

UGANDA / JUDGMENT

Uganda v Tukamuhebwa & Another (Criminal Session Case 139 of 2023) [2024] UGHC 666 (14 June 2024)

[2024] UGHC 666

COURT

High Court of Uganda

BEFORE

Bukirwa, J

CASE / FILE NUMBER

Criminal Session Case 139 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO.139 OF 2023

PROSECUTOR UGANDA.....

VERSUS

A1. TUKAMUHEBWA JULIET

A2. ABOTH MADINA.....

HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA BEFORE:

NTAMBI

JUDGMENT

Tukamuhebwa Juliet (A1) and Aboth Madina (A2) herein referred to as the accused persons were indicted with the offences of Aggravated Trafficking in Children contrary to Section \$3(1)(b)\$ and 5 (a) of the Prevention of Trafficking in Persons Act of 2009 and Defilement contrary to Section 129(1) of the Penal Code Act Cap 120. The particulars are;

In Count 1, it is alleged that A1 and A2 on the 14th day of November 2021 at Masese III-Sauriyako Zone, Walukuba Ward in Jinja city received or harboured or confined Kapiyo Junior, a boy aged 15 years by means of deception or coercion or fraud or of the abuse of position of vulnerability for the purpose of sexual exploitation.

In Count 2, it is alleged that A1 on the 14th day of November 2021 at Masese III-Sauriyako Zone, Walukuba Ward in Jinja city performed a sexual act on Kapiyo Junior, a boy aged 15 years.

At plea taking both the accused persons pleaded not guilty to the indictment.

Representation

The prosecution was represented by Ismail Sseguya Nsamba, a State Attorney from the office of the Director of Public Prosecutions. The accused persons were represented by Counsel Ivan Bamwidhiwa on State brief.

The burden of proof in criminal cases rests on the prosecution to prove its case beyond reasonable doubt. See *Woolmington vs DPP* [1935]AC462; *Sekitoleko vs Uganda* [1967]EA 53;

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Justice Rubby Aweri Opio held in *Uganda vs Aggrey Kiyingi and two others* High Court Criminal session case 0.030 of 2006 that proof beyond reasonable doubt means that;

- 1) Before verdict, the court should consider the evidence as a whole to determine the guilt.
- 2) The court should not examine facts in issue separately and in isolation; and
- 3) That where issues of credibility arise between evidence of prosecution and the defence, it is not necessary to believe the defence evidence on a vital issue, it is sufficient if in the context of all the evidence, a state of reasonable doubt is left as to this guilt of the accused.

If there is reasonable doubt created by the evidence of prosecution or the defence, the only reasonable conclusion court should draw is that prosecution failed to prove its case and the accused is entitled to acquittal.

However, proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. See *Miller vs. Minister of Pensions* [1947] 2 ALLER 372-373.

The prosecution's theory was briefly that on the 14th day of November 2021 at Masese III-Sauriyako Zone, Walukuba Ward in the Jinja city, Kapiyo Junior aged 15 years, the victim in this case, went to the accused persons' house to demand for his money from the accused persons and on reaching their house, the accused persons instead closed the house and that A1 had sex with him.

Count one; Aggravated Trafficking in Children.

On the charge of Aggravated Trafficking in children contrary to section 3(1)(a) and 5(a) of the Prevention of Trafficking in Persons Act, 2009, in order for the prosecution to secure a conviction, it is required to prove the following ingredients beyond reasonable doubt.

- 1. That the victim was a child.
- 2. There was an act of recruiting, or transporting, or transferring, or harboring or receiving of the victim by the accused person.
- 3. The above acts should be done by means of threat or use of force or other form of coercion, of abduction, fraud, of deception or the abuse of power or of position or vulnerability of the giving or receiving of payments or benefits to achieve the consent of person having control over another.
- 4. For the purpose of exploitation of the victim and;
- 5. That the accused person participated in the commission of the offence.

I will now turn to evaluate the evidence that was adduced by the prosecution to prove the above ingredients of the offence of aggravated trafficking in children.

That the victim was a child. 1.

Section 2(a) of the Prevention of the Trafficking in Persons Act defines a child as a person below the age of 18 years.

