

UGANDA / JUDGMENT

Uganda v Okech (Criminal Sessions Case No. 0150 of 2015) [2018] UGHCCRD 116 (17 May 2018) [2018] UGHCCRD 116

COURT

HC: Criminal Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Criminal Sessions Case No. 0150 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT NEBBI

CRIMINAL SESSIONS CASE No. 0150 OF 2015

UGANDA PROSECUTOR

VERSUS

OKECH IBRAHIM alias MICHAEL ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

Following an amendment of the Indictment, the accused is indicted with one count of Simple Defilement c/s 129 (1) of the *Penal Code Act*. It is alleged that the accused on the night of 23rd May, 2015 at Arutha village, Paidha Town Council in Zombo District, performed an unlawful sexual act with Awekonimungu Subra, a girl below the age of 18 years.

The prosecution case briefly is that the victim in this case P. W.2 Awekonimungu Subra suffered demonic attack during the day prompting his guardian, P. W.3 Ocamringa Saviour to invite a group of women, (prayer warriors) to exorcise the demons through the power of prayer inside her room. Later the accused joined him outside and advised that the prayer group should retire and let her recuperate under rest, alone in her room. The victim was at the time lying unconscious inside her room. As P. W.3 proceeded to lock the door from outside following the departure of the prayer warriors, the accused advised him not to lock the door since the victim may need to go out to ease herself later when she came round. He advised P. W.3 though to leave the solar powered

bulb on inside the room. P. W.3 followed the advice of the accused. Later that night, the victim awoke to find herself alone in the room with a man on top of her performing an act of sexual intercourse. The man told him his name was Charles and that she should be compliant. She instead attempted to fight him off and screamed for help. She dashed out of the room and the man fled half naked. She described the assailant to P,W.3 who had responded to her scream and he recognised him as the accused. They immediately proceeded to the home of the accused where they found his door unlocked but with no one around. They lay in wait and later arrested him as he tire to sneak back into his house, still half naked.

In his defence, the accused denied having committed the offence. He stated that on 22nd May, 2015 he slept in his house until the following day. In the morning at around 6.30 am he went to the toilet with water in a jerrycan. He returned from a long call, and being a Muslim, he was doing his ablution in preparation for prayer when he heard a voice behind him as he washed himself. It was the voice of his landlord who is a neighbour. He accused him of having defiled the victim. They came with a pair of male underpants which they hang around his neck and he was marched to the police post. After a few minutes, my wife arrived with his clothes. He attributes the accusation to a deliberate plan by P. W.3 Ocamringa Saviour who has an affair with his wife.

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 **Ssekitoaleko 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 Simple Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim was below 18 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 Simple defilement is proof of the fact that at the time of the offence, the victim was below the age of 18 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 P. W.2 Awekonimungu Subra stated that she was 19 years old having been born in 1999, hence 17 years old two years ago when the offence is alleged to have been committed. Her guardian P. W.3 Ocamringa Saviour testified that he did not know when the victim was born. However, P. W.4 Oryema C. B. Jimmy, the Senior Clinical Officer produced in evidence the report of Mr. Kevio Jacob then a Senior Clinical Officer at Paidha Health Centre III who examined the victim on 23rd May, 2015 (the day on which the offence is alleged to have been committed). His report, exhibit P. Ex.2 (P. F.3A) certified his findings that the victim was approximately 17 years old at the time of that examination, based on the fact that she had only thirty teeth. The court had the opportunity to see the victim testify and in agreement with the joint opinion of the assessors I find that on basis of the available evidence, the prosecution has proved beyond reasonable doubt that Awekonimungu Subra was a girl below eighteen years as at 23rd May, 2015.

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 victim P. W.2 Awekonimungu Subra stated that she woke up to find someone lying on top of her having sexual intercourse with her. She ran out of the house screaming for help after she had managed to escape from him. P. W.3 Ocamringa Saviour her guardian testified that on hearing her scream, he came out of his house and glimpsed a man fleeing from her room half-naked. They later recovered a male pair of male underpants from her room, apparently abandoned by the assailant as he fled in haste. The report of Mr. Kevio Jacob then a Senior Clinical Officer at Paidha Health Centre III who examined the victim on 23rd May, 2015, exhibit P. Ex.2 (P. F.3A) certified his findings that the "hymen [was] ruptured, vagina soiled with whitish slippery discharge. No injuries but discharges are evidence of unprotected sexual intercourse." To constitute a sexual act, 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 disagreement 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 as the perpetrator of the offence. The accused denied having committed the offence. He testified that on 22nd May, 2015 he slept in his house until the following day. In the morning at around 6.30 am he went to the toilet with water in a jerrycan. He returned from a long call, and being a Muslim, he was doing his ablution in preparation for prayer when he heard a voice behind him as he washed himself. It was the voice of his landlord who is a neighbour. He accused him of having defiled the victim. They came with

a pair of male underpants which they hang around his neck and he was marched to the police post. After a few minutes, my wife arrived with his clothes. He attributes the accusation to a deliberate plan by P. W.3 Ocamringa Saviour who has an affair with his wife.

