

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KITGUM
CRIMINAL SESSIONS CASE No. 0163 OF 2016

UGANDA **PROSECUTOR**

5 **VERSUS**

OLEL alias OTTO JUSTIN **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused is charged with two counts of Aggravated Defilement c/s 129 (3) and (4) (a) and (b) of the *Penal Code Act*. It is alleged that the accused on the 29th day of November, 2012 at Tumbafu village in Lamwo District, had unlawful sexual intercourse with; in count 1 Ajalo Mercy, a girl under the age of fourteen years, and in count 2 Aber Norris, a girl under the age of fourteen years, while he was a person with HIV.

15 The prosecution case briefly is that on 29th day of November, 2012 the mother of the two victims, P.W.3 Achola Joyce, left the two victims alone at home as she went to the garden. At the time, Ajalo Mercy was aged three years while Aber Norris was aged five years. She instructed them that after they had their lunch, they should join other children in the
20 neighbourhood to play until her return later in the afternoon. In her absence, the accused met them along the road as they were going out to join other children to play. He dragged both of them into the bush and had sexual intercourse with both of them, one after the other. He went away and they continued on their way. Their mother met them at around 4.00 pm and noticed that Aber Norris was limping. Upon asking her what the problem was she pointed at her private
25 parts and said the accused had done something to them, as well as those of her sister. On opening the legs of the two children, she noticed that their private parts were swollen and had watery stuff that appeared to be semen. She screamed and wailed drawing a response from her neighbours and the matter was reported to the L.C. Chairperson and later to the police, leading to the eventual arrest of the accused.

30

In his defence, the accused denied the accusation. Although he admitted having met both children along the road crying while on their way back home, he denied having defiled any of them. He stated that he only asked them what the cause was but they never responded. He continued on his way to repair his bicycle and to fetch water. He was surprised when later in the evening he was arrested on allegations of having defiled the two girls.

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 each of the victims was below 14 years of age.
2. That a sexual act was performed on each of the victims.
3. That it is the accused who performed the sexual act on each of the victims.
4. That at the time of performing that sexual act, the accused was HIV positive.

The first ingredient of the offence requires proof of the fact that at the time of the offence, the victim was below the age of 14 years. The age of a child may be proved by the production of her birth certificate, or 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*).

30

In the instant case, only one of the victims, P.W.4 Aber Norris testified and stated she was 11 years old, hence five years old, when the offence is alleged to have been committed six years ago. P.W.3 Achola Joyce the mother of the two victims stated that Ajalo Mercy was born on 4th August, 2009 (supported by the immunisation card and short birth certificate marked exhibits P. Ex. 2 and P. Ex. 4 respectively) while Aber Norris was born on 3rd May, 2007 (supported by the immunisation card and short birth certificate marked exhibits P. Ex. 3 and P. Ex. 5 respectively). They were three years and five years old respectively at the time of the offence. This evidence is corroborated by that of P.W.5 Ms. Okello Ventorina who examined both victims on 30th November, 2012 (a day after that on which the offence is alleged to have been committed). Her report in respect of Ajalo Mercy, exhibit P. Ex.6 (P.F.3A) certified her findings that she was aged 3 years at the date of examination, based on her immunisation card, while her report in respect of Aber Norris, exhibit P. Ex.7 (P.F.3A) certified her findings that she was aged 5 years at the date of examination, based on information from her mother.

Counsel for the accused contested this ingredient in his final submissions only because Ajalo Mercy was never brought to court to testify. The court had the opportunity to see Aber Norris when she testified. She was the older of the two children and by her testimony it is in doubt that Ajalo Mercy was her sister. I have not found any reason as to why documents referring to her existence that have been produced in evidence would be a fabrication, or that the three witnesses who testified about her existence; her sister P.W.4 Aber Norris, her mother P.W.3 Achola Joyce or the medical practitioner P.W.5 Ms. Okello Ventorina would tell lies about that fact. From all that evidence and in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Both girls were under the age of 14 years as at 29th November, 2012.

The second ingredient required for establishing this offence is proof that each of the victims was subjected to a sexual act. One of the definitions of a sexual act under section 129 (7) of *the Penal Code Act* is penetration of the vagina, however slight by the sexual organ of another or unlawful use of any object or organ on another person's sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence, (See *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 one of the victims, P.W.4 Aber Norris, who testified that the accused grabbed her and her sister, took her to the bush, opened her legs and slept on her. She felt pain in her private parts and he performed the same act on Ajalo Mercy. This is corroborated by the evidence of P.W.5 Ms. Okello Ventorina who
5 examined both victims on 30th November, 2012 (a day after that on which the offence is alleged to have been committed). Her report in respect of Ajalo Mercy, exhibit P. Ex.6 (P.F.3A) certified her findings that there were some abrasions at the *introitus* caused by forceful penetration, while her report in respect of Aber Norris, exhibit P. Ex.7 (P.F.3A) certified her findings that there were some abrasions at the *introitus* caused by forceful penetration. This victim as well
10 complained of pain in her hip joint.

