**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT NEBBI**

**CRIMINAL SESSIONS CASE No. 0070 OF 2015**

**UGANDA …………………………………………………… PROSECUTOR**

**VERSUS**

**JAWIAMBE INNOCENT …………………………………………………… ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused 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 accused during the month of May 2014 at Arutha village, Oturugang Parish, Paidha Town Council in Zombo District, performed an unlawful sexual act with Awekonimungu Scovia, a girl below the age of fourteen years.

The prosecution case is that the accused and the mother of the victim, P.W.4 Ocaya Evalyne, were cohabiting as husband and wife. The victim was borne out of the mother's previous relationship and as such the accused was the de-fact step-father of the victim. On the fateful evening at around 8.00 pm, she went out with the accused to catch white ants. While there, the accused undressed her, removed his trousers and panty, knelt down and told her to sit on his thighs whereupon he inserted his penis into her private parts. She felt pain and later she saw something whitish coming out of her. She confided in one of her schoolmates the following day. Her mother too noticed a change in the victim's gait. When the victim was mocked by her fellow pupils at the school that she had had sex with her stepfather, she told her mother about it who in turn instructed her sister P.W.5 Apio Evalyne to interview the victim. The victim narrated to her what had happened that fateful evening. the mother reported to the village L.C.1 Chairman resulting in the subsequent arrest of the accused who was then forwarded to the local police post

In his defence, the accused denied the accusation and set up a defence of alibi. He was not at home during the stated period since on 20th March, 2014 he had left for a construction site in Alangi where he remained until his return home on 4th June, 2014 only to be falsely accused. He attributes the accusation to the fact that his wife P.W.4 Ocaya Evalyne was unfaithful during his absence and having discovered this fact and confronted his wife about it, the wife instead concocted the story of his having committed defilement in order to get rid of 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).*

In this case the victim P.W.6 Awekonimungu Scovia testified and stated that she was 13 years old, hence 9 years old, four years ago when the offence is alleged to have been committed. Her mother Ocaya Evalyne testified as P.W.4 and said the victim was born on 10th April, 2005 at home in Arisi village in the Democratic Republic of Congo. Evidence regarding her age is corroborated by the medical report of P.W.2 Mr. Kevio Jalobo, a Senior Medical Clinical Officer at Paidha Health Centre III who examined the victim on 7th June, 2014. His report, exhibit P. Ex.2 (P.F.3A) certified his findings that the victim was nine years old at the time of that examination, based on her dentition. This evidence was not contoverted by cross-examination and counsel for the accused conceded to this element. In agreement with the assessors, I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Awekonimungu Scovia was a girl below fourteen years during the month of May 2014.

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.**

P.W.6 Awekonimungu Scovia testified that on the fateful evening at around 8.00 pm, she went out with the accused to catch white ants. While there, the accused undressed her, removed his trousers and panty, knelt down and told her to sit on his thighs whereupon he inserted his penis into her private parts. She felt pain and later she saw something whitish coming out of her. She confided in one of her schoolmates. Her mother P.W.4 Ocaya Evalyne testified that on the fateful evening, she saw the accused go out together with the victim to catch white ants and when they returned later at around 9.00 pm, they had no white ants. The next day she noticed a change in the victim's gait. The following day, the victim confided in her about being mocked by pupils at the school that she had had sex with her stepfather. She instructed her sister P.W.5 Apio Evalyne to interview the victim. The victim narrated to her what had happened that fateful evening. P.W.2 Mr. Kevio Jalobo a Senior Medical Clinical Officer at Paidha Health Centre III examined the victim on 7th June, 2014, and in his report, exhibit P. Ex.2 (P.F.3A) he certified his findings that there was a healing posterior vaginal tear and the hymen was ruptured.

To constitute a sexual act, it is not necessary to prove that there was deep penetration. 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)*. The witnesses were cross-examined on this point, and did not appear to be mistaken nor have any reason to misstate the facts as they saw them. Therefore, in agreement with both assessors, I find that this ingredient too 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 is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as, perpetrator of the offence. The accused denied having committed the offence and set up a defence of alibi. He was not at home during the stated period since on 20th March, 2014 he had left for a construction site in Alangi where he remained until his return home on 4th June, 2014, only to be falsely accused. He attributes the accusation to the fact that his wife P.W.4 Ocaya Evalyne was unfaithful during his absence and having discovered this fact and confronted his wife about it, the wife concocted the story of his having defiled the victim.

To rebut that defence, the prosecution relies on the oral testimony of P.W.6 Awekonimungu Scovia who stated that she knew the accused very well as her step-father. They went out together and returned home together after the act. This evidence was admitted under section 40 (3) of *The Trial on Indictments Act*, which requires that when such evidence is given on behalf of the prosecution, the accused is not liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him. Her evidence was corroborated by that of her mother P.W.4 Ocaya Evalyne who testified that on the fateful evening, she saw the accused go out together with the victim to catch white ants and they returned later at around 9.00 pm.

