

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL CASE No. 0004 OF 2016**

**UGANDA .....**

**PROSECUTOR**

**VERSUS**

**ABDALA NABIL SALAAM .....**

**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) (c) of the *Penal Code Act*. It is alleged that on the 29<sup>th</sup> day of December 2014 at Dumuru village in Maracha District, had unlawful sexual intercourse with Angucia Molly, a girl under the age of eighteen years, while he was a person in authority over that girl.

The facts as narrated by the prosecution witnesses are briefly that during 2013, the accused was a school teacher at Nyarakua Primary School and the victim was a primary six pupil in the same school. In January 2014, the accused was transferred to Buramali Primary school. In April 2015, the girl dropped out of school after realizing she was pregnant and went missing. Efforts to find her were fruitless until mid July 2015 when her father received information that she had been sighted as an in-patient at Maracha Hospital. By the time he got there, the girl had disappeared again. Further inquiries revealed information that the accused knew the whereabouts of the girl. When the girl was eventually found, she was visibly pregnant and said the accused was responsible for the pregnancy. She later gave birth to a baby girl on 9<sup>th</sup> October 2015.

In the unsworn statement he made in his defence, the accused denied having been a teacher at Nyarakua Primary School in December 2014 and any knowledge of the girl named in the indictment as the victim. He therefore denied having had any sexual relations with her.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531). 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 v 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 18 years of age.
2. That a sexual act was performed on the victim.
3. The accused was a person in authority over the victim at the material time.
4. That it is the accused who performed the sexual act on the victim.

The prosecution is required to prove beyond reasonable doubt that the victim was below 18 years of age. 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. In the instant case, the victim did not testify. PW2 (Ezati Mohammed Bashir), her paternal uncle, explained that she now lives with a maternal uncle at an unknown place in the Democratic Republic of Congo. Her father, PW1 (Enzama Isaac) said she made 17 years last year but could not remember her date of birth since he never went to school. If the father is believed, then the victim was about 15 years old, almost two years ago when the offence is alleged to have been committed. P.W.3 (Abiti Constantine) the current head teacher of Nyarakua Primary School, tendered in evidence the 2013 Primary six class register as Exhibit P.E.1 by. In that register, for the month of February 2013, the victim's class attendance was recorded on a daily basis as No. 18 at page 2 of the register and her age was declared as 15 years. In his unsworn statement, the accused did not address this issue directly. Counsel for the accused though contests this ingredient in her final submissions on grounds that the victim's father did not appear to be sure of her age and there was no medical or other documentary proof to corroborate his testimony yet court was unable to observe her since she

was not called as a witness. I have considered this evidence and find that it has been proved beyond reasonable doubt that by 29<sup>th</sup> December 2014, Angucia Molly, was a girl under the age of eighteen years.

The next ingredient requires proof that a sexual act was performed on the victim. One of the definitions of a sexual act under section 197 of the *Penal Code Act* is penetration of the vagina, however slight, of any person by a sexual organ. This ingredient is ordinarily proved by the direct evidence of the victim, but may also be proved by circumstantial and medical evidence. In the instant case, the victim did not testify since PW2 (Ezati Mohammed Bashir), her paternal uncle, explained that she now lives with a maternal uncle at an unknown place in the Democratic Republic of Congo. In the absence of direct evidence of the victim and any medical evidence, the prosecution relies on circumstantial evidence as follows; P.W.1 (Ezama Isaac) the father of the victim, said that he daughter went missing during April 2015. The next time she got a hint of her whereabouts was when he was told she was admitted in the maternity ward of Maracha Hospital and he found her name in the admissions register. She later that year gave birth to a baby girl. PW2 (Ezati Mohammed Bashir), her paternal uncle said the girl was missing for the period between 18<sup>th</sup> April and 18<sup>th</sup> July 2015. When she was found, he saw that she was pregnant. P.W.5 (SPC Avako Juliet) too confirmed that the girl was pregnant when she took her for medical examination. P.W.4 (Mary Ovuru) her mother, stated that the girl dropped out of school during April 2015 when she realized she was pregnant. The next time she saw her in June 2015, she was visibly pregnant and gave birth to a baby girl on 9<sup>th</sup> October 2015. The accused denies any knowledge of the girl or the fact of her pregnancy. Counsel for the accused in her submissions argues that pregnancy does not prove sexual intercourse and since there is no evidence of pregnancy, this testimony should be rejected as hearsay. If you believe this evidence proves she was pregnant, consider whether it is possible she could have become pregnant through any other means other than sexual intercourse. You must evaluate the evidence and draw your own conclusion.

