

**IN THE CHILD-FRIENDLY GENDER-BASED VIOLENCE CIRCUIT COURT,
DOVVSU HEADQUARTERS, ACCRA, BEFORE HER HONOUR JUDGE DORA G. A.
INKUMSAH ESHUN (MRS.) SITTING ON MONDAY THE 31ST DAY OF JULY 2023**
SUIT NO: D12/006/2022

THE REPUBLIC

V.

MOSES GATOR

**RULING ON WHETHER THE PROSECUTION HAS MADE OUT A CASE FOR THE
ACCUSED PERSON TO ANSWER VERDICT**

The accused person, a 42-year-old trader, was arraigned in court on 18th August 2022 on a charge of defiling his 14-year-old stepdaughter in 2018 at Doboro in Accra, contrary to **section 101 of the Criminal and Other Offences Act, 1960 (Act 29)**.

The brief facts are that the complainant Evelyn Dzamesi (PW1), a caterer, who lives at Doboro, is the victim's mother. She was married to the accused person, a 42-year-old building contractor who lives at Nsawam, Okanta. The three parties lived together at Doboro. In the year 2020, while the family was sleeping in the same room, the complainant woke up around 1 am to check on the tap and saw the accused person lying next to and having sexual intercourse with the victim. PW1 screamed and the accused quickly jumped off from the victim and went to lie beside PW1. This brought a misunderstanding between them. PW1 insisted on sending the victim to the hospital for an examination but the accused person refused.

When PW1 interviewed the victim the following morning, she said the accused person started having sex with her when she was 11 years old. The victim said that in 2018 while she was fast asleep, she noticed someone touching her and woke up to see the accused person lying beside her. She tried to get up, but the accused person warned her not to and

threatened her not to tell anybody about his actions or else she would die. He then removed her trousers and panty, pulled his boxer shorts to the knee level, inserted his penis into her vagina and had sexual intercourse with her for the first time. This happened on several occasions until the complainant caught them in the act.

After the incident, the accused person pleaded to perform some purification rites but failed to do so. He abandoned the family and relocated to another place. When the complainant reported the matter to FIDA, the accused person was invited and interrogated. The matter was then reported to DOVVSU/AR. The victim was medically examined, and a report submitted. The accused person was arrested but denied the offence in his caution statement.

The prosecution called seven witnesses:

1. Evelyn Dzamesi, the complainant (PW1),
2. Priscilla Gator, the victim/survivor (PW2),
3. Torgbui Dzamesi the victim's grandfather and complainant's father (PW3),
4. John Dzamesi the complainant's brother (PW4),
5. Det. P.W. Insp. Charlotte Duku, the investigator (PW5),
6. Susan Aryeetey, the Acting Executive Director of the International Federation of Women Lawyers (FIDA), Ghana (PW6), and
7. Chief Supt. Dr. Nana Kwame Appiah Nkansah, a medical officer from Ghana Police Hospital, Cantonments, Accra (PW7).

The following documents were tendered into evidence:

1. Police written statement by Evelyn Dzamesi dated 13th June 2022 (Exhibits A and A1).
 2. Police written statement by Priscilla Gator dated 13th June 2022 (Exhibits B and B1).
 3. Police written statement by Torgbui Dzamesi dated 12th July 2022 (Exhibits C and C1).
 4. Police written statement by John (Jama) Dzamesi dated 6th July 2022 (Exhibit D).
 5. Police written statement by Moses Gator dated 28th July 2022 (Exhibits E and E1).
 6. Police written statement by Moses Gator dated 7th July 2022 (Exhibits F and F1).
 7. Radiology Report on Bone Age Determination dated 1st July 2022 and signed by Dr. Francis Osei, Senior Specialist Radiology at the Ghana Police Hospital (Exhibit G).
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8. Police General Medical Form, Sections A and B, dated 13th June 2022 (Exhibits H and H1).
9. Police written statement by Susan Aryeetey, dated 6th July 2022 (Exhibits J and J1).
10. Summons from Traditional Service Organization, Arbitration Court of Torgbui Zakada, Agbi Shrines Association of Ghana, dated 13th May 2022, signed by Mama Minao Ladzeshie IV with letterhead cover with the following stated, *“Madam Evenly Dzameshie and Madam Priscilla Dzameshie all of Nsumia Dobloe, Nsawam”* attached (Exhibit K).
11. Letter headed *“Re: Summons”* from a Legal Aid Officer at FIDA to Mama Minao Ladzeshie IV, Torgbui Zakadza, High Priestess, Nogokpo, dated 18th May 2022 (Exhibit K1).

The following documents were filed by PW6 but were not tendered into evidence;

1. Letter from FIDA to the Registrar of the CF-GBVC, Accra dated 27th April 2023, and
2. FIDA Legal Aid Programme Information Sheet 1 – Client Application Form for Evelyn Dzamesi dated 30th March 2022.

In **section 174(1) of the Criminal and Other Offences Procedure Act, 1960 (Act 30)**:

“At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused, sufficiently to require the accused to make a defence, the court shall call on the accused to make their defence and shall remind the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement” [in Logan and Laverick v. The Republic [2007-2008] SCGLR 76].

