

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**

**CRIMINAL CASE No. 0060 OF 2014**

**UGANDA .....**

**PROSECUTOR**

**VERSUS**

**AFEMA JACKSON AYIKI .....**

**ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused in this case is indicted with one count of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It is alleged that the accused on the 30<sup>th</sup> day of April 2013 at Acha village in Arua District, had unlawful sexual intercourse with Candiru Joyce, a girl under the age of fourteen years.

The facts as narrated by the prosecution witnesses are briefly that the accused was a neighbor to the home of the victim PW2 (Candiru Joyce) at Acha village, Yachi Parish, Ogoko sub-county in Arua District. The accused from time to time would visit the home of the victim and share meals with the family. On the afternoon of 30<sup>th</sup> April 2013, the father of the victim, PW3 (John Odama) left his home for the trading center and left instruction to the victim to follow him later to pick money for buying food. At around 6.00 pm, the victim decided to fetch water first before going to the trading centre. She picked a basin and went to the stream. When she got there, she found the water had dried up and she immediately turned back to return home.

When she got to the junction where one of the paths leads to the home of the accused, the accused who was seated at the verandah of his house, called her. The victim put the basin on the ground and went to meet the accused. The accused told her to follow him into the house from where he would tell her the reason he had called her. When the victim entered, the accused went out momentarily to look out for any intruders and returned inside the house. He drew the curtain

used for partitioning the single roomed house into two sections, spread the bed sheet, lifted the victim and threw her down onto the bed sheet, used one hand to cover her mouth in order to prevent her from screaming and used the other to tear her clothes off. He proceeded to defile her by an act of sexual intercourse.

After the act, the victim realized there was blood dripping from her private parts. She put her clothes back on, returned home and washed the clothes, and she then went to her father at the trading centre. She returned home later, prepared supper and went to sleep without revealing her ordeal to her father. She feared her father would beat her since he tended to be violent when drunk. The following day she felt a lot of pain in her private parts and was as a result was walking with her legs wide apart. She went through her morning chores with difficulty and later went to school where her friends expressed concern that she was not her normal self. She did not reveal to them what had happened to her.

On her return home after school, she summoned the courage to tell her father what had happened to her the previous evening. The father, PW3 (John Odama), reported to the L.C I Chairman who, together with the youth, went searching for the accused. He was found bathing at the stream. He was arrested and taken to Yachi Trading Centre. The police was called from Ogoko sub-county, the accused was taken away. Statements were recorded from both the victim and the accused and the two were as well taken for medical examination. On medical examination by the police surgeon at Arua Police Health Centre III on 3<sup>rd</sup> May 2016 by Dr. Ambayo Richard (PW1), the victim was found to be 11 years old, based on her physical development and dentition, and found bruises in her private parts consistent with sexual intercourse having occurred (prosecution exhibit P.E 1). The accused too was examined by the same doctor on the same day and was estimated to be 45 years of age and of sound mind.

In the unsworn statement in his defence, the accused denied the accusation. He stated that on the day in issue, he was at his home until 11.00 am when he went to fill his charcoal into sacks. He did not return home but at round 4.00 pm, when he was done with the work, he went to the trading centre. He found many people sitting under a tree and he was invited to join them. The L.C.I Chairman then asked PW3 (John Odama) to stand up and tell them why they had gathered. PW3 stood up and accused him of having defiled his daughter. The L.C.I Chairman referred the matter to the L.C.II Chairman who ordered his arrest by the youth. He was kept at the home of

the L.C.II the whole night and the youth kept assaulting him throughout the night. The following day he was taken to Ogoko sub-county where he spent the night. The following day he was transferred to Arua police Station. He stated that the accusation against him is false and was concocted by PW3 who owes him sim sim under a private arrangement of annual exchanges of sim sim harvests between him and PW3. He had given his 2012 harvest of four sacks-full to PW3 and now it was his (PW3's) turn to give the accused his 2013 harvest which he is trying to avoid by coming up with the accusation.

