

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0015 OF 2014

UGANDA **PROSECUTOR**

VERSUS

ONZIMA CHARLES **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 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 27th day of October 2012 at Garia
village in Arua District, performed an unlawful sexual act with Asibazuyo Brenda a girl below
fourteen years. At the preliminary hearing the evidence of P.W.1, Dr. Apo Julius a medical
officer attached to Arua Regional Referral hospital was admitted. It was to the effect that on 30th
15 October 2012 he examined a girl called Asibazuyo Brenda who was by then seven years old. It
was at the request of Rhino Camp Police. In the genitalia the hymen was torn with laceration of
the vaginal walls. The probable cause was penetrative sexual intercourse. His conclusion was
that the victim was involved in penetrative coitus / sexual intercourse. The evidence of P.W.2,
Dr. Adako Alex a medical officer attached to Arua Regional Referral Hospital too was admitted
20 and it was to the effect that on 31st October 2012, at the request of Rhino Camp Police Post, he
examined the accused aged 37 years and found him to be of sound mental status with no
disabilities.

Following a voire dire, it was found that P.W.3: Asibazio Brenda, did not understand the nature
25 of an oath but was possessed of sufficient intelligence and understood the duty of telling the
truth. She therefore gave her evidence not on oath. She stated that she was ten years old. And
knew the accused as a neighbour. The accused had sexual intercourse with her on 27th October
2012. That time her mother left her with her sister brewing alcohol and went to dig with the
Catholic Women Association. At around 6.00 pm, before her mother returned, the accused came
30 and asked for alcohol and then some more in a FANTA bottle on credit. Before he could be

given the FANTA bottle her mother arrived. Her sister had refused to sell him on credit. Her sister then went with the alcohol to the market with their father and her mother told her and her other sister to go and un-tether goats. The accused followed them saying he was going to help. Her sister untied and took one of the goats home. The accused untied one of the goats and let it
5 run home. He then held her hand and took her to the bush where he un-dressed and stripped her too and held her mouth tightly and proceeded to have sexual intercourse with her. She said he removed his thing and as he tried to push it into hers, her mother arrived. He touched her private parts with his hand. He pushed his fingers. He kept opening her private parts and fixing in the fingers. His thing touched inside her thing which she uses for urinating. Her mother began
10 calling her. The accused held her mouth and told me not to respond. Her mother eventually came to the scene and found them and when the accused saw her he ran away. He first ran to his home where he told his wife he had got a problem and then to the trading centre. Her mother reported to the L.C. The L.C took her to the sub-county and thereafter to Kamukamu and then Ayavu and that is where she was examined from. Eventually they came to Arua town.

15 Court found aster conducting a *voire dire* that P.W.4, Ejoru Annet a nine year old, understood the nature of an oath and she will gave evidence on oath. She testified that they are neighbours with the accused who is in court because he had sexual intercourse with her sister. They had gone to un-tether goats and bring them home. She untied hers and went home. She was asked
20 where her sister was and she told them Onzi had pulled her into the bush. Her mother followed them into the bush. The accused had returned from burning charcoal and he then came to their home. When they went to untie the goats they had left him home. He said he was returning home but instead he followed her sister. She saw him after he had untied the goats going to her sister and held her hands while her sister resisted. He was about fifteen metres away. It was at around
25 6.00 pm when she saw him pull her sister.

Her mother P.W.5 Jina Envikia, testified that the accused is her neighbour. On 27th October 2012 she went to dig with the Catholic Women Association Group. She put alcohol on fire for brewing and went to the garden. She returned home at 4.00 pm. Onzima came and told her he had been
30 burning charcoal and was very tired and was coming to rest. He told her he had come to stay at her place and she told him it was alright. At 6.00 pm he told her he was returning home. She

thought he had gone and sent Brenda and Annet to bring the goats back home from the bush. Brenda and Annet went. Annet brought hers without Brenda. She asked Annet where Brenda was and she said Onzima had pulled her to the bush. She started running towards Onzima. She found her in the bush. He had thrown Brenda down and when he saw her he started running. Before
5 that he was pulling his zip up. He was standing when she saw him. When she saw the accused she fell down out of shock near him and he ran away. Her daughter remained on the ground. She did not see anything when she got up. She told her they should go. She went with her to the home of the accused. The accused had run back to his home. He left his phone at home with the wife Clara Ozitiru and told her he had got a problem. She went to the L.C with Clara and they
10 were forwarded to Ayavu police post the following morning.

