

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT GULU

HCT-02-CR-SC-0149-2014

UGANDA :::PROSECUTOR

VERSUS

OCITTI GEOFFREY:::ACCUSED

JUDGEMENT OF MARGARET MUTONYI, J

1. Ocitto Geoffrey, hereinafter referred to as the accused was indicted for aggravated defilement contrary to section 129(3),(4)(a) of the Penal Code Act Laws of Uganda. He was charged with two counts.

2. The particulars of the offence were that the accused on the 7th day of October 2013, at Kanyagoga A sub ward, Bardege Division Gulu Municipality, in Gulu district performed a sexual act with AJ P in the first count and A J in the second count both girls below the age of 14 years.

3. The prosecution was led by senior state Attorney, Mr. Kizito Aliwaali while the accused was represented by learned counsel Mr. Oroya Conrad. The court was assisted by Mr. Ocen Daniel and Mr. Odongkara Franklin as court Assessors.

4. The essential ingredients of the offence of Aggravated Defilement are the following:

(a) That there was a sexual act performed

(b) That the sexual act was performed on a child below the age of 14.

(c) That it was the accused who performed the sexual act with the victim.

5. Like in most of the criminal cases, the burden of proof in this case rested on the prosecution throughout the trial since the accused pleaded not guilty. He put all the ingredients in issue.

6. The standard of proof in criminal cases is very high. The prosecution had to prove beyond reasonable doubt that it was the accused who performed the sexual act on the girls.

Both the prosecution and the defense did not make any submissions

7. The brief summary of the case is that the accused was staying in the home of Akumu Filda as her patient. Akumu is a traditional herbalist. On 7th October 2013, the accused spent a night in one hut with the victims after it rained and he took advantage of that and defiled the girls at night. That he threatened to knock them with a motor cycle if they revealed to their mother or any one. On that night one of the victims screamed but when the mother came in she did not say a word, but found the accused standing by her bed claiming he had just escorted them out to urinate. The rest of the story will be brought out in evidence.

8. The following issues arise from the ingredients of the Offence;

- Whether there was a sexual act performed on the victims?
- Whether the victims are girls below the age of 14 years?
- Whether it was the accused who performed the sexual act with the victims.

9. RESOLUTION OF ISSUES.

Whether there was a sexual act performed on the victims

Sexual act is defined under section 129 (7)(a) of the Penal Code Act. It means penetration of the vagina, mouth, or anus, however slight, of any person by a sexual organ: and the unlawful use of any object or organ by a person on another person's sexual organ. Sexual organ means vagina or penis. It entails acts related to sexual intercourse or touching a victims sexual organs or using ones sexual organs on the victim. Where a victim is young, the issue of consent does not arise as the law presumes them incapable of consenting to such sexual acts.

To prove this ingredient, the prosecution relied on the evidence of the Principle Medical Clinical Officer Gulu regional referral Hospital, Mr. Bamas Henry, as PW1,

the mother of the victims Akumu Filda as PW2, The Victims, PW3,PW4, and Dr KIDEGA RICHARD as PW5.

Because the victims are young I will not use their names for purposes of protecting them from stigma.

PW1 Barmas Henry a Principle Medical Officer from Gulu Regional Referral Hospital examined the victim AJ 21st October 2013. The victim was referred to him by the police with PF3A. The victim was a female child of about 5 years old. He received the history from the mother. On examination of her genetalia, her hymen was intact but the lubia minora had bruises on both sides. The injuries were according to his opinion caused by a blunt object. He said in cross examination that the wounds were in the process of healing, this PF3A was tendered and admitted in evidence and marked PE1. He informed court that the kind of injuries on the child are akin to those caused by a penis.

PW2 Akumu Filda the mother of the victim and herbalist, informed court she knew the accused as a relative to her husband and was brought to her home as a patient in July 2013. That on 7th October, 2013, she heard her children make an alarm around 1:48 am. She went to the hut where they were sleeping and found the accused with a torch flashing towards the children. He was dressed in a red short and bare chest. On asking the accused why he was standing where the children were sleeping, he responded he was taking them out to urinate.

And that he was now putting back the mosquito net.

The witness went back to sleep. It was raining that night. She asked the accused whether the alarm was from their house and he said no. The children were asked but they just kept quiet. She informed court the accused used to sleep in that

house and the children slept in another house but on that day it was raining and he said they could sleep there with him.

