IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Sessions Case No. 273 of 2015

In the matter between

UGANDA ………………………………………………………………… **PROSECUTOR**

VERSUS

KAKANDE MIKE alias OJARA ……………………………………………… **ACCUSED**

Heard: 23 May, 2019.
Delivered: 30 May, 2019.

Criminal Law *—Aggravated Defilement —whether the victim was below the age of eighteen years—whether the victim suffered a sexual act—whether that act was performed by the accused—whether the accused was HIV positive at the time.*

Evidence *— inconsistencies and contradictions—The question always is whether or not the contradictory elements are essential to the determination of the case*

JUDGMENT

STEPHEN MUBIRU, J.

The Indictment:

[1] The accused is charged with one count of Aggravated Defilement c/s 129 (3) and (4) (b) of the *Penal Code Act*. It is alleged that the accused on the 11th day of December, 2014 at Pajengo village in Nwoya District, performed and unlawful sexual act with Apiyo Scovia, a girl under the age of eighteen years, while he was a person with HIV.

The facts of the case;

[2] The prosecution case briefly is that on that on the fateful day of 11th day of December, 2014 at around 3.00 pm, the accused went to the home of the victim where he found her alone at home. He asked her for some water for drinking. When the victim handed over the water to him, he grabbed her hand, forced her into the house, threatened her with a panga and prevented her from screaming for help, undressed her and had forceful sexual intercourse with her. He threatened her with death if she ever revealed to anyone what had just happened to her. Around 10th April, 2015 her cousin P.W.3 Opio Sam noticed physiological changes in her whereupon she confided in him about the act that had occurred in December, 2014. She told him that she knew the perpetrator only by appearance.

[3] A week or so later while at the local market, she spotted the accused at one of the market stalls and identified him to P.W.3 who called and briefed her father P.W.2 Odong Bosco about the developments. The latter advised that the accused should be arrested. The accused was arrested and the victim further identified the accused to the police as the perpetrator of the offence.

[4] In his defence, the accused denied having committed the act. Although he was resident at Latoro village in Nwoya District, at the time of the alleged offence, he had never met any of the prosecution witnesses before his arrest in April, 2015 at Latoro village. He was arrested on allegations of attempted murder of his wife Adong Alice, only to be surprised with an accusation of aggravated defilement at Purongo Police Station. He had no grudge with any of the prosecution witnesses and does not know of any reason why they falsely accused him of the offence.

The burden and standard of proof;

[5] 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 *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 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*).

[6] 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 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.
4. That at the time of performing that sexual act, the accused was HIV positive.

Whether the victim was below the age of 18 years;

[7] 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 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).*

[8] In the instant case, the court was presented with the oral testimony of the victim of P.W.4 Apio Scovia who said she was 18 years old at the time she testified. Her father, P.W.2 Odong Bosco stated that the victim was born on 25th June, 2000 and was now 18 years old. This is corroborated by the admitted evidence of P.W.1 Dr. Odiye Geoffrey who examined the victim on 7th April, 2015 (four months after the day the offence is alleged to have been committed). His report, exhibit P. Ex.1 (P.F.3A) certified his findings that the victim was 14 years at the date of examination, based on "the stage of the breast (stage 14) teeth 28 dentition, pimples on the fact, hair at pubic area and armpits." Counsel for the accused did not contest this ingredient during cross-examination of these witnesses and neither did he do so in his final submissions. From all that evidence and in agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt. Apiyo Scovia was a girl under 18 years as at 11th December, 2014.

<u>Whether the victim suffered a sexual act;</u>

[9] 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 **p**enetration 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**.**

[10] In the instant case, the court was presented with the oral testimony of the victim P.W.4 Apio Scovia who described the nature of the act. She was threatened with death if she dared to scream, undressed and the assailant had sexual intercourse with her. Four months later she discovered later that she had conceived and she gave birth to a baby boy on 2nd September, 2015. Her cousin

P.W.3 Opio Sam, testified to having noticed physiological changes in her body nearly four months later and she confided in him about the act that had occurred in December, 2014. There is the corroborative evidence of P.W.1 Dr. Odiye Geoffrey who examined her on 7th April, 2015 (four months after the day the offence is alleged to have been committed). His report, exhibit P. Ex.1 (P.F.3A) certified his findings that her abdomen was "distended with soft round ballotable mass 16/40 not tender."

