

UGANDA / JUDGMENT

Uganda v Kilama (Criminal Session Case 261 of 2022) [2023] UGHCCRD 46 (21 August 2023)

[2023] UGHCCRD 46

COURT

HC: Criminal Division (Uganda)

BEFORE

Okello, J

CASE / FILE NUMBER

Criminal Session Case 261 of 2022

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**S THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA
HOLDEN AT KITGUM CRIMINAL SESSION CASE NO. 261 OF 2022 S
UGANDA..... VERSUS 15 KILAMA
CHRISTOPHER.....**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO 20

RULING

25 This Ruling in on whether or not a prima facie case has been established by the Prosecution against the Accused person. This Court is obliged to make a ruling by the command of section 73 (1) of the Trial on Indictments Act Cap. 23 (TIA) at the end of the prosecution case. Court does so, after hearing the defence submission that the accused person has no case to 30 answer.

The accused person was indicted with aggravated defilement, contrary to section 129 (3) (4) (a) of the Penal Code Act Cap. 120. Under the section, a person who performs a sexual act with another who is below the age of fourteen years, commits the offence of aggravated defilement. A person convicted of aggravated defilement is liable to suffer death. A sexual act is

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defined in section 129 (7) of the PCA to include penetration of the vagina, S however slight, by a penis.

It is alleged that, on 15th, March, 2018, while at Bardege Cell, Pandwong Division, Kitgum Municipality, Kitgum District, the accused performed a sexual act with A. E, a girl aged 13 years. During the plea taking before \$10\$ court (Mubiru, J) on \$1^{st}\$ November, 2019, the accused pleaded not guilty. After the preliminary hearing, in which no facts or documents were agreed upon, two assessors were appointed. The Prosecution thereafter called three witnesses in November, 2019. The case was thereafter adjourned for further hearing of the prosecution case during the next convenient court 15 session. When this court took over the matter during the criminal session, conducted in July 2023, the prosecution called one more witness and closed its case on 25th July, 2023. Court was orally addressed on whether there is a *prima facie* case.

Learned Counsel Mr. Jude Ogik, represented the accused person on State Brief, while the learned Senior State Attorney, Mr. Patrick Ojara represented the Prosecution.

The Defence counsel submitted on what a prima facie case means, and 25 cited the case of **Ramanlal Bhat Vs. R [1957] EA 33**. Learned Counsel went on to submit on the ingredients of the offence charged. He submitted

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\$5\$ that, to prove aggravated defilement under section 129 \$(3)\$ \$(4)\$ \$(a)\$ of the PCA, the prosecution must prove the following ingredients; the victim of the offence was below the age of 14 at the time the offence was committed; there was a sexual act; and the participation of the accused person. In his evaluation of the prosecution evidence, Defence counsel submitted that, the age of the victim was not proved, because, neither the victim nor the 10 victim's mother testified. Learned Counsel argued that, there was no birth certificate adduced in evidence to prove the victim's age. He criticized PW1 (Atim Christine) who told court that, she relied on the victim's word, who allegedly told PW1 that, she was 13 years as at 15th March, 2018, the date the offence was allegedly committed. PW1 also testified that, she did not 15 know the year the victim was born, and, therefore, did not know the victim's age. PW1 further stated that, the victim is a daughter of PW1's aunt. Mr. Ogik also referred to the Medical evidence given by PW2 (Komakech Tito Lutwa) who told court that, he used body mass index to come up with the age of the victim. Counsel criticized the medical evidence, 20 saying, PW2 did not record the weight and height of the victim and yet he claims to have used body mass index to determine the age. According to learned counsel, PW2 conceded that, persons of the same age could have different weight, and factors such as nutrition could account for the weight 25 differences.

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- $\mathcal{S}$ Regarding the ingredient of penetration, the learned defence counsel conceded that, the medical report vide PF 24A (PEX1) proved the fact of penetration, he however submitted that, the participation of the accused person was not proved. Learned counsel refereed to the testimony of PW3 (Benson Omoya) who stated, he had suffered from hung

over and was lying 10 inside his house on 15th March, 2018 at around 8:00 am. PW3 claimed he heard the victim asking for a broom from the accused person. That, the victim entered the house of the accused and came out after failing to find the broom while the accused was outside his house. PW3 claimed that, the accused then entered the house and that, PW3 could not know whether 15 both the victim and the accused entered the house, yet PW3 claimed the victim got out of the accused's house and said "Kilama, You!" PW3 claimed, by such exclamation, the victim implied that "something had happened". PW3 however conceded he did not see anything happen.