The day they went to the L.C I they found the L.C.s had taken the accused away. He was arrested on his way back home. They met him on the way as they went with his wife to the L.C. He did not talk to his wife when they met. He had reported himself to the L.Cs. They told her to return
15 home as they would handle the matter. The following day she went to Ayavu with Clara. She did not to talk to her daughter during the night. The L.Cs had already picked her. The L.C took her away when they met them on the way coming with Onzima. She reported that she had found the accused had thrown the victim down and he was pulling his zip up.

20 In his defence, the accused stated that the events leading to the accusation started on 15th June 2012, not between him and the victim but between him and the mother of the victim. On that day he was returning from Yachi Trading Centre with the husband of P.W.5, the mother of the victim. The husband had a girlfriend from the clan of the accused so he sent him to call the girlfriend and at the same time, unknown to him, P.W.5 was present in the market. He went and
25 brought the girl to the man. The mother of the victim followed him and held the girl from behind and they began fighting. The accused carried the baby away from the back of P.W.5. The fight was intensive and he concentrated on saving the baby. It is the youth who separated them. They were taken before the law. The mother was blamed, laid down and beaten twelve strokes. She was fined 12,000/=. Instead of paying, she said she never had the money and her cock was
30 picked from her home. Before they could go for her cock she said the accused had made her to be beaten and charged and for that the accused would get problems from her. She said the

accused and her husband had infected her with H.I.V. She said if the accused had not brought the girlfriend she would not have been infected because the first husband of the girl had died of HIV. Then up to December of that year she could not talk to the accused and forbade her children from passing near his compound. She did not even want the accused to keep company of her husband.

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On 27th October 2012, they were required to pay shs. 30,000/= to the zone catechist. P.W.5 was their treasurer. The husband was the Secretary of the small Christian Community. The accused was the Chairman. The obligation to pay the shs. 30,000/= was shared between the three groups in the small Christian community. Two groups paid and one did not. They brought the money to the accused as Chairman. P.W.5 and the wife of the accused were from the garden and when his wife arrived he asked her whether P.W.5 had gone back to her home and she said yes. That was about 3.00 pm. He picked his book as Chairman and signed for the shs. 10,000/= and P.W.5 was meant to sign too so that he takes it to the church. He went to her home and found her husband and the children were peeling cassava. He sat for a few minutes and told the husband to sign and he showed him where he himself had signed. He also told P.W.5 to pick her book and also sign. P.W.5 refused to answer and just kept quiet. She said angrily she did not have change as she had only a shs. 50,000/= note. The accused advised her to bring the note the following day and she would receive her balance of shs. 40,000/=. She then said she would not go for prayers and they people of God should go for prayers. She said she would be brewing alcohol the following day. The accused then told her that since she was undergoing instructions for matrimony she should go for prayers and return later. It was around 5.00 pm. She then said that if the accused wanted her to go for matrimony would he be finding additional women for the husband. The accused realised she was angry and kept quiet. He instead struck a conversation with the husband on different things and the husband suggested they go to the Trading Centre but the accused had no money. People were bringing their phones to the accused to charge later at his home. The husband told him to go to the market but he told him he had no money and was going back home. He then pulled out shs. 5,000/= from his pocket and said it would be enough for the two of them since the lady brewing was his girlfriend. The accused told him he was taking the phones first and would join him at the market later. He then picked a bicycle and rolled it to the market and the accused left for his home. He had walked for about 15 metres when he remembered needed to smoke. There was a young girl in the home whom he sent for fire from the kitchen.

