

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0017 OF 2014

UGANDA

PROSECUTOR

VERSUS

YINDU ISAAC YOASI

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) of the *Penal Code Act*. In the two counts, it is alleged that 20th day of December 2012 at Oluleba village in Arua District, had unlawful sexual intercourse with Adiru Flavia, a girl under the age of fourteen years.

The facts as narrated by the prosecution witnesses are briefly that on 20th December 2012, the accused was at Pilikwa Trading Centre when he was met by two girls, the younger of whom was the victim. The accused bought some sweets for them and also gave the victim shs. 200/= On the way back home, the accused went ahead of the rest with the victim and branched off into a cassava plantation where he had sexual intercourse with the victim. A few hours later, the uncle of the victim got to know about the incident and reported to the village L.C. personnel. The accused was arrested and charged with the offence. A charge and caution statement was recorded from him in which he admitted having committed the offence.

At the trial, he denied the indictment. In the unsworn statement he made in his defence he acknowledged having met the victim that day at a shop at Pilikwa Trading Centre and that she had asked him for shs. 200/= but that that is where it all ended. He denied having defiled the victim.

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 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.

With regard to the first ingredient, the prosecution must prove beyond reasonable doubt that the victim was below 14 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 this case, neither the victim nor the parents testified. The prosecution instead relies on the admitted evidence of PW1 (Dr. Ambayo Richard) of Arua Health Centre III who examined the victim on 21st December 2012 (the day after the date on which the offence is alleged to have been committed). His report, Exhibit P.E.1 (P.F.3A) certified his findings that the victim was 11 years at the date of examination, based on her level of physical development and dentition. Counsel for the accused contests this ingredient in her final submissions. She contends that medical evidence is not conclusive and should have been corroborated by the evidence of the biological parents of the victim, a birth certificate or such other evidence and since the court did not see the victim. I have considered the arguments of counsel and the joint opinion of the assessors on this point. Although an expert opinion, such as the prosecution seeks to rely on to prove this ingredient is not binding on court, it is not one to be dismissed without reason. I have considered the methods the doctor used in determining the age of the victim, i.e. the level of physical development and

dentition of the victim (which usually relates to whether or the extent to which wisdom teeth have erupted). They do not appear to me to be methods by which the precise age of the victim may be determined. Exhibit P.E.1 (P.F.3A) does not provide any information relating to how big the margin of error is, using such a method.

I have however considered the case of *C v London Borough of Enfield [2004] EWHC 2297 (Admin)*, where a doctor carried out a physical examination of the claimant and he also talked to her at some length about her past experience and events which might shed light on her age. He noted her height, her physical build, he examined her teeth, he noted that there was only one erupted wisdom tooth, he noted that there was no early molar wear on the lower molars and no root retraction, he noted her weight, he noted her skin fold thickness, body mass index and similar features. The court found as fact based on expert opinion that such a method entailed a margin of error of plus or minus two years.

I have factored that margin of error into the age assessment reflected in Exhibit P.E.1 (P.F.3A) and found that at the upper limit, the victim could have been 13 years old, and therefore still under the age of fourteen years. Therefore in disagreement with the assessors, I find that it has been proved beyond reasonable doubt that by 20th December 2012, Adiru Flavia was a girl under the age of fourteen years.

The next ingredient requires proof that a sexual act was performed on the victim. One of the meanings 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. Sexual intercourse is usually proved by the testimony of the victim, an eye-witness to the act, medical or other circumstantial evidence. In this case, neither the victim nor the parents testified. The prosecution relies on the admitted evidence of PW1 (Dr. Ambayo Richard) of Arua Health Centre III who examined the victim on 21st December 2012 (the day after the date on which the offence is alleged to have been committed). His report, exhibit P.E.1 (P.F.3A) certified his findings that there was a day old bruising of the lower vaginal vestibule and vaginal opening. He did not find any tears of the hymen nor seminal fluid. He concluded that the injuries were consistent with sexual intercourse that had occurred within the last twenty four hours. However, there were no features of deeper penetration and ejaculation. In law the slightest penetration is enough. This evidence is contested

by counsel for the accused in her final submissions on grounds that the victim was never called to testify and therefore there is no direct evidence.

