

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0108 OF 2016

UGANDA

PROSECUTOR

5 **VERSUS**

MUWANGA SEPUYA JAMES ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

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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 on the 17th day of October 2014 at Kyabakazi village in Nakaseke District, being the biological father of Nakalanzi Deborah, a girl aged seventeen years and with a mental disability, performed an unlawful sexual act with her.

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The facts as narrated by the prosecution witnesses are briefly that during 2013, the accused had sometime during the year 2012 separated from his wife P.W.3 Namboozee Florence, the mother of the victim. Later during the year 2014, they reconciled but continued to live in separate homes, the accused at the village home in Kyabakazi village and P.W.3 at the trading centre.

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From time to time, P.W.3 would go to the village to cultivate the garden and would have the victim with her on such occasions because of her mental disability.

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On the morning of 17th October, 2014, P.W.3 went to the garden to weed maize and she left the garden at 10.00 am. As she was passing by her husband's house she heard voices inside the house. She entered the house intending to find out whether the accused had brought another woman into the home. The front door was open but the door to the bedroom was closed. She stood close to the inner door and light was coming from outside into the room. Through a crack, she saw someone sleeping on the ground and another with her knees raised. She saw the accused remove the trousers and as he turned the other person around, she pushed the door open and

found the victim wearing only a blouse. She had removed her pair of shorts and she was naked from the waist down. The accused too was lying down with her had had his legs on top of the girl. He only had a shirt on. Both of them were naked waist down. She asked the accused whether it was his habit to have sex with the victim and went out to report to the Chairman. She
5 returned later to the scene together with the Chairman and a one Mrs. Makanga, P.W.4. The two found the accused still sleeping in the room while P.W.3 waited outside. The accused was arrested and taken to the police while the victim was taken to Nakaseke Hospital where the doctor found that her hymen had been ruptured. In a sworn statement in his defence, the accused denied having seen the victim that day or slept with her or had sexual intercourse with her.

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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
15 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;

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1. That the victim was below 18 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.

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This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver
30 and more important transactions of life, to pause or hesitate before or taking the represented facts

as true and relying and acting thereon" (see *Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994)*; *Rex v. Summers, (1952) 36 Cr App R 14*; *Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82* and *R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918*).

Beyond reasonable doubt is proof that leaves the court firmly convinced the accused is guilty.

5 Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with
10 clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

First, the prosecution is required to prove beyond reasonable doubt that the victim was below 18 years of age. The most reliable way of proving the age of a child is by the production of her birth
15 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. In the instant case, the victim did not testify because of her mental condition. In her testimony, P.W.6 Nambooze Florence the mother of the victim did not disclose the age of the victim. However, there is the admitted evidence of P.W.1
20 Dr. Mwisuke Ursula, who examined the victim on 18th October, 2014, the day following commission the alleged offence. In his report, exhibit P.Ex.1 (P.F.3A) he certified his findings that the victim was 17 years at the date of examination, as stated by the mother. I find that evidence to be inconclusive in that no scientific examination was involved. However, the accused in his defence did not say anything about the age of the victim. The court as well had the
25 opportunity to see the victim in court. Counsel for the accused too did not contest this ingredient during cross-examination of any of the witnesses and neither did he do so in his final submissions. I have considered the evidence and find that it has been proved beyond reasonable doubt that by 17th October, 2014, Nakalanzi Deborah, was a girl under the age of eighteen years.

30 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.3 Nambooze Florence who described the posture and state in which she found the accused and the victim. Both were naked
5 waist down and the accused lay behind her both facing the wall. In the admitted evidence of P.W.1 Dr. Mwisuke Ursula who examined the victim on 18th October, 2014, the following day after the offence is alleged to have been committed, it is indicated in his report, exhibit P.Ex.1 (P.F.3A) that he found the victim's hymen was broken, but there was no discharge and no bleeding. Since the report does not indicate that the rapture was recent and the source of the
10 bleeding is not disclosed, the prosecution rests of what is essentially circumstantial evidence.

In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.
15 The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Shubadin Merali and another v. Uganda* [1963] EA 647; *Simon Musoke v. R* [1958] EA 715; *Teper v. R* [1952] AC 480 and
20 *Onyango v. Uganda* [1967] EA 328 at page 331).

