UGANDA / JUDGMENT

Uganda v Sizomu (Criminal Session Case No. 167 of 2013) [2016] UGHCCRD 141 (20 April 2016)

[2016] UGHCCRD 141

COURT
HC: Criminal Division (Uganda)

BEFORE
Murangira, J

CASE / FILE NUMBER
Criminal Session Case No. 167 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT LUWEERO

CRIMINAL SESSION CASE NO. 167 OF 2013

(ARISING FROM LUWEERO COURT, CRIMINAL CASE NO. 94 OF 2012)

UGANDA :: PROSECUTION

VERSUS

SIZOMU THOMAS Alias SADAM ISMAIL :::::::::::::::::::::::::: ACCUSED

BEFORE: **HON. MR. JUSTICE JOSEPH MURANGIRA**

JUDGMENT

1. **Introduction:**

1. The prosecution is represented by Ms. Kasana Hanifah, State Attorney at Luweero Directorate of Public Prosecution's office.

2. The Accused, Sizomu Thomas alias Sadam Ismail, is represented by Mr. Wameli Anthony from M/S Wameli & Co. Advocates, Kampala.

3. **Assessors (2) in this Case**

2. Mr. Robert Mugabi

3. Kiwalabye Issah

4. **Facts of the case**

The Accused, Sizomu Thomas alias Sadam Ismail, on 15th September, 2012 at Kayanja LC.1, Nyimbwa sub. county in Luweero District, met the victim Salama Abudala Azizi, a girl who was at that time aged 12 years, followed her up in separate events, took her to unfinished building and had sexual intercourse with her. The accused was later on arrested and indicted with Aggravated Defilement. Hence this trial.

1. **Indictment**

The accused, Sizomu Thomas alias Sadam Ismail, was indicted with Aggravated Defilement Contrary to Section 129 (3), (4) (a) and (b) of the Penal Code Act Cap. 120 Laws of Uganda.

1. **Ingredients of the charged offence**

The Prosecution has to prove the following ingredients that:-

1. The victim was below the age of 14 years.
2. The sexual act was performed on the victim.
3. The participation of the Accused on the commission of the offence.

4. **The burden of Proof:**

In proving the above stated ingredients of the charged offence, the prosecution bears the burden. The standard of proof is proof beyond reasonable doubt. It is also a cardinal principle that this burden of proof beyond reasonable doubt does not at any time during the trial shift to the Accused person. The Accused does not need to prove himself innocent. Further, if there is any doubt in the prosecution case that doubt ought to be resolved in favour of the accused.

In their respective submissions, both Counsel for the parties and the gentlemen assessors are alive at this cardinal principle of burden of proof beyond reasonable doubt as it is well expressed in the case of **Woolmington Vs. DPP [1935] AC 462.**

1. **Witnesses for the Parties:**

6.1 **Witnesses for the Prosecution:**

(1) No 22464, D/Sgt Athocon John Baptist, PW1, the investigating officer of this case.

(2) Abduddalah Aziz Yusuf, the father of the victim, PW2.

(3) Salama Abduddalah Aziz, the victim, PW3.

6.2 **Witnesses for the Defence**

(1) Sizomu Thomas alias Sadam Ismail, the accused, DW1. He gave evidence on oath and called no other witness to testify on his behalf.

7. **The Exhibits**

The prosecution relied on the following exhibits:-

1. PF 3A, on which the victim was examined Exh. P1.
2. PF 24A on which the accused was examined as Exh. P2
3. Petty-coat with blood stains, Exh. P3.
4. Exhibit slip – Exh. P4.
5. Sketch Plan of the scene of crime, Exh. P5.

All the above stated exhibits were allowed in evidence for the prosecution without any objection from the defence.

1. **Resolution of the Case by Court**

In her submission, Ms. Kasana Hanifah, Counsel for the prosecution, evaluated the evidence for the prosecution and the defence, and submitted that the prosecution proved all the ingredients of the charged offence beyond reasonable doubt. She then invited this court to find the accused guilty of the charged offence and convict him accordingly.

On the other hand, Mr. Wameli Anthony, in his submissions, in reply agreed to the submissions of the prosecution on the 1st and 2nd ingredients, that is, of age of the victim being below the age of 14 years, and that a sexual act was performed on the victim by unknown aggressor. He contested the 3rd ingredient of the charged offence. That the prosecution failed to adduce evidence that could incriminate the accused with the charged offence. He prayed that the accused be found not guilty of the charged offence and be acquitted accordingly.

For the gentlemen Assessors, in their joint opinion, they too, evaluated the evidence on court record, analysed it and in their considered opinion they found the accused to have committed the charged offence. They then advised me to convict the accused as indicted of aggravated defilement.

On the 1st ingredient: The victim was aged below 14 years, at the time the offence was committed.

The evidence of PW1, PW2 and PW3 (the victim) is that the victim in 2012 was aged 12 years. Their respective pieces of evidence were not challenged by the defence in cross-examination nor by the accused in his defence. There is also the evidence of Exh. P1, PF 3A, on which the victim (PW3) was examined after the defilement, the medical officer who examined her found that she was aged 12 years.

Therefore, in agreement with both counsel for the parties and the two gentlemen assessors, I find that this 1st ingredient of the charged offence was proved by the prosecution beyond reasonable doubt.

On the 2nd ingredient the sexual act was **performed on the victim (PW3).**

There is the evidence of PF 3A (Exh. P1) which was allowed in evidence by consent of the parties under Section 66 (1) of the Trial on Indictment Act, Cap. 23, Laws of Uganda. That evidence on PF.3A confirmed that a sexual act was performed on the victim, PW3. There is also the evidence of the victim (PW3) who told court that when the accused took her to the unfinished building had sexual intercourse with her. There is also the evidence of PW1 and PW2 who told court that they saw the victim's petty-coat with stained blood and when they asked the victim what happened to her and the petty-coat which had blood stains, she narrated to them on how she was defiled by the Accused. This piece of evidence was never challenged by the defence in cross-examination of PW1, PW2 and PW3 and in reference by the accused.

Wherefore, in agreement with both counsel for the parties and the two gentlemen assessors, I find that this 2nd ingredient of the charged offence was proved by the prosecution beyond reasonable doubt.