[11] He confirmed that the victim was "pregnant with 16/40 gestation." There is additional evidence of her father P.W.2 Odong Bosco who testified that he leaned about the pregnancy on 10th April, 2015 and she later gave birth to a baby boy whom he is looking after at his home in Kiryandongo. Counsel for the accused did not contest this ingredient during the trial and in his final submissions. The dates of discovery of the pregnancy and birth of a baby boy are consistent with the date of the alleged sexual act. 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 that Apiyo Scovia was the victim of a sexual act on 11th December, 2014.

<u>Whether it is the accused who performed that sexual act;</u>

[12] 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 denied having committed the offence. He testified that although he was resident at Latoro village in Nwoya District, at the time of the alleged offence, he had never met any of the prosecution witnesses before his arrest in April, 2015 at Latoro village. He was arrested on allegations of attempted murder of his wife Adong Alice, only to be surprised with an accusation of aggravated defilement at Purongo Police Station. He had no grudge with any of the prosecution witnesses and does not know of any reason

why they falsely accused him of the offence. In short, his defence is a total denial, thereby putting the prosecution to strict proof.

[13] To disprove that defence, the prosecution relies on the testimony of P.W.3 Apiyo Scovia the victim. To sustain a conviction, a court may rely on identification evidence given by an eye witness to the commission of an offence. However, it is necessary to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. 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 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. I of 1997)*. To do so, the Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification.

[14] In the instant case, Apiyo Scovia testified that she knew the accused before the incident, multiple times before with his friends and with his cousin P.W.3 Opio Sam although she did not know his name, it was day time at around 3.00 pm, the accused spoke to her in Jonam and Swahili and thus it was not a sudden attack by a stranger, and the witness was in close physical proximity of the accused. By that proximity she was able to notice that the accused had gaps in his teeth, which she had never seen before. Indeed during the trial the court was able to confirm that the accused has gaps in both his upper and lower incisors. Despite that, the victim was placed under threat for her life and fright may be unfavourable to correct identification. I find though that she had ample time to recognise the accused both visually and by voice since the conditions favourable to correct identification far outstripped those that were unfavourable.

[15] Counsel for the accused contested this ingredient during the trial and in his final submissions mainly on account of lack of corroborative evidence from witnesses who were present in the female ward or from the hospital administration.

According to section 133 of *The Evidence Act*, no particular number of witnesses in any case is required for the proof of any fact. Consequently, the testimony of the victim alone, if believed, is sufficient to establish any fact that requires proof. It is only if some aspect of that testimony is found unreliable or lacking that the court will look for corroboration.

[16] The Court can convict without corroboration of the victim's evidence provided he or she is satisfied that the victim was a truthful witness see *Kibale v. Uganda [1999] 1 EA 148; Mugoya v. Uganda [1999] 1 E.A 202* and *Mohammed Kasoma v. Uganda, S. C. Criminal Appeal No. 1 of 1994*). In the instant case, I observed the victim as she testified. Even under rigorous cross-examination by defence counsel she remained composed and steadfast. I found her to be a truthful witness whose evidence could be relied upon without corroboration.

[17] The only question is whether she may be motivated to falsely implicate the accused as a cover up of a third party or for other ulterior motive since it was suggested that the accused is falsely implicated. I find no evidence suggesting the existence of a grudge. I however noted some inconsistencies in the testimony of the victim regarding the timing of the report to the L.C.1 and the depth of her knowledge of the accused. She appeared to have withheld some of the details she knew about the accused before the incident.

[18] It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

[19] What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from case to case but, generally in a trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case

[20] I find the inconsistencies in the victim's testimony are minor and they do not point to deliberate untruthfulness. They have thus been disregarded. Consequently, 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 and the defence of a grudge is not plausible. This ingredient has been proved beyond reasonable doubt.

