**THE REPUBLIC OF UGANDA**

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

**CRIMINAL SESSIONS CASE No. 0095 OF 2014**

**UGANDA …… PROSECUTOR**

**VERSUS**

**ANGUMANIYO STEPHEN …… 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) (a) of the *Penal Code Act*. It is alleged that the accused on the 9th day of May 2013 at Ombatika village in Arua District, had unlawful sexual intercourse with Ayikoru Judith, a girl below fourteen years. The victim of the offence did not testify the court having concluded after conducting a *voire dire* that she had no appreciation of the nature of an oath and therefore could not give evidence on oath and although she was possessed of sufficient intelligence but did not understand the duty of telling the truth and therefore she was as well not competent to give evidence not on oath.

Her step mother, Letia Grace, testified as P.W.2 and stated that the accused is her brother in law. He is a brother to her husband with whom they used to live together in the same home. On 9th May 2013 the rest of the family members went to the garden at 9.00 am and left the victim at home together with the accused. She collected potato vines and took them to the garden. She left them with her husband and returned home at around 1.00 pm, since it was threatening to rain. She decided to go to the kitchen. The kitchen had one wooden door but no window and therefore inside the kitchen was dark. The door was wide open but she did not see anyone as she approached. When she entered the kitchen, she found the accused seated on a four legged wooden stool behind the open door, carrying the victim on his laps. He had spread the victim's legs in a way that her private parts were near his private parts. The victim was dressed in a skirt and a blouse. She had no knickers under the skirt. The accused was putting on a light blue trouser and had unzipped. This was going at a distance of about two to three feet from where she was standing. Both of them saw her. She stood inside the kitchen for about five minutes but did not

talk to any of them as she took a closer look. It was not immediately evident to her what was going on. It took her some time to realise what was going on. The accused then put the girl down and she saw blood coming out of the private parts of the girl and so she decided to go and call the father of the girl. When the father came, he started looking for the accused who had by then gone into hiding and he decided to go and report to Arivu Police Post. The Police went and searched for the accused but could not find him but he later reported to the police by himself. The girl was taken to Arua Regional Referral Hospital after a few days for a check up. She had lived with the accused for about four years and since she was newly married to his brother, he had no grudge with the accused.

The father of the victim, P.W.3 Jimmy Lematia, testified that the accused is his brother with whom they used to live in the same home. He was also the L.C.1 Chairman of the area. On 9th May 2013, the rest of the family members went to the garden and planted beans. The victim remained home with an old woman who was her grandmother and the accused, for she was only three years old at the time. Later his wife took him potato vines and at around 1.00 pm she returned home. She returned to the garden at around 2.00pm to 3.00 pm and told him to put the hoe down and come running to see what was happening at home. He ran home and found blood on a four legged-wooden stool "Kiti polo" it is weaved from bamboo-like strands in the kitchen, the floor and his daughter's body were full of blood. Blood had seeped through the stool onto the ground and was also oozing out of the girl from the vagina. He talked to her but her whole body was shaking and she could not tell him what had happened. He went to the police and on his return, she told him that "Baba", meaning the accused, had defiled her. The accused had disappeared. After two days the police informed him that the person who defiled his daughter had reported to the police so he should go and see. He reported to the police at Arivu Police Post that very day. He took the girl to Kuluva Hospital first and was told to go to Arua Regional Referral Hospital. He took her to Arua Regional Referral Hospital from where she received medication.

P.W.4. Agotre Bosco, a Crime Preventer at Arivu sub-county Police Post testified that on 9th May 2013 he was on duty at around 6.00 pm when Lematia came to him and told him his brother had defiled his three year old daughter. Lematia asked him whether Felix had reported to the

police. Two policemen went to the scene but did not find the accused. While on night duty that day and at around 8.00 pm the accused, whom he knew as the L.C.1 Chairman, emerged at the police post and asked this witness to arrest him but did not tell him why. The accused said he should just help him to lock him up. He said he was afraid that his brothers wanted to kill him. He put him in the cells and relayed the message to the O/c. Then he left the issue to the O/c of the post. The file was forwarded to Arua Central Police Station.

P.W.5. Dr. Martin Edyau, a Principal Medical Clinical Officer at Arua Regional Referral Hospital testified that he knows Dr. Akusa Darlington as one of the staff in the outpatient Department with whom he has worked for five years. He still works in the hospital but had of recent developed some challenges of a mental problem developed in the last two years. He was as a result stopped from working officially though he still comes to the hospital. Being familiar with his signature and handwriting, he recognised P. F. 3A by which Dr. Akusa Darlington examined Ayikoru Judith on 14th May 2013. He found that the hymen was intact but the introitus was bloody and bruised. The apparent age of the girl was three years old based on her build up. The probable cause was penetrative injury. The same doctor on basis of P. F 24A examined the accused and found that he was of the apparent age was 36 years, HIV negative, and of normal and sound mental status. All other parts of the body, head, neck etc, were normal except that at the ano-genital area he found a small bruise on the prepuce (the foreskin) of the penis and the probable cause of this was sexual intercourse. The.

