

Chapter 2

Defilement

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Rape/Defilement: “Any form of non-consensual sexual intercourse. This can include the invasion of any part of the body with a sexual organ and/or the invasion of the genital or anal opening with any object or body part.”



C.K. (A Child) through Ripples International as her guardian and next friend & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others [2013] HC

Principle or Rule Established by the Court's Decision

Failure by police to investigate cases of defilement is a breach of fundamental human rights. This includes the general rights to human dignity and access to justice. It also breaches rights specifically intended to protect vulnerable persons, who are owed special constitutional protections. These include the right to protection from abuse, neglect and all forms of violence and inhuman treatment. A failure to investigate violence against female children as a specific group also amounted to a breach of the right to equality and freedom from non-discrimination.

Judge: J.A. Makau | HC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|--------------------------|--|--------------------|
| Failure by police to investigate cases of defilement a breach of fundamental human rights | High Court, Meru (Kenya) | Petition No. 8 of 2012; judgement delivered on 27 May 2013 | Defilement |

Case Summary

The first 11 petitioners (girls aged between 5 and 15 years) were all victims of defilement. They had experienced sexual abuse at the hands of family members, caregivers, neighbours, employers and, in one case, a police officer. Although each of the girls had reported or attempted to report the defilement to the police, the response in all cases was inadequate. There were failures in the recording of complaints in the Police Occurrence Book, in the arrest of perpetrators and in the interviewing of witnesses. In addition, victims were interrogated in a humiliating manner and demands were made for money

and travel reimbursement. The police further failed to collect and preserve evidence, to bring evidence to court or to visit the crime scenes. This resulted in further psychological and physical harm to the girls, including delays in receiving medical treatment.

The constitutional petition claimed that failure on the part of the police to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence infringed the petitioners' fundamental rights and freedoms under the Constitution of Kenya (2010).

Justice Makau found the respondents responsible for the "horrible, unspeakable and immeasurable" physical, emotional and psychological harm caused to the petitioners by reason of their failure to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement inaction.

The Court issued a declaration that the petitioners' fundamental rights and freedoms under the Constitution had been violated, in particular those relating to special protection as members of a vulnerable group (Article 21(3)), equality and freedom from non-discrimination (Article 27), human dignity (Article 29), access to justice (Article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment (Article 53(1) (d) and (2)). The Court also held that the respondents were in breach of provisions of international conventions that Kenya had ratified, including the ACHPR, CEDAW, CRC and ICCPR.

The Court held that the police had a constitutional duty to protect the petitioners' rights, which were breached by their failure to conduct adequate investigations. The standard of investigation was also in breach of the principle of "the best interest of the child" under Article 53(2) of the Constitution. The investigation failed to meet local and international policing standards and was held to be in violation of the constitutional obligations of the National Police Service Act under Article 244. These include specific obligations to 'strive for the highest standards of professionalism', to 'comply with constitutional standards of human rights and fundamental freedoms', to train staff to this end and to 'promote and foster relationships within broader society'.

The Court further granted an order of mandamus directing the first respondent together with his agents, delegates and/or subordinates "*to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' complaints of defilement and other forms of sexual violence*" and a second order of mandamus directing the first respondent together with his agents, delegates and/or subordinates "*to implement Article 244 of the Constitution in as far as it is relevant to the matters raised in this petition*".

Obiter Dictum

The Court made it clear it was the constitutional duty of the DPP to institute and undertake criminal proceedings against any person before any court; in doing so, it shall have regard to the public interest, the administration of justice and the need to prevent and avoid abuse of legal process.

Points to Note

- This was a landmark constitutional decision in which the Constitutional Court accepted the government's culpability for systemic violence and that failure to ensure proper and effective investigation and prosecution of sexual offences had created a "climate of impunity" for the commission of such offences.
- The Court determined that failure by police to investigate cases of defilement was a breach of fundamental human rights, including the rights to human dignity and access to justice; the rights of vulnerable persons to be protected from abuse, neglect and all forms of violence and inhuman treatment; and the right to equality and freedom from non-discrimination in the criminal justice process.
- The decision made legal history in Kenya as it recognised the obligation of the Kenyan police to conduct proper investigations in cases of sexual abuse and held the police accountable for their treatment of defilement victims. This has important implications for future police handling of sexual violence cases.
- This case has had very significant implications for the future handling of sexual violence cases by all law enforcement agencies. The police (prosecutors) were ordered to ensure that complaints of sexual violence received were promptly, effectively and professionally investigated with due diligence.
- The Court's judgement breathes life into the Constitution of Kenya 2010 by purposively interpreting the bill of rights for the protection of a vulnerable group of people – namely, girl victims of sexual violence. The judgement cites numerous provisions of the Constitution and international law. The case has received international praise for its unapologetic stance on protecting women and girls from sexual abuse. There remains the challenge of ensuring the gains made in this decision are implemented – that is, through the prompt, adequate and effective investigations by police in cases of sexual violence.

| Other cases/decisions referred to | |
|---|---|
| Country/jurisdiction | Decision |
| ECtHR <i>MC Bulgaria v Bulgaria</i> [2003] 39272/98 | The ECtHR held, <i>The investigation of the applicant's case, and in particular the approach taken by the investigators and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations-viewed in the light of the relevant modern standards in comparative and international law-to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse... The court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3(on torture and inhuman/degrading treatment) and 8(on protection of the law) of the Convention.</i> |
| Inter-American Commission on Human Rights <i>Jessica Lenahan (Gonzales) et al. v United States</i> | On 17 August 2011, the Inter-American Commission on Human Rights considered police obligations to enforce a restraining order in circumstances where a father took his children from their mother's custody without permission and killed them. The Commission found that there was <i>broad International consensus that states may incur... responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women.</i> |
| South Africa <i>Carmichele v Minister of Safety and Security & another</i> | The Court held, <i>The courts are under a duty to send a clear message to the accused, and to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime... Thus one finds positive obligations on members of the Police force both in the IC [Industrial Court] and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women (and children) than freedom from the threat of sexual violence.</i> |

C.K.W. v The Attorney General & another [2014] HC

Principle or Rule Established by the Court's Decision

- Statutory provisions criminalising consensual sexual conduct below a prescribed age are not discriminatory. Minors require protection from early engagement in sexual activity.
- A law that permits both the girl and the boy participant to be charged with engaging in sexual conduct below a prescribed age is not discriminatory per se against a particular gender, even if the evidence leads to a particular gender being charged more regularly.