It is alleged by the prosecution that Kapiyo Junior, the victim, was fifteen years at the time the offence was committed. The prosecution led the evidence of the victim PW1, who testified that he was born on 13th September 2005 and that in 2021 he was aged 15 years old. Dr. Buluke Ronald, PW5, a Clinical Medical Officer tendered in Police Form 3A as the evidence of a medical examination report that he recorded in respect of the victim. He testified that he examined the victim and found he was 15 years of age based on the second molars on both jaws. This evidence was corroborated by the testimony of PW2, the mother to the victim, who informed this court that the victim was fifteen years at the time the offence was committed since he was born on 13th September 2005

Regarding this ingredient, it was stated by Justice Paul Mugamba in the case of Uganda vs. Kodo Muhumuza HCT-05-CR-SC-119/2001 that the best way to prove age is by the production of a birth certificate in court and where it is not produced, court can rely on the testimony of the parents and court's own observation among others. Based on my observation, when the victim testified before court he appeared to be aged below 18 years. I am satisfied that the prosecution has proved this ingredient beyond reasonable doubt.

\$2.\$ The act of recruiting or transporting or transferring or harboring or receiving of the victim of trafficking in persons.

In order to prove this ingredient, the prosecution led the evidence of PW1, the victim who testified that he was a fish seller and that he would move around the village to sell fish of which the accused were among his customers who borrowed fish from him and with this he would always go and demand his money worth UGX. 2000. That being a fish seller he would love to people's homes. This evidence was corroborated by PW2 who testified that she used to send the victim to sell fish to different people. PW1 further testified that on arrival at the home of the accused persons, he was asked to enter the house and that the accused closed the door. In *Uganda V Mpagi Didas HCT-00ICD-004-2020 Wangutusi J*, citing the decision in the case of the *State vs. Koch (CC20/2017) (2018) NAHCMID290* observed as follows;

"In my view, an act of receiving and harboring a child would be complete if there was evidence to show that the accused allowed or tolerated the presence in his dwelling of the minors to facilitate the pursuit of his unlawful intention with them, or in the circumstances where had their presence there been known by their parents, the parents would have objected thereto fully aware of the risks."

In the current case before me there was no evidence led by the prosecution to show that the accused allowed and tolerated the presence of the victim in their dwelling. Let's look at the time at which the victim came to A2's home and they closed the door. DW2 testified that the victim came by himself with a book in his hands. DW1 corroborated her evidence that she didn't know how the victim entered A2's house that she found him inside the house with a tray of fish at around 8:30pm. That the victim requested A2 to spend the night at their home as his mother had evicted him. Practically people close their houses at night from safety purposes and I believe that the act of closing the door at that time did not amount to confinement as they had closed the door for safety reasons and considering the fact that the victim used to play football with the nephew of A2 near her home and would sell fish to her they could not treat him as a stranger. DW2 testified that it was true the victim was demanding him and she paid the said money.

In my opinion it would amount to confinement if they left him to spend a night there but it was DW1's testimony that she advised DW2 not to allow the victim to sleep in their house and before they knew it people were already knocking at their door. Prosecution also led the evidence of PW2 Kirabira Aidah the mother to the victim who testified that the neighbours are the ones who told her that they have been seeing the victim entering the house of the accused without asking him what he goes to do there. This corroborates the evidence of PW1 who testified that he would go to A2's house to demand his money for fish and this therefore rules out the transportation element as the victim would willfully and in good faith go to the house to read a book and also demand his money. The same reason is what he told court when he was asked what he would go to do in the accused's house yet he knew that they would defile him.

For the above reasons, I find that the prosecution has not proved this ingredient beyond reasonable doubt.

\$3.\$ The above acts should be done by means of threat or use of force or other form of coercion, of abduction, fraud of deception of the abuse of power or of position of vulnerability of the giving or receiving of

payments or benefits to achieve the consent of person having control over another.

In order to prove this ingredient, the prosecution led the evidence of the victim PW1, who testified that he went to the accused persons' home to demand for his money from A1. PW1 further stated in cross examination that he was not coerced to go to the accused's home. It was the evidence of PW2 that she was told by the neighbours that they would see the victim entering the house of A2. This evidence rally shows that the victim was neither pulled, forced nor beaten to enter the house. It was the testimony of DW2 that as she was in the house she heard knocks on the door and someone called Jaaja three times and she responded the third time and the door was half open. That she asked the victim why he came to the house at 7pm and that the victim told him that he wanted to spend the night at her home having been sent away by the mother. Her evidence was corroborated by DW1 who testified that she found the victim inside the house with a tray of fish and that the victim came to their home requesting DW2 to allow him spend a night at their home as his mother had evicted him. Both the accused denied having called the victim to their house and neither did the victim state that the accused called him to the house of A2. There was no evidence led to show that the victim was threatened or forced to enter the house as he entered willfully and in good faith so in the absence of such evidence I find that this element has not been proved fully.

