IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Sessions Case No. 0021 of 2019

In the matter between

UGANDA **PROSECUTOR**

And

O. R **JUVENILE OFFENDER**

Heard: 22 November, 2019.

Delivered: 3 December, 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; *— Child victims — Where the child's powers of observation and memory, or of the capacity to give a reliable account in unknown and untested by cross-examination, the court has to proceed with caution — Court should consider the developmental and emotional barriers that prevent children acting as an empowered adult might act — While the evidence of children is still subject to the same standard of proof as the evidence of adult witnesses in criminal cases, it should be approached not from the perspective of rigid stereotypes, but on a common sense basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case — ocular observation by the court in its judicial capacity constitutes part of the evidence at a trial.*

Criminal Procedure *— Juvenile Offenders — Disposition Orders — the primary aim of juvenile justice is the rehabilitation and reintegration of the child into society — deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases..*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The juvenile offender 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 juvenile offender on the 20th day of August, 2019 at Lemo West in Kitgum District, performed an unlawful sexual act with Ayo Vivian, a girl aged two years.

[2] The prosecution case is that on Tuesday 20th August, 2019 at around 7.00 pm, the mother of the victim, P.W.2 Akumu Florence, returned home from my place of work. When she arrived home Ayoo Vivian went to her, she picked her up and carried her. The girl then told her; "mummy, we did Cuci with Oloya." P.W.2 asked her how they had performed the act. The girl got up, lifted up her dress and touched her private parts and began demonstrating. She pushed one of her fingers into her vagina. After she had demonstrated, P.W.2 sent Nancy, her babysitter, to go and call O. R. together with his mother. She did not find her at home, but O. R. was sleeping in the house. P.W.2 made several attempts to meet the two in vain. Following this incident, the baby was very sick. On Thursday 22nd August, 2019 during the evening at around 5.00 pm P.W.2 called the father of Vivian and told him what Vivian had narrated to her. On 23rd August, 2019 the father of Vivian called P.W.2 very early in the morning and directed her to take the phone to the mother of O. R. whom he wanted to talk to. On phone he said the two children should be taken to the police and from there to the hospital to check on their health status. They went to Kitgum CPS. They were taken to a clinic within the Police Station. Blood samples were taken and tested from both and the results were positive for O. R. and negative for Vivian. They returned to the counter and statements were recorded. From there they were taken to Kitgum Government Hospital and more tests were done there. It was for

confirmation of the act of defilement or not. The doctor confirmed there had been sexual intercourse. They were told to return to the police from where O. R. was then detained.

[3] In his defence the juvenile offender denied having committed the offence. His version was that on 20th August, 2019 he was at home with his mother and sisters Mercy and Adoch Linda, and his brother Changwat Emmanuel. He did not go to the home of Vivian that day. He used to visit the home of Vivian only when sent to go and borrow small items and sometimes to play with Oleo Raphael. He would at times chat with Nancy, the baby sitter. On the morning of 20th August, 2019 he had gone to sell beans and sorghum at Lamit Market. He went to the market at 7.00 am and returned at 3.00 pm. He then went to play football at the football pitch of St. Francis primary School, with Raphael and Cesar Okwong. After playing football he returned home and bathed at around 7.00 pm. He found Mercy and Adoch Linda at home. He then went to sleep. His mother was not at home that day. She had been called to a meeting earlier. On return from the football pitch he saw Nancy at around 8.00 pm. She was outside, at their home. He did not talk to her and did not see Ayoo Vivian nor her mother when he returned from playing football. Other persons ordinarily resident at Vivian's Ayoo's home are; Junior who is a boy aged 14 years, Odong who is aged 16 years, Olenge who is older that the other two, Nancy who is 16 years old. Vivian is two years old. The mother of Vivian also stays there. The father of Vivian comes once in a while. At that home of Vivian's mother on 20th August, 2019 he saw Junior, Odong, the mother of Junior who is also the mother of Ayoo.

[4] He was arrested on 23rd August, 2019 from his parents' home. Between 20th August, 2019 and 23rd August, 2019 the mother of Junior had been to their home. She did not tell them the purpose of her visit. He was taken to a clinic before his arrest. He was told he was being taken for medical examination. He went with my sister Ajok Mercy to test their blood. He was never told that he was accused of defiling Ayoo. It is from the police after the blood test that he was told

of that accusation, and he was detained. When he was released on bail, he found that Nancy was no longer living at the home of our neighbour. He did not know when she left but at the time of his arrest she was still there as a neighbour.

