

UGANDA / JUDGMENT

Uganda v Ssali (Criminal Session Case 360 of 2018) [2023] UGHC 474 (26 September 2023) [2023] UGHC 474

COURT

High Court of Uganda

BEFORE

Kaahwa, J

CASE / FILE NUMBER

Criminal Session Case 360 of 2018

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT MUKONO****HCT-14-CR-SC-0360 OF 2018****UGANDA:.....****VERSUS****SSALI SWAIBU:.....****BEFORE HON. LADY JUSTICE CHRSTINE KAAHWA****JUDGMENT**

The Accused in this case was indicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (a) and (b) of the Penal Code Act. Under these provisions, any person who performs a sexual act with another person who is below the age of 14 years, where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is pelted commits a felony called Aggravated Defilement and is, on conviction by the High Court, liable to suffer death.

It was alleged that Ssali Swaibu on the 11th day of January, 2018 at Kigugo Village in Buikwe District performed a sexual act with the said victim NC a girl aged 5-6 years. It is the prosecution's case that the accused on the 11th day of January, 2018 at about 7:30Pm while the victim was seated at home under the veranda, the accused called her, pulled her into one of the near by houses, covered her mouth so that she could not make any sound, removed

her dress and nicker, put her down, removed his trouser and had sexual intercourse with the victim. The mother of the victim Namutebi Betty stated that on the fateful day, the victim disappeared from home when it clocked 7:30PM she started looking for her and when she flashed a torch in one of the nearby houses she saw the Accused with the victim, the Accused released the victim immediately after seeing the victim's mother and he ran away, the mother of the victim took her to the house and on checking, she found the victim's private part all wet. The Accused was then searched for and arrested while he was trying to escape from the village with his properties.

The victim was examined on Police Form 3A and was found to be a female juvenile aged between 5 to 6 years with a missing hymen.

Burden of Proof:

The burden of proof in criminal cases always vests on the prosecution who has to prove each and every ingredient of the offence. Notably, this burden never shifts to the Accused, except in circumstances where there is a specific statutory provision to the contrary. This was the position in the locus classicus case of *Woolmington vs D. P. P.* [1935] A. C. 462.

Standard of Proof:

The standard of proof is proof beyond reasonable doubt. This implies that all the essential ingredients of the offence must to be proved beyond reasonable doubt. The standard is achieved if having considered all the evidence, there is no possibility that

the accused is innocent. Lord Denning stated in *Miller vs Minister of Pensions* [1947] 2 AllER.

Evidence:

Court is enjoined to consider evidence of both the Prosecution and the defence relating to each of the ingredients as a whole before coming to a conclusion. It would offer injustice to the accused if the Court considers only the prosecution's evidence in isolation of the evidence presented on behalf of the accused. In *Abdu Ngobi vs Uganda*, S. C. Cr. Appeal No. 10 of 1991, the Supreme Court expressed itself as follows, with regard to treatment of evidence:

The Accused on his defence, opted to give unsworn evidence. 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 on the weaknesses in his defence; reference is made to the case of *Sekitoleko v. Uganda* [1967] EA 531). It therefore goes without saying that for an Accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt:

Ingredients of the offence of Aggravated Defilement contrary to Section 129(3) and 4(a)(b)

- 1. That the victim was below the age of 14 years

- 2. That a sexual act was performed on the victim.

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- 3. That at the time of performing that sexual act, the Accused was HIV positive.
- 4. That it is the Accused who performed the sexual act on the victim.

Whether the child was below the age of 14 years?

The first ingredient of the offence of Aggravated Defilement is proof of the fact that at the time of commission of the offence, the victim was below the age of 14 years. This can be reliably proved by producing the child's 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 as was elaborately discussed in the case of *Uganda v. Kagoro Godfrey H. C. Crim. Session Case No. 141 of 2002*). Leaning on the Kagoro case *Supra*, it is worth noting that, at the preliminary hearing, the prosecution produced evidence of **Police Form 3A** which was admitted and marked as prosecution exhibit 1(PEX1). This revealed the age of the victim to be between 5 to 6 years which proves that the victim was indeed a child below the age of 14 years. I find that the prosecution has led credible evidence to prove this first ingredient.

