

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0021 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

ICHETA MARTINE **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused in this case is indicted with one count of Aggravated Defilement c/s 129 (3), (4) (a) and (d) of the *Penal Code Act*. It is alleged that the accused on the 17th day of February, 2017 at Kenya village, in Moyo District, had unlawful sexual intercourse with Maka Kuku, a mentally retarded girl below the age of 14 years.

15 The facts as narrated by the prosecution witnesses are briefly that the victim Maka Kuku, was at the material time a six year old girl, who as a result of a serious bout of malaria attack at the age of three months old, suffered significant mental retardation. On 17th February, 2017, she was left alone at home as her father, P.W.3 Ibrahim Waitando, had gone to attend to his shop, her mother P.W.2 Zaitun Ibrahim, had gone to attend a funeral and her elder sister, P.W.4. Binti Medina, had
20 gone to school. Later, the accused reported to work at the home where he had been contracted as a casual labourer by P.W.3 to repair the floor of his house. When P.W.4. returned home from school during the lunch break, from a distance of about ten metres she heard Kuku crying from the bath shelter. She called her and she responded. She came out of the bath shelter and she asked her what she had been doing there. Maka Kuku said the accused had called her into the
25 bath shelter, he had made her to lie down and then a had lain on top of her and had put his thing in hers (she clarified that by "thing" she meant the private parts). She was prompted by that answer to examine her sister and she saw something white that looked like pus on her thighs and on her private parts. She left the victim at the home of a neighbour and returned to school.

When her parents returned home later that evening, she narrated the events that had occurred in their absence. The mother too checked Maka and found her private parts injured. There was blood coming out and a sticky white substance. Maka too told her that Martine took her to the bathe shelter and lay with her. The following day, the accused was arrested when he reported to work and taken to the police where both the accused and the victim were medically examined.

In the unsworn statement he made in his defence, the accused denied having committed the offence. He stated that although he worked at the home of the victim's parents that day, he neither saw the victim nor P.W.4. The father of the victim P.W.3 Ibrahim Waitando, from time to time returned home to check on the progress of his work, invited him for lunch and sent him on errands of collecting additional construction material. At the end of the day's work, they returned together home and talked over modalities of payment, whereupon it was agreed that he would be paid his wages the following day, upon completion of the work. That evening, there was no complaint of the nature now leveled against him and for that reason he returned the following day to continue with his work only to be surprised with an arrest on account of this false accusation. He attributed the false accusation to the fact that P.W.3 hatched it as a plan to evade responsibility for paying him his wages.

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 below 14 years of age.
2. The victim is a person with a mental 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 14 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
5 common sense assessment of the age of the child. In the instant case, the victim herself Maka Kuku appeared in court as P.W.5 and stated that she is five years old. Being of an apparent age of less than fourteen years, she had to undergo a *voire dire* before she could testify. P.W.2 Zaitun Ibrahim, her biological mother, testified that Maka Kuku is six years old now while P.W.3 Ibrahim Waitando, her father, testified that Maka Kuku is now seven years old and was six years
10 old last year. I consider this discrepancy to be minor more especially because it does not bring her age anywhere close to fourteen years.

In any event, the admitted evidence of P.W.1 Kizza Francis a Senior Clinical Officer of Logoba Health Centre III who on 18th February, 2017 (a day after that on which the offence is alleged to
15 have been committed) is to the effect that Maka Kuku was found to be six years old. His report, exhibit P. Ex.1 (P.F.3A) certified his findings. Moreover, Counsel for the accused did not contest this ingredient during cross-examination of these witnesses and in his final submissions. I have considered the evidence as a whole and find that it has been proved beyond reasonable doubt that by 17th February, 2017, Maka Kuku, was a girl under the age of fourteen years.

20 The next ingredient requires proof that Maka Kuku is a person with a disability. Under section 129 (7) of *The Penal Code Act*, "disability" is defined as a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation. P.W.2 Zaitun Ibrahim her biological mother, testified that
25 Maka Kuku was a victim of malaria which caused her some mental retardation. Her father, P.W.3 Ibrahim Waitando, testified that three months after birth, Maka Kuku suffered a serious bout of malaria which affected her mind. Maka Kuku herself appeared in court as P.W.5 and the court was able to see some physical signs of mental impairment, such as saliva drooling uncontrollably from her mouth and her limited ability to give rational answers questions put to
30 her during the *voire dire*, the examination in chief and cross-examination.

P.W.1 Kizza Francis a Senior Clinical Officer of Logoba Health Centre III, examined the victim on 18th February, 2017 (a day after the one 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 she had a "mental retardation as a result of permanent
5 neurological damage due to cerebral malaria suffered at three months old." Counsel for the accused did not contest this fact in his cross-examination of the witnesses and in his final submissions. I am therefore satisfied that the prosecution proved beyond reasonable doubt that by 17th February, 2017, Maka Kuku, was a girl under a mental disability.