On the 3rd ingredient of the charged offence. **The participation of the accused in the commission of the said offence.**

In her submissions on this 3rd ingredient of the charged offence, Ms. Kasana Hanifah, counsel for the prosecution evaluated the prosecution evidence and that of the defence, and submitted that there is enough evidence that was adduced by the prosecution that proved that the accused committed the charged offence.

In reply, Mr. Wameli Anthony, counsel for the accused submitted that the prosecution failed to prove the participation of the accused in the commission of the charged offence.

He submitted that PW3 gave evidence that she was defiled by Sadam Ismail. But that the name of the accused is Sizomu Thomas and not Sadam Ismail. That thus, the accused Sizomu Thomas cannot be the one who defiled the victim, PW3.

Again, counsel for the accused in his submission, raised the issue of under the circumstances the accused was arrested. He submitted that PW3 told her father, PW2, that she was defiled by Sadam Ismail of Ngangama village. That the way the accused was arrested after the commission of the charged offence simply because the accused had walked up to PW3 and PW3 signalled PW2 that this is the Sadam Ismail who defiled her, that this court cannot take it as conclusive evidence that it is the accused that defiled her.

Further, Counsel for the Accused raised the issue of identification. That the victim's (PW3's) evidence points on how she indentified the accused. That the factors as they were given by PW3, did not offer proper identification of the accused as the real one who defiled the victim.

Furthermore, counsel for the accused raised the issue of the accused's defence. He submitted that in criminal cases, the accused does not need to have a strong defence. He submitted that owing to his above submissions, the accused did not participate in the commission of the charged offence. And that, therefore, he should be acquitted of the charged offence.

On this 3rd ingredient of the charged offence, the prosecution relied heavily on the evidence of PW3 the victim. The Victim, PW3, gave evidence in court that she first saw the accused on the day in Ngangama village. Then next she meets him when she was going to the market to buy tomatoes. When coming back from the market, the accused followed her. The victim saw the accused following her from behind. The Accused caught up with her, they talked, and then managed to lure her and took her to the unfinished building where the accused had sexual intercourse with her. On the issue of unfinished building where the accused took the victim, PW3 gave evidence that, that building was not yet roofed and that it had no doors and widows. That, therefore, there was enough light.

From the evidence of PW3, which was never challenged in cross-examination by the defence, the victim was familiar with the accused. She had seen him on four different occasions. And on all those occasions the accused engaged the victim, PW3, into a conversation. When the accused was taking her to the unfinished house, they were together and were talking to each other. Then the victim saw the accused when they were having sex in the unfinished building. Those circumstances I have analysed favoured proper identification of the accused by the victim, PW3.

Again, from the evidence of PW3, the victim, it is clear that on all the incidents on which the victim met the accused was during the day light. This piece of evidence was never challenged by the defence in cross-examination. I make a finding that the nature of light pertaining or surrounding the commission of this offence favoured proper identification of the accused by the victim. The light from the sun as it was still day time was adequate for proper identification accused by victim. The light from the sun as it was still day time was adequate for proper identification.

Further, from the evidence of PW3, the victim, who told court in her evidence that the accused had sexual intercourse with her for about a whole hour, that was long enough time taken for the victim to properly identify the accused as person who defiled her. In addition the victim had seen and known the accused before the commission of this offence by the accused.

Furthermore, PW3, the victim gave evidence that when they were moving to the unfinished building she was too close to the accused. That when the accused was having sex with her, she was looking at the accused. PW3 narrated in her evidence how the accused removed her knickers, then he too, undressed himself naked and then had sexual intercourse with her. I therefore, make a finding that the distance between the accused and PW3, the victim, enabled the victim to properly observe the accused and, therefore, PW3 properly identified the accused person as the very person who had sexual intercourse with her on 1st September, 2012.

Furthermore, the evidence of PW3, the victim was corroborated by the evidence of PW1 and PW2, who told court what the victim, PW3, told them shortly after the commission of this offence by the accused.

My above stated analysis of the evidence on identification of the accused by the victim, PW3, is supported by the case of Abdullah **Nabulere and others vs. Uganda and others vs. Uganda Criminal Appeal No. 9 of 1978**, it was held that the factors favouring the identification of the Accused by a single identifying witness are:

1. Familiarity of the witness with the Accused.
2. The nature of light that could have enabled the witness to see the accused and indentify such a person.
3. The time taken by the witness under observation of the accused.
4. The distance between the victim and the accused during the act of committing the charged offence.

In this instant case, as I have analysed and highlighted here in above in this Judgment do exist in favour of the prosecution case.

Consequently, the accused in his defence denied the charge. He also raised a defence of alibi. He said in his defence that he does not know the victim, PW3 and PW2, the father of the victim. However, his denial of the case did not create any doubt in the prosecution case. As I have evaluated and analysed the prosecution evidence hereinabove in this judgment, the defence's evidence to that extent did not create any doubts in the prosecution case.

Again, the accused pleaded an alibi. He gave evidence in defence that he was in Moroto District, where he was performing his duties of a Uganda people's Defence Forces as a soldier. His alibi was destroyed by himself during cross-examination when he told court that he came to Bombo Army Headquarters to check on his salary arrears in July 2012. Then he again stated that he came to Bombo Army Headquarters in August 2012. That he was arrested in September, 2012 and he claimed in his evidence that that at the time of his arrest he had spent only one day in Bombo area. Such an alibi, therefore, is full of contradictions and such it is unbelievable by this court, as the accused was properly put at the scene of crime by the prosecution evidence. In the case of **Nankya vs. Uganda Supreme Court, Criminal Appeal No. 24 of 1995**, it was held that:-

> *"***Whether a court believes one witness and disbelieves another is a question of credibility after the court has considered all the evidence and demeanour of witnesses".**

And in the case of **Alfred Bumbo & Others vs. Uganda, Supreme Court, Criminal Appeal No. 28 of 1994**, it was held that:

> *"***The law is that once the Accused has been positively identified during the commission of a crime then his claim that he was elsewhere must fail".**

In cross-examination of the prosecution witness, the issue of the name of the accused came up. In his argument, counsel for the accused, and even the accused in his defence stated that the accused is not called nor is he known by the names of Sadam Ismail.