\$4.\$ For the purpose of sexual exploitation of the victim.

It is trite law that sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually it is proved by the victims' own evidence and corroborated by medical evidence or any other cogent evidence. See Uganda Vs Kato Session Case 11 of 2022.

PW1 testified that when he went to the accused persons' house for the first time, A1 touched his private parts, put a condom on his penis and had sex with him. He also testified that when he went to the accused persons' home for the second time, A2 told him to come over to her and asked him to do what he was doing with A1 the last time he had come to the house. He testified during cross examination that he slept with A1 two times but did not inform police about the two times that he had sex with A1. That A2 slept with him once but that he did not tell the police about that one time and that he did not tell the police the number of times he had sex with the accused person and only informed the police that he had had sex with both accused persons. The said used condom was not recovered at the scene of crime.

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The prosecution also led the evidence, PW5 the Medical Doctor who examined the victim informed court that he examined the victim who was in a fairly general condition and of normal mental state. That he examined the victim and found that he had a developing circumcised penis

that he conducted the blood test which was HIV negative and there were no other observations. He testified further that the victim was sexually immature as his penis was still developing. He could not confirm whether the victim had actually had sex with the accused persons as alleged since he didn't find any bruises on the body, penis and vaginal fluids during the medical examination.

DW2 testified that with the help of light from a tadooba she did not see DW1 sleep with the victim. One would wonder why the victim kept going back to the A2's house yet he would know that they are going to sexually molest him and also why did he hesitate to tell the mother that DW1 and DW2 were sexually exploiting him. In *Ntambula Fred vs. Uganda SCCA No. 34 of 2015*, the Supreme Court was dealing with aggravated defilement. It was held that a conviction can be solely based on the testimony of the victim as a single witness, provided the Court finds her to be truthful and reliable.

According to the victim's statement dated 15th November 2021 and marked as DEX1 the victim denied having had sex with the accused person as he stated that he was reading a book at the accused's home. His testimony was corroborated by PW3 the chairperson of mailo mpiri who testified that when he asked the victim what he was doing in the accused's house, the victim told him that he was reading a book and the said book was recovered by the chairperson and that he gave it to PW2 Kirabira Aidah who took it to police. PW1 in his 2nd statement dated 19th November 2021 marked DEX2 he admits having had sex with the accused which I think was an afterthought. It was also the testimony of PW4 Detective Corporal Kebeti Moses that while at the crime scene he drew a sketch plan and re-interviewed the victim who told him that A1 used a condom on him and forced him into sex however he did not retrieve any condom from the scene of crime. He testified further that they searched the house of A2 but could not find any item of evidential value that they could pick from the house. The evidence adduced by the witnesses does not support the allegation that the victim was sexually exploited and I don't really find his testimony truthful and reliable. The victim himself admitted having lied at police and I am not sure whether what he told this court is true. The evidence that would have helped him prove the allegations also pointed otherwise and that is the evidence of the medical doctor PW5 who testified that on examination of the victim he found

out that the victim was sexually immature with developing circumcised penis, HIV Negative and no bruises or wounds or even vaginal fluids. In the absence of any evidence corroborating his evidence, I am not convinced that the evidence adduced by the State proves that the accused persons sexually exploited the victim as he himself told PW3 that he was reading a book. It's actually possible that he was reading a book because even after being beaten he stood by his word that he was reading it until he was forced to tell lies. It was his testimony still upon being cross examined by court as to why he went to the accused's home 3 times yet he was being defiled, he stated that he had gone to demand for his money and that he did not report the alleged defilement to anyone. This clearly shows that the victim was not sexually exploited as he is being used due to grudges.

The assessors expressed a joint opinion that the prosecution has not proved this element beyond reasonable doubt and I do agree with that.

\$5.\$ The accused person participated in the commission of the offence.

This ingredient can be proved by direct or circumstantial evidence. The principles for identification of an accused person were laid down in the case of Abdallah Nabulele and Anor versus Uganda Crim. Appeal No.9 of 1978 in which case court stated that:

"The Judge should then examine closely the circumstances in which the identification came to be made, particularly the length of time the accused was under observation, the distance, the light and the familiarity of the witness."

Prosecution led the evidence of PW1 who stated that he had known the accused persons for 2 months and that the accused persons were his neighbors. He testified in his first statement made at police that he would go to A2's house to read a book and also demand for his money worth UGX. 2000.

