

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL SESSIONS CASE No. 0105 OF 2014**

**UGANDA** ..... **PROSECUTOR**  
**VERSUS**  
**KESUNGE ORYEMA DAVID** ..... **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) and (b) of the *Penal Code Act*. It is alleged that the accused on the 29<sup>th</sup> day of August 2013 at Kulimau village in Pasai Parish, Kango sub-county in Zombo District, had unlawful sexual intercourse with Candiru Joyce, a girl under the age of fourteen years while he was HIV positive.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on 29<sup>th</sup> August 2013, at around 8.00 pm the victim in this case left her mother in the kitchen and proceeded to the main house to sleep. She awoke moments later to realize that someone was on top of her having sexual intercourse. She raised an alarm and her mother responded. She met the accused dashing out of the house. She grabbed the accused and raised an alarm. Neighbours responded to the alarm and the accused was arrested from within the compound. On checking the victim, the mother saw semen flowing from her private parts. Both the victim and the accused were taken to the police and subsequently for medical examination where it was found that the accused was HIV positive. The accused in his defence denied the accusation and stated that he was at the home of the complainant that night for a different reason. He was there to claim his share of his late father's land from the father of the victim, who happens to be his paternal uncle. He was surprised to be framed with this allegation.

Since the accused in this case pleaded not guilty, like in all criminal cases 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). The accused does not have any obligation to prove his innocence. 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 before it can secure his conviction. 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 Vs 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.
4. That at the time of performing that sexual act, the accused was HIV positive.

The first ingredient of the offence requires 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*).

In the instant case, the court was presented with the oral testimony of PW3 (Aiyiocan Immaculate) who said she was 12 years old. Her mother, PW4 (Joyce Akumu) stated that she could not remember when the victim was born but that she was 12 years old at the time she appeared to testify in court. PW1 Mr. Edema Gasper, an enrolled comprehensive nurse at Alangi Health Centre who examined the victim on 30<sup>th</sup> August 2013, the day after the date the offence is alleged to have been committed, indicated in his report, exhibit P.Ex.1 (P.F.3A) that the victim was 9 years at the date of examination. The court as well had the benefit of observing the victim when she testified in court. Counsel for the accused did not contest this ingredient during cross-examination of these witnesses and neither did he do so in his final submissions. From all that

evidence and in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Ayiyocan Immaculate was a girl under 14 years as at 29<sup>th</sup> day of August 2013.

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) of *the Penal Code Act* is penetration of the vagina, however slight by the sexual organ of another or unlawful use of any object or organ on another person's 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 the victim PW3 Ayiyocan Immaculate who described the nature of the act. She awoke to find a man lying on top of her and she was wet from the waist up to her private parts. PW4 Joyce Akumu, the mother of the victim, testified that she examined the victim and found her private parts were wet with semen. There is also the evidence of PW1, Mr. Edema Gasper, who on examining the victim medically found that the victim's vaginal opening was wider than normal although the hymen had not been ruptured. She had lower abdominal pain and difficulty in walking. This evidence corroborates that of the victim. The evidence is further corroborated by her reaction immediately after the act. She ran out of the house terrified into the nearby bush, even though it was nighttime, from where her mother retrieved her. On checking her private parts, she found them wet with semen. Although counsel for the accused contested this ingredient during the trial and in his final submissions, in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Ayiyocan Immaculate was the victim of a sexual act on 29<sup>th</sup> day of August 2013.

The third 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. In this case we have the direct evidence of the victim, Ayiyocan Immaculate, who explained the circumstances in which she was able to identify the accused as the perpetrator of the act. Where prosecution is based on the

evidence of an indentifying witness under difficult conditions, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R* (1953) E.A.C.A 166; *Roria v. Republic* [1967] E.A 583; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. 1 of 1997*).

In her testimony PW3 Ayiyocan Immaculate said she recognised the accused while he was on top of her and called him by name. She knew tha accused before that day and had seen him shortly before she went to bed. Although it was dark in the room, she called her by name before he jumped off her in a bid to escape. The victim's mother, PW4 Joyce Akumu, who responded to the victim's screaming, testified that she held the accused by the doorway as he fled out of the house. In his defence, the accused did not deny having been at the home that evening and having been arrested there but states he had gone there to demand for his share of his late father's land only to be falsely accused. Although Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions, in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Ther is no possibility of mistake or error in the evidence placing the accused at the scene of this offence as the perpetrator of the offence. As a result, his defence has been effectively disproved and is hereby rejected as implausible.

