

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT GULU**

[CORAM: Kakuru, Egonda-Ntende & Obura JJA]

Criminal Appeal No.157 of 2014

(Arising from High Court Criminal HCT-02-CO-SC-220 of 2012 at Gulu)

Between

OTOO RICHARD=====Appellant

And

Uganda=====Respondent

*(On Appeal from the Judgment of the High Court of Uganda [Byabakama Mugenyi, J.,] sitting at Gulu and delivered on the 10<sup>th</sup> July 2013)*

**JUGDEMENT OF THE COURT**

**Introduction**

1. The appellant was indicted and convicted, on his own plea of guilty, of the offence of aggravated defilement contrary to sections 129 (3) and (4) (c) of the Penal Code Act. The particulars of the offence were that the appellant had on the 13<sup>th</sup> day of September 2012 at Otwee Town Council in Amuru district, being a guardian of Ayaa Margaret performed a sexual act with the said Ayaa Margaret, a girl who was 16 years. He was sentenced to 15 years imprisonment and ordered to pay compensation of Shs.300,000.00 to the victim as compensation for psychological trauma.
2. The appellant now appeals to this court against both conviction and sentence. He put forth 3 grounds of appeal which are:
  - (1) That the learned trial judge erred in law and fact when he convicted the appellant on an incurably defective indictment, thereby occasioning a grave miscarriage of justice.
  - (2) That the learned trial Judge erred in law and fact when he convicted the appellant on prosecution statement of

facts that does not disclose the offence of aggravated defilement, thereby occasioning a grave miscarriage of justice.

(3) The learned trial Judge erred in law and fact when he imposed a harsh and excessive sentence.'

3. The respondent opposed the appeal.

#### **Submissions of Counsel**

4. At the hearing of the appeal the appellant was represented by Mr Evans Daniel Olwoch on state brief while the respondent was represented by Mr Patrick Omia, Senior State Attorney. Mr Olwoch submitted on ground 1 of the appeal that the indictment had used a technical word to describe the relationship between the appellant and victim and that is 'a guardian'. However, when the indictment was read to the appellant this term was not properly interpreted or explained to the appellant in a language which he understood for him to appreciate the offence he was indicted of and be able to respond accordingly. He submitted that this violated his right to a fair trial under article 28 of the Constitution of Uganda as well as section 25 (c) of the Trial on Indictment Act. The right to a fair trial was non-derogable in line with article 44 of the Constitution. As his right to a fair trial was transgressed this rendered the subsequent conviction a nullity.
5. In relation to the second ground of appeal Mr Olwoch submitted that the aggravating circumstance alleged in the indictment was that the appellant was a guardian of the victim. However, the facts read out to the appellant at the trial by the prosecution did not disclose that the appellant was a guardian of the victim. An essential ingredient of the offence was therefore not disclosed on the facts and the conviction for the same was a nullity.
6. Mr Patrick Omia for the respondent submitted that the appellant had been explained the offence that he had been charged with by the learned trial judge at the beginning of his trial. This is borne out by the record of the proceedings of the trial. He responded that he understood the charge and nothing more was required of the court. With regard to ground no.2 of the appeal he submitted that the appellant was a guardian or a person in authority over the victim and therefore had been properly convicted of the offence of aggravated defilement. However, if this court finds that the facts do not disclose the offence of aggravated defilement, he submitted that the appellant should be convicted of the offence of simple defilement and the sentence imposed upon him be maintained.

## Analysis

7. It will be helpful to set out the record of the court below.

**10/07/2013 – 12.50p.m.**

Accused Present

Mr. Obale Innocent for the Prosecution.

Mr. Anywar Geoffrey hold brief for Mr. Ochorobiya for the accused on state brief.

Mr. Ocan Stephen Court Clerk and Luo Interpreter.

**Court:** Indictment is read and explained to accused in Luo.

**Accused:** I have understood the case against me. It is true, it happened.

**Court:** Plea of Guilty entered.

**Mr Obale:-** The brief facts are, the victim Ayaa Margaret was a pupil of Otwee Primary School. She is the accused's cousin. On 12/9/2012 at around 10.00p.m. the accused entered the house where the victim was sleeping and had sexual intercourse with her. She made an alarm and her brother caught him red handed in the act. The accused pleaded for forgiveness before running to his house where he locked himself till the following day when the Police arrested him. He confessed to the crime in his charge and caution statement. The victim was medically examined and found to be 16 years old and there was evidence of sexual intercourse in her private parts. The accused was examined on the Police Form 24 and found to be of the apparent age of 24 years and was mentally normal.

**Accused:-** The facts are correct.

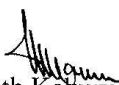
**Court:-** The accused is hereby convicted of aggravated defilement contrary to section 129 (3) & (4) of the Penal Code Act on his own plea.

8. The facts read out to the accused person do not contain the element that the appellant was a guardian to or a person in authority over the victim who was 16 years old. This was an essential ingredient of the offence of aggravated defilement under section 129 (3) and (4) of the Penal Code Act. The conviction for aggravated defilement cannot stand in such circumstances. Such conviction was clearly void. It is quashed. The

sentence and order for compensation are set aside. In light of the foregoing it is unnecessary to consider ground 1 of the appeal.

9. Mr Patrick Omia for the respondent submitted that in case we hold that the conviction for aggravated defilement cannot hold we should substitute it with a conviction for simple defilement and maintain the sentence that had been imposed upon him by the learned trial judge.
10. We agree with Mr Omia that the facts as read out to and accepted by the appellant disclose that the appellant committed the lesser offence of simple defilement. We convict the appellant of the offence of defilement contrary to section 129 (1) of the Penal code Act.
11. The appellant is a first offender who pleaded guilty saving the court's time and resources. He was a young man, 24 years old, at the time the offence was committed. He is remorseful. Nevertheless he committed a serious offence. The victim was 16 years old. She was a relative to the appellant. An appropriate sentence in this case taking into account all the foregoing factors would be 5 years and 10 months. As the appellant spent 10 months in pre-trial custody this is deducted from his sentence and he is sentenced to a term of 5 years imprisonment from the 23<sup>rd</sup> July 2013, the date of his conviction.

Dated, signed and delivered at Gulu this <sup>7<sup>th</sup></sup> day of *November* 2017

  
Kenneth Kakuru  
**Justice of Appeal**

  
Fredrick Egonda-Ntende  
**Justice of Appeal**

  
Hellen Obura  
**Justice of Appeal**