

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0106 OF 2016

UGANDA **PROSECUTOR**

VERSUS

BARU SAVIOUR **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) (a) of the *Penal Code Act*. It is alleged that the accused on the 11th day of December, 2015 at Eraji village, in Adjumani District, performed an unlawful sexual act with Mazira Concy, a girl below fourteen years.

The prosecution case is that on the evening of 11th December, 2015 the victim and her elder sister, Ennen, were alone at home as their mother had gone to the market. The accused came to their home and requested for drinking water. When Ennen took him the water by the doorway, he attempted to grab her and Ennen jumped back into the house. The accused instead grabbed the victim whom he carried to a distance of about twenty meters into the bush under a pigeon pea tree from where he defiled her. In the process, P.W.3. Odendi Charles, a proprietor of a video and barber salon nearby, heard the victim scream and went to the direction where he heard it come from and met the victim walking back in a distressed condition. The victim revealed to him that the accused had defiled her and on checking her private parts he was a white, watery, slippery substance. The accused emerged from the bush about two metres away and he was arrested.

In his defence, the accused denied having committed the offence. He instead stated that on the fateful evening he was at the kiosk briefly wherefrom he retired to bed in the house of his namesake Baru, after asking him for some drinking water. He was surprised when a few hours Baru came to him and told him he had been implicated in an alleged defilement of the victim.

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 the victim was below 14 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 Mazira Concy testified as P.W.4 and stated that she was 9 years old, hence 7 years old, two years ago when the offence is alleged to have been committed. Her paternal uncle P.W.3 Odendi Charles testified that he has known the victim since birth and he knows she was born in 2008. This is corroborated by P.W.1 Dr. Paranja Lubanga David, a medical practitioner at Adjumani Hospital, who examined the victim on 12th December, 2015 the day following 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 7 years old at the time of that

examination, based on the fact that her incisors are still serrated and whiter and she had no secondary sexual characteristics. This evidence was not controverted by cross-examination. In agreement with the assessors, I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Mazira Concy was a girl below fourteen years as at 11th December, 2015.

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 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.

P.W.4 Mazira Concy stated that she was abducted from her parents' home in the evening during their absence. She was dragged into the bush beneath a pigeon pea tree where her abductor removed her clothes and his, threw her down, climbed on her as she struggled to get off the ground, spread her legs and pushed the part he uses for urinating into hers. She felt a lot of pain and attempted to scream but the man held her mouth tight and prevented her. Her evidence is corroborated by that of P.W.3 Odendi Charles, who testified that he was in his kiosk when he heard a scream. He went towards the direction from which it came and she met the victim walking towards him while crying. She said she had been defiled. He saw a white substance on her clothes. She lifted the clothes and saw a white, watery, slippery substance on her private parts. She did not want to be touched. Further corroboration is found in the admitted evidence of P.W.1 Dr. Paranja Lubanga David who examined the victim on 12th December, 2015, the day following that on which the offence is alleged to have been committed. In his report, exhibit P. Ex.1 (P.F.3A), he certified his findings that there were abrasions on both sides of the vaginal orifice, the vaginal orifice was widened (2 cms. traverse diameter) but the hymen was intact. He observed further that these were vaginal vestibular blunt trauma injuries. In his opinion, they were consistent with the time and circumstances of the alleged offence.

To constitute a sexual act, it is not necessary to prove that there was deep penetration. 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). The witnesses were cross-examined on this point, and did not appear to be mistaken nor have any reason to misstate the facts as they saw them. Therefore, in agreement with both assessors, I find that this ingredient too has been proved beyond reasonable doubt.

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. The accused denied having committed the offence. He instead stated that on the fateful evening he was at the kiosk briefly wherefrom he retired to bed in the house of his namesake Baru, after asking him for some drinking water. He was surprised when a few hours Baru came to him and told him he had been implicated in an alleged defilement of the victim.

To rebut that defence, the prosecution relies on the prosecution relies on the oral testimony of P.W.4 Mazira Concy who stated that it is the accused who abducted her from her parents' home in the evening, during their absence. He dragged her into the bush nearby beneath a pigeon peas tree where he defiled her. He recognised him because there was light at the doorway from where he abducted her, the accused had initially asked for water for drinking from her elder sister, Ennen, and attempted to grab her when she gave him the water and on escaping, he went for the victim instead. This evidence was admitted under section 40 (3) of *The Trial on Indictments Act*, which requires that when such evidence is given on behalf of the prosecution, the accused is not liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him.