Whether there was a sexual act performed?

Section 129(7)(a) of the Penal Code Act, defines a sexual act to mean 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. In order to prove this, the Prosecution normally relies on the victim's evidence, medical evidence and any other cogent evidence as per the position in the case of *Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995*. Important to note that, the slightest penetration however, small it maybe, is enough to prove the ingredient. The prosecution led evidence of Police Form 3A, which is the victim's medical examination report which reveals under Paragraph 7(e) that the victim had a missing hymen and the probable cause was under **paragraph 8** which is attributable to blunt vaginal penetration. With this piece of evidence, I find that the ingredient of a sexual act has been proved by the prosecution beyond reasonable doubt in agreement with the joint opinion of both assessors.

Whether the accused was HIV Positive by the time the offence was committed?

Thirdly, the Prosecution has to prove that the accused person was HIV positive at the time of commission of the offence. In the instant case, the prosecution led evidence of Police Form 24A which was exhibited and marked as PEX2 in which the accused was examined on 14th January, three days after that the alleged offence was committed, the reported revealed that the Accused was HIV positive, it is imperative to mention that since the HIV diagnostic test done on the accused three days after the incident turned out positive, it can only be concluded that the window period had elapsed and most importantly, the Accused must have contracted the virus

not less than three months prior to the date of that test. When this was brought to the attention of the accused, he did not contest. Therefore, in agreement with the assessors, I find that this ingredient too has been proved beyond reasonable doubt

The last ingredient to be proved by the prosecution in this case is that it is the accused that performed the sexual act on the victim. This can be satisfied by producing evidence either direct or circumstantial, placing the accused at the scene of crime. The accused denied having committed the offence and stated that he was framed by the mother of the victim whom he had tried to solicit for a love relationship.

To rebut this defence, the prosecution led evidence of PW1 Detective Constable Baraza Borny who testified that he knew the accused as a fisherman and who was reported to have defiled a girl aged 5 years, that the accused was on the verge of running but he missed a step and knocked a stone and fell down. PW1 further testified that the girl was defiled at 7:30PM and the accused was identified by the victim's mother, he attempted to run, however he was caught by the father of the girl. The accused apologized to the father of the girl alleging that Satan had tempted him. PW1 further on the testimony referred to the accused as Kasoseka and when court asked what the name means he interpreted it to mean someone known for defiling children. With this kind of evidence brought forward by the

prosecution, I find that they have proved that it is the Accused who performed the sexual act on the victim; the accused is therefore convicted of aggravated defilement of NC a girl of 6 years as indicted.

Dated at MUKONO this 26th day of September 2023.

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Christine Kaahwa JUDGE

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO CRIMINAL SESSION CASE NO.0360
OF 2018 UGANDA:::.....

VERSUS

SSALI SWAIBU:::.....

BEFORE HON. LADY JUSTICE CHRISTINE KAAHWA

SENTENCE AND REASONS FOR SENTENCE

Parties were given timelines within which to file their written submissions, however this was not complied with, notably on the last day the parties mentioned to court that they leave the whole matter to court to determine whether the accused is culpable and chose not to write submission.

The maximum punishment for the offence of aggravated defilement under section 129(3) of the penal code act is a death sentence. The offence become aggravated where,

- 1. where the person against whom the offence is committed is below the age of fourteen years;
- 2. where the offender is infected with the Human Immunodeficiency Virus (HIV);

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- 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 offence is a person with a disability; or (e) where the offender is a serial offender.