In his defence, the accused stated that he was at home during the morning of 9th May 2013. He then went for work and returned at 11.30 am, rested for some time and then bathed. He then went to visit a friend in Ibira village who was sick. They sat under a tree. At around 6.30 pm he returned home and had supper, bathed and went to bed. He did not hear of anything on that day. The following day 10th a Friday, in the morning he went for the same work. He returned at around midday and remained home until the evening. At night we went to bed together with his family; wife, children, paternal untie and other children of my paternal untie. The following day 11th a Saturday at around 1.00 pm, he went to work. After work he went home and later to Arivu market to buy another hoe and other items. At around 2.00 pm, while he was still shopping, the police came to him and told him he was needed in the office. He handed over the items he had

purchased to a woman he knew and went with the police to their office. Immediately he was told to enter into the cell and he spent the night in the cells. The following day at around 11.00 am, the policemen brought a rope and tied his hands and began beating him up telling him to admit that he had committed the offence. Lematia is his cousin but he did not live with him in the same house since he has his own house about 70 metres from that of Lematia. On the 9th when he went for field work he did not see Lematia at all and did not pass by his compound on that day and neither did he see the victim. One day during the year 2012 when Lematia had newly married that wife, he arranged with some man from Oluko to sell a piece of land to him. After agreeing between themselves Lematia received shs. 5,000,000/= from the man and he used part of the money without anyone but his wife knowing about it. Later he came with that man and he told the accused to sign on the document but the accused refused to sign and advised the man to obtain a refund since the land could not be sold as they were many male children and they had children too. Because of that there was a grudge with him and Lematia and since then they were on bad terms until his arrest..

In his final submissions, defence counsel on state brief Mr. Okello Oyarmoi conceded that the prosecution had proved that the girl was below the age of 14 years. The prosecution had also proved that the girl was defiled. He contested the participation of the accused. The principal witness was P.W.2 who admitted that it was dark because it was cloudy. She also admitted that the kitchen had no window and the door was open and the room was dark. She then said it was broad day light and that was a grave inconsistence. It has not been proved to the standard required that P.W.2 saw and identified the offender. The accused raised the defence of alibi, had not been properly identified and the defence of alibi has not been contradicted. He prayed that the accused be acquitted.

In his final submissions, the learned State Attorney Mr. Emmanuel Pirimba argued that the age of the victim was proved by P.W.1 when she appeared before court and she was a child of tender years. P.W.2 and PW3 her parents told court she was 8 years old at the time she was in court and at the time of the offence she was 3 years old. Sexual intercourse was proved by PW2 the mother of the victim who found the accused in the act. She observed for five-minute what was going on and she saw blood dripping from her private parts and this is corroborated by P.Ex.1 where upon

examination injuries were found in her private parts. PW3 found blood on the floor of the kitchen and the victim confirmed the act to him. The evidence of PW2 implicates the accused. She found the accused in the act. Whereas it was dark, it was not too dark. She was only two feet away. She knew him and he was very familiar to her. The offence occurred at 1.00 pm and the conditions were favourable to correct identification. The witness was not inconsistent, she only made a clarification. It was broad day light. P.W.3 a brother of the accused and P.W.4 who was at the police post all corroborate her testimony. The accused was not found at home and at 8.00 pm he handed himself over to the police. His version of arrest is untrue. Hid defence is unbelievable as an alibi and grudge. The alibi has been disproved by PW2 and the grudge is an afterthought. If it were true, it would have been raised during the cross-examination. This conduct is incriminating. He prayed that he is convicted accordingly.

In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and 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 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.

The first element requires the prosecution to prove the fact that the victim was under the age of fourteen years at the time the offence was committed. 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 the victim Ayikoru Judith was P.W.1. She was a child of tender years and at the conclusion of the *voire dire* she was found incompetent to testify. Her mother Letia Grace testified as P.W.2 and said she was eight years old. Her father Jimmy Lematia testified as P.W.3 and said she was born on 12th December 2009. P.W.5, Martin Edyau, a Principal Medical Clinical Officer and tendered the report of the Dr. Arlington Akusa, the doctor who examined the victim on 10th May 2013, a day after the day on which the offence is alleged to have been committed. His report, exhibit P.Ex.1 (P.F.3A) certified his findings that the victim was approximately three years old at the time of that examination. Counsel for the accused conceded to this element but on basis of all the evidence relating to this ingredient, including the court's own observation of the victim, the court is satisfied that the prosecution has proved beyond reasonable doubt that as at 9th May 2013 Ayikoru Judith was a child below the age of fourteen years.

