

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT NEBBI
CRIMINAL SESSIONS CASE No. 0029 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

OKUMU JOSEPH **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 on the 29^h day of September, 2015 at Ayoro village in Zombo District, performed an unlawful sexual act with Akumu Patricia, a girl below the age of fourteen years.

15 The prosecution case is that on the fateful day at around 5.00 pm, the victim was sent by her parents to place a hoe they had previously borrowed, at a specific temporary shelter in a neighboring garden where the owner would find it the following day. The accused was present when the victim was sent and he immediately followed her, met her on her way back and
20 persuaded her to follow him to his garden where he promised to give her raw cassava for eating. At the temporary shelter, the accused undressed the girl and had sexual intercourse with her. The victim's parents were concerned that she had taken longer than expected to return home. They were about to go after her when she returned crying and told them that she had been defiled by the accused. They confronted the accused with the accusation but he denied it. He was arrested
25 and the matter forwarded to the police.

In his defence, the accused denied having committed the offence. He instead stated that he hired a garden from a third party yet the father of the victim was pestering him to clear the balance. He did not know why the victim's father got involved in that transaction that was none of his
30 business. He told him He had not hired the garden from him. On 29th September, 2015 he had supper at the place where he rented the garden and at around 6.00 pm while on his way home, he

went to bid the victim's father farewell. He found the father of the victim and asked them to return his hoe which they had borrowed from him if they were done with it. The following morning when he returned to his garden some people attacked him saying that he had defiled a child. He wondered how he would defile such a young kid fit to be his granddaughter.

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 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 15 372).

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.
- 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 the victim Akumu Patricia testified as P.W.3, and stated she did not know her age. Her biological mother, P.W.2 Grace Oroma, testified that she gave birth to her on 22nd 30 May, 2007 in Oyoro at home. Her father, P.W.4 Ogen Gilbert, testified that she was born in May,

2007. P.W.5 Okello Ronald, a Senior Clinical Officer who at the time was working at Paidha Health Centre III, examined the victim on 30th September, 2015 (the day after that on which the offence is alleged to have been committed). In his report, exhibit P. Ex.3 (P.F.3A) he certified his findings that the victim was a seven year old girl. She did not have a full set of teeth. The breasts
5 had not developed. She had no pubic hair. The physical appearance was that of a child. 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 Akumu Patricia was a girl below fourteen years as at 29^h September, 2015.

10 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
15 *Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)*). The slightest penetration is enough to prove the ingredient.

P.W.3 Akumu Patricia, stated that on the instructions of her parents, she had picked the hoe and placed it in the temporary shelter in the garden. On her way back, her foot was pierced by a thorn
20 and as she was removing it the accused found her and told her to follow him and pick cassava for chewing. He grabbed her hand and dragged her forcing her to follow him and pick cassava for chewing. He took her to his cassava garden. He removed her panties and skirt and while standing, he took out "his thing and pushed it in me, in my part of women." She felt pain as he performed the act in her "part of the body of women." The act took long.

25

Her mother P.W.2 Grace Oroma, testified that she sent Akumu Patricia to pick the hoe and put it the house ("otbak"). Later on the child came back while crying. They asked her what had happened to her and she said that Joseph undressed her, undressed himself and immediately began having sexual intercourse with her. When they returned home, she began massaging her
30 with warm water. Her father, P.W.4 Ogen Gilbert, testified that at around 5.00 pm they sent Akumu Patricia for a hoe and the accused immediately followed the child. Having waited for the

child for long, they began to wonder why she was not returning. Eventually she came back while crying. They asked her why she was crying and she said Joseph undressed her, he undressed himself and started having sexual intercourse with her. He examined the girl in her private parts and he saw the child had semen (lach-nyodo) all over her vagina, it was whitish. He saw the
5 semen and some bruises too in her private parts.

P.W.5 Okello Ronald, a Senior Clinical Officer of Zeu Health Centre III, while then working at Paidha Health Centre III, who examined the victim on 30th September, 2015 (the day after that on which the offence is alleged to have been committed). His report, exhibit P. Ex.3 (P.F.3A)
10 certified his findings that she was emotional because of what had happened to her. The other parts of the body had nothing abnormal. In the genitals he found that the hymen was ruptured, there was inflammation around the vulva and a lot of secretions around the private parts. The fluids were most likely semen. The hymen had been ruptured the day before.