Judge: Fred Ochieng | HC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--------------------------|-----------------------------|--|---|
| No discrimination | High Court, Eldoret (Kenya) | Constitutional Petition No. 6 of 2013; judgement delivered on 25 July 2014 | Defilement Unconstitutionality of prohibited consensual sex between adolescent minors |

Case Summary

The petitioner, a minor aged 16, was charged with the offence of defilement of a child aged 16–18, contrary to Section 8(1) as read with Section 8(4) of the SOA. The complainant was a girl aged 16. The petitioner contended that the complainant was his girlfriend, that the sexual act between them was consensual and that the complainant had willingly gone to the petitioner’s house.

The petitioner contended that Section 8(1) of the SOA was inconsistent with the rights of children under the Constitution, to the extent that it criminalises consensual sexual relationships between adolescents. The petitioner also contended that Section 11(1) of the SOA, which created a lesser offence of commission of an indecent act with a child, was similarly inconsistent with the Constitution. The petitioner’s main grounds were that:

- i. The provisions, in practice, promoted disproportionate prosecution of the male child in incidences of consensual sexual acts between minors, even when it was clear that the female child was a willing participant in the sexual act. This constituted the violation of the rights of the male child to equal protection and benefit of the law as it amounted to indirect discrimination against the male child, contrary to Article 27(5) of the Constitution.
- ii. The provisions also discriminated against minors on the grounds of their age, given that adults are not subjected to criminal prosecution for similar activities.
- iii. The stigma attached to the word “defiler” was degrading to a minor. The petitioner also claimed to have been negatively affected by the investigation into the incident.

The petitioner did not seek to challenge the constitutional validity of Sections 8(1) and 11(1) of the SOA insofar as those provisions criminalise *adults* who engage in acts of sexual penetration or in indecent acts with children. Nor was he challenging the constitutional validity of the two provisions in circumstances where children engage in sexual acts that are non-consensual, forceful, violent or exploitative.

The judge found that:

- i. The relevant provisions of the SOA do not *per se* discriminate against the boy because they do not distinguish between the girl and the boy. Both are committing an offence on engagement in a sexual act and there is no statutory bar to charging both the girl and the boy. Consent to sexual activity is not a factor in determining whether the offence had been committed.
- ii. The petitioner had not provided any evidence that the provisions of the SOA *as applied* discriminated against the male. On the facts of the case, only the boy had been prosecuted for reasons related to evidence. While theoretically it would have been possible to charge the girl, there was a paucity of evidence against her. The boy had made no complaints sufficient to sustain a charge. Furthermore, the petitioner had not demonstrated any past patterns of disadvantage in relation to other incidents of consensual sexual activities between minors. Therefore, the Court was not persuaded to make a generalised finding about whether the law *as applied* to “incidences of consensual sexual acts between minors” discriminates against male children more generally. The law does not discriminate against adolescents by criminalising their sexual conduct. The provisions of the law are aimed at a worthy or important societal goal – namely, protecting children from engaging in sexual conduct prematurely.
- iii. The law appropriately attaches the label “defiler” to a person who causes sexual penetration of a child, regardless of the age of the offender. The law distinguishes between wrongs and developmentally normal behaviour. The law treats sexual penetration of a child as a wrong and it serves an important purpose in guiding and protecting adolescents, who if “*left to their own devices... tend to engage in more risky behaviour*”. Furthermore, the fact that the behaviour constituting the offence took place in private does not mean the offender ought to escape public censure.

Points to Note

- This decision brings into sharp focus the problem of the disproportionate prosecution of the male child in incidents where the female child is a willing participant of the sexual acts.
- On the facts, the judge found that the defilement provisions of the SOA did not discriminate against the male child.
- In rejecting the approach of the South African courts (as set out below), the judge found that the provisions did not infringe the dignity of adolescents. Rather, the provisions are necessary to guide

and protect adolescents who would otherwise tend to engage in risky behaviour.

- The case also raises the question as to whether criminalisation is the best way to discourage children and protect them from engaging in sexual activities.
- The law considers children to be particularly vulnerable and therefore affords them protection. While this is a noble aim, it is debatable whether the potential imposition of highly penal sanctions on children who engage in sexual activities is an effective preventative measure. The judge avoided consideration of prevention. Rather, the judge focused on how the law should react to a child who has engaged in sexual activities.
- The judge adopted a positivistic stance that the SOA had been passed by democratically elected leaders who had chosen to criminalise certain activities regardless of whether they were done in public or private.
- The case confirmed that, when dealing with child offenders, especially male, under the SOA, courts should always be guided by the principle of the “best interest of the child”. A child should be tried according to the provisions of the Children Act, which discourage a custodial sentence for a child unless as a matter of last resort. This may include treating both the male and the female child as children in need of care and protection and making orders that they both receive counselling.
- Although the judge was reluctant to declare the unconstitutionality of the defilement provisions in the SOA, the Court acknowledged the need to adopt a more child-friendly response instead of a punitive one.
- A more child-friendly response to this predicament might be to provide for placements or committals that rehabilitate the child and foster restorative justice. In similar cases, the prosecution may desist from prosecuting such cases and instead bring them up as protection and care matters.
- This case signals the need to rethink the law in order to protect and balance the interests of the male and the female child. Other countries have handled this problem in various ways.
 - The law of Canada allows a minor aged 12 or 13 to consent to sexual intercourse with an individual who is fewer than two years older; 14 and 16 year olds can consent to a partner who is fewer than five years older.

