

UGANDA / JUDGMENT

Uganda v Okello (Criminal Session Case 64 of 2021) [2025] UGHC 318 (14 May 2025)

[2025] UGHC 318

COURT

High Court of Uganda

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

Criminal Session Case 64 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI
CRIMINAL SESSION CASE NO. 0064 OF 2021 UGANDA ::::::::::::::::::::::::::::::::::

VERSUS

OKELLO JONATHAN ::::::::::::::::::::::::::::::::::

Before: Hon. Justice Boniface Wamala JUDGMENT

Introduction

- [1] The accused person is indicted of Aggravated Defilement s/c/s\$ 129 (3) and 4(b) of the Penal Code Act [now Section 116 (3) & (4) (b)] of the PCA Cap 128. It is alleged that the accused person in the month of August 2019 at Onyal A village, Aperikira parish, Aperikira sub-county in Kaberamaido District performed an unlawful sexual act with Anuso Catherine, a girl aged 17 years well knowing he was HIV Positive. The accused person pleaded not guilty to the offence and the case proceeded for hearing.

Representation

- [2] At the hearing, the state was represented by Ms. Rebecca Namitala from the Office of the Director of Public Prosecutions (ODPP) while the accused was represented by Mr. Olobo James Felix and Mr. Justine Okwalinga, counsel on state brief. The assessors in this case were Mr. Erwaku Lawrence and Ms. **Acheke Proscovia**. Neither the accused, his lawyers nor the state objected to the assessors' appointment.

The Burden and Standard of Proof

- [3] In criminal cases, an accused person is presumed innocent until proven guilty or until he or she pleads guilty; as provided for under Article 28(3)(a) of the Constitution of the Republic of Uganda. As such, the burden of proving each and every ingredient of an offence is always on the prosecution and never shifts onto the accused. See: *Woolmington v DPP* [1935] AC 462. The accused

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person is only convicted on the strength of the prosecution case and not because of weaknesses in his defence. See: *Ssekitooleko v Uganda* (1967) EA 531. Each essential ingredient of the alleged offence must be proved beyond reasonable doubt. However, proof beyond reasonable does not mean proof beyond a shadow of doubt. The standard is satisfied once any evidence suggesting the innocence of the accused person, at its best, only creates a mere fanciful possibility but not any probability that the accused is innocent. See: *Miller v Minister for Pensions* [1947] 2 ALLER 372.

The evidence in this case

- [4] The state and defence signed a memorandum of agreed matters wherein the following documents were agreed upon, namely;
- a) The victim's medical examination report (PF3A);
 - b) The accused's medical examination report (PF24A);
 - c) The victim's short birth certificate; and
 - d) The laboratory request form for the accused.
- [5] The memorandum of agreed matters was tendered and admitted in evidence in accordance with section 67 of the Trial on Indictments Act Cap 25. The agreed documents were admitted in evidence and marked as PE1, PE2, PE3 and PE4 respectively.

The witnesses

- [6] The prosecution led evidence of two witnesses while the defense led evidence of one witness, the accused person. PW1 was Anuso Catherine, a female adult aged 22 years at the time of testifying, resident of Onyal village, Aperikira Parish and Sub County, in Kaberamaido District. She stated that in 2019, she was 16 years, studying in primary six at Okapel Primary school. She testified that the accused was her lover; who asked for a love affair while she was at school. The first day he asked for love, she did not reply. He returned after a

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week and gave her UGX 10,000/= which she took. After two weeks, he found her at a well and persisted with his request for a love affair. She asked the accused about the fact that he was staying with her Aunt as husband and wife; and he responded that she should not worry and should just accept him. The victim stated that at their home, she was staying alone in her house and her mother and other siblings were staying in another house.

[7] The victim stated that on one day, the accused came, entered her house and had unprotected sexual intercourse with her. He told her to go and pick money from him the next day which she did not. Three days later, he returned and had sexual intercourse with her again. On this occasion, her mother came and called her at about 10:00 pm asking for light (a torch). She delayed to open her door since she was still dressing up. When she opened the door, her mother went in, checked the bed and did not see anyone. The mother then saw the accused person standing at the door side. The victim ran out to a friend's home. On the next day, the victim went to the home of the accused's friend in Okapel village where the accused found her and took her to his relative in Angai village where they stayed for about a week. After the week, the accused gave her UGX 20,000/= for transport back to Kaberamaido. As she moved around Owerai trading centre, someone who knew her saw her and called her people. She was picked and taken to Aperikira police post. She was taken for medical examination where she was found to be HIV negative. She was given some drugs to prevent HIV infection. After taking the drugs, she was tested again and was still found HIV negative. At the time of testifying, she was married with two children.