The prosecution is further required to prove that the accused was a person in authority over the victim. "A person in authority" is not defined by the *Penal Code Act*. According to Article 28 (12) of the *Constitution of the Republic of Uganda, 1995* except for contempt of court, no person should be convicted of a criminal offence unless the offence is defined and the penalty for it

prescribed by law. This provision, otherwise known as the principle of legality (*nullum crimen, nulla poena sine lege*), imposes a duty on Parliament to pass penal laws that are clear and unambiguous (*nullum crimen, nulla poena sine lege certa*). The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness. The certainty requirement postulates that the criminal conduct be defined in such a manner that the individual, if need be with the assistance of pre-existing judicial interpretations of the law, may see from the wording of the definition of the criminal conduct which acts or omissions are prohibited.

This need for certainty in penal legislation has famously been observed in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (*'Ex parte Simms'*) by Lord Hoffmann as follows;

The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

The principle of certainty is also considered to guide statutory interpretation through a rule of lenity or strict construction. The rule of lenity provides that in construing an ambiguous criminal statute, the court should resolve the ambiguity in favor of the accused. The principle is that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed. The rule of lenity is an assurance that no person accused of a criminal offence will be caught off guard by broader statutory interpretations than they could reasonably anticipate.

This rule is sometimes misunderstood to mean that, wherever there is room for interpretation, the solution most favourable to the accused must be adopted. The effect of strict construction of the provisions of a criminal statute is rather that, where an equivocal word or ambiguous sentence

leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the accused and against the legislature which has failed to explain itself. It is a rule that is reserved for those situations in which a reasonable doubt persists about a statute's intended scope, even after resort to the canons of statutory interpretation. The rule comes into operation at the end of the process of construing what the legislature has expressed, where the selection of one interpretation over another has failed to yield a single best reading. Whereas it is the core interpretive duty of the courts to give words of a statutory provision the meaning that the legislature is taken to have intended them to have, the rule of lenity is a guarantee that courts will go no further than the legislature intended in interpreting criminal prohibitions, thus preserving the legislative supremacy of Parliament.

It is for that reason that I have chosen to give it both a mischief and purposive interpretation. In that context, for purposes of section 129 (4) (c) of the *Penal Code Act*, a person in authority means any person acting in *loco parentis* (in place of parent or parents) to the victim, or any person responsible for the education, supervision or welfare of the child and persons in a fiduciary relationship, with the child i.e. relations characterized by a one-sided distribution of power inherent in the relationship, in which there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith with regard to the interests of the child reposing the confidence.

School teachers become temporary guardians or caretakers of a child. For the period pupils are entrusted to their care, they are responsible for their physical, moral welfare, and mental training. They regulate the pupils' personal lives, including speech, association, and movement, and take disciplinary action against them. As a result, a fiduciary relationship is presumed in a teacher – pupil relationship. Some close personal and professional fiduciary relations continue long after termination of the official formal contexts in which they first arose. How long after they linger after the formal setting of the relationship is discontinued will depend on the duration of that period and intensity of the relationship. Using the two approaches to interpretation I stated earlier, since the provision is intended to protect children from predatory tendencies of persons who may take advantage of their infancy to exploit them sexually; Parliament must have intended to protect pupils for the duration of their childhood. Therefore, once a teacher – pupil relationship arises, it will be deemed to continue until the child attains the age of 18 years and

will not be discontinued by termination of the official or formal context in which it may have first arisen. A teacher, who leaves the school or even the service, will for that reason remain “a person in authority” over his or her former pupils until they attain the age of 18 years. This is because the pupils will be deemed to maintain a special confidence reposed in their teachers and perceive them as such, for an indeterminate period after the formal setting has come to an end, but which for the purposes of certainty of the law, should be curtailed upon their attaining the age of adulthood. This is the interpretation adopted in this case in light of which the evidence will now be analysed.

