THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

CRIMINAL SESSIONS CASE No. 0065 OF 2015

UGANDA …… PROSECUTOR

VERSUS

SSEMWANGA MUSA alias MUSILAMU …… ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused in this case is indicted with one count of Aggravated Defilement c/s 129 (3) and (4) (d) of the *Penal Code Act*. It is alleged that during the month of November, 2014 at Masajja, Makindye Division in Kampala District, the accused performed an unlawful sexual act with Nakasagga Vanessa, a girl aged 14 years and suffering from epilepsy.

The prosecution case is that the accused and the mother of the victim, P.W.2 Nanteza Mary alias Nakku, were neighbours. On two occasions, in the absence of her mother, the accused went to the home of the victim and finding the victim alone at home, performed acts of sexual intercourse with her on her mothers' bed. On the third occasion, he touched her mouth with his beard, her private parts and stomach with his hands making her feel uncomfortable. This episode was witnessed by her sister P.W.4 Nasuuna Brenda when she interrupted it suddenly on her return from the well. P.W.4 Nasuuna Brenda testified that when she returned from the well, she found the accused laying on top of the victim on their mother's bed. The victim had been undressed and was totally naked. He was holding the victim's mouth with one hand and was in the process of unbuttoning his shirt with the other. He had already taken off his pair of trousers. On seeing P.W.4, he jumped off the victim, dressed up and went out of the house promising to bring sugarcane for the two of them. She saw the bedcover stained with blood. The victim had previously complained to the children of the accused saying she would stop playing with them since their father was doing bad things to her. When this information came to the attention of the victim's mother, she began searching for the accused. The accused went missing for about two days until he was arrested and taken to the police from where he was charged.

In his defence, the accused denied having committed the offence. His version is that it is only in court that he learnt of the allegations made against him. The day he was arrested, he had returned from morning prayers at Gangu Muslim Mosque at around 7.30 am only to find a crowd of hooligans who began beating him. They took him to the home of the complainant and decided that he should be killed. They attempted to dip him in a pool of water while accusing him of defiling their daughter. One good Samaritan called the police who came, fired bullets in the air and took him on a motorcycle to Kikajjo police post. Three days later they took him to the hospital and subsequently he was charged. He attributes the false accusation to a grudge because of the crops he was growing and selling around the area. The father of the victim was after his plot but fortunately his wife migrated to Hoima after selling off the plot.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

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

1. That the victim was a girl below 18 years of age.
2. The girl is a person with a disability.
3. That a sexual act was performed on the victim.
4. That it is the accused who performed the sexual act on the victim.

The prosecution is required to prove beyond reasonable doubt that the victim was below 18 years of age. The most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child (See *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002)*.

In the instant case, the victim the victim Nakasagga Vanessa testified as P.W.3 but stated that she did not know her age. Her mother P.W.2 Nanteza Mary alias Nakku testified that the victim was born in July, 1999 (implying that she was 15 years old in November, 2014 when the offence is alleged to have been committed). This is corroborated by P.W.1 Mr. Asiku Dennis, a Medical Clinical Officer at Mayfair Clinic who examined the victim on 3rd December, 2014 (days after the period within 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 about fourteen (14) years old at the time of that examination, based on her physical development and dentition of 28 teeth. Counsel for the accused conceded to this element. The accused did not offer any evidence on this element and it was not contested by his advocate in his final submissions. On basis of that evidence and based on the court's own observation of the victim when she testified in court, in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt.

The next ingredient requires proof that the victim was at the material time a person with a disability. Under section 129 (7) of *The Penal Code Act*, "disability" means a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation. The disability in this case is mental, as a result of chronic epilepsy. The victim Nakasagga Vanessa testified as P.W.3 but the court had to conduct a *voire dire* first to determine her competence as a witness in light of her apparent substantial mental retardation. Her mother P.W.2 Nanteza Mary alias Nakku testified that the victim sustained that mental disability at the age of three as a consequence of a malaria attack. She experiences convulsions whenever she is angry, tired or annoyed. P.W.1 who examined the victim on 3rd December, 2014 stated in his report, exhibit P. Ex.1 (P.F.3A) that the victim is an epileptic patient who is getting treatment from Butabika Hospital for about ten years. The accused did not offer any evidence on this element and it was not contested by his advocate in his final submissions. On basis of that evidence and based on the court's own observation of the victim when she testified in court, in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt.

