THE REPUBLIC OF UGANDA

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

HCT-01-CR-SC-162/2021

UGANDA……PROSECUTOR

VERSUS

SUNDAY HERBERT ……..……ACCUSED

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

The indictment in this case was that of Aggravated Defilement c/s 129 (3) and (4) (a) and (c) of the Penal Code Act. Under these provisions, any person who performs a sexual act with another person who is below the age of 14 years, where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

It was alleged that Sunday Herbert on the 29th day of September 2020 at Kyamuhanira Village, Mabale Parish, Nkoma Sub-county in the Kamwenge District being a guardian to Kabasiguzi Oliver, performed a sexual act with the said Kabaziguzi Oliver a girl aged 9 years.

It was the case of the prosecution that the accused being the husband of the mother of the victim, the mother of the victim and her other children, lived in the same homestead and house belonging to the mother of the victim. The victim and her

other siblings were sleeping in the house of their grand-mother. On the night in question, they finished supper and the victim left to go and sleep in her grand-mother's house as usual. The mother of the victim later found the accused on top of the victim having sexual intercourse with her behind the house. The accused as 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 has put 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 the accused was a parent or guardian of or a person in authority over victim.

4. That it is the accused who performed the sexual act on the victim.

The prosecution called 2 witnesses, namely, PW1 Kyarisima Medious the mother of the victim and PW2 Kabasinguzi Oliver the victim herself. The accused opted to remain silent and did not testify. Medical evidence was tendered as Agreed Facts.

Section 133 of the Evidence Act provides that, subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact. It means that a fact may be proved by a single witness. A court can convict on the basis of the evidence of a single witness, apart from well known exceptions.

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

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.

In this case there was medical evidence and the evidence of the mother of the victim as well as the victim herself. PW1 Kyarisima Medious the biological mother of the victim told court that the victim was born on 6/6/2011. At the time of her testimony, the victim stated that she was aged 10 years. The medical examination report in respect of the victim (Prosecution Exhibit PE1) dated 3rd October 2020 stated that the victim was aged 10 years at the time. I observed the victim in court and concluded that she was below 14 years at the time of the offence. The defence did not contest the proof of age of the victim being below 14 years at the time of the offence.

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

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

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 Panal 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, there was the victim's evidence as well as medical evidence and the evidence of her mother.

The defence contested the proof of this element. PW2 Kabasinguzi Oliver the victim testified that the accused took her behind her mother's house and raped her. That he got out his penis and inserted it in her vagina. With the aid of a male and female anatomical doll, the witness testified and demonstrated that she was made to lie on her back facing up and the accused went on top of her and defiled her.

PW1 Kyarisima Medious the mother of the victim testified that she had gone to bed while the accused remained outside. She woke up and found the accused missing and the door was locked from outside. She forced the door open and went outside and later found the accused behind the house having sexual intercourse with the victim. That he was on top of her. The witness said that she examined the victim and observed that the victim was bleeding from her private parts and her dress was blood stained. In cross examination the witness stated that during the act, the victim's dress was lifted up.

The offence is alleged to have been committed on the **29th day of September 2020**. PW1 testified that after the incident, she bathed the victim. The medical examination report dated **3rd October 2020** (Prosecution Exhibit PE1), in respect of the victim, concerning her genitals, stated that her hymen was ruptured long time ago and there were no bruises or lacerations; that there were no fresh injuries; and that the hymen could have been ruptured by a blunt object some time ago. The medical examination was conducted some days after the alleged incident and after the victim had taken bath, and was therefore quite unhelpful in stating that the hymen was ruptured "long time ago" while at the same time referring to "some time ago". It suggests that the victim may have been having sexual intercourse prior to the incident herein. Notably, the medical examination report under the part on history and circumstances of the incident as narrated to the examining officer states that the victim narrated that she had been having sexual affairs with the accused on different occasions. For any relevant observation, the examining officer stated that the girl needed more peer counseling. I believe that the fact that the victim had a bath after the act, that the medical examination of the victim took place a few days after the incident, and the medical history that the victim had experienced sexual intercourse before, explains the absence of fresh injuries and

the fact that the victim's hymen had already been raptured prior to the incident resulting in this case.

I am satisfied that the prosecution has proved beyond reasonable doubt that a sexual act was performed on the victim as stated in the indictment.

3. **<u>That the accused was a parent or guardian of or a person in authority over victim</u>.**

The Penal Code Act does not define who a parent, guardian or a person in authority over a victim is, in the context of Aggravated Defilement or any other offence. "A person in authority" may be understood to refer to relational power between a family elder and a younger relative. It may also be understood as any person acting in the position of a parent to the victim, or any person responsible for the education, supervision or welfare of the child.

In **Uganda versus Kayinamura Andrew High Court Kabale Criminal Session Case No.0238 OF 2019**, Hon. Justice Moses Kazibwe Kawumi held that: My appreciation of the term *"A person in authority" in the context of section 129 is that it refers to the relational power between a family elder and a younger relative. The accused may not have for long interacted with the victim as he contends, but as a grandfather who used to visit their home and who was respected as such, he wielded authority over his granddaughter."* The Judge also cited **Uganda V Fualwak [2018]UGHCRD 110** where Hon Justice Mubiru Stephen described the "*authority*" to reside in: *"any person acting in loco parentis to the victim, or any person responsible for the education, supervision or welfare of the child, and persons in a fiduciary relationship with the child characterized by a one sided*

distribution of power inherent in the relationship, in which there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith with regard to the interests of the child reposing the confidence."