The accused called two witnesses to support his alibi; DW2 (Alemiga Grant) a shop owner in Yachi trading centre, said the accused came to his shop at around 2.00 pm where he sat until 4.00 pm when they left to go drinking together. They parted at around 8.00 pm when DW2 left for his home, leaving the accused at the trading centre. DW3 (Festo Abiriga) stated he was with the accused at Yachi Trading Centre on that day from around 2.00 pm to 8.30. He said during that time, the accused sat at his door while he (DW3) bought sim sim at his shop as an agent of Alam Group Company. The accused initially sat under a tree in front of his shop with the L.C.I and L.C.II Chairmen before he came to the verandah of the shop at around 7.00 pm. He was aware of the sim sim harvest exchange arrangement between the accused and the complainant but did not know of any dispute that had arisen between them in that regard.

In this case, 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 because of weaknesses in his defence, (See *Ssekitoaleko v. Uganda* [1967] EA 531). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller Vs Minister of Pensions* [1947] 2 ALL ER 372).

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.

The first ingredient of the offence of Aggravated defilement is proof of the fact that at the time of the offence, the victim was below the age of 14 years. The most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child (See *Uganda v Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

In the instant case, the court was presented with the oral testimony of PW2 (Chandiru Joyce) who said she was 15 years old having been born in 2001. Her father, PW3 (John Odama) stated that the victim was born in 2001 and was now 15 years old but could not remember the date and month. This evidence was unsatisfactory standing on its own. There is little wonder therefore that the second assessor, Ms Oundo Jane, advised the court to find that this ingredient had not been proved. Matters were not helped further when, with treated hair uncharacteristic of the primary seven pupil she claimed to be, the victim had a precocious look while in the dock. That aspect of her physical appearance made her look older than her stated age but her mannerisms and rest of the demeanour was consistent with the age.

This evidence is corroborated by the admitted evidence of PW1 (Dr. Ambayo Richard) who examined the victim on 3<sup>rd</sup> May 2013 (four days after the day the offence is alleged to have been committed). In his report, exhibit P.E.1 (P.F.3A) he certified his findings that the victim was 11 years at the date of examination. This assessment was based on her physical appearance and her dentition (of 26) at the time rather than on what PW3 told her as stated by the second assessor. Counsel for the accused did not contest this ingredient during cross-examination of these witnesses and neither did she do so in her final submissions. Consequently, in agreement with the first assessor, but in disagreement with the second assessor's opinion, I find that this ingredient has been proved beyond reasonable doubt.

The second ingredient required for establishing this offence is proof that the victim was subjected to a sexual act. One of the definitions of a sexual act under section 129 (7) of *the Penal*

*Code Act* is penetration of the vagina, however slight by the sexual organ of another or unlawful use of any object or organ on another person's sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence, (See *Remigious Kiwanuka v Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)*). The slightest penetration is enough to prove the ingredient.

In the instant case, the court was presented with the oral testimony of PW2 (Chandiru Joyce) the victim who said that her assailant had sexual intercourse with her. She narrated how the assailant tore off her clothes, got hold of his genital and inserted it into hers'. It is a rule of practice though not to rely only on the uncorroborated evidence of a victim of a sexual offence to support a conviction, save where court forms the opinion that the witness is truthful and the evidence is free of error. The testimony of PW2 is corroborated by the admitted evidence of PW1 (Dr. Ambayo Richard) who examined her on 3<sup>rd</sup> May 2013 (four days after the day the offence is alleged to have been committed). In his report, exhibit P.E.1 (P.F.3A) he certified that the victim had signs of penetration in her genitalia. Although the hymen was intact, he found bruising around the vestibule which injuries were consistent with sexual intercourse having occurred within the last one week.

The doctor observed that the probable cause of those injuries was penile-genital contact although the contact was superficial without deeper penetration. The vestibule is a cavity beyond the labia majora and about 2/3 of the labia minora forming an approach or entrance to the inner cavity or space constituting the vagina. The assailant therefore achieved penetration beyond the external aspects of the genitalia but was unable to penetrate the interior cavities of the victim's genitalia. In law, such penetration is enough. To constitute an act of sexual intercourse, it is not necessary to prove that there was deep penetration, the emission of seed or breaking of the hymen. The slightest penetration is sufficient (see *Gerald Gwayambadde v Uganda [1970] HCB 156*; *Christopher Byamugisha v Uganda [1976] HCB 317*; and *Uganda v Odwong Devis and Another [1992-93] HCB 70*).

