

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0094 OF 2016

UGANDA

PROSECUTOR

VERSUS

A1 ABIRIGA MICHAEL alias MAYIA }

A2 ODIPIO SIMON }

ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused in this case are indicted with two separate counts of Aggravated Defilement c/s 129 (3), (4) (a) of the *Penal Code Act*. In the two counts, it is alleged that each of the accused on the 17th day of April 2012 at Origama village in Arua District, unlawfully had sexual intercourse with Angucia Stella, a girl under the age of fourteen years.

The facts as narrated by the prosecution witnesses are briefly that on 17th April 2012 at round 10.00 pm, the victim P.W.1 (Angucia Stella) left her home with a friend to buy paraffin from a shop. They at one point branched off to a bar where they met both accused persons. Her friend gave her two sachets of alcohol which she drank. The four of them continued to drink alcohol. At some point the victim's friend left. The victim stayed behind with both accused until around 2.30 am after the bar had closed. By that time the victim was drunk. The two accused then dragged her into a nearby eucalyptus plantation where they threw her down. A1 held her by the neck while A2 forcefully had sex with her. When he was done, A2 held her by the neck while A1 forcefully had sex with her. A1 later dragged her to his home where he sexually molested her again.

The following morning P.W.1 returned home. She did not immediately inform her mother for fear of being beaten. Her mother got to learn about the incident from a neighbor and administered corporal punishment on the victim. The victim escaped from home and took refuge at the Arua

Golf Course. Her family searched for her and found her two days later. She narrated what had happened to her. The two accused were arrested and together with her taken for medical examination. Although the H.I.V test of the victim soon after the incident was negative, a later confirmatory test revealed that the victim was H.I.V positive. Her mother, P.W.2, was so disappointed with the victim that she shortly thereafter allowed her to drop out of school and cohabit with a man with whom she had two children by the time she testified in court.

In his unsworn statement made in his defence, A.1 admitted having been with the victim at the bar together with A.2 and the victim's friend. It had been chosen as the rendezvous where he would receive his payment for work he had done for A.2 involving the making of bricks which A.2 had sold off earlier on the day. He said at different intervals, both A.2 and the other girl left leaving him and the victim alone. He went with the victim home but nothing happened there.

In his unsworn statement made in his defence, A.2 admitted having been with the victim at the bar together with A.1 and the victim's friend. It had been chosen as the rendezvous where he would pay A.2 for work he had done for him. After paying A.2, he left the three seated at the bar and neither knew nor was involved in what happened thereafter.

The prosecution has the burden of proving the case against both 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 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 each of the accused performed a sexual act on the victim.

The prosecution was required to prove 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, who testified as PW1 (Angucia Stella), said she was 17 years old at the time she testified. That would mean she was 13 years old four years ago when the offence is alleged to have been committed. Her mother, PW2 (Anguparu Florence) stated that the victim was born in September 1999. That would mean she was 13 years and six to seven months old when the offence is alleged to have been committed. This evidence is corroborated by PW4 (Dr. Odar Emmanuel) who examined the victim on 20th April 2012 (three days after the date on which the offence is alleged to have been committed). His report, exhibit P.E.2 (P.F.3A) certified his findings that the victim was 13 years old at the time of that examination. I also saw the victim before court. Counsel for the accused contested this ingredient during cross-examination of these witnesses and also in her final submissions. Her argument is that the victim has been married for four years and has two children, facts which are inconsistent with her age of 13 years at the time of the offence. However, on basis of all the evidence relating to this ingredient, including my own observation of the victim and in agreement with both assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that by 17th April 2012, Angucia Stella was a girl under the age of fourteen years.