- 20 In response, the State Counsel conceded that, it is true neither the victim nor the mother testified, and no explanation was given by PW1 as to why the victim's mother and the victim could not attend court. The State counsel also conceded that, whereas the Doctor's report stated that the victim's hymen was ruptured, the participation of the accused was not 25 clear, as PW3 said he did not see the accused perform a sexual act with the victim.

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\$5\$ Analysis and Decision of court

As rightly submitted by both learned counsel, a **prima facie** case does not mean a case proved beyond reasonable doubt, because, proof beyond reasonable doubt can only be determined after the court has heard and considered both the prosecution and the defence. A prima facie case is, therefore, a case on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. See: **Ramanlal Bhat Vs. R** [1957] EA 33. The evidence adduced at the stage of making the finding of a case to answer, should be sufficient to require an accused to offer an explanation, lest he runs the risk of being convicted. See: **Uganda Vs. Maliya Yassin, HC. Crim Case No. 143 of 2012**; **Wabiro alias Musa Vs. R** [1960] E. A 184. A prima facie case thus cannot be established by a mere scintilla of evidence or by any amount of worthless discredited prosecution evidence. Court considers two factors in making a finding of whether a prima facie case is or is not made out. In his Practice Note, Lord Parker, stated two considerations which was published and reported in [1962] ALL E. R 448, and have been followed by our courts in several cases. One such cases is **Uganda Vs. Alfred Ateu** [1974] HCB 179, wherein the considerations were stated to be:

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\$i\$ Where there has been no evidence to prove an essential ingredient of the alleged offence, or HutoQu.

\$\mathsf{S}\$ ii) When the evidence adduced by the prosecution has been so discredited as a result of cross examination, or it is manifestly unreliable, that no reasonable court could convict on it.

Section 73 (1) of the TIA provides to the effect that, where a case has not \$10\$ been made out against the accused person sufficiently to require him to make a defence, the court records a finding of not guilty. In other words, the court shall acquit the accused.

In his Book entitled A Guide to Criminal Procedure in Uganda, 3rd Ed., Law 15 Development Centre, 2006, B. J Odoki, at p. 120, suggests that, where the court determines that there is no case to answer, it must write a detailed ruling, which is (treated as) a final Judgment. I agree. However, in my view, the depth of the Ruling will and should always depend on the facts and circumstances of each case, for instance, the complexity of the case, the number of witnesses called by the prosecution, among others. 20

In this case, the question I should determine, is whether the evidence adduced by the prosecution is sufficient to require the accused to offer an explanation. That, to my mind, depends on whether the evidence adduced by the prosecution proves an essential ingredient of the offence of aggravated defilement, or whether the evidence was so discredited during cross examination, or is so manifestly unreliable that a reasonable court

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could not convict on it, if no explanation were offered by the accused \$\mathsf{S}\$ person.

The essential ingredients of the offence of defilement under section 129 (3) (4) (a) are; the victim was below fourteen years of age; a sexual act was performed on the victim; and; it is the accused who performed the sexual act.

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I find the issue of age of the victim and participation by the accused person very central in this determination. Although the allegation of penetration was conceded by the defence counsel, based on the strength of the medical 15 report which concluded that the victim's hymen was ruptured, court, however finds that the medical report was inconclusive on when the hymen was ruptured. The medical report vide PEX 2 (PF3A) shows that the victim was examined on 16th March, 2018. The report indicates that the hymen 20 was ruptured. The probable cause was penetration by a hard object. The period when the penetration could have happened, was not stated. PW2 purported to supply more information during examination in chief when he stated that, the rupture of the hymen was 'recent'. With respect, this is unacceptable since the medical report was silent about it. PW2 also stated 25 that, mild hyperemia was seen on either sides of the labia minora. PW2 did not, however, state in his report, whether there were any bruises, and also did not expound the findings relating to the mild hyperemia, in his

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\$\mathsf{S}\$ written report. PW2 only claimed in his evidence in chief that, there was the reddening of the inner aspect of the labia, but the oral statement of the alleged finding is not borne out of the signed medical report. Therefore, whereas penetration of the victim's vagina was apparent, I find that the period when the penetration occurred, remained unclear.

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Regarding the age of the victim, the medical approach of using Body mass index (BMI), claimed by PW2, in my view, is a novel one in the field of medicine. The witness claimed he adopted this method because it was in line with the Uganda National Medical Protocol. He, however, never tendered any such 'Protocol' in evidence to back up his assertion. Online research by this court, however, has shown that, BMI calculator is not a source of clinical guidance. Rather, it is only a reliable indicator of body fatness (See Centers for Disease Control and Prevention write up on the subject).

