

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0012 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

MAWADRI JOEL **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 Following an amendment of the Indictment, the accused is indicted with one count of Simple Defilement c/s 129 (1) of the *Penal Code Act*. It is alleged that the accused on the 5th day of September, 2016 at Acimari East village in Moyo District, performed an unlawful sexual act with Osoru Gertrude, a girl under 18 years of age.

15 The prosecution case briefly is that the victim in this case P.W.2 Osoru Gertrude was on her way back home at night from a confirmation ceremony when she was accosted by the accused who threw her onto the ground, tore her panties off and had sexual intercourse with her. The following day she reported the incident to her brothers and the accused was arrested a day after.

20 In his defence, the accused denied having committed the offence. He stated that on 4th September, 2015 at around 9.00 pm he went to Acimari Central trading Centre. He later entered a disco hall at around 10.00 pm. He was there with some of his cousins and visitors. At around midnight while at the disco, he saw the victim was at the disco with her boyfriend called Madrama who is one of his neighbours at home. He returned home to sleep at around 3.00 pm
25 and on 5th September, 2015 he heard rumours that he had sexually assaulted a girl and was surprised when on 6th September, 2015 he was arrested.

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
30 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
5 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
10 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.

15 The first ingredient of the offence of Simple defilement is proof of the fact that at the time of the offence, the victim was below the age of 18 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
20 *Uganda v. Kagoro Godfrey H.C. Crim. Session Case No. 141 of 2002*).

In this case the victim P.W.2 Oloru Gertrude stated that she was 17 years, hence 15 years old slightly over two years ago when the offence is alleged to have been committed. It is her father who told her, her age many years ago. This is corroborated by P.W.1 Mr. Erima Ezekiel, a
25 Clinical Officer at Obongi Health Centre IV who examined the victim on 5th September, 2015 the day 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 the victim was 16 years old at the time of that examination, based on physical appearance. The court had the opportunity to see the victim testify and in agreement with the joint opinion of the assessors I find that on basis of the available evidence,
30 the prosecution has proved beyond reasonable doubt that Oloru Gertrude was a girl below eighteen years as at 5th September, 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.

In the instant case, the victim P.W.2 Osooru Gertrude stated that she was on her way back home at night from a confirmation ceremony when she was accosted by the accused who threw her onto the ground, tore her panties off and had sexual intercourse with her. P.W.1 Mr. Erima Ezekiel the Clinical Officer at Obongi Health Centre IV who examined the victim on 5th September, 2015 stated in his report, exhibit P.Ex.2 (P.F.3A) that he "noted no bruising or tear in the genitalia. The hymen appears to have been ruptured before the current incident." His other observations were that the victim had a "bruise at the left facial region. Tenderness at the right side of the neck approximately a day old. Tenderness at the area of the left first to fourth ribs."

It note that medical examination done soon after the incident did not reveal any bruising or tear in the genitalia of the victim, tell-tale injuries that are otherwise ordinarily associated with sexual assault. However, under section 133 of *The Evidence Act*, subject to the provisions of any other law in force, no particular number of witnesses in any case is required for the proof of any fact. Evidence is not to be counted but only weighed and it is not the quantity of evidence, but the quality that matters. Consequently, even in a case like this one which is more or less of "she said, he said" character, the testimony of a single witness, if believed, is sufficient to establish any fact that requires proof. It is only if some aspect of that testimony is found unreliable or lacking that the court will look for corroboration.

I observed the victim as she was being examined in chief as well as under cross-examination. I undertook a credibility, common sense and ordinary experience evaluation of her testimony to determine its accuracy and truthfulness. I undertook an evaluation of her narration through the by considering her demeanour, perception, memory, sincerity and veracity, testing it against other

independent pieces of evidence that implicitly corroborated or undermined its accuracy or veracity. She appeared to me to be making a good faith effort to fully and accurately give her recollection of the facts. I did not detect any deliberate attempt to tell lies or concealment of information. She gave her narration in a matter of fact manner, without any apparent emotion.

5 She answered questions without hesitation, even when they related to matters of a very private and personal nature. Her recollection of the facts appeared accurate and complete, without distortion or influence from conversations or questions she any have had with others. She understood all the questions put to her quite well and gave well articulated answers. Her demeanour, from the perspective of her manner of speech, pauses, physical appearance and
10 apparent confidence, was not wanting in any significant way. She stated the facts consistently without self-contradiction and the manner in which she handled the cross-examination showed her to be honest and dependable.

Considering the compatibility of her testimony with other independent evidence in the case, I
15 found her testimony to be consistent with that of P.W.1 Mr. Erima Ezekiel the Clinical Officer at Obongi Health Centre IV who upon examining her found a bruise at the left facial region, tenderness at the right side of the neck, and tenderness at the area of the left first to fourth ribs, all approximately a day old. These injuries were consistent with the manner in which she said the sexual assault happened. She was thrown onto the ground, and the assailant grabbed her neck to
20 stop her from screaming. That she did not sustain similar injuries in the genitalia does not cast doubt on her veracity since injuries there are usually associated with the victim's capacity to put up resistance. She was candid in her statement that she felt the assailant ejaculate inside her and that after the act she found semen on her private parts and on her skirt.

