

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0051 OF 2014

UGANDA **PROSECUTOR**

5 **VERSUS**

AMIDU SIJALI FADIL **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)
10 (a) of the *Penal Code Act*. It is alleged that the accused on the 22nd day of May 2013 at Bibia Cell
in Arua District, had unlawful sexual intercourse with Weweru Sakira, a girl below fourteen
years. During the preliminary hearing, the evidence of P.W1: Dr. Akusa Ayuma Darlington was
admitted. It was to the effect that he examined Waweru Sakira on P.F 3A on the 23rd May 2013.
He found her to be of the apparent age of four years. She was of a normal mental status. The
15 head and neck were normal. The chest and breasts were normal. The abdomen and back were
normal. The limbs, both lower and upper were normal. The vagina was soiled with semen, the
introitus was bruised and the hymen ruptured. The probable cause was penetrative sexual
intercourse. He also examined the accused Sijali Amidu on P.F 24A on 23rd May 2013 at Arua
Regional Referral Hospital. He found him to be of the apparent age of 27 years with a normal
20 mental status. His head and neck were normal. He had bruises on the back and trunk.

After conducting a *voire dire*, the court was satisfied that P.W.2: Weweru Shakira, at nine years
of age, understood the nature of an oath and she gave sworn evidence. She testified that on the
fateful day, her mother bathed her and her brother and since it was getting late she told her and
25 her brother Musa to go to sleep. Later at night her mother went to the neighbourhood and when
she came back she found that the paraffin was finished. She bolted the door from outside as she
looked for paraffin. While the victim was sleeping, the accused opened the door, removed her
panties and started sleeping with me. She felt like urinating but when she arose she felt her skirt
was full of water. The accused had touched her private parts while lying on top of her. At first he
30 was lying on top of her and later after releasing in her he slept beside her. He touched her body

using his penis. He touched her with his penis in her private parts. She woke up and stood up. The incident happened at night. It was dark. When my mother came in, she poured paraffin in the lamp and she saw this man. Before my mother came in there was light in the house coming from a tadooba. She had never seen that man before. He was putting on squared boxer shorts. She
5 flashed a torch and I saw him. The torch was near her bed. The accused went and sat on her mother's bed. Her mother found the door already open. She entered the house. She found her behind the door. She called her name and she responded. The accused was on her mother's bed. She decided to call the youth who came. They entered the house, removed the accused and started beating him. They tied his hands and legs and he was brought to the police. Her Aunt
10 carried her on her back and took her to the police who said she should be taken to the hospital. She was taken to Arua Hospital from where she was examined.

The mother of the victim, P.W.3: Atimango Siama, testified that the victim is eight years old now. She did not know the accused before the date of this incident. She got to know his name on
15 that day, 22nd May 2013, at 9.00 pm. Before that at 7.00 pm she bathed her children Shakira and Musa. She then prepared a meal for them which they ate and she directed them to go to bed. They went to bed. She went to a neighbour's house, Halima Chichika, just passing time until 9.00 pm when she told her she was going to sleep. When she entered her house she found the paraffin in the lamp was low and the light was dim. She picked shs. 500/= to go and buy paraffin.
20 She bolted the door from outside but did not lock it with a padlock. She did not find the paraffin so she returned home. On arrival home she found the bolt was open. The door was shut but not bolted.

She then opened the door and when she entered she found Shakira crying while standing. She
25 asked her why she was crying yet she had left her sleeping. She told her that someone had urinated on her. When she asked her where the person was she told me her she did not know. She turned round and saw someone inside the house. He was behind the door. He was naked and she directed her children to run out of the house, she locked the door and made an alarm from outside the house. People responded to the alarm, she picked her phone and called her sister
30 Rema. When she came, they went to call the youth of that area. One of them was Sam. When they came they opened the door and the accused jumped outside in an attempt to escape but the

youth arrested him and began beating him. He started admitting that it is true he did it but he just wanted to release and leave the girl. When she checked her with torchlight on her phone and she saw white semen coming down her thighs. Sam then made a phone call to the police at Arua Central Police Station. The police then said they were busy and if they could they should bring him to the police. He was taken to the police. This was around 11.00 pm. They were advised by the police to return the following day to the police. She was then given some forms to go to the hospital and took the victim to Arua Regional Referral Hospital. She was examined and the doctor said there had not been deep penetration. She had not known the accused before the incident.

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In his defence, the accused stated that around the time of the incident, he was befriending a girl called Siama, daughter of Namusisi. She gave him her phone number and on 23rd at 8.00 pm she called him on phone asking him where he was and he told her he was at home. She asked him whether she could meet him and he said yes. He came to the roadside and jumped onto a boda boda. He was driven to the former UEB Office at Achinjini. When he arrived, he paid the boda boda shs. 1,000/=. He was about to call her on phone when she spotted him from a distance and signalled to him. They talked for some time by the roadside and she later suggested they should go to her home where he sat in the sitting room. He gave her shs. 3,000/= to go and buy two bottles of soda. She went out for a short time and came back and told him it was very dark outside. He flashed the torch on his phone. She used that light to find her way. She was gone for a few minutes when some man came and started knocking and calling her by name three times. The accused told the man she had gone to the shop. The man asked the accused why he was in the house and he told him he had come to see his girlfriend. He then said that every time when he is not at home the accused disturbs his wife. The person closed the door and called another woman Friki. When she came he told her that there was a man in the house he did not know. When Friki opened the door she made an alarm and many people came and began beating the accused up. His hands were tied with a rope from behind. A man of about 60 years told the people that if the accused died they would be responsible. They untied his hands and he had been stripped naked. He was taken to the police and when we arrived at the catholic centre he was given a pair of shorts. People were asking what he had done and they said he was a thief. He was beaten badly and could not speak and at the police he was asked what his name was. It was

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written down and he was detained. The following day a woman took him to make his statement and he narrated the same story. A woman said the accused was charged with defilement. He was taken to the hospital and he was examined by the doctor who asked for his age and he checked my private parts and did not find any wound. He asked the accused whether he had a grudge with the complainants and he replied in the negative. He laughed and checked his HIV status. The accused was then returned to the cell. He was remanded for one month. His file lost position and he was brought to court after two months before a grade one magistrate.