In **section 101(2) of Act 29**, a person who naturally or unnaturally carnally knows a child under sixteen years of age, with or without their consent, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years.

The elements of the offence of defilement are that the;

1. accused person naturally or unnaturally carnally knew the victim, and

2. victim was under sixteen years of age at the time of the offence.

This is a strict liability offence as it does not matter whether the victim consented to the natural or unnatural carnal knowledge [Republic v. Yeboah [1968] GLR 248].

To determine whether the prosecution has made out a case, sufficient for the accused person to answer, the court must consider whether the;

1. victim was under the age of 16 years at the time of the offence, and
2. accused person naturally or unnaturally carnally knew the victim.

The standard of proof for the prosecution in **section 173 of Act 29** was discussed in Logan and Laverick v. The Republic [2007-2008] SCGLR 76¹ as follows:

Section 173 is concerned with summary trials where the judge decides both questions of law and fact. It is for the judge in a summary trial to weigh the evidence and then decide whether from the facts proved, the guilt of the accused can be inferred. Evidence is said to be sufficient when it is of such probative force as to convince and which if un-contradicted, will justify a conviction... where therefore, the evidence adduced on behalf of the prosecution fails to take the case out of the realm of conjecture, the evidence is best described as 'insufficient'. It is the type of evidence which because it cannot convince, cannot be believed, and therefore is incapable of sustaining conviction.

The second issue is resolved by the Bone Age Determination Report (Exhibit G) which states that the victim is estimated to be between 14 and 16 years as of 1st July 2022.

The court will now consider whether the accused person carnally or unnaturally knew the victim in 2018 at Doboro in Accra. PW1 testified that she has been married to the accused person for 12 years. She brought two children into the marriage, and they have one child. She gave birth to the victim on 12th October 2007. The parties and all their children lived in the accused person's house at Doboro close to a bar, restaurant, and depot. In 2020, the

¹ Cited in Mensah, K. & Nyinevi C. (2016). *The Lawyer's Companion, A Guide to Researching Ghanaian Case Law: Cases from 1959 – 2015*. 597-598.

family was sleeping in the same room when she woke up around **12:00 pm** to check on their tap. She saw the accused person lying on the victim and having sexual intercourse with her. The accused person quickly jumped off from the victim and came to lie on their bed after PW1 screamed.

When PW1 asked the accused person why he had sexual intercourse with the victim, he said he would slap her against the wall, so she rushed to pick a bottle to defend herself in case he tried to assault her. She screamed for the second time, causing her junior brother John Dzamesi and his wife to come to their room. PW4 however testified that PW2 came to call him. Accused counsel noted that in PW1's brother John Dzamesi (PW4)'s police written statement (Exhibit D), he stated that when he entered the room of the parties, they were sitting on the bed arguing, contrary to PW1's testimony that she moved away from the bed to pick up a bottle to defend herself when the accused person threatened to slap her. PW4 did not mention a bottle.

PW1 continued to testify that when the accused continued to deny the offence, she decided to take the victim to the hospital for examination, but the accused person refused and admitted he had offended them and was ready to perform the necessary custom and traditions. Accused counsel put it to PW1 that contrary to her statement that the accused prevented her from taking the victim to the hospital, her brother, PW4 said in his written statement that he told PW1 not to take the victim to the hospital on the material date. PW1 admitted that the accused did not personally prevent her from taking the victim to the hospital but testified that he told her brother who was working with him, to stop her from taking the victim to the hospital from 2020 till 2022. Then PW1 admitted that as a mother, if the incident had occurred, she would have found a way to take her child to the hospital between 2020 and 2022.

PW1 called Mr. Kwaku Tamaklo, the accused person's uncle, on the phone and explained the situation to him. He promised to come to resolve the problem but failed to do so. The next morning, the accused left the house and never returned. When she interviewed the victim, she said the accused person had been having sexual intercourse with her since she

was 11 years old, but he threatened her not to tell anyone about it or else she would die.
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accused also told the victim he had been having sexual intercourse with his own daughter, but nothing happened to her, so nothing would happen to the victim – this particular statement is not corroborated by any of the other prosecution witnesses.

According to PW1, the accused went into hiding for many months. She only found out his whereabouts in February 2022 when she reported the matter to FIDA, and he was invited. He failed to comply with FIDA's orders and went to PW1's hometown to seek a divorce. The accused admitted committing the offence at FIDA and promised to perform the customary rites but failed to do so. As a result, FIDA referred the matter to DOVVSU/AR and PW1 took the victim there on 13th June 2-22 to lodge a complaint. PW1's statement reflected her statement in Exhibits A and A1.

When PW1 was asked in cross-examination whether she was aware the accused was put before the court for an alleged incident that took place in 2018, she answered in the negative. When it was put to her that she did not witness any incident in 2108, she denied it and when the court asked her to clarify her answer she said, *"Please when I witnessed it, it was not 2020 but 2018"*. When the question was put to her again, she answered, *"Please I did not see anything in 2018. It was 2020."*

PW1 admitted that the family lived in a single room measuring 12 by 12. She and the accused person slept on the left side of the room while the children slept on the right side. The children slept on two combined mattresses – there was some dispute as to whether there were two student mattresses or one and a half mattresses. The children slept near the accused and PW1 – with a chair between them. Accused counsel pointed out that PW1 stated in her evidence that she saw the accused person having sex with the victim at 12 midnight, yet she reported to the police in Exhibits A and A1 that it was at 1 am. The court notes that the investigator reported in the facts that the incident occurred at 1 am while PW2 testified it was 2 am.

