THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL SESSIONS CASE No. 0058 OF 2015

UGANDA …… PROSECUTOR

VERSUS

OKWAIRWOTH JAKAN …… ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (b) of the *Penal Code Act*. It is alleged that the accused on the 5th day of January 2013 at Namrwotho village, in Nebbi District, performed a sexual act on Biyika Foska, a girl under the age of 18 years, while infected with HIV.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the fateful day, the victim went together with other girls, to visit his Aunt who lives on the same village with the accused. At the home of her Aunt, the visitors were offered a goat and the accused was invited t help slaughter the goat. Later in the evening at around 10.00 pm, the accused asked the victim to take a walk with him and along the way at an isolated spot, the accused threw her down, tore her clothes off and had forceful sexual intercourse with her. He was found in the act by PW5 who went out searching for the couple after he got concerned by their delayed return. He pulled the accused off the victim, returned with the victim home and reported the incident to the victim's Aunt following which the accused was arrested. In his defence, the accused admitted having participated in slaughtering the goat but denied having seen the victim at all that day. He left that home at around midday and spent the rest of the day in Nebbi Town where he had to wait until after midnight for a truck whose driver he had negotiated with to load bricks for a certain man. He was surprised to be arrested the following morning on allegations that he had defiled the victim.

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 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 18 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 18 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 P.W.3 Biyika Foska who said she was 19 years at the time she testified. Her father, PW4 Charles Okellowange stated that the victim was born around 12th May 1995. In addition there is the admitted evidence of PW1 Oryema Stephen, a Medical Clinical Officer who examined the victim on 7th January 2013, two days after the day the offence is alleged to have been committed). Through his report, exhibit P.Ex.1 (P.F.3A) he certified his findings that the victim was about 14 years at the date of

examination. 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 that Biyika Foska was a girl under 14 years as at 5th January 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 relied on the testimony of the victim PW3 Biyika Foska who described the nature of the act. The assailant suddenly picked he up, threw her down, partially undressed her by partially removing her knickers up to her legs, unzipped his pair of trousers and then had sexual intercourse with me. She started making an alarm and P.W.5 Dennis Ongeiwun responded and found him in the act and asked him what kind of act he was doing. P.W.5 started pulling him off her and when he succeeded, she found there were white fluids on the knickers. P.W. 5 a cousin of the victim, also explained the circumstances in which he found the assailant in the act and asked him why he was performing such an act. The victim's evidence is further corroborated by P.W.1 Oryema Stephen, the Medical Clinical Officer who examined the victim on 7th January 2013, two days following the day the offence is alleged to have been committed. By his report, exhibit P.Ex.1 (P.F.3A) he certified his findings that the victim had a ruptured hymen and bruised labia. In agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Biyika Foska was the victim of a sexual act on 5th January 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. The accused denied having

committed the offence. He set up an alibi. Although he had been at the home of the victim's Aunt earlier in the day, he did not see the victim there and he was in Nebbi Town at the time he is alleged to have committed the offence. His alibi was supported by DW2 Odongo Hassan who stated they were together in Nebbi Town that evening until midnight waiting for a lorry driver who had promised to avail them a lorry for hire for purposes of carrying 11,000 bricks of their customer.

To rebut this defence, the prosecution relies on the testimony of PW3 Biyika Fosk, the victim who testified that as visitors to her home, their Aunt had offered a goat to welcome them to her home. At around 7.00 pm, the accused was invited to slaughter it. He stayed around after slaughtering the goat and they passed time with him. He then suggested that they should go and stroll together. Initially they had company as they strolled but once they remained alone at an isolated spot, that is when the accused defiled her. the time by then was about 10.00 pm. PW5 Ongeiwun Dennis, a cousin of the victim, testified that he was together with the accused and the victim art the home of her Aunt passing time and at around 11.00 – 12.00 mid night, the accused held the hand of Biyika and they moved out. They took some time outside and he and the rest of the boys got concerned that something sinister could happen between the two of them yet they were related. He together with other boys took different directions in search for the couple when he eventually came across them along a path through a school play ground connecting to the main road. He found the accused and Biyika lying on the ground. Using a phone light, he flashed it when he came within about two metres from where they were lying on the ground. The accused lowered the clothes of the girl down, had pulled his down too and they were having sexual intercourse. P.W.5 asked the accused why he was engaged in such an act yet the girl was related to him. The accused told me to go along his way and P.W.5 told him he was going nowhere and he should get off the girl. He continued to flash the light on them. The accused eventually got off the girl, P.W.5 went back with the girl the accused continued to the main road.

Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions. Where prosecution is based on the evidence of indentifying witnesses 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. l of 1997).*

I find that both witnesses knew the accused before as a cousin. They had been sitting together from the early hours of the evening until the time of the incident. The accused had been strolling with the victim and talking to her for sometime before he suddenly threw her down. Although it was dark outside, P.W.5 had a flashlight on his mobile phone which he flashed at the accused while he was in the act. He talked to the accused and the accused responded to him. I find that in the circumstances there is no possibility of error or mistake in the manner the accused was seen and recognised as the perpetrator of the offence. This ingredient has been proved beyond reasonable doubt. The defence of the accused 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. In his defence, the accused admitted having been on ARVs since the year 2006. The prosecution further relies on the admitted evidence of PW2 Ocan Alex, a Senior Clinical Officer at Nebbi Hospital, who examined the accused on 8th January 2013, three days after the day the offence is alleged to have been committed. Exhibit P.Ex.2 certifies the findings of the sero-status of the accused on the date of examination as HIV positive.

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.

In the instant case, since the HIV diagnostic test done on the accused on 8th January 2013, three 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 September 2012 and was therefore carrying the virus by 5th January 2013 when he had sexual intercourse with the victim, P.W.3. 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 3rd day of August, 2017.

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Stephen Mubiru
Judge.
3rd August 2017

4th August 2017
10.26 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

The convict was found guilty of the offence of Manslaughter c/s. 187 and 190 of the *Penal Code Act* after a full trial. In his submissions on sentencing, the learned Resident State attorney prayed for a deterrent sentence on the following grounds; although he is a first offender, he caused the death of the victim and life is precious. The victim left many orphans without proper care who may suffer as a result of that loss materially and psychologically. The death was brutal by assault. The court should mete out a deterrent sentence for the convict to re-think his action and to serve as a warning to others.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; he is a first offender and was so remorseful during the trial. He is 51 years old, he has a family, one wife and six children. Three are in secondary schools and three in primary. He is the only bread winner of his family and he is the head of the family with two sisters still surviving. The offence was reduced to manslaughter. He had no intention to kill the deceased. The sentencing guidelines, the starting point is 15 years and the range is 3 years up to life. He should be sentenced to the minimum. He has been on remand since 15th September 2014. It is almost three years now. In his *allocutus,* the convict stated that he suffers from Hernia and hepatitis "B". He is the only bread winner and will lose his home due to long incarceration. He was paying fees for his kids and would engage in casual labour to get fees for them. They will now drop out of school. He has the obligation to take care of the children of the deceased. He left the decision to court.

The offence of manslaughter is punishable by the maximum penalty of life imprisonment under section 190 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of such cases. I do not consider this to be a case falling in the category of the most extreme cases of manslaughter. I have for that reason discounted life imprisonment.

The starting point in the determination of a custodial sentence for offences of manslaughter has been prescribed by Part II (under Sentencing range for manslaughter) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 15 years' imprisonment. Courts are inclined to impose life imprisonment where a deadly weapon

was used in committing the offence. In this case, although the convict used a pestle to assault the deceased, the circumstances were extenuating and I have excluded the sentence of life imprisonment on that ground.

I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Livingstone Kakooza v. Uganda, S.C. Crim. Appeal No. 17 of 1993*, where the Supreme Court considered a sentence of 18 years' imprisonment to have been excessive for a convict for the offence of manslaughter who had spent two years on remand. It reduced the sentence to 10 years' imprisonment. In another case of *Ainobushobozi v. Uganda, C.A. Crim. Appeal No. 242 of 2014*, the Court of Appeal considered a sentence of 18 years' imprisonment to have been excessive for a 21 year old convict for the offence of manslaughter who had spent three years on remand prior to his trial and conviction and was remorseful. It reduced the sentence to 12 years' imprisonment. Finally in the case of *Uganda v. Berustya Steven H.C. Crim. Sessions Case No. 46 of 2001*, where a sentence of 8 years' imprisonment was meted out to a 31 year old man convicted of manslaughter that had spent three years on remand. He hit the deceased with a piece of firewood on the head during a fight. I have considered the aggravating factors in the case before me and in light of those aggravating factors, I have adopted a starting point of ten years' imprisonment.

I have considered the fact that the convict is a first offender, a middle aged man at the age of 51 years. In light of the mitigating factors, the proposed term ought to be reduced to a period of six (6) years' imprisonment. In accordance with Article 23 (8) of the Constitution and 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, I observe that the convict was charged on 22nd September 2014 and been in custody since then. I hereby take into account and set off a period of two years and ten months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of three (3) years and two (2) 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 4th day of August, 2017.

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Stephen Mubiru
Judge.
4th August, 2017