In his final submissions, defence counsel on state brief, Mr. Okello Oyarmoi argued that although the state had proved penetration it had failed to prove the issue of identification. The accused said he was framed. It creates a doubt in the prosecution case. He does not have to prove his innocence. A doubt had been created and he prayed that he is acquitted. On his part, the learned Resident State Attorney Mr. Emmanuel Pirimba argued that the prosecution has discharged its burden and proved all the ingredients. Age is proved by P. Ex. 1 she was four years old, P.W.3 said she was only 8 at the time of the trial and her testimony as P.W.2 she said she was 9 years and she appeared as a child. For the sexual intercourse there is the evidence of P.W.2 and she said she was subjected to sexual intercourse and this is corroborated by P.E.x.1 bruises were found in her private parts. This is corroborated by her mother who found her crying and on being asked she said someone had urinated on her had she saw semen on examining her private parts. Crying corroborates the fact of sexual intercourse. On participation.P.W.2 and P.W.3 identified the accused. He was also found inside the house. He was locked inside and was arrested and he was the only adult male in the house that day and this leaves no doubt that it was him who committed the offence. His defence does not deny being at the scene and this corroborates his participation. His claim that he had gone to visit is a lie. All ingredients have been proved. He prayed for a conviction.

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.
- 10 3. That it is the accused who performed the sexual act on the victim.

Regarding the first element, 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
15 Weweru Shakira P.W.2, as a child of tender years was subjected to a *voire dire* and she was found competent give her evidence on oath. She stated her age was nine years at the time she testified. Her mother P.W.3 Atimango Siama testified that the victim was eight years old at the time she testified although she could not remember the exact date of her birth. P.W.1 Dr. Akusa Ayuma Darlington, a Medical Officer at the Arua Regional Referral Hospital examined the
20 victim on 23rd March 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 four 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
25 reasonable doubt that as at 22nd day of May 2013 Weweru Sakira was a child below the age of fourteen years.

A sexual act is defined by section 129 (7) of *The Penal Code 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
30 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 Weweru Sakira P.W.2 said the accused lay on top of her and had sexual intercourse with her. Her mother Atimango Siana P.W.3 stated she found her daughter in the house standing and crying. She said someone had urinated on her.

5 When she flashed her torch, she saw semen flowing down her thighs. P.W.1 Dr. Akusa Ayuma Darlington, a Medical Officer at the Arua Regional Referral Hospital examined the victim on 23rd March 2013. In his report, exhibit P.Ex.1 (P.F.3A) he certified his findings that her vulva was stained with semen, the introitus was bruised and the hymen was ruptured. In his opinion, these observations were as a result of penetrative sexual intercourse with a man. To constitute a
10 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 22nd day of May 2013 Weweru Sakira was the victim of a sexual act.

15 Lastly, it had to be proved that it is the accused who 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 the victim herself, Weweru Shakira P.W.2 who stated that she recognised the accused when he lay on top of her. Her mother Atimango Siana P.W.3 stated that on finding the
20 accused in the house he locked him inside the house and raised an alarm. The accused in his defence admitted having been arrested at the scene but claims he was framed. He had gone to visit his girlfriend and the husband of P.W. 3 suspected him of having an affair with her.

This element is contested by counsel for the accused. I have considered the defence of having
25 been framed maliciously raised by the accused and have found it 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. I am satisfied that he was correctly identified. Therefore in agreement with the 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) and (4) (a) of the *Penal Code Act*.

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Stephen Mubiru
Judge
27th June 2017

28th June 2017

10 9.03 am

Attendance

Ms. Mary Ayaru, Court Clerk.

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

Mr. Okello Oyarmoi, Counsel for the accused person on state brief is present in court

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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 accused and the victim have an age difference of over twenty years and he was fit to be the father of the victim who would have offered her protection. He has never been remorseful for his act despite the pain that he inflicted on both the mother and the victim herself. The girl child needs to be protected and a deterrent sentence is required.

25 In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; the convict is a first offender who is married with a child in a nursery school. He is now thirty years old and the bread winner of his family. He has been on remand for four years and seven months and is now remorseful. In his *allocutus*, the convict prayed for lenience on grounds that; when he was young he fell from a mango tree and sustained an injury to the waist and when he does a lot of work he feels pain. He is the only child in the family. His mother had previously married in Khartoum and now lives there in Khartoum with her other children. He is the eldest son of his father. No one has ever come to give him support in this since he was imprisoned. He

asked God to look into this because if truly he committed the offence God should bear him witness for he failed to understand this. He left it all in the hands in God who is the Judge.

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
5 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
10 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
15 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
20 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.

25 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
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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 27 years at the time of the offence and the age difference between the victim and the convict was 23 years. He exposed the 4 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 twenty years' imprisonment.

The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and relatively youthful. 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 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 29th 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 ten (10) 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.

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