

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0132 OF 2014

UGANDA **PROSECUTOR**

VERSUS

TUMUSIIME HERBERT **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 3rd day of December 2013 at Munywa village, in Nebbi District, performed a sexual act with Ayiorwoth Sunday, a girl aged 13 years.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that sometime before fateful day, the accused had been pointed out to the victim as the person who had been sending her love messages through a messenger proposing a love affair. During the early evening hours of 3rd December 2013, the accused helped her carry home some of the items she had been using to sell porridge at the Trading Centre. Along the way, the accused gave her shs. 5000/= and asked her to go to his house that night without telling anyone about it. She sneaked out of her Aunt's house that night and went to the house of the accused. The accused was alone at his home and there was light in the house provided by a paraffin lamp which the accused extinguished after locking the door when she entered the house and immediately began fondling her. Against her protestations, the accused threw her down onto a papyrus mat, removed her clothes and had forceful sexual intercourse with her. Later at around 2.00 am, she returned home but her Aunt heard her stealthily attempt to open the door and regain entry. She alerted the victim's father and upon being questioned, the victim revealed that she had been at the residence of the accused where she had performed an act of sexual intercourse with the accused. She led them to the house of the accused a few tens of metres away where the accused was found alone in the house. He denied the victim having been at his home that night or having engaged in any sexual intercourse with her. They all decided to proceed to the police

station where the accused was detained and the following day the victim taken for medical examination. In his defence, the accused denied having committed the offence and set up the defence of alibi and grudge. He said P.W.4, the Aunt of the victim owed him shs. 450,000/= which he had demanded for earlier that day. He was supported by D.W.2 Komakech Moses who said they were together all through that day, the earlier part of which they went together to the home of P.W.4 to collect a debt owed to their uncle by P.W.4, they were later together watching a video show and finally retired to bed and nothing of the nature the accused is alleged to have committed ever happened.

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.

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 testimony of P.W.3 Ayiorwoth Sunday who stated that she was 17 years old at the time she testified, hence 13 years old, four years ago when the offence is alleged to have been committed. Her father P.W.5 Muswa Walter testified that she was born on 9th January 2000. Evidence of her age is corroborated by the evidence of P.W.1 Dr. Were Fred, a Clinical Officer at Panyimur Health Centre III who examined the victim on 4th December 2013, the day after that one on which the offence is alleged to have been committed. His report, exhibit P.Ex.1 (P.F.3A) his findings were that the victim was approximately thirteen years old at the time of that examination, based on the absence of wisdom teeth. 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 Ayiorwoth Sunday was a girl under 14 years as at 3rd December 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 has considered the testimony of the victim P.W.3 Ayiorwoth Sunday who stated that when she went to the house of the accused during the night, he started touching her all over the body, removed her clothes, threw her down on a papyrus mat and had sexual intercourse with her by pushing his male sexual organ into hers. P.W.1 who examined the victim on 4th December 2013, the day after that 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 scratches on the chest area and

back. On her genitals, he found bruises, the hymen was broken and the examining finger was soiled with vaginal fluids. In his opinion those injuries were caused by forceful penetration of the penis. The accused did not offer any evidence regarding this ingredient and Counsel for the accused never contested it during the trial and in his final submissions. In agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Ayiorwoth Sunday was the victim of a sexual act committed on 3rd December 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 his defence, the accused denied having committed the offence and set up the defence of alibi and grudge. He said P.W.4 Acen Rose, the Aunt of the victim owed him shs. 450,000/= which he had demanded for earlier that day. He was supported by D.W.2 Komakech Moses who said they were together all through that day, the earlier part of which they went together to the home of P.W.4 to collect a debt owed to their uncle by P.W.4, they were later together watching a video show and finally retired to bed and nothing of the nature the accused is alleged to have committed ever happened.

To rebut that defence the prosecution relies on the direct evidence of the victim, Ayiorwoth Sunday, 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 a single identifying 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 P.W.3 Ayiorwoth Sunday said she knew the accused before as a person who had been pointed out to her as having expressed interest in engaging in a love relationship with her. As she left the Trading Centre in the early evening hours of the fateful day, they walked together with him after the accused had offered to help her carry some of the items she had been using in her business of selling porridge. He offered her shs. 5000/= and invited her to his home. When she went to his home later in the night, there was light in the house and it is the accused

who let her in. She not only knew the accused before the act, she had ample opportunity and was aided by favourable circumstances in her ability to correctly identify the accused. Her evidence is corroborated by her Aunt P.W.4 Acen Rose in whose house she ordinarily spent the nights and the evidence of her father P.W.5 Muswa Walter both of whom upon discovery of her late escapades, she led them to the home of the accused and identified him as the one with whom she had been having sex. Her description of the interior of the house of the accused, which she had never been to before, matches the description given by D.W.2 Komakech Moses in terms of absence of a bed and presence of a mattress on a papyrus mat lying on the floor. I find that from this evidence, there 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. His alibi has been effectively disproved. 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.

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 (a) of the *Penal Code Act*.

Dated at Arua this 4th day of August, 2017.

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Stephen Mubiru
Judge.
4th August 2017

7th August 2017

9.16 am

Attendance

Ms. Sharon Ngaiyo, Court Clerk.

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

Mr. Okello Oyarmoi, Counsel for the accused person on state brief is present in court

The accused is present in court.

The 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 State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; the offence is very serious. The maximum penalty is death. A child of only 13 years was subjected to sexual intercourse. The experience will forever traumatize her. She left school and became a person of loose morals. It completely derailed the child. A deterrent sentence will help him reform and warn society.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; he is a first offender aged 24 years. He has been on remand for three years and 8 months. He is single. The period he has spent on remand has reformed him and a long custodial sentence would ruin him. In his *allocutus*, the convict prayed for lenience on grounds that; he is sickly; he has heart problems. He was at school which stopped on arrest. He prayed that the sentence served will be short enough to enable him go back to school. His father died and left him and his siblings orphaned, nine of them and he was taking care of them. His mother is mad. If he is given a long custodial sentence his mother will go astray and that will ruin their life at home. It will make his siblings not to ever know him. He agreed with his lawyer in praying for a short custodial sentence. He has learnt a lot from custody and prayed for a few years so that he can go back to school.

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 18 years at the time of the offence and the age difference between the victim and the convict was 5 years. The convict not only exposed her to the danger of sexually transmitted diseases at such a tender age but also corrupted her morals sending her life onto a trajectory of sex for money. The child suffered a lot of physical and psychological pain. It is for those reasons that I have considered a starting point of fifteen 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 18 years who has since realized his mistake and deserves a second chance at life. He deserves more of a reformative than deterrent sentence. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of twenty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of nine 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 February 2013 and been in custody since then, I hereby take into account and set off four years and six 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 and six (6) 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 7th day of August, 2017.

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Stephen Mubiru
Judge.
7th August, 2017