- In the UK, a minor can be guilty of sexual contact with another minor but the decision on whether to prosecute is to be determined on a case-by-case basis. According to the UK Crown Prosecution Guidelines: “[I]t is not in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption.”

| Other cases/decisions referred to | |
|--|---|
| Country/jurisdiction | Decision |
| South Africa <i>National Coalition for Gay and Lesbian Equality & another v Minister of Justice & 2 others</i> [1998] CCT No. 11 ZACC 15 | This case sets out two factors to be considered when determining whether an allegedly discriminatory provision has had an unfair impact on the complainants: <ol style="list-style-type: none"> <i>The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;</i> <i>The nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy or important societal goal, such as for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainants have in fact suffered the impairment in question.</i> |
| South Africa <i>Teddy Bear Clinic for Abused Children & another v Minister of Justice and Constitutional Development & another</i> [2013] CCT No. 12/13 ZACC 35 | The criminalisation of consensual sexual conduct leads to stigmatisation and infringement on the dignity and self-worth of the adolescent. |
| South Africa <i>Khumalo v Holomisa</i> [2002] ZACC 12 | The Court highlighted the importance of privacy in fostering human dignity and the violations caused by invading deeply personal realms of peoples' lives. |

Dennis Osoro Obiri v Republic [2014] CA

Principle or Rule Established by the Court's Decision

Corroboration of a child's evidence is not necessary in cases involving sexual offences as long as the trial court is satisfied that the child was telling the truth.

Judges: Kihara Kariuki, M'Inoti and J. Mohammed | JJA

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|---------------------------------------|----------------------------------|--|--------------------|
| Conviction and sentence upheld | Court of Appeal, Nairobi (Kenya) | Criminal Appeal No. 279 of 2011; judgement delivered on 9 May 2014 | Defilement |

Case Summary

The appellant was charged with defilement of a child aged 11 or less, contrary to Section 8(2) of the SOA. The particulars of the offence were that he caused penetration of a male organ into the female organ of a nine-year-old girl.

There was adequate evidence to suggest the victim had been defiled. The principal issue was the identity of the defiler. This was derived from the testimony of the victim.

The trial magistrate conducted a *voir dire* examination to ascertain the victim's competency to give evidence. It was ordered that the victim could give unsworn evidence. While giving evidence, the victim identified the appellant as the person who had defiled her, and the record showed that her description of the act of defilement was, notwithstanding her innocent words and language, vivid and particularly graphic.

Section 124 of the Evidence Act, introduced by the Criminal Law (Amendment) Act (2003), and further amended by the SOA, states that:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

Pursuant to Section 124, the trial magistrate concluded that she could not find any reason for the girl to frame the appellant, which was as good as stating that she found the girl's evidence trustworthy and her evidence reliable as to the identity of the defiler.

The appellant was convicted and sentenced to life imprisonment. Upon appeal, the High Court rejected the argument that the respondent's evidence was not corroborated as required by law. The Court dismissed the appeal, thereby affirming the conviction and sentence. The appellant launched a second appeal to the Court of Appeal on both conviction and sentence.

The main issue for determination at the Court of Appeal was whether the trial court and High Court had inappropriately relied on the uncorroborated evidence of a minor, whose reliability was being challenged, in convicting the appellant.

The Court of Appeal held that the effect of Section 124 is to create, in cases of sexual offence, an exception to the general rule that an accused cannot be convicted on the uncorroborated evidence of a child of tender years.

The trial magistrate had made specific reference to Section 124 and given an explanation that she could not find any reason for the girl to frame the appellant. Her finding was “as good as stating” that she found the girl’s evidence trustworthy and reliable. The Court of Appeal therefore considered that the trial magistrate was alive to her duty under Section 124 to convict on the uncorroborated evidence in the circumstances.

The Court also affirmed that medical evidence directly linking the accused to the crime was unnecessary as long as the trial court found there was sufficient medical evidence to prove that the victim had been defiled and that the victim’s evidence as to the identity of the person who had defiled her was trustworthy.

The Court therefore held that the appellant had been properly convicted of the offence of defilement contrary to Section 8(2) of the SOA and dismissed the appeal.

Obiter Dictum

The Court rejected the appellant’s argument that the age of the appellant was not proved as an irrelevance. Section 8(2) of the SOA under which the appellant was charged relates to defilement of a child aged 11 years or less. To that extent, it did not matter whether the minor was nine or ten years old. The critical issue is that she was less than 11 years old.

Points to Note

- This is an important precedent that prevents perpetrators of sexual violence from arguing that lack of medical evidence linking the accused to the crime justifies an acquittal. The testimony of a victim alone will suffice if the court is satisfied (and indicates in its judgement) that the victim is a truthful witness.
- Section 124 of the Evidence Act expressly provides that corroboration is no longer necessary in sexual offences if the victim is found to be credible.
- In this case, the trial magistrate had expressly mentioned Section 124, indicating that she was alive to the provision. She had conducted a *voir dire* to ascertain the competence of the victim. Her ruling was akin to a statement that she found the girl’s evidence to be truthful.
- This being a Court of Appeal judgement, it is binding on the High Court and subordinate courts.

