

UGANDA / JUDGMENT

Uganda v Arugai (Criminal Session 14 of 2023) [2025] UGHC 163 (9 April 2025)

[2025] UGHC 163

COURT

High Court of Uganda

BEFORE

Nagawa, J

CASE / FILE NUMBER

Criminal Session 14 of 2023

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT SOROTI HOLDEN AT KATAKWI****HIGH COURT CRIMINAL SESSION CASE NO. 0014 OF 2023****UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR****VERSUS****ARUGAI FILBERT :::::::::::::::::::::::::::::::::::::: ACCUSED BEFORE: HON LADY JUSTICE CELIA NAGAWA****RULING ON PRIMA FACIE CASE**

- 1.0. Arugai Filbert, herein after referred to as the accused is indicted with the offence of Rape contrary to Section 123 and 124 of the Penal Code Act Cap. 120 then and now Section 110 and 111 of the Penal Code Act, Cap. 128.
- 1.1. It is alleged that on the 3rd day of August, 2021 at Aelenyang village in Katakwi District, the accused had carnal knowledge of Adedi Mary Goretti without her consent. The accused pleaded not guilty to the charges on the indictment. By his plea of not guilty, the accused person put in issue each essential ingredient of the offence of rape with which he is charged and the prosecution has the burden to prove those ingredients.

- 1.2. In a bid to prove its case against the accused, evidence of the following was admitted; PF3A in respect of the victim marked PE1 which noted that the victim had a ruptured hymen with bruises and throat pain. It was further stated that the victim was of the apparent age of 16 years based on her dental formula. PF24A in respect of the

accused marked PE2 which noted that the accused was mentally sound. Baptism card of the victim marked PE3 which indicated the victim's date of birth as 2nd February, 2005. A sketch map of the scene of crime marked PE4.

- 2.0. Counsel for the accused, Mr. Tomusange Joel (ULS) on state brief objected to the authors of PF3A, Asele Christine and PF24A, Okaka Dan being recorded as witnesses on grounds that he might feel persuaded to cross examine them. No other objections were made by counsel for the accused.
- 3.0. The prosecution called two witnesses to wit; PW1, Simon Omongin, an uncle to the victim and PW2, the victim.
- 3.1. At the close of the prosecution case, *Section 74 of The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a prima facie case against the accused. It is only if a prima facie case has been made out against the accused that he should be put to his defence *(see section 74 (2) of The Trial on Indictments Act)*. Where at the close of the prosecution case a prima facie case has not been made out, the accused would be entitled to an acquittal *(See Wabiro alias Musa v. R [1960] E. A. 184 and Kadiru Kyanju and Others v. Uganda [1974] HCB 215)*.
- 4.0. A prima facie case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, could convict the accused person if no evidence or explanation was set up by the defence *(See Rananlal T. Bhatt v. R. [1957] EA 332)*. The evidence adduced at this stage, should be

sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

- 4.1. There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in *[1962] ALL E. R 448* and also applied in *Uganda v. Alfred Ateu [1974] HCB 179*, as follows: -

- When there has been no evidence to prove an essential ingredient in the alleged offence, or
- When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.
- 4.2. At the close of the prosecution case, the learned defence counsel, submitted that Court is clothed with the discretion to determine whether the accused has no case to answer following all his cross examination and the responses testified by the witnesses. The prosecution was in agreement with the defence, their evidence was sufficient enough.
- 4.3. I am required at this stage to determine whether the prosecution has led sufficient evidence capable of proving each of the

ingredients of the offence of rape, if the accused chose not to say anything in his defence and whether such evidence has not been discredited as a result of cross-examination or is manifestly unreliable that no reasonable court could safely convict on it. It is important to note, that for the accused person to be put on defence, court must be ready to convict if he offers no explanation on the credible, admissible and high quality evidence in support of each ingredient of the offence but not to shift the burden of proof to the accused as any conviction must be based on the strength of the prosecution case but not on the weakness of the defence case. For the accused to be required to defend himself, the prosecution must have adduced evidence of such a quality or standard on each of the following essential ingredients;

- a) That there was unlawful carnal knowledge of a woman or girl
- b) That there was no consent of the woman or girl
- c) That the accused person is the culprit. (See Section 110 of the Penal Code Act, Cap. 128.)

