THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL HIGH COURT CIRCUIT HELD AT KAMWENGE

HCT-01-CR-SC-004/2020

UGANDA……PROSECUTOR

VERSUS

NYAKATURA FRANCIS……..…….....……ACCUSED

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

The accused stands indicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the Penal Code Act. It was alleged that Nyakatura Francis on the 30th day of August 2018 at Rwakagati Village, Ntara Parish, Ntara Sub-county in the Kamwenge District performed a sexual act with Kobusingye Harriet a girl aged 6 years.

It was the case of the prosecution that the accused found the young victim at the well and lured her into sexual intercourse under the pretext that he was going to give her a sugar cane. That after getting the sugar cane, the accused took the victim to a spot under some palm trees near the sugarcane plantation where he had sexual intercourse with the victim. At around 2.00 PM, the cries of the victim attracted PW2 Mugume Aron who was on his way to the well, before he saw the victim emerge from the bush holding her knickers, followed by the accused, who fled into the opposite direction with his trousers in hand. The victim told Mugume that the accused had just defiled her. Mugume immediately reported the incident to the father of the victim who was attending a funeral in the neighborhood and the

accused was eventually arrested and charged for this offence. The accused in his defence, opted to remain silent.

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 on the weaknesses in his defence; **(See: Ssekitoleko v. Uganda [1967] EA 531).**

By his plea of not guilty, the accused puts in issue each essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of those ingredients beyond reasonable doubt. **(See: Miller v. Minister of Pensions [1947] 2 ALL ER 372)**. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. However, it is trite law that any doubts in the case should be resolved in favour of the accused person (**Mancini Vs DPP(1942)AC and Abdu Ngobi Vs Uganda; Uganda Supreme Court Criminal Appeal No. 10/1991).**

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.

Representation:

The prosecution was represented by Naboth Atuhaire the Kamwenge Resident State Attorney while the accused was represented by Counsel Amon Aruho on State Brief.

The Evidence:

The prosecution called 4 witnesses, namely: PW1 Nuwagaba Obed the father of the victim; PW2 Mugume Aron a paternal uncle of the victim; PW3 Kobusingye Harriet the victim; and PW4 No. 35591 D/CPL Ndyamuhaki Tito the Investigating Officer. Medical evidence was tendered as Agreed Facts. The accused opted to remain silent and did not testify.

1. **<u>That the victim was below 14 years of age</u>.**

It was the submission of the prosecution that this element had been proved beyond reasonable doubt. The defence condeded that this element had been proved beyond reasonable doubt.

The age of a child can be proved by the production of her birth certificate, the testimony of the parents, or by the court's own observation and common sense assessment of the age of the child. (See for example **Uganda versus Kagoro Godfrey HCCS No. 141 of 2002; R versus Recorder of premisby Ex-parte Bursar [1957]2 ALL.ER. 889**).

In this case we have medical evidence and the evidence of the father of the victim as well as the victim herself. **PW1 NUWAGABA OBED** the biological father of the victim testified that the victim was born on 1/1/2012 and that it was also stated in the Baptism Card (Prosecution Exhibit PE3). Police Form 3A containing the

medical examination report of Kobusigye Harriet (Prosecution Exhibit PE1) revealed that the victim upon examination was found to be aged 6 years in view of 24 milk dentition present and no pubertal features noted. The Baptism Card (Prosecution Exhibit PE3) in respect of Harriet Kobusigye named the father of the victim as Obed Nuwagaba and states the date of birth as 1/1/2012. The date of baptism is 5/2/2012. I observed the victim in court. Based on my observation, the victim was below 14 years at the time of the alleged offence.

I am satisfied that the prosecution proved beyond reasonable doubt that the victim was aged below 14 years when the alleged offence was committed.

2. <u>That a sexual act was performed on the victim</u>.

The prosecution relied on the evidence of PW3 the victim and PW2, the medical evidence in respect of the victim contained in Police Form 3A (Prosecution Exhibit PE1), as well as the immediate report made by the victim to PW1 the father of the victim to contend that this element had been proved beyond reasonable doubt. The defence on the other hand contended that this element had not been proved beyond reasonable doubt. That the prosecution did not lead any evidence of a Medical Doctor and as such, there is no medical evidence on record. That PW1 did not see the accused performing the sexual act and that PW2 did not see what the victim and the accused were doing; that PW2 did not see any blood or injury in the private parts of the victim immediately after the alleged sexual act, given the young age of the victim, which was incredible; that PW3 also did not see any blood or semen.