Accused counsel said PW1 was untruthful because of the inconsistencies in her story. He put it to her that PW2 wore a blue jean trouser to bed and when PW1 woke her up, she took off the trouser and inserted her finger into the victim's vagina while accusing the accused

person of having sex with PW2. PW1 denied inserting her finger into the victim's vagina or examining her on the material date. Accused counsel noted that this testimony contradicted PW1's narration of the events to her head of family when she stated that she saw residue semen on her daughter after examining PW2 on the material date. Accused counsel also put it to PW1 that it was impossible for the accused to have sex with the victim on the student mattresses while her siblings slept next to her, without them waking up.

PW1 denied telling Torgbui Dzamesi (PW3) at a family meeting that she did not see the accused person having sex with her daughter. She also denied that PW3 informed the police of this fact in his written police statement (Exhibits C and C1). Counsel put it to her that the distribution of matrimonial property, the reason she first went to FIDA for assistance, was the reason she filed the complaint against the accused person. He also put it to her that she was in the habit of accusing the accused person falsely of having sexual intercourse with other persons. She denied that her report to the police was made from malice or that she had coached her daughter on what to say in the case and insisted the accused person slept with the victim.

When enquiring into whether Priscilla Gator, the victim (PW2), was a competent witness, the court found that she could express herself to be understood in Twi. She stated that she knew why she was in court but would not answer the question why she had come to court. She said she knew the difference between the truth and a lie but could not tell the court what the difference was. She said she knew the importance of telling the truth about what she was coming to tell the court but could not tell the court why, although the question was repeated. The victim testified via video-link from the testifying room. Considering the way the cameras were set up, she could not see the Judge. After rising to stand within the view of a camera so PW2 could see the judge and feel more at ease, she told the court she could not answer the question as to why it was important to tell the court the truth about her statement. Accused counsel stated that PW2 has maintained this silence even when she went to the investigator. Considering her age and awareness, the court permitted PW2 to give her statement and allowed accused counsel to cross-examine her.

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PW2 testified that she used to live in Doboro under the same roof as PW1, the accused and her two siblings. In 2018, when she was fast asleep, she noticed a hand touching her. She woke up and saw the accused person lying beside her. She tried to get up, but the accused warned her not to and threatened that she should not let anybody know his action, or else she would die. He then removed her trousers and panty, pulled his boxer shorts to knee level, inserted his penis into her vagina and had sexual intercourse with her for the first time. It happened on several occasions until PW1 woke up from her sleep and caught them in the act at dawn one day in 2020. This caused a misunderstanding between PW1 and the accused person. PW1 called her uncle John Dzamesi (PW4) but the accused denied the allegation when he arrived. PW1 insisted that they all go to the hospital for PW2 to be examined by the doctor. The accused *"...admitted and claimed he will perform all the customary rites he is expected to do"*. The following morning when they woke up, the accused was nowhere to be found. When PW1 confronted PW2 about the incident, she revealed her ordeal and told her that the accused has been having sex with her since she was 11 years old. She could not tell PW1, because the accused threatened that she would die if she told anyone else. This testimony reflected PW2's statement in Exhibits B and B1.

PW2 identified the accused person in the dock through the video link and admitted that in 2018 she lived with him, her mother, and siblings at Pokuase Abenso in a single room. She slept on two combined student mattresses with her siblings with little room in between them. She could not remember the date on which the incident in 2020 occurred, however, it occurred around 2 at dawn. When it was put to PW2 that it was not possible for the accused to lie beside her on the combined student mattresses she lay on with her siblings, she responded twice, *"I don't understand"*, and finally responded with silence. When it was put to PW2 that her siblings would have woken up if the accused threatened her verbally while he was allegedly sleeping next to her on the bed, PW2 said that her brother usually slept on the bed next to her parents while her sister slept next to her on the mattress.

PW2 testified that she was a virgin before the incident in 2018 – she did not tell anyone about that incident. She was wearing jeans and a top when she was sleeping on the material date in 2020 – she wears that sometimes. She confirmed that either she or her

mum washed her clothes, but on the day after the incident, she washed her own clothes.
When she was

asked whether she would be surprised that her mother PW1 told the court she was wearing a cloth that day, PW2 answered, *"No, I am not surprised"*. PW2 denied that it was her mother who woke her up, pulled down her trouser and panty and inserted her finger in her vagina.

