

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
CRIMINAL SESSIONS CASE No. 0410 OF 2014

UGANDA **PROSECUTOR**

VERSUS

TWAYIGIZE AKRAM **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

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 the accused on the 2nd day of May, 2014 at Kiwafu "B" Zone, Kansanga, Makindye Division in Kampala District, performed an unlawful sexual act with Nanzerena Winnie Florence, a girl aged 11 years.

The prosecution case is that the mother of the victim, P.W.5 Madina Nanyonjo and the accused were friends and he used to visit her at home from time to time. Differences developed between them and P.W.5 had stopped the accused from visiting her home anymore. On the morning of 2nd May, 2014, P.W.5 left home very early in the morning at daybreak to purchase fresh maize from Nakawa Market, for her evening roadside business of roasted maize, in Kansanga. She left the victim home alone together with two younger children. On her return at around 9.00 am, she found the door to her one room tenement ajar. She pushed it wide open only to see the accused laying on top of the victim on her bed, performing an act of sexual intercourse. In shock, she screamed at the accused and dashed out, locking the accused and the girl inside the house by bolting the door from outside. before she could leave the compound to alert a senior lady in the neighbourhood, she heard the accused break the door open and on turning around saw him emerge from the house half-naked. She raised an alarm. She was joined by one of her immediate neighbours, P.W.4 Nanyonga Stella. Some builders working at a construction site nearby ran after the accused and arrested him within a shirt distance, took him to Soya Police Post from where he was transferred to Kabalagala Police Station. He and the victim were subsequently medically examined and the accused charged.

In his defence, the accused admitted that he was at the scene but denies having committed the act. His version is that on 2nd May, at around 11.00 am when he returned home, he found his wife, P.W.5 Madina Nanyonjo, had returned from the market. When he entered the house, he had been there for barely five minutes when his wife P.W.5 went out and left him inside the house. When she returned after about three minutes, she came with a girl aged about thirteen years old whom he had never seen before. She locked the door from outside, locking him and the girl inside the house, with the three children and made an alarm. Some men who were building a house nearby came and opened the door and he got out of the house. P.W.5 claimed that he had slept with her cousin, the victim. The builders arrested her and took him to Soya police post from where he was later forwarded to Kabalagala Police Station. He attributes the false accusation to a grudge by P.W.5 arising from his purchase of a plot of land in the names of the two children he had with another woman and not including that of P.W.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 372*).

For the accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim was below 14 years of age.
2. That a sexual act was performed on the victim.
3. 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 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 never testified. Her cousin P.W.5 Madina Nanyonjo testified that while at Kabalagala Police Station following the arrest of the accused, she heard the mother of the victim tell the police that the victim was eight years old at the time. That evidence is unsatisfactory but there is that of P.W.1 Dr. Jackson Kakembo the Medical Officer who examined the victim on 3rd May, 2014 (the day after that on which the offence is alleged to have been committed). His report, exhibit P. Ex.1 (P.F.3A) certified his findings that the victim was eleven (11) years old at the time of that examination, based on her dentition of 24 teeth. This is an expert's opinion based on his personal scientific observation. In absence of evidence to the contrary, it deserves to be given a lot of weight. No wonder that counsel for the accused conceded to this element. Therefore in agreement with the assessors, I find that on basis of that evidence the prosecution has proved beyond reasonable doubt that Nanzerena Winnie Florence was a girl below fourteen years as at 2nd May, 2014.

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

The victim in instant case did not testify. Her cousin P.W.5 Madina Nanyonjo testified that on that day at around 9.00 am when she returned from Nakawa Market where she had gone to buy maize for her roadside business, she found the accused laying on Winnie, on her bed. The girl

had her dress on but it was folded up to the chest and the accused had lowered his pants up to the knees. The accused had inserted his penis into the vagina of the girl. Her testimony is corroborated by that of P.W.1 Dr. Jackson Kakembo, the Medical Officer who examined the victim on 3rd May, 2014 (the day after that on which the offence is alleged to have been committed). In his report, exhibit P. Ex.1 (P.F.3A), his findings were that her hymen had been ruptured less than 6/12 (six to twelve hours) before the examination. This is corroborated further by the testimony of the neighbour P.W.4 Nanyonga Stella who stated that when she responded to the alarm raised by P.W.5, she found the accused emerging from the house, he was half naked, wearing only a pair of boxers underpants which was stretched at the front by a still erect penis and a watery patch of what appeared to be semen was visible at the front.