The prosecution is further required to prove 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 prosecution presented the oral testimony of PW1 (Angucia Stella) the victim who said that her assailants lay on top of her in turns and had sexual intercourse with her while in the eucalyptus plantation and that thereafter one of them took her to his home where he performed a similar act. This evidence is corroborated by that of PW4 (Dr. Odar Emmanuel) who examined the victim on 20th April 2012 (three days after the date on which the offence is alleged to have been committed). In his report, exhibit P.E.2 (P.F.3A) he certified that the victim had scratch marks, about 3 cms long, on her neck, a freshly torn hymen, some white crust around her genital area which he suspected to be dried up semen and recommended HIV post-exposure treatment. He

concluded that these injuries were consistent with a recent act of sexual intercourse. Although she subjected witnesses to rigorous cross-examination relating to this ingredient, Counsel for the accused did not contest this ingredient in her 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 Angucia Stella was the victim of a sexual act.

Lastly, the prosecution must prove that it is the accused who performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing each of the accused at the scene of crime. There are two scenes; in the eucalyptus plantation and in the home of A1.

PW1 (Angucia Stella) the victim, explained the circumstances in which she was able to identify the perpetrators of the act, both in the eucalyptus plantation and the home of A1. I have considered her evidence with extra caution. It is evidence of a victim of a sexual offence who is a single identifying witness and who at the same time was drunk and at some point passed out. Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in her final submissions. Counsel for the accused in her final submissions argues that the conditions did not favour correct identification since it was dark and the victim was drunk. I have considered familiarity; she knew A.1 well before the incident and although that was her first time to see A.2, she had sat with both of them at the bar for several hours before she was dragged into the eucalyptus plantation. Although the condition of lighting at that plantation might have been poor, she could not have been mistaken about the identity of the assailants considering the duration of the act, they were in close proximity and it was a continuous sequence of events from the bar to the eucalyptus plantation as opposed to a sudden attack.

The offence is of a sexual nature. There is a rule of practice of courts not to convict an accused on the uncorroborated evidence of the victim of a sexual offence. Corroboration is also required as a matter of judicial practice when relying on the testimony of a single identifying witness, especially under conditions that appear not to have favoured correct identification. There is need to find other independent evidence to prove not only that the sexual act occurred but also that it

was perpetrated by the accused. Corroboration could be provided by medical or other scientific examination, circumstantial evidence of relevant events and observations by other persons that occurred around the time, the conduct of the accused around the time of the incident, etc.

In this case, corroboration is to be found in the fact that both accused admit having been with her at the bar. A1 denies having been with her at any point thereafter. An accused who denies the indictment or sets up the defence of alibi does not have a duty to prove it, but it is the duty of the prosecution to disprove both defences by adducing evidence placing each of the accused at the respective scene of crime. To disprove his defence, the prosecution relies on the charge and caution statement of A2 in which statement A2 admits having gone with the victim to his home and had sexual intercourse with her. For court to rely on a charge and caution statement of an accused as evidence against a co-accused, it must be satisfied first that the statement would be sufficient, by itself, to justify the conviction of the maker. Nevertheless, being a confession by a co-accused, it cannot on its own sustain a conviction but can corroborate other evidence. I have closely examined the charge and caution statement of A1 tendered in evidence as exhibit P.E.1.

I am satisfied that in that statement, A1 fully incriminates himself therein as the perpetrator of unlawful sexual acts against the victim as much as he implicates A2. The relevant part reads as follows; “At around 22.00 hours (10.00 pm) when I was at Unity Bar with Odipio drinking alcohol in sachets, Drijaru and Stella arrived. We welcomed them and they sat down. Stella sat near me. Odipio was the one buying alcohol as his money of bricks was paid. Drijaru and Stella also drank the alcohol which made Stella drunk. When it reached the time of going home.....I, Odipio and Stella took the same direction.....Reaching a Eucalyptus plantation, I branched off to a latrine.....after that I followed them only to find that Odipio was on Stella fucking her... we started going going together towards my home. On the way, Odipio branched away. I proceeded with Stella up to my house where we entered in it (sic). We then laid (sic) on the mattress which was on the floor and I had sexual intercourse with her, two rounds without condom (sic).” This statement corroborates the testimony of the victim not only that the sexual act occurred but also that it was perpetrated by both accused.