There is further corroboration provided by the testimony of P.W.3 Achola Joyce, the mother of the two victims, who stated that when she left the two children alone at home when she went to the garden instructing them to go out to play with other children after they had their lunch. On
15 her return from the garden at around 4.00 pm, she noticed that Aber Noris was limping. On asking her the cause, she pointed to her private parts and told her the accused had done something to her there. She examined the private parts of both children and noted they were swollen and the presence of a watery substance she deduced to be semen.

20 Counsel for the accused contested this ingredient during the trial and in his final submissions mainly on account of lack of corroborative evidence semen since P.W.5 did not say that she saw it in examination of both children. According to section 133 of *The Evidence Act*, no particular number of witnesses in any case is required for the proof of any fact. Consequently, the testimony of the victim alone, if believed, is sufficient to establish any fact that requires proof. It
25 is only if some aspect of that testimony is found unreliable or lacking that the court will look for corroboration. In any event, the law regarding corroboration of the victim's evidence in sexual offence cases is that, the trial Judge has to warn the assessors and himself of the danger of acting on the uncorroborated testimony of the victim. However, having done so, the Judge can convict without corroboration of the victim's evidence provided he or she is satisfied that the victim was
30 a truthful witness see *Kibale v. Uganda* [1999] 1 EA 148; *Mugoya v. Uganda* [1999] 1 E.A 202 and *Mohammed Kasoma v. Uganda*, S. C. Criminal Appeal No. 1 of 1994). In the instant case, I

observed P.W.4 as she testified. Even under rigorous cross-examination by defence counsel she remained composed and steadfast. I found her to be a truthful witness whose evidence could be relied upon without corroboration.

5 In any event, in sexual offences, the distressed condition of the victim is capable of corroborating her evidence (see *R v. Zielinski (1950)*, 34 Cr. App. R. 193; *R v. Alan Redpath* 46 Cr. App. R. 319 and *Kibazo v. Uganda [1965] E.A. 509*). Although counsel for the accused contested this ingredient during the trial and in his final submissions, in light of the quality of evidence furnished by the prosecution, and in agreement with the assessors, I find that this ingredient has
10 been proved beyond reasonable doubt. Both children were victims of a sexual act committed during the afternoon hours of 29th November, 2012.

The third 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
15 or circumstantial, placing the accused at the scene of crime. In his defence, he admitted having met both children along the road crying on their way back home. He asked them what the cause was but they never responded. He continued on his way to repair his bicycle and to fetch water. He was surprised when later in the evening he was arrested on allegations of having defiled the two girls.

20

To refute that defence, the prosecution relies on the oral testimony of P.W.4 Aber Norris, one of the victims, who explained the circumstance in which she was able to identify the perpetrator of the act. They were on their way out to play when they met the accused. It was during the day and they knew the accused before as he habitually came to their home in the absence of their mother
25 beat them for no apparent cause. Where prosecution is based on the evidence of an indentifying witness, 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*).

30

In the instant case, P.W.4 testified that she knew the accused before the incident as he used to come to their home frequently in the absence of their mother and beat them for no apparent reason. The act occurred during broad day light in a bush along a village road. Although Counsel for the accused contested this ingredient during cross-examination of this witness and in his final
5 submissions, I find that the witness knew the accused before the incident, and that she had ample time to recognise him both visually and by voice. her evidence is free from the possibility of error or mistake. It is corroborated by the defence of the accused who admitted having met the two children that afternoon along that road and that he was carrying a jerrycan on his bicycle, a detail that matches the testimony of P.W.4. He only denies having committed the act. Despite his
10 denial, his explanation that he met the two children, of such a tender age crying and that he never bothered to tell their mother about it is most incredible. Therefore in agreement with the assessors, I find that the defence raised by the accused has been successfully disproved by the prosecution. There is no possibility of mistake or error in the evidence placing the accused at the scene of crime as the perpetrator of the offence and the defence of a grudge is not plausible. This
15 ingredient has been proved beyond reasonable doubt.

