

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL CASE No. 0134 OF 2016**

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

**VERSUS**

**O. J. (A juvenile)** ..... **JUVENILE OFFENDER**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The juvenile offender in this case is indicted with one count of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It is alleged that the juvenile offender on the 23<sup>rd</sup> day of July 2015 at Jupamagwar village in Nebbi District, performed a sexual act with Yikparwoth Devine, a girl two years old.

The facts as narrated by the prosecution witnesses are briefly that on the fateful day, there was a funeral taking place at Jupamagwar village. Most of the adults in the neighbourhood of the victim's home had gone to participate in the funeral arrangements and the subsequent funeral. The mother of the victim, PW3 (Ofwoyowoth Theopista), left the victim sleeping inside the house and went to fetch water. There were children playing outside the house. Later the victim awoke and joined the rest of the children outside the house. When PW3 returned from the well, a neighbour told her that something had happened to her child and that they were waiting for the mother of the juvenile offender. She immediately went to the home of the juvenile offender where she found her daughter behind the house while the juvenile offender was in a garden nearby harvesting maize. When she asked the victim what had happened, the victim could not respond and looked confused. When she undressed the victim, she saw semen flowing along her thighs from her private parts. She turned to the juvenile offender and asked him what he had done, but the juvenile offender suddenly ran away.

A cousin of the juvenile offender, PW4 Ongiera Naima testified that she had gone to fetch water that day. On her return, she found the juvenile offender standing with the victim behind the

house. The victim was half naked, holding her pair of shorts in her hands. When PW3 came and checked the victim in her presence, she too saw semen flowing down the thighs of the victim from her private parts. When PW3 asked the juvenile offender what had happened to her child, the juvenile offender immediately ran away. Both witnesses testified that the juvenile offender was chased and arrested. Both the victim and the juvenile offender were taken for medical examination and the medical reports were tendered in evidence. The victim was found to be below five years, the hymen was not ruptured and there was no perennial tear in the victim's genitals. The juvenile offender was found to be 14 years old and of sound mind.

In his defence, the juvenile offender denied having performed any sexual act on the victim. He stated that on the fateful day he was at home with his Aunt Margaret Oling when they heard the victim wailing. Her aunt sent him to pick the child and take her to their home since PW4 was around to look after her. He found the victim with other children who included boys younger than the juvenile offender. He took the child to PW4 and went to harvest maize. When the mother of the victim later came and began questioning him he kept quiet but later denied any wrong doing. He did not run away but went to play football. On his way back, as he went to pick his sponge and take a bath, PW3 and PW4 met him on the way and held him by the hand. They began pinching him. He pulled himself away from them but they sent some big men who came with sticks. He was frightened and that is why he ran away for fear of being beaten.

In her final submissions, the learned State Attorney prosecuting the case Mr. Emmanuel Pirimba argued that the prosecution had proved the case against the juvenile offender beyond reasonable doubt and that therefore he should be found responsible for the offence. He submitted that the evidence of PW3 and the medical evidence had proved that the victim was below fourteen years. The sexual act was proved by the presence of semen in the girl's genitals which was seen by both PW3 and PW4. That the juvenile offender was responsible for the act was proved by circumstantial evidence of him and the victim having been found together behind the house with the victim half naked, the conduct of the victim in running away when asked what had happened and the fact that he was the only boy in proximity of the victim at the material time.

In her final submissions, counsel for the juvenile offender on state brief Ms. Winfred Adukule argued that the prosecution had failed to prove the case against the juvenile offender. Although she never disputed the age of the victim, she contested the elements of a sexual act having

performed on the victim by the juvenile offender. She contended that medical evidence did not disclose any sign of penetration. The evidence of PW3 and PW4 to the effect that what they saw was semen is unreliable. The circumstantial evidence of finding the juvenile offender with the victim behind the house was very weak to sustain a conviction. PW3 and PW4 contradicted themselves when the former said the victim was fully dressed while the latter said she was half naked. Their suspicion was based on mere imagination. The juvenile offender ably explained why he had to pick the child from her home and take her to theirs. He also explained why he had to flee for fear of being assaulted. She prayed for the acquittal of the juvenile offender.

In their joint opinion, the assessors advised court to find that the age of the victim had been proved beyond reasonable doubt as having been below fourteen years but that the sexual act had not been proved since the medical evidence did not reveal any signs of penetration yet what PW3 and PW4 saw could have been urine. They believed the defence of the juvenile that he fled from the scene for fear of being assaulted and therefore advised that he should be acquitted.

In this case, the prosecution has the burden of proving the case against the juvenile offender beyond reasonable doubt. The burden does not shift to the juvenile offender and the juvenile offender 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 juvenile offender 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 juvenile offender, at its best creates a mere fanciful possibility but not any probability that the juvenile offender is innocent, (see *Miller Vs Minister of Pensions* [1947] 2 ALL ER 372).

For the juvenile offender to be convicted of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, 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 juvenile offender who performed the sexual act on the victim.