- It should be noted that cases where the court required corroboration of the victim's evidence, such as *Nyanamba v Republic* [1983] KLR 599 and *Johnson Muiruri v Republic* [1983] KLR 445, are no longer good law because they were determined prior to the enactment of the Section 124 provision.

| Other cases/decisions referred to | |
|--|---|
| Country/jurisdiction | Decision |
| Kenya <i>Kassim Ali v Republic</i> [2005] Criminal Appeal No. 84 (Mombasa) | <i>[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.</i> |
| Kenya <i>Geoffrey Kioji v Republic</i> [2010] Criminal Appeal No. 270 (Nyeri) | <i>Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.</i> |

Joseph Lotoyo v Republic [2011] CA

Principle or Rule Established by the Court's Decision

- An appellate court cannot interfere with a sentence unless the sentence is illegal.
- Imposition of the minimum sentence prescribed by statute for defilement is clearly within the range of legal sentences that could be passed upon an offender.

Judges: Onyango Otieno, Karanja and Koome | JJA

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|-------------------------|----------------------------------|----------------------------------|--------------------|
| Appeal dismissed | Court of Appeal, Eldoret (Kenya) | Criminal Appeal No. 135 of 2011 | Defilement |

Case Summary

This was a second appeal by the appellant against conviction and sentence for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the SOA. In the trial court, the appellant pleaded guilty to the charge, and was sentenced to the minimum sentence of 20 years. The appeal against

sentence in the High Court was dismissed. A second appeal was made to the Court of Appeal.

The Court of Appeal considered whether it had the jurisdiction to interfere with sentencing and declined to do so on the grounds that the severity of sentence is a matter of fact the Court is precluded from determining by virtue of Section 361(1)(a) of the Criminal Procedure Act, which provides that:

A party to an appeal from a subordinate court may, subject to subsection 8, appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section- (a) on a matter of fact, and severity of sentence is a matter of fact.

Points to Note

- This case is a well-reasoned precedent that establishes that sentencing is a matter of fact and, unless the sentence imposed is illegal, the Court of Appeal has no jurisdiction to interfere with sentences in defilement cases.
- This case provides procedural guidelines on the Court of Appeal's jurisdiction to interfere with sentences in defilement cases.

M.B.O. v Republic [2010] CA

Principle or Rule Established by the Court's Decision

- "Buttocks" should be treated as falling within the legal definition of "private parts", despite not being included expressly in the definition by statute.
- It is permissible to include a count of indecent assault on a charge sheet as an alternative to a main count of defilement. Therefore, conviction on an indecent assault count is sustainable even after dismissal of a defilement count.

Judges: Omolo, Waki and Visram | JJA

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|-------------------------|---------------------------------|---|--------------------|
| Appeal dismissed | Court of Appeal, Nakuru (Kenya) | Criminal Case No. 342 of 2008; judgement delivered on 16 April 2010 | Defilement |

Case Summary

The appellant, a 63-year old grandfather, was charged with 3 counts of defilement of 3 primary school pupils aged 6, 9 and 11, contrary to Section

145(1) of the Penal Code. Three alternative counts alleged indecent assault through touching of the pupils' buttocks. At trial, the appellant was convicted on each count of defilement. However, on appeal, the High Court ruled that the main counts were defective. The Court found the appellant guilty of the alternative offences, and he was sentenced to serve 10 years for each of the 3 counts of indecent assault, a total of 30 years.

On appeal before the Court of Appeal, the appellant raised two main issues:

- i. Whether touching of the buttocks of a human being constituted indecent assault under Section 144 of the Penal Code.
- ii. Whether an alternative count of indecent assault was sustainable after the dismissal of the main count of defilement.

In dismissing the appeal, the Court of Appeal found that:

- i. Buttocks did constitute private parts. The case of *Gitau v Republic* [1983] KLR 223 defined "indecent assault on females" to include touching:

The touching, for example, of the breasts or private parts of a female without being accompanied by utterances suggestive of sexual intercourse is also indecent assault.

The test is usually whether the assault was intentional and whether it was indecent. A simple assault may constitute indecent assault if it is accompanied by utterances suggestive of sexual intent.

- ii. There was ample evidence that the buttocks of the children were touched by the appellant's male organ. The Court found that, in order for the law to move with the times, "buttocks" should properly be considered part of the private parts of a female sufficient to attract the charge of indecent assault.
- iii. Indecent assault was a sustainable alternative count. The Court of Appeal stated that:

The practice of charging offences in the alternative is one of abundant caution... If the main charge is not proved, either because it is defective or because the evidence on record does not support any element of the offence, the evidence does not evaporate into thin air! It may be examined to see if it supports a minor and cognate offence and if it does prove such offence beyond doubt, a conviction will follow... Indecent assault is a minor and cognate offence and was for consideration if the main charge was unsustainable.

Although the main charge had been defective, the evidence that was adduced supported the alternative charge.

Obiter Dictum

The Court of Appeal noted that the High Court had reversed the decision of the trial magistrate on the main charge of defilement for being defective, as the particulars of the charge did not state that any carnal knowledge was “unlawful”. While there could be no appeal against that decision, the Court of Appeal affirmed the decision of *J.M.A. v Republic* [2009], reached after the decision of the High Court in the present case, where a similar situation arose. The Court in that decision subjected the charges to the test of “failure of justice” in Section 382 of the Criminal Procedure Code, which is intended to cure such irregularities where prejudice to the appellant is not discernible. In that case, the omission of the term “unlawful” had not prejudiced the appellant in putting forward his defence.

