THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0127 OF 2015

UGANDA …… PROSECUTOR

VERSUS

YAWE JOHN …… ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is charged with one count of Simple Defilement c/s 129 (1) of the *Penal Code Act*. It is alleged that on the 24th day of September, 2014 at Lusenke village in Wobulenzi Town Council in Luwero District, the accused performed an unlawful sexual act with Nakirindi Cissy, a girl aged fourteen years.

The facts as narrated by the prosecution witnesses are briefly that the victim was at the material time living with her auntie, P.W.1 Nakirindi Cissy. On or about 24th September, 2014, the victim refused to be subjected to corporal punishment for staying out late at night without permission and chose to escape from home. She went missing and in the course of searching for her whereabouts, P.W.1 met the accused, a village mate at Lusenke village, and requested him to alert her if he ever sighted the victim.

On or about 27th November, 2014, at around midnight, the accused went to the home of P.W.1 and alerted her that he had sighted the victim at the rental unit of a boda-boda rider in Kigulu Zone, Wobulenzi Town, a one Swaibu. He volunteered to direct her to where he had found the victim but he asked her first to get some policemen to accompany them. When they arrived at Swaibu's house, she found that the accused had locked the two inside the house before he went to inform her. Swaibu tried to escape through the window but she managed to arrest him with the help Apollo and Abedi, her neighbours and another woman, Nalongo, with whom they had

proceeded to the scene with some policemen. Swaibu and the victim were taken to the police whereupon the victim denied having had any sexual relations with Swaibu but instead implicated the accused. The accused was arrested from his home later that night and taken to the police station where in his charge and caution statement admitted having had sexual intercourse with the victim since they had been living as husband and wife for months after she fled from her auntie's home. In his defence however, he retracted that confession and stated that he was told to sign it without the content having been explained to him first. He stated that his only involvement was in the search for the missing girl, at the request of P.W.1.

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 Simple Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim was below 18 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 did not testify as her auntie P.W.1 Nakirindi Cissy stated that she had lost contact with her and the last she heard was that the victim was sighted in Juba. The prosecution relies on the testimony of P.W.1 who testified that the victim was aged 13 years at the time of the incident. This witness was not cross-examined on this point, did not appear to be mistaken nor have any reason to misstate the age of the victim. I am therefore inclined to believe her. Her statement of the age of the victim is further corroborated by that of the accused who in his charge and caution statement, exhibit P. Ex. 1, referred to the victim as a "girl" and not a woman. He repeatedly referred to her in similar terms during his defence. Although Counsel for the accused contested this element, in agreement with the joint opinion of the assessors I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Nakirindi Cissy was a girl below eighteen years as at 24th September, 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**.**

In the instant case, the victim did not testify. The prosecution relies entirely on exhibit P. Ex. 1 wherein the accused confessed to have lived with the victim as husband and wife for over two months during which he would have sexual intercourse with her on a daily basis. To constitute a sexual act, 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)*. I find that in agreement with both assessors, that this ingredient has been proved beyond reasonable doubt by the accused's own confession.

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 as the perpetrator of the offence. The accused denied having committed the offence and stated that his only involvement was in the search for the missing girl, at the request of P.W.1.

To disprove the defence, the prosecution relies entirely on the content of the charge and caution statement, exhibit P. Ex. 1, wherein the accused confessed to having lived with the victim as husband and wife for over two months during which he would have sexual intercourse with her on a daily basis. The accused retracted this confession at his trial. It was admitted in evidence following a trial within a trial at the conclusion of which this court formed the opinion that there did not appear to be any evidence, having regard to the state of mind of the accused person and to all the circumstances, to suggest that any violence, force, threat, inducement or promise was brought to bear upon the accused, such as was calculated in the opinion of the court to cause an untrue confession to be made. However, it is the judicial practice not convict on the basis of a retracted confession unless it is corroborated y some other independent evidence. Nevertheless, a court can convict on such a confession after warning itself of the danger of convicting on the uncorroborated confession, if it finds the confession to be true (see *Tuwamoi v. Uganda [1967] EA 84* and *Uganda v. G.W. Simbwa S. C. Criminal Appeal No.37 of 1995*).