This evidence is corroborated further by that of the victim's father, PW3 to whom the victim reported the day after the incident. A report made to a person in authority soon after or within a reasonable time after the incident is capable of corroborating the testimony of the witness (see *Livingstone Sewanyana v Uganda, S.C. Crim. Appeal No. 19 of 2006*). PW3 also noticed a

change in her gait as she walked uneasily with the legs wide apart due to the pain she was feeling. The distressed condition of the victim observed soon after the incident offers further corroboration (see *Kibazo v Uganda* [1965] E.A. 509 at 510). Counsel for the accused as well did not contest this ingredient during her cross-examination of the witnesses and neither did she do so in her final submissions. I find that the testimony of the victim is sufficiently corroborated. Therefore, in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

The last essential ingredient required for proving this offence is that it is the accused that performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. In this case we have the direct evidence of a single identifying witness, PW2 (Chandiru Joyce) the victim who explained the circumstances in which she was able to identify the accused as the perpetrator of the act. Where prosecution is based on the evidence of a single indentifying witness, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v R* (1953) E.A.C.A 166; *Roria v Republic* [1967] E.A 583; and *Bogere Moses and another v Uganda*, S.C. Cr. Appeal No. 1 of 1997).

In her testimony PW2 stated that she knew the accused very well before the incident and that it is the accused that defiled her. The accused denied this and set up an alibi. His alibi is that he was at Yachi Trading Center at the time he is alleged to have defiled the victim. An accused who sets up an alibi does not have a duty to prove it, but it's the duty of the prosecution to disprove it by adducing evidence which places the accused squarely at the scene of crime (see *Vicent Rwamaro v. Uganda* [1988-90] HCB 70). Counsel for the accused in her final submissions argued that the defence of alibi was not disproved, and it placed the accused at Yachi Trading Centre between 2.00 pm and 8.30 pm, in which case he could not have defiled PW2 at 6.00 pm. as alleged.

I have considered the alibi set up by the accused. I have noted some inconsistencies therein. The accused claims to have been under a tree together with the L.CI Chairman in absence of the L.C.II Chairman. DW3 states that he saw the Chairman L.CII was under the tree together with the accused. DW2 claims that the accused was seated on the verandah of his shop from 2.00pm until 4.00 pm while they conversed. The accused and DW3 stated that during that time, the

accused was under a tree. The accused had no duty to explain these inconsistencies but they cast doubt about the veracity of his defence.

On the other hand, the single identifying witness PW2 knew the accused very well before the offence was committed. The offence was committed at around 6.00 pm in broad day light, the victim was in very close proximity of the accused, the accused called her while she was on the road and shortly after talked to her while inside the house. The encounter took some time during which the accused stepped out briefly on the lookout for intruders, drew the curtain, spread the bed-sheet, threw her down, tore off her clothes, capped his hand on her mouth to prevent her from screaming, threatened her not to raise an alarm and went ahead to have sexual intercourse with her. In my view, the conditions that prevailed during the entire course of those events favoured correct visual and audio identification of the accused.

The accused claims that the case against him is a fabrication by PW3 meant to avoid meeting his obligation to hand over to the accused, his sim sim harvest under their arrangement of annual exchange. I have found this claim to be incredible, more so since DW2 is not aware of any dispute between the two regarding that arrangement. Even if there was such a grudge, it would take a very depraved father to coach his 11 year old daughter in matters sexual, as a means of avoiding such an obligation. PW3 did not impress me as a kind of person who could stoop so low for that reason. In that case, I do not see any reason why PW2, the victim, could concoct such a story against the accused. I observed this witness as she testified and she impressed me as a truthful and consistent witness, even under rigorous cross-examination.

I have considered the two defences of alibi and grudge raised by the accused and have found them to be incredible and effectively disproved by the prosecution evidence, which has squarely placed the accused at the scene of crime as the perpetrator of the offence with which he is indicted. Therefore in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby convict the accused for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*.