Secondly, the prosecution was required to prove that a sexual act was performed on the victim. According to section 129 (7) of *The Penal Code Act*, sexual act means (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or (b) the unlawful use of any object or organ by a person on another person's sexual organ. Sexual organ means a vagina or a penis**.** Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim in this case did not testify. Her mother, P.W.2 Letia Grace stated that he found her in the kitchen seated on the laps of a man with her legs apart and her private parts next to that of the man. She was bleeding from her private parts when the man placed her down and blood seeped through the stool onto the ground. Her father P.W.3 Jimmy Lematia saw the blood too. P.W.5, Martin Edyau a Principal Medical Clinical Officer tendered in evidence the report of the Dr. Arlington Akusa, the doctor who examined the victim on 10th May 2013. In his report, exhibit P.Ex.1 (P.F.3A), he certified his findings that the hymen was not ruptured but that the introitus was bloody and bruised. To constitute a sexual act, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient.

Counsel for the accused conceded to this element but on basis of all the evidence, the court is satisfied that the prosecution has proved beyond reasonable doubt that on 9th May 2013 Ayikoru Judith was the victim of a sexual act.

Lastly the prosecution had 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 not as a mere spectator but as the perpetrator of the offence. There is the oral testimony of P.W.2 Letia Grace who stated that he knew the accused very well and recognised him when she found him in the act in the kitchen even when it was poorly lit. He and the victim were behind a door to the kitchen and although the sky was overcast, the light conditions in the kitchen were favourable to correct identification. P.W.3 Jimmy Lematia the father of the victim returned from the garden and the accused was nowhere to be found. P.W.4 Agotre Bosco the Crime Preventer stated that the accused reported to the police post that evening asking to be kept in the police cells. The accused on his part stated he was arrested two days later while shopping. This element is contested by counsel for the accused who argued that the evidence of identification was unreliable.

I have considered the two defences of alibi and grudge raised by the accused and have found them to be incredible and effectively disproved by the prosecution evidence, which has squarely placed the accused at the scene of crime as the perpetrator of the offence with which he is indicted. P.W.2 knew the accused very well as a person with whom she lived in the same home. She stood at a distance of only three feet, she observed the accused for up to five minutes. Although the light was dim, I am satisfied that he was correctly identified. Therefore in agreement with both assessors, 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) and (4) (a) of the *Penal Code Act*.

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Stephen Mubiru
Judge
27th June 2017

28th June 2017
9.12 am
Attendance

Ms. Mary Ayaru, Court Clerk.
Mr. Emmanuel Pirimba for the Resident State Attorney, for the Prosecution.
Mr. Okello Oyarmoi, Counsel for the accused person on state brief is present in court
The accused 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 Resident State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; The offence carries a maximum of death. The action was uncalled for. The convict should have protected by the victim. He inflicted psychological and emotional pain on the victim and the parents. It is a lifelong experience and a girl child needs protection. The convict needs a deterrent sentence to re-think his action and to serve as an example to other potential offenders.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; He is a first offender. He is single. He is aged 40 years and remorseful. He has been on remand for four years and five months. In his *allocutus*, the convict prayed for lenience on grounds that he is sickly; suffers from many sicknesses including ulcers, sickness of the chest, high blood pressure, he is diabetic, the four years he has been in prison which is congested has not been favourable to him. His body swells after eating beans. Before he was arrested he had children whom he left with his paternal Auntie who is weak. He does not know how they are being taken care of because the Auntie is weak. His father died in 2005 and his mother in 2008. They left him ten children to take care of. Some of them are still young and he stood in as their father helping them with school fees, clothes and food.

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. Examples of such consequences are provided by Regulation 22 of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* to include; where the victim was defiled repeatedly by the offender

or by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS, or resulting in serious injury, or by an offender previously convicted of the same crime, and so on. I construe these factors as ones which imply that the circumstances in which the offence was committed should be life threatening, in the sense that death is a very likely or probable consequence of the act. I have considered the circumstances in which the offence was committed which were not life threatening, 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. I have to bear in mind the decision in *Ninsiima v. Uganda Crim. Appeal No. 180 of* 2010, where the Court of appeal opined that the sentencing guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial.

The Court of Appeal though has time and again reduced sentences that have come close to the starting point of 35 years' imprisonment suggested by the sentencing guidelines, as being harsh and excessive. For example, in *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 accused was aged 34 years at the time of the offence and the age difference between the victim and the convict was 31 years. The convict abused the trust of the 3 year old child as her paternal uncle. He ravished the child, exposing her to the danger of sexually transmitted diseases at such a tender age. The child suffered a lot of physical and psychological pain. It is for those reasons that I have considered a starting point of twenty four years' imprisonment.

The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and afflicted by several ailments. He has a large family to look after. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of twenty four years, proposed after taking into account the aggravating factors, now to a term of imprisonment twenty 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 twenty years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 17th May 2013 and been in custody since then, I hereby take into account and set off four years and one month as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of fifteen (15) years and eleven (11) months, to be served starting 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 28th day of June, 2017.

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Stephen Mubiru
Judge.
28th June, 2017.