Sexual act means (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or (b) the unlawful use of any object or organ by a

person on another person's sexual organ. Sexual organ means a vagina or a penis (See **Section 129 (7) of the Penal Code Act**). To constitute a sexual act, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient. The Supreme Court in **Wepukhulu Nyuguli Versus Uganda, S.C.C.A No.21 of 2001** held that it is the law that however slight the penetration may be it will suffice to sustain a conviction for the offence of defilement.

Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. In this case, we have the victim's evidence as well as medical evidence. This evidence should be carefully analyzed.

PW3 KOBUSINGYE HARRIET testified that the accused put her down and had sexual intercourse with her. That he slept on her. That he removed her dress and knickers and he defiled her. That he undressed and slept on her. That he removed his trousers half way. That he used his penis and it entered in her vagina and she felt pain in her private parts and cried. That her uncle Aron was going to the well with a Jerican and he found the accused having sexual intercourse with her; that when the accused saw her uncle, he wore his trousers and ran away and she also went away.

PW2 MUGUME ARON testified that on 30/8/2018 at 2:00 PM he was going to the well to fetch water when he heard a child crying at a place where there were palm trees among eucalyptus trees and later saw a child come out and she went running. That he recognized her as Kobusingye Harriet the victim. Then he saw the accused come out holding his trousers and he ran away in the opposite direction. The witness went towards the victim and found her naked and she was holding her knickers in her hands. That he asked her what had happened and she reported that

that the accused had inserted his thing into her. That she called it **"Ekisura"** which means a penis. That he inserted it in her vagina.

Police Form 3A medical examination of Kobusigye Harriet (that was admitted by way of Agreed fact as Prosecution Exhibit PE1) carried out on 31.08.2018 revealed that her hymen was absent with some lacerations on labia minora. The probable cause of the injuries was a blunt object.

The prosecution did not lead evidence of a Medical Doctor. In the instant case, the medical report was admitted under a *memorandum of agreed facts* during the preliminary hearing under Section 66 of the Trial on Indictment Act that states that: "***Any fact or document admitted or agreed in a memorandum filed under this section shall be deemed to have been duly proved".*** In this case**,** the evidence that was sought to be admitted was recorded as narrated by the state Counsel from his records. After recording, it was read to the accused who then signed it together with his Counsel and State Counsel.

In the light of all of the above evidence, contrary to the submission of the defence, it was immaterial: that PW1 did not see the accused performing the sexual act; that PW2 did not see what the victim and the accused were doing; that PW2 did not see any blood or injury in the private parts of the victim immediately after the alleged sexual act; and that PW3 also did not see any blood or semen.

I found the evidence of the prosecution regarding the sexual act committed on the victim to be straight forward, consistent, not seriously challenged in cross examination and uncontroverted by the defence. I am satisfied based on the above

evidence, that the procution has proved beyond reasonable doubt that a sexual act was performed on the victim.

3. <u>That it is the accused who performed the sexual act on the victim</u>.

This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as the perpetrator of the offence.

The prosecution relied on the evidence of PW3 the victim as well as the evidence of PW2 corroborated by PW1 the father of the victim to submit that this element had been proved beyond reasonable doubt. The defence contended that the element was not proved beyond reasonable doubt. That there was no evidence of injury, blood or semen on the vaginal lips of the victim. That there was no evidence of a sexual act performed on the victim, and as such, the accused did not participate in any sexual act.

PW3 KOBUSINGYE HARRIET testified that she knew the accused as Francis and that she used to see him in their Trading Center of Kiryanga. She said that she was at the well with her younger brother Asiimwe David when the accused came and told her that they go and cut sugar cane. That after cutting sugar cane, he took and put her at a spot where there were palm trees. That he put her down and had sexual intercourse with her. That her uncle Aron was going to the well with a Jerican and he found the accused having sexual intercourse with her; that when the accused saw her uncle, he ran away and she also went away.

PW2 MUGUME ARON testified that he knew the accused as village mate, a fellow youth, and neighbor. That on 30/8/2018 at 2:00 PM he was going to the well

to fetch water when he heard a child crying at a place where there were palm trees among eucalyptus trees and later he saw a child come out and she went running. That he recognized her as Kobusingye Harriet the victim. Then he saw the accused come out holding his trousers and the accused ran away in the opposite direction.

PW1 NUWAGABA OBED testified that on 30/8/2018 he was at the funeral of Fausta, an old woman on the village who had died. It was the day following the burial. That at around 2:00 PM Aron came and reported to him that his daughter Kobusingye Harriet had been defiled by the accused from a sugar cane plantation.