Burden of proof

[5] The prosecution has the burden of proving the case against the juvenile offender beyond reasonable doubt. The burden does not shift to the juvenile offender person and the juvenile offender is only be found responsible 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 juvenile offender 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 juvenile offender, at its best creates a mere fanciful possibility but not any probability that the juvenile offender is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

Ingredients of the offence

[6] For the juvenile offender to be found responsible 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

[7] 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. This may be proved by the production of her birth certificate, the testimony of the parents or other adult acquainted with the circumstances of the child's birth. 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 this case the victim, Ayo Vivian, did not testify due to her tender age, but appeared with her mother in court when she came to testify. She carried her on her lap while she testified. Her mother P.W.2 Akumu Florence testified that the victim was born on 17th November, 2016 (implying that by the date of the incident she was two years and nine months old). This was corroborated by the evidence of P.W.1 Dr. Casta a Medical Officer at Kitgum General Hospital who on 23rd August, 2019 (three days after the incident) examined her, and in his report P.F. 3A (exhibit P. Ex.2) indicated that he found her to be "about 2 - 3 years. Has only the milk teeth, 20 in number." The court had the opportunity to see her and her physical appearance matched the age attributed to her. No wonder that counsel for the juvenile offender conceded this element. Therefore in agreement with the assessors, I find that on basis of that evidence the prosecution has proved beyond reasonable doubt that Ayo Vivian was a girl below fourteen years as at 20th August, 2019.

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

[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 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.

[10] The victim in this case did not testify. Her mother P.W.2 Akumu Florence testified that when she returned home that evening from work at around 7.00 pm, the victim went to her and she carried her. The victim then told her that "mummy we did Cuci with Oloya." She asked her how they did it. She got up, lifted up her dress and touched her private parts and began demonstrating. She pushed one of her fingers into her vagina. From her demonstration she deduced it was a sexual act. P.W.1 Dr. Casta a Medical Officer then at Kitgum General Hospital who on 23rd November, 2019 (three days after the incident) examined her and in his report P.F.3A (exhibit P. Ex.2) indicated that "there is hyperaemia at the outer wall of the vagina, hymen not ruptured." Regarding the possible cause of that, he expressed the opinion that it was "friction by a soft round bodied object."

[11] The defence contests this element contending those signs, hyperaemia, as seen can be caused by so many factors. The victim touched her private parts and that could have caused it. Touching and fingering could cause that effect. This could be by the action of the victim herself. It is a fact that the evidence explaining the cause of the injuries found in the victim's private parts is primarily based on the report the victim gave to her mother.

[12] The law is sceptical of the capacity of children to observe and recall events accurately, to appreciate the need to tell the truth, and to resist the influence of other people. Children are commonly thought to have great difficulty distinguishing fantasy from reality. A major concern with narrations of events by children is their potential suggestibility. Children are more suggestible than adults and they have greater difficulty than adults in communicating what they know. As

a result of repeated or misleading questions, the memory of a child may become distorted. It is possible for a child who has been subjected to repeated, suggestive questioning to develop "memories" of events that did not in fact occur. The way in which children are questioned can also greatly affect what they are able to communicate. While children can be reliable witnesses, children's memories are less well developed than adult memories. Where the child's powers of observation and memory, or of the capacity to give a reliable account in unknown and untested by cross-examination, the court has to proceed with caution. The evidence of a child should not be compared to what one might expect of an adult witness, but it must be carefully assessed. Like adults, children can lie or be mistaken.

[13] On the other hand, while children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it (see *R. v. B.(G.), [1990] 2 S.C.R. 30 at 55*). There are some events that happen in a child's life that are never to be forgotten, even if, with the passing of time, exact dates and times are forgotten. Children can be as reliable in what they recall about an incident as adults, albeit they may not be able to describe events in as much detail in "free recall" as adults and may be unable to answer some kinds of questions that adults can. Court should consider the developmental and emotional barriers that prevent children acting as an empowered adult might act.

