

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

CRIMINAL SESSIONS CASE No. 0456 OF 2015

UGANDA PROSECUTOR

5 VERSUS

KIYINGO FAROUK ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

- 10 The accused 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 12th day of June, 2015 at Katwe, Makindye Division, Kampala District, performed an unlawful sexual act with Kasujja Amila, a girl aged 4 years.
- 15 The prosecution case briefly is that on 12th June, 2015 at around midday, the victim returned home from school. She had a cup of tea prepared by her grandmother and went out to play. The accused approached her while she played and offered to give her a coin if she would follow him to his home. Together with her friend, the victim followed the accused to his home, a distance of about 130 meters in a slum. The accused gave the victim's friend a coin and she went away. The
- 20 accused led the victim into his house where he told her to lie on her back on his bed. When she did, he undressed her, lowered her knickers to knee level and placed a coin in her private parts. He later inserted his private parts into hers and when he was done, he gave her a coin. She dressed up and returned home. Curious to know here she had obtained sweets from, her grandmother asked her and she narrated how she had been defiled. She led her grandmother to
- 25 the tenement of the accused where they found the door open. The accused was taking a bath in an open roofed bathroom and the victim's mother confronted her with the accusation, which he denied. Medical examination of the victim revealed that she had been defiled. The matter was

reported to the police whereupon the accused was arrested and charged. In his defence, the accused chose to remain silent and not to call any witnesses.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt.

5 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
10 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).

15 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.

20 The first ingredient of the offence requires proof of the fact that at the time of the offence, the victim was below the age of 14 years. The age of a child may be proved by the production of her birth certificate, or 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.*
25 *Session Case No. 141 of 2002*).

In the instant case, the victim Kasujja Amila testified as P.W.3 and stated that she was 7 years old having been born on 9th June, 2011, hence 4 years old three years ago at the time the offence is alleged to have been committed. Her grandmother Rose Nyanzi Namuleme testified as P.W.2
30 and stated the victim was born on 9th June, 2011. This is corroborated by P.W.5 Mr. Asiku

Dennis, a Medical Clinical Officer at Mayfair Health Services in Najjanankumbi who examined the victim on 15th June, 2015 (three days after that on which the offence is alleged to have been committed). His report, exhibit P. Ex.3 (P.F.3A) certified his findings that the victim was 4 years old at the time, based on her physical and dental development. She had twenty milk teeth. When she testified, the court had the opportunity to see her and form an opinion as to her age. Indeed she looked her age as stated. From all that evidence and in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Kasujja Amila was under the age of 14 years as at 12th June, 2015.

10 The second ingredient required for establishing this offence is proof that Kasujja Amila 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 15 *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 Kasujja Amila testified as P.W.3 and stated that she was playing at home on the veranda outside the gate. The accused was at the home of a one Kuswayi. He called her and told her to go to his home and he gives her money. He took her to his home together with her 20 friend Muminu but when they arrived at the home of the accused, he gave Muminu a coin and he left her behind at the home of the accused. The accused told her to lie face up on the bed. She lay on her back on his bed. He placed a coin in her "susu." He then got out his penis and he did bad things to her in her "susu." He had lowered her knickers to knee level as he did the bad 25 things to her. She felt bad in her private parts as he did that to her. She put on her knickers after he was done. He then gave her a coin and she returned home. She told her grandmother what the accused had done to her.

This is corroborated by her grandmother P.W.2 Rose Nyanzi Namuleme who testified that on 30 12th June, 2015 when the victim returned from school at around midday, she served the victim tea and she went out to ride her bicycle. On her return she asked the victim where she was coming

from with sweets. The victim told her that a Mukonjo, the accused, had taken her to his house and placed her on the bed, and placed some coins on her private parts. She said that he had placed "akanyolo" in her. After she had gone to the home of the accused to confirm the allegation, big crowd of Bakonjo followed her to her home and accused her of having falsely implicated the accused person. They said the girl should be taken for medical examination. They picked her granddaughter and took her to Zam Clinic. P.W.2 and her sister followed. The relatives of the accused paid the medical examination fee. The doctor examined the victim in their presence. She found semen on the inner part of both thighs of the victim. It was dry. She asked where the child had got the semen from. She then separated the thighs. The outer part of the genitals was inflamed but there was no blood coming from the inside. She told them that someone had defiled the girl. P.W.6 No. 38130 D/C Katakuwange Fredrick too stated that when he interviewed the victim she told him that "yanteekako susu."

P.W.5 Mr. Asiku Dennis, a Medical Clinical Officer at Mayfair health Services in Najjanankumbi examined the victim on 15th June, 2015 (three days after that on which the offence is alleged to have been committed), and in his report, exhibit P. Ex.3 (P.F.3A) certified his findings that in the genitals, he found the hymen intact however there were some bruises on the labia minora on both left and right sides. Other parts of the vulva were all normal. The buttocks and anus had no injuries. The probable cause of the injuries was recent sexual intercourse. There was no sign of active vaginal penetration.