Her evidence was corroborated by that of P.W.3 Odendi Charles, who testified that on hearing a scream and going into the direction from which it had come, the accused emerged from the bush within two meters of where he found the victim in a distressed condition. The victim then pointed out the accused as her defiler and the accused was detained in that home for night.

This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witnesses 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 witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused.

As regards familiarity, both identifying witnesses knew the accused prior to the incident. In terms of proximity, the accused was very close. As regards duration, the accused first talked to the victim's elder sister asking for drinking water, in her presence and he saw him try to grab her. That was long enough a period to aid correct identification. She also recognized him by voice as he spoke to her elder sister. Lastly, the act was performed in the bush under a pigeon tree in conditions of darkness, there was light at the doorway from which the victim was abducted, which provided sufficient light to aid her recognition of the accused and later when P.W.3 came to the scene, he flashed s torch at when examining the victim and at the accused as he emerged from the bush nearby. In light of that evidence, it appears to me that the defence put up by the accused has been effectively disproved by the prosecution evidence, which has squarely placed the accused at the scene of crime as the perpetrator of the offence for 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 Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*.

Dated at Adjumani this 28th day of February, 2018.

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

1st March, 2018

9.00 am

Attendance

Ms. Baako Frances, Court Clerk.

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

Mr. Jurugo Isaac, 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) and (4) (a) of the *Penal Code Act*, the learned Resident State Attorney prosecuting the case Ms. Bako Jacqueline prayed for a deterrent custodial sentence, on grounds that; the offence is rampant in the community. The accused had sex with a seven year old victim exposing her to early sex and his conduct traumatised her and she broke into tears as she testified. The convict is not remorseful and is dangerous. He has to be kept away from the community. He deserves 50 years imprisonment to enable the victim ample time to recover from the psychological effect.

In response, the learned defence counsel Mr. Jurugo Isaac prayed for a lenient custodial sentence on grounds that; the convict has no previous criminal record. He is now 23 years and was 21 at the time. He is still young and can learn from a reformatory sentence. It is unfortunate that he was engaged with a young girl aged seven. He has been on remand for two years and two months. He proposed a sentence of fifteen years' imprisonment. In his *allocutus*, the convict prayed for lenience on grounds that; he is now 23 years old. He lost both parents. He lives with his grandmother and they are left only three in the family. His younger brother is in school and he is living with the grandmother who cannot give him support. He prayed to be given a sentence that will enable him support his grandmother. He proposed five years' imprisonment.

In his victim impact statement Mr. Aliku James, a brother of the victim, stated that the convict denied all the facts and therefore he never felt sorry for what he did. They cannot feel sympathy for him since he lived in the same home with them. He deserves life imprisonment because when he comes back he will be tempted to do the same thing.

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 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 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. I have considered the circumstances in which the offence was committed which were not life threatening, in the sense that death was not a very likely consequence of the convict's actions, for which reason I have discounted the death sentence.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of life imprisonment. Only one aggravating factor prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case, i.e. the victim was defiled repeatedly by an offender who is supposed to have taken primary responsibility of her. 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 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*).

There are cases where the crimes are so wicked that even if the offender is detained until he or she dies it will not exhaust the requirements of retribution and deterrence. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required (see *R v. Edward John Wilkinson and Others (1983) 5 Cr App R (S) 105 at 109*). 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.

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. At the time of the offence, the accused was 21 years old and the victim 7 years old. The victim was an infant. The age difference between the victim and the convict was 14 years. He took advantage of the absence of the parents of the child and dragged her from home at night. The child went through a harrowing experience whose emotional and psychological effect were still visible when she testified in court.

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.

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 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.

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 traumatised the victim physically and psychologically. It is for that reason that I have considered a starting point of twenty five years' imprisonment. The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender, of a relatively youthful age and he has considerable family responsibilities. The severity of the sentence he deserves has therefore been tempered by those mitigating factors and is reduced from the period of twenty five years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty one 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 twenty one years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 22nd December, 2015 and been in custody since then, I hereby take into account and set off two years and two months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of eighteen (18) years and ten (10) 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 Adjumani this 1st day of March, 2018.

.....
Stephen Mubiru
Judge.
1st March, 2018