[14] For example in *R. v. R. W [1992] 2 S.C.R. 122*, the accused was charged with indecent assault, gross indecency and sexual assault against three young girls. The youngest girl, his niece, was between two and four years old when the incidents occurred, seven when they were reported to the authorities, and nine at the time of trial. The other two girls were his step-daughters. The younger one was between nine and ten at the time of the events, eleven when they were reported, and twelve at the time of trial, while the oldest girl was ten at the time of the events, fourteen at the time of reporting and sixteen at the time of trial.

[15] At the trial the girls described the incidents out of which the charges arose, and the accused denied the allegations. The evidence of the oldest child was un-contradicted, apart from the accused's denial, and internally consistent, but the evidence of the two younger children revealed a number of inconsistencies and was contradicted in some respects. The accused was convicted on all five counts. The Court of Appeal set aside the convictions and entered acquittals. It found that there was "really no confirmatory evidence," that the evidence of the two younger children was "fraught with inaccuracy" and that neither of the older children was "aware or concerned that anything untoward occurred."

[16] Reversing the decision, the Supreme Court held;- "the law concerning the evidence of children has undergone two major changes in recent years. First, the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution has been eliminated. Thus various provisions requiring that a child's evidence be corroborated have been repealed. Second, there is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. While the evidence of children is still subject to the same standard of proof as the evidence of adult witnesses in criminal cases, it should be approached not from the perspective of rigid stereotypes, but on a common sense basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case. The Court of Appeal went too far in this case in finding lacunae in the evidence which did not exist and in applying a stringent, critical approach to the evidence. It appears to have been influenced by the old stereotypes relating to the inherent unreliability of children's evidence and the "normal" behaviour of victims of sexual abuse and to have placed insufficient weight on the trial judge's findings of credibility. The verdicts in this case were ones which a properly instructed jury (or judge), acting judicially, could reasonably have rendered."

[17] The rule against hearsay is based on the expectation that a child victim should give evidence in the same way as adults in the witness box in the presence of the accused. It is in that regard peculiarly weighted against a child. The courts need to contextualise the unique circumstances surrounding the sexual abuse of children. Even though it is relevant, a witness's evidence of a child's recent complaint is caught by the exclusionary hearsay rule under section 59 of *The Evidence Act*. Nonetheless, it is evidence that falls within the hearsay exception under section 156 of *The Evidence Act*, which applies when the maker of while the maker of the statement was under the stress of excitement caused by the event. In a child sexual assault trial, evidence of recent complaint would be relevant to whether or not the alleged sexual conduct had taken place, since consent is not a fact in issue. Evidence given by a child victim's first confidant about the complainant's experiences of being sexually abused, and the circumstances in which it was made is admissible as the hearsay rule does not apply to evidence of a representation that is given by a person who heard or otherwise perceived the representation being made; if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation. Hearsay evidence of a recent complaint of sexual assault satisfies the relevance test under *The Evidence Act* because it is capable of "rationally affecting the assessment of the probability of a fact in issue." Child evidence should be more readily available to the court by removing the restraints on its use that are based on stereotypes.

[18] Delayed disclosure for sexually abused children after the abuse, may not necessarily be evidence of fabrication, but rather, evidence of the trauma experienced by the sexually abused child, resulting in the child's psychological accommodation to the abuse through denial, secrecy, confusion, self-blame, and helplessness. The implication is that the sexually abused child may engage in activities that reflect his or her position of powerlessness (silence, denial and self-blame) rather than acts that reflect a position of empowerment (prompt disclosure and complaint). Exceptions to the hearsay rule are generally allowed

for two reasons: reliability and necessity. Some out-of-court statements are made with circumstantial guarantees of reliability that substitute for in-court guarantees like an oath and cross-examination (see for example John Wigmore, *Evidence in Trials at Common Law* § 1420, at 251 (James H. Chadbourn ed. 1974) noting that some hearsay is so reliable that cross-examination is a "work of supererogation"). Necessity sometimes justifies the use of hearsay evidence when the statements have unique evidentiary value that cannot be obtained from other sources, for example under section 30 (a) of *The Evidence Act* where statements are admitted when a declarant is deceased. The use of hearsay testimony is more appropriate in child sexual abuse cases than in many other criminal cases. For example in *Smith v. State, 252 A.2d 277, 278–79 (Md. Ct. App. 1969),* the court admitted the hearsay statement of a four-year-old defilement victim although the statement was made four to five hours after the assault, and the court found the child had been calm at the hospital for several hours before making the statement.