PW4 NO. 35591 D/CPL NDYAMUHAKI TITO the investigating officer testified that he recorded the statement of the victim who also showed him the scene of the crime in a eucalyptus tree plantation under a palm tree. That in her statement the victim stated that the accused got her with her brother and convinced her that he was going to give her sugar cane and later took her to the scene where he had sexual intercourse with her before Aron found them.

The defence evidence in this case:

The accused opted to remain silent.

Corroboration:

This being an offence of a sexual nature, as I warned the assesors, I now warn myself that there is a rule of practice of courts not to convict an accused on the uncorroborated evidence of the victim of a sexual offence. Corroboration is also required as a matter of practice when relying on the testimony of a single identifying witness. **— See Chila and another V. Republic 1967 EA 722.** This case lays down the rule of practice that in sexual offences, the judge should warn

assessors and himself of the danger of acting on the uncorroborated testimony of a single identifying winess.

The rule of practice has laid down by the EACA with regard to all sexual cases has been expressed thus:

> *"The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the compliant, but having done so, he may convict in the absence of corroboration if he is satisfied that her evidence is truthful."* **(Chila v. R (1967) EA 722**.

The Supreme Court of Uganda considered and settled this issue in **Remigious Kiwanuka Vs Uganda Criminal Appeal No. 41 of 1993**. It *was* held that *it is settled law in sexual offences that though corroboration of the prosecution evidence is not essential in law, it is, in practice looked for, and it is the established practice to warn the Assessors against the danger of acting upon un corroborated testimony.*

I can proceed to rely on the evidence of a single identifying witness without corroboration, if I am satisfied that the witness was truthful and there is no possibility of error in the identification of the perpetrator. I can also proceed to rely on the evidence of the victim in a sexual offence without corroboration if I am satisfied the witness was truthful. **(Chila v. R [1967] EA 722; Abdala bin Wendo & Anor v. R (1953) 20 EACA 166).**

I have considered the truthfulness or otherwise, of the victim as a witness. She testified on oath following a ***voire-dire***. Her evidence was consistent and remained so in cross examination. I found no reason to doubt or disbelieve her evidence. Being naive and a child, she was an unsuspecting victim who was easily lured by a

deceiver who told her that he was going to give her sugar cane. In cross examination the witness maintained that she recalled what happened to her; that she saw the penis of the accused, but that she did not see blood or semen. In further cross examination the witness stated that her father had told her that he was bringing her to court, but that he did not tell her what she was coming to do and that no one told her what to say in court; she said that it was the truth that she was defiled. I am satisfied that the victim was a truthful witness.

I have evaluated the evidence in regard to whether there was a possibility of a mistake in identification of the accused by the victim. To satisfy myself that there was no possibility of error in the identification, I have considerred whether the conditions were favourable or unfavourable for a correct identification. I have particularly examineed factors like the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailant, the quality of light, and any material discrepancies in the description of the accused by the witness. In this case the accused was well known to the victim before. They took some time together when he found her at the well and took her to the sugar cane plantation for a sugar cane, before taking her to the spot where he defiled her. They remained close to each other before and during the sexual act. The offence took place during broad day light. I was further satisfied that there was no possibility of error in the identification of the perpetrator by the victim.

Corroboration means additional independent evidence connecting the accused to the crime. There is need to find other independent evidence to prove not only that the sexual act occurred but also that it was committed by the accused.

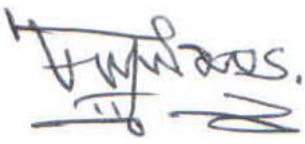
Corroboration may be in the form of direct or circumstantial evidence or expert evidence (see **R. v. Baskerville [1916] 2 K.B 658, R v. Manilal Ishwerlal Purohit (1942) 9 EACA 58 (p.61**). In this case the evidence of **PW2 MUGUME ARON** is relevant. The evidence was that at around 2.00 PM, the cries of the victim attracted PW2 who was on his way to the well, before he saw the victim emerge from the bush holding her knickers, followed by the accused, who fled into the opposite direction with his trousers in hand. He said he went towards the victim and found her naked and she was holding her knickers in her hands. In my view, this is good circumstantial evidence that tends to prove that the sexual act occurred and that it was committed by the accused.