[8] PW2 was Alamo Sarah, a female adult aged 46 years, peasant farmer, resident of Onyal A village, Kapel Parish, Kapel Sub County in Kaberamaido District and biological mother to the victim. She stated that the accused person was married to her sister, Acen Immaculate. In August 2019, her daughter was

16 years. On 10/08/ 2019, at around 10:00 pm, she went to pick her light (a torch) from the victim's house but when she called the victim, she remained silent yet she (PW2) heard some noise inside the room. When PW2 looked through under the door, she saw the accused and the victim coming from the bed naked and they started dressing up. After some time, the victim opened the door, switched off the light and took off. PW2 switched on the torch, flashed the light and saw the accused standing behind the door. The accused only had his trouser on and was holding the other clothes on his chest. PW2 recognized him and started crying while mentioning his name saying "why have you killed my daughter?". This was because the accused was staying with PW2's sister and were on ARVs which they were getting from Kaberamaido Hospital. The accused then got PW2 by the throat and threw her down. PW2 made an alarm but no one responded. She went and reported to the LC1 Chairperson. The following morning, the matter was reported to Aperikira police post where PW2 made her statement. The victim returned after a week, she was taken for examination at Kaberamaido Health Centre IV and was given a PEP drug. PW2 stated that she had a prior grudge with the accused which had been resolved. The cause of the misunderstanding was that when PW2's husband died, the accused was the first person to ask for a love affair with her, over which he persisted for some time but PW2 refused since the accused was staying with

her sister.

[9] In defence, the accused (DW1), stated that he was 36 years, a resident of Okapel B in Okapel Parish, Aperikira Sub County in Kaberamaido District. He stated that he had another home in Angai village in Dokolo District. He testified that he did not know the victim until 6/02/2020 and denied defiling her. He stated that between 13/08/2019 and 06/02/2020, he was in Dokolo. He further stated that in 2013, he had a family issue about a piece of land which was not fully resolved and he went to Angai village on 13/08/2019 and did not return to Okapel village for a period of about six months. He returned to

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Okapel village on 4/02/2020 to take his children to school. Then on 5/2/2020 while at his house, policemen came with a gun and he heard the voice of a GISO saying "shoot him direct" and the police shot thrice. The accused refused to go with them unless they brought police officers from Kaberamaido Police Station. Police officers came from Kaberamaido and took him to the police station. On 6/2/2020, he was picked from the police cells to make a statement and that was when he met the police officer with a girl whom he did not know. He also got to know the victim's mother on 6/02/2020. The accused stated that he only knows Apio and Akello as sisters to his wife and not the victim's mother. The accused further stated that he had problems with Eriu Michael and a GISO called Enyum James. The accused, however, could not tell whether the victim's mother (PW2) had any relationship with Eriu Michael or whether his problems with Eriu Michael had anything to do with the present case.

Submissions by Counsel

[10] Counsel for the prosecution and the defence made and filed written submissions which I have adopted and considered in the determination of the matter before the Court.

The law and ingredients of the offence

[11] The offence of aggravated defilement is provided for under Section 116(3) and (4) (b) of the Penal Code Act Cap 128 in as far as is relevant to the present case, which states thus;

- "(3) Any person who performs a sexual act with another person who is below the age of 18 years in any of the circumstances specified in sub-section (4) commits a felony called aggravated defilement and is on conviction by the High Court, liable to suffer death.*
- (4) The circumstances referred to in sub-section (3) are as follows (a) ...
- *b) where the offender is infected with Human Immunodeficiency Virus (HIV)* ..."

[12] In the instant case, for the accused person to be convicted of aggravated defilement, the prosecution must prove each of the following essential ingredients/ elements beyond reasonable doubt;

- a) That the victim was below 18 years of age;

- b) That the offender was HIV Positive;
- c) That a sexual act was performed on the victim; and
- d) That it is the accused who performed the sexual act on the victim.

Resolution by the Court

That the victim was below 18 years of age

- [13] In law, the most reliable way of proving the age of a child is by the production of her birth certificate, any other documents speaking to her date of birth, 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 medical evidence, the court's own observation and common sense assessment of the age of the child. See: *Uganda v Oryem Bosco* (Criminal Case No. 116 of 2019) [2020] UGHC 78 (10 July 2020).
- [14] In this case, the victim (PW1) stated that in August 2019, she was aged 16 years, studying in primary six at Okapel Primary School. Her mother (PW2) stated that her daughter was 16 years old in August 2019. The short birth certificate of the victim (PE3) indicated that the victim was born on \$30/7/2003\$; which made her 16 years in August 2019. In the medical examination report of the victim (PE1), the victim's age was estimated to be 16 years. These matters were not contested by the defence. Prosecution has therefore proved this element of the offence beyond reasonable doubt.