[19] I have considered in the instant case that the victim was not prompted by the mother. The moment she lifted the girl up, the girl, without any prompting, told her that "mummy, we did Cuci with Oloya." It is then that P.W.2 asked her how they had performed the act. The girl got up, lifted up her dress and touched her private parts and began demonstrating. That is the only question she put to the child and it was not suggestive at all. The possibility that the child who has been subjected to repeated, suggestive questioning to develop "memories" of an event that did not in fact occur is therefore ruled out.

[20] On the other hand, according to section 2 (1) (d) of *The Evidence Act*, ocular observation by the court in its judicial capacity constitutes part of the evidence at a trial. The court had the opportunity to test the child's powers of observation and memory and the capacity to give a reliable account. The court put a number of questions to the child victim while she was seated on the lap of her mother P.W.2 and the father was outside the chambers, but within her view. When asked what

she had for breakfast she stated that she had a bottle of soda before coming to court. When asked where her father was she instantaneously turned round in an excited and jovial mood to point at her father seated within view but outside the open door to the Chambers. When asked to point out O. R. she turned towards her mother's bosom, drawing very close to her chest and holding her palm against her face. The question had to be repeated three times before she turned round, palm still to the face, peering through her fingers and she pointed at the juvenile offender. This satisfied court that she had the capacity to demonstrate familiar objects and events in her surroundings in response to questions put to her. She had the mental capacity to distinguish between fact and fantasy and to give a reliable account of the alleged event. The court concludes that the victim's power of observation and memory is sufficiently developed and her capacity to give a reliable account is not in any serious doubt.

[21] Generally, children as young as the victim in this case do not have the necessary vocabulary or knowledge about sexual matters and the motive to lie about the incident. Children this age almost never make up stories about being sexually abused. Many do not even realise that what has happened to them is wrong and therefore are most unlikely to propagate a continuous lie to parents and authority figures for a substantial amount of time. This was explicit information about sexual behaviour told from a child’s viewpoint. There was sexual content in the manner the child demonstrated what she meant by "mummy, we did Cuci with Oloya." When a two year-old child provides a clear-cut dramatic enactment of vaginal penetration, it is unlikely that such a memory has been spontaneously invented. The injuries seen in her private parts upon medical examination by P.W.1 Dr. Casta are corroborative of her demonstration rather than a self inflicted injury that occurred during that demonstration. What she demonstrated to her mother was sexual knowledge beyond what one would expect of a child that age, that could not have been fabricated by her. There is no evidence to show that she had the prior sexual knowledge necessary to fabricate such an allegation nor evidence to show that she had been coached by an adult. Misinterpretation of an

innocent experience is an outside possibility since the person named as the perpetrator had no justification for touching her private parts.

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[22] 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).* I find that this ingredient has been proved beyond reasonable doubt.

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

[23] The last essential ingredient required for proving this offence is that it is the juvenile offender that performed the sexual act on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the juvenile offender at the scene of crime. The juvenile offender denied having committed the offence. His defence is alibi. He did not go to the home of Vivian that day. He went to Lamit market at 7.00 am to sell beans and sorghum, returned home briefly at 3.00 pm and then went out to play football, eventually returning home at around 7.00 pm, had a bath and retired to bed at 8.00 pm.

[24] The juvenile offender does not have to prove that alibi. The burden is on the prosecution to place the juvenile offender at the scene of the crime, and sufficiently connect him to the commission of the offence (see *Uganda v. Sabuni Dusman [1981] HCB 1*; *Uganda v. Kayemba Francis [1983] HCB 25*; *Kagunda Fred v. Uganda S.C. Criminal Appeal No. 14 of 1998*; *Karekona Stephen v. Uganda, S.C. Criminal Appeal No. 46 of 1999* and *Bogere Moses and Kamba v. Uganda, S.C. Criminal Appeal No. 1 of 1997*). Where prosecution evidence places the juvenile offender squarely at the scene of crime at the material time, the alibi is destroyed (see *Uganda v. Katusabe [1988-90] HCB 59*).

