

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0140 OF 2015

UGANDA

PROSECUTOR

5 **VERSUS**

MUYINGO JOHN

ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

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The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It is alleged that on the 19th day of August 2014 at Bange village in Nakaseke District, the accused performed an unlawful sexual act with Nagawa Rachael, a girl aged seven years.

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The facts as narrated by the prosecution witnesses are briefly that years ago, the parents of the victim, Mr. Kabugo John and P.W.4 Ms. Nampijja Annet migrated from Masaka to Bange village in Nakaseke District where they established their home. Approximately two weeks prior to 19th August, 2014, Mr. Kabugo John brought the accused from Masaka to Bange village to work as a casual labourer in their gardens. As their labourer, the parents of the victim shared their residence with the accused in their two bed-roomed house. The parents had their bedroom, the victim and her two younger siblings occupied the other and accused would sleep in the living room. On 19th August, 2014 at around 11.00 pm, the accused returned from the trading centre to find P.W.4 Ms. Nampijja Annet and her children at home. The children were already in bed. He duped P.W.4 by telling her he had left her husband Mr. Kabugo John at a bar in the trading centre with his ex-girlfriend a one Ms. Nabasumba. Infuriated by the information, after serving the accused with supper P.W.4 stormed out of the house, closed the door behind her leaving the accused having his supper in the living room, and went in pursuit of her husband at the trading

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centre. On reaching there, he found the information she had been given to be incorrect since her husband only had men in his company and the bar was about to close.

Together with her husband they returned home and as they came close to their home she heard
5 her children crying. She ran ahead of her husband and opened the door, and immediately she saw
the accused coming from the children's bedroom and he only had his underpants on. She was
able to recognise him with the aid moonlight coming from outside. At that point her husband
arrived and he asked what the problem was and a struggle ensued between him and the accused
but the accused managed to escape. The victim narrated to them that she was sleeping only to
10 realise that the accused had covered himself with her in bed. He began kissing her. He also
started fondling her private parts. He then got hold of his penis and inserted it into her vagina.
She cried because she felt pain. She saw a watery substance in her private parts after the act. On
being examined by one of the neighbours, P.W.3 Anna Maria Nagawa, it was confirmed that she
had been defiled. The following day she was taken for medical examination. The accused too
15 was arrested at his friend's home where he had gone into hiding. In his defence, the accused
admitted having been inside the house at the material time but denied having defiled the girl. He
attributed the accusation to a grudge between him and the mother of the victim, P.W.4 who
blamed him for destabilising her marriage.

20 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
25 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.
- 5 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 conclusive
10 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*).

The prosecution relies on the testimony of the victim Nagawa Rachael who testified as P.W.5. She stated that she was 10 years old, hence 7 years old, over three years ago when the offence is
15 alleged to have been committed. Her mother, Nampijja Annet, testified as P.W.4 but did not disclose the age of her daughter. However, P.W.1 Dr. Mubeezi of Nakaseke Hospital who examined the victim on 21st August 2014, two days after the offence is alleged to have been committed, stated in his report, exhibit P.Ex.1 (P.F.3A) that the victim was seven years old at the time of that examination. This witness though did not disclose the basis of forming that opinion.
20 Counsel for the accused conceded this element. The court as well had the opportunity to observe her when she testified. Because of her apparent tender age, she had to be subjected to a *voire dire* before she could testify. In agreement with the assessors, I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Nagawa Rachael was a girl below fourteen years as at 19th August 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
30 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.

In the instant case, the court was presented with the oral testimony of P.W.5 Nagawa Rachael
5 who stated that she woke up at around 1.00 am only to realise that an assailant had covered himself with her in bed. He began kissing her. He also started fondling her private parts. He then got hold of his penis and inserted it into her vagina. She cried because she felt pain. She saw a watery substance in her private parts after the act.

10 Her testimony is corroborated by that of P.W.3 Anna Maria Nagawa, their Land Lady and neighbour, who testified that she took the child behind the house who told her that it is true that she had been defiled. The witness got a polythene sheet and asked the victim to demonstrate what had done to her. The victim told the witness to lie down and she lay on the witness' stomach and told her the assailant had lay on her in that manner while pinching her private parts
15 and that he was making bodily movements while on top of her. The witness examined the victim's private parts and found a scratch mark on her private parts most probably inflicted by a finger nail. She called a neighbour who is a midwife and sought her second opinion. The midwife examined the victim, put on gloves and tried to insert her finger but it would not enter. She concluded that the accused had attempted to defile the victim but that he had managed to
20 inflict a wound with a finger nail. It was a fresh wound. The following day she advised the parents to take the child for further examination. The victim's mother P.W.4 Nampijja Annet testified that a few meters to the house she heard the children crying. She ran and opened the door, and immediately she saw the accused was coming from the children's bedroom and he only had his underpants on. The victim told her that uncle Muyingo had laid on top of her, kissing her,
25 touching and trying to insert his penis into her private parts. She examined the victim's private parts and saw she that she had sustained a cut in her private parts. She also saw semen on the vulva of the child.