The evidence of P.W.6 being in the nature of visual identification that took place at night, the question to be determined is whether as the single identifying witnesses was able to recognise the accused. In circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R (1953) 20 EACA 106*; *Roria v. R [1967] EA 583* and *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*). In doing so, the court considers; whether the witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused.

As regards familiarity, the identifying witness knew the accused prior to the incident. In terms of proximity, the accused was very close. As regards duration, they walked together to and from the place where they went to catch white ants. That was long enough a period to aid correct identification. In light of that evidence, it appears to me that the defence put up by the accused has been effectively disproved by the prosecution evidence, which has squarely placed the accused at the scene of crime as the perpetrator of the offence for 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 Nebbi this 8th day of May, 2018. …………………………………..

Stephen Mubiru

Judge.

8th May, 2018

9th May, 2018.

8.25 am

Attendance

Mr. Cannyutuyo Michael, Court Clerk.

Mr. Muzige Amuza, Resident Senior State Attorney, for the Prosecution.

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

The accused is present in court.

Both assessors are present 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 Mr. Muzige Amuza prayed for a deterrent custodial sentence, on grounds that; although the convict had no previous criminal record, there are aggravating factors; the victim was nine years old. The accused was 26 years old at the time. The difference in age between them is seventeen years. Thus victim was a baby. The offence was committed repeatedly, at least twice. She sustained a vaginal tear. She felt a lot of pain. Walked awkwardly. It subsisted even when she went back to Congo. She was traumatised up to the time she testified in court. She cried throughout her testimony. The convict was a step father and lived together with the victim. He knew the tender age of the victim. He should have considered her as his child. His wife was in the same house. The offence was committed with pre-meditation on the pretext of catching white ants. The maximum sentence is death. He proposed 35 years' imprisonment though.

In response, the learned defence counsel Mr. Onencan Ronald prayed for a lenient custodial sentence on grounds that; the convict has no previous criminal record. The convict has two children who are school going. He has a mother and father. The 35 years is a starting point but the sentencing guidelines provide for a point of 30 years. In *Ainobushobozi v. Uganda*, Cr. App. No 242 of 2014 of the Court of Appeal stated that first offenders ordinarily do not receive the maximum sentence. The accused is a first offender and has family responsibilities, which is one of the critical factors. He is remorseful. Deterrence should not be the focal point. He was remanded in 2014. He proposed ten years' imprisonment.

In his *allocutus*, the convict prayed for lenience on grounds that; he suffers from hepatitis "B." He has children whose mother left and his brother cannot raise school fees. He has spent four years in prison and his brother is now in Bunyoro and he does not know where the children are currently since his parents died. Court should forgive him. He prayed for a few years so that he can go back and send the children to school. He proposed seven to ten years' imprisonment.

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.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of life imprisonment. Only one aggravating factor prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case, i.e. the victim was defiled repeatedly by an offender who is supposed to have taken primary responsibility of her. A sentence of life imprisonment may as well be justified by extreme gravity or brutality of the crime committed, or where the prospects of the offender reforming are negligible, or where the court assesses the risk posed by the offender and decides that he or she will probably re-offend and be a danger to the public for some unforeseeable time, hence the offender poses a continued threat to society such that incapacitation is necessary (see *R v. Secretary of State for the Home Department, ex parte Hindley [2001] 1 AC 410*). However, since proportionality is the cardinal principle underlying sentencing practice, I do not consider the sentence of life imprisonment to be appropriate in this case.

Although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the act such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. At the time of the offence, the accused was 26 years old and the victim 9 years old. The age difference between the victim and the convict was 17 years. The child went through a traumatising experience whose emotional and psychological effect were still visible when she testified in court. The convict was more or less the victim's step-father.

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.

In that regard, I have considered the decision in *Birungi Moses v. Uganda C.A Crim. Appeal No. 177 of 2014* where 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*, the Court of Appeal 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 do not justify the imposition of a sentence of life imprisonment, they are sufficiently grave to warrant a deterrent custodial sentence. The convict traumatised the victim physically and psychologically. It is for that reason that I have considered a starting point of twenty five years’ imprisonment. The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender, is in a poor health condition and has considerable family responsibilities. The severity of the sentence he deserves has therefore been tempered by those mitigating factors and is reduced from the period of twenty five years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty 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 twenty years’ imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 12th June, 2014 and been in custody since then, I hereby take into account and set off three years and eleven months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of sixteen (16) years and one (1) month, 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 Nebbi this 9th day of May, 2018. …………………………………..

Stephen Mubiru

Judge.

9th May, 2018

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