Points to Note

- This case is a good example of how judges using judicial reasoning innovatively or creatively interpreted laws in the absence of statutes, to protect women and girls from sexual abuse or indecent assault.
- By broadening the definition of “private parts”, the Court demonstrated a willingness to take a progressive stance, ensuring the law progresses with the times and “does not stand still”.
- This case was initially heard before the enactment of the SOA. The Court’s position was buttressed by the SOA, which defines “genital organs” to include “the anus”.

P.O.O. (A Minor) v DPP & another [2017] HC

Principle or Rule Established by the Court’s Decision

In a case of defilement involving two minors it is unconstitutional discrimination to take action against the male and not the female.

Judge: H.A. Omondi | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|---|------------------------------|---|--------------------|
| Violation of human rights declared; compensation awarded | High Court, Homa Bay (Kenya) | 17 August 2017; Constitutional Petition No. 1 of 2017 | Defilement |

Case Summary

The petitioner was arrested on 14 February 2016 and the following day he was charged before the Senior Resident Magistrates’ Court, Mbita, with the offence of defilement of a child aged 16–18, contrary to Section 8(1) as read with 8(4) of the SOA. He faced an alternative charge of committing an indecent act with

a child contrary to Section 11(1) of the same Act in Criminal Case No. 7 of 2016. The female minor involved was not charged with any offence.

The petitioner was unrepresented. On 15 March 2016, he informed the trial court that he was a minor being held in a prison for adults. Although the trial magistrate directed that he be held at Magunga Police Station so as to be escorted to hospital for age assessment, the order was not complied with and the trial court did follow up on the issue. Despite contending that he was a minor, the trial continued. The petitioner was not provided with copies of all of the witness statements, despite repeated requests and court orders directing their supply.

The petitioner remained unrepresented until the matter was listed during Children's Service Week (14–18 November 2016; this was an initiative of a special Task Force on Children Matters) and an advocate was appointed to represent him in the matter. The petitioner told his advocate that, at the time of the alleged offence, he was 16 years of age, whereupon the advocate made an application for the age assessment report. No age assessment report was ever presented.

The petitioner alleged that his constitutional rights were and continued to be infringed by the respondents. The issues for determination were whether:

- i. The petitioner was a minor.
- ii. Charging the male minor and not the female minor was an infringement of his constitutional right to be treated equally before the law (Article 27 of the Constitution).
- iii. Failing to afford the petitioner the services of an advocate from the outset of his trial and to provide adequate materials to enable him to prepare for his trial, including witness statements, compromised his right to fair trial (Article 50 of the Constitution).
- iv. The constitutional rights afforded to the petitioner as a child had been infringed, in particular the duty to act in a child's best interests (Article 53(2) of the Constitution).

The judge declared the proceedings unconstitutional and awarded the petitioner damages of KSh 200,000.

- i. As to the petitioner being a minor, Section 143 of the Children Act provides that:

Where it appears to the court that a person is under eighteen years of age, the court shall make due enquiry as to the age of that person, and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgement of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of that person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

Even in the absence of medical evidence, the magistrate must have presumed that the petitioner was a minor, otherwise there would not have been a listing during Children's Service Week. By analogy with the decision in *Francis Omuroni v Uganda* [2000] C.C. No. 2, in which the Court held that, in the absence of medical evidence, age may be proved using a birth certificate, evidence from a parent or guardian or observation and common sense, the magistrate applied observation and common sense to determine age. The magistrate had the benefit of seeing the petitioner's appearance.

- ii. The petitioner was discriminated against in terms of sex. Being minors, both parties needed protection against harmful sexual activities and should have been dealt with by the authorities, preferably outside of the criminal justice system.
- iii. There was a gross violation of the petitioner's right to a fair trial. He had not been provided with all of the relevant documentation, and he been "*left on his own to conduct a hearing in an offence which was complex and which attracts a minimum sentence of 15 years' imprisonment*".
- iv. The detention of a child for a prolonged period and in an adult remand facility violated the express constitutional right to be detained only for the shortest appropriate period of time, and to be detained separately from adults in conditions that take account of the child's sex and age (Article 53(1)(f) of the Constitution), as well as various international instruments.

Obiter Dictum

"Does a boy under 18 years have the legal capacity to consent to sex? Haven't both children defiled themselves? Shouldn't both then be charged or better still shouldn't the Children's Officer be involved and preferably a file for a child in need of care and protection ought to be opened for both of them. I think these are children who need guidance and counselling rather than criminal penal sanctions. '...I really think in this kind of situation should be re-examined in the criminal justice system....' Mr Oluoch's sentiments are taken in account but I honestly think that in exercising its prosecutorial powers, the DPP ought to pay fidelity to section 4 of the Office of the Director of Public Prosecutions Act (2013) which provides that 'In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles:

- a. *Impartiality and gender equity*
- b. *The rules of natural justice*
- c. *The need to serve the cause of justice, prevent abuse of the legal process and public interest.'*

What transpired in this matter did not, in my opinion, live up to the ideals espoused in the Office of the Director of Public Prosecutions Act. The mere assertion by the petitioner that he was a child ought to have been investigated at the first instance and a children's officer should have been assigned the duty of getting more information about the minor. [I find that the appellant was discriminated against on the basis of sex in that he was charged alone] but in reality they both needed protection against sexual activities."