The circumstantial evidence in this case is that the accused and the victim were found lying together half naked, the accused behind the victim, both lying on their side. P.W.3 saw the accused remove his trousers and place his legs over the victim before the witness pushed the
25 door open and rebuked the accused. The witness returned some time later with P.W.4 the latter of whom found the two still lying down in more or less the same posture, but the victim had covered herself with a bed-sheet. The following day the victim was medically examined and it was found that her hymen was ruptured but the doctor did not express an opinion as to when the rapture occurred and what the probable cause was. The doctor found some bleeding but did not
30 indicate that there were any tears or lacerations to explain the bleeding. The question is whether these pieces of evidence prove beyond reasonable doubt that an act of sexual intercourse took

place. In his defence, the accused denied this element. He denied having seen the victim at all on that day. Counsel for the accused did not contest this ingredient during the trial and in his final submissions.

For a finding of fact to be made based on circumstantial evidence, the court must be satisfied that
5 there are no other co-existing circumstances which would weaken or destroy the inference. I find that neither in the testimony of P.W.3 nor that of P.W.4 is there an element that conclusively proves that sexual intercourse or any other sexual act as defined by section 197 of *The Penal Code Act* occurred. The circumstances are suggestive of that having been the intention but do not establish it as a fact that there was contact, let alone penetration, between the sexual organs of
10 the accused and the victim. The would be corroborative evidence too is inconclusive. The bleeding that was seen by the doctor, in absence of an explanation as to the cause, does not rule out the possibility of menstruation as the cause. The evidence considered as a whole causes such doubt as would lead a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying
15 and acting thereon. It causes a real and substantial uncertainty with respect to this element of the offence charged and a real possibility that the unlawful sexual act did not take place.

Without an estimation of time as to when the rupture of the hymen occurred or as to what must have caused it, the fact that it was caused by factors unrelated to the events witnessed by P.W.3
20 and P.W.4 has not been ruled out. The court cannot say with moral certainty that an unlawful sexual act did take place. In disagreement with the joint opinion of the assessors, I find the circumstantial evidence too weak to establish beyond reasonable doubt that Nakalanzi Deborah was a victim of an unlawful act of sexual intercourse as alleged. Since the prosecution has failed to prove one of the essential ingredient of the offence, it is not necessary to evaluate the evidence
25 relating to the rest of the ingredients. I accordingly acquit the accused of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of *The Penal Code Act*.

However, according to section 87 of *The Trial on Indictments Act*, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be
30 convicted of the minor offence although he or she was not charged with it (see *Uganda v. Leo Mubyazita and two others* [1972] HCB 170; *Paipai Aribu v. Uganda* [1964] 1 EA 524 and

Republic v. Cheya and another [1973] 1 EA 500). The minor offence sought to be entered must belong to the same category with the major offence. This provision envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence.

In the instant case, I find the offences of Attempted aggravated defilement C/s 386 and 129 (3) and (4) (c) of *The Penal Code Act* and Indecent Assault c/s. 128 (1) of *The Penal Code Act* as being minor and cognate to the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of *The Penal Code Act*. For example in *Achoki v. Republic* [2000] 2 EA 283, an accused charged with attempted rape was instead convicted of an alternative count of indecent. In that case, the appellant accosted the complainant, knocked her down, tore away her knickers and lay on top of her. He was at the same time lowering his own trousers and he tried to get in between her thighs. The complainant was all the time screaming and her screams brought along a witness who said he found the appellant lying on top of the complainant. The court found that these facts, apart from supporting a charge of attempted rape, which charge was incurably defective, also supported the alternative charge of indecent assault. He was thus convicted of the minor and cognate offence in the alternative count of indecent assault.

In another case, *Hamisi v. Republic* [1972] 1 EA 367, the appellant was convicted of indecent assault, having dragged the complainant to the ground with the threat of raping her. In that case, as the complainant was on her way home, the accused who was riding a bicycle overtook her and after riding a few steps ahead alighted from his bicycle and appeared as if he was repairing his bike. When the complainant reached him, the accused threw his bicycle to the ground and held the complainant and said to her that he was going to have sexual intercourse with her by force. The accused then dragged her to a place where there was tall grass and threw her to the ground, drew a knife, and threatened to kill her if she did not comply with his request. While the accused held a knife pointed at her, he forced her to remove her underclothes which she did. The accused then started to remove his trousers but as he was doing so a police car stopped nearby and the complainant called for help. The driver of the car went to the scene and took both parties to the police station. The accused was eventually charged with attempted rape. It was held that on those

facts, the trial court was right in holding that a charge of attempted rape was unsupportable. An assault on a lady, though not indecent in itself, becomes indecent if it is accompanied by indecent utterances suggestive of sexual intercourse.