15 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*). All the above 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,
20 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 ingredient is satisfied by adducing evidence, direct
25 or circumstantial, placing the accused at the scene of crime. In his defence, the accused denied the indictment and stated that he hired a garden from a third party yet the father of the victim was pestering him to clear the balance. He did not know why the victim's father got involved in that transaction that was none of his business. He told him he had not hired the garden from him. On 29th September, 2015 he had supper at the place where he rented the garden and at around 6.00
30 pm while on his way home, he went to bid the victim's father farewell. He found the father of the victim and asked them to return his hoe which they had borrowed from him if they were done

with it. The following morning when he returned to his garden some people attacked him saying that he had defiled a child. He wondered how he would defile such a young kid fit to be his granddaughter.

5 To rebut that defence, the prosecution relies on the oral testimony of the victim P.W.3 Akumu Patricia, who stated that the accused removed her panties and skirt and while standing, he took out "his thing and pushed it in me, in my part of women." 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
10 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
15 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
20 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.

25 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*
30 (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 her parents P.W.2
5 Grace Oroma and P.W.4 Ogen Gilbert, who testified that they sent Akumu Patricia to pick the
hoe and put it the house ("otbak"). Joseph got up and said he was going to pick his dry cassava
from the rock. Later on the child came back while crying. They asked her what had happened to
her and she said that Joseph undressed her. That after undressing her he also removed his and
immediately began having sexual intercourse with her. Further corroboration is to be found in
10 the defence of the accused himself when he admitted having met the father of the victim that
evening to bid him farewell and to remind him to return a hoe he had borrowed.

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.
15 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
20 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 period was long enough to aid correct
25 identification since he walked with her to the temporary shelter before the act. 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
30 disagreement 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*.

5 Dated at Arua this 17th day of May, 2018.

.....
Stephen Mubiru
Judge.
17th May, 2018.

17th May, 2018.

10 3.46 pm.

Attendance.

Ms. Sharon Ngaiyo, Court Clerk.

Mr. Emmanuel Pirimba, Resident State Attorney, for the Prosecution.

Counsel for the accused person on state brief is absent.

15 The accused is 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 prayed for a deterrent custodial
20 sentence, on grounds that; the offence carries a maximum of death. The age gap between the victim and the accused, he is supposed to be a grandfather and should have behaved responsibly by protecting the victim. She suffered pain and the mother had to massage her and this will cause psychological fear in the future. The victim had a blind mother and now will have fear to lead the blind mother. The cases of this nature are on the rise. The society needs to be protected. His
25 attempt to rely on grudge should not justify targeting the victim. I pray for a deterrent sentence to enable him reform. He suggested a sentence of not less than 15 years' imprisonment.

In his *allocutus*, the convict prayed for lenience on grounds that; at home he has children of his three brothers who are deceased and he pays school fees for them, they depend on him. He is not
30 well in the brain. He at times feels dizzy. His chest is not o.k. It normally pains but he has not been examined yet. He also suffers from hernia. He also has a young child who he needs to take to nursery school.

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, for which reason 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) (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.

The Court of Appeal though has time and again reduced sentences that have come close to the starting point of 35 years' imprisonment suggested by the sentencing guidelines, as being harsh and excessive. For example, in *Birungi Moses v. Uganda C.A Crim. Appeal No. 177 of 2014* 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*, it 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
5 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 these circumstances did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the action such as would have justified the death
10 penalty, they are sufficiently grave to warrant a deterrent custodial sentence. The accused was aged 65 years at the time of the offence and the age difference between the victim and the convict was 58 years. He exposed the 7 year old child to the danger of sexually transmitted diseases at such a tender age. The child suffered a lot of physical and psychological pain. It is for those reasons that I have considered a starting point of twenty years' imprisonment.

15 The seriousness of this offence is mitigated by a number of factors mentioned in his allocutus. 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 fifteen years.

20 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
25 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 during September, 2015 and been in custody since then, I hereby take into account and set off two years and eight months as the period the convict has already spent on remand. I
30 therefore sentence the accused to a term of imprisonment of twelve (12) 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 Arua this 17th day of May, 2018.

5

.....
Stephen Mubiru
Judge.
17th May, 2018.