Whether the accused was HIV positive at the material time

[21] The last essential ingredient requires proof that at the time of performing the sexual act, the accused was HIV positive. To prove this element, the prosecution relied on the admitted documentary evidence, P.W.1 Dr. Odiye Geoffrey who examined the accused on 7th April, 2015 (four months after the day the offence is alleged to have been committed). His report, exhibit P.Ex.2 (P.F.24A) certified that the medically examined the accused and found him to be HIV positive. It was the evidence of the accused D.W.1 Kakande Mike in his defence that for one year before December, 2014 he had known his sero status as HIV positive and was on septrin.

[22] It is now common knowledge that HIV is not detectible immediately after infection. There is a "window period" soon after infection during which the

presence of the virus in the human body cannot be detected by diagnostic tests. The window period occurs between the time of HIV infection and the time when diagnostic tests can detect the presence of antibodies fighting the virus. The length of the window period varies depending on the type of diagnostic test used and the method the test employs to detect the virus.

[23] Furthermore, it is still common knowledge that if an HIV antibody test is performed during the window period, the result will be negative, although this will be a false negative since the virus will be present in the body, only that it cannot be detected yet. At page one of his paper published in November 2011 entitled, *The HIV Seronegative Window Period: Diagnostic Challenges and Solutions,* Mr. Tamar Jehuda-Cohen of SMART Biotech Ltd. Rehovot Israel; and Bio-Medical Engineering, Technion Israel Institute of Technology, Haifa, Israel reveals that scientific research has established that it takes 95% of the population approximately three months to seroconvert following HIV infection. The window period therefore is generally three months.

[24] In the instant case, since the HIV diagnostic test done on the accused on 7th April, 2015, four months after the incident turned out positive, it implies that the window period had elapsed. He therefore must have contracted the virus not less than three months prior to the date of that test, i.e. latest December, 2014 and was therefore carrying the virus by 11th December, 2014 when he had sexual intercourse with the victim. Counsel for the accused did not contest this during cross-examination of the prosecution witnesses and in his final submissions. In agreement with the assessors, I therefore find that this ingredient too has been proved beyond reasonable doubt.

[25] 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) and (b) of the *Penal Code Act*.

SENTENCE AND REASONS FOR SENTENCE

[26] Upon the accused being convicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (b) of the *Penal Code Act*, the learned State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; although there is no record of his past conviction and he has been on remand for five years, one month and nineteen days, the offence is serious that attracts the maximum of death. The victim was only 14 years old at the time. The accused was HIV positive and therefore exposed the victim to the risk of infection. The offence is rampant. The court should pass a deterrent sentence. He prayed that the accused be sentenced to 18 years' imprisonment.

[27] In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; the convict is a first time offender that has no previous criminal record. He has been on remand for 5 years, one month and 19 days. He appeared remorseful throughout the trial. The average sentence in such cases is ten years' imprisonment taking into consideration the time spent on remand. In his *allocutus*, the convict prayed for lenience on grounds that; he is sick. He left children and he does not know where his wife is. Even his relatives do not know where he is. There is no one to help his wife. Since he has spent five years on remand, he prayed for a sentence he can serve so that he can help his children. His mother was sick by the time he came to Gulu. He do not know in what state she is.

[28] 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) (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 probable consequence of the act. Although in the instant case the circumstances in which the offence was committed were not life threatening, for which reason I have discounted the death sentence, the convict knew or had reasonable cause to believe that he was HIV positive at the time he committed the offence. He poses a danger to other girls.

[29] When imposing a custodial sentence on a person convicted of the offence of Aggravated 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 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.

[30] I have taken into account the mitigating factors as elucidated by the convict and his counsel. Despite that mitigation, the circumstances of the case are sufficiently grave to warrant a deterrent custodial sentence. The convict knew or had reasonable cause to believe that he was HIV positive at the time he committed the offence. The fact that he nevertheless chose to have unprotected sexual intercourse with the victim is manifestation of a callous disregard of the life of others when he exposed the victim, to the danger of contracting HIV at the tender age of 14 years. His propensity to commit similar offence in the circumstances is

very high. It is for those reasons and in light of those aggravating factors, that the convict deserves to spend the rest of his natural life in prison. The convict is hereby sentenced to Life imprisonment. He is to spend the rest of his natural life in prison.

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

Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the prosecution : Mr. Onencan Moses, Asst. DPP.

For the accused : Mr. Simon Peter Ogenrwot.