In this case the evidence was that the victim was not the biological child of the accused but the accused was living with her mother as husband and wife. He was therefore a step-father of the victim. In-fact the victim in her testimony referred to him as her father.

I am satisfied that the accused qualifies as a parent or guardian of or a person in authority over the victim in this case within the meaning of the law of aggravated defilemen set out in Section 129 (3) and (4) (a) and (c) of the Penal Code Act. The prosecution has thus proved this element beyond reasonable doubt.

4. <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.

PW1 Kyarisima Medious the mother of the victim testified that she lived with the accused in her own house as husband and wife. Her daughter the victim and other siblings were sleeping in the house of PW1's mother nearby. That on the night in question, they finished supper and the victim left to go and sleep in her grand-mother's house as usual. The witness testified that she later found the accused on top of the victim having sexual intercourse with her. That she had left the accused outside when she went to bed and when she woke up, he was not in the house. That she found the door locked from outside and she forced the door open. She went

with a torch. That she first checked in the kitchen and the accused was not there. That she then went behind the house and found the accused having sexual intercourse with the victim. There is no question that the accused was well known to the witness, being her husband with whom they lived in the same house. The witness stated that she recognized the accused with the aid of torch light and moon light. That the distance between them was only 3 meters and she observed them for about 2 minutes before the accused ran away and he did not return until he was arrested. That the accused had never missed sleeping at home but after the incident he ran away and did not spend the night at home.

PW2 Kabasinguzi Oliver the victim testified that the accused was her father and that they lived in the same house. That she had left the accused sited outside on her way to her grand-mother's house to sleep when the accused called her saying he wanted to tell her something; that the accused held and took and defiled her from a place behind the house of her mother. That when her mother came and the accused saw torch light, he ran away.

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 as 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.*

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**)

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 that the witness was truthful. **(Chila v. R [1967] EA 722; Abdala bin Wendo & Anor v. R (1953) 20 EACA 166).**

In this case I was satisfied that the victim and her mother were truthful witnesses and that in regard to identification, there was no possibility of error. The accused was well known to the identifying witnesses. PW1 the mother of the victim stated that she recognized the accused with the aid of torch light and moon light. That the distance between them was only 3 meters and she observed them for about 2 minutes before the accused ran away and he did not return until he was arrested.

Corroboration of the evidence of the victim is required as a matter of law because the victim was a child of tender years who gave evidence not on oath. In this regard, Section 40 (3) of the Trial on Indictments Act states thus: "*Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her*." In this case the evidence of the victim concerning the sexual act and the identification of the accused is well corroborated by the evidence of PW1 her mother.

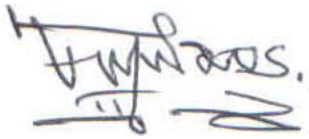
The conduct of the accused can corroborate the complainant's testimony. For example if the conduct of the accused indicates a sense of guilt on his part; such as escaping from arrest or running away , can add strength to the prosecution case and to his responsibility. (**See: Bogere Charles Vs Uganda Crim. Appeal No. 10/98 S.C; MuhamedMukasa & anor vs. Uganda-Criminal Appeal 27/95 (S.C.); Telesfora Alex & Anor vs. Republic (1963) EA 140.** In this case PW1 the mother

of the victim testified that when she cought the accused having sexual intercourse with the victim, the accused ran away and he did not return until he was arrested. That he had never missed sleeping at home but after the incident he ran away and did not spend the night at home. This was not the conduct of an innocent person.

The conduct of the accused in locking the door from outside and staying outside was not the conduct of an innocent person. The offence was planned.

I am satisfied that the prosecution evidence was truthful and credible and it is well corroborated in implicating the accused. There was no possibility of a mistaken identification. 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 **27th**day of **September 2022.**



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Vincent Wagona

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 totality.

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 pointed to the tender age of the victim and age gap between the concict and the victim. The charge sheet stated that the convict was 41 years at the time. the victim was stated to have been aged 9 years at the time of the offence. The accused was like a father to the victim being a husband of her mother. That cases of aggravated defilement are rampant and call for a diterent sentence. That the victim sustained injuries according to the evidence of her mother and additionally requires counseling as per the medical report. The prosecution proposed a sentence of 50 years imprisonment

as well as compensation for the victim. Additionally the court observes that the convict abused the hospitality of the mother of the victim who hosted her in her own house and family as a husband and went ahead to defile her daughter the victim who looked up to him as a father figure. The convict lived with the victim and must have had knowledge of her tender age. There was pre-medittion when the convict left his wife to go to bed and he locked the door from outside while he remained outside the house. The convict did not at all demonstrate any kind of remorsefulness. The defence in mitigation submitted that there were no grave injuries sustained by the victim. That the convict did not infect the victim with any STD. he is the sole bread winner and has a wife and twins now in custody of his elderly mother. He is now 45 years and can reform. He has been on remand for 1 year, 11 months and 15 days. The defence proposed 12 years imprisonment. I have additionally considered that the convict is a first offender with no record of previous conviction. The convict in allocutus stated that he had nothing to say. I have considered all these factors. The aggravating factors by 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:

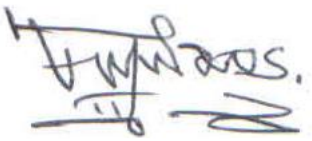
1. In the circumstances of this case, I consider a sentence of 27 years' imprisonment to be appropriate.
2. After taking into account the period of 1 year, 11 months and 15 days

already spent in custody, the convict will now serve a sentence of imprisonment of 25 years and 15 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 within 14 days from today.

Dated at Fort-portal High Court Circuit sitting at Kamwenge this 27th Day of September 2022.



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Vincent Wagona

Judge