For the offence of aggravated defilement, the court is guided by Guideline 33 of the Sentencing Guidelines and accordingly, the court shall be guided by the sentencing range laid down in Part IV of the Third Schedule while determining the appropriate sentence in cases of this nature. The starting point being 35 years' imprisonment and the sentencing range is from 30 years' imprisonment to death sentence;

The factors in paragraphs 34, 35 and 36, are used by courts to determine the sentence in accordance with the sentencing range. Courts are enjoined to apply the doctrine of stare decisis while making use of the sentencing guidelines. This was mentioned in the case of Ninsiima v. Uganda Crim. C. A Criminal Appeal No. 180 of 2010). A review of past precedents tend to show that the Court of Appeal has time over reduced sentences that have come close to the sentencing starting point suggested by the sentencing guidelines, as being harsh and excessive, and upheld those that were lower than the starting point. In German Benjamin vs Uganda, CACA No. 142 of 2010 the Court of Appeal set aside a sentence of 20 years imprisonment for the offence of

aggravated defilement committed against a child aged 5 years, and substituted it with a sentence of 15 years imprisonment. In *Tiboruhanga Emmanuel vs. Uganda*, Court of Appeal Criminal Appeal No. 0655 of 2014, the Court of Appeal stated that the sentences approved by this Court in previous aggravated defilement cases, without additional aggravating factors, range between 11 years to 15 years. The Court considered the fact that the appellant was HIV positive as an additional aggravating factor in that he had, by committing a sexual act on the victim while HIV positive, exposed her to the risk of contracting HIV/AIDS. The Court imposed a sentence of 25 years' imprisonment after deducting 3 years spent on remand, the convict was to serve 22 years in totality

In *Apiku Ensio vs. Uganda*, Criminal Appeal No. 751 of 2015 the Court of appeal reduced a sentence of 25 years to 20 years. Each case must be treated on its own merits and upon the accused being convicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) and (b) of the Penal Code Act, the prosecution has to make submission in aggravation, however, this was not done. Court notes that much as the accused has no previous conviction, this offence is of a serious nature. The victim was a young girl aged between 5 to 6 years, tender and the accused knew he was HIV positive but decided to endanger the life of the young industrious girl. It is the mandate of every person to protect children from people like the accused. A deterrent custodial sentence is deserved.

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In his **allocutus**, however the convict prayed to be set free on grounds that he was framed by the mother of the child after realizing that he had another woman, that he needed to look at go back home and take care of his three children. He prayed for a lenient punishment.

As per section 129(3) of the penal code Act, the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) (b) of the **Penal Code Act**, is death. However, the punishment for death is reserved for the re-arrest of the rear cases and circumstances under which such punishment can be given are provided for under 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.

In the instant case, the Accused saw the victim while seated on the veranda in the absence of the victim's parents, called her and took her to the nearby house, covered her mouth, removed her kickers and clothes, he then performed the sexual act with the victim, circumstances like this allude to the vulnerability of the victim which the convict saw as an opportunity to victimize the girl.

The Court can only imagine the terror unleashed on this child as her mouth had been covered, she was helpless while being sexually molested.

Court again notes that at the time the convict committed the offence, the convict was aware that he was HIV positive. This fact too, according to Regulation 22 of The Constitution *(Sentencing Guidelines for Courts of Judicature) (Practice)* Directions, 2013 justifies death penalty.

At the time of the offence, the convict was aged 37 years while the victim was in the range of 5 to 6 years old. The age difference between the victim and the convict was 32 or 31 years. The victim was an infant and vulnerable that he could not defend herself against the gruesome acts of the convict, he took advantage of the absence of the parents of the child, called her and dragged her into a nearby house and had sex with her the way he pleased. The child went through a harrowing experience whose emotional and psychological effect may cease. In considering the allocutus of the convict and the mitigating factors in this case, being that the convict had no previous convictions on the same offence and having reviewed the previous cases in relation to the same offence.

I find a sentence of 31 years' imprisonment appropriate, the period spent on remand should be deducted as per Article 28 of the constitution and I accordingly do so. The convict is to serve the remaining sentence after the years spent on remand have been deducted. He had been on remand for 05 years, 08 months & 7 days and therefore he will serve a balance of 25 years, 3 months & 23 days in Prison.

The convict is advised that he has a right of Appeal against both conviction and sentence, within a period of fourteen days.

Dated at Mukono this 26th day of September 2023

Christine Kaahwa JUDGE

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