

## Chapter 6

# Sexual and Other Forms of Violence Against Children

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### Case 6.1 Uganda v Sekajija Asuman

(HCT- 00-CR-SC-0087-2012)

High Court of Uganda at Kampala

**Aspects relevant to VAWG:** Aggravated defilement, evidence of child of tender years, requirement for corroboration

#### Summary of evidence

The accused was charged with the offence of aggravated defilement c/s 129 (3) and (4) (a) of the Penal Code Act (U). The particulars alleged that the accused on the 5th day of November 2011 at Lufuka Zone, Katwe in Makindye Division in Kampala District defiled Musimenta Akiiki, a girl aged eight years.

On the material day, she had been summoned by the accused into his house. She entered the house and sat on the chair while the accused went to his bedroom, undressed and returned while totally naked. The accused then instructed the victim to undress but she refused. The accused grabbed the victim and tied his socks around her mouth and dragged her to his bedroom. He undressed her and defiled her. Asked what she meant by 'defiling me', the victim said 'he slept on me' and further that 'he fixed his penis into my vagina' and she felt bad. The complainant's mother (PW2) went to the house and found the door locked from inside. The victim's sandals were at the door to the house of the accused.

She raised the alarm as she forced the door open and met the accused moving from the bedroom to the living room completely naked. The victim was also naked and lying on the bed of the accused person and covered with a bed sheet. The victim said that her mother picked her up from the bed and beat her up, but her mother made no mention of this. Some people responded to the alarm raised and came to the scene, beat up the accused until he was rescued by a neighbour and a police officer, who arrested him. The victim was taken to hospital for medical examination, but no medical report was produced in evidence.

In her statement to the police, the mother (PW2), stated that when she entered the house and found the victim on the bed, she asked and the victim said that she had been defiled by the accused. At the police station, the victim denied having been defiled by the appellant. In court, she said she was defiled but that she did not tell the police the truth because she had been beaten by her mother. While at the hospital, she had also denied having been defiled by any man. It was her evidence that, after the medical examination at the hospital, it is the medical personnel who told her mother that she had been defiled. No such medical report or evidence was produced in court. During cross-examination, the victim admitted lying to the police by saying that neither her skirt nor knickers were removed. That she told her mother the truth when they returned from the hospital. Asked why she said she had felt bad when the accused inserted his penis into her vagina, it was her answer that she did not know. In her statement to the police (DE1) the victim admitted to sitting on the bed of the accused and said the accused never did anything to her because her mother came before the accused could do anything.

### **Issues and resolution**

Three issues were framed for determination, namely: the age of the victim (was she aged below 14 years), whether a sexual act was performed on her, and participation of the accused in the crime. These were to be proved beyond reasonable doubt. The prosecution adduced evidence, which was not contested, to show that the victim (PW1) was eight years old at the time of the alleged defilement.

On the issue of absence of corroboration by a medical report, the court found that a charge of defilement can still be proved without medical evidence and the court can convict without such evidence as long as there is strong direct evidence. The circumstances of the offence must be so convincing and compelling as to leave no ground for a reasonable doubt. This is because medical evidence is merely advisory and goes to the fact and not to the law. Finally, the court held that in sexual offences, the court should normally look for corroboration of the evidence of the victim, but may convict on the evidence of the victim alone after due warning. The court noted the many inconsistencies in the testimony of the victim and her mother (PW2), and found no good reason why the victim kept changing her stance on the matter if she had indeed been defiled.

The court was of the view that as much as corroboration by a medical report is not a requirement, in the circumstances of the present case and in view of the numerous contradictions on record, a medical report should have been produced to resolve those contradictions.

In the absence of medical evidence, the court found that it could not be said that there was strong direct evidence or circumstances that leave no ground for a reasonable doubt. The fact of defilement having taken place was therefore not proved beyond reasonable doubt. The participation of the accused in the crime was consequently not an issue and was nevertheless not proved as required by law. The court however found it clear from the evidence that the accused was involved in some indecent behaviour as against the victim, a young child. He locked himself in the house, undressed the child and tied her mouth using his socks but the child's mother came before he could defile her.

