

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

HCT – 02- CR – SC – 0364 – 2014

UGANDA:.....PROSECUTOR

VERSUS

OJARA DENIS:.....ACCUSED

JUDGMENT OF MUTONYI MARGARET, JUDGE

1. Ojara Denis hereinafter referred to as the accused was indicted with the offence of Aggravated Defilement C/S 129(3) and 4(a) of the Penal Code Act.
2. The particulars of the offence were that the accused on the 15th day of April 2014 at Termituna village, Unyama Sub County in Gulu District performed a sexual act with (Ayubu Lilian) AL a girl below the age of 14 years hereinafter referred to as victim.
3. The summary of the prosecution case was that the accused on the 15th day of April 2014 removed the victim a child of about 2 years old who was left by her mother Lalam Vicky in the compound as she went to ease herself from the place of convenience. She then heard the child crying a few meters away from the edge of her compound and upon rushing to check, found the accused who was well known to her squatting on top of the victim with his penis out performing a sexual act with the victim.
The accused ran away on seeing the mother of the victim. The mother found semen spilled on the child and took the child to the mother of the accused and showed her. The case was reported to police hence this case.
4. When the accused was arraigned in this court, he pleaded not guilty. By that plea, the accused set in issue all the ingredients of the offence of Aggravated defilement that are essential to prove the case.

5. The essential ingredients or elements requiring proof in Aggravated defilement are the following
 - (1) That there was a sexual act performed.
 - (2) That the sexual act was performed on a child below the age of 14 years
 - (3) That it was the accused who performed the sexual act

6. The law places the burden of proving the above elements on the prosecution. An accused does not bear the burden of proving his innocence.

He is presumed innocent till proved guilty or until that person has pleaded guilty. This is clearly spelt out under Article 28(3) (a) of the Constitution of the Republic of Uganda, 1995.

It is also trite law that the accused should only be convicted on the prosecution case and not on the weakness of his defence as it was held in the case of **Sekitoleko vs. Uganda, 1967 EA 531** which has been followed in a number of cases in Uganda.

In a bid to discharge the burden of proof as set out under the law, which burden has a high standard of proof which is beyond reasonable doubt, the prosecution adduced evidence of three witnesses; these were PW1 Dr. Omona Otto Charles, PW2 Lalam Vicky, mother of the victim and PW3 Komakech David the father of the victim.

The accused on the other hand gave sworn testimony and did not call any witness.

7. The state was represented by Kizito Aliwaali Senior State Attorney while the defence was conducted by learned counsel Mr. Oroya Conrad.

The court was assisted by Mr. Ocen Daniel and Mr. Odongkara Franklin as court assessors.

I shall deal with the ingredients of the offence one by one: starting with whether there was a sexual act performed.

PW1 Doctor Omona Otto Charles a medical doctor specialized in pediatrics and child health received the victim from police who was issued with PF 3A. He examined the

victim. A.L. who was a breast feeding child. According to the history of the matter, the child was 1 year and nine months old.

The baby was brought to the doctor naked and crying excessively. The child was restless. The head, chest, was soiled with dirt. Both the upper and lower limbs were soiled.

On checking the genitals, they were tender on touching and inflamed. He also found seminal fluid stains on the vaginal part and the probable cause of the injury was sexual abuse.

He recommended HIV test and Hepatitis B.

On the pictogram of the anatomy of the body, he indicated his findings.

The hymen was intact as there was no penetration but the lips of the vagina were tender and flamed.

The PF 3A was tendered and admitted in evidence and marked PE2.

The witness concluded, it was a case of sexual abuse because of the sexual stains and the tampered with genitalia. He informed court accidents, and self inflicted injury was ruled out.

In cross examination, he insisted the hymen was intact and not ruptured and noticed the seminal fluids by inspection. He did not do the microscopic testing on the child.

He further clarified to court that seminal fluids can physically be identified.

PW2 Lalam Vicky informed court she was the mother of the victim. On 15/4/2014, she went to the latrine leaving her baby outside. When she got outside the latrine she heard her child crying on the path and when she went there, she found when the accused had put the child down on the path near a mango tree and had put his penis on the child's private part. She made an alarm and he ran away to his house. She picked her child and

chased him upto his home. She examined her child from the spot where she was found. Some semen dropped on the ground and some remained on the private parts of the child. That she took her child to the Hospital and the father reported the case to police.

Before that the accused's mother had pleaded with her to forgive the accused as he was not mentally fine.

The 3rd witness Komakech David, the father of the victim reported the case to police. He did not witness the defilement but was merely informed by the mother.

The accused in his defence claimed the child was at their home and he merely shared a raw cassava with her.

That he was carrying the baby on his laps while the mother of the victim and his mother were inside the house.

He said the child went to him and cried because he removed the raw cassava they were sharing from her.

That when the mother came out, she saw his erected penis because his short was short and lousy. He denied pushing his penis in the child's private parts.

He said his short exposed his penis.

In cross examination he informed court he has a high libido and if the child had not come out, he would not have had on erection.

He denied ever moving away from their compound and informed court the community does not like him.