The following day, she noticed AJP was not walking well. When she asked her, she claimed her stomach was the one paining.

She said the child was checked the following day by herself, the auntie to the girl and the accused's mother. They saw a tear between the abdomen and the thigh. The child continued to walk with difficulty, until the father asked her to check the girl's private parts.

This time when she examined the child, the victim AJP, she disclosed she had a wound in her private parts that was inflicted by Ocitti the accused. Further examination revealed pus and blood flowing from her vagina to the thighs. The girl AJP further revealed that the accused opened her thighs, pushed his penis in her vagina and covered her mouth with a bed sheet. That she cried once.

She asked the victim why she did not tell her, and the child informed her the accused threatened them that he would knock her with the motor cycle and throw her in the sugarcane plantation and also not buy for her sweets.

The following day AJ another child was down with malaria. She also informed her mother that her vagina was paining. She told the mother the accused pushed his finger inside her private parts and eggplant from his short. She took the children to police which referred her to Gulu Regional Referral Hospital. Both children had pus in their private parts. They were screened for HIV and the results were negative. Their condition worsened and she took them to Lacor Hospital. She informed court the accused after noticing the child was walking badly disappeared from home and was arrested from cukpa Otarawo near the army

school. Cross examination by the defense counsel did not make the witness contradict herself.

PW3 AJP is a child aged ten years. A voire dire was conducted and she was found to be possessed with sufficient intelligence to understand the import of taking the oath before giving her testimony in court. She informed court she was 10 years old in P2. She identified the accused person very well and knew him as a person who came to their home to receive treatment and lived there for some time. She said he was in prison for doing foolish things on her and AJ. She described the foolish things as having sex with them. She informed court that the accused held her legs apart, placed her on him and pushed a red thing from his trousers and pushed it into her. That he tied her mouth with a bed sheet that night to stop her from shouting.

That she shouted later. She informed court that he pushed his penis in her vagina and it was painful. All this happened inside the house of their uncle where the accused used to sleep while getting treatment.

On that night, she informed court only three people slept in that hut; the accused, PW3 and AJ. She said he also pushed the fingers in the private part of AJ and his penis as well. That she made an alarm and the mother came and found him standing with a torch and told mummy that he had taken the girls to urinate. That after having sex with her, he stood on the side where their heads were facing. That he talked and she knew his voice because she had known him for some time.

She went on to say that she did not inform the mother because he had threatened to knock them with a motor cycle and throw them in the sugar cane

plantation and would not buy for them sweets. He used to buy for them sweets. The mother left them to sleep till morning.

She said the following morning she was not walking well. Her mother examined her and saw watery substance with pus mixed with blood. It was at this time that she disclosed Ocitti had sex with them. She was taken to the Hospital where it was discovered she had gonorrhoea.

She informed court that was the first time he did it and it was the first time they slept with him in the house.

In cross examination, she maintained she made an alarm after he turned to AJ. She said she knew he was the one because he stood next to them and he was the only male in the house.

PW4 AJ a six year old girl did not give her testimony on oath,. She informed court that the accused had been in their home before he was taken to prison. That the accused pushed his finger where she urinates from and also pushed something which looks like an egg plant and pushed into her vagina. That the accused flashed a torch and she saw him. That he said after doing AJP he would also do her. This happened at night but she saw his face because he flashed a torch. She informed court she had seen him before since he was staying in their home.

Just like AJP, she said they did not tell the mother because he had threatened to knock them with a motorcycle and dump them in a sugar plantation. That after some days she told the mother that the accused pushed his fingers in her vagina.

The last witness PW5 Dr Kidega Richard a medical officer attached to Gulu R R Hospital examined AJP on 14th October 2013. The child was between 8-9 years old. When he examined the genetalia, she was found with vaginal pus discharge,

raptured hymen and wounds, the probable cause of the injuries was penetrative sex.

He requested for laboratory tests which revealed that the victim was HIV negative but the results for gram stain were positive .The test was for Gonorrhoea. The PF3A for AJP and laboratory results were admitted in evidence and marked PE2 and PE3 respectively.

It should also be brought out clearly that section 129 (7)(a) of the Penal Code Act talks of penetration however slight. It therefore does not matter whether there was penetration and rapture of the hymen or not. What is relevant is the sexual act.

