

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT NEBBI
CRIMINAL SESSIONS CASE No. 0085 OF 2015

UGANDA **PROSECUTOR**

5 **VERSUS**

FUALWAK OMAR **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) (c) of the *Penal Code Act*. It is alleged that the accused during the month of February, 2014 at Jobe village, Gamba Parish, Kango sub-county in Zombo District, performed an unlawful sexual act with Pifua Sunday, a girl under the age of fourteen years and his guardianship.

15 The prosecution case is that the accused and the mother of the victim, P.W.4 Paracel Agnes, were cohabiting as husband and wife. The victim was born to P.W.4 out of a previous relationship and this she lived with her mother at the home of the accused who thereby became her *de facto* step-father. Sometime in February, 2014, P.W.4 left home to attend a funeral where she spent the night. That night, the accused left his house and stealthily entered the hut where the victim and
20 the other children were sleeping. He undressed the victim and began having sexual intercourse with her. The victim arose to find the accused on top of her and he immediately threatened to cut her with a panga if she dared scream. After the act, he asked her to follow him to his house uphill which the victim refused to do thereby prompting him to instruct her to close the door behind him. The victim did not reveal this occurrence to her mother when she returned the following
25 day. In July, 2014 P.W.4 noticed that her daughter's belly was distended and initially thought the victim had a swelling in the tummy and applied local herbs to it. She was alerted by her neighbours that the girl was pregnant. She took her to a medical facility where it was confirmed that she was six months pregnant. The girl disclosed that the accused was responsible for the pregnancy, resulting in his arrest.

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In his defence, the accused denied having committed the offence. Although he admitted having cohabited with P.W.4 Paracel Agnes the mother of the victim from 2012 to September, 2013 he had never seen the victim before until the day in July, 2014 when he was arrested. He attributed the accusation to a revengeful design by P.W.4 as a result of his having discovered that she had re-ignited her relationship with her former husband, behind his back. She wants to keep him in prison to prevent him from pursuing recovery of his household property which was stolen by P.W.4 and her former husband.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531). 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. The accused was a person in authority over the victim at the material time.
4. That it is the accused who performed the sexual act on the victim.

The prosecution is required to prove beyond reasonable doubt that the victim was below 14 years of age. 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*).

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In the instant case, the victim Pifua Sunday testified as P.W.2 and said she was 17 years old based on what her mother told her the day before she testified. Her mother, P.W.4 Paracel Agnes

stated that the victim was born in the year 2002 but could not remember the date and month. She asked court to help her determine how old the victim was currently. At one moment she claimed to have carried the victim in her womb for over two years and later that it was a premature birth at the age of seven months. The admitted evidence of P.W.1 Ms. Letaru Beatrice a Nursing
5 Officer at Alangi Health Centre III who examined the victim on 21st July, 2014 is equally unsatisfactory. In her report, exhibit P. Ex.1 (P.F.3A) her findings were that the victim was 14 years at the date of examination "as stated by the mother." She did not make an independent scientific age determination. Counsel for the accused contested this ingredient in his final submissions on grounds that the victim and the rest of the witnesses did not appear to be sure of
10 her age and there was other documentary proof to corroborate her testimony. Although the court had the opportunity to observe her, it was only clear that she was below 18 years at the time she testified. It was not possible to say with reasonable certainty what her specific age could have been at the time of the offence. I have considered this evidence and find that it leaves considerable doubt which ought to be resolved in favour of the accused. The prosecution has not
15 proved beyond reasonable doubt that by February, 2014, Pifua Sunday, was a girl under the age of fourteen years. All that it has established is that she was a girl under eighteen years. This result only eliminates one aggravating factor but does not affect the character of the offence since there is an additional aggravating factor.