The evidence is further corroborated by the medical evidence of P.W.1 Dr. Mubeezi of Nakaseke
30 Hospital who examined the victim on 21st August 2014, two days after the offence is alleged to have been committed. In his report, exhibit P. Ex.1 (P.F.3A) he certified his findings that the

victim had lacerations on the left side of the vaginal vestibule and a ruptured hymen with tenderness. His opinion was that the injuries were caused by a male sexual organ.

5 In his defence, the accused insinuated that the injury could have been inflicted by the mother of the victim P.W.4 whom he saw take out the child to the veranda where she began to inserting her fingers in the private parts of the child. When he went to seek the intervention of the elderly neighbour, Nagawa P.W.3, they returned only to find the mother still fondling the private parts of the girl. Counsel for the accused argued too that it could have been inflicted by the midwife who examined the victim at the scene. Although Counsel had initially conceded to this element, 10 he too argued that the injury could have been inflicted by the midwife. I have considered these possibilities and discounted them as fanciful. They do not explain why the victim and the rest of the siblings were found crying when their parents returned from the trading centre. That fact is more consistent with the prosecution version than that of the accused.

15 To constitute a sexual act, it is not necessary to prove that there was deep penetration, the use of a sexual organ, the emission of seed or breaking of the hymen. 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). Under section 129 (7) (b) of *The Penal Code Act*, a sexual act is defined as including the 20 unlawful use of any object or organ by a person on another person's sexual organ. In this case, the assailant's use of his fingers or his penis fits the definition. I find that the testimony of the victim is sufficiently corroborated. Therefore, in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

25 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 and stated that he was framed by the victim's mother P.W.4 Nampijja Annet who falsely accused him of destabilising her marriage. P.W.4 had almost slapped him that 30 night saying he had betrayed her by leaving her husband with other women and he had instead returned home to cover up for her husband. She went to her room and he also retired to the

sitting room where he used to sleep. He did not realise that P.W.4 went out of the house. At around 11.00 pm, he heard the children crying in their room. When he heard the children crying he arose and stood up calling her name. The main door was half closed and so the cold breeze was coming through. P.W.4 was standing by the door way at the main entrance and she was
5 holding a dim torch. As he came to shut the door she flashed the torch into his face and she asked him what the problem was and he asked her the same question. She then told him he had defiled her daughter. The mother took out the child to the veranda. The mother began to insert her fingers in the private parts of the child. She told the accused that he could not be smarter than her and that where he stops is where she begins. He went to the elderly neighbour, Nagawa
10 P.W.3, and knocked at her window. He asked her to come to his help. They returned and found the mother still fondling the private parts of the girl.

To disprove the defence, the prosecution relies on the evidence of the victim herself, P.W.2 Nagawa Rachael and that of her mother P.W.4 Nampijja Annet. Where prosecution is based on
15 the evidence of indentifying witnesses, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v R (1953) E.A.C.A 166; Roria v Republic [1967] E.A 583; and Bogere Moses and another v Uganda, S.C. Cr. Appeal No. 1 of 1997*).

20 The victim P.W.5 Nagawa Rachael stated that she woke up at around 1.00 am only to realise that an assailant had covered himself with her in bed. The door was closed and it was dark but she recognised the assailant as her uncle, the accused. He was wearing an underwear. He did not talk to her. She saw his legs and also saw his face as he was kissing her. P.W.4 testified that when the accused returned from the trading centre, he duped her that he had left her husband Mr. Kabugo
25 John, was with a one Nabasumba, his ex-girlfriend, at a bar at the trading centre. She got annoyed and after serving the accused with supper, she went out to confront her husband. She locked the door of the house from outside and went to the bar only to find her husband with other men and the bar attendant was asking them to go out. Nabasumba was nowhere.

30 She led the way back home and her husband followed. A few meters to the house she heard children crying. She ran ahead of her husband and opened the door, and immediately she saw the

accused coming from the children's bedroom and he only had his underpants on. There was no light inside the house but she was able to recognise him with the aid moonlight coming from outside. She had left him eating food with the aid of a wick-lamp but by the time she returned the house was dark. She had been about thirty minutes to the trading centre and back. At that point her husband arrived and he asked what the problem was and a struggle ensued between him and the accused but the accused managed to escape. The accused was arrested the following day from his friend's home where he had gone into hiding. She having engaged the accused as a spy against her husband's suspected infidelity. This element is contested by counsel for the accused.