With the above evidence on record, it is very apparent that the two victims were sexually assaulted. Performance of the sexual act was proved much as AJ's hymen remained intact. Touching her vagina with a finger amounted to defilement.

The gentlemen assessors also agreed that the ingredient was proved.

It is my view that the first issue is resolved in the affirmative as evidence has proved beyond reasonable doubt the ingredient of performance of the sexual act.

The second issue is whether the sexual act was performed on children below the age of 14. I don't have to repeat the evidence above. PW1, PW2, PW3, PW4 and PW5 all proved that the victim in the first count was about 9 years old and victim in the second count was about 5 years old. At the time they testified PW3 was 10 years while PW4 was 6 years. They are children below 14 years old. The defense is also not disputing this fact.

The second issue is also resolved in the affirmative as it is not contentious.

This brings me to the last issue of **whether it was the accused who defiled the children.**

The accused denied both counts and made a sworn statement, he called his mother as the witness. In his lengthy defense, he alleged there was a grudge between him and the parents of the victims because the father claimed the accused was having an affair with his wife. He also claimed the father claimed he was in love with their daughter whose name he could not disclose and at the same time claimed they wanted him to marry their daughter but he refused. He said on that night he spent the whole night in the shrine with his mother and some other people.

His witness DW1 Auma Christine claimed she was there on that night and she spent a night in the shrine with the accused and some other people including the grandfather of the victims.

I am alive to the fact that the burden of proof rests on the prosecution throughout the trial and it never shifts. I am also aware that a conviction can never be based on the weakness of the defense but on the strength of the prosecution.

The offence happened at night. The accused was not a stranger to the victims because he had stayed in their home for some time getting treatment. This fact is known to both the prosecution and the defense. The accused had every opportunity to raise the issue of grudge in cross examination but he did not.

The victim especially the 9 year old girl was very consistent with her testimony which was well corroborated with her mother's evidence and the medical evidence. The accused in his defense gave the impression that he had no problem with PW2 Akumu who wanted him to go away in peace. There is therefore no reason why Akumu would fabricate a very serious case against her patient and friend. The children did not report immediately because they

informed court they were threatened. I have no reason to doubt them. AJP was infected with Gonorrhoea. It is only absurd that our investigations are in most cases wanting. This was a case where the accused should have been subjected to Gonorrhoea test.

But this does not mean that without that test the evidence is not sufficient. The accused simply claimed he was being framed but the prosecution evidence was not destroyed at all in cross examination.

The children had an opportunity to see him when he flashed a torch and when he spoke to their mother claiming he had taken them outside to urinate.

To show that the mother was not even suspicious of him, she left the children to spend the rest of the night with him.

In cases of this nature court is mindful of the relationship between the accused and his witnesses and the victim. The doctors are independent and impartial witnesses,. They do not have any reason to lie about the defilement case. The mother of the victim was informed by her children after noticing AJP walking with difficulty. These children did not have any reason to accuse the accused when it was another person who did it.

On the other hand, court did not trust the mother of the accused at all . Her interest is to help her son get out of prison. Where the prosecution has established a prima facie case, the accused has the duty to simply raise doubt which doubt should be raised by witnesses who are not interested in the outcome of the case, in case they were around.

The mother of the victim, knew very well that her girls slept in the hut where the accused slept, she heard an alarm and she responded by going to the hut where the children were and found the accused flashing a torch near the children

pretending to be covering them with a net. The girls who knew the accused very well were not mistaken about his identity.

The prosecution evidence placed the accused at the scene of the crime beyond reasonable doubt. I have not agreed with the assessors because they did not properly evaluate the evidence of the prosecution. The accused who lived in that place long enough did not name any other male person in the home who could have defiled the children. His defense was a mere denial with allegations which were not adding up. As mentioned earlier, convictions are not based on the weakness of the defense because the accused is not obliged to say anything but on the strength of the prosecution case. I have warned myself against the dangers of relying on evidence of minors.

I am very convinced beyond reasonable doubt that the accused is the person who defiled the children and thereafter threatened them not to reveal anything to their mother.

In the result the last issue is resolved in the affirmative and I find the accused guilty of the offence of aggravated defilement in both counts and convict him accordingly under S. 82 of the TIA.

HON LADY JUSTICE MARGARET MUTONYI.

6th March, 2015.

State: Most Obligated.

