THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT NEBBI

CRIMINAL SESSIONS CASE No. 0063 OF 2010

UGANDA …… PROSECUTOR

VERSUS

OMAKA GEOFREY ONWANGA …… ACCUSED

VERSUS

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) (c) of the *Penal Code Act*. It is alleged that the accused on the 20th day of August, 2009 at Penji village, Padel Parish, Parombo Sub-county in Nebbi District performed an unlawful sexual act with Charon Bithum alias Agala, a dumb girl aged ten years. There has been a significant delay in the trial of this case because sometime in 2010 when the case first came up for hearing, the accused had been adjudged unfit to stand trial by reason of insanity. It is only on 13th April, 2018 during the current criminal session that he was found to be fit to stand trial on basis of a subsequent psychiatric assessment report dated 14th July, 2017.

The prosecution case against him is that on 20th August, 2009 at around 4.00 pm, he met the victim, by then a ten year old dumb and deaf girl, along a village path. He dragged her into a cassava garden nearby where he proceeded to have forceful sexual intercourse with her. P.W.2 Wathum Herbert who was at that time hunting for birds with his catapult on his way to the garden, heard some strange human voices. He tiptoed to the direction of the voices only to find the accused lying on top of the girl having sexual intercourse with her while she was screaming. Upon realizing that he had been spotted, the accused fled into the bush. P.W.2 reported to her mother what he had seen and the accused was subsequently arrested.

In his defence, the accused denied having committed the offence. He does not live on that village. He does not know the people of Erusi which is a remote area. He was suddenly arrested

by the police while at Pader. He asked them why they were arresting him. Even the area L.C.1 Chairman did not know about his arrest. Everyone was surprised to see the police arresting him and asked questions as to what he had done to cause the police to arrest him. He too asked them where they were taking him. They told me they were taking him back to Erusi and he asked them where Erusi was located. He has never stepped in Erusi market nor that of Nebbi. It was his first time to see the witnesses who testified against him here in court.

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 a girl below 14 years of age.
2. The girl is a person with a disability.
3. That a sexual act was performed on the victim.
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)*.

In the instant case, the victim Charon Bithum alias Agala testified as P.W.4 and said she was 19 years old, hence ten years old nearly nine years ago when the offence is alleged to have been committed. Her mother, P.W.3 Hellen Angeyango, testified that she could not remember the year

the victim was born but the date of birth indicated on her baptism card is 28th October, 1999. She is now nineteen years old and was ten years old when this incident happened. P.W.2 Wathum Herbert testified that the victim was born in 1999, but he could do not remember the month in which she was born. Consider the admitted evidence of P.W.1 Dr. Okello Nicholas a Medical Officer at Nebbi Hospital he examined Charon Bithum alias Agala on 26th November, 2009 (nine days after the date on which the offence is alleged to have been committed) and found her to be 10 years old at the date of examination as per his report, exhibit P. Ex.1 (P.F.3A). The accused did not offer any evidence on this element and it was not contested by his advocate in his final submissions. On basis of that evidence and based on the court's own observation of the victim when she testified in court, in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt.

The next ingredient requires proof that the victim was at the material time a person with a disability. Under section 129 (7) of *The Penal Code Act*, "disability" means a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation. The disability in this case is physical, the victim being deaf and dumb. The victim testified as P.W.4 through a sign language interpreter, but even with his aid, she found it difficult to communicate as it was clear she has never been trained in the use of standard sign language. Her mother, P.W.3 Hellen Angeyango, testified that she uses sign language to communicate with her because she is deaf and dumb and has been so since birth. P.W.2 Wathum Herbert testified that when she heard the victim making sounds while being defiled he could not tell whether she was screaming or crying because she had been deaf and dumb since birth. The accused did not offer any evidence on this element and it was not contested by his advocate in his final submissions. On basis of that evidence and based on the court's own observation of the victim when she testified in court, in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt.

The next ingredient requires proof that a sexual act was performed on the victim. One of the definitions of a sexual act under section 197 of the *Penal Code Act* is penetration of the vagina, however slight, of any person by a sexual organ. This ingredient is ordinarily proved by the direct evidence of the victim, but may also be proved by circumstantial and medical evidence.