10 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, P.W.5 Maka Kuku stated that someone touched her private parts. She
15 demonstrated where she was touched by pointing to her private parts and said he touched it with his hands for nothing. She was sitting or squatting when he touched her on the susu and that she felt pain. Her thirteen year old sister P.W.4. Binti Medina, testified that on that day, when she returned home from school during the lunch break, from a distance of about ten metres she heard Kuku crying from the bath shelter. She called her and she responded. She came out of the bath
20 shelter and she asked her what she had been doing there. She said the accused had called her into the bath shelter, he had made her to lie down and then a had lain on top of her and had put his thing in hers (she clarified that by "thing" she meant the private parts). She was prompted by that answer to examine her sister and she saw something white that looked like pus on her thighs and on her private parts.

25 Both witnesses, P.W.4 and P.W.5 had their evidence admitted under section 40 (3) of *The Trial on Indictments Act*, according to which where evidence admitted by virtue of that subsection is given on behalf of the prosecution, the accused is not liable to be convicted unless that evidence is corroborated by some other material evidence in support thereof implicating him or her. The
30 evidence of both P.W.5 and P.W.4 therefore by law requires corroboration. I find corroboration in the testimony of P.W.2 Zaitun Ibrahim the biological mother of the victim, who testified that

upon receiving a report of the incident later that evening, from P.W.4 Binti Medina, she too checked Maka Kuku and found her private parts injured. There was blood coming out and a sticky white substance. Maka told her further that Martine took her to the bathe shelter and lay with her.

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It is further corroborated by the admitted evidence of P.W.1 Kizza Francis a Senior Clinical Officer of Logoba Health Centre III, who examined the victim on 18th February, 2017 (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 on the genitals of the victim he found a crack-like bruise, though the hymen was intact and in his opinion this injury was as a result of attempted penetrative sex. Counsel for the accused contested this ingredient during the cross-examination of the witnesses and in his final submissions. I am therefore satisfied that the prosecution has proved beyond reasonable doubt that Maka Kuku, was the victim of a sexual act that occurred in the bath shelter at the home of her parents on 17th February, 2017.

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Lastly, the prosecution had to prove that it is the accused that 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 in his unsworn statement totally denied any involvement. He stated that although he worked at the home of the victim's parents that day, he neither saw the victim nor P.W.4. On that day, the father of the victim P.W.3, Ibrahim Waitando, from time to time returned home to check on the progress of his work, invited him for lunch and sent him on errands of collecting additional construction material. At the end of the day's work, they returned together home and talked over modalities of payment. There was no complaint of the nature now leveled against him and for that reason he returned the following day to continue with his work only to be surprised with an arrest on account of this false accusation. He attributed the false accusation to the fact that P.W.3 hatched it as a plan to evade responsibility for paying him his wages.

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In support of that defence, counsel for the accused in his final submissions argued that there are a number of contradictions in the testimony of the various prosecution witnesses that render their evidence unreliable and that the defence of the accused should therefore be believed. It is trite

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law that grave contradictions unless satisfactorily explained may, but will not necessarily result in the evidence being rejected and minor contradictions and inconsistencies, unless they point to a deliberate untruthfulness, will usually be ignored (see *Alfred Tajar v. Uganda*, EACA Cr. Appeal No.167 of 1969, *Uganda v. F. Ssembatya and another* [1974] HCB 278, *Sarapio Tinkamalirwe v. Uganda*, S.C. Criminal Appeal No. 27 of 1989, *Twinomugisha Alex and two others v. Uganda*, S. C. Criminal Appeal No. 35 of 2002 and *Uganda v. Abdallah Nassur* [1982] HCB). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

- 10 The contradictions in the prosecution case include the following;- the father of the victim testified that he left the victim's mother home on that day by which time the accused had reported for work whereas the mother testified that by the time she left, the accused had not reported for work; the father of the victim testified that his wife followed her later and they spent the day at the shop while the wife testified that she went to attend a burial after leaving home; the father of
- 15 the victim testified that he learnt about the sexual assault of the victim at around 11.00 am when he received a call from P.W.4. while on her part P.W.4 testified that she never made any phone calls, never informed anyone about the incident and only briefed her parents in the evening upon their return home.
- 20 What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements
- 25 necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case. The contradictions highlighted by counsel only relate to the destination of departure of the two parents that morning, the time at which they obtained information relating to the crime and the means by which they were informed. All these in my view are collateral issues to the elements of the offence that have to be
- 30 proved. For that reason I find them to be minor contradictions.

I have considered the range and character of the contradictions so highlighted. I have not found them to be grave in so far as they relate to matters which are peripheral to the central issues in the case. Indeed P.W.3 while under cross-examination retorted that he was not a computer to be expected to retain all the details in his memory. I find the contradictions to be the inevitable
5 result of the passage of time and fallibility of human memory. The retention span of details of events varies from one individual to another and the mere fact that two witnesses contradict one another when relating from their memory what they recall of an event does not necessarily imply that they are untruthful. I have not found any evidence to suggest that the contradictions were the result of deliberate untruthfulness on the part of any of the witnesses to whom they are attributed.

