THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA SITTING AT ENTEBBE MAGISTRATE'S COURT.

CRIMINAL CASE NO. 0659-2020

UGANDA :: PROSECUTION

VERSUS

NSUBUGA MUHAMMED ::: DEFENDANT

Before Hon. Justice Oyuko Anthony Ojok

JUDGEMENT

The accused person was indicted with the offence of Aggravated Defilement contrary to section 129(3)(4)(a) of the Penal Code Act, Cap 120.

It is alleged that Nsubuga Muhammed, on the 12th day of July 2019 at Lwemwedde village in Wakiso District, performed a sexual act on Namuli Molly, a girl aged three (3) years.

The brief facts of the Prosecution case are that:

1. The victim, Namuli Molly, is a juvenile aged three (3) years and daughter of Naggayi Topista, a resident of Lwemwedde, Masuulita, Wakiso District.

2. The accused, Nsubuga Muhammed, is a male adult aged 23 years, a peasant resident of Matugga Lwasa 'A' village, Gombe Sub-county, Wakiso District.

3. On the 12th day of July, 2019, the accused was visiting a neighbour of the complainant. On 12th July, 2019, Nagayi Topista left the victim playing with her sister, Nabiryo Esther, then aged thirteen (13) years. Nabiryo later went to fetch water, leaving the victim playing.

4. When Nabiryo Esther came back, she found the suspect, Nsubuga Medi, inside their house with the victim. The victim was crying, she was lying on a table with her legs apart. The accused had unzipped his trousers and his penis was outside.

5. Nabiryo ran to call her mother who was in the trading centre. Namuli Topista found the accused with the victim outside the house. The victim was not walking properly.

6. Nagayi rushed to report to the Police. The accused was arrested. The accused was examined and found to be 23 years of age, with normal mental status.

7. The victim was examined on PF3A, she was aged 3 years.

The accused denied committing the offence. Prosecution produced five (5) witnesses in a bid to prove its case and the accused gave unsworn evidence and called no witness.

Kiconco Agnes, State Attorney, appeared for the State and Counsel Robinah Kyamuhangire represented the accused on State Brief.

Burden of Proof

It is a requirement of the law that Prosecution must prove its case beyond reasonable doubt because the accused has no duty to prove his innocence (see the case of Woolmington vs DPP 1935 AC, page 462 and Article 28 of our Constitution). Any doubt must be resolved in favour of the accused person. Court must convict on the strength of the Prosecution case but not on the weakness of the defence case (Ssekitoleko vs Uganda 1967 EA, page 531). Therefore, Prosecution must prove all the ingredients of aggravated defilement in order to sustain a conviction. In the case of Miller vs Minister of Pensions [1947] 2 ALL ER, page 373, it was held that proof beyond reasonable doubt does not mean proof beyond shadow of doubt.

Section 129(7)(a) and (b) of the Amendment of the Penal Code Act defines 'sexual act' as penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ or unlawful use of any object or organ on another person's sexual organ. Sexual organ means vagina or penis. In Uganda vs Adinani Fahamu Criminal Session case no 0168 of 2020, it states that the ingredients of aggravated defilement are:

a) The victim was below fourteen (14) years of age;

b) The sexual act was performed on the same victim;

c) Participation by the accused person.

1. The victim was below 14 years of age

In Uganda vs Kagoro Godfrey HCCS no. 141 of 2012, it stated that the age of a child may be proved by production of a birth certificate or testimony of the parents. Other ways can be equally conclusive such as the court's own observation of the victim and common sense assessment of the age of the child.

PW1, Joshua, the Clinical Officer who examined the victim stated that she was of the apparent age of three (3) years, basing on the appearance as well as the birth certificate. PF3A was admitted as prosecution exhibit 1 (PEx1). The testimony of PW1 was further corroborated by the testimony of the biological mother of the victim who confirmed that the victim was born in 2016. I also had the benefit of observing the victim herself and saw that she was below fourteen (14) years of age. This ingredient was proved beyond reasonable doubt.

2. There was a sexual act performed

The law on proof of sexual intercourse was stated by the Supreme Court in the case of Basita Hussein vs Uganda SCCA no. 34 of 1995 (unreported) as follows: "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved for instance by the victim's own evidence and corroborated by medical or other evidence. It is not a

hand and first rule that the victim's evidence and medical evidence must always be addressed in every case of defilement, and yet the medical report PF3A was admitted as exhibit PE1. PW1 stated that the hymen was ruptured and there was ulceration of labia caused by penal penetration; meaning that there was a sexual act committed as per the said PF3A. This was further corroborated by the evidence of PW3, the sister, who saw the accused defiling the baby on the table, legs spread apart and she was crying.

That upon her returning from fetching water, she peeped in the room and found the victim's dress was removed from her, her knickers on the floor, the accused's trousers pulled down and him on top of her. That the accused, to confuse the sister, pretended that he was asking why the baby was crying and that later walked out of the house and sat on the veranda while the victim's sister ran to the trading centre to call their mother. PW4, the mother, in her testimony said she also came to the house and found the baby crying, still on the table and legs spread apart. The curtain had been drawn and yet she had left it open. She found the accused coming out of the house. PW5, Edison, came following PW4 and found the baby crying.