Points to Note

- This case highlights one of the challenges of implementing the SOA in respect of a male child, where adolescents engage in “mutual” defilement or what appears to be consensual sexual intercourse (also referred to as the Romeo and Juliet scenario).
- The judge found that the prosecution’s decision to charge the male child and not the female child in such a case was discriminatory against the male child.
- While this case does not hold that minors have capacity to consent to sex, it raises questions regarding the suitability of harsh penal sanctions in such situations. Rather than being subjected to the criminal process, the Court opined that adolescents who engage in sex require protection, guidance and counselling.
- Judicial officers are alerted as to the unsuitability and unconstitutionality of harsh penal sanctions in such cases and are encouraged to prefer non-custodial sentence and ensure adolescents who engage in sex receive protection, guidance and counselling, as suggested by the judge in this case.
- The prosecution is advised to proceed with the matter as a care and protection case to enable the children to receive the help they need.
- The case also makes important findings on the treatment of children in the justice system – namely, that the state’s failure to assign an advocate to the accused child was an infringement of the child’s right to a fair trial under Article 50(2) of the Constitution, and the detention of a child in an adult remand facility violated Article 53(1)(f) as well as various international instruments.
- The judge gave directions on how a trial of a minor should be conducted especially in the instant case where the charge indicated both the perpetrator and the victim were more or less aged 16 years. A medical doctor should ascertain the age of the minor, and the children’s officer should be involved in what should be known as a care and protection process. The child should be assigned legal counsel and the trial should be conducted expeditiously. If the child is being held on remand, the case should be dealt with within six months. This will ensure the treatment of the child accords with the provisions of the Children Act.
- The Court made a similar finding in the case of *G.O. v Republic* [2017] eKLR (Criminal Appeal No. 155 of 2016), where the arrest of the male child, instead of both the appellant and the female complainant, amounted to discrimination on the grounds of sex.

| Other cases/decisions referred to | |
|--|---|
| Country/convention | Decision/reference |
| Uganda <i>Francis Omuroni v Uganda</i> [2000] C.C No. 2 | <i>Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.</i> |
| UK <i>English case of R v G (Appellant) the Baroness Hale of Richmond</i> | <i>As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted...the person penetrated may be the offender... Obviously ... there will be wide variations in the blameworthiness of the behaviour... Both prosecutors and those who render sentences will have to make careful judgements about who should be prosecuted and what punishment, if any, is appropriate.</i> |
| CRC | Article 37 |

W.J. & L.N. v Astarikoh & 9 others [2015] HC

Principle or Rule Established by the Court's Decision

The state is under a duty to safeguard a child's constitutional rights to dignity, health and education. This includes a duty to safeguard the child against sexual violence by employees such as teachers. Appropriate policies and measures must therefore be adopted to minimise the risk of sexual violence.

Judge: Mumbi Ngugi | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|---|--|--------------------|
| State found vicariously liable for sexual violence committed by its employees | Constitutional and Human Rights Division of High Court, Nairobi (Kenya) | Petition No. 331 of 2011; judgement delivered on 19 May 2015 | Defilement |

Case Summary

The first and second petitioners, girls aged 12 and 13 years, respectively, were primary school pupils at J Primary School (second respondent) where the first respondent was a teacher as well as deputy head teacher. The first respondent was charged with defilement of the two children contrary to Section 8(1) as read with Section 3 of the SOA. At the time of the hearing of the petition, the criminal case had been concluded and the first respondent acquitted.

The third respondent, the Teacher's Service Commission (TSC), held disciplinary proceedings against the first respondent. The TSC is a constitutional commission established under Article 237 of the Constitution, with the responsibility of, *inter alia*, registering, recruiting, employing and

exercising disciplinary control over teachers. It found the first respondent culpable, dismissed him from employment and struck him off the register of teachers.

The petitioners brought an action seeking declarations that their constitutional rights had been violated and claimed compensation for damages against the first respondent (the teacher). It was also contended that the second, third, and fourth respondents (the school, the TSC and the state, respectively) were jointly liable for compensation as the employer and principal of the first respondent.

The petitioners also sued the state on allegations of failure to put in place measures and implement steps geared towards curbing emerging and continuing cases of sexual abuse against children in schools in Kenya.

The Court found that:

- i. The first respondent (teacher) was indeed guilty of defilement based on the evidence adduced by the petitioners. This was reinforced by the fact that the first respondent had been dismissed from his employment and struck off the register of teachers by the third respondent (the TSC).
- ii. The teacher's conduct caused the petitioners emotional and psychological trauma as well as the risk of contracting sexually transmitted diseases. Thus, the Court found and declared that the teacher's conduct amounted to a violation of the petitioners' constitutional rights to dignity (Article 27), health (Article 29) and education (Article 43).
- iii. The state and any educational or other institution are vicariously liable for the acts of sexual abuse committed by teachers or other caregivers against those who have been placed under their care.
- iv. The third and fourth respondents (the TSC and the state) failed in their duty to safeguard pupils from sexual abuse by their teachers. While there was a circular and a Code of Ethics, there was insufficient enforcement of the same. Further, the TSC had failed to make students aware of the contents of the circular, for instance the prohibition against teachers making contact with students outside what is required of a normal teacher-pupil relationship. There was also insufficient awareness of the TSC website and its reporting and disciplinary mechanisms. The third and fourth respondents were therefore vicariously liable for the unlawful acts of the first respondent.

The first and second petitioners were awarded KSh 2 million and KSh 3 million in damages, respectively, to be deposited in interest-earning accounts in trust for them and for their further education and training.

Points to Note

- The Court found that acts of sexual and gender-based violence committed not only against the first and second petitioners but also against *all students* amount to a violation of their constitutional rights to dignity, health and education.
- This is a groundbreaking decision, because it is the first Kenyan case to consider the vicarious liability of institutions for the unlawful acts of teachers found to have sexually abused pupils. The Court made an important statement of principle that educational institutions and state bodies such as the TSC are under a duty to safeguard pupils from sexual abuse by their teachers. Safeguarding rights not only involves taking remedial action but also requires preventative measures to be put into place, including implementation of appropriate policies and mechanisms. Failure to do so will lead to bodies being held vicariously liable for the unlawful acts of the teacher(s) found to have sexually abused pupils.
- Additionally, the respondents in this case were faulted for failing to provide appropriate psychological support for child victims who were subjected to sexual violence by their teachers.
- The case also encouraged judicial officers to borrow progressive ideas from jurisprudence of other jurisdictions in the Commonwealth.

