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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CRIMINAL CASE NO. 15 OF 2018

[ARISING OUT OF CRIMINAL SESSION CASE NO. HCT-12CR-SC-0026-2016]

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UGANDA :::PROSECUTOR

VERSUS

OMIRAMBE JULIUS:::ACCUSED

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RULING BY JUSTICE GADENYA PAUL WOLIMBWA

Introduction


The matter is before this court for its opinion under Section 206 of the Magistrates Court Act cap 16, arising from the proceedings before the chief magistrate's court Masindi at Masindi upon referral by the High Court of Uganda sitting at Masindi.

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Brief facts

The accused person herein was indicted with the offense of Aggravated defilement contrary to sections 129 (3) (4) (a) of the Penal Code Act Cap 120. It is alleged by the prosecution that on the 29th day of July 2014 at Nyabyeya village in Masindi district, the accused person Omirambe Julius performed a sexual act with Fualal Juliet a girl aged 12 years.

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 That the matter was accordingly fixed for trial before the High Court of Masindi for hearing before Justice Henrietta Wolayo and that PF 3A in respect of the examination of the victim and PF24A in respect of the examination of the offender were tendered in as agreed documents (exhibits).

30 The prosecution further stated that on examination of the medical documents stated above, it was discovered that the victim was aged 12 years while the accused person was found to be aged 17 years of age. That upon this discovery, the learned judge basing on Section 129 A (2) advised that this was Child-to-child sex and recommended that the file be referred to the Chief Magistrates court for trial of the accused person on the offence of child-to-child sex.

35 The prosecution was dissatisfied with the decision of the Hon. Lady Justice Henrietta Wolayo and raised two points of law that necessitated the opinion of this Honourable Court to ensure that proceedings before the Chief Magistrates' Court were legally before it.

Two questions of law were framed for the opinion of this court.

- 40 1. Whether there is an offence known as child-to-child sex under the Penal Code Act Cap 120, Laws of Uganda.
- 45 2. Whether the Chief Magistrates Court or any other Magistrates court has jurisdiction to entertain the offense of aggravated defilement under section 129(3) (4) (a) of the Penal Code Act whenever the accused person is above 12 years of age vis avis section 129 A of the Penal Code Act.

Representation

50 Kukundakwe Arthurton as the State Attorney was present for the Director of Public Prosecutions while Ms Ajok Harriet appears for the defence. Both parties were advised by this Honourable Court to file submissions in regards to the points raised by the prosecution, but the defense have not filed any submissions. This court will proceed to give its opinion in accordance with the law while putting into consideration the submissions by the prosecution.

Submission of the Prosecution on the first issue

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- 55 1. Whether there is an offence known as child-to-child sex under the penal code Act Cap 120, laws of Uganda.

It's the prosecution's case that there is no offense legally known as child-to-child sex under the Penal Code Act. That the principle of legality in criminal law requires that for there to be a crime, only the law can define a crime and prescribe a penalty (*nulla poena sine lege*). The prosecution further submitted that the principle is well established under article 28 (7) and (12) of the
60 Constitution of the Republic of Uganda 1995 as amended.

That the same principle was expounded by the constitutional court in the case of **Salvatori Abuki vs Attorney General, Constitutional Petition No. 2 of 1997** where Justice GM Okello in a majority court decision observed that:


In short, the article requires an offense to be defined and penalty for it prescribed.

65 The prosecution further stated that Section 129 A (2) of the Penal Code Act provides that:

where an offense under Section 129 is committed by a male child and a female child upon each other when each is not below the age of 12 years, each of the offenders shall be dealt with as required by part X of the Children Act.

The prosecution submitted that in their opinion, an offense committed under Section 129 of the
70 Penal Code Act may be aggravated defilement or simple defilement. Further to the above, Section 129 (3) provides for the offenses and prescribes punishment to be death penalty in case of aggravated defilement and life imprisonment in case of simple defilement.

Counsel for the prosecution cited the case of **Uganda vs. OJ alias T (A Juvenile) criminal case session case No.090 of 2017**, where the High Court sitting at Gulu entertained an amended
75 indictment in which the offender pleaded guilty to the offense of child to child sex and court went on to sentence the offender under section 129 (3) of the Penal Code Act cap 120 and Sections 104 (A) (1), 94(1) (g) of the Children's Act. It is important to note that section 129 (3) provides for circumstances that make defilement cases aggravated and the maximum sentence for the same.

