

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL CASE No. 0033 OF 2016**

**UGANDA** .....

**PROSECUTOR**

**VERSUS**

**OLEGA MUHAMAD** .....

**ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused in this case is indicted with one count of Aggravated Defilement c/s 129 (3), (4) (a) and 7 (b), of the *Penal Code Act*. It is alleged that the accused on the 3<sup>rd</sup> day of October 2015 at Ngakua village in Yumbe District, performed an unlawful sexual act, to wit inserting his finger into the vagina of Ayikoru Happy, a girl under the age of fourteen years.

The facts as narrated by the prosecution witnesses are briefly that the victim PW3 (Ayikoru Happy) lived at the home of her grandfather PW1 (Stephen Ocen) at Ngakwa village in Koci Parish. The accused was an occasional visitor at that home. On 3<sup>rd</sup> October 2015, PW1 left three children at home alone and went to Ngakwa Trading Centre. While PW.1 was at the trading centre, the accused came to the home at around 2.00 pm and found only the three children who included PW3 (Ayikoru Happy), PW.4 (Eunice Noel) and another girl named Peace Jennifer. The girls offered the accused a stool and he sat on it in front of the house. The accused offered them a shs. 500/= coin and suggested they use it to buy exercise books. The girls retorted that their grandfather would buy books for them. He then suggested that they could use it to buy pencils. The two girls PW.4 (Eunice Noel) and Peace Jennifer went away leaving PW.3 alone with the accused. They went to the trading center where they found PW1 (Stephen Ocen) and told him about the visitor they had left home. PW1 (Stephen Ocen) immediately returned home and the accused upon seeing him, attempted to run away. PW .I then saw that PW.3 was crying.

She revealed to them that in their absence, the accused had inserted his finger into her genitals and it was the reason she was crying. PW.1 reported the incident to the L.C.I General Secretary whereupon the accused was arrested and spent the night at the home of the L.C.I Chairman. The following day policemen from Koch Division organized transport that took him to Yumbe Police Station. From there, the accused and the victim were taken for medical examination. The accused was thereafter charged with aggravated defilement.

In the sworn testimony he made in his defence, the accused denied the accusation. He stated that on the day in issue, 3<sup>rd</sup> October 2015, he went to the home of P.W. 1 to sort out an issue where the son of P.W.1 had defiled and impregnated the daughter of the accused's brother, Haruna Kemisi, yet they were closely related. He arrived at the home of P.W.1 where he found four girls who had just returned from school, and four other people who included P.W.1. The girls said their teacher had asked them to buy pencils with a rubber. P.W.1 said he had no money. The accused then offered them a shs. 500/= coin to buy pencils. When the girls went to obtain change to enable them share the money, P.W.1 slapped the accused and said that it was because the accused had demanded for a goat and a bull that they had now tricked him to come to their home. He escaped from the assaults and was rescued by sympathizers who were nearby. He was arrested and kept at the home of the L.C.1 Chairman overnight and subsequently taken to Nebbi Police Station and eventually Court. He said he had been framed by P.W.1 who wanted to avoid compensating him with a bull and sheep for his son having impregnated his brother's daughter.