[25] To refute that defence the prosecution relies only on circumstantial evidence comprised of the report and demonstration the victim made to her mother, that was admitted as an exception to the hearsay rule under section 156 of *The Evidence Act*. It is a statement made by the victim at or about the time when the fact took place. This is corroborated by evidence admissible under section 2 (1) (d) of *The Evidence Act*, that renders ocular observation by the court in its judicial capacity to form part of the evidence at a trial; the fact that the victim was visibly upset and uneasy when asked to identify the juvenile offender in court. This was behaviour suggestive of the child's anxiety or troubled mental state in relation to an unpleasant past experience with the juvenile offender, expressive of a child's fear of the perpetrator.

[26] Ordinarily, in a circumstantial evidence case, guilt is inferred from a number of circumstances, often numerous, which taken as a whole eliminate the hypothesis of innocence. The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance (see *Shepherd v. R (1990) 170 CLR 573; (1990) 51 A Crim. R 181; (1990) 65 ALJR 132*). To enable a court to be satisfied beyond reasonable doubt of the guilt of the juvenile offender it is necessary not only that his guilt should be a rational inference but that it should be "the only rational inference that the circumstances would enable the court to draw." For an inference to be reasonable, it must rest upon something more than mere conjecture. The bare possibility of innocence should not present a court from finding the juvenile offender guilty, if the inference of guilt is the only inference open to reasonable persons upon a consideration of all the facts in evidence.

[27] In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the juvenile offender and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It

is necessary before drawing the inference of the juvenile offender's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

[28] I find that the representation the victim made to her mother occurred while the incident was fresh in the memory of the child, and she asserted the fact that it was the juvenile offender who had performed "Cuci" with her. From her demonstration, "Cuci" turned out to be a sexual act. Her behaviour in court can only be attributed to that incident, since in his own admission in his defence, the juvenile offender sated that the two neighbouring families were on good terms, the children used to play together and used to visit one another in their respective homes. The victim knew the juvenile offender very well and cold not have been mistaken about his identity. The circumstances have created a moral certainty, to the exclusion of every reasonable doubt, that it is the juvenile offender who committed the act and consequently his alibi has been disproved.

Order:

[29] 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 juvenile offender responsible for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*

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DIDPOSITION ORDER AND THE REASONS THEREOF

[30] 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, according to section 104 (A) (1) of *The Children Act*, a death sentence is not to be pronounced on or recorded against a person convicted of an offence punishable by death, if it appears to the court that at the time when the offence was committed the convicted person was below the age of eighteen years. The

alternative is provided for by section 94 (1) (g) of *The Children Act*, which states that in such instances the maximum period of detention is to be three years. The juvenile offender has been adjudged responsible for the offence of Aggravated Defilement C/s 129 (3) and (4) (a) of the *Penal Code Act* after a full adjudication. I have considered the submissions in aggravation of sentence, in mitigation, the *allocutus* of the juvenile offender and the victim impact statements.

[31] On account of children's diminished culpability and heightened capacity for reform, by statute children are different from adults for sentencing purposes. Sentencing a juvenile offender to three years in a children detention facility is the most severe criminal penalty available. Whereas the maximum punishment for a juvenile offender found responsible for an offence punishable by death is three years' detention, section 94 (1) (g) of *The Children Act* provides that detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order.

[32] In arriving at an appropriate disposition order, the court will take into account the aggravating and mitigating factors relevant to the offence charged, the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, the offender's record while on remand, the offender's ability to appreciate the risks and consequences of the conduct, the degree of criminal sophistication exhibited by the offender, the degree of responsibility the offender was capable of exercising, the offender's chances of being rehabilitated, the physical, psychological and economic impact of the offense on the victim and the community, and such other factors as the court may deem relevant. Orders imposing the maximum period of detention should normally be reserved for the worst offenders and the worst cases.

[33] Orders of that kind may be justified where the offence was committed with brutality, or where the prospects of the juvenile offender reforming through non-custodial interventions are negligible, or where the court assesses the risk posed by the juvenile offender and decides that he or she will probably re-offend and be a danger to the public for a considerable time to come. In such cases, maximum incapacitation is desirable. In cases of a grave nature but where the court forms the opinion that they were only the consequence of unfortunate yet transient immaturity of youth, from that maximum point the sentence should be graduated and proportional to the offender and the gravity of the offence, with a view to strike a balance between the need for public safety and that of rehabilitating the juvenile offender. A distinction must be made between the juvenile offender whose crime reflects unfortunate yet transient immaturity of youth from the rare juvenile offender whose crime reflects a deep-seated depravity.

