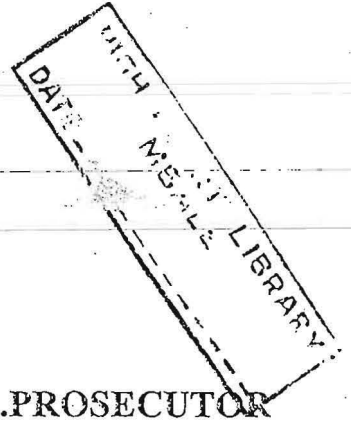


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**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**



**HCT-04-CR-SC-0051-2009**

UGANDA.....PROSECUTOR

**VERSUS**

MABERI SIMON.....ACCUSED

**BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN**

**JUDGMENT**

Maberi Simon hereinafter referred to as the accused is indicted for aggravated defilement c/s 129 (3), 4(a) and (c) of the Penal Code Act.

Prosecution alleges that the accused person on the 19<sup>th</sup> day of August 2008 at Bubeza parish, Buwalasi sub-county in Sironko District had unlawful sexual intercourse with Namataka Jesca a girl aged 7 years.

The accused denied the indictment and during his trial the State afforded him an advocate in the names of Yusuf Mutembuli. The State was represented by M/s Namakoye Catherine the Resident State Attorney Mbale. Upon denial of the

offence by the accused person it was incumbent upon the prosecution to adduce evidence to prove all the ingredients of the offence charged beyond any reasonable doubt. In a bid to discharge this burden of proof prosecution adduced the evidence of four witnesses.

At the commencement of the trial the medical examination report of the victim was admitted in evidence under S.66 of the Trial on Indictments Act and was marked as Exh.P.I. The said medical report which comprised PW.I reveals that the age of the victim at the time of offence was seven (7) years. Dr. Rubanza the police surgeon who examined her established that there was slight penetration of the victim's private parts although her hymen was intact. The private parts of the victim had ulcerations on the libia majora and a small tear around the urethra opening muscle. No bruises on the thighs, legs elbow and back were detected. The victim was not strong and was incapable of putting up resistance. She had stunted growth and jiggers due to poor parental care.

Namataka Jesca now 9 years testified as PW.2. She told court that the accused is her biological father who is in prison for doing "bad manners to her". That on the day in question while she was at the door way, her father grabbed her took her to the bedroom closed her mouth, made her lie on her back and did bad manners to her." That her father who was lying down did bad manners to her in her lower private parts which she uses to urinate. She felt pain and started crying. That was when her father blocked her mouth to stop her from crying. PW.2 further testified that at the time her mother had gone to the banana plantation. When the mother came back, she found the father on top of her. She made an alarm which was

answered by many people including Juliet, Wakooli and Nandete. PW.2 was taken to the LC, then to Pato health centre from where she was injected. Later she was brought to Mbale Police, where she was asked questions.

In cross-examination PW.2 testified that during the sex, she felt pain and blood came out of her private parts. That the act took place in broad daylight.

The third prosecution witness (PW.3) was Mutebo Mutesho. He calls the accused a paternal uncle. He testified that on 19 August 2009, he got a report from someone that Maberu defiled his daughter. When he went to the accused's home he had escaped. The mother of PW.2 Nabukwasi Elina testified as PW.4. She confirmed that the accused is her husband and father to PW.2. That on the fateful day, she had gone to the banana plantation. When she came back, she found the accused on top of her daughter (PW.2) in the bedroom having sex with her. She found the accused having sex with the daughter whom she produced with him. PW.4 made an alarm which prompted the accused to run back to the sitting room. Soon after, the accused disappeared. He returned after some days and was arrested. PW.4 checked her daughter and saw blood on her thighs. The matter was reported to the LC who took the victim to the sub-county Health Centre at Mumudu and thereafter to the police post. The daughter was eventually brought to Mbale.