In her evidence, the victim, PW3, told court that the accused introduced himself and that he told her that his name is Sadam Ismail. Her evidence is believable. When the accused saw the victim dressed in her proper attire as a Muslim lady , the accused in order to seduce her into sexual intercourse had to call himself a Muslim name – Sadam Ismail. Then PW1 in his evidence in re-examination told court that the accused told him that his other names are Sadam Ismail. Going by the resolved issue of identification of the accused and for the fact Exh. P2, PF 24A which was admitted by both parties in court by consent under section 66 (1) of the Trial on Indictment Act (Supra) where by signing on the court record, the Accused and his counsel confirmed, that the accused is called Sizomu Thomas alias Sadam Ismail. There is no doubt, therefore that the accused nick named himself "Sadam Ismail". And for purposes of this trial, the accused is called Sizomu Thomas alias Sadam Ismail.

Wherefore, on this 3rd ingredient of the charged offence, I am in agreement with the counsel for the prosecution and the opinion of the two gentlemen Assessors, and hold that the prosecution proved this ingredient of the charged offence beyond reasonable doubt against the accused person.

1. Conclusion:

In closing, in consideration of all the evidence of the prosecution and that of the defence, the submissions by counsel for both parties, the law applicable to this case, and my own evaluation and analysis of the evidence on record, and the opinion of the assessors, I hold that the prosecution proved all the ingredients of the charged offence beyond reasonable doubt. Therefore I found the accused guilty and I convict him of the offence of Aggravated Defilement Contrary to Section 129 (3) (4) (a) and (b) of the Penal Code Act (Supra).

Dated at Luweero this 19th day of April, 2016.

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JOSEPH MURANGIRA

JUDGE

19/4/2016

19/4/16:

Ms. Nabasitu Daisy holding brief for Ms. Kasana Hanifah state Attorney for the state.

Mr. Wameli Anthony for the accused on state brief.

The accused is in court.

The 2 Assessors are in court.

Mr. Kavuma Michael the clerk in Court.

Court: Judgment is delivered to the parties in open court.

JOSEPH MURANGIRA

JUDGE

19/4/16

Ms. Kasana Hanifah State Attorney for state.

Prosecution in Allocutus:

1. The accused is not 1st offender. This is supported by his own evidence that he is a convict.
2. Offences of Aggravated defilement are rampant and the society needs to be protected.
3. Accused is HIV+ and he knew it before he committed the offence.
4. Though the victim was not examined after a period of HIV Aids, there is a possibility that she is infected by HIV Aids.
5. The forceful manner in which the sexual intercourse was done was inhuman. I therefore pray for a deterrence sentence to discourage the would be defilers. I pray for 40 years imprisonment.

I pray that this court to notes that small sentences encourage the would be offenders to continue committing such offences.

Counsel for the Accused in Mitigation for sentence:

1. We pray that court exercises linience in passing the sentence against the convict.
2. We take note that the offence he was convicted of and sentenced was a minor offence.
3. It is true that the convict is HIV positive but this is also a mitigating factor in that along detention sentence will hasten the already bad condition.
4. The convict has a wife and 2 children whom he was looking after before he committed his offence. So the long custodial sentence will worsen the situation they are already in.
5. The convict is 35 years of age meaning that he is still a resource to this generation. There is chance for him to re-integrate himself with the society.
6. He has been on remand for over 4 years. He has learnt a lot in prison. Much as he exercised his right of the presumption of innocence, he regrets the incident of his conduct.

We pray that minus 4 years he has spent on remand, 12 years imprisonment would suffice.

We so pray.

Court: Sentence shall be delivered on 20/4/16 at 9.00 a.m. Accused further remanded.

JOSEPH MURANGIRA

JUDGE

19/4/16

20/4/16:

Sentence and the reasons for the sentence;

In passing the Sentence against the convict the following factors are considered.

1. All the mitigating factors for the sentence that were advanced by both counsel for the parties.
2. I note that throughout the entire trial, the convict appeared not remorseful.
3. The offences of Aggravated defilement are rampant in this jurisdiction. About 90% of the cases in this criminal session are aggravated defilement offences.
4. The convict is not first offender as evidenced by the evidence of the convict in cross examination.
5. The convict is HIV+ and he knew it when he lied the victim into sexual intercourse.
6. From the evidence of the victim's petty coat which was stained with a lot of blood, clearly explains that the convict had a forceful sexual intercourse with the victim.
7. The convict has been on remand for a period of 3 years and 7 months which is about 4 years.

Therefore, considering all the above mitigating factors, I would have sentenced the convict to 20 years imprisonment. But I do deduct the 4 years the convict has already spent on remand. And accordingly, I sentence the convict to 16 (sixteen) years imprisonment.

Dated at Luwero this 20th day of April, 2016.

JOSEPH MURANGIRA

JUDGE

Ms. Kasana Hanifah State Attorney for the state.

Mr. Wameli Anthony for the Convict absent.

The convict is in court.

The 2 Assessors are in Court.

Mr. Kavuma Michael – The Clerk is in Court.

Court: Sentence is delivered to the parties in open Court.

Right of Appeal is explained.

JOSEPH MURANGIRA

JUDGE

20/4/16

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT LUWEERO

CRIMINAL SESSION CASE NO. 167 OF 2013

(Arising from Luweero Court, Criminal Case No. 94 of 2012)

UGANDA :: PROSECUTION

VERSUS

SIZOMU THOMAS alias SADAM ISMAIL:::::::::::::::::::::::::::: ACCUSED

BEFRORE: THE HON. MR. JUSTICE JOSEPH MURANGIRA

PROCEEDINGS

10/3/16

Ms. Nabasitu Daisy Principal State Attorney for state.

The accused is supposed to be represented by Ms. Birungi Monica from Wameli and Co. Advocates.

The Accused is not in court. I apply for production warrant.

Mr. Kavuma Michael – Court Clerk is in Court.

Court: Production Warrant is issued for 14/3/16 at 9.00 a.m. when the case is coming up for plea taking.

JOSEPH MURANGIRA

JUDGE

10/3/16

14/3/16:

Ms. Kasana Hanifah State Attorney for the state.