 It was further submitted for the prosecution that the said Section 129A (2) itself does not define
80 child-to-child sex as an offense and neither does it prescribe a penalty for it but rather provides for the procedure upon which the juvenile offenders in defilement cases are to be treated.

That the prosecution's understanding of Section 129 implies that the offense (defilement) is only committed by both juveniles under Section 129 where there is some level of consensual sexual intercourse and that in such a case both offenders are treated as joint offenders while being charged.

85 That where the force is used by an offender in the performance of a sexual act, it cannot be said that the procedure of child-to-child sex applies, merely because both parties are above 12 years old. In such a case it cannot be said that the offense is committed upon each other as per the language of the section. It is the party that used force (the aggressor) that should be charged under section 129 for defilement or even rape under section 123 of the penal code Act. It is their
90 submission that the decision to prosecute and or to convict on such an offense should be based on evidence of each case.

In conclusion, the Prosecution submitted that there is no offense known as child-to-child sex and that the offense available in law is defilement and section 129A (2) only provides for the procedure to adopt while charging and trying both offenders in consensual defilement.

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Resolution

Section 206 of the Magistrates Court Act provides for the Reservation of question of law.

(1) A magistrate's court, presided over by a chief magistrate or by a magistrate grade I, exercising criminal jurisdiction may, and shall upon the application of the Director of Public Prosecutions, at
100 any stage of the proceedings before judgment, reserve a question of law arising during the trial of any accused person for the opinion of the High Court.

2. *Where a question of law is reserved under subsection (1), the magistrate shall make a record of the question reserved with the circumstances upon which it arose and shall
Gm transmit a copy of the record to the chief registrar.*

105 3. *The High Court shall consider and determine the question reserved and shall remit the case to the magistrate's court with the opinion of the High Court upon that question, and the magistrate shall dispose of the case in accordance with that opinion.*

4. *No party shall have any right to be heard before the High Court when exercising its powers under subsection (3); but the High Court may, if it thinks fit, hear any party either personally or by advocate.*

It is upon that provision of the law that I have been moved by the prosecutor to give my opinion accordingly.

It is a cardinal principle of law that no person shall be charged and convicted of an offense that did not exist at the time the alleged act was committed. To that extent, Article 28 (7) and (12) of the Constitution of the Republic of Uganda provides that: -

No person shall be charged with or convicted of a criminal offense which is founded on an act or omission that did not at the time it took place constitutes a criminal offense.

This principle was well elucidated in **Salvatori Abuki vs Attorney General, Constitutional Petition No. 2 of 1997** where Justice GM Okello in a majority court decision observed that;

In short, the article (article 28(7) of the Constitution) requires an offense to be defined and penalty for it prescribed.

The exception to this principle which in legal terminology is referred to as the *nulla poena sine lege* is found in Article 28(12) of the Constitution which provides that: -

except for contempt of court, no person shall be convicted of a criminal offense unless the offense is defined and penalty for it prescribed by the law.

In the matter before me the question to determine whether there exists in the Penal Code Act an offense called child-to-child sex. The relevant section under which this question arises is section 129 A of the Penal Code. Section 129A of the Penal Code (Amendment) Act, 2007 provides that:
Child-to-child sex.

129A. (1) *Where the offender in the case of any offense under section 129 is a child under the age of twelve years, the matter shall be dealt with as required by Part V of the Children Act.*

(2) *Where an offense under section 129 is committed by a male child and a female child upon each other when each is not below the age of twelve years of age, each of the offenders shall be dealt with as required by Part X of the Children Act.*

135 The prosecution contends that Section 129A (2) itself does not define child-to-child sex as an offense and neither does it prescribe a penalty for it but rather provides for the procedure upon which the juvenile offenders in defilement cases are to be treated. That in their opinion, there is no offense legally known as a child to child sex under the Penal Code Act, and under Section 129, it can only be aggravated defilement or simple defilement.

140 Accordingly, looking at Section 129A of the Penal Code Act, while the title / marginal note provides for child-to-child sex to the extent that where the offender is a child under 12 years; and when committed by a male child and a female child upon each other when each is not below 12 years, each of the offenders shall be dealt with as required by the Children Act, this section does not create any new offense other than the general offense of defilement under section 129 of the
145 Penal Code Act. Section 129 (1) of the Penal Code (Amendment) Act, 2007 provides that:

Any person who performs a sexual act with another person who is below the age of eighteen years commits a felony known as defilement and is on conviction liable to life imprisonment.