5.0. Determination of the evidence on each of the essential elements of rape.

- 5.1. The first essential element the prosecution must prove is that there was unlawful carnal knowledge of a woman or girl.
- 5.2. PF3A (marked as PE1) which was agreed upon by both parties in the memorandum of agreed facts indicates that the victim had a ruptured hymen with bruises and throat pain consistent with probable forced sexual intercourse (forced penile penetration).

- 5.3. PW1, the victim's uncle, recounted that on 3rd August, 2021, as he left home for Katakwi Town, his wife asked him to buy plates and cups due to a shortage at home. After purchasing the items, he called his wife and asked her to send the victim to collect them. The victim left home on a bicycle to pick up the items. He handed the items to the victim to take home. Shortly thereafter, he received a call from his brother, Peter Eluu, who was in Kampala, requesting that he send him certain documents related to a sponsorship opportunity. PW1

informed his brother that the documents were at his home. While PW1 returned home for the documents, he was shocked to find the victim's bicycle abandoned by the roadside along with the utensils. He then heard movement in the grass and a faint voice. Upon checking, he found the accused in the act of having sexual intercourse with the victim, whom he had grabbed and the victim was struggling. PW1 approached from behind, grabbed the accused, and a struggle ensued. He managed to grab the accused's belt and restrained him. He then took the accused towards his home, made an alarm as they approached, and upon arrival, asked his wife to bring a rope to tie the accused's hands. PW1 subsequently took the accused to the LC1 Chairperson's home.

- 5.4. PW2, the victim, narrated that on Tuesday, 3rd August, 2021, she was sent by her aunt, Atiba Mosleta, to collect household items (plates and cups) from PW1 who was in Katakwi Town. She travelled by bicycle and was handed the items by PW1. On her return journey, she noticed a motorcycle following her. She got off the bicycle to pave way for him as the place was sandy. As she pushed her bicycle

through the sandy area, the accused continued to trail her. Near a cassava garden, the accused emerged, jumped on her, dragged her into the garden, tore her knicker and forcibly had sexual intercourse with her. The victim testified that she reacted by making noise but the accused strangled her. She was rescued when PW1 arrived at the scene.

- 5.5. This court is convinced that there was unlawful carnal knowledge of the victim.
- **6.0. The second ingredient requires proof that there was no consent of the woman or girl.**
- 6.1. PF3A (marked as PE1), which was agreed upon by both parties in the memorandum of agreed facts, indicates that the victim was 16 years old based on her dental formula. This is corroborated by PE3, the victim's baptism card, which shows that she was born on 2nd February 2005 placing her at 16 years of age on 3rd August, 2021, the date of the alleged offence. PW2 also testified in court that she is currently 20 years old, further confirming that she was 16 years old on the date of the alleged offence.
- 6.2. It is well-established under the Ugandan law that where the victim is under the age of 18 years, the issue of consent does not arise. Therefore, any sexual act with such a person, irrespective of consent, constitutes the offence of defilement or aggravated defilement in circumstances listed under **Section 116 (4) of the Penal Code Act** and not rape.
- 6.3. The critical distinction between these offenses lies in the element of consent. Rape fundamentally hinges on the absence of consent or

vitiating consent, whereas defilement is constituted irrespective of consent. The law recognizes that a child under 18 years cannot provide legally valid consent to sexual intercourse.

