THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL CASE No: HCT-01-CR-SC-0015-2014

UGANDA **PROSECUTION**

VS

KUSEMERERWA JULIUS **ACCUSED**

RULING

Kusemererwa Julius alias Semererwa stands indicted with one count of RAPE C/S 123 and 124 of the Penal Code Act (PCA). It was alleged that on the 6th day of June 2013 at Hakibale Village in the Kabarole District the accused had unlawful carnal knowledge with A. S (abbreviated name) without her consent. A. S was aged 16 years at the time. The accused wanted to plead guilty to charges of rape and bargain for a sentence of 10 years imprisonment but his counsel raised a point of law objecting to the charges of rape.

Both Counsel Businge A. Victor and Ms. Ruth Ongom on State Brief for accused submitted that the charges of RAPE contrary to Sections 123 and 124 of the Penal Code Act were defective. That the accused should have been charged with SIMPLE DEFILEMENT contrary to Section 129 (1) of the Penal Code Act (PCA) being the law applicable to girls below 18 years. They submitted that the offence of Rape can only be committed against a woman capable of giving consent to sexual intercourse and not a child below the age of 18 years. Counsel pointed out the

fact that the offence of DEFILEMENT was specifically legislated by Parliament to condemn sexual acts with another person who is below the age of 18 years. If the victim or survivor of the sexual act is 14 years and above the suspect is is charged with **Simple defilement** C/S 129 (1) of the PCA. And any person who performs a sexual act with another person who is below 18 years of age in any of the circumstances specified in subsection (4) of Section 129 commits a felony called **Aggravated defilement.**

Counsel on State Brief cited four cases to back up their submission namely:

1. Woolmington v. DPP [1935] A.C 462
2. Lubogo & Ors v. Uganda [1967] E.A. 440
3. Serugo v. Uganda [1978] HCB 1
4. Uganda v. Rwabulekwire Moses HCT-CR-SC 006 of 2001.

Finally the counsel on State Brief submitted that the offence of Rape attracts a maximum penalty of death while Simple defilement attracts a different and lesser sentence of life imprisonment. Counsel asked court to throw out the defective charges and direct the state to amend the charges accordingly for the Plea Bargain.

In reply, the learned Senior State Attorney Adam Wasswa submitted that the law clearly allows the state to prefer either charges of Rape or Defilement.

Section 123 PCA reads:-

“Any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm or by means of false representation as to the nature of the act or in case

of a married woman, by personating her husband, commits a felony termed rape."

The State Attorney argued that by including the persons of **'a woman or girl'** in the definition of Rape the legislature intended that the accused can be charged with rape if he has unlawful sexual intercourse with a girl forcefully and without her consent.

The learned Senior State Attorney admitted that S. 129 (1) PCA creates the offence of Simple Defilement but argued that it is not fatal to charge the accused with Rape. He cited the Supreme Court case of **Ochit Labwor Patrick v. Uganda, Criminal Appeal No. 15 of 1998** where the Supreme Court considered S.117 and S. 129 PCA in circumstances similar to the present case. It was held that the Section creating the offence of Rape does NOT exclude girls although it would have been more appropriate to charge him with defilement. He submitted that in the instant case the state chose to charge the accused with rape because of his use of excessive force. It was alleged that he used a panga and a knife to cut the arm of his victim in order to intimidate her and force her into unlawful sexual intercourse. The Learned Senior State Attorney submitted that the legislature had intended that where force is used by the accused in defilement cases the Director of Public Prosecutions (DPP) should have a wide discretion to prefer charges of rape and other related charges like Indecent Assault C/S 128 of the PCA.

Finally, the State Attorney argued that public policy demands that the DPP exercises his mandate under Article 120 of the Constitution with such wide discretion unless his decision causes a miscarriage of justice to the accused. He urged this court to protect the gains of parliament in promoting the girl child and women by ruling that people who commit heinous offences should be charged with crimes that attract tough sentences commensurate with the offences and the circumstances in which they are committed.

In final reply counsel for the accused pointed out that the case of **Ochit Labwor Patrick v. Uganda,** a case of 1998, was distinguishable. It was decided before the Penal Code Amendment Act of 2007 that created specific jurisdictions and elements for Simple Defilement and Aggravated Defilement. By then their Lordships were considering a general offence of defilement triable by the High Court only and carrying a maximum sentence of death. Currently a person charged with Simple defilement can be tried by a Chief Magistrate while a person charged with Aggravated defilement is tried by the High Court only. Counsel enumerated the specified circumstances creating aggravated defilement in subsection (4) of Section 129 of the PCA as follows:

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 victim of the offence is a person with a disability
d) Where the offender is a serial offender

Counsel Businge argued that his client is prejudiced being charged with Rape which carries a maximum penalty of death instead of being charged with Simple defilement which carries a maximum penalty of life imprisonment.