In his testimony, PW1 (Ezama Isaac) the father of the victim said that her daughter was a pupil at Nyarakua Primary school until April 2015 when she dropped out of the school in P.6 after becoming pregnant and that the accused was a teacher in the same school. Her mother P.W.4 (Mary Ovuru) testified in similar terms. Her paternal uncle PW2 (Ezati Mohammed Bashir) gave similar evidence. P.W.3 (Abiti Constantine) the current head teacher of Nyarakua Primary School produced and tendered in evidence the school’s primary six 2013 class register, Exhibit P.E.1 which shows that for the month of February 2013, Angucia Molly attended classes more or less regularly in that school at that time. The accused in his unsworn statement admitted having been a teacher in that school but that he only taught for two terms in 2013, second and third terms only from May 2013 (contrary to what P.W.3 (Abiti Constantine) said that transfers of teachers take effect at the beginning of the year). He was transferred to Buramali Primary school at the beginning of 2014. In her submissions, counsel for the accused contends that since in December 2014 when the offence is alleged to have been committed the accused was no longer a teacher in Nyarakua Primary School, and therefore he could not have been a person in authority over Angucia Molly. Having considered the available evidence I find that it has been proved beyond reasonable doubt that that by 29<sup>th</sup> day December 2014, the accused was a person in authority over Angucia Molly.

Lastly, the prosecution had to prove that it is the accused that performed the sexual act on the victim. The accused in his unsworn statement totally denied any involvement. He denied knowledge of the victim. Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in her final submissions. She argues that the only

evidence linking the accused to the offence is hearsay. It was not proved that the victim was found in Otravu.

To counter this defence, the prosecution was required to adduce direct or circumstantial evidence to prove that the accused was the perpetrator of the unlawful sexual act which resulted in the victim's pregnancy. Usually this aspect is proved by the testimony of the victim, eye-witness accounts, and confessions of accused person, medical and other scientific or forensic evidence. In this case, the prosecution largely rests on a discovery made as a result of the confession of the accused and reports made by the victim to third parties.

The victim's father, PW1 (Ezama Isaac) said the in-patient register at Maracha Hospital indicated her name as an admitted patient at the hospital and the in-patients in the ward told him it is the accused person who had taken Angucia Molly to that hospital. When later her daughter was found, she talked to her and she told him the accused was responsible for the pregnancy. Her paternal uncle PW2 (Ezati Mohammed Bashir) talked to her too and she told him the accused was responsible for the pregnancy. She told her mother P.W.4 (Mary Ovuru) that a man named Abdalla was responsible for her pregnancy. She told P.W.5 (SPC Avako Juliet) that for all that time that she was missing, it was Abdalla Nabil who had hidden her at his Aunt's home. Both P.W. 1 and P.W.5 said it is the accused who revealed the victim's hideout at a place near Otravu Secondary school, to the police. Although this confession is inadmissible by reason of having been made after the accused was arrested, the fact that the whereabouts of the victim were established as a consequence is admissible evidence.

On this aspect of the case, the prosecution relies entirely on circumstantial evidence and reports made to third parties. The argument is that these series of facts, by reason and experience, are so closely associated with an intimate sexual relationship between the accused and the victim that the fact of participation may be inferred simply from the existence of these series of facts. There is a perception that circumstantial evidence is inherently weak but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of Mathematics. It is no derogation of evidence to say that it is circumstantial.