In the instant case, the prosecution relies on the testimony of P.W.4 Bithum Sharon, who testified that while she was walking in the evening, the accused called her, grabbed her hands, threw her down, removed her clothes and he began having sexual intercourse with her. He then ran to the bush afterwards. P.W.2 Wathum Herbert testified that on 20th August, 2009 at around 4.00 pm while hunting for birds with his catapult on his way to the garden, which was in Nyajualo valley not far from the market, he heard some strange human voices. He tiptoed to the direction of the voices only to find the accused lying on top of the girl, Agala. He had rolled his trousers down. He lay on top of her facing down while the girl was facing up. He was having sexual intercourse with her while Agala was screaming. He was within ten metres from them when the accused saw him and he immediately got off the victim and began running while the girl stood up and walked home. Her mother, P.W.3 Hellen Angeyango, testified that on that day she was in Jonam County for trade when she received the news that her daughter had been defiled. She returned home immediately and on examining the victim she found tears in her vagina. I find that the evidence of P.W.1 Dr. Okello Nicholas a Medical Officer at Nebbi Hospital who examined Charon Bithum alias Agala on 26th November, 2009 (nine days after the date on which the offence is alleged to have been committed) corroborates that of the victim since he found signs of penetration and a ruptured hymen which was six days old. In agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt

Lastly it must be proved that it is the accused who performed the sexual act on the victim. There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator of the offence. The accused denied having committed the offence. He does not live on that village. He does not know the people of Erusi which is a remote area. He was suddenly arrested by the police while at Pader. He asked them why they were arresting him. Even the area L.C.1 Chairman did not know about his arrest. Everyone was surprised to see the police arresting him and asked questions as to what he had done to cause the police to arrest him. He too asked them where they were taking him. They told me they were taking him back to Erusi and he asked them where Erusi was located. He has never stepped in Erusi market nor that of Nebbi. It was his first time to see the witnesses who testified against him here in court.

To refute the defence the prosecution relies on the testimony of the victim P.W.4 Charon Bithum alias Agala who made a dock identification of the accuses as the perpetrator of the act. P.W.2 Wathum Herbert testified that he knew the accused before this case. He was doing business in Erusi market. He was a trader dealing in groceries. He had known him since childhood and on 20th August, 2009 at around 4.00 pm while hunting for birds with his catapult on his way to the garden, which was in Nyajualo valley not far from the market, he heard some strange human voices. He tiptoed to the direction of the voices only to find the accused lying on top of the girl, Agala. He had rolled his trousers down. He lay on top of her facing down while the girl was facing up. He was having sexual intercourse with her while Agala was screaming. He was within ten metres from them when the accused saw him and he immediately got off the victim and began running while the girl stood up and walked home.

The evidence of both P.W.4 and P.W.2 being in the nature of visual identification, the question to be determined is whether as identifying witnesses they were 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 witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused.

As regards familiarity, the two identifying witnesses knew the accused prior to the incident. Although the accused denied having known the victim, P.W.2 testified that he used to buy groceries from him. In terms of proximity, the accused was very close to the victim for purposes of sexual intimacy while P.W.2 was within a distance of ten metres. In terms of light, it was during day time and their vision was not obstructed by the cassava plants, which P.W.2 said were taller than both of them. The grass under the cassava had been weeded and was not tall. As regards duration, the act took some time and P.W.2 had observed the act for a while before the accused got up and dashed. That was long enough a period to aid correct identification.

For those reasons, I find that the prosecution has proved beyond reasonable doubt that the accused was correctly identified and he is accordingly convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*.

Dated at Nebbi this 15th day of May, 2018.

……..
Stephen Mubiru
Judge.
15th May, 2018.

16th May, 2018
10.49 am
Attendance

Mr. Cannyutuyo Michael, Court Clerk.
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

SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act* after a full trial. In his submissions on sentencing, the learned Resident State attorney prayed for a deterrent sentence on the following grounds; the tender age of the victim should be considered. She was only ten years old. He was 38 at the time. He was 20 years older. The victim was fit to be his child. The mental disability of the victim. She was deaf and dumb. The victim sustained injuries; ruptured hymen and vulva. She can never be the same. She underwent psychological trauma. He knew the age and condition of the victim. He proposed 35 years' imprisonment.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender. He was 42 years at the time. He has spent nine years on remand. She had a physical disability not a mental disability. She has healed. She is now an adult. There was no trauma in the medical evidence submitted. He has family responsibilities. An additional five years' imprisonment would be adequate. He has repented and has leant a lesson. A caution would be enough. He is now 56 years old. He is of advanced age.

In his *allocutus,* the convict stated that he has children at home and he is the one who looks after them. He does not have a mother and father. No one will pay fees for the kids. His first born was nine years old at the time he was arrested. He suffers from hernia which requires operation. But for the sudden arrest the hernia would have been operated upon by now.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 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.

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 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 sentence. At the time of the offence, the accused was 42 years old and the victim 10 years old. The age difference between the victim and the convict was 32 years.

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 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*

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 twenty years' imprisonment.

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 twenty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of eleven 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 eleven years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged in August, 2009 and has been in custody since then, I hereby take into account and set off eight 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 six (6) years and two (2) 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 16th day of May, 2018.

……..
Stephen Mubiru
Judge.
16th May, 2018