THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI

CRIMINAL SESSIONS CASE No. 0009 OF 2018

UGANDA …… PROSECUTOR

VERSUS

ODUTI JIMMY …… 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) (b) of the *Penal Code Act*. It is alleged that the accused on the 26th day of August, 2016 at Pacuwai village in Moyo District, performed an unlawful sexual act with Edea Jackline, a girl under the age of fourteen years, knowing that he was HIV positive.

The facts as narrated by the prosecution witnesses are briefly that the victim and her two other siblings were alone at home as their mother had gone to attend a funeral at a neighbouring village where she spent the night. During the night, they came out of the house to ease themselves when they saw a man suddenly emerge from the bush. In fright, they dashed back into the house but the man forded the door open and flashed a light from his mobile phone. The children recognised him as the accused, a man they knew before from the neighbourhood. He asked for the victim's whereabouts saying he wanted to send her to buy him something. When the victim refused to leave the house, the accused grabbed him and took him out of the house. As the other two kids began to scream, he threatened to stab them. He carried the victim to a place approximately 800 meters away, outside an unoccupied house where he threw her onto the ground, undressed her and grabbed her by the throat as he sexually assaulted her. After the act, the accused abandoned the girl at that deserted and isolated spot. Despite the pain, exhaustion and fright, the victim manage to slowly make it back home where she narrated her ordeal to her siblings. When her mother returned home the following morning, the victim narrated her ordeal to her as well. The mother asked her to squat and pass urine and she saw it was bloody. She reported the local authorities who in turn reported to te police and the accused was arrested.

In his defence, the accused denied having committed the offence. He stated instead that he is a footballer and was participating in a football tournament at Nebbi that took place from 17th to 27th August, 2016 and returned on 27thAugust at 3.00 pm only to be surprised by an arrest and being implicated in the alleged aggravated defilement that was said to have occurred the previous day, 26th August, 2016 in his absence. He believes he was framed by the mother of the victim on basis of a grudge arising from the fact that some time before that incident, his brother had been a suspect if committing arson at the victim's mother's homestead and he had since then gone into hiding.

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.
4. That at the time of performing that sexual act, the accused was HIV positive.

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 P.W.2 Edea Jackline testified that she was 11 years, hence approximately nine years old, slightly over one year ago when the offence was allegedly committed. Her mother, P.W.1 Joyce Atimako stated that the victim was born in 2007 and is now 11 years. This is corroborated by the evidence of P.W.4 Kizza Francis, a Medical Clinical Officer at Moyo General Hospital who examined the victim on 27th August, 2016, a day after that on which the offence is alleged to have been committed. In his report, exhibit P. Ex.1 (P.F.3A) he certifies his findings that the victim was 9 years old at the date of examination based on her dentition. The court had the opportunity to see the victim testify and because of her tender age, a *voire dire* had to be conducted before it was determined that she was competent to testify. In agreement with the assessors, I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Edea Jackline was a girl below fourteen years as at 26th August, 2016.

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 P.W.2 Edea Jackline described the nature of the act. A man carried her from her mother's house at night shortly after she had gone out to ease herself, took her outside an unoccupied house about 800 meters away from her home, tore her clothes off, and put his thing which he uses for urinating inside hers while strangling her. He abandoned her there after the act and she struggled to get back home while in deep pain. This is my view is a child's expression of an act of sexual intercourse. Her evidence was admitted under section 40 (3) of *The Trial on Indictments Act,* and since it was 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 is corroborated by her mother P.W.3 Joyce Atimako, who testified that when she returned home drunk from a funeral the following morning, the girl narrated to her the ordeal and she sobered up immediately out of shock. She asked the girl to squat and pass urine and it came out bloody. It is further corroborated by the evidence of P.W.4 Kizza Francis, a Medical Clinical Officer at Moyo General Hospital who examined the victim on 27th August, 2016, the following day. In his report, exhibit P. Ex.1 (P.F.3A) he certified his findings that he saw a "bleeding fauchette (lower) vulva, visible bruise, hymen lacerated." in his opinion, the probable cause was "use of finger nails and possible attempted penetrative sex." He also found multiple scratch marks on her face and a scratch wound on the anterior aspect of her neck.

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)*. This witness although cross-examined on this point, did not appear to be mistaken nor have any reason to misstate the facts. I am therefore inclined to believe her. Therefore, in agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

The other 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 and stated that he is a footballer and was participating in a football tournament at Nebbi that took place from 17th to 27th August, 2016 and returned on 27thAugust at 3.00 pm only to be surprised by an arrest and being implicated in the alleged aggravated defilement that was said to have occurred the previous day, 26th August, 2016 in his absence. He believes he was framed by the mother of the victim on basis of a grudge arising from the fact that some time before that incident, his brother had been a suspect if committing arson at the victim's mother's homestead and he had since then gone into hiding.