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Be that as it may, in his finding, PW2 never stated the height and weight of the victim, to inform his conclusion on the alleged age of the victim. In cross examination, PW2 conceded that, using BMI is fraught with weaknesses. He agreed that, different persons of the same age could have different weights, and, weight depends on nutrition, among others. PW2 was also not sure about the impact of genes on weight.

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- \$\mathsf{S}\$ On her part, PW1 (Atim Christine) who apparently was the guardian of the victim and living with her at the time of the alleged offence, was not conclusive on the issue of the victim's age. She conceded, she relied on the victim's word, to tell her age. PW1 said the victim told her that she is 13 years old. PW1 stated that the victim dropped out of school in primary five.
- \$10\$ However, the year this happened, court was not told. PW1 did not state what the age of the victim was at the time she dropped out of school. In my view, PW1's testimony regarding age, was hearsay, and needed independent corroboration. Unfortunately, the medical evidence failed in that respect.

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It has been held that the most reliable proof of age of a child could be by production of birth certificate, followed by the testimony of the parents of the child. See: Uganda Vs. Fulawak, Crim. Session case No. 85 of 2018. However, there are other ways of proving age of a child, for instance, court's own observation and common sense assessment of the age of the child. See: Uganda Vs. Kagoro Godfrey, H. C Crim. Session Case No. 141 of 2002.

Aside from the foregoing ways of proving age of a child, the child's 25 immunization card, and the child's testimony regarding her age, could help in proof of age of the child.

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- $\$ \mathsf{S}$ I have perused the Children Act Cap. 59, and noted that, section 88 (2) and (3) offers a helpful guide with regard to how the age of a child can be determined. Although the section is concerned with determination of age of a child for the purposes of criminal responsibility, I think the section should be helpful on the matter at hand. Section 88 (2) and (3) of the
- $\$10$ Children Act, provides that, court can determine the age of a child by giving full assessment of all available information, giving due consideration to official documentation including birth certificate, school records, health records, statement certifying the age from the parent or child, or medical evidence. In my view, therefore, one or more of the methods discussed 15 herein, could, depending on the circumstances of each case, help in proving age of a child.

In this case, apart from the discredited medical evidence regarding the victim's age, there was no other credible evidence adduced for the 20 prosecution. The victim never appeared in court so this court could not observe and assess her age. The victim's parents who could have been of assistance, never appeared in court either. There was no documentary proof, be it by way of the immunization or baptism cards or any school documents, or statement by the victim or her parents, as to the age. I, $\$25$ therefore, find the allegation in the indictment that the victim of defilement was below the age of 14 years, not proved.

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The other essential ingredient of the offence of defilement is participation $\$ \mathsf{S}$ of the accused.

Court notes that, PW1 testified that on 15th March, 2018, she left the victim at home, and went to her workplace, being a school teacher. PW1 was called by Adong Irene, a sister, at 4:00pm, who said there was a 10 problem at home. PW1 rushed home and arrived at 5:00pm. Adong Irene told PW1 what had happened. Adong said the victim was sexually abused by a neighbor. PW1 asked the victim about what had happened. The victim also told PW1 the 'same thing'. The victim told PW1 that she wanted to sweep the compound at 9:00am, so she went to the accused's home to $\$15$ borrow a broom. The accused accepted to give the victim a broom and told her to pick it from inside the house behind the door. According to PW1, Omoya Benson (PW3) a neighbor, was inside his own house, and so could hear the accused and the victim. The victim entered inside the accused's house and was pushing off the accused. Omoya finally heard the victim 20 moving out of the house, saying "Kilama You! Let me hurry up home there is food on fire." PW1 stated, the victim told PW1 that, when she entered the accused person's house, there was no broom but the accused sexually abused her. That the accused told the victim to go and bathe very well and 25 no one would know anything. PW1 stated, the accused went into hiding. Omoya (PW3) and a one Komakech called the accused on phone, who said he was coming but the accused never turned up. PW1 saw the accused the

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following day, at Pandwong Police Station, under arrest. The Accused was \$5\$ arrested from Opete, about 4-5 kilometers away. It is Komakech who disclosed where the accused could be found, before the arrest. The accused was arrested from someone's home. PW1 asked the accused whether he had defiled the victim and he kept quiet. PW1 also asked the 10 accused why he escaped, but he kept quiet. PW1 stated that she was told the offence was committed at 9:00am.