### **Verdict**

The judge and assessors were in agreement that the offence of aggravated defilement had not been proved and the accused was acquitted for failure by the prosecution to prove that a sexual act had been performed on the victim. However, the court found that the evidence adduced disclosed the offence of indecent assault c/s 128 (1) of the PCA. That evidence was that the accused locked himself in the house, undressed himself and undressed the victim, who was found naked on his bed. He was convicted of the lesser offence of indecent assault.

### **Ratio Decidendi**

- a) Failure to produce a medical report to prove that a sexual act occurred is not fatal to the prosecution case so long as there is strong direct evidence upon which a Court could proceed to convict.

## **Case 6.2 Uganda v Joseph Baluku**

(Criminal Session No. 0015 of 2012)

The High Court of Uganda, Kampala

**Aspects relevant to VAWG:** Aggravated defilement, evidence of a single witness in sexual offence cases, corroboration, evidence of a child victim, requirement for caution before convicting on such evidence in the absence of corroboration

### **Brief facts**

The accused, Joseph Baluku, was charged with the offence of aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act. The

brief facts giving rise to this indictment were that on or about 30<sup>th</sup> May 2011 at Nakulabye Zone 4 in Kampala District, the accused allegedly performed a sexual act on one Robinah Nakanyike, then aged 11 years.

At the preliminary hearing that preceded trial the prosecution and defence agreed to the admission of a medical examination report in evidence. The report gave the age of the accused at approximately 18 years old and of sound mental disposition at the time he was examined. The examination took place about one day after the alleged defilement. The Prosecution called three witnesses – the aunt of the victim, the victim herself and the medical doctor who examined the victim after the alleged incident. The evidence of the prosecution was that on the evening of 30<sup>th</sup> May 2011, the victim's aunt asked the victim to guide the chicken into the chicken house. The victim went to the chicken house as instructed and saw the accused person at a distance. She assumed that he was going to the pit latrine that was near the chicken house where she was. When he came towards her she attempted to bypass him, but he threw her down and defiled her. She screamed and her aunt heard the victim screaming for help. She testified that when she ran to victim's rescue she saw the accused running from the chicken house with an open zip trouser. Medical examination revealed that the victim had been subjected to a recent sexual act and her hymen had been ruptured about one day prior to the examination. The doctor who examined the victim reiterated this evidence.

The defence presented the accused, his father and a relative as witnesses. The accused person gave sworn evidence and denied having defiled the victim. He attributed the prosecution to a grudge against him by the victim's aunt. A relative of the accused raised an alibi and said that at the material time he was with the accused, and that they were not at the scene of the alleged defilement. The defence argued that the doctor's medical findings that the hymen was ruptured a day prior to examination were inconsistent with the victim's evidence to the effect that she had had a previous sexual encounter.

### **Issues and resolution**

The prosecution was required to prove: that the victim was 11 years old; that a sexual act had been performed on her; and the participation of the accused in the crime. A medical examination report in respect of the victim established that she was 11 years old at the time of examination (shortly after the alleged defilement). In her statement to the police, the victim appeared to contradict the medical finding that she had ruptured her hymen a day before the examination, when she stated that she had had a previous sexual encounter with her brother three years prior to the date of the statement. The defence sought to discredit the evidence of the doctor relating to the rupture

of the hymen, as it could not be reconciled with the victim's statement that this was not her first sexual encounter.

According to the defence, the only explanation for this inconsistency must be that no medical examination took place and indeed no medical report was produced in evidence. Indeed, no medical report of the examination was produced. However, the court noted that an eight-year-old is a young child and her perception of what amounts to a sexual activity is quite subjective.

The learned judge noted that the doctor stated categorically under cross-examination, that it was possible for someone to engage in what they deemed to be a sexual act and the hymen remains intact if penetration did not occur. This would, in the court's view, explain the contradiction and reconcile the doctor's evidence with that of the victim. Consequently, the judge was of the view that more weight would be attached to the expert medical evidence than the victim's oral testimony. She was satisfied and found that the prosecution had proved the incidence of a sexual act beyond reasonable doubt.