Ms. Birungi Monica for the Accused.

The accused is not in court. I presume he is in prison.

P/I/610 – P. O Butalami Emmanuel from Butuntumula prison. The accused is in Marchson Bay prison – Luzira. They are arranging transport for him to come.

Prosecution: I have 3 witnesses in court. I pray for an adjournment.

Court: Production Warrant issued to the accused. Case is adjourned to 17/3/16 at 9.00 a.m. for hearing.

JOSEPH MURANGIRA

JUDGE

14/3/16

17/3/16:

Ms. Kasana Hanifah State Attorney for State.

Ms. Birungi Monica for the Accused.

The accused is not in court, though a production warrant was issued.

I have 3 witnesses in court.

I pray for production warrant.

Mr. Kavuma Michael the Clerk is in court.

Court: This matter is adjourned to 1/4/16 at 9.00 am for hearing.

Production Warrant issued for that date.

JOSEPH MURANGIRA

JUDGE

17/3/16

1/4/16:

Ms. Kasana Hanifah State Attorney for the State.

Mr. Wameli Anthony for the accused.

The Accused is n court.

Prosecution: We have agreed to P. F 3A in respect of Salama Abudala Aziz, the victim. It was on 22/9/2012 by a clinical medical officer of Nyimbwa Health Centre 4- called Mbaruma; he observed that the victim was 12 years old. That her hymen was already ruptured.

Court: He signed, stamped and dated 22nd/8/2012. His HIV status was negative.

1/4/16:

For PF 24 in respect to Sizomu Thomas alias Sadam Ismail. It was done on 28/9/2012 and he was 35 years old with 9 normal mental status. And he was HIV positive, his examination was done by Dr. Kazibwe Kato of Luweero Health centre 4. He signed, stamped and dated it 28/9/2012.

Prosecution: I pray to tender in PF.3A and PF. 24 as exhibits for the prosecution.

Counsel for the Accused: No objection.

Court: PF3A and PF 24 are allowed in the evidence of the prosecution and marked Exh. P1 and Exh. P2 respectively.

JOSEPH MURANGIRA

JUDGE

01.4.16

Court: Appointment of Assessors:

1. Mr. Mugabi Robert 46 years. I work with Bay Port Financial services. Luweero Branch, I stay in Kasoma zone in Luweero Town Council. Protestant on oath s/s.

Counsel for the Accused: No objection.

1. Mr. Kiwalabye Issa, 48 years, businessman in Ngogolo trading centre, Butuntumula sub. County in Luweero District, Muslim affirms and states;

Counsel for the Accused: No objection.

Prosecution: I have 3 witnesses.

PW1: No. 22464 D/Sgt. Athocon John Baptist, 42 years old, police officer, attached to Kanyanda police post which is under Bombo police station, catholic on oath states. I know the accused. I came to know the accused when he was arrested and brought to Bombo police post for custody. I was the Investigating Officer when at the police post. On 20/9/2012 I received a report from Kadili Abudallah who is also a special police constable attached to Mile 21, Police post of aggravated defilement of his brother's daughter called Salama Abudala Azizi. The victim was 12 years old in Umea Primary School at Bombo.

The same complainant told me that the victim was defiled on 15/9/12 by the Accused. The complainant came around with the victim. I recorded her statement. The victim also revealed the same name of the accused person. The same victim told me that the accused followed her right – Mile 21 up to Segetula village, Nyakatonya parish, Nyimbwa sub.county in Luweero District.

The victim further told me that the accused grabbed her and took her to a nearby uncompleted building without a roof. After recording the statement, I issued her PF 3A. The victim handed over to me a half pettie she was putting on. It was green in colour and contained bloodstains. I exhibited the same. The victim said that the half pettie that contained blood stains was a result of the accused forcing her to sexual intercourse. And that when she reached home, she kept it in the compound for fear.

It was the father of the victim who recovered this pettie and after questioning her, she revealed that it came about when she was having unlawful sex with accused on 15/9/2012. I exhibited at Bombo police station, it was marked CRB/628/2012 and also bearing SD 07/20/9/2012 of our police post.

I made an exhibit slip. It mentions the half pettie with stains of blood.

Secondly the one who brought in the exhibit (complainant) and my self who received the exhibit? It has my particulars. This is the exhibit I made. This is the half pettie. These are blood stains. These are the marks. I put on it. It is light green in colour.

Prosecution: I pray to tender in court the half pettie and the exhibit slip as the prosecution exhibits.

Accused for the Accused: No objection.

Court: The half-pettie and its exhibit slip are allowed in evidence for the prosecution and marked Exh. P3 an Exh. P4 respectively.

JOSEPH MURANGIRA

JUDGE

1/4/16

PW1: I visited the scene together with the victim and the complainant and I drew a sketch plan. I can identify it if shown to me. There is my phone no and particulars. This is my signature and dated it.

Prosecution: I pray to tender in court the sketch plan as a prosecution exhibit.

Counsel for the Accused. No objection.

Court: The sketch plan of the scene of crime is allowed in evidence for the prosecution and marked Exh. P5.

JOSEPH MURANGIRA

JUDGE

1/4/16

The Accused was arrested by the complainant and taken to Bombo police station.

That is all.

Counsel for the Accused cross-examination.

* I had not met the accused before he was arrested. * I knew the complainant. The complainant is a workmate but not my friend. * The complainant did not show me the spot where he discovered the half-pettie. * These are blood stains on the half-pettie as per the victim's story. * I took this exhibit to my present police station and O. C/CID Bombo police station took over. * I reached the

victim's home during my investigations when I recorded the statement from the father of the victim- Abudala Azizi and her 2 brothers. * I did not go with accused at the scene of crime. The accused was arrested around 24/9/2012. After committing the crime he went into hiding. * The victim gave the names of the defiler as Ismail Sadam. * She did not describe the accused to me. * I took her statement. The victim said she knew the accused. * It is the accused who defiled her and he has four names. The other names were revealed by the Accused when he was giving his charge and caution statement. * The accused admitted that he is called also Ismail Sadam and signed his statement.

Cross-examination closed.

Re-cross-examination: Nil.