When she was asked the following about David Gator, the accused person's son, *"Do you recall that in a phone call with the said David Gator, you told David Gator that accused person did not do anything and that it is your mother who is making you say these things?"*, she answered, *"Yes please"*. When she was asked whether her mother took her to the hospital after her stepfather left the house in 2020, PW2 answered, *"Please no... Please she took me. She was taking me, and my father said she should not take me."*

She admitted that the accused did not return to the house when he left after the incident in 2020. She also admitted that when she was taken to the scene of the crime by the investigator, she did not utter a word. She said it was because she was afraid to say that the accused person had sexual intercourse with her. She clarified in re-examination that she told David Gator that her father did nothing to her and she was not permitted to speak at FIDA or DOVVSU – only her mother was allowed to speak. David Gator is older than her and is in the university. This statement is contradicted by the testimony of PW6 who said that the child was called into another office at FIDA where she told officials the accused had defiled her since she was 12 years old and had been defiling his own daughter.

The court noted that the child was timid and had to be encouraged to speak up many times – considering her demeanor, the court ordered that she be enrolled in counselling while she was in school.

Torgbui Dzamesi (PW3), the grandfather of PW2 and father of PW1, presented a different version of the events. He testified that in 2020, PW1 called him to say that someone had defiled the victim and she suspected his son-in-law, the accused. He invited the accused and PW1 to his village at Adaklokpogadzi where both families sat on the issue. When PW1's family head confronted her on the issue, she said when she woke up at midnight,

something prompted her to check on the victim and she saw some sperms on her. She then called the accused person from his sleep and questioned him, but he denied it. PW1 then called her

brother Sitsokpe Dzamesi to check on the victim but he failed to do so. When she tried to send the victim to the hospital, the accused person told her it was late.

When family members asked PW1 whether she saw the accused person lying on the victim, she replied “no” and stated that she was only suspecting him. When the accused person was questioned, he denied the allegation and swore to it. PW3 then advised PW1 to leave it for God to judge – if the allegation against the accused person was true, it would surely come out one day. The parties returned to Accra. Later, the accused called PW3 on the phone to tell him that PW1 had refused to let him touch her and if it continued, he would have no option but to seek for divorce. Later, the accused brought 2 bottles of Castle Bridge to seek a divorce. PW3 told the accused to bring PW1 or else they would not accept the drinks. The accused returned later with PW1 and PW2. When PW2 was interviewed by PW1’s sisters, she claimed nothing had happened to her and that the accused was innocent. Afterwards, when PW1 reported the matter to the police PW3 gave his statement to the police. PW3’s statement is reflected in Exhibits C and C1.

PW3 confirmed in cross-examination that PW1 admitted to him and the family at the meeting that she did not see the accused person lying on the victim, but only suspected him. PW3 also confirmed that when PW2 was interviewed by PW1 and her sisters, she told them the accused did nothing to her. The accused brought drinks to the family after the incident to divorce PW1 because she was “...not understanding the whole issue”. When PW3 was asked whether he was surprised PW1 told the court the accused had sexual intercourse with PW2, he answered, “They didn’t say that to my hearing”.

John Dzamesi (PW4), the younger brother of PW1 and PW2’s uncle, testified that he is a driver who lives at Ho. In 2020, he went to stay with the parties for some time to learn a trade. One night at **12:00 am**, the victim came to call him from his room to say the accused person wanted to see him. **When he rushed to the room, he met the parties sitting on their bed and arguing at the top of their voices.** The accused person asked PW4 to listen to the complainant’s allegation that he was having sexual intercourse with the victim and asked whether it was possible. When PW4 confronted PW1 about the incident, she said it

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was true. When PW1 insisted on sending the victim to the hospital, the accused person told PW4 to stop her because it was late, so PW4 convinced PW1 to hold on until daybreak.

The following day, the accused confronted PW4 about the incident and advised him to advise PW1 not to take PW2 to the hospital. PW4 said he became confused by the accused's actions and told PW1 to stop going to the hospital. Then he moved out of the house and returned to Ho. The following day, the accused called while PW4 was at work and asked whether PW1 sent PW2 to the hospital. PW4 asked what his interest was in the matter because if he continued, PW4 would doubt him. The accused told PW4 that if he followed PW1, he would leave the house for them as he had already given the house to them. PW4's testimony was reflected in Exhibit D.

PW4 admitted that he did not witness the alleged incident in 2018. On the material date in 2020, he did not see the incident with his "eyes". He was in the next room when the child called him. When he ran to the room, the parties were quarrelling. The accused person said he woke up and realized there was no cloth around the child. After he covered her, PW1 accused him of sleeping with the child. The accused asked PW4 whether he could do such a thing and PW4 asked PW1, "*This is what your husband is saying, does it mean he really did it?*" PW1 responded, "*He did it*".

PW4 testified that after the accused left the house, he was told one day by an apprentice that the accused said he should no longer train PW4, so PW4 left the house in December 2020 – accused counsel noted that this was not stated in PW4's witness statement or written police statement. PW4 insisted the statement was true and added that he informed the accused's brother, the accused and PW1 that because the accused was no longer training him, he would leave.

PW4 said he did not ask PW2 any question on the date of the incident. He denied writing in his police statement that he tried to interview the victim, but she never uttered a word. PW4 testified that the investigator wrote down the statement he gave in Twi at the police station. The first statement had part of his father's statement in it. When he told her it was

not his statement, she took his statement around 4 o'clock and because it was late, she did not read

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it back to him. PW4 then told the court that he did try to speak with the victim about the incident, but she did not respond to his questions.

