

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KITGUM

CRIMINAL SESSIONS CASE No. 0373 OF 2018

UGANDA

PROSECUTOR

5 **VERSUS**

OYWELO FELIX

ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It is alleged that the accused on the 8th day of May, 2016 at Logu Paracele village, in Lamwo District, performed an unlawful sexual act with Acan Linda Brenda, a girl aged twelve years.

15 The facts as narrated by the prosecution witnesses are briefly that during the night of 8th May, 2016 while she was sleeping in her house with her husband at around 10.00 pm, P.W.2 Lanyero Betty woke up to the screams of her twelve year old daughter, P.W.4 Acan Linda Brenda. She had come to visit, as a step-daughter of the accused, and they were sleeping in the same room with her together with three other of her siblings. She flashed a torch and saw her husband lying
20 on top of Acan Linda Brenda, having sex with the girl. She made an alarm and her neighbour Akello Night responded. Together they decided to report the incident to the authorities. The following morning the accused was arrested. In his defence, he denied having committed the sexual act. He instead was in the process of fixing the mosquito net on their bed when his wife, P.W.2 Lanyero Betty began grabbing him accusing him of sleeping with his children. The
25 children were in their bed net to theirs. He told her he was not like other people who defile their children. She left the house and went to the neighbours. He never had sex with Linda that night and suspects his wife to have framed him in order to get rid of him to enable her resume her relationship with her ex-husband.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

For the accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim was below 14 years of age.
2. That a sexual act was performed on the victim.
3. That it is the accused who performed the sexual act on the victim.

The first ingredient of the offence of Aggravated defilement is proof of the fact that at the time of the offence, the victim was below the age of 14 years. The age of a child may be proved by the production of her birth certificate, or by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child (See *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

In this case the victim testified as P.W.4 Acan Linda Brenda and stated that she was 16 years old, hence 14 years old two years ago when the offence is alleged to have been committed. Her mother Lanyero Betty testified as P.W.2 and said she could not remember the victim's date of birth. Her father, P.W.3 Olara George Morris testified that the victim was born on 1st February, 2004, hence she was 12 years old in 2016. He produced her short birth certificate in proof of that fact (exhibit P. Ex.3). P.W.1 Mr. Odongpiny Bosco, a Clinical Officer at Lagoro Health Centre

III who examined the victim on 10th May 2016 (two days after the night the offence is alleged to have been committed). His report, exhibit P. Ex.1 (P.F.3A) certified his findings that the victim was twelve years old at the time of that examination, based on her dental formula. Counsel for the accused conceded to this element. Having considered all the available evidence on this
5 element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Acan Linda Brenda was a girl below fourteen years as at 8th May, 2016.

The second ingredient required for establishing this offence is proof that the victim was subjected to a sexual act. One of the definitions of a sexual act under section 129 (7) of *the Penal*
10 *Code Act* is penetration of the vagina, however slight by the sexual organ of another or unlawful use of any object or organ on another person's sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence, (See *Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)*). The slightest penetration is enough to prove the ingredient.

15

In the instant case, the victim Acan Linda Brenda testified as P.W.4 and stated that she woke up that night to find someone on top of her having sexual intercourse with her. P.W.1 Mr. Odongpiny Bosco, a Clinical Officer at Lagoro Health Centre III who examined the victim on 10th May 2016 (two days after the night the offence is alleged to have been committed). His
20 report, exhibit P. Ex.1 (P.F.3A) certified his findings that there was "abnormal bleeding from the vagina to the anal orifice due to rupture of the hymen." To constitute a sexual act, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient (see *Gerald Gwayambadde v. Uganda [1970] HCB 156; Christopher Byamugisha v. Uganda [1976] HCB 317; and Uganda v. Odwong Devis and Another [1992-93] HCB 70*). The victim did not
25 appear to be mistaken and her testimony is corroborated by medical evidence and the account of her mother. I am therefore inclined to believe her. Therefore, in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

The last essential ingredient required for proving this offence is that it is the accused that
30 performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct

or circumstantial, placing the accused at the scene of crime. The accused denied having committed the offence and stated that the allegation is a total fabrication designed by his wife .

To rebut that defence, the prosecution relies on testimony of the victim, P.W.4 Acan Linda Brenda who stated that she woke up to find that someone had undressed her and was on top of her having sexual intercourse with her, she screamed and her mother flashed a torch. She saw it was the accused. This was corroborated by her mother P.W.2 Lanyero Betty who testified that when she heard her daughter scream, she quickly flashed a torch only to see the accused lying on top of her. He raised an alarm, reprimanded him and alerted her neighbour. It was decided that the matter would be resolved the following day.

10

I have considered the defence raised by the accused and I have found it to be incredible. If indeed there was such a design by P.W.2 it was neither put to her nor her former husband P.W.3. Olara George Morris, the father of the victim, in cross-examination. It is a clear afterthought. His defence has been effectively disproved by the prosecution evidence, which has squarely placed him at the scene of crime as the perpetrator of the offence with which he is indicted. Therefore in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

15

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby convict the accused for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*.

20

Dated at Kitgum this 26th day of November, 2018.

.....

Stephen Mubiru

25

Judge.

26th November, 2018

26th November, 2018.