PW2: Abudulla Azizi Yusuf, 58 years, a peasant in Segentula, Nakatonya parish, Nyimbwa sub. County Luweero District.

Muslim – Affirms and states;

I do not know the accused, but I know why he is in court. It is my daughter Salama Abudala Azizi, Aged 12 years old by that time, who said that the accused defiled her while on her way back home. It was on 19/9/2012 at midday. I was walking around my compound I found a black kavera which had been brought wrapping my brother's coffee. I had put that black kavera on the plant to dry. I now decided to overturn that kavera so that the other side could be washed with the rain. I saw a half pettie full of blood stains. It is somehow blue. I could not disturb it. I waited for the children to come for lunch. When they came back for lunch I questioned the children and Salama confessed that it was hers. She told me that she had sex with a man called Sadam Ismail. I did not know that man. I then called my brother Abdul Kadali, who was working as special constable on 20/9/2012 he came with a police intelligence who recorded the statement of my daughter, went to see where the exhibit was and proceeded to the scene of crime. That special police constable arrested the Accused.

* She told me that the defiler was an army man and he was putting on an army uniform trouser. * She told me that the defiler stays in the nearby village called Ngangama. She was coming from the market and that accused followed her, grabbed and took her into a nearby uncompleted house, removed her knickers and started playing sex with her. * It is the court to decide what to do with the accused. * That is all.

Counsel for the accused cross-examination.

* At that period it was a rainy season. * Apart from the name Ismail Sadam – she never told me any other name. * The officer (PW1) who was here recorded the victim's statement. * The accused told the victim that he stays in the nearby village called Ngangama. * I was present when he was arrested. The girl was in front, he started walking from Nyakatonga Health clinic. I was following her trying to investigate how to get that man and when I reached the accused, the victim told me that this is the man who defiled me. I then rang Mr. Kadisi who came and arrested him at around 8.30 p.m. * He was coming from Ngangama village side and the girl was going alone and the

accused joined her. I was following to see what could happen. * It was the victim who knew the man. * When I was almost passing them she told me that this is the man.

Cross-examination closed.

Re-examination: Ni.

PW3, Salama Abudalla Azizi 16 years, I am schooling in Nakatonya Islamic secondary school in Senior 2. Muslim affirms and stats;

I know the Accused. I know him as Sadam Ismail. I came to know him when my father had sent me to the market. It was on 15/9/2012 when my father sent me to the market to buy tomatoes. I then found the accused at a petrol station. That was not the first time to see the accused.

It was the 2nd time. The 1st time I saw him was on Idd day. He was coming from Ngangama to mile 21. We did not talk but he waived to me.

When I saw him at Petrol station I proceeded to the market. On my way back from the market we did not talk, he simply followed me. When I was reaching home, he called me that come here young girl. He was talking to me in Luganda. I then went to him to see why he was calling. He told me that we go down there I said for what? He said that he was going to give me money and then we went. He took me to a house which was still under construction without a plaster and roof. I entered that house and when I reached inside that house he told me to remove my clothes. I refused and the accused used force to remove my clothes. He then raped me and told me that if I tell anyone he will kill me. After doing to me what he did he gave me 2000/= and told me to go home. After defiling me he told me that he is called Ismail Sadam.

The accused removed his trouser; he put me down had sexual intercourse. He took like 30 minutes having sexual intercourse with me. During sexual intercourse I was not felling good and I saw blood oozing from my private parts.

It was around 6.00 p.m. It was turning into night. I had gone to the market when it was still day and I came back from the market when it was still day.

In that building there was not much darkness. From the petrol station where the accused was and to where I was it was about 5 metres. When he called me to come there was no darkness. When I went to where he was, we were standing too close to each other. When he called me to go to the house, i spent like 5 minutes talking to him.

From the time he started following me up to the time he forced me into sex, was like one hour.

The 2nd time I saw him I recognised him by face and stature.

After that forced sex, I dressed up and went home. I left the accused inside that unfinished building.

When I reached home I was not feeling well, I went to my bed, and slept. In the morning I removed my half-pettie and put it in a black kavera as feared that my father could see it and he beat me. The colour of the pettie –coat was blue and it was full of blood from my private parts. Is shown my half –pettie I can indentify it. This is my half pettie and all this is my blood stained on it. The pettie in the kavera stayed there for 2 weeks.

When I was coming from school, my father called me and asked me about this half-pettie. I kept quiet. He told my brother Juma to ask me what happened to my half - pettie. I was first caned and I then told them what i have explained to this court. My father then said I should not go back to school. I then ran from home to my grandfather's place. I stayed there for one day. Then my father got me from there and we went to Nangangama village to look for the accused. Because I had told my father that it is the accused who defiled me and I told him that it was Ismail Sadam who defiled me and that he stays in Ngangama. On the 1st time on Idd Day I had seen him in Ngangama.

From the day he defiled me until we went to Ngangama. I had not seen him. We went to Ngangama but we did not see the accused and we went back home. We went to Ngangama for 2 days and we never found the accused there.

I saw the accused around Nyakatonya and my father was following. When I saw the accused. I then went back behind and told my father that this is the one. My father told me to go back to him. I went back to the accused, started talking and even suggested to take me and buy me a chapatti, but i refused.

My father had called Kalidi, my uncle. I remained talking to the accused until my uncle Kalidi came and he arrested the accused. For me saw my father went back home.

I went to the police and recorded my statement. I was sent to Nyimbwa Hospital for medical check up.

I don't know what time doctor observed.

I am now feeling okay.

I want court to imprison him for what he did to me.

That is all.

Counsel for the Accused cross-examination:

On Idd day he was putting on a shirt and a trouser but I do not remember the colours.

On the day he defiled me, he was not putting on army uniform. On the day he was arrested he was putting on army uniform.

I know the accused as Ismail Sadam.

Cross-examination closed

Re-examination: Nil.

Prosecution: I wish to close the prosecution case.

Counsel for the Accused:

I leave it to court to rule on a no case to answer.

Prosecution: I also leave it to court.

Court: very well. According to the prosecution witnesses' evidence on court record, the prosecution has established a prima facie case against the accused.

The Accused, therefore, is put on his defence.