That the offender was infected with HIV

- [15] Prosecution led evidence of the accused's medical examination report (PE2) and the Laboratory Request Form (PE4) which showed that the accused, upon

examination, was found to be HIV positive. The evidence by the victim's mother (PW2) also showed that the accused person, who was living with her sister as husband and wife, was living on ARVs which he was getting from Kaberamaido Hospital. PW2 indicated that she had prior knowledge of the fact that the accused was HIV positive; which explains the nature of her alarm when she recognized the accused person at the scene. This evidence was not contested by the defence. I have found is sufficient to prove beyond reasonable doubt that the accused was HIV positive at the time the alleged offence was committed.

That a sexual act was performed on the victim

- [16] A sexual act means (a) penetration of the vagina, mouth or anus of one person by a sexual organ of another person, however slight; or (b) the unlawful use of any object or organ by a person on another person's sexual organ. Sexual organ means a vagina or a penis. Note that a sexual act does not necessarily have to be sexual intercourse. In the present case, the victim (PW1) narrated to court that she had sexual intercourse with the accused on two occasions including the 18/08/2019 when her mother came to her house and found the

accused person standing at the door side. The victim's medical examination report (PE1) showed that the victim's genitals had a foul smell with visible white material probably semen on the perineum (in females, it is the area of the body between the anus and the vulva). This evidence was not contested by the defence. I have found the evidence by the prosecution sufficient to prove beyond reasonable doubt that a sexual act was performed on the victim.

That it is the accused who performed the sexual act on the victim

- [17] In order to prove the participation of an accused person in the commission of an alleged offence, the prosecution has to adduce evidence which places the accused person at the scene of the crime or that discloses him/her as the perpetrator of the alleged crime. The evidence may be direct or circumstantial.

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On the evidence before me, the victim (PW1) narrated to the Court the time taken by the accused person to entice her to fall into a love affair with him while on her way to or from school. The victim testified that the accused person eventually went to her house and had sexual intercourse with her. Three days later, the accused returned to her house and still had sexual intercourse with her. It was on this occasion that the victim's mother found the accused in the house.

- [18] The victim's mother (PW2) stated that when she went to the victim's house and knocked, before the victim opened, she peeped through underneath the door and saw the accused person and the victim coming from the bed naked. When the door was opened, PW2 flashed a torch and saw the accused standing at the door side, with only his trouser on and holding the other clothes on his chest. PW2 had an altercation with the accused person whereby the accused held her by her throat and threw her down. PW2 also stated that as she made the alarm, she was mentioning the accused's name. Prosecution evidence showed that the accused was well known to both the victim and her mother, as a person who was cohabiting with PW2's sister.
- [19] The accused in evidence denied knowing the victim and her mother. He also denied knowledge of the fact that the victim's mother (PW2) was a sister to his wife. Accused further put up an alibi, stating that at the time of the alleged offence, he was not present within the area where the offence was allegedly committed. He stated that he had another home in Dokolo District where he stayed between 13/08/2019 and 6/02/2020 and returned to Okapel village in Kaberamaido District on 4/2/2020 to take his children to school. Counsel for the defence submitted that the prosecution evidence regarding the accused's participation in the said offence was fabricated and it should be disbelieved by the Court.
- [20] In **Abdullah Nabulele & 2 Others v Uganda* [1978] UGSC 5 (5 October 1978)*, it was held that the factors that determine the quality of identification evidence include the length of time the witness had to watch the offender, the distance, the light and familiarity of the witnesses with the accused person. In the present case, I find that the accused person was positively

identified by the victim (PW1) and her mother (PW2) as the circumstances were very favourable to proper and correct identification. As indicated in evidence, the victim (PW1) had had prior dealings with the accused; this was the second time the accused was coming into her house. PW1's evidence is strongly corroborated by that of her mother (PW2) who saw the accused using light of a torch and when they went out of the house, the accused grabbed PW2 by the throat and threw her down. PW2 made an alarm while mentioning the name of the accused. In light of such evidence, I do not find even the slightest possibility of erroneous or mistaken identification of the accused person. The evidence by the prosecution sufficiently places the accused person at the scene of the crime and thus disproves his alibi. The prosecution has therefore proved beyond reasonable doubt that it is the accused person that performed the sexual act upon the victim.

[21] In all, therefore, I am satisfied that the prosecution has proved all the ingredients of the offence of aggravated defilement against the accused person beyond reasonable doubt. In agreement with the opinion of the lady and gentleman assessors, I find the accused person guilty of the offence as indicted and I convict him accordingly. It is so ordered.

Dated at Soroti this 14th day of May, 2025.

mama

Boniface Wamala JUDGE

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