In his unsworn defence the accused person denied committing this offence. He however admitted that PW.2 Jesca Namataka is his daughter and PW.4 Nabukwasi Elina his wife. He further said he had nothing to tell court since he knew nothing

about the case. That he never had sex with his daughter. He only saw LCs arresting him on allegation that he defiled his daughter. He heard the details of the allegation while in court during the testimony of prosecution witnesses. He further denied having a sour relationship with his wife (PW.4) and smoking opium.

In the opinion of the lady and gentleman assessors to wit Tegule Isaac and Claudia Chepsania I was advised to convict the accused.

In all criminal trials, the burden of proof of all the ingredients of the offence charged lies on the prosecution throughout the trial. At no stage does this burden shift.

All the ingredients of the offence charged must be proved by evidence beyond any reasonable doubt save for a few statutory offences where the law provides otherwise. There are a wealth of authorities on the legal proposition but the classic one is the often quoted. *Woolmington v. DPP 1935 A.C 462.*

In the instant case, the accused is indicted for aggravated defilement contrary to section 129(3) and 4(a) and (c) of the Penal Code Act. The prosecution therefore has the burden of proving that:-

- i) There was unlawful sexual intercourse with the complainant in this case Namataka Jesca.
- ii) The complainant was aged below 14 years.

- iii) The accused Maberu Simon is responsible.
- iv) The accused is a parent or guardian or a person in authority over, the person against whom the offence was committed. There are other ingredients that prove this offence but are not relevant to this trial. I need not refer to them.

I will deal with each ingredient of the offence charged separately beginning with ingredient I whether unlawful sexual intercourse was performed on the complainant.

According to the evidence of PW.2 Namataka Jesca, the complainant she was at home with her father the accused. He dragged her to the bedroom made her lie facing up. That the father lay on her and "did bad manners to her in the private parts she uses to urinate".

This was an obvious reference to sexual intercourse. She felt pain, cried and the accused closed her mouth to prevent her from making noise. PW.2's testimony was minutely corroborated by the evidence of PW.4 who testified that while this was still going on PW.4 Nabukwasi Elina who had gone to the banana plantation came back home and found the accused ready having sex with their daughter on their bed. When the accused saw PW.4, he jumped and retreated to the sitting room from where he escaped. PW.4 made an alarm which was answered by several people. She checked her daughter's private parts and saw blood coming out. This evidence was further corroborated by medical evidence which was admitted uncontested during the preliminary hearing of this case. In the said evidence Dr. Rubanza the police surgeon examined PW.2 and his findings in

police form Exh.P.1 confirms that PW.2 was indeed defiled. During the defilement, there was slight penetration. Ulcerations on PW.2's libia majora and a small tear around the urethra opening were seen. From this piece of evidence, I am satisfied beyond any reasonable doubt that an unlawful sexual intercourse was performed on Namataka Jesca. These was penetration. Penetration however slight is enough to prove that a sexual act took place. It is immaterial that seed was emitted. Prosecution has proved the first ingredient as required by the law.

The second ingredient to be considered is whether the complainant was aged below 14 years.

As regards this ingredient prosecution relied on the medical evidence of Dr. Rubanza. The said evidence reveals that at the time of offence, the complainant was aged 7 years only. It is trite law that age of the victim can be proved by expert evidence as well as any other lawful evidence which may include observation and common sense. See *R v. Recorder of Grimsley Exparte Purser (1957) 2 ALLER 889*. Medical evidence apart, my observation of the complainant showed that Namataka was a toddler aged 7 years and below. There remained no doubt in my mind that she was below the age of 14 years. This ingredient has equally been proved beyond any reasonable doubt.

Another ingredient for consideration is whether the accused Maberu Simon is responsible for this offence. The accused denied being responsible for this

offence. He said he learnt of the details of the allegations against him when prosecution witnesses were testifying against him.

This offence was committed in the matrimonial home. In her impressive evidence, PW.2, the complainant told court her harrowing experience when the accused grabbed her, took her to the bedroom and "did bad manners to her" in the lower part she uses to urinate. She felt pain. She cried. The accused held her mouth to stop the noise. In the process, the mother PW.4 came and found the accused having sex with the complainant. She was overwhelmed, made an alarm which was answered by several people.

