

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL SESSIONS CASE No. 0154 OF 2016**

**UGANDA** ..... **PROSECUTOR**

**VERSUS**

**AWEKONIMUNGU PATRICK** ..... **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 4<sup>th</sup> day of December 2012 at Nyandima village, in Zombo District, performed a sexual act with Oweknyinga Jackline, a girl aged eight years.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the fateful night at around 8.00 pm, P.W.2 Oweknyinga Jackline went out with her siblings to catch grasshoppers. When her light burnt out, she had just began the journey back home to relight it when she was joined by the accused who shortly thereafter threw her down, lay on top of her and performed an act of sexual intercourse with her, causing her a lot of pain. When her father P.W.4. Ongei Emmanuel received a report of the defilement, he rushed to where the girl was and found her frightened, shivering with fear and unable to speak. He was taken for medical examination the following day and upon examination P.W.3 Dr. Charles Kissa Kennedy, a Medical Officer and Superintendant of Nebbi General Hospital found that that there were lacerations on the right inguinal area measuring 2 inches long, a laceration at the vestibule bilaterally, just at the introitus and he concluded that the probable cause was friction in an attempt to penetrate the vagina of the young girl. The accused was arrested and charged and in his defence he denied the accusation and said he had spent that day doing and night his charcoal business and was surprised when on his return the following morning he was arrested.

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 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 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 victim herself, P .W.2 Oweknyinga Jackline stated that she was 14 years old, hence 8 - 9 years old, nearly five years ago when the offence is alleged to have been committed. Her father P.W.4. Ongei Emmanuel said she was born during the year 2002, hence 10 years nearly five years ago when the offence is alleged to have been committed. According to P.W.3 Dr. Charles Kissa Kennedy, a Medical Officer and Superintendent of Nebbi General Hospital who examined the victim on 5<sup>th</sup> December 2012, the day after the date on which the offence is alleged to have been committed and submitted his report, exhibit P.Ex.2 (P.F.3A), his

findings were that the victim was eight years old at the time of that examination, based on the fact that she had a set of 23 milk teeth and no permanent set of teeth yet, with no pubic hair and no breast eruption yet. 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 that Oweknyinga Jackline was a girl under the age of 14 years as at 4<sup>th</sup> December 2012.

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 PW2 Oweknyinga Jackline who said she was out that night catching grasshoppers when the accused threw her down, lay on top of her and pushed his penis into her vagina and she felt a lot of pain. Her father P.W.4. Ongei Emmanuel testified that when he received the report of the defilement, he rushed to where the girl was and found her frightened, shivering with fear and unable to speak. This distressed condition is corroborative of her testimony which is further corroborated by the evidence of P.W.3 Dr. Charles Kissa Kennedy, who examined the victim on 5<sup>th</sup> December 2012, the day after the date on which the offence is alleged to have been committed. His report, exhibit P.Ex.2 (P.F.3A) shows that he found lacerations on the right inguinal area measuring 2 inches long, a laceration at the vestibule bilaterally, just at the introitus. In his opinion, the probable cause was friction in an attempt to penetrate the vagina of the young girl. High vaginal swabs showed leucocytes which was indicative of body response to an injury. He concluded that the injuries were consistent with genital penetration. The accused did not offer any evidence on this element and defence counsel did not contest it in his final submissions. In agreement with

the assessors, I find that this ingredient has been proved beyond reasonable doubt that Oweknyinga Jackline was the victim of a sexual act on 4<sup>th</sup> December 2012.

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 the accusation and said he had spent that day and night in question doing his charcoal business. To rebut that defence, the prosecution relies on the oral testimony of P.W.2 Oweknyinga Jackline who stated that she knew the accused as her paternal uncle and was a neighbour at the time of the incident. The accused met her and her sisters at around 8.00 pm and said he was going to give them grasshoppers. Her light burnt out and when on her way back to her uncle's house to relight it, the accused joined her and along the way threw her down and proceeded to assault her sexually.

Where prosecution is based on the evidence of a single 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*).

I have reviewed the circumstances in which the offence was committed. The victim knew the accused before as her uncle. During the act, the light of the accused was still burning on the ground a short distance from where the act took place. He ran away with the light after the act and she had to grope in the dark for her panties. The light was burning throughout the encounter thus providing sufficient visibility. The accused talked to the victim before the act promising to give her grasshoppers. He was in close proximity with the victim for him to achieve physical intimacy. 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. There is no possibility of mistake or error in the evidence placing the accused at the scene of crime as the perpetrator of the offence. As a result, his defence has been effectively disproved and is hereby rejected as implausible.

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 7<sup>th</sup> day of August, 2017.

.....  
Stephen Mubiru  
Judge.  
7<sup>th</sup> August 2017

7<sup>th</sup> August 2017

4.46 pm

Attendance

Ms. Topaco Consolate, Court Clerk.

Ms. Harriet Adubango, Senior Resident State Attorney, for the Prosecution.

Mr. Ronald Onencan, Counsel for the accused person on state brief is present in court

The accused is present

**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 Senior Resident State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; the offence is serious. The maximum penalty is death. The victim was only eight years at the time of the offence. She was subjected to a traumatising experience. The court should take a serious view of this. The offence is rampant a the girl child deserves protection. A long custodial sentence will be deserved.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; he is a first offender. He is a young man who can reform. Although he is a cousin to the child, he is remorseful. The offence involves young people and it is not taken seriously by the community. He has spent five years in prison. He is now an orphan and should be given time to change into a better citizen of this country. In his *allocutus*, the convict prayed for lenience on grounds that; he has four children whom he left at home with their mother. His mother died after birth and his step-mother left three children under his care. He is lame in one leg having at one time suffered a

snake bite and the leg swells whenever it gets dark. At the beginning of every month he experiences epilepsy.

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 23 years at the time of the offence and the age difference between the victim and the convict was 15 years. The convict not only exposed her to the danger of sexually transmitted diseases at such a tender age but also traumatised her physically and psychologically. It is for those reasons that I have considered a starting point of eighteen 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 young man who committed the offence at the age of 23 years but has considerable family responsibilities and also suffers from a number of ailments. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of eighteen years, proposed after taking into account the aggravating factors, now to a term of imprisonment of fourteen 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 nine years' imprisonment, arrived

at after consideration of the mitigating factors in favour of the convict, the convict having been charged in December 2012 and been in custody since then, I hereby take into account and set off four years and eight months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of nine (9) years and four (4) 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 7<sup>th</sup> day of August, 2017.

.....  
Stephen Mubiru  
Judge.  
7<sup>th</sup> August, 2017