

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT MOROTO
CRIMINAL SESSIONS CASE No. 0041 OF 2015

UGANDA **PROSECUTOR**

VERSUS

ALEPERE PETER **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is charged 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 17th day of December 2014 at Namoru-Akwangan village, Kayepas Parish, Lokopo sub-county in Napak District, performed a sexual act with Nakut Emmanuel, a boy below fourteen years.

The facts as narrated by the prosecution witnesses are briefly that on that fateful night, while the victim was sleeping at the home of his Auntie, he awoke to find the accused holding him by the neck. The accused turned him round to face the ground and repeatedly hit his head onto the ground while committing an act of sodomy. At some point in that process, the victim passed out and when he regained his consciousness he saw the accused totally naked, walking out of the hut. The victim was too weak to alert anyone and was only able to summon some energy at around 8.00 pm whereupon he returned to the home of his parents. His parents noticed there was something wrong with him and thinking that he was ill, his mother prepared him some herbs to drink. He later revealed to his parents what had befallen him the previous night. They examined his anus and saw blood and semen oozing from it. They took him to the hospital and arrested the accused and took him to the police. The victim was admitted in hospital for a week or so undergoing treatment. The accused opted to remain silent in his defence.

Since the accused pleaded not guilty, the prosecution has the burden of proving the case against him 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 ingredient of the offence of Aggravated defilement is proof of the fact that at the time of the offence, the victim was below the age of 14 years. 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 (See *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

The prosecution relies on the testimony of the victim, P.W.3 Nakut Emmanuel who stated that he was 15 years old, hence 12 years old nearly three years ago when the offence is alleged to have been committed. His father Lowal Daniel testified as P.W.2 and said his son, the victim, is now fourteen years old although he did not remember when he was born. This evidence is corroborated by that of P.W.1 Dr. Paul K., a Medical Officer at St. Kizito Hospital Matany who examined the victim on 27th December 2014, ten days after the date on which the offence is alleged to have been committed. In his report, exhibit P.Ex.1 (P.F.3A) he certified his findings that the victim was of the apparent years of twelve years at the time of that examination, based on his dental development. The court too had the opportunity to observe the victim when he testified in court. In the court's opinion, his physical characteristics were consistent with tender

age. Counsel for the accused did not contest this element and in agreement with the assessors, I find that on basis of that evidence the prosecution has proved beyond reasonable doubt that Nakut Emmanuel was a boy below fourteen years as at 17th December 2014.

The second ingredient required for establishing this offence is proof that the victim was subjected to a sexual act. One of the definitions of a sexual act under section 129 (7) (a) of *the Penal Code Act* is penetration of the anus, 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, (See *Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)*). The slightest penetration is enough to prove the ingredient.

In the instant case, the court was presented with the oral testimony of P.W.3 Nakut Emmanuel who stated that an assailant strangled him, turned him over and proceeded to perform an act of sexual intercourse on him while banging his head on the ground until he passed out. When he regained his energy at around 8.00 am, he saw blood and semen oozing from his anus as he walked home to report to his parents. His father P.W.2 Lowal Daniel testified that he saw his son, the victim, at around 8.00 am that morning in a distressed condition and upon receiving a narration of the events of the previous night, he asked him to bend over. He saw blood and semen oozing from his son's private parts. However, P.W.1 Dr. Paul K. a Medical Officer at St. Kizito Hospital Matany who examined the victim on 27th December 2014, ten days after the date on which the offence is alleged to have been committed stated in his report, exhibit P.Ex.1 (P.F.3A) that the victim had a "normal anus tone with no bruises or any other injuries noted and there was no blood on the finger and instruments inserted in the anus during the medical examination." He however found "multiple bruises on the left side of the face, clothing heavily soiled with blood and significant accumulation of liquid around his eyes."

