

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0015 OF 2013

UGANDA

PROSECUTOR

VERSUS

DRADRIGA FRED

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 June 2012 at Akaya village, Akaya Parish in Yumbe District, he had unlawful sexual intercourse with Nadya Duduu, a girl under the age of fourteen years.

The facts as narrated by the prosecution witnesses are briefly that sometime during the late 2011 or early 2012, the accused left his home in Aringa village, Odupi Sub-county in Arua District and went in search of employment. He subsequently found employment as a casual labourer with the parents of the victim at Akaya village in Yumbe District, where he worked in the garden.

On the 20th day of June 2012, at around 3.00 pm, while the victim's mother, P.W.3 (Sauda Okuku) had gone to the cassava garden to harvest some cassava, the victim P.W.2 (Nadya Duduu) was left with her younger brother at the home with instructions to collect clothes that were hanging on the clothesline behind the house, where they had been spread for drying. As the victim was in the process of collecting the clothes, the accused grabbed both her hands, covered her mouth with one hand and dragged her into her parents' house. He proceeded to undress her, threw her onto the ground and spread her legs and lay on top of her. He tried to insert his male sexual organ into her genitalia but could not gain full penetration. He resorted to rubbing it

against her lower abdomen until he ejaculated. In the process of this sexual assault, the accused was interrupted by a certain girl called Barao, who had returned from school and wanted to drink some water. She entered the house and found the accused lying on top of the victim. The accused rebuked her for entering the house but got off the victim. Barao went immediately to the cassava garden and reported to the victim's mother P.W.3 who returned home and found the victim seated alone on the verandah as the accused was being interrogated by other members of the family, who included her father. The accused confessed having committed the offence. The victim narrated her ordeal to her mother. The accused was arrested and taken to Lobe Sub-County from where he and the victim were taken to Yumbe Hospital for medical examination. The accused was subsequently charged with the offence of aggravated defilement.

In the unsworn statement he made in his defence, the accused admitted having migrated to the home of the victim's parents but only in search of land he could rent on a seasonal basis for growing crops. The victim's father let him three of acres of land which he tilled and planted crops. He would work in the victim's father's fields only occasionally. By insinuation, he attributed the accusation made against him to a grudge.

The burden of proving the case against the accused beyond reasonable doubt lies on the prosecution and does not shift to the accused person. 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 no 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.

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. In her testimony, the victim herself PW2 (Nadya Duduu) said she was 12 years old at the time she testified. That puts her age at 8 years four years ago when the offence was allegedly committed. This is corroborated by the testimony of her mother, PW2 (Sauda Okuku) who stated that the victim was born in 2004. That puts her age at 8 years four years ago when the offence was allegedly committed. PW1 (Dr. Tabu Geoffrey) who examined the victim on 21st June 2012 (the day after the date on which the offence is alleged to have been committed), in his report, exhibit P.E.1 (P.F.3A) certified his findings that the victim was 8 years at the time of that examination. I had the opportunity to observe the victim before court during the *voire dire* and subsequent unsworn 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. On basis of all the evidence relating to this ingredient, including my own observation of the victim when she testified in court and in agreement with both assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that by 20th June 2012 Nadya Duduu was a girl under the age of fourteen years.

The Court has to determine whether the evidence proves 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. The court was presented with the testimony of PW2 (Nadya Duduu) the victim who said that her assailant tried to insert his male sexual organ into her genitals but could not gain penetration whereupon he rubbed it on her abdomen repeatedly. Her evidence is corroborated by that of her mother, PW2 (Sauda Okuku) who stated that she examined the girl and saw fresh semen around the waist and in her private parts. This was corroborated further by the evidence of PW1 (Dr. Tabu Geoffrey) who examined the victim on 21st June 2012 (the day after the date on which the offence is alleged to have been committed), in his report, exhibit P.E.1 (P.F.3A)

certified his findings that there was a widening of the vaginal opening, a ruptured hymen, hyperemic (inflamed) areas around the vaginal opening and urethral opening. He concluded that there was vaginal penetration. In law, the slightest penetration is sufficient. Counsel for the accused did not contest this ingredient in his final submissions. On basis of all the evidence relating to this ingredient and in agreement with both assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that a sexual act was performed on Nadya Duduu.

Lastly, the prosecution had to prove beyond reasonable doubt 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 offence. In the instant case, there is oral testimony of PW2 (Nadya Duduu) the victim who explained the circumstances in which she was able to identify the perpetrator of the act. Being evidence of a single identifying witness, I have subjected it to close scrutiny to avoid the possibility of error. I have considered familiarity; she had known the accused before as her father's employee who lived with them in the homestead. She said she had known him for a week but the accused in his own admission during his defence said he had lived in the home for several months. I have considered the condition of lighting; it was during day time (around 3.00 pm) and she was dragged from outside into the house. I have considered proximity; sexual intimacy ordinarily takes place in close body contact and from her explanation this is what happened. The accused was very close to her. Lastly, I have considered the duration; grabbing her, pulling her into the house, removing her clothes, attempting to insert his penis into her vagina and thereafter rubbing it against her lower abdomen did not take an instant. She had ample opportunity to observe and recognize her assailant. I am satisfied that her evidence is free from error and the possibility of mistaken identification.

Her evidence is also corroborated by the fact that she reported the same details to her mother PW3 (Sauda Okuku) a short while after the act, when she came from the garden in response to information about the occurrence of the incident. The accused confessed to her as he was interrogated by members of the homestead who had gathered. I also saw the victim testify and she impressed me as a truthful witness. Furthermore, in his unsworn statement, the accused

admitted that he was living in that home at the time but denies having committed the act. He attributes the allegation to a grudge and fabrication. The evidence has not established any grudge that existed between him and the parents of the child or the child herself at the time. Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions. He argues that the victim's evidence is not corroborated. He points out the contradiction between PW2 who said her mother did not check her private parts and that of PW3, her mother, who said she did so. I have considered this to be a minor contradiction attributable to lapse of memory from passage of time considering the extreme tender age of the victim at the time. On basis of all the evidence relating to this ingredient and in agreement with both assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that the accused performed a sexual act on Nadya Duduu.

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.

Stephen Mubiru
Judge.

22nd August 2016

12.30 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 accused was 20 years old at the time of the offence and the victim aged only ten years. She was exposed to pervert sexual acts of the convict at a very tender age and will be traumatized by that experience. He abused the hospitality of the home. Children deserve protection from sexually perverted 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 24 years who is capable of reforming and becoming a useful member of society. He has been on remand since June 2013. In his *allocutus*, the convict prayed for lenience on grounds that he has two wives and two children.

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. 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. where the facts have a resemblance to the case under trial.

I have taken into account past precedents of Court, decisions such as, *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 age difference between the victim and the convict was 12 years. The convict abused the hospitality of the home. He exposed the girl to the danger of sexually transmitted diseases at such a tender age. The child suffered a lot of physical and psychological pain. It took her some time after the ordeal to summon the energy to rise from the ground. She felt considerable pain in the lower abdomen. She was exposed to a pervert sexual act at a very tender age. For those reasons that I have considered a starting point of eighteen years' imprisonment.

The seriousness of this offence is mitigated by a number of factors stated by his advocate and himself as recounted above. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of eighteen years' imprisonment, 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 fourteen years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 25th June 2012 and been in custody since then, I hereby take into account and set off four years and two months as the period the convict has already spent on remand. I

therefore sentence the accused to a term of imprisonment of nine (9) years and ten (10) 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.