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 *Ssekitoleko 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 PW3 (Ayikoru Happy) who said she was 9 years old. Her grandfather, who said she was 9 years old. Her grandfather, PW1 (Stephen Ocen) stated that the victim was about three years old at the time her mother brought her to stay with him. He did not know when she was born but estimated her age to be 9 years. Their testimony is corroborated by that of PW5 (Dr. Moses Adroma) who examined the victim on 4<sup>th</sup> October 2015 (the day after the date on which the offence is alleged to have been committed). His report, exhibit P.E.4 (P.F.3A) certified his findings that the victim was 5 ½ years at the time of that examination. Although there is a disparity between the medical evidence and the age estimated by the two witnesses, there is no doubt that at the time of the offence, the victim was below the age of fourteen years. I had the opportunity to see the victim before court during the *voire dire* and subsequent unsworn testimony. She was clearly under fourteen years of age. 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. In agreement with the single assessor, 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 PW3 (Ayikoru Happy) the victim who said that her assailant inserted his little finger into her genitals. This is corroborated by the evidence of PW5 (Dr. Moses Adroma) who examined her on 4<sup>th</sup> October 2015 (the day after the date on which the offence is alleged to have been committed). In his report, exhibit P.E.4 (P.F.3A) he certified that the victim had blood stained hyperemic labia minora, a freshly ruptured hymen with 0.5 – 1.0 cm defect, which were signs of penetration by a blunt penetrative object. Her evidence is further corroborated by the evidence of the victim's grandfather, PW1 (Stephen Ocen) who found her crying and to whom the victim narrated what had happened to her. PW4 (Eunice Noel), her ten year old maternal aunt, also saw her crying soon after the incident. The distressed condition of the victim observed soon after the incident may offer further corroboration (see *Kibazo v Uganda [1965] E.A. 509 at 510*). Although she subjected the witnesses to rigorous cross-examination relating to this ingredient, Counsel for the accused did not contest it in her final submissions. To constitute a sexual act, it is not necessary to prove that there was deep penetration. 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*). Therefore, in agreement with the single assessor, 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 identifying 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 PW3 (Ayikoru Happy) the victim explained the circumstances in which she was able to identify the perpetrator of the act and PW4 (Eunice Noel), her ten year old maternal aunt, who explained how the accused visited their home that day but did not find any adult at home. How he offered them shs. 500/= for purchase of exercise books or pencils. Being evidence of visual identification, I have considered familiarity between these witnesses and the accused, it was broad day light, they all were in close proximity of the accused and he talked to them for some considerable time. The accused himself does not deny having been at the scene at the time in issue and offered the children the shs. 500/= coin exhibited in court. He only contests having inserted his finger into the genitals of the victim. He gave an explanation regarding his presence at the scene that afternoon. He claims to have been framed by PW1 (Stephen Ocen) as a cover up for his son having defiled one of the accused's brother's daughter.

The prosecution relies on evidence of bad character of the accused to disprove this defence. Such evidence, is admissible as evidence of or a disposition towards misconduct under section 52 (b) of the *Evidence Act*. Under that provision, proof that the accused committed or was convicted of another offence is admissible evidence to show that he or she is guilty of the offence with which he or she is charged. Such evidence is admissible even where the accused has previously been acquitted of charges based on those allegations as well as allegations which had never been tried.

For example in *R v Z [2000] 2 AC 483*, the accused, facing a charge of rape had been tried and acquitted of the rape of different women on three previous occasions in three separate trials. The prosecution wished to call those three complainants to give similar fact evidence in support of the new charge. The accused had objected to the admissibility of such evidence as simply bad character evidence. The House of Lords, while interpreting a provision similar to our section 52 (b) of the *Evidence Act* gave the definition of bad character such a scope wide enough to apply to conduct arising out of a conviction, or conduct where there has been an acquittal and also to a person who has been charged with another offence, and a trial is pending. It decided as follows;

Similar fact evidence was not inadmissible only because it tended to show that the defendant was guilty of other offences of which he had in fact been acquitted. Provided that the principle of double jeopardy was not offended, such evidence might be admitted. Here although the facts were similar, the trial related to a different set of facts and there was no element of re-trial for the earlier matters.

‘Similar facts are admissible because they are relevant to the proof of the defendant’s guilt. The evidence relating to one incident taken in isolation may be unconvincing. It may depend upon a straight conflict of evidence between two people. It may leave open seemingly plausible explanations. The guilt of the defendant may not be proved beyond reasonable doubt. But, when evidence is given of a number of similar incidents, the position may be changed. The evidence of the defendant’s guilt may become overwhelming. The fact that a number of witnesses come forward and without collusion give a similar account of the defendant’s behaviour may give credit to the evidence of each of them and discredit the denials of the defendant. Evidence of system may negative a defence of accident. This is the simple truth upon which similar fact evidence is admitted: it has probative value and is not merely prejudicial.

Similarly, in *Regina v Wilmot (1989) 89 Cr App R 341*, the accused was charged with a series of six predatory rapes, committed by picking up women, some prostitutes, in one or other of two cars. The court considered the admissibility of similar fact evidence. It held that there are circumstances in which, where it is proved or admitted that a man has had sexual intercourse with a number of young women, the question whether it is proved that one of them did not consent may in part be answered by proving that another of the women did not consent if the circumstances bear a striking resemblance.