I have considered the arguments of counsel and the joint opinion of the assessors on this point. Their submissions and opinions respectively are based on the argument that in absence of testimony of the victim, a court would not make a finding of the kind required by this ingredient. I respectfully disagree. In this case, the medical evidence is corroborated by the charge and caution statement of the accused, Exhibit P.E. 3B dated 24th December 2012, in which he admitted having had sexual intercourse with Adiru Flavia on 20th December 2012 at about 4.00 pm. which was only a day before the medical examination. Therefore in disagreement with the assessors, I find that it has been proved beyond reasonable doubt that a sexual act was performed on Adiru Flavia.

The last ingredient requires proof that it is the accused that performed the sexual act on the victim. There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator of the act. There is no eye-witness account in this case. The accused in his defence acknowledged knowing the victim and that on the fateful day; she met him at a shop, but he denies having defiled her. His defence therefore is a denial of the offence. Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in her final submissions. She argues that the prosecution is relying on hearsay, since both PW2 and PW3 were not eye-witnesses.

To disprove the defence, the prosecution relies on the charge and caution statement of the accused. It was admitted in evidence as Exhibit P.E 3B. In that statement, the accused said “I went ahead with Adiru Flavia and took her inside a cassava plantation. I asked her for sex, she accepted. I removed her knickers and had sexual intercourse with her. The girl went back to her Uncle Jimmy’s home. For me I went to my home.” This in law amounts to a confession. It was neither retracted nor repudiated during the trial. It is corroborated by what the victim told PW3 (D/AIP Adiru Grace) that it is the accused that defiled her. This evidence effectively disproves the defence of the accused. On basis of all the evidence relating to this ingredient and in

disagreement with both assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that the accused performed a sexual act on Adiru Flavia.

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) of the *Penal Code Act*

Dated at Arua this 26th day of August, 2016.

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Stephen Mubiru
Judge.

31st August 2016

2.40 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) (a) 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 offence is rampant in the region, the accused was 49 years old and the victim only 11 years, practically fit to be his granddaughter. The sentence would help him 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 68 years and thus is of advanced age. He is now partially blind and lost his wife while on remand. He needs to return to his family and take care of it. He has been on remand since December 2012. In his *allocutus*, the convict prayed for lenience on grounds that his children are suffering since the death of their mother.

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 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) (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.

Although the manner in which the offence was committed was not life threatening, in the sense that death was not a very likely immediate consequence of the action such as would have justified the death penalty, there are sufficiently grave factors that warrant a deterrent custodial sentence, thus; at the time of the offence, the accused was 49 years old and the victim 11 years old. The age difference between the victim and the convict was 38 years. He exposed her to the danger of sexually transmitted diseases at such a tender age. He practically defiled his granddaughter after enticing her with sweets and shs. 200/=, corrupting her morals at such a tender age.

I have considered the decision in *Uganda v Kamudan, H.C. Crim. Sess. Case No. 3 of 2011*, where the High Court imposed a sentence of 14 years' imprisonment for a convict who was a first offender and had spent two years on remand, for the defilement of an 11 year old girl. In *Uganda v Hakiza, H.C. Crim. Sess. Case No. 74 of 2010*, the High Court imposed a sentence of 7 years' imprisonment for a 20 year old convict who was a first offender and had spent two years and one month on remand, for the defilement of an 12 year old girl. In *Ogarm v Uganda, C.A. Crim. Appeal No 182 of 2009*, the Court of Appeal upheld a sentence of 15 years' imprisonment for a 30 year old convict who was a first offender and had spent one year and four months on remand, for the defilement of a 13 year old girl. In light of the sentencing range apparent in those

decisions and the aggravating factors mentioned before, I have considered a starting point of seventeen 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, especially his relatively advanced age and partial blindness. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of seventeen years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twelve 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 twelve years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 27th December 2012 and been in custody since then, I hereby take into account and set off three years and eight months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of eight (8) years and four (4) 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 31st day of August, 2016.

Stephen Mubiru
Judge.