Similarly, in *R. v. Haruna Ibrahim (1967), H.C.D. Case No. 76*, the accused was charged with attempted rape. The evidence was that he had dragged the complainant to a ditch, placed his hands over her mouth and pulled down her underpants but while lying on her, he was observed by a passer-by and fled. The High Court held that the acts of the accused did not amount to attempted rape but found that his acts were consistent with indecent assault and he was convicted accordingly.

For conduct to constitute an attempt, the impugned act has to be more than just preparation. It has to be an unequivocal step towards the completion of the crime which, but for interruption or interference, would have occurred. According to section 386 (1) of *The Penal Code Act* when a person, intending to commit an offence, begins to put his or her intention into execution by means adapted for its fulfillment, and manifests his or her intention by some overt act, but does not fulfill his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.

It was the testimony of P.W.3 that she observed the perpetrator remove his pair of trousers and place his legs on top of the victim who too was naked from the waist down. He held the victim close to him. It is at that point that this witness then pushed the door open to interrupt the ongoing activity. The activity she observed had gone beyond mere preparation but had not reached the point of contact between the sexual organ of the perpetrator and that of the victim. I find that the conduct she observed constitutes an unequivocal step towards the completion of the crime which, but for her interruption or interference, would have resulted in the commission of the offense. The prosecution has therefore established beyond reasonable doubt that there was an attempt made to perform an unlawful sexual act on the victim, Nakalanzi Deborah on 17th October, 2014 at or around 10.00 am while she was inside the house of the accused.

Lastly, the prosecution had to prove that it is the accused who attempted to perform the unlawful sexual act on the victim. The accused in his unsworn statement totally denied any involvement.

He denied having seen the victim on that day. Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions.

To counter this defence, the prosecution was required to adduce direct or circumstantial evidence
5 proving that the accused was the perpetrator of the attempted unlawful sexual act. Usually this
aspect is proved by the testimony of the victim, eye-witness accounts, confessions of accused
persons, medical and other scientific or forensic evidence. In this case, the prosecution largely
rests on the eye-witness accounts of P.W.3 and P.W.4 and on the admission of the accused made
in his defence that placed him at the scene of the crime. I have examined closely the
10 identification evidence of the two witnesses and found it to be free from the possibility of
mistake or error since both witnesses knew the accused before, saw and spoke to him on the
fateful day and thus were in close proximity to him, the events they narrated occurred during day
time and over such a duration that enabled them to correctly identify the accused. In light of that
evidence, I reject the accused's denial of having seen the victim on that day.

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That said, the law is that the court is required to investigate all the circumstances of the case
including any possible defences, even though they were not duly raised by the accused for as
long as there is some evidence before the court to suggest such a defence. Under section 12 of
The Penal Code Act, for intoxication to constitute a defence to a criminal offence, it must be
20 shown that by reason of the intoxication, the accused at the time of the act or omission
complained of, did not know that the act or omission was wrong or did not know what he or she
was doing and the state of intoxication was caused without his or her consent by the malicious or
negligent act of another person, or that the person charged was by reason of intoxication insane,
temporarily or otherwise, at the time of such act or omission.

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Where the accused has voluntarily put himself or herself in the position of being intoxicated to
the extent that he or she is not capable of forming the mental element of the crime, the law draws
a distinction between crimes of basic intent and crimes of specific intent. If charged with a crime
of specific intent, meaning that the accused must have had the specific intent to commit the
30 crime in question, involuntary intoxication can be a defence if it prevents the accused from
forming the intent that is required.

A basic intent crime is one where the *mens rea* is intention or recklessness and does not exceed the *actus reus*. This means that the accused does not have to have foreseen any consequence, or harm, beyond that laid down in the definition of the *actus reus*. Specific intent on the other hand is a special state of mind that is required, along with a physical act, to constitute certain crimes. With such offences, the offender must have actively desired the prescribed criminal consequences to follow his act or failure to act, e.g. death in the case of murder, and destruction of property in a case of malicious damage to property. Where an accused's intoxication is voluntary and the crime is one of basic intent, the accused is not permitted to rely on their intoxicated state to indicate that they lack the *mens rea* of the crime. Since sexual offences, such as attempted defilement and indecent assault, are crimes of basic intent and not specific intent (see for example the case of rape *R v. Woods (1982) 74 Cr App R 312*), the defence of intoxication is not available to the accused.

Having discounted the only defence suggested by the evidence before me, I find that the admission of the accused that he was asleep on that day in his house when he was awoken by the police who told him to dress up, placed him squarely at the scene of the crime as perpetrator of the offence. This admission supports the otherwise credible, strong identification evidence of P.W.3 and P.W.4. For that reason, I find that the prosecution has proved beyond reasonable doubt that the accused attempted to commit an unlawful sexual act with Nakalanzi Deborah and he is accordingly convicted of the offence of Attempted aggravated defilement C/s 386 and 129 (2), (3) and (4) (c) of *The Penal Code Act*.

