

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT NEBBI
CRIMINAL SESSIONS CASE No. 0013 OF 2017

UGANDA **PROSECUTOR**

5 **VERSUS**

UCIRCAN FRANCIS **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 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 on the 16th day of September, 2014 at Lewe-West village, in Zombo District, performed an unlawful sexual act with Kissa Mapenzi, a girl below the age of fourteen years.

15 The prosecution case is that on the fateful day, the victim was left alone at home by her grandmother P.W.1 Beatrice Adokorach when she went out to the garden. At around 3.00 pm, the victim proceeded with two other children to the well, a short distance from her home, intending to fetch water. They met the accused who instantly began to run after them. The other two girls escaped but the victim was not fast enough. The accused caught up with her, grabbed
20 her, threw her to the ground, undressed her and proceeded to perform an act of sexual intercourse with her. After the act the accused returned to the direction of his home while the victim collected water and walked back home with a lot of difficulty. At home, she lay down in pain on a papyrus mat inside the house and that is where her grandmother found her at around 8.00 pm when she returned from the garden. Suspecting her to have fallen sick, she took her for a bath
25 only to discover that she had injuries in her private parts and on inquiring how she sustained the injury, the victim revealed to her that she had been defiled by the accused earlier in the day. the accused was arrested the following day after P.W.1 reported to the village L.C.1 Chairman.

In his defence, the accused denied having committed the offence. He instead set up an alibi. At the material time, he was at his place of work cutting timber. He only got to know of the accusation the following morning after he had returned home.

5 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
10 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).

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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.
- 20 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
25 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.2 Kissa Mapenzi stated that she was 10 years old, hence 6 years old nearly four years ago when the offence is alleged to have been committed. Her grandmother
30 P.W.1 Beatrice Adokorach testified that she did not know when the victim was born. However,

the court had the opportunity to see the victim when she testified and she had to be subjected to a *voire dire* to determine her competence to testify in light of her apparent age. In agreement with the assessors, I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Kissa Mapenzi was a girl below fourteen years as at 16th September, 2014.

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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.

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P.W.2 Kissa Mapenzi testified that she went out with her friends to fetch water at around 3.00 pm when a man chased and caught up with her. He undressed her, threw her to the ground, lay on top of her and "began doing his things." She felt a lot of pain in her private parts. She saw a tear and blood in her private parts. She collected the water and returned home where her grandmother found her in the evening sleeping on a papyrus mat. P.W.1 Beatrice Adokorach the victim's grandmother testified that on her return home at around 8.00 pm that day she found the victim lying down on a papyrus mat and she suspected she had pneumonia. While bathing her, she noticed tears and bleeding in her private parts and on asking her what had happened to her she revealed that the accused had defiled her when she went to fetch water.

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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.

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The last 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. At the material time, he was at his place of work cutting timber. He only got to know of the accusation the following morning after he had returned home.

To rebut that defence, the prosecution relies on the oral testimony of P.W.2 Kissa Mapenzi who stated that she knew the accused well although he had never spoken to her before. He used to see him at the well. The incident happened in broad day light at around 3.00 pm along a village path to the well after the accused had ran after her and caught up with her. She had ample time to recognise him. 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.

According to section 156 of *The Evidence Act*, any former statement made by the witness relating to the same fact, at or about the time when the fact took place, can be used to corroborate the testimony of the victim. The section envisages two categories of statements of witnesses which can be used for corroboration. First is the statement made by a witness to any person "at or about the time when the fact took place". The second is the statement made by him to any authority legally bound to investigate the fact. It is clear that there are only two things which are essential for this section to apply. The first is that a witness should have made a statement with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place. The former statement may be in writing or may be made orally to some person at or about the time when the fact took place. If it is made orally to some person at or about the time when the fact took place, that person would be competent to depose to the former statement and corroborate the testimony of the witness in court.

This provision was applied in *Katende Mohammed v. Uganda, S. C. Criminal Appeal No. 32 of 2001* where the seven year old victim of defilement met her mother (PW2) immediately after the offence. She was in a distressed condition which included crying and bleeding. These conditions corroborated her evidence as to the matter of defilement. Then she reported to her mother that it was the appellant who had defiled her. By virtue of the then section 155 of *The Evidence Act* (now section 155 of *The Evidence Act*), her statement to her mother was found to have corroborated her testimony about the identity of her defiler. (see also *Bukenya Joseph v. Uganda C. A. Criminal Appeal No.222 of 2003*).

Similarly in the instant case, the victim's evidence was corroborated by that of P.W.1 Beatrice Adokorach, the victim's grandmother who testified that the home of the accused is about 200 meters from hers, separated only by a stream from which they used to fetch water and where they met the accused often. On the fateful day, when she discovered the victim had been defiled, the victim immediately disclosed to her that it was the accused who had committed the act.

The testimony of the victim being evidence of visual identification by a single witness, the question to be determined is whether the 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 victim knew the accused prior to the incident. In terms of proximity, the accused was very close. As regards duration, the accused first ran after her before grabbing her and throwing her to the ground. That was long enough a period to aid correct identification. Lastly, the act was performed in broad day light which provided sufficient light to aid her recognition of the accused. 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 disagreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

- 5 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.

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Stephen Mubiru
Judge.
8th May, 2018

9st May, 2018

8.32 am

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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.

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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 has no previous criminal record, there are aggravating factors; the victim was about four and half years. The accused by then was 18 years old. There was a difference of 13 and a half years in-between. The victim was ravaged and bled. She suffered pain, she lay at home helpless and could not walk. She was admitted in hospital for a week. She also suffered a trauma that was visible even in court. He was a neighbour and knew the girl as a baby. He could also see that the child was a baby by appearance. She tried to escape but the accused pursued her. The maximum penalty for the offence is death, but because of his age the court should consider the starting point of 35 years. That will deter him and he will still be able to come out and be useful. It will also serve as a warning to other would be defilers. He proposed 35 years' imprisonment.

In response, the learned defence counsel Mr. Onencan Ronald prayed for a lenient custodial sentence on grounds that; the accused was sixteen years at the time of the offence. He has spent three years on remand and is now 19 years old at the moment and capable of reforming. In his *allocutus*, the convict prayed for lenience on grounds that; he was born in January or March, 1998, although the document relating to my birth was with the L.C chairman. He is an orphan and I was living with my mother only. He became a lumber jack at the age of none years and suffered a fracture above the right wrist resulting in a weakness and pain in that hand. He proposed seven 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.

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 18 years old and the victim 6 years old. The victim was an infant. The age difference between the victim and the convict was 12 years. The child went through a traumatising and painful experience whose emotional and psychological effect were still visible when she testified in court.

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, of a relatively youthful age and he has considerable family responsibilities. Because of the youthful age of the convict and being a first offender, I consider a reformatory rather than a retributive sentence to be more appropriate. For those reasons, the severity of the sentence he deserves has 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 fifteen 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 fifteen years’ imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 24th September, 2014 and been in custody since then, I hereby take into account and set off three 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 eleven (11) 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 Nebbi this 9th day of May, 2018.

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Stephen Mubiru
Judge.
9th May, 2018