State: We do not have any record of previous conviction. He may be treated as first offender. However, there are a number of aggravating factors.

The victims were young 5 and 9 years respectively.

The convict abused the hospitality of the matter of the victim according to him. He was getting treatment in the home. She even entrusted him with the safety of the children that night.

To defile two children in one night in one home, bardies between an act of terrorism.

It is unbelievable. The convict was about 22 years old and should have been a person taking care of this children rather than sexually ravaging them.

One of them was found to be infected with a STI. It is not known whether it has been cured or not. That can any attributed to the sexual act.

Both of them were subjected to severe injuries. They suffered both physical and psychological torture.

The offence of aggravated defilement attacks death sentence: a conviction.

According to the sentencing guidelines, which this court is obliged to apply, the starting point is 35 years where court can reduce or increase depending a aggravated or mitigating factors.

There are very strange and compelling reasons this court can rely upon to enhance the sentence. Should this court not award maximum sentence of death, although we pray for it, we pray for sentence of not less than 50 years imprisonment be given to him and that the sentences run consecutively.

I so pray.

Conrad: The convict before court is a first offender, a parent of 3 children of tender age who depend wholly on the convict.

He is charged with the responsibility of their upbringing. He is a young person who can reform and become a useful citizen. He has spent a good period on remand.

It is our prayer that court be lenient on the convict. We pray for a reformatory sentence and caution him not to repeat a similar act in case he is back in the community.

Being a young man of 22, we pray for the higher side of 15 years for each count.

Accused: Even though I did not do it, I have my brothers, mother and children. I pray for mercy.

Court: Adjourned to 9/3/2015 for sentencing at 9.00am.

Sentence and Reasons.

The offence of aggravated defilement is punishable by death as the maximum penalty.

The Sentencing Guidelines however set 35 years as the starting point whereby the court may decide sentence the convict either below or above 35 years depending on the mitigating or aggravating factors.

The Resident State Attorney submitted defiling two young children in the range of 5 - to 9 years was To acts of terrorism and prayed for the maximum penalty but in case court does not give the maximum, he prayed for 50 years on each count to be served consecutively.

The parents of the victims were also consulted on the kind of punishment that was deserving. The mother proposed 20 years for each while the father proposed 35 years.

The difference in age if it be small is a mitigating factor. In the case the victims were aged 5 and 9 years while the convict was 22 years.

The age difference aggravates the offence the convict had also lived in be home for sometime much as he was a patient. The mother of the victims trusted him with the victims that night. This further aggravated the offence.

The offence of aggravated defilement is also prevalent in Acholi Sub Region compared to the other crimes of capital nature. It is tapping the cause list. Court has tried to look for mitigating factors but have not found any.

The convict has remained adamant that he did not commit the offence. He is therefore not remorseful at all.

He insisted it is the court that has decided he is guilty. The convict's conduct is vicious. He ruthlessly ravaged a small child of 9 years and used his finger on her sister of 5 years. He took advantage of a single night to sexually terrorize the two little girls and then threatened them not to reveal their ordeal to anyone. No wonder they could not even tell their mother of what had happened on that night. Until the effect of penetrative sex was apparent on one of the victims of nine years it is the duty of this court to protect defenseless children from the vicious conduct of the convict and deter others from committing crime of this nature.

Having sexual intercourse with very young children is sexual perversion of its kind. In court's opinion, the convict is too noxious to be left in society.

However being a first offender and young man of 23 years old, I will not give him the maximum sentence. I would have given a reformatory punishment, but the convict was not remorseful at all. He did not plead for mercy as a person who made errors and accepted his mistake.

This leaves me with the sentence which will be deterrent and punitive. Much as he claimed to have children, his deprived conduct doesn't make him a good father. The children are better off without him.

In the result, he is ordered to serve 25 years in prison on each count and since he defiled the first victim and turned to the second victim much as it was in one night, the sentences are to run consecutively. The period spent on remand is inclusive.

Right of Appeal against both conviction and sentence explained.

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Hon. Lady Justice Margaret Mutonyi

Judge

9/03/2015

Convict in court.

Kizito Aliwaali for State

Opoka Juliet for accused.

Assessors in court

Anna for court clerk.

Court: Sentence passed in the presence of the above.

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Hon. Lady Justice Margaret Mutonyi

Judge

9/3/2015