Detective P.W. Inspector Charlotte Duku (PW5) the investigator, testified that the case was referred to her on 13th June 2022. She has been an investigator for 15 years. Statements were taken from the parties involved and a medical report form was issued and returned. On 27th June 2022, a police wireless message was sent to the Nsawam police for the arrest of the accused person. PW5 went to Nsawam with another officer to bring the accused person to the DOVVSU/AR. The accused denied the allegation. Since PW1 could not produce a birth certificate or weighing card for the victim, PW5 took her to the Police Hospital on 30th June 2022 for her age to be ascertained.

PW1 led the police, victim and accused person to the scene of crime at Doboro near Nsawam, where she narrated and demonstrated to the police how she saw the accused person lying on the victim and having sexual intercourse with her. *“Victim on the other hand failed to alter [utter] a word or demonstrate anything to police at the scene”*. After her investigation, she charged the accused person with defilement and arraigned him before the court.

In cross-examination, PW2 conceded that not all complaints made to her in her 15 years of service have turned out to be true. The complaint was made on 13th June 2022 in respect of events in 2018 and 2020. She admitted the event that occurred in 2018 could only be within the knowledge of PW2 and the accused. According to PW5, the accused was not charged with the events in 2020 because PW1 could not prove them. When PW5 asked PW1 why it took her so long to report the events, she stated that it was because she reported them to FIDA at Madina – she was aware this report was made in 2023. The victim gave her statement in the absence of her mother, PW1. When asked whether the medical form aided PW5 to link the accused to the offence, PW5 replied in the affirmative and testified that the medical form proved the victim was defiled and the victim said the accused defiled her.

In response to counsel’s question, *“I further put it to you that the only thing that the medical report shows is a missing hymen and does not have a conclusion on defilement on that*

medical report", PW5 answered, *"Yes my lady."* PW5 admitted that the accused person denied committing the offence at all material times. She also admitted that she did not visit the scene of the alleged crime in 2018 at Pokuase Abenso. She only visited the scene of the alleged crime in 2020. PW5 then backtracked and said she visited the scene of the alleged crimes for both 2018 and 2020 – yet, in her witness statement, she stated that she visited the scene of the alleged crime at Doboro in Nsawam and said nothing about visiting Pokuase. In response to counsel's assertion that if she had conducted a thorough investigation, she would have known the parties lived at Pokuase in 2018, PW5 answered, *"My lady I did visited the crime of scene for both 2018 and 2020 incident because victim claimed it all happened at Doboro but not Pokuase."* PW5 noted the proximity of the sleeping area of the parties to that of the children. She also admitted that the statements of the various witnesses were conflicting but denied she conducted an armchair investigation, relying heavily on the account of PW1 without considering the accused's side of the story.

Madam Susan Aryeetey (PW6), the Acting Executive Director of FIDA Ghana, an organization that protects the rights of women and children, testified that PW1 filed a complaint against the accused person on 3rd March 2022, initially seeking FIDA's assistance to claim her share of property the parties had jointly acquired. She then added during the discussion that the accused was defiling the victim and wanted to divorce her because she witnessed him in the act. She stated that the accused started sleeping with the victim within two years of their marriage. She also said the accused person said she abused him physically, verbally, and emotionally and was seeking to divorce her.

The accused was invited initially on 30th April 2022 – but failed to show up twice. He called to say he lost his way to the office and the case was adjourned to 20th April 2022. When PW6 confirmed that complaints were taken on Mondays and their offices were open to the public from Tuesdays to Thursdays, accused counsel pointed out to PW6 that April 30, 2022, was a Saturday, therefore, FIDA's offices could not have been open.

When the accused visited FIDA, he claimed he had never been intimate with the victim – it was rather his 12-year-old son who had had sex with her when she was 7-years-old. PW1 however insisted that she had seen the accused on top of the victim and when she attempted

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to take the victim to the hospital for examination and treatment, the accused refused to allow her to do so. The accused told FIDA PW1 was lying because she wanted his property and he wanted to divorce her. The victim was called into another office where she revealed that the accused had been defiling her since she was about 12 years old and the accused's own daughter alleged he regularly defiled her. Accused counsel noted and PW6 admitted that this would bring the time frame of the beginning of the alleged defilement to 2020.

PW1 testified that she gave birth to PW2 on 12th October 2007 – if so, PW2 would be 15 years 9 months as of July 2023, the month of this ruling. PW1 told PW6 that the accused had begun defiling the child 2 years into their 12-year marriage. This would make PW2, 5 to 6 years old when she was allegedly defiled by the accused. Yet, PW2 told PW6 the accused had started defiling her from the age of 11 years and told PW6 the accused started defiling her from the age of 12 years.

PW6 admitted that while interviewing PW2, PW2 said that she was defiled by the accused's son David Gator when she was 7 years old. Accused counsel put it PW6 that this would put the date of around 2018 but PW6 could not answer the question. She then testified that PW2 told her the accused then defiled her in 2020.