PW3 (Omoya Benson) testified that he knew the victim, a daughter of PW1, who was a neighbor. On 15th March, 2018, at 8:00am, PW3 was lying in his house, suffering from a hung over. PW3 heard the victim asking for a 15 broom from the accused. The victim entered the house of the accused. She came out after failing to find the broom. The accused person was outside. The accused then entered the house. PW3 did not know whether both the victim and the accused entered. But the victim 'got out' and PW3 heard 20 her say "Kilama, You!" According to PW3, that meant 'something had happened.' PW3 stated, he neither saw nor heard anything happen. PW3 claimed, the victim spent about fifteen minutes inside the house of the accused. PW3 and the accused lived in the same building but separate rooms. The accused was the immediate neighbor of PW3. The door to the 25 accused's house was immediate to that of PW3, but the accused's bed room was opposite that of PW3. PW3 came out of his house and was with the accused till 5:00pm. They played cards and when a drizzle occurred,

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\$\mathsf{S}\$ both entered the accused's house. At about 5:10pm, Adong Irene (sister of PW1 but claimed by PW3 as being an elder sister of the victim, came and called the accused person aside. The two talked but PW3 could not hear what they spoke. Adong then told the accused to wait for Mama Michelle (meaning PW1). At 6:00pm the accused and PW3 went for a drink in a nearby village. PW3 stated, the accused was not arrested from Opete \$10\$ primary school.

PW4 (No. 57987, Det. Constable Omer Simon Peter) testified that, on 15th March, 2018, while at Pandwong Police Station, he received a complaint

from PW1 that, her daughter had been defiled by the accused person. PW4 15 searched for the accused with the help of a one Komakech Bosco, a security guard. Komakech found the accused in the area of Lukira, and arrested him. The accused was handed over to PW4, who took over. In cross examination, PW4 conceded, he did not arrest the accused person but it was Komakech Bosco. PW4 also stated, he only did the preliminary 20 inquiry and recorded statements. He handed the file to Det. Sgt. Okot Anthony (since deceased) who played a role in the matter. PW4 did not

know the role the Det. Sgt. Okot (RIP) played in the case.

25 The prosecution closed its case.

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I have critically reviewed the prosecution evidence regarding the alleged participation of the accused person. Whereas the accused appears to have been at his home on 15th March, 2018, there is no evidence pointing out to an alleged sexual act by him. PW1 relied on the statement by Adong Irene, and the victim, to report to Police. PW1 however, did not describe the condition of the victim when PW1 returned home on the material day. \$10\$ Court was not told that the victim was distressed. Neither the victim nor Adong Irene who is said to have first reported via a phone call to PW1, testified. Court was not told whether Adong Irene also was at home at the time of the alleged incident. The evidence of PW3, a neighbour, exonerates the accused person. He said he neither heard nor saw any sexual act being 15 performed by the accused person. PW3 however appears to contradict himself in a material respect. On the one hand, he says the victim entered the house of the accused while the accused was outside and the victim exited the house. PW3 also claims the victim again (for the second time) 20 entered the accused's house, and spent about fifteen minutes. PW3 did not state whether the victim was dragged to the house by the accused this second time. He did not state whether he heard the two discussing something before the victim could allegedly enter the house for the second time. Being a close neighbor whose door was next to the accused's door, PW3 was best placed to know the truth of what transpired. However, he 25 was holed in his own house, suffering from a hung over, and did not bother to step out and verify his fears as a neighbor who was the next door would

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- \$5\$ be expected to act. He claims the victim pushed off the accused. How he was able to tell about the push, the court was not told. PW3's statement that, the victim then moved out of the house, exclaiming "Kilama, You!" meaning a sexual act had happened, contradicts his earlier claim that he neither saw nor heard the victim and the accused having sexual \$10\$ intercourse. PW3 thus drew wild conclusion that, the victim's exclamation meant "something had happened". Court wonders why the victim did not report to PW3 or any neighbor immediately, if at all she was sexually abused by the accused person. No one spoke about the condition of the victim immediately she left the house of the accused. The victim's \$15\$ exclamation could only be explained by the victim, as to what she meant, and what had happened to her. On the contrary, she did not testify. There is also no contemporaneous independent credible evidence to support the allegations of a sexual act.
- 20 I think in the absence of the testimony by the victim, and other independent credible evidence, the prosecution evidence was left with lots of gaps. This court notes that, the victim's guardian (PW1) testified on 7th November, 2019, and the case was adjourned to 12th November, 2019, I think, to enable the victim to be taken to court to testify. I say so because, 25 in his address to court, Mr. Muzige Hamza, the then Resident State Attorney said, "the victim is in Pader and has been unable to turn up. I pray for an adjournment." Court adjourned the matter to 20th November, 2019