He submitted that Parliament did not find it wise to include use of violence or harm as a factor to make the defilement aggravated defilement or to change defilement in such circumstances, where violence or harm is used, to make it rape.

On the protection of the girl child and women counsel Businge agreed with the State Attorney but submitted that Parliament has indeed protected them under the distinct sections of the PCA creating Rape, Simple Defilement and Aggravated Defilement. Using force or violence is not

such a circumstance that creates a new offence. Use of force is not an ingredient to prove under S. 129 (1) PCA. Lastly, he submitted that consent is not a defence in defilement under S. 129 (1) PCA yet lack of consent is a major ingredient in Rape under S. 123 of the PCA. This makes both section 123 and 129 of the PCA contradictory because it leaves ambiguity as to whether a girl of 16 years can consent to sex under the current law. That the DPP does not have discretion to create offences but only to prefer charges that have been made distinct and certain by the legislature under the law. He submitted that this instant case is the first of its kind hence the need for a High court precedent.

Second Counsel Ruth Ongom on state brief supported the final submissions of Counsel Businge with nothing useful to add.

My considered opinion is that there is no ambiguity in the law of rape or defilement. Defilement, as created by the 1990 Penal Code Amendment Act replaced all forms of rape of girls formerly covered by section 123 of the PCA. Before that, all unlawful sexual intercourse of women and girls without their consent was termed rape. In 1990 Parliament specifically extracted defilement out of rape to protect girls from sexual abuse in light of the then rampant spread of the deadly disease of slim.

A reading of the Parliamentary **Hansards of Tuesday, 12th June 1990** shows the National Resistance Council (NRC) debating to raise the punishment of rape from the optional sentence of life imprisonment to a mandatory life imprisonment with or without corporal punishment. The Minister of Justice and Constitutional Affairs/Attorney General, Hon. Kanyeihamba, as he then was, led the debate. Parliament differentiated the rape of girls from the rape of women by creating the offence of defilement of girls with some members advocating for a mandatory death sentence. The amended Section 129 finally read as follows:

"129. Defilement of girls under the age of eighteen

(1) Any person who unlawfully has sexual intercourse with a girl under the age of eighteen years commits an offence and is liable to suffer death.

(2) Any person who attempts to have unlawful sexual intercourse with a girl under the age of eighteen years commits an offence and is liable to imprisonment for eighteen years without corporal punishment."

The age of consent for girls was raised from the ***apparent age*** of 14 years to 18 years in order to curb the spread of HIV through sexual activities. This was considered to be a revolutionary move at that time because the old law was liberal giving different consent ages for different forms of marriage. It was 21 years in church marriages, 14 years for the Muslims and 16 years for customary marriages as long as the parents consented to the arrangement. It appears consent to sex was pegged to marriage for procreation within marriages and was blind to sex before marriage for sexual pleasure which was contributing to uncontrolled spread of HIV. For the first time we got one single law on the consent age putting it at 18 years.

Therefore the continued description of the female victim as "a woman or girl" in Section 123 PCA would have serious legal implications. 'Girl' in the Longman Dictionary of Contemporary English, New Edition of 2008 is defined at page 680 to mean a female child. To call a woman a girl is acceptable but only as a joke between adults, more so peers. It is ordinary English and not legal language.

I would understand a woman to be an adult above eighteen years of age going by Article 31 of the Constitution of the Republic of Uganda, 1995 (as amended). Any female below the age of majority (eighteen years) would be described as a girl. A child below eighteen years is incapable

of giving consent to sex. In rape LACK OF CONSENT to the sexual act is what makes it an offence. Consent is a complete defence to Rape. But in defilement under S.129 consent is not a defence. It is irrelevant as long as the victim is below the age of eighteen years. That means that Age is a central factor in the construction of defilement as a crime differentiating it from rape. In Legal terms and technically speaking girls are defiled while women are raped.

