

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0008 OF 2018

UGANDA **PROSECUTOR**

VERSUS

ANYOVI GODFREY SUNDAY **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 7th day of December, 2016 at Olia village, in Adjumani District, performed an unlawful sexual act with Majokua Everline, a girl below the age of fourteen years.

The facts as narrated by the prosecution witnesses are briefly that P.W.2 Lillian Itudria the mother of the victim had left the accused, a son of her brother-in-law, in charge of the home when she went to the refugee settlement camp in Pagirinya. When she returned home, before she could settle down, her daughter Majokua Evalyne ran to her and said that Anyovi did "Driokpwo" to her, meaning sexual intercourse. She asked her how he had done it. She told her the accused had called her to go and lay on his mattress where he sleeps. That when she lay there, the accused used his finger to penetrate her private parts and she cried. Being stressed and tired, she went to bed. The following morning she examined her daughter's private parts and saw a tear. There was some little blood on the spot where the injury was. She reported the case to the local leaders. The accused was then arrested and taken to the police.

In his defence, he denied the offence. He stated that that on 6th December, 2016 he left home in the morning and went Olia trading centre where he bought bread and returned home at 10.00 am. Then he left at around midday in order to attend a football match in Dziapi starting at 3.00 pm. After the match he returned to the village and joined other people in a trans-night celebration of

their victory where after he returned home in the morning to sleep only to be arrested at around 9.00 am. He denied having committed the offence.

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, Majokua Everline, testified as P.W.5 and stated that she was 6 years old, hence 4-5 years old nearly two years ago when the offence is alleged to have been committed. Her mother P.W.2 Lilian Itudria stated that the victim was born on 26th January, 2011 and is now seven years old. Her father, P.W.3 Ondomi Charles, testified that she is now seven years old and

in primary one. P.W.6 Dr. Idoru Joseph Atia, a Medical Officer at Adjumani Hospital who examined the victim on 8th December, 2016, the day following that on which the offence is alleged to have been committed, stated in his report, exhibit P. Ex.1 (P.F.3A) that the victim was below thirteen years old at the time of that examination, because she had no secondary sex characteristics. The court too had the opportunity to see the victim in court and because of her tender age, had to conduct a *voire dire* before it could be determined that she was competent to testify. Therefore in agreement with the assessors, I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Majokua Everline was a girl below fourteen years as at 7th December, 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 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.

The victim stated that she was playing with other children when the accused called her inside the house, lay on top of her and did "Driopkwo" on her and thereafter inserted his finger into her private parts. 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 her mother P.W.2 Lilian Itudria who testified that on her return home at around 7.00 pm the victim ran to her and told her the accused did "Driopkwo" on her. She was too tired to do anything but the following morning she examined the victim's private parts and saw a tear. It is further corroborated by P.W.6 Dr. Idoru Joseph Atia a Medical Officer at Adjumani Hospital who examined the victim on 8th December, 2016, 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 the victim had bruises at the vaginal introitus and the hymen had ruptured recently. In his opinion, the injuries he saw were inflicted by an act of penetration by a blunt firm object.

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 the victim and her mother were cross-examined on this point, none of them appeared to be mistaken nor have any reason to misstate the fact. I am therefore inclined to believe them. Therefore, in agreement with both assessors, I find that this ingredient 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. In his defence, the accused stated that on 6th December, 2016 he left home in the morning and went to Olia trading centre where he bought bread and returned home at 10.00 am. Then he left at around midday in order to attend a football match in Dziapi starting at 3.00 pm. After the match he returned to the village and joined other people in a trans-night celebration of their victory where after he returned home in the morning to sleep only to be arrested at around 9.00 am. He denied having committed the offence.

To rebut that defence, the prosecution relies on the testimony of P.W.5 Majokua Everline who stated that it is the accused that took her into the house and performed that act. This is corroborated by mother P.W.2 Lilian Itudria who testified that the accused was resident at her home as the son of her brother in law and she left him behind on that day to look after the children and the home as she went to the refugee settlement camp in Pagirinya. I find that the offence was committed during daytime. The victim knew the accused very well and I have not found any condition that could have disabled her from recognising him neither have I found any reason why she would falsely accuse him. In his defence, he admitted having been at that home at least up to midday. Having been left in charge of the home, I find his claim to have gone away to attend a football match and thereafter celebrations overnight to be implausible. 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.

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 1st day of March, 2018.

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

9th March, 2018

2.40 pm

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 criminal record, the victim revealed that it was not the first time that he was molesting her using his fingers. He betrayed the trust of the parents. Considering the tender age of the victim of 5 years, the convict deserves a deterrent sentence to restrain him and enable the victim recover physically and psychologically. She proposed 40 years' imprisonment.

In his *allocutus*, the convict prayed for lenience on grounds that; his father died in 2008 and his mother died in 2016. He has 8 siblings and he needs to help them. His grandmother was admitted to hospital.

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. 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 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 convict was 18 years old and the victim 5 years old. The age difference between the victim and the convict was 13 years. The victim was a toddler.

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 years' imprisonment. The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and a relatively young man who deserves more of a rehabilitative than a punitive sentence. The severity of the sentence he deserves has therefore 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 fourteen 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 fourteen years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged in December, 2016 and been in custody since then, I hereby take into account and set off one year and two months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of twelve (12) 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 9th day of March, 2018.

.....
Stephen Mubiru
Judge.
9th March, 2018.