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- \$5\$ during which the State Counsel proceeded with the Medical Clinical Officer as a witness (PW2) instead of the victim who was absent. Thereafter, PW3 (the neighbour) testified that day. The case was then adjourned to the next convenient session of court, for further prosecution hearing.
- In light of the foregoing, it is my view that, failure to call the victim as a \$10\$ witness in the matter was not sufficiently explained. This Court takes juridical notice that, Pader and Kitgum are neighboring Districts that are not very far apart. Nothing stopped the complainant (PW1) from cooperating with the State, to secure the court attendance by the victim.
- Although it is trite law that the evidence of witnesses to whom the victim \$15\$ made accusation can be admissible as part of the *res gestae* even where the victim does not testify, nevertheless, the evidence by the witness to whom the victim reported, can only be admissible, if the report by the victim was made contemporaneously with the offence. See **Bardu Mwindu**
- Vs. Uganda, SCCA No. 15 of 1997; Omuroni Vs. Uganda [2002] 2 EA 20 531; Moro Alex Vs. Uganda, Criminal Appeal No. 0370 of 2015 (COA).

25 In **Moro Alex Vs. Uganda (supra)**, the Court of Appeal underscored the rationale for allowing in evidence, the victim's report made to third parties, as exception to hearsay evidence, thus:

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\$\mathsf{S}\$ "It is because defilement cases are unique in the sense that the victims are sometimes persons who are not able to testify by reason of age or mental disability. If the strict rule on hearsay evidence was to be applied, then credible witnesses to whom the victims accuse the perpetrators would be locked out and the heinous crimes committed on such unfortunate victims would go unpunished." \$10\$

In this case, however, the inability of the victim to testify, was not sufficiently explained to court. The prosecution witnesses attempted, but contradictorily, to paint a picture that the accused was on the run or was in hiding, thus conduct of a guilty person. However, Komakech Bosco who \$15\$ allegedly arrested and handed the accused to Police, did not testify. Neither PW1, PW3 nor PW4 were present when the accused was arrested. They thus contradicted themselves as to the exact place where the accused was allegedly arrested from. The time of the alleged sexual assault, from the prosecution evidence, was at 8:00am or 9:00am, according to PW3 and 20 PW1, respectively. Although this is a minor contradiction, Court wonders why Adong Irene who reported to PW1 on phone, could not do so, much earlier, and only waited till 4:00pm to report the allegation. It is also not clear whether Adong's report to PW1 was based on what she was told by \$25\$ the victim. All in all, PW1's evidence needed corroboration by the victim or other independent witness. Crucially, the victim did not report to PW3 (Benson Omoya), a neighbor who claimed he was at

home at the material

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\$5\$ time. It is intriguing that PW1 relied so much on what the neighbor (PW3) allegedly told her. Since PW3 told court that he did not hear or see any sexual act between the accused and the victim, I do not see a case strongly made out, to require an explanation by the accused person. The benefit of the doubt goes to the accused person. The whole prosecution case was \$10\$ merely based on suspicion aroused by the victim's exclamation "Kilama, You!", yet suspicion, however strong, can never form the basis of an indictment. PW3 did not confront the accused, or the victim, with his suspicion, as a responsible adult and a neighbor at that. However, PW3 would later came out of his house (I think having dealt with the hung over) and stayed with the accused till 5:00pm (outside) playing cards. At \$15\$ 6:00pm, he and the accused went away for a drink in a nearby village.

Considering the prosecution evidence in totality, I find that no essential ingredient of the offence of aggravated defilement has been proved, 20 warranting an explanation. Accordingly, a prima facie case has not been established against the accused person. Consequently, I dismiss the prosecution case and acquit Kilama Christopher, the accused, of the offence of aggravated defilement, contrary to section 129 (3) (4) (a) of the Penal Code Act. The Accused person shall be released forthwith unless \$25\$ held on some other lawful charge.

I so order.

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Dated, signed and delivered this..... \$\mathsf{S}\$

> HutoQue 01/8/2023
George Okello JUDGE HIGH COURT

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Ruling read in Court

15 9: 15 Am

1st August, 2023 Accused in court Mr. Judge Ogik, Defence Counsel on State Brief Mr. Ojara Patrick, Senior State Attorney, for the Prosecution Ms. Jennifer Lubik, Court clerk.

> Hurodin. 01/8/2023 George Okello JUDGE HIGH COURT

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