[34] Three factors distinguish juveniles from adults convicted of similar crimes: lack of maturity, increased vulnerability to environmental influences, and likelihood of reform. Juveniles are more vulnerable to negative peer and family influences. These factors lessen a child’s moral culpability and enhance the prospect that those deficiencies will be reformed. On account of children's diminished culpability and heightened capacity for reform, by statute children are different from adults for sentencing purposes. Sentencing a juvenile offender to three years in a children detention facility is the most severe criminal penalty available. Whereas the maximum punishment for a juvenile offender found responsible for an offence punishable by death is three years' detention, section 94 (1) (g) of *The Children Act* provides that detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order.

[35] In arriving at an appropriate disposition order, the court will take into account the aggravating and mitigating factors relevant to the offence charged, the character of the offender, including but not limited to the facts and circumstances of the

crime, the criminal history of the offender, the offender's level of family support, social history, the offender's record while on remand, the offender's ability to appreciate the risks and consequences of the conduct, the degree of criminal sophistication exhibited by the offender, the degree of responsibility the offender was capable of exercising, the offender's chances of being rehabilitated, the physical, psychological and economic impact of the offense on the victim and the community, and such other factors as the court may deem relevant. Orders imposing the maximum period of detention should normally be reserved for the worst offenders and the worst cases.

[36] Orders of that kind may be justified where the offence was committed with brutality, or where the prospects of the juvenile offender reforming through non-custodial interventions are negligible, or where the court assesses the risk posed by the juvenile offender and decides that he or she will probably re-offend and be a danger to the public for a considerable time to come. In such cases, maximum incapacitation is desirable. In cases of a grave nature but where the court forms the opinion that they were only the consequence of unfortunate yet transient immaturity of youth, from that maximum point the sentence should be graduated and proportional to the offender and the gravity of the offence, with a view to strike a balance between the need for public safety and that of rehabilitating the juvenile offender. A distinction must be made between the juvenile offender whose crime reflects unfortunate yet transient immaturity of youth from the rare juvenile offender whose crime reflects a deep-seated depravity. In the instant case, the juvenile offender defiled a child aged only seven months for which reason the gravity of the offence warrants an order of detention and I thus consider a two (2) years and nine (9) month's period of detention to be appropriate for this offender.

[37] Article 40 of the United Nations *Convention on the Rights of the Child (1989)* emphasises that the primary aim of juvenile justice is the rehabilitation and reintegration of the child into society. This establishes the right of a child to be

treated in a manner consistent with the child's age. The United Nations *Standard Minimum Rules for the Administration of Juvenile Justice, 1985* (Beijing Rules) state that the aims of a juvenile justice system are to "emphasise the well-being of the juvenile and to ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence" (see r 5 (1) thereof). Rule17.1 (b) further states that “restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum.” Similarly, the United Nations *Guidelines for the Prevention of Juvenile Delinquency, 1990* (The Riyadh Guidelines) provide that “deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases." Accordingly, the juvenile justice system is very different from the adult criminal justice system because juvenile justice focuses on rehabilitation, promotes the reintegration of the juvenile into his family and community, while the adult system focuses primarily on punishment.

[38] In the instant case, the juvenile offender, while knowing he was HIV positive, sexually molested a two year old child for which reason the gravity of the offence warrants an order of detention. However, section 94 (1) (g) of *The Children Act* provides that detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order. To determine what alternatives are befitting both the offence and the offender, the court needs to determine first the level of danger to the public posed by the juvenile offender. The aggravating factors in this case far outweigh the mitigating ones such that a period close to the maximum incapacitation would be desirable. I thus consider two (2) years' and nine (9) months' period of detention to be appropriate for this offender.

[39] In accordance with section 94 (3) of *The Children Act*, to the effect that where a child has been remanded in custody prior to an order of detention being made in

respect of the child, the period spent on remand shall be taken into consideration when making the order, I note that the juvenile offender was in custody from 28th August, 2019 to 23rd September, 2019. I hereby take into account and set off one month as the period the juvenile offender had already spent on remand. Having taken into account that period, I therefore consider an order of two (2) years' and eight (8) months' detention, as appropriate custodial disposition for the offence.

