THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL SESSIONS CASE No. 0095 OF 2016

UGANDA …… PROSECUTOR

VERSUS

OKOKU OCHIKUYO …… 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 20th day of November 2013 at Pathenju village, Ujayo Parish, Atyak sub-county in Zombo District, performed a sexual act with Ajolrwoth Sukuru, a girl under the age of 14 years.

The facts as narrated by the prosecution witnesses are briefly that on that fateful day, the accused who lived in the neighbourhood, visited the home of the mother of the victim. He sat the victim on his laps and when the mother went out of the house to collect water from outside for bathing the younger sibling of the victim, the accused inserted his finger into the genitals of the victim causing her pain as a result of which she began crying. When the mother returned, she found the accused placing the victim down from his laps. She asked why the victim was crying but she did not respond. After the accused had left, the mother noticed that the victim had blood oozing from her genitals and they were sensitive to the touch. On asking her what had happened to het she told her the accused had inserted his fingers there. The mother reported to the local authorities who proceeded to the home of the accused and when confronted with the facts he denied the accusation. He was arrested and handed over to the police. the victim was medically examined. In his defence, the accused denied the offence and stated that the injuries seen in the genitals of the victim were self-inflicted as her mother had advised her to scratch them when she said they were itching and further that they were based on a grudge against him.

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 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 P.W.2 Ajolorwoth Sukuru who stated that she was 7 years old at the time she testified in court, hence 3 years old nearly four years ago when the offence is alleged to have been committed. Her father P.W.4 Alfred Munguriek could not remember the day she was born because he was on safari at the time. Her mother P.W.6 Anirwoth Sharon testified that the victim was seven years old at the time she came to testify in court. The admitted evidence of P.W.1 Kevio Jacon Kebi Warungu, Senior Clinical Officer at Paidha Health Centre who examined the victim on 7th December 2013, nearly two weeks after the day on which the offence is alleged to have been committed. In his report, exhibit P.Ex.1

(P.F.3A) his findings were that she was approximately three years old based on the fact that she still had her milk teeth. The court as well had the opportunity to observe her when she testified. Counsel for the accused conceded to this element in his final submissions. In agreement with the assessors, I find that on basis of that evidence the prosecution has proved beyond reasonable doubt that Ajolorwoth Sukuru was a girl below fourteen years as at 20th day of November 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 **p**enetration 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 P.W.2 Ajolorwoth Sukuru who testified that the accused inserted his fingers in her genitals while she was sitting on his laps and her private parts started itching, she felt a sharp pain and got off the laps of the accused. The admitted evidence of P.W.1 Kevio Jacon Kebi corroborates her testimony. When he examined the victim on 7th December 2013, nearly two weeks after the day on which the offence is alleged to have been committed, he indicated in his report, exhibit P.Ex.1 (P.F.3A) that he found a posterior vaginal wall tear. The introitus was inflamed but the injuries were not fresh. He opined that the cause of the injuries was forceful vaginal penetration of the minor. He further observed that the victim was of normal mental status but emotionally she looked very scared. In law, such penetration is enough. It was suggested during the defence and final submission sthat the injuries could have been self inflicted when the mother, P.W.6 advised the victim to scratch her private parts when she told her that they were itching. However, P.W.6 testified that when she advised the victim to scratch, she immediately questioned her how she would be able to do that when it is the accused who had inserted his fingers there. This prompted P.W.6 to check the victim's private parts only to discover that the girl was already bleeding. This effectively rules out the possibility of self inflicted injuries.

To constitute a sexual act, it is not necessary to prove that there was deep penetration, the use of a sexual organ, the emission of seed or breaking of the hymen. 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)*. Under section 129 (7) (b) of *The Penal Code Act*, a sexual act is defined as including the unlawful use of any object or organ by a person on another person's sexual organ. In this case, the assailant's use of his fingers fits the definition.

