IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Sessions Case No. 0038 of 2019

In the matter between

UGANDA **PROSECUTOR**

And

ONYANGO DAVID **ACCUSED**

Heard: 11 November, 2019.

Delivered: 13 November, 2019.

Criminal Law: *— Aggravated Defilement — the prosecution must prove that the victim was below 14 years of age, that a sexual act was performed on the victim and that it is the accused who performed the sexual act on the victim.*
Evidence *— Identification by voice — factors to take into account when evaluating voice identification evidence —The principles which apply to a visual identification apply equally to voice identification —The risk of mistake in identifying a voice is seen to be at least as great as that involved in visual identification.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The accused is indicted with one count of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It is alleged that the accused on the 22nd day of

February, 2018 at Pakumu Jangyat village in Kitgum District, performed an unlawful sexual act with Ayaa Eunice, a girl aged nine years.

[2] The prosecution case is that on the fateful night the victim was sleeping at home in the same house with one of his brothers when she suddenly awoke to find a man lying on top of her performing an act of sexual intercourse. She recognised the man by his voice as the accused, after the act when he warned her not to tell anyone about it.

[3] In his defence the accused denied having committed the offence. He claims that he was framed by the mother of the victim who did not want him to live in her home. On the day he was arrested, he had gone into the bush at night to trap birds. On return late in the night, the father of the victim assaulted him and accused him of having defiled his daughter.

<u>Burden of proof</u>

[4] 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).*

Ingredients of the offence

[5] 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 14 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.

a) That the victim was below 14 years of age

[6] The first ingredient of the offence of Aggravated defilement is proof of the fact that at the time of the offence, the victim was below the age of 14 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).*

[7] In this case the victim Ayaa Eunice, testified as P.W.4 and stated that she was 12 years old, hence 11 years old last year when the offence is alleged to have been committed. The admitted evidence of P.W.1 Okongo Simon Knox a Senior Clinical Officer at Kitgum Matidi Health Centre III is to the effect that on 27th February, 2008 (five days after the incident) he examined her and in his report P.F. 3A (exhibit P. Ex.1) indicated that he found her to be nine years old based on the fact that she had only 22 permanent teeth. It is corroborated by the additional admitted evidence of P.W.2, a medical Officer at Kitgum General Hospital who on 26th June, 2007 issued an immunisation Card (P. Ex.2) indicating that the victim is the 6th born in her family and was born at that hospital on 6th June, 2007 (implying she was 11 years old last year when the offence is alleged to have been committed). The court had the opportunity to see the victim

when she appeared to testify and the court had to conduct a *voire dire* first. Despite the two years' disparity between the two documents, there is no doubt that the victim was still below the age of fourteen years event at the time she testified. No wonder therefore that counsel for the accused conceded to this element. Therefore, in agreement with the assessors, I find that on basis of that evidence the prosecution has proved beyond reasonable doubt that Ayaa Eunice was a girl below the age of fourteen years as at 22nd February, 2018.

b) That a sexual act was performed on the victim.

[8] 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.

[9] The victim, Ayaa Eunice, testified as P.W.4 and stated that on the fateful night, she woke up to find someone on top of her having sexual intercourse with her. She stated that she felt pain after the act in her lower abdomen. She saw a whitish substance on her dress during the day time when she was bathing. P.W.1 Okongo Simon Knox a Senior Clinical Officer at Kitgum Matidi Health Centre III who on 27th February, 2018 (five days after the incident) medically examined her stated in his report P.F.3A (exhibit P. Ex.1) that that her hymen was ruptured and the possible cause was an erect penis. Her father, Okello Francis, testified as P.W.5 and stated that it is on the 26th February, 2018 that he learnt about the incident from the mother of the victim and the accused confirmed to him that indeed it had happened. The testimony of the victim is corroborated by the medical evidence indicating that she had experienced a sexual act.

[10] To constitute a sexual act, it is not necessary to prove that there was deep penetration, the use of a sexual organ, the emission of seed or breaking of the hymen. 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 agreement with both assessors, I find that this ingredient as well has been proved beyond reasonable doubt.

c) <u>That it is the accused who performed the sexual act on the victim.</u>

[11] 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. The accused denied having committed the offence. He claims that he was framed by the mother of the victim who did not want him to live in her home. On the day he was arrested, he had gone into the bush at night to trap birds. On return late in the night, the father of the victim assaulted him and accused him of having defiled his daughter.

[12] To refute that defence there is the oral testimony of P.W.4 Ayaa Eunice, the victim, who stated that when she woke up, she found someone on top of her having sexual intercourse with her, she recognised him by his voice. This was corroborated by her father P.W.5 Okello Francis who testified that on the 26th February, 2018 when he learnt about the incident from the mother of the victim, he confronted the accused with that information and the accused confirmed to him that indeed he committed the act. He further stated that the accused went into hiding during that night. He was traced and arrested the following day sometime after midday, pursuant to a manhunt conducted by the members of the clan of the accused.