At FIDA, PW1 said the accused person could not contact her until he went through purification rites in their hometown. The accused person was advised to go home, engage in the purification rites and provide financial and maintenance support for his son. According to PW6, the accused person sent a “*threatening*” voice message to the Legal Aid officer imploring her to institute proper investigations to absolve him of the allegation. He also stated that he would report the matter to the Novokpo Shrine in the Volta region. On 28th May 2022, PW1 visited FIDA with a letter requesting that PW1 report to the Novokpo Shrine on 21st May 2022 at 8 am without fail. The accused person insisted that if PW1 failed to turn up, he would not show up.

FIDA responded to the letter to say that PW1 would show up at the shrine after FIDA had addressed the issues. On 29th June 2022, FIDA reported the case of defilement to DOVVSU Ministries because it was not within their mandate. Upon counsel's request, PW6 filed,

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1. A FIDA Ghana Legal Aid Programme Information Sheet 1, Client Application Form for PW1 with notes on discussions held with the parties at FIDA for 30th March 2022, 6th, 13th and 20th April 2022, 11th and 18th May 2022, 8th June 2022, 6th and 7th July 2022 and 28th September 2022.
2. A letter headed “*Summons*” from Mama Minao Ladzeshie IV of the Arbitration Court of Torgbui Zakadza, Agbi Shrines Association of Ghana dated 13th May 2022 with the letterhead attached, and
3. A response from FIDA dated 18th May 2022 to Mama Minao Ladzeshie IV, Torgbui Zakadza, High Priestess Nogokpo asking that FIDA be permitted to conclude the matter. This letter was copied to the Nsumia Weku Nukpa, Nii Akramah Aku II of Nsumia Mantse We, Nsawam and the accused person, Moses Gator, of Nusmia, Accra.

The standard of proof in a criminal trial includes the burden of persuasion and the burden of producing evidence [sections 10 and 11 of the Evidence Act, 1975 (NRCD 323)]. The burden of persuasion is the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court [section 10(1) of NRCD 323]. It requires a party in a criminal trial to raise a reasonable doubt concerning the existence or non-existence of a fact or to establish the existence or non-existence of a fact by proof beyond a reasonable doubt [sections 10(2) of NRCD 323].

The burden of persuasion in a civil or criminal action “...as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt” [section 13(1) of NRCD 323]. “In a criminal action, the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on all the evidence, a reasonable mind could have a reasonable doubt as to guilt” [section 11(3) of NRCD 323]. In Ali Yusuf Issa (No. 2) v. The Republic [2003 – 2004] SCGLR 174, the Supreme Court held that the burden of producing evidence and the burden of persuasion are the components of “*the burden of proof*”.

On 29th March 2023, following a request by the investigator, Dr. Alex K Amaquando of the Ghana Police Hospital was summoned to appear to testify to the police medical form he

signed. The Medical Director of the Ghana Police Hospital wrote on 12th April 2023 to inform the court that the doctor had travelled outside the country and was not available.

Chief Supt. Nana Kwame Appiah Nkansah (PW7), an officer at the Out-Patient's Department of the Ghana Police Hospital, identified and confirmed the handwriting and signature of Dr. Amaquando and testified in his stead. He said:

"Dr. Amaquando is no longer with the Police Hospital. He is outside the country at the moment. The date on the report is 15 of June 2022 at 6:45 am. The report says 14-year-old Priscilla Gator came to the Ghana Police Hospital OPD with complaints of defilement by the stepfather. Patient came with the mother. She claims the stepfather has been having peno-vaginal sexual intercourse with her. Last time took place in June 2020.

On examination, patient was stable, systemic examinations were normal. On examination of the external vagina, patient has not actively bleeding. I think it may be, "was" ... "was not actively bleeding". There was copious whitish vaginal discharge, "no tear was seen". I can't make out what is in bracket ... "in the normal ..." I don't know what that is. However, the hymen was torn at 5, 6 and 7 o'clock, lower part of the introitus. Impression made was vaginal discharge (vaginitis) and absent hymen at the lower part of the introitus.

Lab requested came back as follows:

HIV 1 and 2 - nonreactive, VDRL-nonreactive, Hepatitis C- nonreactive, Hepatitis B – positive. Patient was referred to see the clinical psychologist and the Public Health Department. Signed and stamped by Dr. Amaquando."

PW7 explained in cross-examination that the positive test result for infection could be a result of either sexual infections like gonorrhoea or chlamydia, or fungal infections like candida which are not sexually transmitted. He disagreed with accused counsel's assertion that the normal flora of the vagina can be disrupted, affecting the PH of the vagina. He admitted that the positive Hepatitis B result for the victim was through sexual intercourse and stated that a viral load and viral profile test would enable a doctor to determine when the victim contracted Hepatitis B and monitor the progress of treatment. PW7 stated that

after treatment, some patients had their positive Hepatitis B test results converted into a negative result.

PW7 noted that the examination of PW2 which showed a torn hymen, took place in 2022, while the last reported incident was in 2020. There was no mention of an occurrence of defilement in 2018 – because of the period between the alleged incident and the date of examination, no DNA materials were collected. PW7 admitted that the observation of a torn hymen did not conclusively determine that it was the accused person who defiled the victim. He also admitted that a hymen can be broken by means other than sexual intercourse.