The last essential ingredient requires proof that at the time of performing the sexual act, the accused was HIV positive. To prove this element, the prosecution relied on the admitted evidence of PW2 Kevio Jacob Waringwe, a Senior Clinical Officer at Paidha Health Centre who on 3<sup>rd</sup> September 2013, five days after the incident, medically examined the accused and found him to be HIV positive. The sero-status of the accused on the date of examination is certified by documentary evidence in the form of exhibit P.Ex.2 (P.F. 24A) certifying those findings. It is now common knowledge that HIV is not detectible immediately after infection. There is a "window period" soon after infection during which the presence of the virus in the human body cannot be detected by diagnostic tests. The window period occurs between the time of HIV infection and the time when diagnostic tests can detect the presence of antibodies fighting the virus. The length of the window period varies depending on the type of diagnostic test used and the method the test employs to detect the virus.

Furthermore, it is still common knowledge that if an HIV antibody test is performed during the window period, the result will be negative, although this will be a false negative since the virus will be present in the body, only that it cannot be detected yet. At page one of his paper published in November 2011 entitled, *The HIV Seronegative Window Period: Diagnostic Challenges and Solutions*, Mr. Tamar Jehuda-Cohen of SMART Biotech Ltd. Rehovot Israel; and Bio-Medical Engineering, Technion Israel Institute of Technology, Haifa, Israel reveals that scientific research has established that it takes 95% of the population approximately three months to seroconvert following HIV infection. The window period therefore is generally three months. This research supports PW6's testimony regarding the duration of the window period. In the instant case, since the HIV diagnostic test done on the accused on 3<sup>rd</sup> September 2013, five days after the incident turned out positive, it implies that the window period had elapsed. He therefore must have contracted the virus not less than three months prior to the date of that test, i.e. latest May 2013 and was therefore carrying the virus by 29<sup>th</sup> August 2013 when he had sexual intercourse with the victim, PW3. Counsel for the accused did not contest this during cross-examination of the prosecution witnesses and in his final submissions. In agreement with the assessors, I therefore find that this ingredient too 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) and (b) of the *Penal Code Act*.

Dated at Arua this 10<sup>th</sup> day of July, 2016.

.....  
Stephen Mubiru  
Judge.  
10<sup>th</sup> July 2017

24<sup>th</sup> July 2017

2.48 pm

Attendance

Ms. Sharon Ngayiyo, Court Clerk.

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

Mr. Okello Oyarmoi for the convict on State Brief.

The convict is present in Court.

**SENTENCE AND REASONS FOR SENTENCE**

Upon the accused being convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (a) (b) of the *Penal Code Act*, although he had no previous record of conviction against the convict the learned State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; offences of this type are rampant in the region, the Convict was aware of his sero-status at the time and the victim was related to the convict. There is need to protect the girl child from the likes of the convict. He deserves a sentence ten years and above.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; the convict is a first offender, he is aged 28 years, he was married but the wife died while he was in prison. He has been in custody for three years and four months. He is a young man and can still reform. He prayed for lenience to enable the convict take care of the four children. He is now repentant. In his *allocutus*, the convict prayed for lenience on grounds that his mother died and left him when he was young and she produced him alone. His father died later. When he grew up he contracted HIV and Hepatitis “B” and is blind in one eye and has partial sight in the other. He has four children whom he left at home alone. There is no one to look after them. They are suffering at home. The only portion of land he was left with was grabbed by his uncle the complainant. He does not know where he will go on return. He prayed for mercy.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) and (b) of the *Penal Code Act* is death. However, this punishment is by sentencing convention reserved for the most extreme circumstances of perpetration of such an 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 consequence of the action.

In the case before me, although the accused was HIV positive at the time he committed the offence, there is no evidence to suggest that he knew at the time or had reasonable cause to believe that he had acquired HIV/AIDS. There is no factor that would justify the death penalty in this case. The circumstances in which the offence was committed were not life threatening, in the sense that death was not a very likely consequence of the convict's actions, 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) (b) 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.

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.