- 6.4. Where the victim is under 18 years of age, the proper charge is defilement, not rape. The element of consent, which is central to the offense of rape, is legally irrelevant when the victim is a child. Parliament has deliberately established defilement as a strict liability offense that does not require proof of lack of consent.
- 6.5. The amendments to the Penal Code Act have created a comprehensive framework for sexual offenses. Where the victim is under 18 years, regardless of the circumstances of force or violence, the appropriate charge is defilement. The offense of rape is reserved for adult victims who can legally consent to sexual intercourse.
- 6.6. Based on the statutory provisions and established case law, the offenses of rape and defilement are legally distinct, with different elements and protecting different aspects of sexual autonomy. The critical distinction lies in the element of consent, which is central to rape but irrelevant to defilement.
- 6.7. Where a victim is under 18 years of age, the appropriate charge is defilement or aggravated defilement (depending on the circumstances), not rape. The fact that force or violence was used does not transform a case of defilement into rape when the victim is under 18 years.
- 7.0. In the case of **Muhereza Wilbroad v. Uganda, Court of Appeal Criminal Appeal No. 470 of 2016**, it was stated as follows;

"...We have noted the tendency of persons being charged with the offence of rape when the facts prove that it was defilement. Where a child is under the age of 18 years the issue of consent does not arise. By charging assailants with the offence of rape the prosecution appears to be looking for acquittals. This is unethical if the facts clearly reveal that the victim was a child. The other strand is the one where the offender is charged with the offence of rape but the victim is described as a child. Is this a deliberate mistake introduced in the summary of case with intention of attracting sympathy for the error and an acquittal for the appellant? The final strand could be that the officers who charge or indict the accused person do not have sufficient knowledge of what constitutes the offences of rape and defilement and therefore lack capacity to determine when to prefer a particular charge. This speaks to need for training. Be that as it may, whether the above mistake is advertent or inadvertent it has the effect of causing so much convoluted that the only option is for the court to acquit the appellant. This is unacceptable and unethical conduct on the part of the Respondent/Prosecution..."

7.1. The Justices of the Court of Appeal in the above case further labored to provide clarity on the offence of Rape and Defilement as herein below;

".. Having regard to the offence of defilement the necessary ingredients in general are that the victim must be below the age of 18 years but ought to be 14 years or above; there must be proof of sexual intercourse and the proof that it is the accused who performed it. There are specific ingredients that aggravate and elevate it to a capital offence. These include; where

the person against whom the offence is committed is below the age of fourteen years; where the offender is infected with the Human Immunodeficiency Virus (HIV); where the offender is a parent or guardian of or a person in authority over the person against whom the offence is committed; where the victim of the offence is found to be a person with a disability and finally where the offender is a serial offender...For the offence of rape to be proved the victim must be a woman or girl. The offence does not exclude the victim as a girl. On that ground alone a person can be charged with the rape of a girl...It should be noted however, that for rape to be proved there must be proof either of lack of consent or evidence that the consent was induced or forced...the other ingredients for rape include proof of carnal knowledge and that the accused raped the female without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband and the final ingredient which must be proved in all offences is that it is the accused who did it..."

7.2. This Court fully aligns with the views expressed by the Justices of the Court of Appeal. The summary of the case unequivocally indicated that the victim was a pupil aged 16 years at the time of the alleged offence. It is therefore deeply troubling that the Office of the Director of Public Prosecutions elected to proceed with a charge of rape rather than the appropriate charge of defilement. Such prosecutorial missteps not only undermine the fair administration of justice, but also inflict further harm on victims who courageously testify in court, only to see their suffering rendered futile due to legal technicalities that could easily form the basis for an appeal. The

justice system must protect the vulnerable, not compound their trauma through avoidable errors.

- 7.3. It was expected that the learned prosecuting counsel would have noted and addressed this apparent error, and that learned counsel for the accused on state brief would have raised a preliminary point of law in respect of the charge of rape. The failure to rectify such a fundamental issue at an early stage is unfortunate and highlights the need for greater vigilance in the handling of criminal matters. For this therefore, the court had to interrogate the age of the victim and it was testimony with documentary evidence that she was a child at the time of the act.

- 8.0. Having found that consent is immaterial in cases involving a minor, the offence of rape cannot stand. I therefore find that no prima facie case has been made out against the accused in respect of the charge of rape. Consequently, the accused is accordingly acquitted of the offence of rape and shall be released forthwith unless lawfully held on other charges.

Dated at High Court of Uganda at Soroti, Katakwi this **9th** day of **April**, 2025.

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Prepared on 12 October 2026 · Esheria