On establishing whether or not the accused was the person who defiled the victim, the aunt of the victim who responded to the screams of the victim said that the victim told her that the accused person had defiled her. She reiterated the accused person's responsibility for her defilement in her own evidence. The accused person, however, denied defiling the victim and raised an alibi. His relative testified to the fact that at the material time the defilement was alleged to have occurred, he was with the accused and they were not at the scene of crime.

The identification of the accused person in this case was that of a single witness (the victim), who also happened to be a minor. The court examined the victim and established that she understood the nature of an oath. She gave evidence on oath. However, given that she was the sole identification witness, the court was mindful of the requirement for caution before convicting the accused, whose defence was an alibi. The victim's evidence offered the best proof of identification of the person who defiled her. Her aunt, who came to her rescue when the victim screamed for help, saw the accused run out of the chicken house with an open zip trouser and the victim told her that the accused had defiled her. This evidence proved, beyond reasonable doubt, the participation of the accused in the crime.

The judge found this evidence to be credible and coherent, and further found that the victim was very familiar with the accused having lived in the same homestead as him for close to one year. Clearly she had seen the accused, both at a distance and at close range, and had sufficient time to ascertain his identity. In the circumstances, the judge rejected the alibi of the accused and found that the accused person and his witness contradicted each other on the time they left Nsambya, where they had allegedly spent the whole of 30<sup>th</sup> May

2011. That these two critical witnesses contradicted each other on such a vital component of their defence raised questions as to the authenticity of the alibi.

### **Conviction**

The court found that the prosecution had proved the offence of aggravated defilement against the accused beyond reasonable doubt, found him guilty of aggravated defilement contrary to section 129 (3) and (4) of the Penal Code Act, and convicted him as charged.

### **Ratio decidendi**

- a) Where there is conflict between evidence of an expert witness and a victim's evidence, the evidence of an expert is to be accorded greater weight.

## **Case 6.3 Uganda v Kakuru Johnson**

(HCT-05-CR-CSC-0259-2013)

### **High Court of Uganda at Mbarara**

**Aspects relevant to VAWG:** Aggravated defilement, vulnerable child victim, role of the judiciary in addressing VAW

The accused was charged with the offence of aggravated defilement *c/s* 129 and (4)(a) of the Penal Code Act. The particulars were that Kakuru Johnson on the 17 February 2013 at Kicece village Ruhaaro Sub-County in the Ntungamo district performed a sexual act with Ninsiima Precious, a girl under the age of 14 years.

### **Summary of evidence**

The victim's mother (PW1) left the victim at home and went to fetch water. On her return, her child was missing and PW1 went searching for her. She heard a baby crying from the house occupied by the accused. She called out the child's name and the accused ran out from the house and stood outside. PW1 entered the house and met the crying baby walking out of the accused's bedroom into the living room. She examined the baby and saw sperm and blood on the thighs and the private parts of the baby. It was her testimony that the accused could not even answer any of the questions she put to him. She reported the matter to Kafunjo police and the accused person was arrested. A medical examination of the victim found that she had suffered bruises on the labia minora. This finding was consistent with the testimony of PW1, who had also seen blood and sperm on the baby's private parts and thighs.

The accused had denied committing the offence. He raised an alibi and said that at the time of the offence, he was at his grandmother's home. He explained that on the material day, he woke up at 7:30 am and went to do some work at his grandmother's place until 8:30 am, when he was accosted by residents who alleged that he had defiled the victim herein. He said that there was a grudge between him and the father of the mother of the child victim. The accused said he had done some work for the father of PW1, and that the said father of PW1 had failed to pay him.

### **Issues and resolution**

The prosecution was required to prove beyond reasonable doubt that the victim was aged below 14 years, that there was a sexual act performed on her and the participation of the accused person in the crime. There was no dispute as to the age of the victim. Although the assessors found that defilement had not been proved, the court found that there was medical evidence that corroborated the evidence of PW1 to the effect that the victim had been defiled. The only question for determination was the participation of the accused. This had to be proved beyond reasonable doubt.