The cases I have found whose facts bear some resemblance to the one before are; firstly that of *Ogarm v Uganda C.A. Cr. Appeal No. 182 of 2009*. In that case, on the 17<sup>th</sup> of April 2008, at about 10.00 pm, the victim aged 13 years, was on her way home from watching a video when she met the appellant who grabbed and pulled her to a banana plantation. He forcefully had sexual intercourse with her for about one hour resulting in bleeding from her private parts. Upon conviction, the trial court took into account the period of one year and 4 months the accused has spent on remand. The Court of Appeal upheld the sentence of 15 years' imprisonment as being appropriate. In the other case, *Uganda v Kigoye, H.C. Cr. Session Case No. 6 of 2013*, on the fateful day in January, 2013 at about 5:00 pm, the victim along with other children went to collect firewood. On the way they met the accused, aged 38 years, who isolated and took the victim, a 12 year old girl, further away from the other children she was with. When they reached a secluded place in the forest he ordered the victim to undress and proceeded to have sexual intercourse with her. The sexual act caused the victim to cry out in pain and the dog she was with started barking. When her colleague responded to her alarm, he found the accused lying on top of the victim and her knickers hanging on a stick. The accused on seeing the rescuers put on his trousers and fled from the scene. In sentencing the convict, the court considered that he had committed a serious offence against a defenseless victim who clearly was a young girl with a disability. Apart from epilepsy, she was mentally retarded. Although the convict had been on remand for one year, three months and three days, he was sentenced to 24 years' imprisonment.

In none of the cases I have cited above, where the sentences were reduced by the Court of Appeal was the fact that the offender was HIV positive at the time of the offence considered as one of the aggravating factors. In none of them was the victim subjected to repeated acts of sexual intercourse over a period of days. In none of them was the victim under restraint, in some form of captivity for an extended period of time. I am inclined to believe that the presence of these factors in the case before me operates to aggravate the offence to an extent that has not been considered before by the Court of Appeal in any of those cases I have cited. Indeed I observe that the victim was kidnapped with intent to subject her to the unnatural lust of the



convict, which of itself is another aggravating factor. The victim was not only traumatized, and dehumanized but was exposed the danger of contracting HIV. 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 constitute a callous disregard of the victim's dignity, autonomy and inviolability of person and as such are sufficiently grave to warrant a deterrent custodial sentence. I have as well considered the disparity in age between the victim and the convict being seventeen years at the time of the offence (the victim was 9 and the convict was 26 years old). He was also related to the victim by blood. The message should ring out loud and clear to the convict that sexual abuse of this nature is totally unacceptable. It is for those reasons that I have considered a starting point of thirty years' imprisonment.

The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and a relatively young person at the age of almost 30 years, still capable of reforming and becoming a useful member of society. He is sickly and a father. The severity of the sentence he deserves has been tempered the mitigating factors and is reduced from the period of thirty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty five years. This in my view is lenient in comparison with the sentence in *Uganda v. Bonyo Abdu, H.C. Crim. Sess. Case No. 17 of 2009*, where a convict who was HIV positive at the time he had "consensual" sexual intercourse, over six times, with a child aged 14 years, was sentenced to life imprisonment. The fact that the victim did not contract HIV/ Aids was not considered as a mitigating factor in that case. His appeal to the Supreme Court (*Bonyo Abdu v. Uganda, S.C. Criminal Appeal No. 07 of 2011*), against the sentence of life imprisonment was dismissed. It should be borne in mind that a life sentence in those terms means the natural life of the convict, (see *Tigo Stephen v Uganda S.C. Criminal Appeal No. 08 of 2009*).

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. This provision was applied in *Kizito Senkula v Uganda S.C. Cr. Appeal No.24 of 2001*, and ***Katende Ahamad v Uganda, S.C. Criminal Appeal No.6 of 2004*** where the Supreme Court held that in **Article 23 (8) of The**

**Constitution**, the words “to take into account” do not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand, from the sentence to be meted out by the trial court. This decision was followed by the Court of Appeal in *Zziwa v Uganda Cr. Appeal No. 217 of 2003*, and *Kaserebanyi v Uganda Cr. Appeal No. 40 of 2006*, among other cases, where it was decided that to take into account does not mean a mathematical exercise. What is necessary is that the trial Court makes an order of sentence that is not ambiguous.

That Supreme Court interpretation was made before the adoption of Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, to the effect that the court should “deduct” the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This approach requires a mathematical deduction by way of set-off. From the earlier proposed term of twenty five years’ imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged in August 2013 and been in custody since then, I hereby take into account and set off three years and eleven months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of twenty (21) years and one (1) month, to be served starting today. The convict is advised of his right of appeal against both conviction and sentence, within a period of fourteen days.

Dated at Arua this 24<sup>th</sup> day of July, 2017.

.....  
Stephen Mubiru  
Judge.  
24<sup>th</sup> July, 2017