The next ingredient requires proof that a sexual act was performed on the victim. One of the definitions of a sexual act under section 197 of the *Penal Code Act* is penetration of the vagina,

however slight, of any person by a sexual organ. This ingredient is ordinarily proved by the direct evidence of the victim, but may also be proved by circumstantial and medical evidence.

In the instant case, the prosecution relies on the testimony of the victim Nakasagga Vanessa who stated that on two occasions while her mother was away, while inside their house the accused undressed her, inserted his penis in the place where she urinates from and she bled from her buttocks as a result. The third occasion was when he touched her mouth with his beard, her private parts and stomach with his hands making her feel uncomfortable. Court may proceed to rely on the evidence of the victim, even without corroboration, if satisfied that the victim was truthful and there is no possibility of error in her identification of the nature of the act.

However in the instant case, I consider it necessary to find corroboration of the sexual act considering the manifest mental limitations of the victim. When considered necessary, corroboration could be provided by medical or other scientific examination, circumstantial evidence of relevant events and observations by other persons that occurred around the time, the conduct of the accused around the time of the incident, etc. What is needed is independent evidence, which, when linked with the testimony of the victim, removes beyond any reasonable doubt the question of innocence. However, having been admitted under section 40 (3) of *The Trial on Indictments Act*, by law the evidence of P.W.4 Nasuuna Brenda requires corroboration by some other material evidence in support thereof implicating the accused before he can be convicted on it. For that reason, that evidence is not capable of corroboration.

Nevertheless, I find corroboration in the evidence of P.W.1 who examined the victim on 3rd December, 2014 and stated in his report, exhibit P. Ex.1 (P.F.3A) that the victim's hymen had been ruptured, although not in the recent past. Although there were no bruises seen on her vulva, it was determined that she was a sexually active female. On the other hand, 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. In the instant case, the victim narrated the events to P.W.4 and to her other playmates who are children of the accused, what had happened to her involving bad things their father was doing to her. I find the two pieces of evidence as sufficient corroboration of the victim's evidence that she was subjected to acts of sexual intercourse during the month of November, 2014. In

agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt

Lastly it must be proved that it is the accused who performed the sexual act on the victim. There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator of the offence. The accused denied having committed the offence. His version is that it is only in court that he learnt of the allegations made against him. The day he was arrested, he had returned from morning prayers at Gangu Muslim Mosque at around 7.30 am only to find a crowd of hooligans who began beating him. They took him to the home of the complainant and decided that he should be killed. They attempted to dip him in a pool of water while accusing him of defiling their daughter. One good Samaritan called the police who came, fired bullets in the air and took him on a motorcycle to Kikajjo police post. Three days later they took him to the hospital and subsequently he was charged. He attributes the false accusation to a grudge because of the crops he was growing and selling around the area. The father of the victim was after his plot but fortunately his wife migrated to Hoima after selling off the plot.

To refute the defence the prosecution relies on the testimony of the victim P.W.3 Nakasagga Vanessa who identified him in court as the person who defiled her. She knew the decased as "Musiraamu" and that he was their neighbour. P.W.4 Nasuuna Brenda witnessed one of those encounters. P.W.4 also heard the victim tell the children of the accused that she would no longer play with them because of the bad things their father had done to her. The children of the accused told P.W.2 the same story prompting her to begin searching for the accused.

The evidence of both P.W.3 and P.W.4 being in the nature of visual identification, the question to be determined is whether as identifying witnesses they were able to recognise the accused. In circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R (1953) 20 EACA 106*; *Roria v. R [1967] EA 583* and *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*). In doing so, the court considers; whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify

the accused and the proximity of the witnesses to the accused at the time of observing the accused.

As regards familiarity, the two identifying witnesses knew the accused prior to the incident. In terms of proximity, the accused was very close to the victim for purposes of sexual intimacy while P.W.4 was inside the same room when she saw him laying, half naked, on top of the victim. In terms of light, it was during day time and their vision was not obstructed. As regards duration, the act took some time and the accused on one occasion spoke to them promising them sugarcane. That was long enough a period to aid correct identification. In any event, their evidence is corroborated by that of the victim's mother P.W.2 Nanteza Mary alias Nakku who testified that the accused went missing for two days after he realized the victim and her sister had reported the case to her. This sudden disappearance is not the conduct of an innocent person. For that reason the defence raised by the accused is rejected since the alleged grudge has not cast any doubt on the evidence of correct identification. In agreement with the joint opinion of the assessors, I fund that this ingredient too has been proved beyond reasonable doubt.