The assessors returned a verdict of not guilty, having found that the fact of defilement had not been proved. However, the court believed PW1, who found her child missing and traced the child (having already been defiled) to the house of the accused. The accused, who had come out of the house running, could not answer any of the questions which PW1 asked him. The court was satisfied that the prosecution had discharged the burden of proof, especially through the evidence of PW1 – who saw the accused in broad daylight. Her evidence placed the accused at the scene of crime. Upon her examining the baby she found sperm and blood on her thighs and private parts. There was no other person in the vicinity or in the house of the accused where the child was found crying.

The court found that all these facts if considered together would lead to the irresistible conclusion that the accused, and no other person, performed a sexual act on the victim. In the circumstances, the accused was found guilty of aggravated defilement and convicted accordingly. It would appear that no forensic investigations were carried out to connect the accused person to the offence. Had he not been identified by PW1 after she called out her child's name and he ran out of the house, a conviction, in the absence of forensic evidence, could not have been possible and the accused person could have been set free.

This case demonstrates how accused persons can escape punishment as a result of careless investigations. The police need to invest in forensic technology for comprehensive investigations in cases of sexual violence.

**Ratio Decidendi**

- a) In a case dealing with sexual offences, medical evidence can be used to corroborate the oral evidence of a witness that a sexual act occurred.

**Case 6.4 Uganda v Peter Matovu<sup>1</sup>**

(Criminal Session Case No. 146 of 2001)

High Court of Uganda, Kampala

**Aspects relevant to VAWG:** Discrimination against women, defilement, requirement for corroboration of evidence of a single witness in sexual offence cases, requirement for warning before conviction on the evidence of a single witness in sexual offence cases and not in other cases

**Brief summary of facts**

The accused was charged with the offence of defilement contrary to section 132(l) of the Penal Code Act. The particulars of the charge alleged that, on the 18th day of July 2001, at Kyebando-Kisenyi Zone in the Kampala District, he unlawfully had carnal knowledge of Nampa Sarah (the victim), a girl under the age of 18 years. He denied the indictment.

The prosecution called four witnesses in support of its case against the accused. The facts of the case were that on 18th July 2001, the victim escorted her aunt who boarded a taxi to Kalerwe at around 7.00pm. On her way back, she met the accused who persuaded her to visit his home at Kyebando. The two set off and on arrival at the accused person's home they entered the house and had sexual intercourse. Later on, she returned home and revealed to her mother what had transpired between her and the accused. Her mother reported the matter to the police, who arrested the accused and charged him with the offence of defilement.

The accused person on the other hand gave evidence on oath and denied that he committed the alleged offence. He pointed out that the indictment was a frame up that arose from a grudge Nakyejwe had against him two weeks before the alleged offence. He stated that two weeks prior to his arrest, one of Nakyejwe's customers abandoned her and instead bought sweet potatoes worth 5,000 Uganda shillings (USh) from the accused. Nakyejwe got angry and warned the accused that she would shortly destroy his business. Two weeks later he was arrested on a charge of defilement, which he knew nothing about.

**Issues and resolutions**

The court took note of three key established principles that guide the court in determining sexual offence cases. The court noted that the prosecution bears

the burden of proving its case beyond reasonable doubt against the accused person(s), and that burden does not shift upon the accused except in very few circumstances where statutory law specifically provides so; secondly, the standard of proof required in criminal cases is 'proof beyond reasonable doubt'. The third principle was the requirement for corroboration of the evidence of a victim of a sexual offence.

The court declined to apply the common law principle that, where a victim alleges that the accused committed a sexual offence against her, the court must warn itself that it is dangerous to act upon the uncorroborated evidence of the victim and, before so acting, to satisfy itself that the victim is a truthful witness. He explained that the principle discriminated against women, who were the most frequent victims of sexual offences. The learned judge found that this principle was inconsistent with Article 2 of the Constitution of Uganda, which proclaims equality for all persons under the law, equal protection of the law and protection against discrimination on ground of sex.