However, in a case depending exclusively upon circumstantial evidence, one must find before deciding upon conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. I have examined the facts closely and have not found any co-existing circumstances which would weaken or destroy the inference that the accused was responsible for Angucia Molly's pregnancy.

In this case, P.W.5 (SPC Avako Juliet) testified that while in police custody, the accused disclosed that Angucia Molly was in Otravu and indeed the wife of the accused subsequently produced Angucia Molly from Otravu. Notwithstanding that as a confession this revelation may be inadmissible, according to section 29 of the *Evidence Act*, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. This evidence is corroborated by reports made to third parties by the victim identifying the accused as the person responsible for her pregnancy, which type of evidence is as a general rule admissible. Being admitted as an exception to the hearsay rule, it is not evidence capable of sustaining a conviction on its own. It can only corroborate other credible evidence. In this case it supports the otherwise credible, strong circumstantial evidence of the accused's sexual involvement with Angucia Molly. For that reason, In agreement with the first assessor but in disagreement with the second assessor, I find that the prosecution has proved beyond reasonable doubt that the accused committed a sexual act with Angucia Molly.

Dated at Arua this 26<sup>th</sup> day of August, 2016.

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Stephen Mubiru  
Judge.

31<sup>st</sup> August 2016

2.50 pm

Attendance

Ms. Andicia Meka, Court Clerk.

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

Counsel for the convict is absent.

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) (c) of the *Penal Code Act*, the learned Senior Resident State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; the maximum penalty for the offence is death, the convict was supposed to teach not defile the victim, he caused her disappearance for over three months, she made her pregnant and turned her into a child mother. The sentence should be one that can help protect children in schools and the convict to reform.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; the convict is a first offender and remorseful. He is aged 29 years and thus capable of reform. He has a young family. He has been on remand since April 2015. In his *allocutus*, the convict prayed for lenience on grounds that; he is the only surviving son of his elderly mother who also is an H.I.V Victim. He was looking after the children of his deceased siblings. He has a wife with a two year old child. He had enrolled for a degree course at Kyambogo University.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*, is death. However, this punishment is by sentencing convention reserved for the most egregious forms of perpetration of the offence such as where it has lethal or other extremely grave consequences. Since in this case death was not a very likely or probable consequence of the act, 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) (c) 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.

Although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the act such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. At the time of the offence, the accused was 28 years old and the victim 17 years old. The age difference between the victim and the convict was 11 years. He abused a fiduciary relationship and took advantage of a primary school pupil, turning her into a child mother and causing her to drop out of school.

I have considered the decision in *Kato Sula v Uganda, C.A. Crim. Appeal No 30 of 1999*, where the Court of Appeal upheld a sentence of 8 years' imprisonment for a teacher who defiled a primary two school girl. In *Bashir Ssali v Uganda, S.C. Crim. Appeal No 40 of 2003*, the Supreme Court, on account of the trial Court not having taken into account the time the convict had spent on remand, reduced a sentence of 16 years' imprisonment to 14 years' imprisonment for a teacher who defiled an 8 year old primary three school girl. The girl had sustained quite a big tear between the vagina and the anus. In *Tujunirwe v Uganda, C.A. Crim. Appeal No 26 of 2006*, where the Court of Appeal in its decision of 30<sup>th</sup> April 2014, upheld a sentence of 16 years' imprisonment for a teacher who defiled a primary three school girl. In light of the sentencing range apparent in those decisions and the aggravating factors mentioned before, I have considered a starting point of fifteen years' imprisonment.

The seriousness of this offence is mitigated by the factors stated in mitigation by his counsel and his own *allocutus*, which have been reproduced above. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of fifteen years, proposed after taking into account the aggravating factors, now to a term of imprisonment of eleven 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 eleven years' imprisonment,

arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 27<sup>th</sup> July 2015 and has been in custody since then, I hereby take into account and set off one year and one month as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of nine (9) years and eleven (11) 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 31<sup>st</sup> day of August, 2016.

Stephen Mubiru  
Judge.