JOSEPH MURANGIRA

JUDGE

01/4/16

Counsel for the Accused. I pray for an adjournment.

Prosecution: No objection.

Court: This case is adjourned to 11/14/16 at 10.00.a.m for defence

Accused further remanded.

JOSEPH MURANGIRA

JUDGE

01/4/16

11/14/16

Ms. Kasana Hanifah State Attorney for the state.

Mr. Wameli Anthony for the accused.

The accused is in court.

The case is for defence.

The 2 Assessors are in court.

Mr. Kavuma Michael the Clerk is in Court.

Counsel for the Accused. We only have the accused as a witness and he is going to give sworn evidence.

DW1 (A1) Sizomu Thomas, 35 years, before my arrest, I was a soldier attached in the factory in Moroto, Protestant. On oath swears and states;

At the time of my arrest, I had come from Moroto the previous evening I was arrested from Bombo at a place called mile 21, at about 9.00 p.m. I had gone to have supper from Bombo General Headquarters. I came to Bombo Headquarters to claim my 3 months arrears.

I did not know the victim before I was arrested.

I just saw the victim at the police.

It is not true that I was arrested when I was standing with her.

I was arrested while standing at mile 21 when I was smoking the cigarette.

All the prosecution witnesses were not present when I was being arrested. I was arrested by the boda-boda people.

The prosecution witnesses gave false evidence against me. This is because the half pettie had blood which appeared fresh yet when blood goes on a piece of cloth after short time it changes colours. I have yet spent 4 years in prison.

At the time I committed the crime, the girl was in senior 2 and why didn't she make an alarm?

Somebody came to the police and said that the girl had disappeared for 3 days.

It was my first time being in Bombo Township.

I came to Bombo in August 2012 to check on my account.

I am HIV positive and when the girl was examined she was HIV negative.

I deny that case against me.

That is all.

Prosecution cross-examination:

I was not arrested on 25/9/2012. I came to Bombo Headquarters in August, 2012. I had come to claim my salary arrears. I was told to come the following morning to check with the legal officer. I was coming from Moroto.

There is no anybody I knew at the police when I was arrested. The signature on this police statement is mine. I signed on it after I had been caned and tortured. What is in the police statement are false.

Prosecution: I pray to tender in court the accused's police statement in court.

Counsel for the Accused. The accused denies the contents of the statement and that his signature was after he was tortured. I object to its tendering in court.

Prosecution in reply: I am withdrawing the police statement.

Cross-examination: I did not know why a girl I do not know gave evidence against me.

I said the half-pettie with stained blood which was about 2 months old. It had not changed the colour.

I came in august, 2012 to Bombo Barracks and that is where I was staying with Amedi Richard, others I do not know them.

I had stayed in Bombo Barracks one day and the following day I was arrested.

I was imprisoned in the Barracks in 2012 for neglect of duty. I spent 1 year and 6 months in Luzira Marchson Bay Prison.

I was released from prison in July 2012.

In Marchson Bay I was serving a sentence as I shot a person at night thinking he was a thief whereas not. It was under the influence of alcohol.

Before I was arrested I knew that I was HIV positive.

I have a wife and 2 children. I sent them to my home area in Busoga Iganga.

Cross-examination closed.

Re-cross-examination: Nil.

Counsel for the Accused. We are closing the Defence Case.

Court: Case is adjourned to 13/4/16 at 11.00 a.m. for final submissions.

Accused further remanded.

JOSEPH MURANGIRA

JUDGE

11/4/16

13/4/16:

Ms. Kasana Hanifah State Attorney for the state.

Mr. Wameli Anthony for the accused.

The Accused is in court.

The case is for submissions and I am ready.

The 2 Assessors are in court.

Mr. Kavuma Michael the Clerk is in court.

Prosecution:

The accused is charged with Aggravated Defilement c/s 129 (3) and (4) (a) and (b) of the Penal Code Act.

Facts:

The accused on 15/09/2012 at Kanyanja LC.1 Nyimbwa sub.county met a 12 year old Salama, followed her up took her to unfinished building and had sexual intercourse with her.

The burden of proof lies on the prosecution and the standard of proof is proof beyond reasonable doubt. See Woolmington vs. DPP [1935] AC 462.

Prosecution had to prove the following ingredients:

1. Victim being below 14 years.
2. Sexual act performed on the victim.
3. Participation of the accused.
4. Accused being HIV positive

On the 1st ingredient the prosecution relied on the evidence of PW2 and PW3. PW2 the father of the victim told court that the victim was 12 years old.

PW3 the victim told court that she was 16 implying that she was 12 years in 1012. This evidence is corroborated by PF3 A (Exh. P1) on which the victim was examined and found to be 12 years.

With that I pray that court finds that the 1st ingredient has been proved by the prosecution.

On 2nd ingredient Sex with the Victim:

The prosecution relied on the direct evidence of PW3 who told court that when the accused took her to the unfinished building he had intercourse with her.

This evidence was corroborated by the PW2 who told court that he saw the victim's pettie-coat with blood and when he asked she narrated to him on how she was defiled. PF3A further corroborated this evidence, when the Doctor observed that the victim was defiled, with that I pray that court finds that the prosecution has proved this 2nd ingredient.

On ingredient No. 3: Participation of the accused.

The prosecution relied on the evidence of PW3 the victim who told court that she first saw the accused on Idd day. Then she met him when she was going to buy tomatoes. Followed her up-took her to the unfinished building and had sex with her.

In considering this evidence, I invite court to consider the factors for proper identification as laid out in **Abdallah Nabulere Vs. Uganda – Criminal Appeal No. 9/78.**

1. Familiarity
2. Nature of light
3. Time taken under observation
4. The distance between the victim and the accused.

On familiarity

The victim saw the accused on Idd day. She again saw him when she was going to buy tomatoes. Then she saw him after buying the tomatoes. She then saw him when he was following her. Then she saw him when he called her and then they went together to the unfinished building and then she saw him when she was having sexual intercourse with her. I invite this Honourable Court to find that accused was properly identified since the victim was not seeing the accused for the first time.