Although it was suggested during cross-examination that the injuries observed in the genitals of the victim could have been as a result of friction from riding a bicycle, this was refuted by P.W.5 who stated that had that been the case, there would have been evidence of friction at the anal area as well. In the instant case the injuries were localised to the genitalia and that ruled out the cause suggested by the defence. In light of the quality of evidence furnished by the prosecution, and in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Both children were victims of a sexual act committed during the afternoon hours of 12th June, 2015.

The third 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 opted to remain silent and not to call any witnesses in his defence.

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To incriminate the accused the prosecution relies on the oral testimony of the victim P.W.3 Kasujja Amila who testified that it is the accused who enticed her to his home from where he proceeded to defile her. Where prosecution is based on the evidence of an indentifying witness, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken
10 identity (see *Abdalla Bin Wendo and another v. R* (1953) *E.A.C.A* 166; *Roria v. Republic* [1967] *E.A* 583; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. 1 of 1997*).

In the instant case, P.W.3 testified that she knew the accused before the incident as he was friendly to her friend Muminu. He not only saw him at the home of Kuswayi but he approached
15 her and talked to her. The act occurred during broad day light inside the house of the accused. Although Counsel for the accused contested this ingredient during cross-examination of this witness, I find that the witness knew the accused before the incident, and that she had ample time to recognise him both visually and by voice since they walked together for a distance of about 130 meters to the house. The act itself requires physical intimacy and so he was in close
20 proximity to her at al material time. Her evidence is free from the possibility of error or mistake.

The testimony of the victim is corroborated by that of her grandmother P.W.2 Rose Nyanzi Namuleme who testified that the victim was able to lead her to the home of the accused. It was a one roomed tenement about 130 metres away, via a series of corners. They found the door to the
25 house open. She asked the neighbours where the accused was. She saw him from a distance in a an open roofed bathroom pouring water over his head from a jerrycan. She entered into the bathroom and asked him what he had done to her granddaughter and he denied having done anything. After the girl was examined and it was confirmed she had been defiled, she reported the case to the police. It would appear that the victim led P.W.6 No. 38130 D/C Katakawange
30 Fredrick to the same location but I found his evidence to be inconclusive on this point.

Despite that, considering that the victim at her tender age was able to lead her grandmother P.W.2 to a specific house, through a maze of houses in a slum, and from among several other rental units constructed in a rectangular mode with a compound in-between, which house was said to be occupied by the accused and which fact he did not refute when confronted by P.W.2 as he took a bath, save for the accusation of defilement which he refuted, in agreement with the assessors, I find that the defence raised by the accused has been successfully disproved by the prosecution. There is no possibility of mistake or error in the evidence placing the accused at the scene of crime as the perpetrator of the offence. 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) (a) of *The Penal Code Act*.

Dated at Kampala this 6th day of February, 2019.

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Stephen Mubiru

Judge

6th February, 2019.

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 State Attorney prayed for a deterrent custodial sentence, on grounds that; the maximum penalty is death. The victim was only four years old against 18 the age of the accused. The accused was more than four times the age of the victim at the time. He qualified to be a guardian of the victim by virtue of his age but instead chose to harass her. P. Ex.4 shows that the hymen was intact. She did not have previous sexual encounters. The accused introduced her innocent mind to a sexual act hence the trauma of the act to her and her family which will last for a long time. The cases are rampant in the country and the confidence is in the judicial system. She prayed that an appropriate sentence is passed to send a signal back to the public so as to deter other persons of similar mind from offending children so young.

In his submission in mitigation of sentence, learned counsel for the accused prayed for a lenient sentence on grounds that; the convict is a first offender with no previous criminal record. He has been on remand for three years and four months. He appears remorseful and has learnt his lesson.

5 The purpose should be to reform and he is sorry for the act. He is a youthful offender and is a bread winner to the mother in Kasese. He prayed for a lenient sentence. He should serve and be re-integrated and he can still provide of his mother. The convict opted not to say anything in his *allocutus*.

10 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)*
15 *(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
20 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
25 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
30 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.

5 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
10 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
15 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 26 years at the
20 time of the offence and the age difference between the victim and the convict was 15 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 twenty three (23) years' imprisonment.

25 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 twenty three (23) years' imprisonment, proposed after taking into account the aggravating factors, now to a term of imprisonment of nineteen (19) 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
5 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 23th June, 2015 and been in custody since then, I hereby take into account and set off
10 three years and four months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of fifteen (15) years and eight (8) 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.

15 Dated at Kampala this 6th day of February, 2019.

Stephen Mubiru

Judge

6th February, 2019.