

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0011 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

DRANYUMA JOSEPH **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) 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.

15 The prosecution case briefly is that the accused had a garden near the home of the victim's parents. Whenever he would come to his garden, he would ask for fire to light his cigarettes or water for drinking from the home of the victim's parents. On the 11th day of December, 2015 the accused went to the home of the victim in the absence of her parents. He enticed her away into the bush on the pretext of going out to find "Uba" fruits. While in the bush under a temporary
20 shelter known as "Uchi," he ordered the victim to undress and threatened her not to tell anyone about what was happening. He proceeded to commit an act of sexual intercourse with the girl after which he collected some pieces of firewood which he placed on her head and they began to walk back home.

25 In the meantime, the parents had returned home and realised the victim was missing. They had alerted some of their neighbours and a search for the accused and the victim had been mounted. The search party met the two as they were on their way back home. On sighting the search party, the accused attempted to flee but the father of the victim pointed a bow and arrow at him and he stopped. He was arrested and upon the victim disclosing that the accused had defiled her while in
30 the bush, both were taken for medical examination.

In his defence, the accused admitted having been found with the girl but said she had been collecting firewood as he cut logs nearby. He denied having enticed the victim into the bush to find "Uba" fruits or had sexual intercourse with her. He attributed the accusation to an existent grudge between him and the father of the victim which arose on 14th July, 2016 when warned
5 him to stop grazing his cows in the accused's garden and that that should be the last time. The father of the victim had an ox for his ox-plough and about six goats yet he had no pasture. His goats normally destroyed the accused's maize.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt.
10 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
15 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*).

20 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.

25 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
30 *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

In this case In this case the victim Kojoki Evaline testified as P.W.4 and stated that she was 9 years old, hence 7 years old nearly two years ago when the offence is alleged to have been committed. Because of her apparent age, a *voire dire* had to be conducted before it was determined that she was competent to testify. Her father Kotevo Bosco testified as P.W.2 and
5 said she was born in 2009. Her mother Esther Bayoa testified as P.W.3 and stated that the victim is now nine years old. Their testimony is corroborated by that of P.W.1 Mr. Kizza Francis, a Medical Clinical Officer at Logoba Health Centre III who examined the victim on 27th July, 2016, four days after the offence was 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 having been born on 5th
10 May, 2009 at Aya Health Centre II, based on her immunisation card and her dentition of 24 teeth. 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 Kojoki Evaline was a girl below the age of fourteen years as at 11th December, 2015.

15 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
20 *Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)*). The slightest penetration is enough to prove the ingredient.

The victim in this case Kojoki Evaline testified as P.W.4 and stated that she was enticed away from her parents' home by a man on the pretext of going out into the bush to find "Uba" fruits.
25 From the bush under a "Uchi" the man undressed her, lay on top of her, spread her legs and put the thing he uses for urinating into hers. She felt a lot of pain to the extent that she could not pass urine. This in my view is a child's expression of an act of sexual intercourse. This being evidence admitted under section 40 (3) of *The Trial on Indictments Act*, and given on behalf of the prosecution, the accused is not liable to be convicted unless the evidence is corroborated by some
30 other material evidence in support thereof implicating him.

I find corroboration in the evidence of P.W.1 Mr. Kizza Francis, a Medical Clinical Officer at Logoba Health Centre III who examined the victim on 27th July, 2016, four days after the offence was alleged to have been committed. In his report, exhibit P. Ex.1 (P.F.3A) he certified his findings that "the hymen was intact but fairly dilated with no obvious bruises around the labia.

5 Her father P.W.2 Kotevo Bosco testified that when they met her coming from the bush, she told them that the accused had taken her to the bush, made her undress, lie down and began having sexual intercourse with her. She complained of pain in the lower abdomen and had traces of wet tears on her cheeks. He examined her and saw semen on her clothes and in her private parts. Her mother P.W.3 Esther Bayoa testified that she was present when the girl narrated that story and
10 during her medical examination whereupon she saw a white substance flowing from her private parts. 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*). Although all the witnesses were cross-examined on this point, and
15 it was suggested to them that the wetness could have resulted from crossing a stream, they did not appear to be mistaken nor have any reason to misstate that what they saw was semen and not water. I am therefore inclined to believe them. Therefore, in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

20 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. In his defence, the accused admitted having been found with the girl but said she had been collecting firewood as he cut logs nearby. He denied having enticed the victim
25 into the bush to find "Uba" fruits or had sexual intercourse with her. He attributed the accusation to an existent grudge between him and the father of the victim which arose on 14th July, 2016 when warned him to stop grazing his cows in the accused's garden and that that should be the last time. The father of the victim had an ox for his ox-plough and about six goats yet he had no pasture. His goats normally destroyed the accused's maize.

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To rebut that defence, the prosecution relies on the oral testimony of P.W.2 Kojoki Evaline who stated that she knew the accused used very well before the incident as he used to collect fire from their home whenever he came to his garden nearby and that on that day it is him who enticed her into the bush from where he defiled her. This was corroborated by Her father P.W.2 Kotevo
5 Bosco who testified that he met the victim and the accused coming from the bush with the victim carrying firewood on her head. Similar evidence was given by her mother P.W.3 Esther Bayoa. I find the fact that the accused attempted to run away on seeing the search party to be inconsistent with his claimed innocence. I have considered the defence raised by the accused and I have found it to be incredible, hence his defence has been effectively disproved by the prosecution
10 evidence, which has squarely placed him 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
15 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 1st day of March, 2018.

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Stephen Mubiru
Judge.
1st March, 2018.

1st March, 2018
9.00 am

25 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.

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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; although he has no previous conviction, the offence is rampant. He is not remorseful and wasted court's time when he knew he committed the act. He exposed the victim to early sex and trauma. He should be given a deterrent custodial sentence of 45 years to enable the victim recover and it would deter
5 the re-occurrence of the offence in the community.

In response, the learned defence counsel Mr. Barigo Gabriel prayed for a lenient custodial sentence on grounds that; the convict has no previous criminal record. It is regrettable that he acted that way. He is an adult of sound mind. He should be able to appreciate his conviction. He
10 has a family, a peasant farmer and bread winner for the family. The family is youthful and needs to be protected. He has been on remand for some time. He looks a person who can reform and if given a lenient sentence he should be able to reform. He proposed nine years' imprisonment. In his *allocutus*, the convict prayed for lenience on grounds that; he is sorry for what he did. His father died and his mother is elderly, he was the one taking care of him. He is married and has
15 two children. The younger one died when he was in prison. The husband of his sister died and had four children all of whom were under his care. He prayed for a lenient sentence so that it will help him return and help his family. If imprisoned for a long time it will be as if his family too is imprisoned. He proposed five years' imprisonment so that he can find his family still surviving.

20 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)*
25 (*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
30 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
5 life imprisonment. None of the aggravating factors prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case. 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
10 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
15 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.

20 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 28 years old and the victim 7 years old. The
25 age difference between the victim and the convict was 21 years. The victim was an infant. He took advantage of the absence of the parents of the child and took her into the bush. The child went through a harrowing experience whose emotional and psychological effect were still visible when she testified in court.

30 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.

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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 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 two years.

30 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 3rd August, 2016 and been in custody since then, I hereby take into account and set off one year and six months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of nineteen (19) years and six (6) months, 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 Adjumani this 2nd day of March, 2018.

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Stephen Mubiru
Judge.
2nd March, 2018..