

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0038 OF 2014

UGANDA

PROSECUTOR

VERSUS

NOAR HUSSEIN

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*. It is alleged that on the 29th day of October 2012 at Obanga village in Yumbe District, the accused had unlawful sexual intercourse with Shanga Cheka, a girl under the age of fourteen years.

The facts as narrated by the prosecution witnesses are briefly that the victim PW3 (Shanga Cheka) lived with her aunt PW4 (Tiko Fatuma). The latter was the second wife of the accused. The accused had a first wife living in the same homestead, but in a separate house. On 29th October 2012, PW4 went to attend a funeral that took place at a distant village and spent a night there. She left the victim at home alone with another younger child. During the night, the victim awoke to find that she was being carried from the mat on the ground where she used to sleep, to her aunt's bed behind the curtain. She identified her assailant as the accused who proceeded to undress her and defile her. Upon her aunt's return the following day, the victim narrated to her the events of the previous night. She confronted the accused who denied the accusation and instead administered corporal punishment on the victim. PW4 nevertheless reported to the L.C Officials and the accused was arrested and subsequently charged.

In the unsworn statement he made in his defence, the accused denied the indictment. He stated that the victim had not spent the night at home and was possibly defied elsewhere. He said he spent the night in issue with his second wife and, by insinuation, that the accusation against him is a fabrication by the victim and his (the accused) wife.

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 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 requires proof 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. The victim testified as PW3 (Shanga Cheka) and said she was 16 years old at the time she testified. That would mean she was 12 years old nearly four years ago when the offence is alleged to have been committed. PW4 (Tiko Fatuma) her paternal aunt with whom she lived at the time of the incident, stated that the victim was 11 years old at time of the incident. This is corroborated by the evidence of PW5 (Taira Okujo) her biological father said she was born in the year 2000, in which case she must have been 12 years old at the time of the incident. The fact is further corroborated by the evidence of PW1 (Dr. Tabu Geoffrey) who examined the victim on 2nd November 2012 (three days 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 time of that examination. I as well saw the victim before court during her testimony. Counsel for the accused did not contest this ingredient during cross-examination of these witnesses and neither did he do so in his final submissions. In agreement with both assessors, on basis of all that evidence, I am satisfied that the prosecution has proved beyond all reasonable doubt that by 9th October 2012, Shanga Cheka 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 definitions of a sexual act under section 129 (7) of *the Penal Code Act* is penetration of the vagina, however slight, of any person by a sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. In her testimony the victim who testified as PW3 (Shanga Cheka) said that her assailant carried her from her bed, placed her on her aunt's bed and proceeded to have sexual intercourse with her. This is corroborated by the evidence of PW1 (Dr. Tabu Geoffrey) who examined the victim on 2nd November 2012 (three days after the date on which the offence is alleged to have been committed). In his report, exhibit P.E.1 (P.F.3A) he certified that the victim had a ruptured hymen with a 2 cm tear, with a whitish discharge from her vagina, which were signs of vaginal sexual penetration. This is corroborated further by the evidence of the victim's paternal aunt, PW4 (Tiko Fatuma) to whom the victim narrated what had happened to her, the previous night immediately she returned from where she had gone to attend the funeral. Although he subjected the witnesses to rigorous cross-examination relating to this ingredient, Counsel for the accused did not contest this ingredient in his final submissions. In agreement with both assessors, on basis of all that evidence, I am satisfied that the prosecution has proved beyond all reasonable doubt that Shanga Cheka was the victim of a sexual act.

Lastly, the prosecution is required to prove 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 as the perpetrator of the sexual act. In his unsworn statement, the accused raised the defence of alibi. The accused states that he spent the night in the house of his first wife, sharing the same compound. He also stated that the victim did not spend the night at home but elsewhere. The accused in effect denies having been at the scene at the material time in issue. Counsel for the accused, Mr. Ben Ikilai, contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions. He argues that the offence was

committed at night and there was a curtain in the room. He argues further that there was doubt as to the position of the light inside the house; whether to one side or in the middle of the room. That the witness seemed untruthful and her evidence should not be relied upon.

On her part, the learned State Attorney, Ms. Jamilar Faidha, argued that the victim recognized the accused well because there was light in the room. The victim knew him very well and could not have been mistaken. The prosecution must disprove this alibi by adducing evidence placing him squarely at the scene of crime and proving that it is him who committed the act.

To disprove the alibi, the prosecution relies on the testimony of PW3 (Shanga Cheka) the victim who explained the circumstances in which she was able to identify the perpetrator of the act. Being evidence of visual identification by a single identifying witness, consider familiarity, condition of lighting, proximity and duration to determine its reliability.

Regarding familiarity, the victim knew the accused very well as her aunt's husband with whom they lived in the same homestead. In respect of the condition of lighting at the scene, the victim explained there was a torch bulb, powered by three big size dry cells, hanging from the roof of the house as a makeshift light bulb. Although there was a curtain partitioning the room into two, according to the victim the light was brighter behind the curtain where her aunt's bed was and the act of defilement took place. She recognized the accused by his dark skin and height. Although she was awoken from sleep, she had ample opportunity to see and observe the accused since the act took some time and the accused was in close proximity.

It is curious that the accused, who knew his wife was away, and that the victim was on a frolic of her own, does not appear to have been concerned about the whereabouts that night, of the younger child her wife had left with the victim. It is further curious that the assailant apparently was familiar with the locking mechanism of the door and was able to gain access without awakening the occupants. It is indeed curious that the assailant knew PW4 was not at home and chose to attack the victim when she was more or less alone at home and defiled her, not from her bed, but from the bed of her absent aunt. These are a coincidence too many to have occurred as

happenstance. They seem rather to be occurrences pointing to no other person than the accused. In his unsworn statement in his defence he said that he had been warned before that the victim would cause him problems. It was not clear to me how that would be except in the context of an amorous relation toward the girl. All this is strong circumstantial evidence that corroborates the testimony of the victim. In any event, I observed the victim testify and she appeared to be truthful. I believe that her evidence is free of error and the possibility of mistake.

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) of the *Penal Code Act*.

Dated at Arua this 25th day of August, 2016.

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Stephen Mubiru
Judge.

30th 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) (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 convict is

an adult, a husband to the victim's aunt who should have protected the victim rather than defiled her. The sentence would 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 29 and capable of reforming and becoming a useful member of society. He has two wives and six children of school going age. He suffers from Hepatitis "B" which cannot be effectively managed in prison. He has been on remand since 9th November 2011. In his *allocutus*, the convict prayed for lenience on grounds that he has a chest pain which makes life in prison difficult for him and there is no one to care for his family.

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. 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.

I have considered the decision in *Ninsiima Gilbert v Uganda, C.A. Crim. Appeal No. 180 of 2010*, where the Court of Appeal set aside a sentence of 30 years' imprisonment and substituted it with one of 15 years' imprisonment for a 29 year old appellant convicted of defiling an 8 year old girl and the case of *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. At the time of the offence, the accused was aged 28 years and the victim 11 years old. The age difference between the victim and the convict was 17 years. The convict abused the trust of the child and of her aunt. He exposed her to the danger of sexually transmitted diseases at such a tender age. He administered corporal punishment to the victim instead of acknowledging his crime. 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 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 twenty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of fourteen 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 9th November 2012 and been in custody since then, I hereby take into account and set off three years and nine months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of ten (10) years and three (3) 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 30th day of August, 2016.

Stephen Mubiru

Judge.