Section 156 of the Evidence Act provides that: in order to corroborate the testimony of a witness, any former statement made by such a witness relating to the same fact, at or about the time when the fact took place, or before authority legally competent to investigate the fact, may be proved. (See **Livingstone Sewanyana vs. Uganda, SCCA No. 19 of 2006; Katende Mohammed Vs Uganda, SCCA No. 32 of 2001 which referred to Ndaula. James Vs Uganda, S.C.C.A. No. 22 of 2000 (unreported).** In this case the evidence of **PW2 MUGUME ARON** was that at around 2.00 PM, the cries of the victim attracted PW2 who was on his way to the well, before he saw the victim emerge from the bush holding her knickers, followed by the accused, who fled into the opposite direction with trousers in hand. He said he went towards the victim and found her naked and she was holding her knickers in her hands. That he asked her what had happened and she reported that that the accused had inserted his thing into her. That she called it **"Ekisura"** which means a penis; that he inserted it in her vagina. **PW1 NUWAGABA OBED** told court that when he spoke to the victim, she told him that the accused had defiled her in the sugar cane plantation. That she had

gone to the well when the accused lured her saying that he was going to cut sugar cane for her and later defiled her. That he took the victim to Ntara Health Center for medical examination from where he was referred to police where he was given a police form that was later filled and taken back to the police. **PW4 NO. 35591 D/CPL NDYAMUHAKI TITO** the investigating officer testified that he recorded the statement of the victim showed him the scene of the crime in a eucalyptus tree plantation under a palm tree. That in her statement the victim stated that the accused got her with her brother and convinced her that he was going to give her sugar cane and later took her to the scene where he had sexual intercourse with her before Aron found them. In the circumstances of this case, the evidence of former statement made by the victim relating to the fact that a sexual act had been performed on her and implicating the accused at or about the time when the acts took place, and before the investigating officer, such evidence is relevant.

I am satisfied that the prosecution evidence was consistent, truthful and credible and it is well corroborated in proving the age of the victim, the sexual act, and in implicating the accused. I therefore find that the prosecution has proved the case against the accused beyond reasonable doubt. In agreement with the Lady and Gentleman Assessors, I find the accused person guilty as indicted and convict him accordingly.

Dated at Fortportal this **17th** day of **October 2022.**



Vincent Wagona

High Court Judge

SENTENCE AND REASONS FOR SENTENCE

Under the Penal Code Act Section 129 (3), the maximum punishment for the offence of aggravated defilement is a death sentence. Under Act Section 129 (3) an offence of defilement becomes one of aggravated defilement under the following circumstances: (a) where the person against whom the offence is committed is below the age of fourteen years; (b) where the offender is infected with the Human Immunodeficiency Virus (HIV); (c) where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed; (d) where the victim of the offence is a person with a disability; or (e) where the offender is a serial offender.

Section 129B of the Penal Code Act provides for payment of compensation to victims of defilement and states as follows: (1) Where a person is convicted of defilement or aggravated defilement under section 129, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual and psychological harm caused to the victim by the offence; (2) The amount of compensation shall be determined by the court and the court shall take into account the extent of harm suffered by the victim of the offence, the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence.

Under Guideline 33 of the Sentencing Guidelines: (1) The court shall be guided by the sentencing range specified in Part IV of the Third Schedule in determining the appropriate sentence for defilement. The sentencing starting point for aggravated defilement is 35 years' imprisonment and the sentencing range is from 30 years' imprisonment to death sentence; (2) The court shall, using the factors in

paragraphs 34, 35 and 36, determine the sentence in accordance with the sentencing range.

Under Guideline 34 of the Sentencing Guidelines: The court shall take into account the following factors in considering a sentence for defilement— (a) the age of the victim and the offender; (b) the nature of the relationship of the victim and the offender; (c) the violence, trauma, brutality and fear instilled upon the victim; (d) the remorsefulness of the offender; (e) operation of other restorative processes; or (f) the HIV/AIDS status of the offender.

Under Guideline 35 of the Sentencing Guidelines: In determining a sentence for defilement, the court shall be guided by the following **aggravating factors**— (a) the degree of injury or harm; (b) whether there was repeated injury or harm to the victim; (c) whether there was a deliberate intent to infect the victim with HIV/AIDS; (d) whether the victim was of tender age; (e) the offender's knowledge of his HIV/AIDS status; (f) knowledge whether the victim is mentally challenged; (g) the degree of pre-meditation; (h) threats or use of force or violence against the victim; (i) knowledge of the tender age of the victim; (j) use or letting of premises for immoral or criminal activities; (k) whether the offence was motivated by, or demonstrating hostility based on the victim's status of being mentally challenged; or (l) any other factor as the court may consider relevant.

Under Guideline 36 of the Sentencing Guidelines: In considering a sentence for defilement, the court shall take into account the following **mitigating factors**— (a) lack of pre-meditation; (b) whether the mental disorder or disability of the offender was linked to the commission of the offence; (c) remorsefulness of the offender;

(d) whether the offender is a first offender with no previous conviction or no relevant or recent conviction; (e) the offender's plea of guilty; (f) the difference in age of the victim and offender; or (g) any other factor as the court may consider relevant.