The section does not make a distinction between offenders who are below 18 and thus considered children or adults. What is important is that the offender, whether child or adult, has had unlawful
150 sexual intercourse with a child. The law has, however, provided a mechanism for dealing with juvenile or child offenders by specifically providing for the procedure the court should adopt when dealing with them. Accordingly, section 129A of the Penal Code Act provides that:

129A. (1) Where the offender in the case of any offense under section 129 is a child under the age of twelve years, the matter shall be dealt with as required by Part V of the Children Act.

155 *(2) Where an offense under section 129 is committed by a male child and a female child upon each other when each is not below the age of twelve years of age, each of the offenders shall be dealt with as required by Part X of the Children Act.*

Subsection 2 which is relevant in this matter directs the court when faced with child offenders who have allegedly committed defilement on each other to adopt the procedure in Part X of the Children
160 Act instead of the procedure either under the Trial on Indictment Act or the Magistrates Courts Act. In sub-section 1, the law provides for the procedure where the offender is less than twelve years old; there the procedure to be adopted is in Part V of the Children Act.

In conclusion, the law does not create the offense of child-to-child sex. The use of the phrase **child to child-to-child sex** in the marginal notes to section 129A of the Penal Code Act is therefore misleading to the extent that it creates the offence of child-to-child sex. The correct reading of the marginal note should be a procedure to be followed when the offenders are both children. The offender in this case was therefore rightly charged with the offense of defilement contrary to section 129(3)(4)(a) of the Penal Code Act.

Submission of the prosecution on the second issue.

Whether the Chief Magistrates Court or any other Magistrates court has jurisdiction to entertain the offense of aggravated defilement under section 129(3) (4) (a) of the Penal Code Act whenever the accused person is above 12 years of age vis a vis section 129 A of the Penal Code Act.

On the second question, the prosecution contends that based on the above submissions the only offense available is defilement, where the circumstances of the case fall under section 129 (3) & (4) (a) such a case only falls within the jurisdiction of the High Court.

In this particular case, it is their submission that the offense committed is aggravated defilement and that this is the proper and competent court to entertain the matter. The prosecution prayed that the court be pleased to fix the same for trial at the earliest available criminal session.

Resolution

As I have found above any person who is criminal responsibility can commit the offence of defilement.

Section 129 (3) of the Penal Code Act provides that;

Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

Section 129 (4) lists the circumstances that would make it aggravated defilement;

1. Where the person against whom the offense is committed is below the age of fourteen years;

- 190 2. Where the offender is infected with the Human Immune Deficiency Virus (HIV)
3. Where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed
4. Where the victim of the offense is a person with a disability.
5. Where the offender is a serial offender.

GJM

195 In the case of **Uganda v Kusemererwa (HCT-01-CR-SC-2014/15)** it was stated that a person charged with Simple defilement can be tried by a Chief Magistrate while a person charged with Aggravated defilement is tried by the High Court only. In this case, the accused is charged with having unlawful sexual intercourse with a child aged 12 years. The accused's case therefore falls within the category of aggravated defilement contrary to section 129 (3) of the Penal Code Act

200 That being the case, the accused person cannot be tried by the Chief Magistrate. The right forum to try the accused person is the High Court and I accordingly direct the Chief Magistrate to promptly forward the accused's file to the High Court so that he can be tried. It is so ordered.

Decision

205 In conclusion, I make the following orders:

1. Section 129A of the Penal Code Act does not create the offense of child-to-child sex. The section only provides the procedure for dealing with child offenders, who are charged with defilement.
2. Secondly, the accused person was rightly charged with the offense of aggravated
- 210 defilement contrary to section 129(3)(4)(a) of the Penal Code Act.
3. Lastly, the accused person shall be tried by the High Court.

Accordingly, I direct the Registrar of the High Court, Masindi to transmit this ruling to the Chief Magistrate, Masindi, and serve a copy of the same to the Office of the Director of Public

215 Prosecutions and on the accused person and his counsel.

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Gadenya Paul Wolimbwa

JUDGE

220 14th April 2021.