The debates of 2007 that lead to the creation of Aggravated defilement were centered on clearing backlog of defilement of sexually active youths but at the same time protecting the vulnerable kids and the need to protect not only the girl child but also the boy child. The law was expanded to captures both male and female offenders.

A good reading of the Parliamentary **Hansards of Wednesday, 18 April 2007** reveals that there was no express amendment to the sections of the law on rape. It only came about by way of amending the law on defilement which expressly provides that "any person who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment."

In 2007 Parliament got concerned with the big number of remand prisoners awaiting trial on defilement charges. The law of defilement as amended in 1990 had created a huge backlog in the High Court. Parliament noted with great disappointment that no court had sentenced any defiler to the stiff maximum penalty of death. The Honourable Members of Parliament debated the amendment to the PCA with a view of lowering the punishment and jurisdiction in defilement cases to the jurisdiction of the Chief Magistrates to clear the backlog in the High Court. A new category of defilement was created for cases where the children abused were youths above the age of 14 years. That is Simple defilement carrying a lesser sentence of Life imprisonment. A proposal to create a new offence of Aggravated Rape depending on the age of

the victim or other circumstances was differed to the Sexual Offences Bill which the Minister promised to table soon. I am not aware of any Sexual Offences Bill tabled since then. The Minister of State, Justice and Constitutional Affairs **(Mr. Freddie Ruhindi)** while responding to some of the questions raised in Parliament stated as follows:

> ***"The Honourable member wanted to know why there were no proposed amendments to the following sections: section 130 of the Penal Code on defilement of idiots and imbeciles; section 131 on postulation for defilement; section 132 on defilement of women by threats, and so on. Section 133 is on a householder permitting defilement of a girl under the age of 18.***
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> ***The main purpose of this Bill is to transfer jurisdiction of defilement cases from the High Court to chief magistrates' courts, in order to decongest the prisons and courts and expedite the hearing of such cases. As you may note, the offences in sections 130 to 133 are all currently triable by the lower courts, or magistrate's courts, and there was therefore no immediate need for amendments to those provisions in that regard. Amendments to the above sections are therefore proposed in the Sexual Offences Miscellaneous (Amendment) Bill, which is before Cabinet for approval of principles for drafting of the Bill. It will soon be introduced in Parliament for debate.***
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> ***Hon. Winfred Masiko was very supportive of the Bill. Her major concern on the burden of proof has already been addressed. The member wondered whether offences on attempts to commit the offence of defilement were covered under the Bill. The answer is yes, under sub clause (2) of clause 2. Colleagues may also wish to study***

Chapter 40 of the Penal Code, which spells out the general provisions of offences on attempts.

Her proposal of a state fund for the victims of the offence of defilement is not sustainable. Every criminal sanction should be aimed at deterrence and corrective measures. To the contrary, a state fund would be counter-productive and promote the opposite. This is, however, without prejudice to any measures that the state may take to ensure that the victims are treated, given some contribution towards their welfare, etcetera.

Hon. Alice Alaso, like Hon. Winfred Masiko, advocated for state arrangements to look after victims of defilement and rape. As much as some of her submissions will be dealt with under the Sexual Offences Bill, I have already covered this matter.

Her concern about rape of old women and her proposal to create another provision of aggravated rape, may be considered under the Sexual Offences Bill. She may wish to note, however, that section 124 of the Penal Code provides that a person convicted of rape is liable to suffer death. This means that a judge has discretion depending on the gravity of the case, say where a very old woman is raped, to impose maximum sentence.

Hon. Denis Obua was concerned that suspects stay on remand for long periods without trial. This Bill when passed partly addresses that problem through the empowerment of Chief Magistrates to hear and determine defilement cases."

Indeed, Parliament passed the law as proposed by the Honourable minister above. It reads:

"Defilement of persons under eighteen years of age.

129. (1) Any person who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment."

The intention of Parliament as regards clearing the backlog of defilement cases was achieved. A big number of Simple defilement cases were transferred to the Chief Magistrates relieving the High Court of that backlog. I recall receiving many cases from the High Court when I was the Chief Magistrate of Masaka then. Many more cases of simple defilement are now being tried by Chief Magistrates under a cheaper and simpler procedure compared to the expensive and cumbersome procedure under the Trial on Indictment in the High Court. Moreover, suspects easily and quickly plead guilty to Simple defilement knowing that it no longer carries a death sentence. This has since expedited trials leading to decongestion of prisons. By charging these many cases of Simple defilement as Rape, which carries a death sentence and is only triable by the High Court, we are fighting to destroy the good intention of the legislature. We are unlawfully creating a fresh wave of case backlog. We should not add insult to injury by increasing the number of remand prisoners awaiting trial by the High Court in the already congested prisons.