Obiter Dictum

Judge Ngugi appreciated that, while the majority of sexual abuses are committed by males against female victims, the findings of the Court would apply with equal force to all teachers, regardless of gender, who sexually abuse children under their care.

With respect to the criminal culpability of the accused for defilement, the judge acknowledged that proceedings before the Constitutional Court are not criminal proceedings, and therefore a lower standard of proof is required. Drawing an analogy with non-criminal disciplinary proceedings, the Court quoted the High Court of Kerala in *Spadigam (J.) v State of Kerala* [1970] ILLJ 718 Ker:

"I do not think that judgement of a Criminal Court acquitting an accused on the merits of a case would bar disciplinary proceeding against him on the basis of the same facts, or that the Judgement would operate as conclusive evidence in the disciplinary proceedings. The reason for it is not far to seek. A criminal court requires a high standard of proof for convicting an accused. The case must be proved beyond reasonable doubt. The acquittal of an accused by a Criminal Court only means that the case has not been proved against him beyond reasonable doubt. Such a standard of proof is [not] required for finding a person guilty in a disciplinary proceeding."

| Other cases/decisions referred to | |
|---|---|
| Country/jurisdiction | Decision |
| England <i>Lister & Ors v Hesley Hall Limited</i> , [2001] 2 All E.R 769 | The House of Lords held that the employer of the warden of a residential boarding annex for children with emotional and behavioural difficulties could be held liable for the intentional acts of the warden on the basis of the principle of vicarious liability. |
| Canada <i>B. (A.) v D. (C.)</i> [2011] B.C.J. No. 1087, 2011 BCSC 775 | <i>Board EF owes a duty of care to its students to protect them from unreasonable risk of harm at the hands of other members of the school community... The standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful and prudent parent. This was set out by the Supreme Court of Canada in Myers v. Peel County Board of Education, [1981] 2 S.C.R. 21.</i> |
| Zambia <i>R. M. K. v Edward Hakasenke & others</i> , [2006] 2006/HP/0327 | In a case with very similar facts, the plaintiff student brought a claim against a teacher who had raped her at her school, in which the defendant was a teacher, the Ministry of Education and the Attorney General. The Court found in favour of the plaintiff, holding that a teacher is employed, selected and paid by the Ministry, is regulated in the performance of his or her duties by the Ministry and can be suspended or relieved of duty |

David Mwangi Njoroge v Republic [2013] HC

Principle or Rule Established by the Court's Decision

A charge of defilement can be brought only where the complainant is under 18 years old. A conviction for rape cannot merely be substituted because it is not a minor and cognate offence of defilement, and the offence of rape raises issues of consent that are unlikely to have been addressed in relation to defilement, an offence in which consent is not a major consideration.

Judge: G. W. Ngenye-Macharia | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|--------------------|----------------------------------|--------------------|
| Appeal allowed, retrial ordered | High Court (Kenya) | Criminal Appeal No. 193 of 2013 | Defilement Rape |

Case Summary

The accused was convicted of defilement, contrary to Section 8 of the SOA. However, the complainant was 18 at the time of the offence. She was therefore not a minor at the time of the offence and a conviction on a charge of defilement was not possible as a matter of law. The accused therefore sought to have the conviction quashed.

The High Court found that the accused should have been charged with the offence of rape, contrary to Section 3 of the SOA. The Court considered whether Section 179 of the Criminal Procedure Code could cure the defect by simply allowing the conviction to be substituted for by one of rape. Section 179 permits conviction for an offence other than that charged if the offence is both minor and cognate to the original offence. The Court held that rape

is not minor and cognate to defilement and so to allow the substitution of such a charge would lack “*legal basis and... [go] against the duty of the court to uphold the right to a fair trial*”.

Furthermore, there was a problematic issue of consent that would have stymied substitution of a conviction for rape in any event. On the facts of the case, the complainant attended a school for mentally challenged persons. Section 45 of the SOA creates a rebuttable presumption that a person who is mentally impaired lacks the capacity to consent to sexual intercourse. The issue of consent had not arisen during the trial because consent is not a major element under the offence of defilement. Therefore, no medical records had been produced in relation to the complainant to confirm her actual mental inability, and therefore her incapacity to consent to a sexual act remained unresolved. The accused had therefore been given no opportunity to seek to test the evidence in relation to consent or to rebut the presumption. It would be unjust not to give the accused an opportunity to challenge those issues at trial.

The Court therefore quashed the conviction and set aside the jail term. It was substituted with an order that a retrial be held. It was ordered that a fresh charge sheet be prepared.

Points to Note

- This is a case in which a charge of defilement lacked legal basis. The Court could not simply substitute this for a rape conviction because rape neither is a minor and cognate offence to defilement nor affords the accused an opportunity to address the issue of consent, which is not a major element of the offence of defilement. The courts must uphold the right to a fair trial and ensure balanced justice.
- This case is an important indicator for the proposition that the mere fact that a person has a mental illness does not mean there is incapacity to consent to a sexual act. It also lays a heavier burden on the prosecution to adduce more evidence to show there was lack of consent.
- To prove the absence of consent owing to a mental impairment, it is important to demonstrate the nature and extent of the mental incapability to consent. While the case shows that medical evidence is essential to prove mental incapacity, it also points to the Court’s heavy reliance on said evidence. The evidence adduced reflected that the victim attended a school for mentally challenged persons and that for said victim to attend that school proved that she suffered a form of mental impairment.
- The fact of a complainant being mentally impaired is not conclusive proof of absence of consent; rather, it is a rebuttable presumption that can be dislodged by production of evidence.