This court notes that the medical examination for purposes of P.F.3A was done ten days after the incident and after the victim had received medical treatment for about one week. No wonder there were no longer any visible signs of physical trauma on the victim's anus. In any case, the examining doctor may not necessarily have been the one who provided treatment to the victim. Counsel for the accused contested this element arguing that there is no evidence of penetration.

Although the medical report does not corroborate the testimony of either the victim or his father, I had the opportunity to observe both witnesses as they testified and found no reason as to why they would mislead court about what they saw that morning. Even without corroboration, I found them to be truthful and reliable witnesses without any animus towards the accused such as would have motivated any of them to falsely allege an act of sodomy. The medical report though is corroborative of the victim's testimony in so far as the doctor observed the distressed and dishevelled condition of the victim. To constitute a sexual act, it is not necessary to prove that there was deep penetration, the use of a sexual organ or the emission of seed. The slightest penetration is sufficient (see *Gerald Gwayambadde v. Uganda* [1970] HCB 156; *Christopher Byamugisha v. Uganda* [1976] HCB 317; and *Uganda v. Odwong Devis and Another* [1992-93] HCB 70). Therefore, in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

The last essential ingredient required for proving this offence is 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. The accused opted to remain silent in his defence. To implicate him, the prosecution relies on the testimony of P.W.3 Nakut Emmanuel as a single identifying witness. This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witness was able to recognise the accused. In circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R* (1953) 20 EACA 106; *Roria v. R* [1967] EA 583 and *Abdalla Nabulere and two others v. Uganda* [1975] HCB 77). In doing so, the court considers; whether the witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused. This court is keenly alive to the fact that an eyewitness may be genuinely mistaken in his or her identification of the accused. This is further exacerbated by the fact that a mistaken witness could be a convincing one.

P.W.3 stated that before he went to bed, he saw the accused preparing his bed in a shelter where he ordinarily slept, outside the door leading to where he and the other boys slept. At around 9.00 pm, the accused sneaked into their room naked and he recognised him when one of the other boys, Amuge, flashed a torch when they realised there was an intruder inside their room. The accused walked out without saying a word. Later in the night an assailant attacked him and strangled him and the entire ordeal took about forty minutes. He became unconscious at some point and it is not clear whether or not the torch was flashed again. He stated though that he recognised him as he walked out of the door and that he was the only person sleeping immediately outside their door. It appears his identification evidence is based partly on recognition and inference.

I have consider the reliability of this identification evidence in light of the circumstances that prevailed at the time of identification. The witness was familiar with the accused. He knew the accused as one of the occupants of his Auntie's homestead. Although there was light to aid visual identification at the very moment of the attack, the accused had walked into the boys' room a few hours before totally naked. He never said anything to the boys and retreated silently from the room the moment one of them flashed a torch at him by which the victim recognised him. It was very suspicious conduct on his part as an adult, to sneak into the room unannounced, while naked on that occasion. According to the victim, the ordeal took about forty minutes and although he passed out at some point, there was ample time for the witness to identify and recognise the accused as he walked out of the hut, against light coming from outside. In terms of proximity of the witness to the accused at the time of observing the accused, the victim stated that among the boys, he was the sleeping closet to the door. The accused ordinarily slept under a shelter immediately outside that door where the victim saw him in the early evening hours preparing to go to bed as the victim walked past him into the hut. It is practically the door to the hut that separated the two of them when they went to bed and the accused appears to have taken advantage of that proximity to gain entry into the hut and sexually assault the victim.

Considering the prior familiarity, the suspicious behaviour of the accused immediately before the attack, conduct with a manifestation of sinister intentions of a sexual nature, I am satisfied that in the circumstances, the witness had ample opportunity to recognise the accused as he walked out

of the hut and that his testimony is free of the possibility of error or mistake. The accused has been squarely placed at the scene of crime as the perpetrator of the offence. 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*.

Dated at Moroto this 29th day of September, 2017.

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Stephen Mubiru
Judge.
29th September, 2017