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. In the instant case, in her oral testimony, PW3 (Ofwoyorwoth Theopista) the mother of the victim stated that the victim is now 3 years old having been born during 2013. The admitted evidence of PW1 Senior Medical Clinical Officer Negageno M. who examined the victim on 25<sup>th</sup> July 2015, two days after the date on which the offence is alleged to have been committed, indicated in his report, exhibit P.E.1 (P.F.3A) that the victim was below five years at the time of that examination. The mother of the victim brought her before court but because of her extremely tender age, she was incapable of testifying in court. On basis of all that evidence and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that on 23<sup>rd</sup> July 2015, the victim was below 14 years.

The second element requires proof beyond reasonable doubt that the child was the victim of a sexual act. According to section 129 (7) of *the Penal Code Act*, "sexual act" means (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or (b) the unlawful use of any object or organ by a person on another person's sexual organ. Sexual organ means a vagina or a penis. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim in this case was too young to testify. The evidence on this element is entirely circumstantial. The relevant pieces of circumstantial evidence include the oral testimony of PW3 (Ofwoyorwoth Theopista) the mother of the victim who said she saw semen flowing on the victim's thighs from her genitals. This was corroborated by PW4 Ongiera Naima, the juvenile offender's cousin and neighbour of the victim who said she saw semen flowing on the victim's thighs from her genitals as the victim's mother examined her. Although the evidence of PW1 Senior Medical Clinical Officer Negageno M. who examined the victim on 25<sup>th</sup> July 2015, two days after the date on which the offence is alleged to have been committed shows in his report, exhibit P.E.1 (P.F.3A) that the victim's hymen was not ruptured and that there were no perennial tears in the victim's genitals, to constitute a sexual act it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient. The evidence of PW3 Ofwoyorwoth Theopista the mother of the victim who said the victim was experiencing pain around her waist and in her genitals during baths, after the incident and that

her genitals were tender, supports the prosecution's contention that there was contact with the victim's sexual organ. PW3 testified further that the victim revealed to her that her sexual organ had been touched. Although the substance seen by both PW3 and PW4 was never subjected to forensic analysis, I am inclined to believe them when they said it was semen. Both are mothers and formed this opinion based on their personal experience. PW3 touched it and felt that it was slippery. Taking the circumstantial evidence as a whole, I do not find any coexistent facts incompatible with the victim having experienced a sexual act on that date. The circumstantial evidence is incapable of explanation upon any other reasonable hypothesis than the fact that the sexual act indeed occurred. Therefore in disagreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Yikparwoth Devine was the victim of a sexual act performed on 23<sup>rd</sup> day of July 2015.

The last ingredient required proof of the fact that it is the juvenile offender before court who performed that sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the juvenile offender at the scene of crime not as a mere spectator but as the perpetrator of the offence. The court was presented with the oral testimony of PW3 Ofwoyorwoth Theopista the mother of the victim who said found the juvenile offender behind the house with the victim. This was corroborated by PW4 Ongiera Naima a neighbour of the victim who said she was the first to see the juvenile offender with the victim behind the house. The victim was half naked. The juvenile offender did not deny having been found with the victim. He only contends that he had taken to the victim to her Aunt.

The juvenile offender's version however is inconsistent with the rest of the facts. He suggested in his defence that there were other boys younger than him who had been playing with the victim at the time he went to pick the victim and that he only went to the rescue of the victim after hearing her cry, on the instructions of his Aunt Margaret Oling, and took the victim to PW4. There is no other independent evidence that his Aunt Margaret Oling was at home at the material time. PW4 was not at home either but had gone to fetch water. When questioned, he did not offer this explanation to PW3 and PW4 yet he was alone with the two of them at the time and he was not under any threat. He instead kept quiet initially and later denied having done anything to the victim. The circumstantial evidence of his having run away immediately upon being questioned

is inconsistent with his innocence. His claim that he was forced to run away from the scene when he saw a group of men coming in his direction with big sticks is incredible. The only adult persons with him at the time questioning him were PW3 ns PW4 and they were not armed with anything. He was chased and arrested later after this questioning. His reaction is not that of an innocent person. I have found these incriminating facts to be incompatible with the innocence of the juvenile offender and incapable of explanation upon any other reasonable hypothesis than that of his being responsible for the offence. The circumstances produce moral certainty, to the exclusion of every reasonable doubt. There are no other co-existing circumstances which would weaken or destroy the inference.

For the reasons stated above, in disagreement with the assessors, I find that the last ingredient of the offence too has been proved beyond reasonable doubt. I therefore find the juvenile offender responsible for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. In accordance with section 100 (3) of *The Children Act*, this case is therefore referred to the Family and Children Court for that court to make the appropriate order. The juvenile offender is informed that he has the right to appeal this decision within fourteen days.

Dated at Arua this 12<sup>th</sup> day of January, 2017.

.....

Stephen Mubiru

Judge.