20 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
25 *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 victim P.W.2 Pifua Sunday, testified that in February, 2014 when her mother was away attending a funeral, a man came into the house while she was asleep, undressed
30 her, threatened to cut her with a panga if she dared raise an alarm and proceeded to have sexual intercourse with her. Her mother, P.W.4 Paracel Agnes stated that later in July, 2014 she noticed

her daughter's belly was distended and initially thought the victim had a swelling in the tummy and applied local hers to it. She was alerted by her neighbours that the girl was pregnant. She took her to a medical facility where it was confirmed that she was six months pregnant. This is corroborated by P.W.1 Ms. Letaru Beatrice, a Nursing Officer at Alangi Health Centre III who
5 examined the victim on 21st July, 2014 and in her report, exhibit P. Ex.1 (P.F.3A) certified her findings that the victim was carrying a six months' pregnancy. When she came to testify in court, P.W.2 was carrying a baby boy of about three years old. In agreement with the assessors, and having seen her testify in court, I find that the possibility of P.W.2 having become pregnant by means other than sexual intercourse is fanciful. The fact of having been pregnant and given birth
10 to a child of itself is corroborative of her testimony. I find that this ingredient has been proved beyond reasonable doubt.

The prosecution is further required to prove that it is the accused that performed the sexual act on the victim. There should be credible direct or circumstantial evidence placing the accused at the
15 scene of crime as the perpetrator of the offence. The accused denied any participation. Although he admitted having cohabited with P.W.4 Paracel Agnes the mother of the victim from 2012 to September, 2013 he had never seen the victim before until the day in July, 2014 when he was arrested. He attributed the accusation to a revengeful design by P.W.4 as a result of his having discovered that she had re-ignited her relationship with her former husband, behind his back. She
20 wants to keep him in prison to prevent him from pursuing recovery of his household property which was stolen by P.W.4 and her former husband when they broke into his house in his absence after he had separated with P.W.4 in September, 2014.

To refute that defence, the prosecution relies on the oral testimony of the victim P.W.2 Pifua
25 Sunday) the victim who said that in February, 2014 when her mother was away attending a funeral, a man came into the house while she was asleep, undressed her, threatened to cut her with a panga if she raised an alarm and proceeded to have sexual intercourse with her. He recognised the man as the accused by his voice when he spoke to him when uttering that threat before the act and also after the act when he asked her to follow her to his residence in the upper
30 house. When she refused to follow him, he instructed her to close the door after him. He had also

sexually molested her once before, during the day. Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions.

5 The evidence of P.W.2 being in the nature of visual identification that took place at night, the question to be determined is whether as a single identifying witnesses she 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
10 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.

15 As regards familiarity, the identifying witness knew the accused prior to the incident. They had lived together in the same home for over a year. Although the accused denied having known her before his arrest, I found that denial to be false since it is improbable that P.W.4 lived with all her other children at his home except the victim. In terms of proximity, the accused was very close. As regards duration, the act took some time and he later asked her to follow him to his
20 house uphill which she refused to do prompting him to instruct her to close the door behind him. That was long enough a period to aid correct identification.

The requirements which apply to visual identification apply equally to voice identification. Voices that are familiar in everyday situations may not be easily identified or recognized with
25 reliable accuracy in other contexts. However, where the identifying witness has had frequent previous and recent interaction with the accused, the visual identification may be confirmed by the identification and recognition of his voice (see *Mutachi Stephen v. Uganda, C.A. Cr. Appeal No.132 of 1999*). I find that the voice identification of the accused by the victim in this case corroborates her identification evidence in otherwise difficult circumstances. She lived with him
30 in the same home and had frequent interactions with him by virtue of the living arrangement. That night, her mother had left the accused at home as the only adult male and there is no

evidence of any intruder. 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
5 reasonable doubt.

Lastly, the prosecution is required to prove that the accused was a person in authority over the victim. "A person in authority" is not defined by the *Penal Code Act*. I construe it to mean any person acting in *loco parentis* (in place of parent or parents) to the victim, or any person
10 responsible for the education, supervision or welfare of the child and persons in a fiduciary relationship, with the child i.e. relations characterized by a one-sided distribution of power inherent in the relationship, in which there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith with regard to the interests of the child reposing the confidence.

15 In this regard, P.W.4 Paracel Agnes, the mother of the victim testified that at the time of the incident she was cohabiting with the accused as husband and wife. In his defence, the accused admitted having cohabited with P.W.4 from 2012 to September 2013 as his "wife" although he denied having seen the victim before his arrest. In her testimony, the victim referred to the
20 accused as her father and he schoolmates mocked her for having had sex with her "step-father." The victim lived in the home of the accused who was therefore her *de facto* "step-father." In agreement with the assessors. I find that this ingredient too has been proved beyond reasonable doubt.

