

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT KITGUM**

**CRIMINAL SESSIONS CASE No. 0096 OF 2015**

**UGANDA** .....

**PROSECUTOR**

5 **VERSUS**

**KIDEGA MARK** .....

**ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

10 The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (d) of the *Penal Code Act*. It is alleged that the accused on the 1<sup>st</sup> day of January, 2014 at Liba village, Kitgum District, performed an unlawful sexual act with Acan Scovia, a girl under the age of 18 years who was suffering from the nodding disease syndrome.

15 The prosecution case briefly is that on the evening of 31<sup>st</sup> December, 2014 the victim retired to bed together with her two siblings. The other two later sneaked out and went to attend an end of year dance. The accused took advantage of their absence and sneaked into the house where he found the victim was alone, lying on a papyrus mat. She saw him enter and remove his trouser. He went to where she was laying. She had her skirt, petticoat and panty on. He removed the skirt  
20 and her panty. She resisted but he overpowered her. He held her waist and had sex with her. There was no light inside the house but there was a fireplace inside the house with fire burning. She was alone and she made noise calling for help. Her father heard her scream and he came. He found Mark inside the house. He was hiding behind the door. He was still trying to put on the trouser. He was arrested and taken away.

25 Her father P.W.3 Okane Martin testified that on the morning of 1<sup>st</sup> January, 2014 at 5.00 am as he went into the house where he kept the shopping bag and drinking water, he found a phone on top of tyre sandals outside the door. He opened the door and the accused hid behind the door. He

asked the girl whose sandals these were and she did not answer. He began closing the door but the accused held on tightly to it. He struggled as the accused prevented him from closing the door. He raised an alarm and his wife, his brother and other neighbours came. They arrested the accused and called the L.C.1. The matter was forwarded to the police at Kitgum High. The  
5 accused and the girl were examined at the hospital. Apart from the victim, two other children used to sleep in that house. The other two had escaped and gone for a dance that night. The house is about twenty metres from mine. The accused did not have a wife at the time. The victim told her paternal aunts that the accused slept with her twice. The sandals and the phone of the accused recovered from the scene were taken to Kitgum High Police Post. The findings of the  
10 doctor, P.W.1. Dr. Akena Geoffrey of Kitgum Hospital, corroborated his suspicion that a sexual act had just taken place since fresh injuries were found in the victim's genitals

In his defence, the accused denied the accusation. He stated that he spent the night of 31<sup>st</sup> December, 2013 at a dancing place. It was around 4.00 - 5.00 am when he left the dance but was  
15 drunk and confused by the disco lights, ended up using an unfamiliar shortcut and found himself at the home of Okane the father of Acan. He did not enter any house in that home but remained in the compound. Okane came out and asked him who he was. He identified himself. Okane held his hand. Okane's wife too came out and asked who he was. He identified himself once again. Okane's wife made an alarm and the boys around the home came. They flashed a torch into his  
20 eyes and hit his face. He fell down. They picked a rope used for tying cows and tied his legs with a rope. At daybreak he was dragged across the compound and I was tied to a tree. Okane accused him of being found in the house where Acan had been sleeping. The mob began beating him until the arrival of the L.C1 and he told him he did not enter Okane's house but had only been confused by disco lights. He asked for his phone and he told him it had fallen during the  
25 beating. Okane was asked for my phone and he admitted he had it. He gave it to the L.C. he advised us to mediate the matter. He left. The L.C. later called the boys who said he should be taken to the police post. Before they left the place they said they wanted sh. 15,000/= and the phone. When he failed to do that they began taking him to the police. He did not enter the house where Acan was sleeping. He had no grudge with the father of the girl, Okane.

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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  
5 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  
10 372).

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 18 years of age.
- 15 2. The victim is a person with 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 first ingredient of the offence requires proof of the fact that at the time of the offence, the victim was below the age of 18 years. The age of a child may be proved by the production of her  
20 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*).

25 In the instant case, the victim Acan Scovia testified as P.W.5 and stated that she was 18 years old (implying that she was 14 years old four years ago when the offence is alleged to have been committed). Her father P.W.3 Okane Martin, stated that she is about twenty years old now since he was born on 18<sup>th</sup> April, 1998. This is corroborated by the admitted evidence of P.W.1 Dr. Akena Geoffrey of Kitgum Hospital who examined the victim on 2<sup>nd</sup> January, 2014 (a day after  
30 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 about 15 -16 years old at the time of the incident, based on the stage of dental development (31 teeth). From all that evidence and in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Acan Scovia was under the age of 18 years as at 1<sup>st</sup> January, 2014.