Nature of light

The defilement took place during the evening-it was still day time. The Accused followed up the victim when it was still bright. And even when he called her back it was still day time and they were outside. I pray that this Honourable Court finds that the light was enough for proper identification.

On time taken under observation:

The victim told court that the accused took an hour with her and i pray to court to consider it sufficient. I also pray to this Honourable Court to consider the events before defilement.

That is meeting the accused 1st on Idd day, then meeting him at the Petrol station when she was going to the market, then meeting him after buying tomatoes, then the accused followed the victim, then the accused was calling up the victim, then both of them going to the unfinished building. All these happened for a long time. So the time to identify the accused by the victim was enough.

Distance between the victim and the Accused:

The victim told court that, at the Petrol Station she was 5 metres from the accused. When he called her, she went to him and were close. The 2 moved to the unfinished building close. Sexual intercourse is close in nature and that when they were having sex they were close and it favoured proper identification.

The present evidence of PW3 was corroborated by PW2 who told court that when the victim told him that it was the accused that defiled her, they started to look for the accused. They could go to look for the accused and they could come back without seeing him until the day when the victim signalled the father that this is the one. The accused also came and started conversing with the victim. If there was a mistaken identity, the accused would had by-passed the victim. I invite court to consider the conversation between the victim and the accused when the accused was telling her that they go to the restaurant to buy for her chapatti. This shows that the accused was familiar with the victim.

I pray that this Honourable Court finds that the accused's participation has been proved beyond reasonable doubt.

On the 4th ingredient Accused being HIV positive.

The prosecution relied on PF24 on which the accused was examined which indicated that he was HIV+. This evidence was proved by the evidence of DW1- the accused who told court that he came to know that he was HIV+ in 2012 with that I pray that this Honourable court finds that this ingredient has been proved beyond reasonable doubt.

I have some few points to comment on his defence:

1. Accused raised a defence of total denial.
2. Pleaded an alibi that he was in Moroto which alibi was destroyed by himself during cross-examination when he told court that he came to Bombo in July, 2012, then he said that he came to Bombo in August, 2012. That he was arrested in September 2012 and he claimed that he had spent one day in Bombo.

His defence was full of contradictions and I pray to court to consider him untruthful.

I therefore pray that this court finds that we have proved this case beyond reasonable doubt and finds the accused guilty and convicts him accordingly.

I so pray.

Counsel for the Accused in reply submissions.

We submit that the state had failed to prove the charge beyond reasonable doubt.

We agree with the state that burden of proof lies on the prosecution in criminal offence. We add that this burden does not shift to the accused thoughout the trial.

We also agree that the standard of proof has to be beyond reasonable doubt. We also add that this standard of proof goes to each and every ingredient of the charged offence. The conviction should not be based on the weakness of the defence case but on the strengths of the prosecution case. Because the Accused has no duty to prove his innocence.

But he has a doubt to caste on the prosecution case. Any such doubt must be resolved in favour of the Accused. We also refer to the case of Woolmington versus DPP (Supra).

We now go to the ingredients as listed by the prosecution.

We are in agreement to ingredient four that the accused is HIV positive.

We also consent to sexual intercourse of the victim – 2nd ingredients.

On age: Our concern on age is that PW2 the victim's father said that she was 12 years. I abandon my argument on that ingredient – we consent to that 1st ingredient too.

On the 3rd ingredient, Participation of the accused.

The person has failed to prove this ingredient beyond reasonable doubt. The victim PW3 told court that she was defiled by Sadam Ismail who comes from a nearby village called Ngangama. She maintained that though out her evidence. The accused before court is Sizomu Thomas.

The mention of the said Sadam Ismail as the name of the accused as is being contended by the prosecution was never mentioned in evidence by the victim to refer to the accused.

We move under the circumstances which the accused was arrested.

PW3 told court that when she informed PW2 that she has been defiled by Sadam Ismail of Ngangama village. The father first beat her and sent her to the grandmother for one day. Then the following day, he told her to put on her clothes so that they go to look for the defiler.

She said they went to Ngangama 2 times and failed to get Sadama Ismail. That the father decided that they go to mile 21 to see who could come up to talk with the victim. And when Sizomu Thomas walked up to the victim, the victim signalled the father that he was Sadam Ismail.

The Court has to consider that the victim PW3 must have been under pressure from her father to find her defiler. It was not a must that only the Defiler would walk up to a girl and start talking to her. Any other man, who ever had not previously defiled her, can walk up to her. And we believe that is exactly what happened.

That Sizomu Thomas walked up to the victim and fell into a trap that was laid by PW2 and PW3.

It is clear from the prosecution evidence that some facts became apparent when the accused had been arrested, which the prosecution is trying to turn around to say that the Accused participated. For example the fact that the Accused was a soldier – this was never mentioned by the victim prior to his arrest. But the victim's father mentions it because the accused was arrested when he was putting on army uniform. Also the name of Sizomu Thomas the accused was arrested and made a statement as Thomas Sizomu and from that they started calling him Sizomu Thomas alias Sadam Ismail.

PW3 told court that her aggressor was putting on a shirt and trouser but she could not remember the colour.

Prosecution on identification.

The points at which the victim PW3 is alleged to have seen the accused raise some issues whether PW3 identified that person e.g. on Idd day. We are not told how long she observed the aggressors and whether the aggressor was isolated or whether he was among other many people. She said the aggressor waved at her, meaning that person was far.

At the petrol station when she was going to the market – much as she was 5 metres from the aggressor, the victim was busy walking to the market – so it was like a snap- shot.

After buying the tomatoes she was walking back home, she claims the accused was walking behind her and that does not necessarily mean that she identified him yet he was behind.

She did not even mention the proximity of following her. That shows that they were not walking together.

On the accused caught up with her. The factors to consider are that she was so frightened. Much as it was evening- they finally went to unfinished building.

These factors we have outlined-mitigate for improper identification and leaves chance for mistaken identity.

The Accused did not participate in having sexual intercourse with the victim.

But since the victim failed to find her aggressor on 2 attempts so she decided to take advantage that the Accused talked to her when her father had laid a trap.

Prosecution has therefore failed to prove this 3rd ingredient beyond reasonable doubt.

As regards to the accused's defence, court is alive that the accused does not need to have a strong defence.