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To counter the defence raised by the accused and the submissions of counsel regarding the impact of contradictions, the prosecution relies on the evidence of the victim herself, P.W.5 who in court pointed at the accused as the person who touched her private parts. It also relies on the testimony of her thirteen year old sister P.W.4. Binti Medina, who testified that she saw the
15 accused's legs through the lower section of the bathe shelter which was open and that she recognised him when he came out of the bathe shelter after the victim,. She even spoke to him asking what the problem was but the accused did not answer. She left the accused repairing the floor of her father's house, took the victim to a neighbour and returned to school.

20 This being evidence of identification, it is trite law that to sustain a conviction, a court may rely on identification evidence given by an eye witness. However, it is necessary, especially where the identification is made under difficult conditions, to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. To do so, the Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct
25 identification. Before convicting solely on strength of identification evidence, the Court ought to warn itself of the need for caution, because a mistaken eye witness can be convincing, and so can several such eye witnesses.

I am satisfied on consideration of all the conditions that prevailed at the scene that the factors
30 which favored correct identification were far greater than those that were unfavourable, if any. It was during day time and the observation was aided by daylight since the shelter was neither

roofed nor fully enclosed. Both witnesses came into close proximity of the accused. Both knew the accused before and had ample time to have an unimpeded look at him. I have not found any significant unfavourable circumstances which could have negatively affected their ability to see and recognise the accused. None of the two witnesses could have been mistaken and I find their evidence therefore to be free from the possibility of error or mistake.

Nevertheless, this evidence requires corroboration having been admitted under section 40 (3) of *The Trial on Indictments Act*, according to which where evidence admitted by virtue of that subsection is given on behalf of the prosecution, the accused is not liable to be convicted unless that evidence is corroborated by some other material evidence in support thereof implicating him or her. The evidence of both P.W.5 and P.W.4 therefore by law requires corroboration. I find corroboration of this aspect of identification in the fact that in his defence, the accused admitted having worked at the victim's home on that day, repairing the floor of P.W.3 Ibrahim Waitando's house by leveling and compacting murram. Counsel for the accused contested this ingredient during cross-examination of the prosecution witnesses and in his final submissions.

For that reason, in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that it is the accused who committed the sexual act on Maka Kuku. 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), (4) (a) and (d) of the *Penal Code Act*.

Dated at Adjumani this 19th day of February, 2018.

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Stephen Mubiru
Judge.
19th February, 2018.

20th February, 2018

9.05 am

Attendance

Ms. Baako Frances, Court Clerk.

Ms. Jacqueline Bako, the Resident State Attorney of Moyo, for the Prosecution.

Mr. Jurugo Isaac holding brief for Mr. Lebu William, 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 Aggravated Defilement c/s 129 (3), (4) (a) and (d) 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 grave. It attracts the death penalty. It is also a very rampant offence. The victim was and is still a very young girl. She is a child with disability. The convict betrayed the trust the victim's parents had in him. To some extent one can say he was earning a living from the parents. They did not suspect that the convict would indulge in this kind of mischief but believed the victim would be in safe hands only to be proved wrong. He prayed for a deterrent sentence of 25 years' imprisonment.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; the accused is deeply remorseful. He is a first offender with no previous record. He is a young person at 19 years old. He still has a lot ahead of him at that young age. He has been on remand for eleven months. The state has sought twenty five years. The sentencing trend now is that prisoners should be given time to reform for they will be useful to society. He can be useful in other work. A long prison sentence would be destructive to a young person. He may be unproductive because of psychological harm. He deserves about ten years' imprisonment. In his *allocutus*, the convict stated that; he is an orphan. During the death of his father he was the only responsible child at home. He has siblings whom he was looking after. The years should be reduced so that he can go home and take care of the family. He prayed for four years' imprisonment that will enable him to join them so that he proceeds with life. He prayed for lenience. Right now he is confused because no one has gone to visit him in prison. He feels weak

because all along in his life he has been doing heavy work. He has pain in his kidney that was caused by beating.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s
5 129 (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.

10 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
15 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
20 sentence. At the time of the offence, the accused was 21 years old and the victim 6 years old, and
mentally retarded. The age difference between the victim and the convict was 15 years. He
abused the trust of the parents and scandalized two children.

I have considered the decision in *Kato Sula v. Uganda, C.A. Crim. Appeal No 30 of 1999*, where
25 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
30 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.

5 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 fifteen years.

10 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
15 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 eleven years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 28th February, 2017 and has been in custody since then, I hereby take into account and set off one year as the period the convict has already spent on remand. I therefore
20 sentence the convict to a term of imprisonment of fourteen (14) years, 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.

25 Dated at Adjumani this 20th day of February, 2018.

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Stephen Mubiru
Judge.
20th February, 2018.