This evidence is further corroborated by that of the victim's mother, P.W.6 Anirwoth Sharon who found the victim leaving the laps of the assailant crying inexplicably. The distressed condition of the victim observed soon after the incident offers further corroboration (see *Kibazo v. Uganda [1965] E.A. 509 at 510*). Upon checking her private parts when she complained of itching and pain there, the witness saw blood. Moreover, Counsel for the accused did not contest this ingredient during her cross-examination of the witnesses and neither did he do so in his final submissions. I find that the testimony of the victim is sufficiently corroborated. 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 denied having committed the offence. He pleaded an alibi to the effect that he was with his wife at home at that material time. He further stated that he was framed because of a grudge between him and P.W.3 Santo Olwor, the L.C.II Chairman, who happens to be his neighbour.

To disprove the defence, the prosecution relies on the evidence of the victim herself, P.W.2 Ajolorwoth Sukuru and that of her mother P.W.6 Anirwoth Sharon. Where prosecution is based on the evidence of indentifying witnesses, 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. l of 1997)*.

In their respective testimonies, both P.W.2 and P.W.6 stated that they knew the accused very well before the incident and P.W.2 was emphatic that it is the accused who inserted his fingers in her private parts while she sat on his laps. The victim was in very close physical proximity of the accused. The encounter took some time during which the mother left briefly to fetch water from outside. In my view, the conditions that prevailed during the entire course of those events favoured correct visual identification of the accused by both witnesses. I have considered the defence of alibi and grudge 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. 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 Arua this 3rd day of August, 2017.

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Stephen Mubiru
Judge.
3rd August, 2017

4th August 2017
9.42 am
Attendance

Ms. Sharon Ngayiyo, Court Clerk.
Mr. Emmanuel Pirimba Resident State Attorney, for the Prosecution.
Mr. Oyarmoi Okello, Counsel for the accused person on state brief is present in court
The accused is present in court.
Both Assessors are 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 is serious and carries a maximum punishment of death. Although he is a first offender, the conduct of the convict is absurd. He is a

parent and should have behaved responsibly. It is not an act befitting his age. the offence of defilement is on the rise. the court should protect the girl child. The victim suffered pain as a result of the finger. He needs a deterrent sentence an serve as a lesson to other offenders. The sentencing guidelines should be taken into account.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; The convict is a first offender at the dawn of his life. He is seventy years old. He was the bread winner of his family which badly needs him he should not die in prison. He has been on remand for three years and four months. He cannot endure beyond ten to twelve years. Anything above will be a gamble. Although the offence is bad he deserves lenience. In his *allocutus,* the convict prayed for lenience on grounds that; what happened was all as a result of allegations by his maternal people of things which he did not commit. He has seven orphans of his deceased children, and four of his late brother to look after. They are no longer at school, yet he is also weak with his left shoulder which got broken when he fell from a tree at one time, and is now unable to dig. He takes good care of people and I will do the same. He prayed for lenience.

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, 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) (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 the circumstances of the instant case 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 66 years at the time of the offence and the age difference between the victim aged 3 years then and the convict was 63 years. He is more or less the victim's great grandfather. The convict traumatised her physically and psychologically. It is for those reasons that I have considered a starting point of ten years' imprisonment.

The seriousness of this offence is mitigated by a number of factors; the fact that the convict became a first offender at the age of 66 years and he has considerable family responsibilities and also suffers from physical disability. He is now 70 years old and unlike young people, when persons of that age and above are subjected to a long custodial sentences, they may reasonably expect to die before completing their sentence. The severity of the sentence he deserves has therefore been tempered by those mitigating factors and is reduced from the period of ten years, proposed after taking into account the aggravating factors, now to a term of imprisonment of seven years and seven months.

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 nine years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 18th December 2013 and been in custody since then, I hereby take into account and set off three 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 four (4) years, 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 4th day of August, 2017.

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Stephen Mubiru
Judge.
4th August, 2017