Corroboration is further found in the fact that the following day, the mother of the victim recovered from the scene of crime in the eucalyptus plantation, a pair of knickers she identified

as her daughter's and a cape she identified as that of A.1. In her final submissions, counsel for the accused Ms. Olive Ederu, argued that the victim could have dropped her panty in the bush when she went to ease herself. She argues further that no medical tests were done to link the accused to the offence. I observed both P.W.1 and P.W.2 as they testified and they appeared to me to be truthful witnesses. They were not fazed by the rigorous cross-examination of defence counsel. I believe them regarding this version of events and I therefore reject the arguments advanced by counsel for the accused. Their testimony is further corroborated by medical evidence. Exhibit P.E.2 indicates that upon medical examination done on 20th April 2012 (three days after the incident), the victim was found to have scratch marks on the neck. This corroborates the testimony of P.W.1 regarding the fact that she was held by the neck at the eucalyptus plantation as she was being defiled. The Alibi of A2 has effectively been disproved by all that evidence combined. He has been squarely placed at the scene of the crime as one of the perpetrators of the offence. Therefore, 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 both A.1 (Abiriga Michael alia Mayia) and A2 (Odipio Simon) performed a sexual act on the victim Angucia Stella, as indicted.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby in respect of count 1 convict A1 (Abiriga Michael alias Mayia) and in respect of count 2, A2 (Odipio Simon), both named as accused in this case, 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.

.....

Stephen Mubiru
Judge.

30th 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.

Both convicts are present in Court.

SENTENCE AND REASONS FOR SENTENCE

Upon both 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, accused are two able bodied men who mercilessly ravished a helpless girl who was drunk. The case adversely subjected the victim to adverse consequences including dropping out of school and being married off at a tender age. The girl child deserves protection from sexually violent people like the convicts and to deter other would be offenders, a deterrent sentence is deserved.

In response, the learned defence counsel prayed for a lenient custodial sentence for each of the convicts on grounds that; they are a first offender at the age of 30 and 36 years respectively and capable of reforming and becoming a useful member of society. A1 has four young children while A2 has three. Both have been on remand since April 2012. In their respective *allocutus*, the convicts prayed for lenience on grounds that he is sickly; A1 suffers from ulcers and both their families are suffering.

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 and indeed they were life threatening, in the sense that death was a very likely consequence of the convict's actions since she was held in turns by the throat, she was drunk and at one point she passed out. However, because of the convicts' youthful age, the fact that they have young families and are first offenders, I have discounted the death sentence. 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. I have taken that too into account but still find that the convicts deserve a deterrent sentence.

I have not seen a repercussion of defilement such as the one presented in this case. The trajectory of the victim's life was sent onto a downward spiral from which only something akin to a miracle will ever get her out of. The convicts participated in getting her drunk and took advantage of her drunken state and her first time experimentation with alcohol. She was exposed to extreme violence during the act which involved holding her by the neck, she was subjected to repeated acts of sexual intercourse in a "gang rape" style in one night, her mother more or less banished her, she became a street dweller for a few days, her mother was still visibly cross with her even as she testified during the trial, in disgust she has been married off at a tender age and is now a child mother of two children, she is H.I.V positive. She dropped out of school and now survives on menial jobs, tilling other people's gardens for pay. In court, she was visibly emancipated and talking with considerable difficulty. The events of that night have indeed more or less totally devastated her life. Her future is quite bleak.

In light of the extreme repercussions caused by the convicts' defilement of the victim, they deserve to spend the rest of their natural lives in prison. I therefore hereby sentence A1 to life imprisonment in respect of Count 1. I as well sentence A2 to life imprisonment in respect of count 2.

The convicts are advised that they have 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.