He also found that this principle was inconsistent with section 132 of the Evidence Act and Uganda's international law obligations under various conventions, particularly CEDAW Article 1. He held that the discriminatory principle was therefore unconstitutional, null and void. The court considered the evidence and found that the prosecution had proved beyond reasonable doubt that the accused had defiled the victim.

### **Conviction and sentence**

The court found the accused guilty of defilement contrary to section 132(1) of the Penal Code Act and convicted him accordingly. However, although the learned judge noted that the offence of defilement was a serious one, and that it exposed the complainant and girls to HIV/AIDS and other sexually transmitted diseases, he declined to impose the maximum capital sentence and sentenced the accused to ten (10) years in prison.

### **Ratio Decidendi**

- a) The need for corroboration in sexual offences is discriminatory against women and violates their right to equality with men before the law.
- b) **Contribution to jurisprudence/Point to note**
  - The Court applied both international conventions and the Constitution in arriving at the conclusion that the need for corroboration was discriminatory to women and in contravention of the Constitution.

- The Court was unwilling to affirm a baseless stereotype which had adverse consequences for women victims of sexual violence and further impaired their dignity and worth in society.

### Case 6.5 Uganda v Tigahwa

(HCT-05-CR-SC-0210-2012)

High Court of Uganda

**Aspects relevant to VAWG:** Aggravated defilement, vulnerable victim of sexual violence, child marriage

#### Summary of evidence

The accused (Tigahwa Elisam) was charged with aggravated defilement after performing a sexual act with Nasanga Dyana, a girl under the age of 14 years, on 31<sup>st</sup> December 2010 at Omukabare Cell in Bushenyi District. Then prosecution called six witnesses in a bid to prove its case against the accused person.

The mother of the victim (PW4) told the court that the victim was born on the 29 September 1999 and was, at the time of her testimony, 15 years old. As she did not have a birth certificate, she provided the court with the victim's baptismal card.

PW6, the medical officer who examined the victim, produced a medical report which showed that the victim was 11 years old at the time the incident. On the material date, the victim (PW1) testified that on the instruction of the accused person, she went to the home of the accused to help in carrying his logs. The accused person introduced himself to her as a neighbour, but she did not know him previously. She went to his home and, while at the home, the accused forcefully took her into his bedroom and defiled her. When she attempted to raise the alarm, the accused covered her mouth with his hand. After he defiled her, he gave her 1000/= and warned her not to tell anyone what had happened. The victim's mother (PW4) saw her coming from the house of the accused after the alleged defilement and the victim told her what had happened. Thereafter, the matter was reported to the authorities.

PW2 (Aberi Mabaare) and PW3 (Chairman LC1) said that they confronted the accused over the matter, and the accused told them that he had not defiled the victim but had married her after receiving a vision that he should marry her. PW5 told the trial court that he met the accused, who was in the company of his nephew, and the said nephew of the accused promised to give PW5 2,000,000 shillings in order to exonerate his uncle (accused)

from defilement charges. PW5 refused the offer and arrested and detained the accused person. He was handed over to the police and charged with this offence.

The victim was examined by PW6 (medical personnel), who produced a medical report of the examination. According to the report, there was slight penetration leading to partial rupture of the hymen and subsidiary inflammation of the vulva. The injuries were said to be one-day old. The report concluded that the injuries were as a result of sexual intercourse.

In defence, the accused claimed that he did not know the victim and imputed the existence of a grudge between him and PW2, claiming that he bought land from the uncle of PW2 and that PW2 was not happy about the transaction. The defence further pointed out that there were several contradictions in the prosecution evidence, namely: that the victim was said to have been a Primary 4 pupil and later on it was alleged that she was out of school; that PW1 said that she did not know the accused and yet they were neighbours; that the victim said that she was defiled on a Monday and yet 31st was a Sunday; and finally that the victim claimed to have been examined by a woman doctor, yet the doctor (PW6) testified that he was the one who examined her.