Much as the victim never testified, at the time of commission of the offence, she was very young and never made a statement at the Police (three years old). PW3 also stated that there was only the accused and other young children in the vicinity of scene of the crime. She even talked to the accused person when he attempted to confuse her about him asking about the baby crying. So this ingredient was proved beyond reasonable doubt even if there was some minor contradiction regarding whether he moved out before, after or when the mother arrived at the house.

3. Participation by the accused

The accused person was placed at the scene on the fateful day by PW3. On the said day, she left the victim playing and went to fetch water and returned at 4pm, entered the house and found the accused lying on the victim with his trousers pulled down. The victim was crying and had her legs spread apart. Although PW3 did not know the accused person, she found him defiling the victim in broad daylight. It was a single room residence with a table in it, where the victim was found lying. That the accused even spoke to PW3, claiming he was enquiring why the victim was crying. She later went and called her mother who came running and found the child crying on the table with her legs spread apart. PW5 followed her to the scene. PW3, PW4 and PW5 all testified that they found the accused still at the scene of the crime.

Whether the table was tendered in court or not, in the case of Uganda vs Katushabe 1988-1990 HCB page 59, cited with approval by Lady Justice Anglin in Uganda vs Isabirye Robert, HCC no. 78 of 2011, court held that failure to produce exhibits is not detrimental to the Prosecution case if the prosecution witnesses saw the exhibits and described the same in court. PW3, PW4 described the table where the alleged defilement took place even if it was not tendered in court. PW4 stated that she had seen the accused person the previous evening in the company of her neighbour. When she asked the neighbour about him, she said that the whole matter was not her business and she refused to come to court to be a witness because he had slept at her house and left.

The accused was put to his defence and gave unsworn testimony that he was a resident of Matuga, a taxi conductor, did not know the victim, could not recall where he was on the fateful day and that he was arrested at his workplace. I find all that a pack of lies because PW5, who came to the house and had no grudge with him, explained how the accused was arrested at the scene of the crime and handed over to the Police. All the prosecution witnesses placed the accused at the scene of the crime, specifically PW3 who found him defiling the victim; PW4 who found him still at the scene as well as PW5 who apprehended him. More so, the accused spoke to PW4 and, furthermore, the police officer stated that he received brought to him by PW5 on the fateful dy.

I am in total agreement with the assessors' opinion that all the ingredients of the offence have been proved beyond reasonable doubt. The accused is guilty and is therefore convicted of the offence of aggravated defilement contrary to section 129(3)(4)(a) of the Penal Code Act.

Sentence and Reason for Sentence

The convict was found guilty of the offence of aggravated defilement after full trial. In her submission on sentencing, the learned State Attorney prayed for a deterrent sentence on the following grounds: although the convict had no previous conviction, the offence is, however, very grave in nature and attracts a maximum sentence of death. The victim in this case was aged only three (3) years. The convict was aged twenty-three (23), a big gap of nineteen (19) years. Other than going for a child of three years, he would have gone for a variety of much older ladies. The victim sustained injuries at a tender age and became a woman at only three years. Her hymen was ruptured and she suffered ulceration around her reproductive organ. After the commission of the offence, the victim was crying because of pain and the convict's selfish evil desires. He premeditated the time when no one was around her. She was fit to be his child.

The offence of aggravated defilement is rampant in this area and must be discouraged. Because the convict wasted court's time by not pleading guilty and is not remorseful, she prayed for a long custodial sentence.

In mitigation, defence counsel submitted that the convict has no previous record. That this is an occurrence which is not condoned but it happened. It was quite unfortunate. That the convict is now 25 years old, has a family of four children below 10 years, is capable of reforming and can contribute to the economy of this country. He has been on remand for three years and prays for leniency.

The offence of aggravated defilement is punishable by the maximum penalty of death as provided for under the law. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of aggravated defilement. This case is not within that category, although it is close. For that reason I have discounted the death sentence. Where the death penalty is not imposed, the starting point in determination of a custodial sentence for cases of aggravated defilement has been prescribed by item 1 of part 1 under sentencing ranges (in capital offences) of the third schedule of the Constitution (Sentencing Guidelines for Courts of Judicature

[practice] direction 2013) as 35 years imprisonment. The sentencing guidelines, however, have to be applied bearing in mind past precedents of courts in decisions where the facts have resemblance to the case under trial (Ninsiima Vs Uganda , Crim. CA Criminal Appeal no. 180 of 2010).

I have for that reason taken into account the current sentencing practices in relation to cases of this nature.

From the facts of this case, the convict's conduct demonstrated no respect for the girl-child. The torture that goes with it and lack of remorse should be given a deserving sentence. In light of both aggravating and mitigating factors, I consider forty (40) years imprisonment appropriate. According to Regulation 15(2) of the Constitution (Sentencing Guidelines for Courts of Judicature [practice] direction, 2013), to the effect that the Court should deduct the period spent on remand of three (3) years, that leaves the convict to serve thirty-seven (37) years in prison.

The convict is advised that he has a right of appeal against both conviction and sentence within a period of fourteen (14) days.

Dated at Entebbe, this 29th day of July, 2022,

Oyuko Anthony Ojok,
Judge