I find corroboration of this confession in the conduct of the accused bolting the door to Swaibu's rented room from outside before alerting P.W.1. and his insistence on alerting the police before proceeding to the scene. This is conduct consistent more with a jilted or jealous lover than one who simply happens to have sighted a girl that age that had been reported missing. The fact that P.W.1 found the door bolted from outside as indicated in the charge and caution statement further proves the it to be true. I have considered the defence raised by the accused to the effect that he never understood the content of the statement since it was not read back to him and that his only involvement was in the search for the missing girl, at the request of P.W.1. 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.

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 Simple Defilement c/s 129 (1) of the *Penal Code Act*.

Dated at Luwero this 6th day of February, 2018.

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Stephen Mubiru
Judge.
6th February, 2018

7th February, 2018
10.48 am

Attendance

Mr. Senabulya Robert, Court Clerk.
Ms. Odongo Beatrice, Resident State Attorney, for the Prosecution.
Mr. Asaph Tumubwine, Counsel for the accused person on state brief is present in court
The accused is present in court.
Both Assessors are in court

SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted for the offence of Simple Defilement c/s 129 (1) of *The Penal Code Act*, in justification of a proposed sentence of seven (7) years' imprisonment, the learned Resident State Attorney Mr. Ntaro Nasur holding brief for Ms. Odongo Beatrice, submitted that although he no previous record and the accused has been on remand for three years and four months, he nevertheless, deserves that sentence.

In his submissions in mitigation of sentence, the learned defence counsel Mr. Asaph Tumubwine submitted that court should take into account the conduct of the girl which was also questionable. There were no after affects on the condition of the girl. There was no force used. The convict

was a bread winner since at night he was riding a boda-boda and in the day he was attending to a shop. He had siblings, a mother and the father who have a mental problem and he was the only one assisting them. The age of the girl should be considered. The accused is now 21 years and he is capable of reforming if given a chance. It is not long sentences that can deter a convict. Even short sentences can. The convict told the whole story and thus is capable of reforming. Counsel proposed three years' imprisonment, less the remand period. In his *allocutus*, the convict prayed for a lenient sentence on grounds that while in prison, he contracted hernia in 2015 and yet there is no surgery availed to remand prisoners. It is only available to convicts. He developed a second hernia and cannot engage in hard labour. In prison men sexually assault fellow men and the conditions are unbearable. He is truly sorry for what he did and he will not do it again. He proposed one year's imprisonment.

I have considered the proposed sentences in light of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. According to Item 1 of Part IV thereof (Sentencing range for defilement), the starting point when imposing a custodial sentence for the offence of Simple defilement is 15 years' imprisonment, which can be reduced or increased depending on the mitigating and aggravating factors applicable to the specific case. I have also reviewed current sentencing practices for offences of this nature. In this regard, I have considered the case of *Uganda v. Aringanira Isaac, H. C. Criminal Session Case No. RUK. 17 of 2011*, where a 23 years old man was convicted as a first offender after trial, for the offence of Simple Defilement of a 14 year old girl. He was HIV positive and on drugs but was remorseful, and capable of reforming. He was nevertheless on 13th December 2012 sentenced to 15 years' imprisonment despite having been on remand for one year and eight months. In *Ongodia Elungat John Michael v. Uganda C.A. Cr. Appeal No. 06 of 2002*, a sentence 5 years' imprisonment was meted out to 29 year old convict, who had spent two years on remand, for defiling and impregnating a fifteen year old school girl.

The aggravating factors as provided for by Regulation 35 of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 which are relevant to the instant case are; the age difference of 7 years between the accused and the victim and the numerous acts

of sexual intercourse committed by the convict on the victim. Accordingly, in light of those aggravating factors, I have adopted a starting point of ten years' imprisonment.

The seriousness of this offence is mitigated by a number of factors. The mitigating factors as provided by Regulation 36 of the Sentencing Guidelines which are relevant to the instant case are; the remorsefulness of the convict, being a first offender, a relatively young man with no previous relevant or recent conviction and his plea of guilty. He deserves more of a rehabilitative than a deterrent sentence. The severity of the sentence he deserves for those reasons has been tempered and is reduced further from the period of ten years' imprisonment, proposed after taking into account his plea of guilty, now to a term of imprisonment of six 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 accused. 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 six (6) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict. I note that the convict has been in custody since 1st December, 2014, a period of three years and two months. I therefore sentence the convict to a term of imprisonment of two (2) years and ten (10) months to be served staring 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 Luwero this 7th day of February, 2018.

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Stephen Mubiru
Judge.
7th February, 2018