25 In conclusion therefore, I find that the prosecution has proved all ingredients of the offence beyond reasonable doubt and accordingly the accused is found guilty and is hereby convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*.

30 Dated at Nebbi this 9th day of May, 2018.

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Stephen Mubiru
Judge.
9th May, 2018.

10th May, 2018.

2.50 pm

Attendance

Mr. Cannyutuyo Michael, Court Clerk.

5 Mr. Muzige Amuza, Senior Resident 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 in court.

10 **SENTENCE AND REASONS FOR SENTENCE**

Upon the accused being convicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*, the learned Senior Resident State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; the convict was a person in a responsible position over the victim. The age difference was about 16 years which is still a big difference. She was also defiled twice and resulted into pregnancy. A child gave birth to a baby. The victim's father is deceased. A man having sexual intercourse with mother and child is abominable in Alur culture and it is punished by stoning. It is a big taboo. The second baby's fate is unknown. It was a planned act by a married man. He waited for the wife to leave and he used the child as an alternative. He proposed 35 years' imprisonment.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; the convict is a first offender. He looked after the children of the mother of the victim while they were living together and he was kind to them. He has spent four years on remand and has responsibility at home over his other children. He should go home early. He is the head of the family with no other people at home and long incarceration will not help. Reform should be the target. He is remorseful. The worst should be ten years' imprisonment. In his *allocutus*, the convict prayed for lenience on grounds that; he is the head of the family and has problems at home. He has five orphans whose mother died in 2004. He has two children of his step sister. By 2014 two children were in nursery school. He was involved in an accident and sometimes coughs blood as an after effect. Since he was remanded nobody has come to update him on the living circumstances of the children. He thought the mother of the victim would help him raise the children. He is a first offender and has never been in jail before. This is the first allegation made

against him. He proposed eight years so that he can take care of the family home and even look after the child of the victim together with the other ones.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s
5 129 (3) and (4) (c) of the *Penal Code Act*, is death. However, this punishment is by sentencing convention reserved for the most egregious forms of perpetration of the offence such as where it has lethal or other extremely grave consequences. Since in this case death was not a very likely or probable consequence of the act, I have discounted the death sentence.

10 When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) 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
15 aggravating factors or reduced on account of the relevant mitigating factors.

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
20 sentence. At the time of the offence, the convict was a de facto step father to the victim. He abused a fiduciary relationship and took advantage of the girl, turning her into a child mother.

I have considered the decision in *Kato Sula v. Uganda, C.A. Crim. Appeal No 30 of 1999*, where the Court of Appeal upheld a sentence of 8 years' imprisonment for a teacher who defiled a
25 primary two school girl. In *Bashir Ssali v. Uganda, S.C. Crim. Appeal No 40 of 2003*, the Supreme Court, on account of the trial Court not having taken into account the time the convict had spent on remand, reduced a sentence of 16 years' imprisonment to 14 years' imprisonment for a teacher who defiled an 8 year old primary three school girl. The girl had sustained quite a big tear between the vagina and the anus. In *Tujunirwe v. Uganda, C.A. Crim. Appeal No 26 of*
30 *2006*, where the Court of Appeal in its decision of 30th April 2014, upheld a sentence of 16 years' imprisonment for a teacher who defiled a primary three school girl. In light of the sentencing

range apparent in those decisions and the aggravating factors mentioned before, I have considered a starting point of thirty years' imprisonment.

5 The seriousness of this offence is mitigated by the factors stated in mitigation by his counsel and his own *allocutus*, which have been reproduced above. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of thirty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty four years.

10 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
15 deduction by way of set-off. From the earlier proposed term of twenty four years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 31st July 2014 and has been in custody since then, I hereby take into account and set off three years and nine months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of twenty (20) years and two (2)
20 months, to be served starting from today.

The convict is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.

25 Dated at Nebbi this 10th day of May, 2018.

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Stephen Mubiru
Judge.
10th May, 2018.