The sentencing guidelines have to be applied bearing in mind past precedents of courts in decisions where the facts have a resemblance to the case under trial (see **Ninsiima v. Uganda Crim. C.A Criminal Appeal No. 180 of 2010**). A review of past precedents tends to show that the Court of Appeal has time and again reduced sentences that have come close to the sentencing starting point suggested by the sentencing guidelines, as being harsh and excessive, and upheld those that were lower than the starting point.

In **German Benjamin vs Uganda, CACA No. 142 of 2010** the Court of Appeal set aside a sentence of 20 years imprisonment for the offence of aggravated defilement committed against a child aged 5 years, and substituted it with a sentence of 15 years imprisonment. He had spent 4 years and 6 months on remand.

In **Byera Denis vs. Uganda, Court of Appeal Criminal Appeal No. 99 of 2012**, the Court of Appeal substituted a sentence of 30 years imprisonment with one of 20 years imprisonment it considered appropriate in a case of aggravated defilement. The victim in that case was aged 3 years. He had been on remand for 1 year and 8 months.

In Anguyo Siliva v. Uganda, Criminal Appeal No. 0038 of 2014, the Court of Appeal reduced a sentence of 27 years to ***21 years and 28 days imprisonment. He had been on remand for 2 years, 11 months and 2 days.***

In **Tiboruhanga Emmanuel vs. Uganda, Court of Appeal Criminal Appeal No. 0655 of 2014**, the Court of Appeal stated that the sentences approved by this Court in previous aggravated defilement cases, without additional aggravating factors, range between 11 years to 15 years. The Court considered the fact that the appellant was HIV positive as an additional aggravating factor in that he had, by committing a sexual act on the victim while HIV positive, exposed her to the risk of contracting HIV/AIDS. The Court imposed a sentence of 25 years imprisonment afrer deducting 3 years spent on remand, the convict was to serve **22 years**.

In **Apiku Ensio vs. Uganda, Criminal Appeal No. 751 of 2015** the Court of appeal reduced a sentence of 25 years to 20 years. he had been on remand for two years and 11 months.

Each case must be treated on its own merits. In this case the prosecution cited the following aggravating factos: the offence is serious attracting a maximum sentence of death. Offences of this nature are rampant and deserve serious punishment. The victim was only 6 years old while the convict was 19 years. there was a big age difference of 13 years; the convict was a neighbour and villagemate with a duty to protect children like the victim; he introduced the victim to sex as a child; there was premeditation as the convict first sent away the young brother of the victim and used tricks to lure the victim that he was going to give her sugar cane; the prosecution proposed 30 years imprisonment and an order for compensation. In

mitigation, the defence cited the following factors: the convict is a first offender with no record of previous conviction; he is youthful and can transform into a useful citizen; he has been in custody since 30/8/2018; that an order for compensation should not be considered because the victim did not sustain any serious injuries. In allocutus the convict asked for forgiveness; however, I observed that the convict throughout the trial and sentencing process, did not express any genuine remorse or at all. Although the victim sustained no injuries in her other body parts, she had some injuries in her private parts. There was evidence that the victim felt pain and cried as a result of the sexual act; indeed it was the cries of the victim that attracted the attention of PW2 Mugume Aron. I have therefore considered the physical, sexual and psychological harm caused to the victim by the offence; the convict was from the same village and must have had knowledge of the tender age of the victim; the offence was motivated by or based on the victim's vulnerable status of being a child of 6 years who was alone at the well with only a younger brother. I have considered all these aggravating factors, mitigating factors and allocutus of the convict. The aggravating factors far outweigh the mitigating factors.

Under Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the court should take into account the period spent on remand from when sentencing the convict.

I therefore sentence the convict as follows:

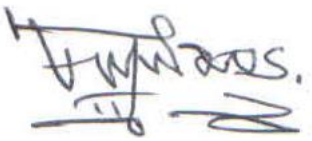
1. In the circumstances of this case, I consider a sentence of 26 years' imprisonment to be appropriate.
2. After taking into account the period of 3 year, 9 months and 18 days already

spent in custody, the convict will now serve a sentence of imprisonment of 21 years, 2 month and 12 days starting today.

3. The convict will pay compensation of UGX 2 milion to the victim to atone for the physical, sexual and psychological harm caused to the victim by the offence within a period of 12 months from today or in default serve an additional 2 years' imprisonment.

The convict is advised that he has a right of appeal against both the conviction and sentence with 14 days from today.

Dated at Fort-portal High Court Circuit sitting at Kamwenge this 18th Day of October 2022.



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Vincent Wagona

Judge