In Exhibits E and E1 (ICS) the accused stated that he and PW1 were married for 7 years and had one child. They used to stay at Doboro with her two children Priscilla and Patience Gator. In 2020, they were all sleeping in the same room when PW1 woke him up one midnight and started accusing him of having sex with his stepdaughter Priscilla Gator. The child was fast asleep but PW1 woke her up, removed her trousers and underwear and inserted her finger into the child's vagina to check on her. Since his brother-in-law lives in the same house, he shouted his name, and he came into their room with his wife. The accused told him about PW1's allegations. When her brother John (PW4) tried to interrogate her, she shouted at him that she was taking the victim to the hospital and police station, but her brother told her to stop.

The accused called a friend, the Mamprossi king, on the phone and informed him about the allegation. The king spoke to PW1 on the phone and said he would come the following morning to resolve the issue. When he came the next morning, PW1 insisted she saw him having sex with the child. The Mamprossi king asked the accused to call his family members who tried unsuccessfully to resolve the issue. Afterwards, the accused tried unsuccessfully to bring peace to the house. PW1 would not let him have sex with her and took possession of all his businesses and house without accounting for them. As a result, he decided to leave the house for her and the children and sent his family members to her people to ask for a divorce. PW1's father requested that the accused bring PW1. When her father asked her whether she had evidence of her allegation, she responded in the

negative, so her family brushed the issue off. Later, she brought the accused a letter from FIDA

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inviting them on the same allegation, which the accused denied. PW1 said she wanted the accused to pacify them. The accused ended his investigation caution statement with the statement *"In fact, I have never had sex with the victim as she is alleging"*. The court notes that PW5 did not include the accused's friend, the Mamprossi king within the scope of her investigation.

In his charged caution statement, the accused relied on Exhibits E and E1 and added that after the incident, the parties went to PW1's family in Ho, where her father *"Akozo Dzamesi"* interviewed the victim when both families met. The victim told their families that the accused had not had sexual intercourse with her. PW1 was asked whether she had any evidence and responded in the negative. The accused said he did not know why she reported him to the police. He believes she reported him to FIDA because he sent his family to ask for a divorce. He ended that statement by saying *"I have no idea about what they are accusing me of"*.

In The State v. Ali Kassen [1962] 1 GLR 144 it was held that;

"Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations. A submission that there is no case to answer may properly be made and upheld,

- a) when there has been no evidence to prove an essential element in the alleged offense;*
- b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so many manifestly unreliable that no reasonable tribunal could safely convict upon it.*

Apart from these two situations, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, that decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that that reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer".

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In accused counsel's written address filed on 4th July 2023 a plethora of authorities were cited, beginning with the principle in The State v. Ali Kassena (*supra*) which was adopted in several cases such as Kole v. The Republic (2009) 20 MLRG 39 CA and The Republic v. Iddrissu alias Mbadugu & 14 Others, Unreported, Criminal Case No. B.01/14/2010, 29th March 2011 (the *Ya-Na Case*).

Accused counsel also cited the following principle by Lord Devlin in the case of R v. Attaer reported in **The Times**, 22nd March 1956;

"Where one has a case where the evidence is purely circumstantial, then I must satisfy myself, in my judgment, that there is some piece of evidence that is more than mere suspicions, that there is some piece of evidence which would justify me in saying that points to the accused. You cannot put a multitude of suspicions together and make a proof of it."

Accused counsel cited **article 19(2)(1)** of the **1992 Constitution of Ghana** which states that, *"A person charged with a criminal offence shall – be presumed to be innocent until he is proved or has pleaded guilty"* [Okeke v. The Republic, (2012) 41 MLRG 53 at 61-62]. Counsel argued that the accused person should be acquitted and discharged on the following grounds:

1. Considering the architecture of the room PW1, PW2 and the accused slept in and the proximity of the sleeping areas, it is improbable that the alleged occurrence in 2018 happened.
 2. At the age of the alleged victim in 2018, the lack of observational testimony on the physical and emotional post effects of the alleged defilement makes the alleged occurrence even more improbable.
 3. There were inconsistencies in the testimonies of PW2 and other prosecution witnesses with respect to whether the accused person engaged in any sexual intercourse through the vagina of PW2 (alleged victim).
 4. The medical report and testimony of PW7 did not corroborate the already flawed testimony of PW2.
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5. The instant case was activated as a result of the misguided motives of PW1 and not on truth.
6. The investigator conducted a flawed, one-sided and armchair investigation heavily relying on only the words of PW2.
7. Holistically, the prosecution failed to prove its case beyond a reasonable doubt.

The court agrees with accused counsel on his first point to the extent that the size of the room and sleeping positions of the parties and the children were such that it would be difficult for anyone especially PW1 who should have felt the absence of the accused from her bed if he moved away for periods of time, to hear or see something. Although it is possible a defilement victim could be silenced by having their mouth covered during the act, this possibility was not included in the evidence.

