The hymen was raptured which she determined to be caused by sexual penetration. She admitted in cross examination that she did not expressly state the word *"sexual penetration"* in the form. Further, could not remember the name of the child's father who brought her in for examination, but denied being related to him or being paid to carry out the examination. She recorded but did not investigate what could have caused the bruises on the child's chest.

I did observe then and say so now, that Nabwire did not do a very professional job. She did well to document the injuries she found on the child's genitals but knowing why this examination was being done, she should have been explicit on her recording of what she thought was the probable cause of those injuries. The word *"defilement"* was too general and indirect a term to have been used in the circumstances. That said, I fully appreciate that this was an examination being done on a Police Form 3A with regard to a complaint of defilement. The victim's genitals were examined and analyzed. In Court, Nabwire explained the cause in her professional opinion to be sexual penetration. In my view, this would erase any doubt of what she meant when filling the form. She maintained her findings that the hymen was raptured. She could not recall whether it was a recent or old rapture, in my view, another careless omission. However, coupled with the raptured hymen, were the tender bruised genitals, an

indication that tampering with them and the hymen was recent. Even the lapse of time had not erased those clear injuries, an indication that this child was the victim of sexual intercourse. I consider the bruises on the chest irrelevant, especially when the core signs of defilement were present. I am not prepared to believe that Nabwire was either bribed or known to the child's father before the examination. No evidence was adduced to support that allegation. She was a medical officer carrying out her normal duties.

Thus in spite of the inconsistences I have raised, I am satisfied that the child was the victim of a sexual act. I have held before in **Criminal Session Case No. 109/2014 Uganda vs. Okodi Bernard** that for purposes of defilement, carnal knowledge is proved to have taken place if there is some degree of penetration of the complainant's vagina by the accused, however slight it may be. Three year olds do not normally have bruised genitals and raptured hymens. The fact that Bagume saw a dried whitish substance in the girls genitals and thighs, the distressed countenance of the child soon after the defilement, the pain she felt when touched in the genitals, and the fact that she had had a private encounter with a male person, collectively support the notion of sexual intercourse.

I would therefore respectfully depart from the assessor's opinion to find that this ingredient has been proved to the required standard.

<u>Proof of participation</u>

The accused's strongly contested his alleged participation in the offence, and in this, he was believed by the assessors. In his defence his stated that on the fateful day, he first worked in his garden and then proceeded to

Namayombe to attend a SACCO meeting. He admitted knowing both Bagume and Wanyama her husband, but denied knowledge of the child.

In full support of the defence, accused's counsel argued that the child's testimony was absent and prosecution's evidence was exclusively circumstantial and could not be relied upon to convict because the conduct of the prosecution witnesses was manifestly untrue, inconsistent and contradictory. That in contrast, the accused's evidence was consistent in that at the material time he was away from the alleged crime scene and he explained why he and his father visited Bagume's home after he heard rumors in the village that he had defiled the child. That he never run away from the village until his arrest pointing to innocent conduct. That the accusations against the accused were the product of a grudge that Bagume held against him and thus, there were co-existing circumstances which weaken the prosecution's case.

It was not in dispute that the accused and the child's family knew each other well. Although she could not remember the incident, the child testified that she knew the accused well as one who ever lived in Esinde. Bagume narrated that the she had known the accused as her husband's close friend and their neighbor since 2009 when she and Wanyama were married. That the accused's home was a mere 10 meters from their home. She conceded that she did not see the accused defiling the child but denied holding any grudge against him, and insisted that she left the child in his home and found her inside the house with the accused, in a distressed state, and then discovered the defilement by questioning the child.

In my view, Bagume's account of the events was more convincing than that of the accused. The accused admitted knowing Batume and being a close friend of Wanyama and his neigbhour and that they often hanged out together since 1992, over ten years before the incident. It was thus inconceivable that he had never visited Wanyama's home (save once to attend the funeral of Wanyama's mother) and that he did not know the child, Wanyama's daughter, who lived with her parents a mere ten meters away from his home. I believe he lied on this fact in order to strengthen his evidence that Batume's testimony was a frame, up because she suspected the accused was linking up Wanyama with other women.

Defence counsel raised issue that important witnesses were deliberately left out. In particular Wanyama who in fact attended the proceedings and police officer which pointed to the fact that matter was not properly investigated. It was held in **Kamudini Mukama Vrs. Uganda SCCA No. 36/1995** that the decision to call a witness is the preserve of the prosecuting State Attorney and a Court will not interfere unless for example where it is shown that the prosecutor is influenced by some oblique motive. Again an arresting or investigating officer will be called to testify only if that evidence is relevant.

See for example **Kasajja S/o Tibawa Vrs. R (1952) 19 EACA 268.** In my view it was not necessary to call Wanyama or any police officer. I was satisfied that the child narrated the defilement to PW2 her mother the latter who acted on it. PW2's evidence was corroborated by the testimony of PW3 the medical evidence. Those three witnesses were sufficient to prove the three ingredients of the offence and no further evidence was required.

I am conscious of the fact that the accused has no duty to prove his alibi. However, his evidence should be strong enough to discredit the fact he was present at the point it is claimed he participated in the offence. My evaluation of the prosecution evidence is that there was a strong inference that the two families were very well acquainted. Thus it is not farfetched that Bagume decided to leave her children in the accused's home under the care of the accused's wife. Upon her return, she found the child inside the house with the accused, the only male adult present in the home. A few hours after retrieving the child, she tried to bathe her and that is when the child cried out due to pain in her private parts, leading Bagume to investigate other incriminating signs of defilement. I have stated that Bagume's testimony in court substantially tallied very well with what she told police soon after the incident. Her account of the defilement was received directly from the child and subsequently corroborated by medical evidence. It was not fatal to the prosecution case that Wanyama or the arresting officer was not called to testify. The child, Bagume and the medical officer were sufficient to prove that the accused and no other defiled the child.

Although she could not remember much, the child was emphatic that she knew the accused. It is clear that she was a single identifying witness to the offence. It would thus call for caution from this court to look for other evidence to support her testimony. I believe such other evidence is the fact that she was left in a house with a male person, found in a distressed state or at least, became distressed and in pain after being with the accused. Her physical distress and pain was medically confirmed to have been caused by being the victim of a sexual activity.

Under such circumstances, the accused's alibi would fail. He had opportunity to be present at his home with the child. There being no other adult, he defiled her. His claims that Bagume framed him were never substantiated. He infact claimed that Bagume uttered her vengeance while fetching water at a nearby bore hole. He did not state that he personally heard the accusations and if he did not, it would be mere hearsay.

For the above reasons, I again respectfully differ from the assessor's opinion. I am persuaded that the accused was present in his home on the afternoon of 5/4/13 and did defile the child Melvin Buheri Ajambo. I accordingly find him guilty of the offence of aggravated defilement contrary to Section 129(3)(4)(a) Penal Code Act and convict him accordingly.

I so order

Signed

EVA K. LUSWATA
JUDGE
05/02/2020