Identification

[13] The prosecution evidence implicating the accused largely depends on the identification evidence of P.W.4 Ayaa Eunice, which was identification by voice. Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognising a person under difficult conditions; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions. In visual identification cases, a conscientious, responsible and fair minded person can make a mistake when it comes to identification just as an impulsive, irresponsible and not very bright person may. Even when multiple witnesses give identification evidence, a number of such witnesses can all be mistaken for which reason unsatisfactory or defective identifications do not necessarily support one another *(see R v. Turnbull [1977] QB 224 and R v. Weeder (1980) 71 Cr App R 228).* A witness can be credible but mistaken.

[14] There is a possibility of reluctance of even a perfectly fair minded person once they have made up their mind about the matter, to admit that they may be wrong in their identification of the person. It is a fact of life that a person who makes an identification may be honestly reluctant to admit that there is a possibility of his or her having made a mistake. This may not apply to everybody, but a court should be on its guard against accepting and acting upon the witness' identification simply because it was impressed by him or her as a witness.

[15] Courts are exceptionally cautious where the circumstances in which the opportunity of the identifying witness to recognise a suspect was so limited, or the witness's familiarity with a suspect was of such a short duration *(see Arthurs v. Attorney-General for Northern Ireland (1970) 55 Cr App R 161; R v. Carr (2000) 117 A Crim R 272 and R v. Marijancevic (1993) 70 A Crim R 272).* The evidence is considered more reliable where If the witness is very familiar with the person observed, there was an extended opportunity for observation, and the

circumstances of the observation were such that there was little likelihood that the difficulties inherent in the identification process would lead to misrecognition.

[16] The principles which apply to a visual identification apply equally to voice identification. The risk of mistake in identifying a voice is seen to be at least as great as that involved in visual identification *(see Li v. R (2003) 139 A Crim R 281).* The evidence provided by the victim P.W.4 Ayaa Eunice is purely based on her as an ear witness's memory of the voice she heard of the person who committed the crime. This in itself presents an issue with ear witness testimony. Empirical research shows that voice identifications can sometimes be accurate but can also be highly unreliable, even more so (on average) than eyewitness testimony. A court therefore ought to evaluate voice identification evidence with extreme care. Voices that are familiar in everyday situations may not be easily identified or recognized with reliable accuracy in other contexts. It seems clear from both informal observations and experimental evidence that individuals vary widely in their ability to identify people solely by their voices. In rare cases, this ability is severely impaired or altogether absent.

[17] In *Mutachi Stephen v. Uganda, C.A. Cr. Appeal No.132 of 1999*, the victim was awakened by a loud bang at his door whereupon the door was thrown open and three thugs entered his house. Two of them were armed with guns. They threatened to shoot him and menacingly demanded money and other properties while torturing him. They tore a mattress and took shs. 44,000/= plus other household properties. Two of the thugs were recognized by the complainant as the accused whom he had known before that day. The wife of the complainant also recognized one of them as a person she had also previously known. This recognition was facilitated by the fact that the thugs were flashing a torch around while searching for property and counting the money they had stolen. The court considered the evidence of one of the victims that he knew the voice of AI and that when he spoke the witness confirmed AI was one of the assailants because his voice was known to the witness. The court believed that with the frequent

interaction between AI and the witness, the visual identification of AI was confirmed by the identification and recognition of his voice as one of his assailants thus confirming his visual identification.

[18] The Canadian case of *R v. Campbell, 2006 BCCA 109* is another case illustrative of this point. In that case, Campbell was charged with robbing a video store. The issue in the case was the identity of the thief. The store clerk was the only person to give identification evidence. The robber was previously unknown to her and she interacted with him on the date in question for five to ten minutes. A month later she claimed to see him at a local mall. She recognized him by his appearance and his voice. The trial judge cautioned himself regarding the frailties of eyewitness evidence but said nothing about the weaknesses of ear witness evidence. On the contrary, he only used the victim's voice identification to help overcome any weaknesses with her visual identification. On appeal, Campbell claimed that his conviction was unreasonable, in part because the trial judge "gave undue weight to [the victim's] recognition of the appellant's voice as confirming her identification of him." The British Columbia Court of Appeal said nothing about that submission and only used the ear witness testimony to help justify the reasonableness of the visual identification evidence.

[19] The reliability of voice identification evidence depends on a number of factors including; (a) familiarity, the greater the familiarity of the listener with the known voice the better is his or her chance of accurately identify a disputed voice, (b) length of exposure to the voice both before and during the incident, (c) the retention interval between the time when the witness last heard the voice and when recognition of the voice is called in issue (d) the degree to which the earwitness made a conscious effort during the crime to pay attention to the characteristics of the perpetrator's voice (e) whether the perpetrator used unfamiliar language and accent, the danger, where the accused has an accent being that the witness is identifying the accent rather than the particular voice of the accused. People may not be able to distinguish readily between voices

speaking in a manner that is unfamiliar to the witness (f) the distinctiveness of the perpetrator's voice (or lack thereof), and so on. Although voice identification is less reliable if a witness cannot describe the basis on which a match is made (e.g. by describing the intonation, rapidity of speech and cadence), voice identification may be accurate even though a person is unable to analyse and explain the characteristics of the voice.