If prima facie evidence of previous allegations is admissible notwithstanding the fact that the accused had previously been acquitted of charges based on those allegations, then its relevance is more pertinent when such evidence resulted in conviction. It has also been held that allegations which had never been tried are potentially admissible (See *R v Edwards (Stewart) and another [2006] 1 WLR 1524*).

In the instant case, the accused was cross-examined about his previous conduct. He admitted he was on bail at the time he is alleged to have committed the instant case and that he was subsequently convicted. I have had occasion to peruse the record of his previous conviction comprised in Arua High Court Criminal Session Case No. 56 Of 2012. In that case the accused was on 6<sup>th</sup> June 2011 charged with Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. The facts were that on the 1<sup>st</sup> June 2011, at around 12.00 pm, the accused met a

thirteen year old girl who was on her way to a trading centre where she had been sent by her grandfather to take his phone for charging. The accused offered her a lift on his bicycle. The accused diverted from the road leading to her home and instead and rode to a neighbouring village where upon reaching a deserted place, the accused disembarked from the bicycle and pulled the victim into the bush near a mango tree where he had sexual intercourse with her. He pleaded guilty to the offence and was convicted on his own plea on 11<sup>th</sup> August 2016.

This previous conduct establishes that at the time the offence was committed, the accused was on bail, facing another charge of aggravated defilement. He was eventually convicted of that offence. There is close similarity in the *modus operandi* of that case and in the instant case. In both cases, the accused meets a girl child and endears himself to the child by offering to help. He then proceeds to isolate the child and performs a sexual act on the child. That evidence not only establishes the accused's propensity to sexually assault young girls but also the similarity in the *modus operandi* is so striking that it excludes the possibility of mere coincidence beyond reasonable doubt and effectively rebuts the defence of a grudge raised by the accused. I have for that reason found the defence of the accused to be incredible. He never raised it at all during the prosecution case. To me it is a lame afterthought, I therefore reject it.

Although Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in her final submissions, the prosecution has effectively disproved his defence, and has succeeded in squarely placing the accused at the scene of crime as the perpetrator of the offence with which he is indicted. Therefore in disagreement with the opinion of the single assessor, 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), (4) (a) and 7 (b) of the *Penal Code Act*.

Dated at Arua this 19<sup>th</sup> day of August, 2016.

Stephen Mubiru  
Judge.

22<sup>nd</sup> August 2016

12.30 pm

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), (4) (a) and 7 (b) 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 victim was only five years old and looked up to the convict for protection as a frequent visitor at the home, but had instead abused the hospitality of that home. It his second conviction during the current session in respect of an offence of a similar nature, having committed the instant offence while on bail for the previous one. He therefore deserves a custodial sentence to protect young girls from his criminal tendencies.

In her submissions in mitigation of sentence, counsel for the accused prayed for a lenient sentence on grounds that; the convict is very remorseful, he is of very advanced age being 105 years old. Although aggravated defilement is a serious offence, the convict cannot endure a custodial sentence and would probably die in prison. He is senile and probably that accounts for his criminal behavior in this case. She prayed for a suspended sentence coupled with a stern warning as sufficient punishment for the convict.



In his *allocutus*, the convict pleaded for lenience because of his extremely advanced age, he would have died in prison by now had he not been “put aside”. He suffers from abdominal complications that have resulted in passing out blood in his stool and urine. He at times takes six days without bowel movement. He was looking after children of his deceased brothers who have now dropped out of school. He prayed to be released so that he can look after his home which must now be overgrown by bush. He vowed not to commit similar acts if released since he had learnt his lesson.

I have reviewed *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. I have also reviewed current sentencing practices for offences of this nature. I take cognizance of some of the aggravating factors stipulated by Regulation 35 of those guidelines, which are relevant to this case and they include; the fact that the convict is a repeat offender, the he committed the offence with a degree of pre-meditation and careful planning and deceit, he had knowledge of the tender age of the victim, he practically defiled his great, great granddaughter. I have also considered the wide age difference between the convict and the victim, he was 103 years old at the time of the offence and the victim was 5 ½ years only, an age difference of almost a century. The victim and the convict are three generations apart.

However, the manner in which the offence was committed did not involve an immediate threat of death or similar grave consequence. Although the maximum sentence for the offence is death, I have not found any circumstances that would justify the death penalty. In imposing a custodial sentence, Item 3 of Part I of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, prescribes a base point of 35 years’ imprisonment. This can be raised on account of the aggravating factors or lowered on basis of the mitigating factors. Regulation 36 of the Guidelines provides for factors which mitigate the offence of aggravated defilement. The only one relevant to this case is the remorsefulness of the offender.