For those reasons, the accused is accordingly found guilty and is hereby convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (d) of the *Penal Code Act*.

Dated at Kampala this 12th day of July, 2018. ……..

Stephen Mubiru
Judge.
12th July, 2018.

Later.
4.23 pm
Attendance

Court is assembled as before.

SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of Aggravated Defilement c/s 129 (3) and (4) (d) of the *Penal Code Act* after a full trial. In his submissions on sentencing, the learned State attorney, Ms. Adongo Harriet, prayed for a deterrent sentence on the following grounds; the victim was someone who was sick suffering from epilepsy for the last ten years. It has affected her mental capacity further. The age difference between the convict and the victim since the convict was

apparently 46 years old and the victim and the girl is 19 years old now. It was a repeated act of defilement, twice before and on the third occasion he was interrupted before he could consummate the act. The offence is so rampant. It is the duty of the court to protect the integrity of girls. The offence is so grave which carries the death penalty. The convict was married with a wife and children and was supposed to act responsibly because he would not expect that to be done to his own children. She proposed thirty years' imprisonment.

Counsel for the convict, Mr. Kumbuga Richard, prayed for a lenient custodial sentence on the following grounds; the convict is a first offender. He is remorseful and he has repented. He will never repeat it. He wishes to join his family. He has children and a wife and he was the sole bread winner. He was working to make his family survive. His young children miss his parental role. His wrong actions were not violent. He was humble much as he was molesting her. The girl showed no sign of trauma. She has moved on from this act. He has reformed and he is willing to check his conduct in case he returns to society. His three and eight months' remand should be deducted. He is nearing advanced age, he is coming to the evening if his life. He suggested 14 years minus the time spent on remand.

In his *allocutus,* the convict stated that he prays for mercy and has repented. He has been on remand for three years but treated as a convict. As a result he has broken down physically working at a prison farm. He is remorseful and will not hurt the complainant. He had his children and property and all have been disrupted. He does not know where his family is now. He is incapable of hard labour anymore in prison. In her victim impact statement, the mother of the victim stated that the convict did not behave well towards her considering the condition of her child. She would have castrated him had she got him. It is expensive to offer medication to the girl. But since he has expressed remorse, the court may be lenient to him.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act,* is death. However, this punishment is by sentencing convention reserved for the most egregious forms of perpetration of the offence such as where it has lethal or other extremely grave consequences. Since in this case death was not a very likely or probable consequence of the act, I have discounted the death sentence.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*, the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* stipulate under Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors.

Although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the act such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence, especially because of the condition of the victim's disability and the 27 year age difference between him and the victim.

I have considered the decision in *Kato Sula v. Uganda, C.A. Crim. Appeal No 30 of 1999*, where the Court of Appeal upheld a sentence of 8 years' imprisonment for a teacher who defiled a primary two school girl. In *Bashir Ssali v. Uganda, S.C. Crim. Appeal No 40 of 2003*, the Supreme Court, on account of the trial Court not having taken into account the time the convict had spent on remand, reduced a sentence of 16 years' imprisonment to 14 years' imprisonment for a teacher who defiled an 8 year old primary three school girl. The girl had sustained quite a big tear between the vagina and the anus. In *Tujunirwe v. Uganda, C.A. Crim. Appeal No 26 of 2006*, where the Court of Appeal in its decision of 30th April 2014, upheld a sentence of 16 years' imprisonment for a teacher who defiled a primary three school girl. In light of the sentencing range apparent in those decisions and the aggravating factors mentioned before, I have considered a starting point of twenty years' imprisonment.

The seriousness of this offence is mitigated by the factors stated in mitigation by his counsel and his own *allocutus*, which have been reproduced above. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of twenty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of sixteen 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 sixteen years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 12th December, 2014 and has been in custody since then, I hereby take into account and set off three years and seven months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of twelve (12) years and five (5) 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 12th day of July, 2018.

……..
Stephen Mubiru
Judge.
12th July, 2018.