25 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). Therefore in disagreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

30 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. He testified that on 4th September, 2015 at around 9.00 pm he went to Acimari Central trading Centre. He later entered a disco hall at around 10.00 pm. He was there with some of his cousins and visitors. At around midnight while at the disco,
5 he saw the victim was at the disco with her boyfriend called Madrama who is one of his neighbours at home. He returned home to sleep at around 3.00 pm and on 5th September, 2015 he heard rumours that he had sexually assaulted a girl and was surprised when on 6th September, 2015 he was arrested.

10 To disprove the defence, the prosecution relies entirely on testimony of the victim, P.W.2 Oso
Gertrude who stated that she knew the accused before and that she recognised the accused by voice and by appearance. This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witness was able to recognise the accused. In circumstances of this nature, the court is required to first warn itself of the likely
15 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 witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe
20 and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused.

As regards familiarity, the witnesses knew the accused prior to the incident. In terms of proximity, this being a sexual offence of a nature that required physical intimacy, the accused
25 were very close to the victim. As regards duration, the accused first talked to the victim before he threw her down and a struggle ensued. It was not a sudden attack by a stranger. That was long enough a period to aid correct identification. Both witnesses also recognized him by his voice they had heard him speak to them before. Lastly, although it happened outdoors at night, the victim was walking home from which it may be inferred that the light was sufficient to enable
30 her see the way home and thus sufficient to recognise an acquaintance from close quarters.

On the other hand, her evidence is corroborated by the accused who in his defence admitted that he met her at a disco. The implication that the victim and the accused told two different versions whose common factor is that they met that night; the accused saying it was at a disco and the victim saying that it was along the road. I note that in the version narrated by the accused, there is no explanation for the injuries sustained by the victim whereas in her version, these injuries are explained as having been sustained in the process of an assault of a sexual nature.

Furthermore, whereas in his statement to the police (P. Ex. 3) the accused did not mention that the victim was present at the disco and instead he said that he did not know the victim at all, his testimony in court placing the victim at the disco and admission that he knew her before as a girl living in the neighbourhood smacks of being an afterthought and of deliberate untruthfulness. Whereas lies told by an accused person may not form the basis of his conviction, deliberate lies told by an accused can provide useful corroboration of the prosecution case (see *Twehamye Abdul v. Uganda, C. A. Criminal Appeal No.49 of 1999*; *Kutegana Stephen v. Uganda C. A. Criminal Appeal No. 60 of 1999* and *Siras Kiiza alias Tumuramy and another v. Uganda, C. A. Criminal Appeal No. 130 of 2003*). Lies are inconsistent with innocence. Proved lies can be used to corroborate prosecution evidence (See *Juma Ramadhan v. Republic Cr. App. No. 1 of 1973* (unreported)). I find that the untruthful version narrated by the accused in his defence, corroborates the testimony of the victim. His defence has been effectively disproved by the prosecution evidence, which has squarely placed him at the scene of crime as the perpetrator of the offence with which he is indicted. Therefore in disagreement 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 Adjumani this 1st day of March, 2018.

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

9th March, 2018

2.48 pm

Attendance

Ms. Baako Frances, Court Clerk.

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

Mr. Barugo holding brief for Mr. Lebu William, Counsel for the accused person on state brief is present in court

The accused is present in court.

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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*, the learned Resident State Attorney Ms. Bako Jacqueline, submitted that though the convict has no previous record of conviction, the offence is rampant. The victim dropped out of school after the incident because at school her classmates were laughing at her. She has since entered an early marriage. The convict is not remorseful and is dangerous. He deserves a deterrent custodial sentence. He should be sentenced to life imprisonment. It would deter the re-occurrence and would enable her heal psychologically.

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In his *allocutus*, the convict prayed for a lenient sentence on grounds that he is an orphan, his father died. His mother is not at home. His grandmother died and he is the one helping his mother. He also helps his siblings with school fees. He is not married and he also is still young. He was 24 years on arrest and in May he will make 26 years. He proposed four years' imprisonment. In his victim impact statement, Mr. Anyanzo Christopher, the victim's stated that the convict should be sentenced to nine years. His daughter was in primary five. By now she would be in P.7 and he was ready to meet her fees to secondary school level. Because of the convict's act, she could not continue. Her fellow pupils would abuse her "Tulenge" (second hand) and therefore she felt out of place at school, She is now cohabiting with a man and is pregnant.

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I have considered the submissions 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 8 years between the accused and the victim. The accused was 24 years old while the victim was 16 years old. As a result of his act, the girl dropped out of school and the trajectory of her life changed for the worse that she is now destined to be a child mother. Accordingly, in light of those aggravating factors, I have adopted a starting point of eighteen 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 eighteen years' imprisonment, proposed after taking into account the aggravating factors, now to a term of imprisonment of thirteen 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 thirteen 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 11th October, 2016, a period of one year and four months. I therefore sentence the convict to a term of imprisonment of twelve (12) years and four (4) 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.

10 Dated at Adjumani this 9th day of March, 2018.

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Stephen Mubiru
Judge.
9th March, 2018.