10 In their respective testimonies, both P.W.4 and P.W.5 stated that they knew the accused very well before the incident and P.W.5 was emphatic that it is the accused who fondled her private parts and inserted his penis in her private parts while lying on top of her. The victim was in very close physical proximity of the accused. The encounter took some time. In my view, the conditions that prevailed during the entire course of those events favoured correct visual identification of the accused by both witnesses. In his defence, the accused admitted having been inside the house at the material time. He is the only male adult inside that house at the material time and there is no possibility of any other intruder or any of the victim's siblings being responsible for the act. I have considered the defence of grudge raised by the accused and I have found it to be incredible and effectively disproved by the prosecution evidence, which has squarely placed the accused at the scene of crime as the perpetrator of the offence with which he is indicted. Therefore in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

25 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 Luwero this 30th day of January, 2018.

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Stephen Mubiru

Judge.

30th January, 2018

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30th January, 2018

10.12 am

10 Attendance

Mr. Senabulya Robert, Court Clerk.

Mr. Ntaro Nasur, Resident State Attorney, for the Prosecution.

Mr. Tumubwine Asaph, Counsel for the accused person on state brief is present in court

The accused is present in court.

15 Both Assessors are 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. Ntaro Nasur prayed for a deterrent custodial sentence, on grounds that; although he has been on remand
20 for three and a half years, the victim was 7 years only and she was traumatised for the whole of her life. He betrayed the trust of the parents. The offence carries a maximum sentence of death and the Sentencing Guidelines provide for a starting point of 35 years. The demeanour of the accused was wanting and he deserves a sentence of 30 years' imprisonment.

25 In response, the learned defence counsel Mr. Tumubwine Asaph prayed for a lenient custodial sentence on grounds that; the accused has been on remand and this should be considered. The convict is a first offender. He was a bread winner at the time of arrest. He was working as a casual labourer and he was also engaged in coffee business to cater for his eight children and a wife. He deserves lenience. Regarding the 30 years sought by the state, he submitted that the
30 intention of a sentence is to deter and reform the convict. He proposed that a sentence not

exceeding ten years would deter and reform the convict. The demeanour of the convict was not wanting. It is the effect of remand. He deserves a reformatory sentence so that he comes back to society and assists the young family members. When the victim testified she appeared to be no longer under any trauma and was in an improved condition. She had the capacity to testify. He
5 prayed for lenience. In his *allocutus*, the convict stated that he has eight children and that is the reason he came to work so that he could earn their fees. He prayed that the remand period be considered. He is a first offender. He left his children with his aged father who is 75 years old. There is no one to care for them.

10 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)*
15 *(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
20 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.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of
25 life imprisonment. Only one aggravating factor prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case, i.e. the victim was defiled repeatedly by an offender who is supposed to have taken primary responsibility of her. A sentence of life imprisonment may as well be justified by extreme gravity or brutality of the crime committed, or where the prospects of the offender
30 reforming are negligible, or where the court assesses the risk posed by the offender and decides that he or she will probably re-offend and be a danger to the public for some unforeseeable time,

hence the offender poses a continued threat to society such that incapacitation is necessary (see *R v. Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410). There are cases where the crimes are so wicked that even if the offender is detained until he or she dies it will not exhaust the requirements of retribution and deterrence. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required (see *R v. Edward John Wilkinson and Others* (1983) 5 Cr App R (S) 105 at 109). However, since proportionality is the cardinal principle underlying sentencing practice, I do not consider the sentence of life imprisonment to be appropriate in this case.

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 over 35 years old and the victim 7 years old. The age difference between the victim and the convict was 28 years. He abused the trust of the parents of with the victim and the victim herself since they lived together in the same residence.

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 case, 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

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.

10 Although the circumstances of the instant case 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 penalty, they are sufficiently grave to warrant a deterrent custodial sentence. The accused was more or less the victim's father. The convict traumatised her physically and psychologically and abused a position of trust. It is for those reasons that I have considered a starting point of twenty years' imprisonment. The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and he has considerable family responsibilities. The severity of the sentence he deserves has therefore 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 seventeen years.

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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 seventeen years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 27th August 2014 and been in custody since then, I hereby take into account and set off three years and five months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of thirteen (13) years and seven (7) months, to be served starting today.

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

5 Dated at Luwero this 30th day of January, 2018.

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Stephen Mubiru

Judge.

30th January, 2018