To rebut that defence, the prosecution relies on the testimony of P.W.2 Edea Jackline, the victim who explained the circumstances in which she was able to identify the perpetrator of the act, and that of her now six year old sister with whom they were in the house, P.W.3 Ababiku Jocelyn. Both knew the accused as a resident of the neighbourhood where he operated a shop selling groceries. They used to buy groceries from him and they would pass by his kiosk on their way to the church. Once in a awhile he would speak to the victim. While inside the house, he spoke to them asking where victim was and when threatening to stab them if they screamed as he carried the victim away. He also had a flashlight on his mobile phone which he used to locate the victim and by aid of that light they were able to recognise him since he was standing a few feet from where they lay on a papyrus mat. The victim added that she recognised him by the way he walked and as he carried her away she asked him whether she had recognised him and she answered in the affirmative, although the accused continued to deny he was not the one.

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 witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses 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, this being a sexual offence of a nature that required physical intimacy, the accused were very close to the victim and while inside the house, to P.W.3 Ababiku Jocelyn as well. As regards duration, the accused took some time inside the house as he attempted to persuade the victim to come out and run him an errand. As for the victim, it was even longer as she was carried to a distance of approximately 800 metres during which the accused talked to her further. 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. The victim added that she even knew how he walked and further recognised him by that. Lastly, although outdoors near the unoccupied house there was a situation of darkness, there was light from his mobile phone flashlight which provided sufficient light to aid their recognition of the accused while inside the house. On the other hand, their evidence is corroborated by the accused who in his defence admitted that he is the only one among his siblings who owns and operates a kiosk in the neighbourhood. 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 agreement with both assessors, I find that this ingredient has been proved beyond reasonable doubt.

Lastly, it has to be proved that the accused was HIV positive as at 26th August, 2016. Scientific research has established that it takes 95% of the population approximately three months to seroconvert following HIV infection. The window period therefore is generally three months. When an HIV antibody test performed during the window period, the result will be negative, although this will be a false negative since the virus will be present in the body, only that it cannot be detected yet. In the instant case, it was the evidence of P.W.4 Kizza Francis, a Medical Clinical Officer at Moyo General Hospital, who examined the accused on 27th August, 2016 (a day after that on which the offence is alleged to have been committed, as certified in his report, exhibit P. Ex.2 (P.F.24A), that the accused was HIV positive. Since the HIV diagnostic test done on the accused a day after the incident turned out positive, it implies that the window period had elapsed. He therefore must have contracted the virus not less than three months prior to the date of that test, i.e. latest May 2016 and was therefore carrying the virus by 26th August, 2016 when he had sexual intercourse with the victim.

When he personally cross-examined the P.W.4, the accused put it to him that he did not carry out any scientific test but rather heard the accused send for his ARV drugs and from that concluded that he was HIV positive. By the manner of his cross-examination, it appeared that he did not contest the finding but rather the method by which it was arrived at. P.W.4 explained in response that he used the detamine rapid test and the result came out positive for HIV after about five minutes. I have not found any reason why this witness would rely on an utterance of the accused

rather than apply a scientific test with equipment readily available to him and whose results are that quick. Therefore in agreement with the assessors, I find that this ingredient too 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) (b) of the *Penal Code Act*.

Dated at Adjumani this 1st day of March, 2018.

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Stephen Mubiru
Judge.
1st March, 2018.

9th 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; although he has no previous conviction, this offence is of a serious nature. The victim was below 14, school going and he knew he was HIV positive and decided to endanger her. Children need to be protected from people like the accused. A deterrent custodial sentence is deserved. She proposed that he is sentenced to 60 years which will be deterrent enough.

In his *allocutus*, the convict prayed for lenience on grounds that; his mother died in 2010 and he is married with five children and his elderly mother cannot take care of his family. He prayed for a lenient punishment.

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. 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.

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*).

In the instant case, the accused kidnapped the victim at night from the sanctuary of her parents' home in their absence, hence in circumstances when the victim was most vulnerable. This fact on its own would justify the death penalty. Under section 243 (1) (a) of *The Penal Code Act*, a person who by force kidnaps another against his or her will with intent that such person may be murdered or may be so disposed of as to be put in danger of being murdered, is liable on conviction to suffer death. In her testimony, the victim testified that the convict squeezed her neck so tight that it was very difficult for her to breath. Thus the manner in which this offence was committed created a life threatening situation, in the sense that death was a very likely immediate consequence of the act. The victim was put in danger of being murdered, more so since after the act he abandoned her more than 800 metres away from her home and at her tender age of only nine years, she had to find her way home despite the extreme physical pain she was experiencing as a result of the act. The court can only imagine the terror unleashed on this child as she was separated from her siblings, carried away into the night, strangled while being sexually molested and abandoned, left on her own at such an isolated and deserted place.

Furthermore, at the time he committed the offence, the convict was aware that he was HIV positive. This fact too, according to Regulation 22 of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* justifies the death penalty.

At the time of the offence, the convict was 34 years old and the victim 9 years old. The age difference between the victim and the convict was 25 years. The victim was an infant. He took advantage of the absence of the mother of the child to kidnap her. The child went through a harrowing experience whose emotional and psychological effect was still visible when she testified in court. No wonder in his report. the doctor who examined her recommended that she and her mother should undergo counselling. The girl clearly needs urgent psycho-sociological support. I have considered the allocutus of the convict and the mitigating factors advanced pale in light of the aggravating factors. Short of killing the victim, the convict did every imaginable thing that would attract the death penalty. I accordingly sentence the convict to suffer death in accordance with the law.

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 9th day of March, 2018.

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Stephen Mubiru
Judge.
9th March, 2018..