When she brought the fire he lit the cigarette and left for his home. He had walked to about the same distance when P.W.5 sent Brenda to untie goats. The goats were nearby. She was making noise, he stood and asked her where she was going and she said she was going to untie goats. He thought since the mother had no loose money she had been sent with the money. The mother was
5 going to wash beans from which she had removed husks within her compound. Since the girl was young, he decided to assist her untie the goat near the road and sent her to untie the other deeper in the bush. The one in the bush was loose enough for her to untie compared to the one by the roadside. The mother heard him talking to Brenda and called. She asked who she was talking to and she responded she was talking to the accused. The mother stood and went towards them.
10 She asked the accused why he was standing there and he told her he was untying the goat. She asked him again angrily why he was standing there. He answered do you think I am stealing your goat? She then uttered that she was beaten 12 strokes and charged to pay money and she could easily allege that he had had sexual intercourse with the daughter. She immediately called the victim and that was before the victim could un-tie the goat and even the accused had not untied
15 his. She then told the victim that if she did not admit that the accused wanted to have sexual intercourse with her, she would beat her up. She told the accused to go to Yachi. He told her he would go to his home first to dress up and return the phones to his home. He had gone to her home in a vest. She refused and since the accused feared that if she went with the victim alone she would pump her with a lot of lies, he rushed home, picked his shirt and told his wife he was
20 going to the Trading Centre.

He met the L.C.1 Chairman of the neighbouring village and he asked them whether they had seen P.W.5 going to the market. They said no and asked him why his eyes were red and whether they had been fighting. He told them no and suggested they should go to the home of the victim
25 since they may have remained home. He narrated the story to them and then his wife and P.W.5 came. The L.C.1 Chairman asked P.W.5 what the problem was and she did not answer. He also asked the victim who at first refused to answer and later said there was nothing wrong. The L.C.1 Chairman asked the victim whether the accused had thrown her down and she said no. They asked whether the accused had inserted something in her and she said no. Then they told them to
30 go back home.

The accused insisted that since P.W.5 was lying, she should be taken before the youth and beaten or both be taken from medical examination. The chairman said no but the accused insisted they should go. The L.C.1 Chairman made a phone call to his counterpart from the village of the accused and told him an incident had happened. They proceeded to Yachi Trading Centre to the home of the L.C.1 Chairman. The accused was then taken to Ayavu Headquarters. He spent the night in Ayavu Police Post cells and the following day statements were recorded. The victim was checked at Ayavu Health Centre. The accused was taken to Rhino Camp and from there he was brought to Arua. On 5th November the father of the victim came to him in the cells and said he should be released but the police demanded for Shs. 500,000/= and he was not released.

In his submissions, the learned Resident State Attorney, Mr. Emmanuel Pirimba argued that the medical examination of the girl on P.F 3A showed that her age was estimated to be 7 years and this was corroborated by the evidence of the victim who said she was 10 years and P.W.5 the mother all testified to the age. The court observed the tender age of the victim and a *voire dire* had to be conducted. As to the act of sexual intercourse; the evidence of the victim is corroborated by that of the doctor. The victim testified about the events when they went to untie the goats. She explained clearly to the court that the assailant touched her private parts by fixing the fingers there. The medical examination of the doctor done three days after the alleged incident corroborated this. This evidence offers sufficient proof. As regards participation P.W.3, 4, and 5 said he was a neighbour. The accused himself admitted that they are neighbours. P.W.4 saw the accused grabbing her sister. The factors aiding correct identification existed. The mother of PW3 found him zipping up. The accused fled upon seeing her and went past his home. In his defence, he raises a grudge and being framed. The threat by the mother of the victim that she would do something is unbelievable. There was no bad blood with the families. They were all leaders of a small Christian community. The grudge was not with the victim if it existed at all. He has no defence whatsoever. He had made an attempt at her before. During the testimony she still showed deep trauma. The accused should be found guilty.

In his final submissions, defence counsel on state conceded that the first two ingredients of the offence had been proved. The last ingredient was not proved. The evidence of the mother of the victim is not straight forward. She said he found him zipping up. Although the conduct of

running away may not that of an innocent person, her evidence calls for a lot of caution. The defence raised by the accused is that of a grudge. This was revenge by the mother of the victim. The weakness of the victim's evidence is that she was not sworn. The evidence requires corroboration. The prosecution has failed to prove the participation of the accused and he should
5 be acquitted.

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,
10 (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
15 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.
- 20 2. That a sexual act was performed on the victim.
3. That it is the accused who performed the sexual act on the victim.