And as regards the alleged contradictions on the date he came to Bombo. We pray that court considers them as minor, considering that it is 4 years since the incident happened.

We therefore pray that the charge be dismissed and the accused be acquitted and set free. We so pray.

Prosecution in rejoinder and reply.

On the issue of the name raised by defence counsel when the victim was asked in examination in Chief how she came to know the accused as Saddam Ismail, she told court that it was the Accused who told her that his name was Saddam Ismail.

On the issue the victim moving to the accused, clearly shows that the victim had clearly identified the accused. Otherwise, she would have picked on any one on the 1st day.

On the issue of the father deciding to go to mile 21 to see who could come to talk to the victim. This is not true. They did not go to Mile 21 to just wait to see who could come to talk to the victim. Rather it was a trap that if the defiler comes along to talk to her. Then she signalled to her father.

Issue of identification:

The victim PW3 told court that the accused was following her. It is a human reflex that whenever one feels something following him or her one has to turn and see who is following.

PW3- told court that when she was going to the market she was walking and managed to see him.

On the issue of unfinished building, PW3 told this court that the building was not roofed and had no windows so there was enough light.

On the issue of the accused's defence, I pray that court considers that lying is not in line with innocence.

I maintain my earlier prayer that the accused be found guilty and convict him as charged.

I so pray.

Court: Summing up notes to assessors.

Assessors: We have understood. We shall give our opinion today.

Court: Case is adjourned to 2.00 p.m. to receive the Assessors opinion.

JOSEPH MURANGIRA

JUDGE

13/4/16

Court: As before.

Assessors: We are ready with our joint opinion.

Mr. Mugabi Robert:

In this case of aggravated defilement the prosecution has to prove the following ingredients beyond reasonable doubt.

1. Victim was below 14 years at the time.
2. The sexual act took place.
3. That the accused participated in the act.

Ingredients 1 and 2 were agreed upon by both the prosecution and defence counsel that the prosecution proved them beyond reasonable doubt.

On ingredients – No. 3 participation of the accused. It was contested by the defence counsel.

The victim and PW3 gave evidence to this court that she first saw the accused on Idd day and then met him when she was going to buy tomatoes. Accused seduced her and took her to unfinished building from where they had sexual intercourse. The victim told court that this happened in the evening at around 6.00pm. So there was enough light for the victim to properly identify the accused.

During the act of sexual intercourse there was close contact so the victim properly identified the accused.

We therefore find that it is none other than accused who participated in this unlawful act.

In our opinion we find the accused person guilty and we advise this Honourable court to convict him as charged.

Court: Judgment shall be delivered on 19/4/16 at 9.00 a.m. Accused further remanded.

JOSEPH MURANGIRA

JUDGE

13/16

19/4/16:

Ms. Nabasitu Daisy holding brief for Ms. Kasana Hanifah state Attorney for the state.

Mr. Wameli Anthony for the accused on state brief.

The accused is in court.

The 2 Assessors are in court.

Mr. Kavuma Michael the clerk in Court.

Court: Judgment is delivered to the parties in open court.

JOSEPH MURANGIRA

JUDGE

19/4/16

Ms. Kasana Hanifah State Attorney for state.

Prosecution in Allocutus:

1. The accused is not 1st offender. This is supported by his own evidence that he is a convict.
2. Offences of Aggravated defilement are rampant and the society needs to be protected.
3. Accused is HIV+ and he knew it before he committed the offence.
4. Though the victim was not examined after a period of HIV Aids, there is a possibility that she is infected by HIV Aids.
5. The forceful manner in which the sexual intercourse was done was inhuman. I therefore pray for a deterrence sentence to discourage the would be defilers. I pray for 40 years imprisonment.

I pray that this court to notes that small sentences encourage the would be offenders to continue committing such offences.

Counsel for the Accused in Mitigation for sentence:

1. We pray that court exercises linience in passing the sentence against the convict.
2. We take note that the offence he was convicted of and sentenced was a minor offence.
3. It is true that the convict is HIV positive but this is also a mitigating factor in that along detention sentence will hasten the already bad condition.
4. The convict has a wife and 2 children whom he was looking after before he committed his offence. So the long custodial sentence will worsen the situation they are already in.

5. The convict is 35 years of age meaning that he is still a resource to this generation. There is chance for him to re-integrate himself with the society.
6. He has been on remand for over 4 years. He has learnt a lot in prison. Much as he exercised his right of the presumption of innocence, he regrets the incident of his conduct.

We pray that minus 4 years he has spent on remand, 12 years imprisonment would suffice.

We so pray.

Court: Sentence shall be delivered on 20/4/16 at 9.00 a.m. Accused further remanded.

JOSEPH MURANGIRA

JUDGE

19/4/16

20/4/16:

Sentence and the reasons for the sentence;

In passing the Sentence against the convict the following factors are considered.

1. All the mitigating factors for the sentence that were advanced by both counsel for the parties.
2. I note that throughout the entire trial, the convict appeared not remorseful.
3. The offences of Aggravated defilement are rampant in this jurisdiction. About 90% of the cases in this criminal session are aggravated defilement offences.
4. The convict is not first offender as evidenced by the evidence of the convict in cross examination.
5. The convict is HIV+ and he knew it when he lied the victim into sexual intercourse.
6. From the evidence of the victim's petty coat which was stained with a lot of blood, clearly explains that the convict had a forceful sexual intercourse with the victim.
7. The convict has been on remand for a period of 3 years and 7 months which is about 4 years.

Therefore, considering all the above mitigating factors, I would have sentenced the convict to 20 years imprisonment. But I do deduct the 4 years the convict has already spent on remand. And accordingly, I sentence the convict to 16 (sixteen) years imprisonment.

Dated at Luweero this 20th day of April, 2016.

JOSEPH MURANGIRA

JUDGE

Ms. Kasana Hanifah State Attorney for the state.

Mr. Wameli Anthony for the Convict absent.

The convict is in court.

The 2 Assessors are in Court.

Mr. Kavuma Michael – The Clerk is in Court.

Court: Sentence is delivered to the parties in open Court.

Right of Appeal is explained.

JOSEPH MURANGIRA

JUDGE

20/4/16

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