The court disagrees with accused counsel on point 2 to the extent that research has shown that the reaction of sexual abuse victims to the crimes committed against them cannot be *generalized* or *normalized*. In a report submitted to the Department of Justice, Canada by Dr. Lori Haskell, C. Psych. and Dr. Melanie Randall it was stated,

*“Because the victim-witness in a sexual assault trial is, in the overwhelming majority of cases, the primary or even exclusive source of evidence, her testimony is of crucial importance. Yet it is precisely in how this testimony is heard, received, and understood, including misunderstood, that many of the difficulties in how the criminal justice system processes sexual assault cases arise. This is because many of the misunderstandings continue to arise from still commonly held rape myths, failures to understand common trauma reactions, and mistaken assumptions about small and apparent inconsistencies in recall about upsetting and traumatic events. These lead to the mistaken belief that victim-witness testimony lacks credibility or reliability.”*²

The report discussed various rape myths that have influenced the prosecution and adjudication of sexual assault cases, including,

2 Haskell, L & Randall M. (2019). *The Impact of Trauma on Adult Sexual Assault Victims*, Report Submitted to Department of Justice, Canada, 7, cited from: https://justice.gc.ca/eng/rp-pr/trauma/trauma_eng.pdf

“Another persistent rape myth is the baseless idea that women who do not promptly disclose or report sexual assaults are lying, or the mistaken idea that women who do not want to engage in sex will physically fight back and/or attempt to escape the situation to “prove” they really did not consent.”³

According to Haskell and Randall,

“Sexual assault is an experience of trauma, and trauma has a neurobiological impact – that is, it affects our brains and our nervous systems. For this reason, it is imperative that those working within the criminal justice system understand the impact of trauma on victims of sexual assault so they can process sexual assault cases more effectively and hear evidence in these cases fairly and impartially.”⁴

The court finds that this principle applies to children who may hide wrongs done to them for myriad reasons. The court respectfully declines to be persuaded by the reasoning in the authority cited by accused counsel – People of the Philippines v. Edwin Ladrillo [G.R. No. 124342, December 8, 1999] that it hardly conforms to human experience that a child could keep a traumatic experience such as sexual assault to herself for a long time.

However, the court finds it improbable that **after** the complaint was made by PW1 to her family and the police, PW2 did not speak up about the details of the alleged sexual assaults between 2018 and 2020 to the police and her aunts/family members to ensure that a thorough investigation was done to bring the alleged perpetrator to justice.

The court agrees with accused counsel on points 1, 3 to 7 and makes the following findings:

1. The prosecution charged the accused person with defiling PW2 in 2018 at Doboro in Accra.
2. The evidence of the prosecution was directed at the alleged commission of the same offence in 2020 in Doboro, Accra.

³Haskell, L & Randall M. Ibid p. 7

⁴ Ibid p 8.

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3. The parties and their children lived in Pokuase Abenso when the alleged offence in 2018 was purported to have been committed.
4. The investigator did not include the house the parties lived in or potential witnesses at Pokuase Abenso in the scope of her investigation.
5. The testimony of PW1 and PW2 contained inconsistencies and conflicted with the testimony of PW1's father and PW2's grandfather – PW3.
6. PW2 testified that the accused's daughter said he regularly defiled her – yet the accused's daughter was not made a prosecution witness and the accused was not charged with defiling his own daughter.
7. PW3's testimony clearly shows that when both families met to deliberate over the issue, PW1 admitted that the allegation she made against the accused person was not supported by evidence and PW2 admitted to her aunts that the allegation was false.
8. PW4's testimony consisted mostly of hearsay as he did not personally witness the alleged incidents in 2018 or 2020 save to confirm that the parties were seated on their bed and arguing when he entered – which contradicted PW1's statement that she moved away from the bed to pick up a bottle to defend herself from the accused person.
9. PW5 and PW6's testimony confirms that the accused person denied the allegations throughout their investigations/enquiries, despite PW1's testimony that the accused person admitted the allegation and sought to cleanse himself by conducting some rituals.
10. PW7's testimony confirmed the child has been defiled but could not confirm that it was the accused person who defiled her.
11. The prosecutions' evidence and cross-examination revealed the allegation that the child could have been defiled in 2018 by her stepbrother David Gator.
12. The investigator (PW5), did not include the accused's friend the Mamprossi king (who came to the house after the incident upon the accused's request), or Mr. Kwaku Tamaklo the accused's uncle (who PW1 testified she spoke to after the incident), within the scope of her investigation.
13. The evidence shows that it is probable that PW1 was motivated to file the charge against the accused person in a bid to get part of their alleged matrimonial property,

and in response to the initiation of customary divorce proceedings against her by the accused person.

In section 173 of Act 30;

“Where at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require the accused to make a defence, the Court shall, as to that particular charge, acquit the accused.” [C.O.P. v. Akoto [1964] GLR 231].

The court finds from the evidence that the prosecution has not made a prima facie case against the accused person on the charge of defiling his stepdaughter. The evidence presented by the prosecution is insufficient, manifestly unreliable and has been so discredited by the accused person in cross-examination that this Court cannot call upon the accused person to respond to the charge.

The accused person is therefore acquitted and discharged of the offence of defiling Priscilla Gator in 2018 at Doboro, Accra, contrary to **section 101(2)** of the **Criminal and Other Offences Act, 1960 (Act 29)**. The sureties of the accused person are discharged.

(SGD)

DORA G. A. INKUMSAH ESHUN
CIRCUIT COURT