[40] Having determined the appropriate period of detention, considering section 94 (1) (g) of *The Children Act*, and after careful consideration of the circumstances of the juvenile offender who is on medication for HIV, is still in school and has both his parents present, able and willing to take up his custody and offer guidance under supervision of a probation officer, I have formed the opinion that despite the gravity of the offence, reasonable alternatives exist that warrant the imposition of an order of probation rather than detention.

[41] The well-being and the needs of a juvenile offender are important considerations in the determination of an appropriate disposition order. In the circumstances of this case where the juvenile offender committed an offence of such a heinous magnitude considering his health status and the age of the victim, the court is required to fashion out an individualised response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the antecedents and interests of the juvenile offender. From the facts of the case, I consider the juvenile offender to be a danger to society. The court though is satisfied that a rehabilitative disposition would be in the best interests of the juvenile offender and the needs of society. For that reason, the juvenile offender is hereby;

a) Placed on probation as from this date for a period of nine (9) months, in default of which he is to serve a period of two (2) years and eight (8) months' detention.

b) In accordance with section 94 (1) (d) of *The Children Act*, he is bound over to be of good behaviour for a period of six (6) months starting today.
c) He is to remain in the custody of his biological father Mr. (redacted) of Konypaco village, Central Division, Kitgum Municipality during that period.
d) He is not to return to his mother's home at Lemo West village, Pager Division Kitgum Municipality until the victim is 18 years old.

[42] The juvenile offender is advised that he has a right of appeal against both the adjudication of responsibility and the disposition order within a period of fourteen days

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Stephen Mubiru
Resident Judge, Gulu

Appearances

For the Juvenile Offender : Mr. Boris Geoffrey Anyoru with Mr. Mukiibi Paul, on State brief.

For the State : Mr. Muzige Hamza, Resident State Attorney.

Warrant of supervision upon Release on Probation
Section 94 (1) (f) Children Act
Sections 2 and 3 of The Probation Act

MODIFIED U.C. FORM 80

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN

AT KITGUM

TO:

1. **The probation Officer, Kitgum District**
2. **The Family and Children Court, Kitgum District**

ORDER OF RELEASE ON PROBATION

WHEREAS on the **3rd** day of **DECEMBER,** 2019, **O. R.** the **Juvenile Offender** in Criminal Session Case No.**0021** of the Calendar Year for **2019** was found responsible and adjudged a Juvenile Offender before me: Honourable Justice **MUBIRU STEPHEN, a Judge of the High Court of Uganda,** for the offence of **AGGRAVATED DEFILEMENT CONTRARY TO SECTION 129 (3) & (4) (a)** of the Penal Code Act and is placed on probation as of this date for a period of **NINE (9) MONTHS.**

THIS IS TO AUTHORISE, REQUIRE YOU, and to place the said **O. R.** under your supervision for the duration of that period as the District probation officer and the Family and Children's Court having jurisdiction in the district or area for the time being in which the juvenile offender resides or will reside, together with this

Warrant and there carry the afore said order into execution according to Law.

During the period of probation, the juvenile offender is ordered to comply with the following conditions of probation;-

1. in accordance with section 94 (1) (d) of *The Children Act*, he is bound over to be of good behaviour for a period of **SIX (6) MONTHS** starting today.
2. He is to remain in the custody of his biological father Mr. (REDACTED) of Konypaco village, Central Division, Kitgum Municipality.
3. He is not to return to his mother's home at Lemo West village, Pager Division Kitgum Municipality until the victim is 18 years old.

I hereby accept probation in lieu of detention and agree to comply with the conditions imposed. These conditions of probation have been read and explained to me, and I understand the purpose and scope of these conditions and what is expected of me during the probation period. I also understand that if I violate any of the conditions of probation the Court may revoke probation and I will be required to serve the period of **TWO (2) YEARS AND EIGHT (8) MONTHS**' detention originally imposed.

.....

JUVENILE OFFENDER

In the presence of;

.....

PROBATION AND SOCIAL WELFARE OFFICER

GIVEN under my Hand and the Seal of the court this **3rd** day of **DECEMBER,** 2019**.**

.....

JUDGE