PW3 the chairman of Masese III-Sauriyako Zone where the accused persons reside testified that when he interrogated the victim about what he was doing in A2's house he told him that he had come to demand his money for fish worth 2000 shillings and also that he was reading a book and that the said book was recovered by the chairman and given to the mother of the victim. PW3 further told court during cross examination that he has never received any case against the accused persons and that they have been good citizens for the years that he has known them.

DW1 and DW2 testified that they never invited the victim to come to their home and that the victim was known in the village as a fish vendor and a neighbor to them. This evidence was corroborated by the testimony of PWI who

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testified that being a fish seller he would move to people's homes to sell fish. DW1 and DW2 testified further that they were implicated because of the grudges between DW1 and Opendi's wife who alerted the victim's mother. DW1 testified that on 14th day of November 2021 A2's brother (Opendi) came to their house and started touching her feet, buttocks and thighs while she was asleep and his daughters were watching him do so. That the daughters went and reported to their mother about what was happening. That she later heard Opendi and his wife quarreling. DW2 corroborated her evidence that it all started when Opendi was touching A1 and the children reported to their mother which made her angry. She testified that Opendi is her brother who is married and that as they were inside the house with the victim that is when Opendi's wife told the victim's mother that the victim was in their house and that shortly after they heard people knocking at their door. It was further her testimony that people started condemning Opendi's wife upon which on Wednesday 17th November 2021 she packed her clothes and disappeared from the home. PWI confirmed that he had ever witnessed conflict between his family and the accused persons. That A2's daughter and his mother never

used to greet each other. The act of Opendi's wife leaving the village soon after the incident left me wondering and believe in the saying that guilty ones run before they are caught.

I therefore concur with the submissions of Counsel for the accused that this was a set up by an angry and jealous wife of Opendi who suspected that DW1 was having an affair with her husband Opendi. This was reasonable for Opendi's wife to react that way given her suspicions. This is evidenced by the testimony of DW1 and DW2 that it was Opendi's wife who alerted the mother to the victim that the victim was in A2's house. It was the testimony of PW2 that she was told by the neighbours to the accused that they used to see the victim enter A2's house.

On the whole, I am not convinced that adequate evidence has been adduced by the prosecution to prove that the accused persons participated in the offence.

In their joint opinion, assessors advised this court to acquit both accused persons and I am in agreement with them.

DISPOSITION ON COUNT 1

I hereby, find you Tukamuhebwa Juliet(A1) not guilty of the offence of Aggravated Trafficking in Children contrary to section \$3(1)(a)\$ and \$5(a)\$ of the Prevention of Trafficking in Persons Act of 2009 and I accordingly acquit you.

AND

I, hereby, find you Aboth Madina (A2) not guilty of the offence of Aggravated Trafficking in Children contrary to section \$3(1)(a)\$ and \$5(a)\$ of the Prevention of Trafficking in Persons Act of 2009 and I accordingly acquit you.

COUNT TWO: DEFILEMENT CONTRARY TO SECTION 129(1) OF THE PENAL CODE ACT

The particulars of this offence are that Tukamuhebwa Juliet on the 14th day of November 2021 at Maseses III-Sauriyako Zone Walukuba in the Jinja city performed a sexual act on Kapiyo Junior, a boy aged fifteen.

Section 2 (1) of the Penal Code Amendment Act, 2007 defines defilement as an act of performing sexual intercourse with another below the age of 18 years

The ingredients for the offence were laid down in the case of Uganda V Mawadri Joel CR-SC 0012/2018 as follows;

- 1. That the victim is below the age of 18.
- 2. That there was a sexual act performed on the victim.
- 3. That the accused participated in the offence.

The evidence of age of the victim has already been discussed above. The same is true about the element of performance of a sexual act, which I have examined in my discussion of the element of sexual exploitation under the first count of Aggravated Trafficking in Children. Similarly it goes without saying that the prosecution has failed to establish the element of participation of the accused person, A1, in the commission of the offence of defilement

In conclusion, I find and hold that the prosecution has failed to adduce sufficient evidence requiring the accused persons to be convicted.

DISPOSITION ON COUNT 11:

I, hereby, find you Tukamuhebwa Juliet (DW1) not guilty of the offence of defilement contrary to section 129(1) of the Penal Code Act as amended and I accordingly acquit you.

I so order.

Judgment read in open court on 14th June 2024.

HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI **JUDGE**

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