10.22 am

30 Attendance

Ms. Acen Susan, Court Clerk.

Mr. Patrick Ojara, State Attorney, for the Prosecution.

Ms. Harriet Otto, Counsel for the accused person on state brief is present in court

The accused is present in court

5 Both assessors are in court

SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, the learned Resident State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; although he has no previous record of the convict
10 and the offence is rampant within the jurisdiction. There is need to deter. The accused is not remorseful. He was a guardian to the victim and he owed him a duty to protect her. He breached that duty. The offence attracts a maximum sentence of death. The starting point is 30 years. He prayed that he should be given a minimum of 35 years in prison.

15 In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; The convict is a first offender. He is 34 years of age. A light sentence will enable him to reform and return to society as a useful person. He is an orphan, has two children whom the wife has returned to his home. A long custodial sentence will cause the children to suffer. He should be given a light sentence, not 35 years. In his *allocutus*, the convict stated that people do sin. He
20 knows he has done wrong. Satan makes someone to sin. He prayed for a short sentence so that he may go and take care of his children. His brother is now struggling with his children. He now looks after eight children including his. No one is helping them. They are all orphans. The children must go to school. His brother has a big burden.

25 According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, is death. However, this punishment is by sentencing convention reserved for the most extreme circumstances of perpetration of the offence such as where it has lethal or other extremely grave consequences. Examples of such consequences are provided by Regulation 22 of The *Constitution (Sentencing Guidelines for Courts of Judicature)*
30 (*Practice*) *Directions, 2013* to include; where the victim was defiled repeatedly by the offender

or by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS, or resulting in serious injury, or by an offender previously convicted of the same crime, and so on. I construe these factors as ones which imply that the circumstances in which the offence was committed should be life threatening, in the sense that death is a very likely or probable consequence of the act. I have considered the circumstances in which the offence was committed which were not life threatening, in the sense that death was not a very likely consequence of the convict's actions, for which reason I have discounted the death sentence.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of life imprisonment. Only one aggravating factor prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case, i.e. the victim was defiled repeatedly by an offender who is supposed to have taken primary responsibility of her. A sentence of life imprisonment may as well be justified by extreme gravity or brutality of the crime committed, or where the prospects of the offender reforming are negligible, or where the court assesses the risk posed by the offender and decides that he or she will probably re-offend and be a danger to the public for some unforeseeable time, hence the offender poses a continued threat to society such that incapacitation is necessary (see *R v. Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410). However, since proportionality is the cardinal principle underlying sentencing practice, I do not consider the sentence of life imprisonment to be appropriate in this case.

Although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the act such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. At the time of the offence, the accused was 32 years old and the victim 12 years old. The age difference between the victim and the convict was 20 years. He abused his position of trust as a step-father of the victim, and defiled her in the physical presence of her mother, within the same room where they slept. It us an act that demeaned both the victim and the mother.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, the *Constitution (Sentencing*

Guidelines for Courts of Judicature) (Practice) Directions, 2013 stipulate under Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors. I have to bear in mind the decision in *Ninsiima v. Uganda Crim. Appeal No. 180 of 2010*, where the Court of appeal opined that the sentencing guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial. In that case, it set aside a sentence of 30 years' imprisonment and substituted it with a sentence of 15 years' imprisonment for a 29 year old appellant convicted of defiling an 8 year old girl

10

In that regard, I have considered the decision in *Birungi Moses v. Uganda C.A Crim. Appeal No. 177 of 2014* where a sentence of 30 years' imprisonment was reduced to 12 years' imprisonment in respect of a 35 year old appellant convicted of defiling an 8 year old girl. In another case, *Ninsiima Gilbert v. Uganda, C.A. Crim. Appeal No. 180 of 2010*, the Court of Appeal set aside a sentence of 30 years' imprisonment and substituted it with a sentence of 15 years' imprisonment for a 29 year old appellant convicted of defiling an 8 year old girl. Lastly, in *Babua v. Uganda, C.A Crim. Appeal No. 303 of 2010*, a sentence of life imprisonment was substituted with one of 18 years' imprisonment on appeal by reason of failure by the trial Judge to take into account the period of 13 months the appellant had spent on remand and the fact that the appellant was a first offender. The Court of Appeal however took into account the fact that the appellant was a husband to the victim's aunt and a teacher who ought to have protected the 12 year old victim.

15
20

Although the circumstances of the instant case do not justify the imposition of a sentence of life imprisonment, they are sufficiently grave to warrant a deterrent custodial sentence. The convict traumatised the victim physically and psychologically and abused a position of trust. It is for those reasons that I have considered a starting point of twenty years' imprisonment. The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender, and he has considerable family responsibilities. The severity of the sentence he deserves has therefore been tempered by those mitigating factors and is reduced from the period of twenty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of eighteen years.

25
30

It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a convict. Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*,
5 requires the court to “deduct” the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. From the earlier proposed term of seventeen years’ imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having
10 been charged on 2nd November, 2016 and been in custody since then, I hereby take into account and set off two years as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of sixteen (16) years, to be served starting today.

The convict is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.

15

Dated at Kitgum this 26th day of November, 2018.

Stephen Mubiru

Judge.

26th November, 2018