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The second ingredient required for establishing this offence is proof that the victim was a person with 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 the nodding disease syndrome. The victim P.W.5 Acan Scovia appeared in court and looked young for her age and extremely shy. P.W.1 Dr. Akena Geoffrey of Kitgum Hospital examined the victim on 2<sup>nd</sup> January, 2014 (a day after that on which the offence is alleged to have been committed). In his report, exhibit P. Ex.1 (P.F.3A) commenting on his findings about the mental status of the victim, he stated that "normal though shy. She is taking drugs for nodding syndrome." 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 third 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 victim P.W.5 Acan Scovia appeared in court and stated that during the evening of 31<sup>st</sup> December, 2013 she lay awake in bed when her assailant opened the unlocked door, entered, removed his pair of trousers, undressed her and began performing an act of sexual intercourse with her prompting her to scream and call for help. Her father, P.W.3 Okane Martin, stated that the following morning of 1<sup>st</sup> January, 2014 at 5.00 am he went into the kitchen where

her daughter and two other children ordinarily slept, to pick a shopping bag and to drink water. He found a man's car tyre sandals outside her door and a phone. On entering he found the half naked man behind the door and arrested him. P.W.1 Dr. Akena Geoffrey of Kitgum Hospital examined the victim on 2<sup>nd</sup> January, 2014 (a 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 her hymen was "ruptured long ago."

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 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.5 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. Although counsel for the accused contested this ingredient during the trial and in her 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 been proved beyond reasonable doubt. Acan Scovia was the victim of a sexual act committed during the night of 31<sup>st</sup> December, 2013.

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. In his defence, he admitted having been arrested on the morning of 1<sup>st</sup> January, 2014 from the compound of P.W.3 Okane Martin after he had lost his way home while returning from a disco, but denied having entered any of the house there let alone having defiled the victim.

To refute that defence, the prosecution relies on the oral testimony of P.W.5 Acan Scovia, the victim, who explained the circumstances in which she was able to identify the perpetrator of the act, and that of her father, P.W.3 Okane Martin, explaining the circumstances in which the

accused was arrested. 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*).

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In the instant case, P.W.5 testified that she knew the accused before the incident as he had proposed to her before. The act occurred inside a house in which there was fire burning at the fireplace. She had ample time to recognise him visually since his presence in the house was discovered in the early morning hours of the following day. Her evidence is free from the possibility of error or mistake. It is corroborated by that of her father P.W.3 Okane Martin who arrested the accused from inside his daughter's house. It is further corroborated by the defence of the accused who admitted having been arrested within that compound, within the vicinity of the scene. He only denies having committed the act. Despite his denial, his explanation that he was drunk and confused by disco lights such that he only had lost his way home to find himself in the compound of P.W.3 Okane Martin, is unbelievable.

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I have not found any reason and neither did he advance any as to why any of the two witnesses could have falsely misrepresented the facts. 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 his defence is not plausible. This ingredient has been proved beyond reasonable doubt.

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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 accordingly convict the accused for the offence of Aggravated Defilement c/s 129 (3) and (4) (d) of the *Penal Code Act*.

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Dated at Kitgum this 30<sup>th</sup> day of November, 2018.

Stephen Mubiru

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Judge.

30<sup>th</sup> November, 2018.

## SENTENCE AND REASONS FOR SENTENCE

5 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 rampant and he is not remorseful. He  
wasted a lot of time and other resources. He planned to commit it and executed it successfully.  
He had convinced her to have sex with him. The victim was vulnerable. She is mentally  
10 abnormal. He proposed a deterrent sentence of at least twenty years' imprisonment.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that;  
the convict is 25 years old, a first offender. At the time he was just barely 20 years and has been  
on remand for four years an eleven months. He was slightly about 20 years as had poor judgment  
15 at the time. He had been drinking. He has seven siblings to look after. He has time and chance to  
correct his life. He should be treated leniently.

In his *allocutus*, the convict prayed for lenience on grounds that; he is an orphan, his father  
having died a long time ago. The one following up is his uncle who is struggling. His sisters have  
20 seven children at home and other children. He requested the court to forgive him since it is his  
first time to come to court.

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  
25 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  
30 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. 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.

5 When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (d) of the *Penal Code Act*, 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 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  
10 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*). 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.

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For other custodial sentences, *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  
20 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.

25 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  
30 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.

5 Although the circumstances of the instant case do not justify the imposition of a sentence of life imprisonment, they are sufficiently grave to warrant a deterrent custodial sentence. The convict victimised a vulnerable person. It is for that reason that I have considered a starting point of fifteen (15) years' imprisonment. The seriousness of this offence is mitigated by a number of factors disclosed in the mitigation of counsel and the *allocutus* of the convict. The severity of the  
10 sentence he deserves has therefore been tempered by those mitigating factors and is reduced from the period of fifteen (15) years, proposed after taking into account the aggravating factors, now to a term of imprisonment of ten (10) years.

It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take  
15 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,  
20 arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 8<sup>th</sup> January, 2014 and been in custody since then, I hereby take into account and set off three years and ten months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of six (6) years, 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.

Dated at Kitgum this 30<sup>th</sup> day of November, 2018.

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Stephen Mubiru

Judge.

30<sup>th</sup> November, 2018.

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