Dated at Arua this 16<sup>th</sup> day of August, 2016.

Stephen Mubiru  
Judge.

18<sup>th</sup> August 2016

9.45 am

Attendance

Ms. Andicia Meka, Court Clerk.

Ms. Harriet Adubango, Senior Resident State Attorney, for the prosecution.

Ms. Olive Ederu for the convict on State Brief.

The convict is present in Court.

**SENTENCE AND REASONS FOR SENTENCE**

Upon the accused being convicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, the learned State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; the maximum penalty for the offence is death, the accused, an adult of sound mind, should have protected the victim rather than defiling her. He subjected the victim to a lot of pain and there is need to protect children from sexually violent people like the convict and to deter other would be offenders.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; he is a first offender at the age of 48 and capable of reforming and becoming a useful member of society. He has nine children whose mother abandoned them to their grandmother when the convict was arrested. He suffers from Hepatitis “B” which cannot be effectively managed in prison. He has been on remand since 2013. In his *allocutus*, the convict prayed for lenience on grounds that he is sickly; suffers from suffers from Hepatitis “B” and ulcers. His children have dropped out of school due to his imprisonment.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, is death. However, this punishment is by sentencing convention reserved for the most extreme circumstances of perpetration of the offence such as where it has lethal or other extremely grave consequences. Examples of such consequences are

provided by Regulation 22 of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* to include; where the victim was defiled repeatedly by the offender or by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS, or resulting in serious injury, or by an offender previously convicted of the same crime, and so on. I construe these factors as ones which imply that the circumstances in which the offence was committed should be life threatening, in the sense that death is a very likely or probable consequence of the act. I have considered the circumstances in which the offence was committed which were not life threatening, in the sense that death was not a very likely consequence of the convict's actions, for which reason I have discounted the death sentence.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* stipulate under Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors. I have to bear in mind the decision in *Ninsiima v Uganda Crim. Appeal No. 180 of 2010*, where the Court of appeal opined that the sentencing guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial.

The Court of Appeal though has time and again reduced sentences that have come close to the starting point of 35 years' imprisonment suggested by the sentencing guidelines, as being harsh and excessive. For example, in *Birungi Moses v Uganda C.A Crim. Appeal No. 177 of 2014* a sentence of 30 years' imprisonment was reduced to 12 years' imprisonment in respect of a 35 year old appellant convicted of defiling an 8 year old girl. In another case, *Ninsiima Gilbert v Uganda, C.A. Crim. Appeal No. 180 of 2010*, it set aside a sentence of 30 years' imprisonment and substituted it with a sentence of 15 years' imprisonment for a 29 year old appellant convicted of defiling an 8 year old girl. Lastly, in *Babua v Uganda, C.A Crim. Appeal No. 303 of 2010*, a sentence of life imprisonment was substituted with one of 18 years' imprisonment on appeal by reason of failure by the trial Judge to take into account the period of 13 months the appellant had spent on remand and the fact that the appellant was a first offender. The Court of Appeal

however took into account the fact that the appellant was a husband to the victim's aunt and a teacher who ought to have protected the 12 year old victim.

Although these circumstances did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the action such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. The accused was aged 45 years at the time of the offence and the age difference between the victim and the convict was 34 years. The convict abused the trust of the child and of her father. He enjoyed their hospitality but in return ravished the child, exposing her to the danger of sexually transmitted diseases at such a tender age. The child suffered a lot of physical and psychological pain. It is for those reasons that I have considered a starting point of twenty years' imprisonment.

The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and afflicted by serious ailments. He has a large family to look after. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of twenty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of sixteen years.

It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a convict. Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, requires the court to "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. From the earlier proposed term of sixteen years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 13<sup>th</sup> May 2013 and been in custody since then, I hereby take into account and set off three years and three months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of twelve (12) years and nine (9) months, to be served starting from today.

The convict is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.

Dated at Arua this 18<sup>th</sup> day of August, 2016.

Stephen Mubiru

Judge.