### **Issues and resolution**

The prosecution was required to prove beyond reasonable doubt that the victim was below 14 years old, that a sexual act was performed on her and participation of the accused. Medical evidence established that, at the time of examination, the victim was 11 years old and that she had injuries which were consistent with defilement. The court considered the inconsistencies pointed out by the defence and found that they were minor and they did not go to the root of the prosecution case. The court was of the view that the said inconsistencies did not touch on the issue of the allegation that the accused had defiled the victim.

Finally, the defence counsel submitted that the victim suffered from a mental disability, which might have led to her making false allegations against the accused. However, the court accepted the mother's testimony that on the material day and time, the victim had not suffered any mental breakdown and that she saw the victim coming out of the house of the accused on the material day. Considering her evidence, together with that of the victim and the doctor who examined her and whose findings were contained in the medical report which was produced in evidence, the court found that this evidence was overwhelming and connected the accused to the crime. The assessors returned a verdict of guilty as charged.

**Verdict**

The court was in agreement with both assessors and held that the prosecution had proved the case beyond reasonable doubt and found the accused person guilty of aggravated defilement contrary to section 129 (3) and (4)(a) of the Penal Code Act, and convicted him accordingly.

**Ratio Decidendi**

- a) Minor inconsistencies which did not go to the root of the prosecution case are not fatal to the prosecution case.

**Case 6.6 Uganda v NA**

(Msk-CR-AA-132/2013)

High Court of Uganda at Masaka

**Facts**

The accused was charged with the offence of murder contrary to sec.188 of the Penal Code Act of Uganda.

During the night of 8th of May 2013, the deceased (Majwala Ahmed) was heard making an alarm and exclaiming 'you are killing me'. Upon the other household members and immediate neighbours responding to the cry for help, they found the deceased lying in a pool of blood with deep cut wounds on his neck and head, while the convict (NA, the deceased's 18-year-old biological daughter) was standing outside the house. Matters were reported to police and the convict was arrested and charged with murder.

The convict in her charge and caution statement to the police confessed to having killed the father who had sexually abused her for over three years.

The convict appeared before court and pleaded guilty to murder. The convict in her mitigation informed the court that she had endured repeated sexual assaults by her father. Reports to her mother and relatives did not yield anything, as the family decided to keep the abuse a secret. The judge sentenced her to the rising of the court.

In sentencing the accused, the trial judge held that:

1. Whereas the convict had committed an unlawful act, she had for all intents and purposes been the victim in the circumstances. Though the deceased had a moral obligation to protect the convict, he had instead continually abused her – thereby transforming from protector to perpetrator.
2. The state and its agencies had equally failed in their international and constitutional obligations to protect the convict, and in those

circumstances the convict was deserving of empathy and support rather than punishment as she would have to carry psychological scars for life.

**Contribution to jurisprudence/point to note:**

1. Realising that a harsh sentence would not serve justice in the case, the court exercised its discretion and gave the accused a lenient sentence – because although she was before court as a perpetrator of violence, her violent act was in reaction to the extreme abuse she suffered at the hands of the deceased.
2. In arriving at an appropriate sentence, the judge placed this case within a broader context recognising that ‘her violence’ was not an exclusively legal issue.

### **Case 6.7 Uganda v Rwishosha Geoffrey**

(High Court Criminal Session No 322 of 2011)

High Court of Uganda at Masaka

**Facts**

The accused had summoned the victim, his eldest daughter, to check if she was still a virgin. The victim was aged 13 years. The accused ordered the victim to lie down whereupon he proceeded to sexually assault her. The victim reported the accused to her mother, who attempted to depart from the matrimonial home alongside her other children. However, the accused forcefully kept the victim, threatening to kill the victim’s mother if she, the victim’s mother, attempted to take the victim out of his custody.

At trial, the wife and daughter of the accused were among the prosecution witnesses.

The accused was convicted as charged.

In sentencing the accused to life imprisonment, the High Court noted that:

1. The convict had committed an abomination not only against any known culture, religion and custom, but had also violated the victim’s human rights – including her dignity and personal integrity.
2. The court further noted that the convict’s actions had left permanent psychological scars with the victim, including an incestuous child who closely resembles the convict.