[20] Although recognition evidence may be more reliable than evidence identifying a stranger, mistakes in recognition of close relatives and friends are still sometimes made. Such mistakes can arise because the difficulties surrounding the observation of a crime can be just as great when observing a familiar person as an unfamiliar person. There is also a possibility of jumping to a conclusion as to the identity of the offender, if they resemble a known person. Such evidence therefore ought to be treated with extreme caution.

[21] In her testimony P.W.4 Ayaa Eunice stated that she knew the accused very well before the incident since they lived together in the same home for two months and that she recognised his voice when he warned her not to tell anyone about the incident. The accused admitted as much in his defence, only disputing having been responsible for the act. I have considered the fact that by reason of having lived together in the same home for two months, there were frequent interactions between the accused and the victim. There is no indication in the evidence before me that the victim ever left the home during that period. The retention interval between the time when the witness last heard the voice of the accused and the night of 22nd February, 2018 is therefore not in issue. The assailant spoke to the victim in very close proximity and the duration of the sexual act was long enough to aid correct identification of the voice. I am satisfied that in the circumstances, there is no possibility of error in the victim's recognition of the voice of the assailant. This voice recognition was further corroborated by the fact that the accused went into hiding the following morning.

[22] I observed the victim as she testified in court. She was firm and consistent in all aspects of her testimony. She appeared to be a steady, truthful and reliable witness. She withstood the rigorous cross-examination of defence counsel. She answered all questions without hesitation or exaggeration. She had no motive of her own to falsely implicate the accused. I am not persuaded by the argument that she is a mere tool in the grudge that exists between her mother and the accused, if such grudge exists at all. It is incredible that her mother would instigate the victim to create a story of the type the court has heard.

Order:

[23] In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find the accused guilty and convict him for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act.*

SENTENCE AND REASONS FOR SENTENCE

[24] Upon the accused being convicted for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, the learned State Attorney prosecuting the case prayed for a deterrent custodial sentence, on grounds that; although the convict has no previous conviction and has been on remand for one year eight months, the offence attracts a maximum of death. The victim was only eleven years and the accused 20 years. He is a cousin of the victim. His mother is the big sister of the victim's father. He should have acted as a big brother to protect the victim at night but instead preyed on her to fulfil his selfish sexual needs. He is old enough to have his own wife and not to have sex with a cousin. Such offences are rampant. Young girls are lured into sex and this affects them through trauma and physical injury. He prayed for a term of imprisonment to keep him away for a long time and thus proposed 25 years' imprisonment.

[25] In his submission in mitigation of sentence, learned counsel for the accused, prayed for a lenient sentence on grounds that; the convict has been on remand for one year and eight months. While on remand he has not attempted to escape. He is following the programme of reform. He is remorseful and 20 years is still useful and can be useful. He is a first offender. He was in senior one and was helping the mother so we pray for lenience. The convict opted not to say anything in his *allocutus*.

[26] 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. I have considered the circumstances in which the offence was committed which were not life threatening, in the sense that death was not a very likely consequence of the convict's actions, for which reason I have discounted the death sentence.

[27] 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.

[28] The Court of Appeal though has time and again reduced sentences that have come close to the starting point of 35 years' imprisonment suggested by the sentencing guidelines, as being harsh and excessive. For example, in *Birungi Moses v. Uganda C.A Crim. Appeal No. 177 of 2014* a sentence of 30 years' imprisonment was reduced to 12 years' imprisonment in respect of a 35 year old appellant convicted of defiling an 8 year old girl. In another case, *Ninsiima Gilbert v. Uganda, C.A. Crim. Appeal No. 180 of 2010,* it set aside a sentence of 30 years' imprisonment and substituted it with a sentence of 15 years' imprisonment for a 29 year old appellant convicted of defiling an 8 year old girl. Lastly, in *Babua v. Uganda, C.A Crim. Appeal No. 303 of 2010*, a sentence of life imprisonment was substituted with one of 18 years' imprisonment on appeal by reason of failure by the trial Judge to take into account the period of 13 months the appellant had spent on remand and the fact that the appellant was a first offender. The Court of Appeal however took into account the fact that the appellant was a husband to the victim's aunt and a teacher who ought to have protected the 12 year old victim.

[29] Although the circumstances of the instant case did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the action such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. The accused was aged 20 years at the time of the offence and the age difference between the victim and the convict was 9 years. The convict not only exposed her to the danger of sexually transmitted diseases at such a tender age but also traumatised her physically

and psychologically. It is for those reasons that I have considered a starting point of thirty (30) years' imprisonment.

[30] The seriousness of this offence is mitigated by a number of factors; the fact that the convict is a first offender and a young man who committed the offence at the age of 20 years. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of thirty (30) years' imprisonment, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty five (25) years.

[31] 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 convict. 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 twenty five (25) years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 15th March, 2018 and been in custody since then, I hereby take into account and set off one year and eight months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of twenty (23) years and four (4) months, to be served starting today.

[32] 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 accused : Mr. Geoffrey Boris Anyoru, on State brief

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