The defence prayed to have the mother's statement tendered in court in support of their defense.

When I need it, the underlined words were and I quote **“Ojara was squatting while mustabating onto my daughter. When he saw me he dropped the child down and began running towards their home”**

In her statement in court, she described what she saw in the following words ***“I found the accused had put the child down on the path near the mango tree. He picked his penis and put it on the private part of my child. I made an alarm and he ran away”***

Court has not found the two statements very contradictory. They all bring out the sexual act.

Section 129(7) (a) of the Penal Code Act defiles a sexual 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”

In the instant case, PW1 the medical doctor informed court that he found seminal stains on the vaginal area of the child. Her Luvia minora was tender on touching.

PW2 the mother of the victim caught the accused in the act and found seminal fluids on the baby's private parts. The principle of corpus delicti applies here. The presence of seminal fluids on the child's private parts even if no penetration was done amounts to a sexual act.

PW1 and PW2 have proved the first ingredient beyond reasonable doubt.

On the second ingredient, PW2 the mother of the victim stated her child was by then 1 year and 9 months old.

PW1 informed court the baby the victim was breast feeding.

The issue of the victim being below 14 years is therefore not disputed.

The second ingredient was also proved beyond reasonable doubt.

Court remains with the issue of whether it was the accused who committed the crime.

The crime was committed at around 12 noon in broad day light. The accused was well known to the mother of the victim who chased him up to their home. Much as the accused denied the issue of being found with the child on the path near a mango tree, he put himself at the scene of crime by being in contact with the child, with his erected penis

and confessed to his high libido which was caused by the presence of the child. I have not believed his story on how he found himself in the mess with this child.

The mother who did not have any grudge with him was found to be a veracious witness. There was no reason why she would tell lies about the accused person. She properly identified him as a person who was caught red handed defiling the little baby. She survived penetration by the grace of God.

I do agree with the gentle men assessors that the accused was properly identified as he was caught in the act.

With the above said, the last ingredient was also proved beyond reasonable doubt. In the result, the accused person is convicted of the offence of aggravated defilement under s. 82 of the Trial on Indictment Act.

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Margaret Mutonyi

Judge

9/3/2015

Judgment delivered in the presence of Kizito Aliwaali the Senior State Attorney. Opoka Juliet and Conrad Oroya for accused.

Assessors as before

Anna for clerk.

State: We have no previous record. He is a first offender. We however pray for the maximum sentence of death penalty because of the following reasons.

1. This is a case of the rare of the rarest which attracts death. The victim was 1 9/12 at the time. Very young and the convict was 28 years with the age difference of 26 years.
2. This was a breast feeding child who was sexually abused. Her genital were tender and inflamed

If the mother was not intervened handy, the child would have been raptured.

The convict needs to be out of the society to save both children and adults because of his self confessed high libido.

The offences of aggravated defilement are rampant in this jurisdiction. This calls for a deterrent sentence to other would be offenders.

I so pray.

Mitigation

Conrad Oroya: The convict is a first offender. He is very remorseful according to his conduct. He is a young man and capable of reforming to become a useful citizen of this nation. He is the only child to the mother who is charged with the responsibility to take care of the old woman. He has been on remand since April 2014. It is our prayer that court has mercy on the convict and instead of giving the maximum death penalty, he be given reformatory sentence that will enable him come out and be a sign of agent.

We therefore pray for a short term of imprisonment as opposed to the maximum the state has prayed for.

I so pray.

Adjourned to 2:30 for sentencing and reasons.

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Margaret Mutonyi
Judge

Sentencing and Reasons

The convict is a first offender. He however committed a very serious crime against a little baby. His depraved conduct deserves heavy punishment which will serve as a deterrent to others.

Going in for a child of 1 year and 9 months is not only vicious but malignant.

He exhibited very evil intentions. He is noxious to society and deserves to be out of circulation for some time.

The constitution courts of judicature sentencing guidelines practice Direction 2013 set 35 years as the starting point for case of aggravated defilement. Depending on the mitigating factors, it may be reduced and aggravating factors enhances the years.

Apart from being a first offender, there is no other mitigating factor.

The rest are all aggravating factors which include the age difference between his victim and himself about 26 years, the very young nature of the victim, 1⁹/12, the prevalence of the offence of aggravated defilement in Acholi sub region, and subjecting court to a protracted trial. He unleashed his lust on a very innocent baby.

It is the duty of this court to impose penalties that will have the effect of deterrence on the community to protect the defenceless children from people with perverted and depraved minds.

The penalty should also be punitive to the offender. The state prayed for the maximum sentence because the victim was very young but considering the convict is a first offender, he is ordered to serve a term of imprisonment of 40 years period spent on remand inclusive.

He is free to appeal against both the conviction and sentence.

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Mutonyi Margaret

Judge

9/3/2015

3.00pm

Convict in court

Kizito Aliwaali for state

Conrad Oroya for accused

Odongkara Franklin

Ocan Daniel

Assesso }
}

Anna for clerk.

Court: Sentence passed in the presence of the above persons.

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Mutonyi Margaret

Judge

9/3/2015