**Point to note**

The court placed/situated the experience of the victim within the broader context of human rights violations and, in arriving at the punishment,

emphasis was laid on the fact that the criminal activities of the accused constituted a violation of the fundamental human rights of the victim.

### **Case 6.8 Prosecutor v Nihimbazwe Samuel**

(Case Number RPA min0019/15/HC/KIG)

Rwanda High Court Kigali

#### **Facts**

The Rwanda Prosecution Authority accused Nihimbazwe Samuel at the High Court of Gasabo in respect of the rape of a minor called AS, aged four years. Having analysed submissions and the way of pleading by both the plaintiff and the defendant, the Premier Court sentenced Nihimbazwe to seven years' imprisonment in consideration of the assumption that he committed the crime as a child.

Both the Prosecution Authority and Nihimbazwe appealed. The Prosecution Authority insisted that it was not right to regard Nihimbazwe a child, because the National Identity Card Centre confirmed that Nihimbazwe was born on 15/05/1996. Hence, the Prosecution Authority insisted that the defendant had to be punished as an adult. Worse still, he pleaded guilty initially but later changed his plea to innocent. In consideration of the foregoing, therefore, the Prosecution Authority requested the court to sentence Nihimbazwe to life imprisonment.

Nihimbazwe pleaded that he had not intended to lie regarding his age, because as an orphan he did not know when he was born. He excused himself by claiming that he had not committed the crime intentionally; and to have his sentence reduced, that he did not commit crime with malice aforethought.

Issues:

1. Whether Nihimbazwe committed the crime as a child that deserved to be sentenced as a child by the Premier Court.
2. Whether the initial sentence should be reduced by the court appealed to.

#### **Judgement**

The Prosecution Authority maintained that justification of its appeal hinged on the fact that Nihimbazwe initially pleaded as a child and was in fact sentenced as a child, contrary to the fact that the National Identity Card Centre confirmed

that Nihimbazwe was born on 15/05/1996 – and as such should be judged as a mature person who should be sentenced to life imprisonment. That, coupled with the fact that initially he pleaded guilty, but then he pleaded innocent, should be sufficient to justify his life imprisonment sentence. Nihimbazwe Samuel alleged that as an orphan he did not know his age at all by the time of pleading at the Premier Court, implying that he did not lie intentionally. As a way of correcting the error made, the High Court acknowledged that the accused committed the crime as a first offender, and as such that could be a reason to justify reduction of his sentence.

Hence, in consideration of Article Number 78 of Penal Code, Law Number 01/2012/OL enacted on 02/05/2012 and its section one; one notes that an accused child that would be sentenced to life imprisonment can have the sentence reduced to an imprisonment of not less than 10 years. Accordingly, Nihimbazwe Samuel could have his sentence reduced to 10 years' imprisonment, because he pleaded guilty as a person that sexually violated a minor and according to Article 191 of Penal Code Law Number 01/2012/OL enacted on 02/05/2012, he would otherwise be sentenced to life imprisonment. The High Court confirmed that Nihimbazwe committed the offence as an adult and in fact he pleaded as an adult. That is why his sentence had to be increased to 10 years' imprisonment instead of 7 years. Accordingly, he also had to be imprisoned with other adults.

### Case 6.9 George Hezron Mwakio v Rep

(Criminal Appeal No. 169 of 2008)

High Court of Kenya at Mombasa

**Aspects relevant to VAWG:** Defilement, child trafficking for sexual exploitation, sentence, role of the judiciary in ensuring perpetrators of violence are appropriately punished, role of judiciary in creating awareness

#### **Brief summary of facts**

The appellant was charged in the Magistrates Court with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act and a second count of child trafficking for sexual exploitation contrary to section 18(1) of the Sexual Offences Act. He was tried, found guilty, convicted and sentenced to 30 years' imprisonment. He appealed against both the conviction and sentence.