The last essential ingredient requires proof that at the time of performing the sexual act, the accused was HIV positive. P.W.3 Achola Joyce, the mother of the two victims stated that he was aware that the accused was on ARVs hence her emotional distress on learning that he had
20 performed sexual intercourse with her two daughters. To prove this element, the prosecution relied on the admitted documentary evidence, exhibit P.Ex.1 (P.F.3A) certifying the findings of Dr. Okumu Francis of Padibe Health Centre IV who on 3rd December, 2012, four days following the date on which the offence is alleged he committed. He examined the sero-status of accused and found him to be HIV positive. A comment was made that he was already on ARVs. This
25 exhibit is a certification of the findings of the sero-status of the accused on the date of examination. It is now common knowledge that HIV is not detectable immediately after infection. There is a “window period” soon after infection during which the presence of the virus in the human body cannot be detected by diagnostic tests. The window period occurs between the time of HIV infection and the time when diagnostic tests can detect the presence of
30 antibodies fighting the virus. The length of the window period varies depending on the type of diagnostic test used and the method the test employs to detect the virus.

Furthermore, it is still common knowledge that if an HIV antibody test is performed during the window period, the result will be negative, although this will be a false negative since the virus will be present in the body, only that it cannot be detected yet. At page one of his paper published in November 2011 entitled, *The HIV Seronegative Window Period: Diagnostic Challenges and Solutions*, Mr. Tamar Jehuda-Cohen of SMART Biotech Ltd. Rehovot Israel; and Bio-Medical Engineering, Technion Israel Institute of Technology, Haifa, Israel reveals that scientific research has established that it takes 95% of the population approximately three months to seroconvert following HIV infection. The window period therefore is generally three months. In the instant case, since the HIV diagnostic test done on the accused on 3rd December 2012, four days after the incident turned out positive, it implies that the window period had elapsed. He therefore must have contracted the virus not less than three months prior to the date of that test, i.e. latest August, 2012 and was therefore carrying the virus by 29th November, 2012 when he had sexual intercourse with the two victim.. In agreement with the assessors, I therefore find that this ingredient too has been proved beyond reasonable doubt.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby convict the accused for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) and (b) of the *Penal Code Act* in respect of Count 1, and for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) and (b) of the *Penal Code Act* in respect of Count 2.

Dated at Kitgum this 28th day of November, 2018.

.....
Stephen Mubiru
Judge.
28th November, 2018.

SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (b) of the *Penal Code Act*, the learned Resident State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; the offence is very rampant. He contested the offence and this is conduct of as person who is not remorseful. He is a grandfather of the two

victims. He breached trust. He exposed the children to HIV. He caused a lot of trauma to the children. The maximum is death. He prayed for a minimum of twenty years in prison.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that;
5 the convict has been on remand for six years. He is a first offender. He left behind a son he was looking after as a single parent.

In his *allocutus*, the convict prayed for lenience on grounds that; it is his first time to do this kind of thing. He had never been even to the L.C. before. He wondered how he got here. He requested
10 that the court considers that he has three children. The youngest was born in 2006 and the mother died. He has children from different mothers and they have all been sent to his home and his brother is the one looking after them. The brother had two wives and one died. The younger one has remained. All his children are with the brother. He prayed for a few years to enable him go back home after correction. When in prison he became sick with epilepsy. He was taken to the
15 hospital, up to now his brain does not work properly.

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
20 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
25 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. Although in the instant case the circumstances in which the offence was committed were not life threatening, for which reason I have discounted the death sentence, the convict knew or had reasonable cause to believe that he was HIV positive at the
30 time he committed the offence. He poses a danger to other girls.

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.

10

I have taken into account the mitigating factors as elucidated by the convict and his counsel. Despite that mitigation, the circumstances of the case are sufficiently grave to warrant a deterrent custodial sentence. The convict knew or had reasonable cause to believe that he was HIV positive at the time he committed the offence. The fact that he nevertheless chose to have unprotected sexual intercourse with the two victims is manifestation of a callous disregard of the life of others when he exposed the two victims, to the danger of contracting HIV at the tender age of 3 and 5 years respectively. He used the victims as a mere sexual objects. The accused was aged 45 years at the time of the offence and the age difference between the two victims and the convict was 42 - 40 years respectively. He is old enough to be the grandfather of both victims. His propensity to commit similar offences is very high. It is for those reasons and in light of those aggravating factors, that the convict deserves to spend the rest of his natural life in prison. The convict is hereby sentenced to Life imprisonment in respect of Count 1 and another sentence of Life imprisonment in respect of Count 2. He is to spend the rest of his natural life in prison. Both sentences are to run concurrently.

25

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

Dated at Kitgum this 29th day of November, 2018.

30 Stephen Mubiru
Judge.
29th November, 2018.