Having legislated and amended the Penal Code to create the new offence of Simple defilement, Parliament cannot be said to have intended to retain any age of girls as victims of rape under S.123 of the PCA. It is a question of an omission or poor legislative draftsmanship or poor cross-referencing not to delete the words "or girl" from the definition of Rape. The word 'girl' in that

section is redundant and meaningless. We cannot say that we are correctly interpreting the law of defilement or rape if we go by the mere wording "woman or girl" in Section 123 PCA. Law is not mere words. Law is made by legislators for a particular purpose. As the Latin maxim goes;

"***Legislatorum est viva vox, rebus et non verbis legem imponere***."

Meaning that:

"The voice of legislators is a living voice, to impose laws on things, and not on words".

The intention of the legislators must be read in the law by giving the correct meaning to words and phrases within the context of the legislative history of the offence in question. The court interpreting the law must look at the background and events, including committee reports, hearings, and floor debates, leading up to enactment of the law. Such history is important to courts when they are required to determine the legislative intent of a particular statute. I have laboured to bring out that legislative history by quoting the Parliamentary Hansards. The typing error or failure to delete the words "or girl" from the section on rape or failure to do proper cross-referencing by the First Parliamentary Counsel or draftsperson upon amendment of the PCA, must be corrected by the High Court giving the law its correct interpretation. Interpreting the law is our work as courts of law.

It is still a debatable issue whether the creation of the offence of Simple defilement with a less stiff sentence took away the gains for women's emancipation and the protection of the girl child. Time will tell. What is glaringly certain is that it is easier and cheaper for courts to try cases of simple defilement. Justice is being administered to both the suspects and the victims in an expeditious manner. The continued practice of committing suspects of Simple defilement to the High Court, hoping that they shall be sentenced to death, is *unjustified* legal drama with malice

of keeping the suspects on long remand periods. After all, as rightly observed by the legislature, Courts are still reluctant to hand down the death sentence in defilement cases. The few sentences of death so far passed by the High Court have been reduced to imprisonment upon appeal. The Sentencing Guidelines that we use nowadays, though not mandatory, have spared the death sentence for only the rarest of rare cases.

Last but not least, the wild submissions on the discretion of the DPP and the demands of public policy did not appeal to me in the least. That could not have been the guidance and wise counsel of the person of the DPP that I have known for some good time. There is no such power or discretion given to the DPP by the Constitution or Act of Parliament to change Simple defilement into Rape or create a new criminal offence under any circumstance. The DPP can only prefer charges whose ingredients are best supported by the evidence on the police file. Rape is clearly rape of a woman capable of giving consent, withdrawing consent or refusing to consent to sexual intercourse. In the context of the current Penal Code provisions in Uganda, a girl is a minor who is incapable of consenting to sex and cannot therefore be raped.

Technically speaking, Rape ceased to apply to girls in 1990 and was replaced with provisions of defilement. Going by the 2007 amendments to the PCA, the two offences are distinct, distinguishable by the age element, criminal jurisdiction and the difference in the prescribed punishments. The legal circumstances in the Supreme Court case of **Ochit Labwor Patrick v. Uganda, Criminal Appeal No. 15 of 1998** have since changed**.** The only proper and most appropriate thing to do now is to amend the charges and charge persons who perform sexual acts with children with the offence of either Simple defilement or Aggravated defilement. In the instant case where A.S. (the survivor of the sexual assault) was a girl aged 16 years, the accused should be charged with Simple Defilement C/S 129 (1) of the PCA and not Rape.

The Plea Bargain agreement of 10 years on the defective charges of Rape is hereby rejected by court.

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Batema N.D.A.

Judge

25/11/2015

ORDERS

1. The Resident State Attorney is ordered to amend the indictment in this case from Rape C/S 123 of the PCA to Simple Defilement C/S 129 (1) of the PCA.
2. This case shall serve as a test case as prayed for by counsel for the applicant. The ruling decides the fate of all pending cases framed in a similar manner.
3. The Deputy Registrar at Fort Portal shall sort out the files for amendment and send them to the relevant Chief Magistrates for further and expeditious handling save for only those already cause listed before me in the current session.

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Batema N.D.A.

Judge

25/11/2015