The prosecution evidence was that on the 27th October 2007 at around 9.00 pm in Taveta district within Coast Province, the appellant had carnal

knowledge of MM, a girl under the age of 16 years. On the material day, the complainant (MM) escorted her sister to C Estate. On her way back home at about 6.00 pm, she met the appellant who professed his love for her. The complainant declined his advances, saying she was a student. The appellant then held her hand and began to pull her along with him. The complainant called out for help, but nobody came to her assistance. The appellant took her to his house. The complainant asked a man there to rescue her, but he just walked away. Then after 8.00 pm, the appellant took her to a nearby sisal plantation where he raped her. They then walked all the way to Tanzania. The complainant was eventually rescued by police from Kitoto Police Post and brought back to Kenya. The appellant was also arrested and handed over to Kenyan authorities.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He made an unsworn statement in which he denied the charges. On 13 March 2008, the learned trial magistrate delivered her judgement in which she convicted the appellant and, after listening to his mitigation, sentenced him to serve thirty (30) years imprisonment. It was against this conviction that the appellant appealed. The appellant opted to rely entirely upon his written submissions, which were filed in court. The respondent/state opposed the appeal.

### **Issues and resolution**

The trial magistrate found as a fact that the victim had been defiled and that she was 15 years old at the time of the offence. The appellant raised four grounds of appeal, namely: defective charge; insufficient evidence; identification; and failure to consider defence.

With respect to the charge, the appellant argued that the words ‘unlawful’ were not included before the term ‘carnal knowledge’ in the particulars of the charge. Despite the fact that indeed this was the case, the learned judge found that under the Sexual Offences Act, 2006, any act of sexual intercourse with a child under the age of 18 years is unlawful and that the omission of the word ‘unlawful’ was not a fatal defect. The court ruled that this ground had no merit and the same was dismissed. On whether the prosecution had adduced sufficient evidence to prove the offence beyond reasonable doubt, the court re-evaluated and re-examined the testimonies given by the victim, the Tanzanian police officers and other witnesses, including the doctor who examined her, and ruled that defilement did actually occur.

On the issue of identification, the learned judge found that the evidence on identification was overwhelming. The complainant herself had ample time and opportunity to see the appellant. Further, her friend and the officer from Tanzania both testified that they saw the appellant with the complainant. With this, the court was satisfied that there was a clear, positive and reliable identification of the appellant by the victim and witnesses and ruled out the possibility of error.

Lastly, the appellant claimed that his defence was not given due consideration. On the contrary the learned judge was satisfied and found that the record of the trial magistrate showed that the trial magistrate considered the defence raised by the appellant – that he had been framed – and dismissed the same as untenable. The court found the totality of evidence in this case to have been cogent, consistent and reliable. All relevant witnesses were called to testify and the court was satisfied that the prosecution proved its case beyond reasonable doubt. The appellant's conviction was both sound and safe.

### **Verdict**

The learned judge noted that, before sentence, the trial magistrate took into account the mitigation by the appellant and the fact that he was a repeat offender, having earlier been convicted of attempted rape. The trial magistrate had also noted that the offence which the appellant committed was aggravated as he forced the victim, a girl child aged 15 years, to walk through bushes throughout the night across the Kenya–Tanzania border in circumstances indicating that he kidnapped/abducted her. The learned judge was in agreement with the trial magistrate and dismissed the appeal, having found that indeed the offence was aggravated and a sentence of 30 years was merited.

### **Ratio Decidendi**

- a) Repetitive sexual offending is an aggravating factor in sentencing.

### **Contribution to jurisprudence/Point to note**

- In arriving at the appropriate sentence, the court did not only ensure justice for the victim of this case, but factored in the risk that the offender posed to the society as a whole and women in particular. Court therefore used its discretion to pass a severe sentence and not merely the statutory minimum sentence of 20

years' imprisonment. This was in line with the duty of judicial officers to send out a clear message that violence against women even in circumstances where it is justified as part of culture is unacceptable in contemporary society.

### Note

- 1 *Uganda v Peter Matovu*, High Court of Uganda, Criminal Session Case No. 146 of 2001.