To disprove the defence, the prosecution relies entirely on testimony of the victim, P. W.2 Awekonimungu Subra who stated that when she woke up to find someone on top of her having sexual intercourse with her, she was able to see and recognise him by aid of a solar light bulb that was shining inside the room. She recognised him as a man with a French cut who lived in the neighbourhood, who had previously come to their home in search of a house to rent and usually passed by their home. He had called himself Charles. This was corroborated by P. W.3 Ocamringa Saviour, her guardian, who testified that he saw the man flee from the scene and on proceeding to the home of the accused, they found he was not at home but the door to his house was not locked. They lay in wait and after one hour he emerged naked from the direction of his toilet claiming he had been preparing for the early morning prayers.

This being evidence of visual identification of both P. W.2 and P. W.3 which took place at night, the question to be determined is whether the identifying witness was able to recognise the accused. In circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see **Abdalla Bin Wendo v. R (1953) 20 EACA 106**; **Roria v. R [1967] EA 583** and **Abdalla Nabulere and two others v. Uganda [1975] HCB 77**). In doing so, the court considers; whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused.

As regards familiarity, the two witnesses knew the accused prior to the incident. In terms of proximity, this being a sexual offence of a nature that required physical intimacy, the accused were very close to the victim. As regards duration, the accused talked to the victim before he dashed out of the house. It was not a sudden attack by a stranger. That was long enough a period to aid correct identification. Lastly, although it happened at night, there was a solar powered light bulb inside the room which provided sufficient light that enabled the victim to recognise the accused from close quarters and offer a clear description of his appearance.

On the other hand, her evidence is corroborated by the queer conduct of the accused that morning. His claim that he was undertaking his ablution is a lame excuse for the search party having found him out of his house. I find that the untruthful version narrated by the accused in his defence, corroborates the testimony of the victim. 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 Simple Defilement c/s 129 (1) of the *Penal Code Act*.

Dated at Arua this 17th day of May, 2018.

Stephen Mubiru

Judge.

17th May, 2018.

Later

3.43 pm.

Attendance.

Ms. Sharon Ngayiyo, Court Clerk.

Mr. Emmanuel Pirimba, Resident State Attorney, for the Prosecution.

Counsel for the accused person on state brief is absent.

The accused is present in court.

SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted for the offence of Simple Defilement c/s 129 (1) of *The Penal Code Act*, the learned Resident State Attorney submitted that the offence of simple defilement attracts life imprisonment. The offence is rampant and the action of the convict in abusing good neighbourliness is uncalled for. The victim was sick and needed help. He needs to reform from prison. He proposed a ten year term of imprisonment.

In his *allocutus*, the convict prayed for a lenient sentence on grounds that both his parents died. His father was killed by Kony rebels. He grew up with his grandmother and the only paternal uncle who was taking care of him died and he was left with orphans to look after. He suffers from hepatitis "B." He was found positive from Arua Hospital. One time he fell from a mango tree and it affects his chest which normally pains.

I have considered the submissions in light of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. According to Item 1 of Part IV thereof (Sentencing range for defilement), the starting point when imposing a custodial sentence for the offence of Simple defilement is 15 years' imprisonment, which can be reduced or increased depending on the mitigating and aggravating factors applicable to the specific case. I have also reviewed current sentencing practices for offences of this nature. In this regard, I have considered the case of *Uganda v. Aranganira Isaac*, *H. C. Criminal Session Case No. RUK. 17 of 2011*, where a 23 years old man was convicted as a first offender after trial, for the offence of Simple Defilement of a 14 year old girl. He was HIV positive and on drugs but was remorseful, and capable of

reforming. He was nevertheless on 13th December 2012 sentenced to 15 years' imprisonment despite having been on remand for one year and eight months. In *Ongodia Elungat John Michael v. Uganda C. A. Cr. Appeal No. 06 of 2002*, a sentence 5 years' imprisonment was meted out to 29 year old convict, who had spent two years on remand, for defiling and impregnating a fifteen year old school girl.

The aggravating factors as provided for by Regulation 35 of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 which are relevant to the instant case are; the age difference of 6 years between the accused and the victim. The accused was 23 years old while the victim was 17 years old. He took advantage of a vulnerable girl recuperating from a demonic attack. Accordingly, in light of those aggravating factors, I have adopted a starting point of eighteen years' imprisonment.

The seriousness of this offence is mitigated by a number of factors. The mitigating factors as provided by Regulation 36 of the Sentencing Guidelines which are relevant to the instant case are; the remorsefulness of the convict, being a first offender, a relatively young man with no previous relevant or recent conviction. He deserves more of a rehabilitative than a deterrent sentence. The severity of the sentence he deserves for those reasons has been tempered and is reduced further from the period of eighteen years' imprisonment, proposed after taking into account the aggravating factors, now to a term of imprisonment of thirteen 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 accused. 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 thirteen years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict. I note that the convict has been in custody since 26th May, 2015, a period of three years. I therefore sentence the convict to a term of imprisonment of ten (10) years to be served staring 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 Arua this 17th day of May, 2018.

Stephen Mubiru

Judge.

17th May, 2018.

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Prepared on 13 October 2026 · Esheria