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). In his defence, the accused only denied having had sex with the girl with whom P.W.5 locked her inside the house but there is no evidence to suggest that there was any other female occupant at the material time apart from the victim. His claim that there was a thirteen year old girl he had never seen before in that house is thus rejected as a fabrication and afterthought. This version was never put to P.W.5 in cross-examination. Therefore, in agreement with both assessors, I find that this ingredient as well 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 or circumstantial, placing the accused at the scene of crime. His version is that on 2nd May, at around 11.00 am when he returned home, he found his wife had returned from the market. When he entered the house, he had been there for barely five minutes when his wife P.W.5 Madina Nanyonjo went out and left him inside the house. When she returned after about three minutes, she came with a girl aged about thirteen years old whom he had never seen before. She locked the door from outside, locking him and the girl inside with the three children and made an alarm. He

attributes the false accusation to a grudge by P.W.5 arising from his purchase of a plot of land in the names of the two children he had with another woman and not including that of P.W.5.

In order to prove that he was the perpetrator of this act, the prosecution relies on the testimony of P.W.5 who denied having been the wife of the accused or having a child with him. She testified that when she locked the accused inside the house, shortly thereafter he broke the door open and she saw him standing in the doorway. He had a pair of trousers in his hands and his boxer underpants were still at knee level. He dashed and was arrested after a chase. She saw the victim's dress smeared with what appeared to be semen but by the time P.W.5 returned after the arrest of the accused, the victim had washed it. This witness knew the accused before since she was her friend. She found the door ajar and only opened it further, thereby giving her ample time and opportunity to recognise him. Although it was inside a house, the incident occurred during day time, she had opened the door, and the accused was also in close proximity. In any event the accused does not deny having been found inside that house by P.W.5. Therefore in agreement 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 find the accused guilty and convict him for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*.

Dated at Kampala this 4th day of July, 2018.

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Stephen Mubiru
Judge.
4th July, 2018.

4th July, 2018
4.27 pm
Attendance

Court is assembled as before.

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 State Attorney prosecuting the case, Ms. Adongo Harriet, prayed for a deterrent custodial sentence, on grounds that; although the convict has no previous conviction, the offence is rampant. Men take advantage of young girls. The convict does not look

remorseful even when he was making his defence. The circumstances in which it was committed, the a convict was a friend to the victim's cousin. He took advantage of the victim who was under the custody of his own friend, yet he was a married man. The offence carries a maximum penalty of death. The sentence should act as a signal to other would be perpetrators. The Court should protect the girls. The victim was eleven years old. She proposed thirty years' imprisonment.

In his submission in mitigation of sentence, learned counsel for the accused, Mr. Owinyi Gerald prayed for a lenient sentence on grounds that; the accused is a first offender. At the time of his arrest, he had two children; Wathuin Shafiq who was aged five at the time and now is nine, Nyirambabazi Shirat who was about two and a half years old, who were both dependant on him. They now live with his mother. He has been on remand since May, 2014 hence four years and two months. At the time of arrest he was 26 years old. He is now thirty years old. The offence is heinous but he is a youth and the punishment should give him the opportunity to return to the community as a changed man. He proposed six years' imprisonment since the convict has undergone rehabilitation in craftsmanship and he trains fellow inmates in making liquid soap. In his *allocutus*, the convict only prayed for lenience.

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, 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.

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 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 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 aged 26 years at the time of the offence and the age difference between the victim and the convict was 15 years. The convict not only exposed her to the danger of sexually transmitted diseases at such a tender age but also traumatised her physically and psychologically. It is for those reasons that I have considered a starting point of eighteen (18) years' imprisonment.

The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and a young man who committed the offence at the age of 26 years. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of eighteen (18) years' imprisonment, proposed after taking into account the aggravating factors, now to a term of imprisonment of fourteen (14) 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 nine years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 13th May, 2014 and been in custody since then, I hereby take into account and set off four years and two months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of nine (9) years and ten (10) 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 Kampala this 4th day of July, 2018.

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Stephen Mubiru
Judge.
4th July, 2018