Dated at Luwero this 17th day of January, 2018.

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Stephen Mubiru

Judge.

17th January, 2018

17th January, 2018

2.35 pm

Attendance

Mr. Senabulya Robert, Court Clerk.

Ms. Beatrice Okello holding brief for Mr. Ntaro Nasur, Resident State Attorney, for the Prosecution.

Mr. Katamba Sowad, Counsel for the accused person on state brief is present in court

5 The accused is present in court

SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of Attempted aggravated defilement C/s 386 and
10 129 (3) and (4) (c) of *The Penal Code Act* after a full trial. In her submissions on sentencing, the learned Resident State attorney prayed for a deterrent sentence on the following grounds; being the biological father of the victim, the convict does not deserve lenience since he took advantage of the victim who is an imbecile. He is a father and a mature person and should have protected the victim. He deviated by attempting to defile he instead. Had it not been for the intervention of
15 the mother, he would have abused the girl. The victim would have suffered at the hands of the father.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender. He has no previous record. He has been convicted on a minor and cognate
20 offence. He looks and appears remorseful. He is of advanced age at 52 years, he has a family which he was looking after. He had land where they would grow crops. He proposed that the convict is sentenced to a caution. In his *allocutus*, the convict stated that he has been on remand for long and was diagnosed with liver disease and there is no cure for it. He is also hypertensive. The period he has spent on remand should be considered.

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Under section 129 (2) of *The Penal Code Act*, any person who attempts to have unlawful sexual intercourse with a girl under the age of eighteen years commits an offence and is liable to imprisonment for eighteen years. However, maximum sentences are usually reserved for the worst of such cases. The starting point in the determination of a custodial sentence for Attempted
30 Defilement has been prescribed by item 2, Part IV (under Sentencing range for Defilement) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature)*

(Practice) Directions, 2013 as 9 years' imprisonment. I consider this to be a case falling in the category of the most extreme cases of attempted aggravated defilement considering that the convict is the biological father of the victim and the victim is an imbecile. I have also considered the embarrassment, indignity and shock suffered by the mother of the victim who found her husband, the convict, red handed in the act. I for that reason have adopted the maximum punishment of eighteen years imprisonment.

I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Uganda v. Ojengo Abdu, H. C. Cr. Sessions Case No. 9 of 2011*, where the High Court at Mbale on 13th November, 2013 sentenced a 68 year convict, who had seven grandchildren and three elderly wives at home, had several illnesses associated with old age and had been on remand for three years, to 3 years' imprisonment for having attempted to defile a twelve year old imbecile. In another case of *Uganda v. Rwabulikwire Moses, H. C. Cr. Sessions Case No. 066 of 2001*, the High Court at Kampala on 11th November, 2002 sentenced a 47 year old convict who was a first offender and had spent two years on remand to 14 years' imprisonment for the attempted defilement of a five year old victim.

However at sentencing, the court should look beyond the cognitive dimensions of the convict's culpability and should consider the affective and volitional dimension as well. It may as a result consider extenuating circumstances, which are; those factors reflecting on the moral blameworthiness, as opposed to the legal culpability of the convict. It is for that reason that the principle of proportionality operates to prohibit punishment that exceeds the seriousness of the offending behaviour for which the offender is being sentenced. It requires that the punishment must fit both the crime and the offender and operates as a restraint on excessive punishment as well as a prohibition against punishment that is too lenient. The principle of parsimony on the other hand requires that the court should select the least severe sentencing option available to achieve the purpose or purposes of sentencing for which the sentence is imposed in the particular case before the court.

I have considered the fact that the convict is a first offender, he is a middle-aged man at the age of 52 years, he suffers from some ailments and that he was to some extent intoxicated at the

material time. In light of the mitigating factors, the proposed term ought to be reduced to a period of sixteen (16) years' imprisonment.

In accordance with Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution*
5 *(Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, to the effect that
the court should deduct the period spent on remand from the sentence considered appropriate,
after all factors have been taken into account, I note that the convict has been in custody since
22nd October, 2014, a period of three years and three months. I therefore sentence the convict to a
term of imprisonment of twelve (12) years and nine (9) months to be served starting today.

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

Dated at Luwero this 17th day of January, 2018.

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Stephen Mubiru

Judge.

17th January, 2018