This offence took place during broad day light. The complainant knew the accused very well. She pointed at him while he was in the dock. The mother equally knew the accused very well. There was no possibility of any mistaken identity. The accused's denial of the offence is a lie. I did not believe him. I am satisfied beyond any reasonable doubt that the accused was properly identified as the perpetrator of this crime against PW.2.

Maberi Simon has been proved beyond any reasonable doubt to be the culprit.

The last ingredient for consideration is whether the accused is a parent, guardian or a person in authority over Namataka Jesca. Namataka (PW.2) testified in court and identified the accused as her biological father. That at the time he "did bad manners to her," her mother had gone to the banana plantation. When the mother came back, she found her father lying on top of her. This piece of evidence was

corroborated by the testimony of PW.4 Nabukwasi Elina. She testified that the accused is her husband. That when she came from the banana plantation she found the accused having sexual intercourse with their daughter she produced with him.

In his defence, the accused acknowledged that P. 2 is his daughter and PW.4 his wife. With this piece of evidence, prosecution has overwhelmingly proved that the accused is a parent to the victim.

I am therefore satisfied that prosecution has proved the offence of aggravated defilement against the accused person beyond any reasonable doubt. I am in total agreement with the unanimous advice of the lady and gentleman assessors that I find the accused guilty and convict him accordingly.

Maberi Simon is found guilty and convicted of Aggravated Defilement c/ss 129 (3), 4(a) and (c) of the Penal Code Act.

**Musota Stephen**

**JUDGE**

**27.4.2010**

### **Sentence and Reasons**

The convict is a first offender. He however committed a grave offence which carries a maximum death sentence. I uphold the submission by the State that being



a father to the victim, the convict had a duty to protect her but did the contrary. The victim lost her innocence and was traumatized. This might be forever.

On the other hand, learned defence counsel urged for a lenient sentence because the convict has been on remand for 20 months and is only 30 years old capable of reforming. That his services are required by his family and 6 children further that the convict appears remorseful and regrets what he did. Finally learned counsel submitted against sentencing the convict to death because it will be a double loss.

Although this offence carries a maximum sentence of death it is not mandatory. Before deciding sentence, mitigating and aggravating circumstances must be identified by the court bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the convict. In awarding sentence, due regard must be paid to the personal circumstances and subjective factors that might have influenced the convict's conduct. These factors must be weighted with the main objectives of punishment:- deterrence, prevention, reformation and retribution. The death sentence should be handed down in the rarest of cases where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence: *STATE V. MUKWANYA (1995) (3) SA 391 Para 46*

*STATE V. SENONOH (1990) 4 SA 735 at 743-745.*

In view of the above legal proposition, and given that the State has not asked for the ultimate sentence which they are bound to defend beyond doubt I am inclined

not to consider giving the convict the maximum death penalty. He is still young with prospects for reform. He has spent 20 months in prison. Court has no social report about the convict's station in life and general conduct. Nevertheless, our society abhors a conduct where a parent turns on his biological child and molesters her. It expects such a character to be banished for sometime.

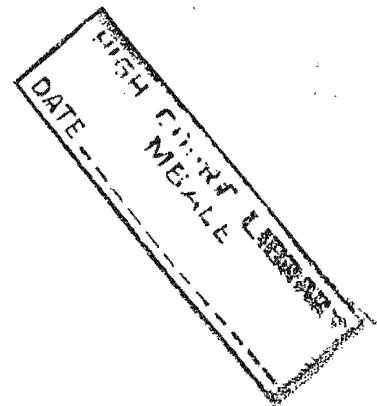
For those reasons, I will sentence the convict to 25 years imprisonment.

Right of appeal explained.



Musota Stephen

JUDGE



29.4.2010

Accused produced.

Namakoye Resident State Attorney.

Mutembuli for accused on State brief.

Assessors present.

Wanale Interpreter.

Resident State Attorney: Case for sentencing.

Court: Sentence pronounced.



Musota Stephen

JUDGE