Since the length of a prison sentence tends to reflect the seriousness of the crime, in light of the aggravating factors in this case one would be justified to propose a long term of imprisonment for the convict. I am of the considered view that the Sentencing Guidelines do not displace the traditional role of the trial court in bringing compassion and common sense to the sentencing

process. Especially in areas where the Sentencing Guidelines are silent, a trial court should not hesitate to use its discretion in devising sentences that provide individualized justice, since it is a cardinal principle of penology that the punishment should not only fit the crime but also the offender.

In sentencing the convict before me for his previous conviction during this session upon his plea of guilty for having defiled a 13 year old girl, I expressed the view that whereas younger offenders may reasonably look forward to release after a long term of imprisonment, a high proportion of persons above seventy years subjected to a long custodial sentence may reasonably expect to die before completing their sentence. A relatively long prison sentence is a more severe punishment for someone who is already in their 60s or 70s than for someone in their 20s or 30s. To a person above 70 years, a long custodial sentence could easily be tantamount to a sentence of death. On that occasion, I considered the increased likelihood that the convict would have special healthcare needs arising out of physical and / or mental infirmity, the heightened sense of vulnerability for a senior prisoner whose physical decline diminishes the prisoner's ability to cope with the hostility and aggression that characterises much of the behaviour of younger prisoners, the natural judicial tendency to treat the older person with mercy and leniency based largely on the belief that a certain class of mental health problems (e.g. dementia rather than anti-social personality disorder) is often an important contributory factor in the offending among persons of that age bracket, he had become a first offender at the age of 99 years. These factors combined militated against a lengthy custodial sentence.

Although those factors are still true in the instant case and despite the decision to treat the convict with mercy and leniency upon his previous conviction, there is now an enhanced need for balancing those considerations against the seriousness of the offence, the risk of re-offending and the previous criminal record of the convict. Although physically infirm, this being his second conviction, the convict represents a heightened threat to society considering that he committed this offence while on bail for the previous one for which he was convicted. There is reason to believe that he is likely to commit repeat offences. On the previous occasion he benefitted from a doubt that arose due to lack of a psychiatric report and lack of evidence of any history of sex offenses involving children. He no longer enjoys the benefit of that doubt since the court now

believes he poses a considerable risk. He has probably developed predatory sexual tendencies involving children.

For his first conviction, he was charged on 6<sup>th</sup> July 2011 for the offence he committed on 1<sup>st</sup> June 2011. He was granted bail on 30<sup>th</sup> October 2012. While on bail, he committed the current offence on 3<sup>rd</sup> October 2015 (three years after the first offence). He was arrested and charged on 8<sup>th</sup> October 2015. He has therefore been on remand since that date, a period of ten months.

I have also considered Regulation 9 (4) (a) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, which provides that; “The court may not sentence an offender to a custodial sentence where the offender, is of advanced age.” Advanced age for purposes of the guidelines is 75 years. This being his second conviction, a custodial sentence will be imposed. The sentence he deserves should be sufficient but not greater than necessary to meet the aims of punishment. I am still of the view that in a way, extreme old age is a descent into a “second childhood.” By analogy, the juvenile penal system does not permit custodial sentences beyond the period of three years, even for capital offences. I have decided to treat the convict, being a person of extreme advanced age, in similar fashion. In any event, S. 14 (2) (c) of the *Judicature Act*, enjoins this court to exercise its discretion in conformity with the principles of justice, equity and good conscience. This includes exercise of discretion in determining an appropriate sentence within the parameters set by law.

In order to balance the seriousness of the offence with the peculiar antecedents of the convict, I sentence the convict to a term of imprisonment of three years. The ten months he has spent on remand, are credited to him as part of that sentence and I hereby suspend the remaining period, of two years and two months, of that sentence on condition that the accused does not commit any offence relating to sexual violence towards children, within a period of one year from today. The convict should be released from custody forthwith unless held for other lawful reason, with knowledge that a fixed sentence for the specified term of imprisonment hangs over him and its execution, or the lack thereof, will depend on his conduct towards young girls henceforth.

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 22<sup>nd</sup> day of August, 2016.

Stephen Mubiru

Judge.