

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0024 OF 2018

UGANDA **PROSECUTOR**

VERSUS

ZUBAIRI RAMANDAN **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is charged 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 28th day of January, 2017 at Kenya village, in Moyo District, performed an unlawful sexual act with Take Easy Immaculate, a girl below the age of fourteen years.

The facts as narrated by the prosecution witnesses are briefly that on that fateful evening, the victim's guardian, P.W.2 Josephine Anguko Jamilar, sent the victim P.W.5 Take Easy Immaculate, to a nearby trading centre to buy flour. On her way back home, the victim met the accused who engaged her in conversation and thereafter dragged her away from the road to a place underneath a tree where he performed an act of sexual intercourse with her. When she returned home, her guardian asked her what had uncharacteristically delayed her. The victim disclosed that the accused had dragged her off the road and defiled her. The accused was summoned to the victim's home, arrested and the case forwarded to the police.

In his defence, the accused stated that he spent the whole day fishing on the river and was returning from fishing in the evening when he was asked by P.W.3 Aliga Felix, the landlord of P.W.2 Josephine Anguko Jamilar the victim's guardian, to follow him to the home of P.W.2 from where he was surprised to be implicated in having defiled the victim. He denied having committed the offence and attributed it to a grudge he had with P.W.2 over a fishing boat.

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*).

The prosecution relies on the testimony of the victim, P.W.4 Take Easy Immaculate who stated that she was 14 years old, hence 13 years old last year when the offence is alleged to have been committed. Her guardian, Josephine Anguko Jamilar, testified as P.W.2 and said she has raised and had custody of the victim since the child was four years old and she is now 14 years. P.W.5 Mr. Kizza Francis a Medical Clinical Officer at Moyo Hospital examined the victim on 2nd February, 2017 (five days after that on which the offence is alleged to have been committed). His report, exhibit P. Ex.1 (P.F.3A) certified his findings that based on her dentition, the victim was

about fourteen years old at the time of that examination. The court had the opportunity to see the victim as she testified in court and despite the opinion of the Medical Clinical Officer, is inclined to agree with the victim and her guardian. Therefore in agreement with the assessors, I find that on basis of that evidence the prosecution has proved beyond reasonable doubt that Take Easy Immaculate was a girl below fourteen years as at 28th January, 2017.

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 court was presented with the oral testimony of the victim P.W.5 Take Easy Immaculate, who stated that she was returning home from buying flour from a mill at around 8.00 pm when a man pulled her to a place under a tree where he had sexual intercourse with her. P.W.6 Mr. Kizza Francis a Medical Officer at Moyo Hospital who examined the victim on 2nd February, 2017, five days after that on which the offence is alleged to have been committed, stated in his report, exhibit P. Ex.1 (P.F.3A) that although the victim was in active menstruation at the time she examined her, when he wiped away the blood he was able to see signs of penetration. I have considered the fact that there had been attempts at examining the victim before that which was done by P.W.6. It was argued by counsel for the accused that the injury seen by P.W.6 could have been inflicted during the two earlier attempts.

I find that what occurred during those examinations was well explained by the victim, the first attempt having failed because the medical personnel appeared to have been laughing at her which made her uncomfortable, and the second attempt because of the pain she felt with the attempt to insert a surgical tool in her vagina for traces of semen. I find that the injury seen by P.W.6 is not one that could have been inflicted by any of the said processes. I saw P.W.6 testify and it did not appear that he could have been mistaken about his observations.

To constitute a sexual act, it is not necessary to prove that there was deep penetration, the use of a sexual organ, the emission of seed or breaking of the hymen. 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 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 he was returning from fishing on that day when he was asked by P.W.3 Aliga Felix to follow him to the home of the victim's guardian from where he was surprised to be implicated in having defiled the victim. He denied having committed the offence.

In order to place him at the scene of crime as the perpetrator of this act, the prosecution relies on the testimony of P.W.5 Take Easy Immaculate who stated that it is the accused that dragged her to a place under a tree and performed that act. She knew the accused before since they lived in the same neighbourhood and on the fateful day, he engaged her in some talk before dragging her away. It was not a sudden attack by a stranger. She therefore had ample time to recognise him. Although it was dark, the accused was in close proximity. Her prior knowledge of the accused is corroborated by the accused himself who in his defence admitted they were lovers, although he denied that the affair involved sexual intercourse. 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.

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Stephen Mubiru
Judge.
1st March, 2018.

9th March, 2018

3.00 pm

Attendance

Ms. Baako Frances, Court Clerk.

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

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

The accused is present 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 prayed for a deterrent custodial sentence, on grounds that; although the convict has no previous conviction, the offence is rampant. The victim is a pupil who is yet to complete her studies. The accused interfered by indulging her in early sex. He deserves a deterrent custodial sentence to keep him away until he finishes her studies and to deter re-occurrence. He should be sentenced to 30 years to allow her complete her studies and to recover.

In his *allocutus*, the convict prayed for lenience on grounds that; he lost his father in 2014. His four siblings are younger than him, he was the one helping them. Last year in October his mother died. He prayed for lenience to enable him return home and assist his siblings. He does not know how they are surviving.

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.

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.

The Court of Appeal though has time and again reduced sentences that have come close to the starting point of 35 years' imprisonment suggested by the sentencing guidelines, as being harsh and excessive. For example, in *Birungi Moses v. Uganda C.A Crim. Appeal No. 177 of 2014* 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*, it 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 did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the action such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. The accused was aged 18 years at the

time of the offence and the age difference between the victim and the convict was 8 years. The convict not only exposed her to the danger of sexually transmitted diseases at such a tender age but also traumatised her physically and psychologically. It is for those reasons that I have considered a starting point of fifteen (15) 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 young man who committed the offence at the age of 18 years. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of fifteen (15) years' imprisonment, proposed after taking into account the aggravating factors, now to a term of imprisonment of eleven (11) 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 nine years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 15th February, 2017 and been in custody since then, I hereby take into account and set off one year as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of ten (10) years, 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.

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Stephen Mubiru
Judge.
9th March, 2018