Regarding the first instalment, 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
25 own observation and common sense assessment of the age of the child. In this case the victim Asibazuyo Brenda testified as P.W.3 and was first subjected to a *voire dire* at the conclusion of which she was found competent to testify not on oath. She said she was ten years old. Her mother, Jina Envikia, testified as P.W.5 and said she was ten years old at the time she testified. P.W.1, Dr. Apo Julius, a Medical Officer, examined the victim on 30th October 2012, three days
30 following 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 seven 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 prosecution has proved this element beyond reasonable doubt.

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Regarding proof of the fact that a sexual act was performed on the victim, section 129 (7) of The Penal Code Act defines a sexual act as (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

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penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim P.W.3 Asibazuyo Brenda testified that the accused had sexual intercourse with her while holding her mouth shut. He opened her private parts with his fingers and inserted them there and that his "thing touched inside my thing which I use for urinating."

Her mother P.W.5 Jina Envikia, testified that she found the accused at the scene zipping up.

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P.W.1 Dr. Apo Julius, a Medical Officer examined the victim on 30th October 2012. In his report, exhibit P.Ex.1 (P.F.3A) certified his findings that the hymen was torn with lacerations of the vaginal walls. In his opinion the probable cause was coitus (sexual intercourse) and that the victim was involved in penetrative coitus (sexual intercourse). To constitute a sexual act, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient. On

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basis of all this evidence, the prosecution has proved this element beyond reasonable doubt.

Lastly the prosecution was 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 not as a mere spectator but as the perpetrator of the offence.

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There is the oral testimony of the victim Asibazuyo Brenda P.W.3 who stated that she knew the accused very well and recognised him when he undressed her and proceeded to fondle her private parts and also have sexual intercourse with her. Her sister P.W.4 Ejoru Annet saw her being pulled into the bush by the accused. Her mother, P.W.5 Jina Envikia found the accused zipping up. The accused in his defence admits being found at the scene but denies having

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committed any sexual act on the victim. He said he was only helping her to untie one of the goats. His explanation is that he is being framed by the mother of the victim on basis of a pre-existing grudge between him and her stemming from his involvement in assisting her husband in

cheating on her by calling him some young girl previously, which sparked off a fight between her and her husband's lover. Counsel for the accused contested this element.

I have considered the defence of a grudge raised by the accused and have found it to be
5 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. I do not
see how any grudge he may have had with the mother of the victim would involve the victim at
such a tender age as well as result in the lacerations and broken hymen seen by P.W.1 when he
examined the victim. I am satisfied that he was correctly identified and that he is responsible for
10 the sexual act. 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

20 28th June 2017

9.00 am

Attendance

Ms. Mary Ayaru, Court Clerk.

Mr. Emmanuel Pirimba, Resident State Attorney, for the Prosecution.

25 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)
30 (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. He has
not been remorseful during trial. The victim and the convict have a very big age difference. He is
the age-mate of the father of the victim who should have offered her protection rather than
abused her. The victim was under emotional trauma even at the time of her testimony and this is

likely to have a life-long effect on her considering lack of support. The girl child needs protection and hence a deterrent sentence ought to be meted out so that he can re-think his action and also deter would be offenders.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that;
5 the convict is a first offender. He is now remorseful for what he has done. He is a young man at 31 years. He is married with four children and a bread winner of the family. He has been on remand for four years and six months. He has the opportunity to reform and he has indeed reformed. He prayed for such a sentence as would enable him to come out and take care of his family. In his *allocutus*, the convict prayed for lenience on grounds that; he had a wife and
10 family of four children. When he was in prison the last child died and now he is left with three. He left a wife who is now married to the L.C.1 Chairman. His land was sold off and he requested for mercy to help him and sentence him to a few years to enable him solve those issues. He is diabetic and suffers from hepatitis “B.” He is not allowed to eat beans and posho.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s
15 129 (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
20 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
25 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
30 (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 37 years at the time of the offence and the age difference between the victim and the convict was 30 years. He exposed the 7 year old child 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 nineteen 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 young 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 nineteen years, proposed after taking into account the aggravating factors, now to a

term of imprisonment of fifteen 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 fifteen 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 four years and seven 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 five (5) 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.