Rwanda

Prosecution v Habimana [2016] SC

Principle or Rule Established by the Court's Decision

Although the law provides that an expert's report must be preceded by an oath and failing to do so nullifies the report, nothing prohibits such a procedural error (as distinct from a substantive error) from being rectified. This may be achieved by the expert appearing before the court and swearing an oath before the report is admitted into evidence.

Judges: Mugenzi Louis Marie, Nyirinkwaya Immaculée and Rugabirwa Ruben | JJSC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|-----------------------------|---------------------------|--|-----------------------|
| Appeal dismissed | Supreme Court (Rwanda) | Supreme Court Case No. RPAA0321/ 10/CS of 18 March 2016 | Defilement |

Case Summary

The accused was prosecuted for having defiled a six-year-old girl. The girl was entrusted to the accused by her grandmother on the way home from church. It was intended that he would bring her to her mother, who was his neighbour. On the way, he prevented the girl from walking with another man, who was also their neighbour. Instead, he defiled her behind a house.

The Intermediate Court convicted the accused and sentenced him to 10 years of imprisonment. He was fined 100,000FRw, his penalty being reduced because he was young (aged 25). Furthermore, the victim's mother was granted moral damages of 500,000FRw.

Following an appeal lodged by the accused, the decision was upheld by the High Court. The High Court relied on the testimony of the victim's mother, the testimony given by the victim's teacher and a medical report. The medical report did not set out the oath of the physician, as required by article 93 of Law No. 15/2004 (relating to evidence and its production). However, the physician swore an oath before the Court prior to the content of the report being admitted into the proceedings.

The accused appealed to the Supreme Court, challenging the evidence on which the earlier decisions were made, in particular the admission of the medical report despite it failing to set out details of the physician's oath.

The Supreme Court upheld the High Court decision. It held that, although the law provides that an expert's report must be preceded by the oath and failing

to do so annuls it, nothing prohibits such a procedural error (as opposed to a substantive error) from being rectified. This could be achieved, for instance, by summoning its issuer before the court and requiring them to take an oath before providing related explanations. This is precisely what happened during this case.

Points to Note

- This case serves as an authority in cases where a medical report is issued without being preceded by the oath, as required by law.
- This case is a demonstration of good analysis by the Supreme Court. It allows value to be given to expert reports affected by procedural rather than substantive errors. Nothing prohibits such a procedural irregularity from being rectified. Failure to preface a medical report with the oath may be remedied by the issuer appearing before the court and swearing prior to the report being admitted into evidence.

Prosecution v Maniragaba [2015] SC

Principle or Rule Established by the Court's Decision

- A court may consider any available supporting evidence in resolving contradictory evidence as to a victim's date of birth.
- The accused cannot rely on alleged consent to sexual intercourse by a victim who is a minor. A minor is incapable of giving such consent.

Judges: Hatangimbabazi Fabien, Kalimunda Aimé and Munyangeri Innocent | JJSC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--------------------------|------------------------|--|--------------------|
| Conviction upheld | Supreme Court (Rwanda) | Case No. RPAA0257/10/CS of 11 September 2015 | Defilement |

Case Summary

The accused was brought before the Intermediate Court for having defiled a 17-year-old girl. The Court convicted the accused. He was sentenced to 20 years' imprisonment and a fine of 100,000FRw. The sentence had been reduced because he pleaded guilty and sought forgiveness. The accused accepted that he had sought to persuade the victim to have sexual intercourse, thinking that she was 18 years of age.

He appealed to the High Court, which upheld the judgement. It also found partial merit in a civil claim filed by the defiled child's mother, and ordered the accused to pay her 200,000FRw in damages.

The accused lodged a second appeal to the Supreme Court contending that:

- i. There was contradictory evidence as to the victim's date of birth. Although her birth certificate suggested that the victim was born in 1990 (putting her age at below 18), the accused produced a form issued by the local administration that stated that the victim was born in 1988 (putting her age at above 18). He contended that he must benefit from the doubt created by the contradictory documents.
- ii. The victim had in fact consented to sexual intercourse.

Upholding the conviction, the Supreme Court held that:

- i. It is for courts to decide in their sole discretion on the veracity and admissibility of incriminating or exculpatory evidence. The only document with the date of birth of 1988 was procured by the accused himself. The victim was able to produce four separate documents putting her date of birth at 1990. It was beyond doubt that the victim was born in 1990 and therefore below 18 at the date of the offence.
- ii. Any alleged consent of the victim cannot be taken into consideration. Any sexual relation with a child, whatever means or methods are used, is considered to be defilement.

Points to Note

- The case is of interest to the jurisprudence as it clearly states that there is no possibility for a child under the age of 18 years to consent to having sexual intercourse with an accused who is older than him/her. The supposed consent of the victim in this case was therefore irrelevant.
- The case is also of interest with regard to the role of the courts in giving due consideration to other supporting evidence in the file in order to determine the veracity of contradictory or ambiguous evidence. The Court was able to use four different documents to corroborate the victim's date of birth in this case.

Prosecution v Ngurinzira [2015] SC

Principle or Rule Established by the Court's Decision

The court cannot disregard testimony against an accused only because it comes from victim's relatives, or because those relatives have interests in the case. The validity of testimony does not depend on the author but rather on its veracity as determined by the court's assessment.

Justices: Mutashya Jean Baptiste, Hitiyaremye Alphonse and Hitiyaremye Alphonse | JJSC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|--------------------------|------------------------|---|--------------------|
| Conviction upheld | Supreme Court (Rwanda) | Case No. RPAA0118/11/CS of 13 November 2015 | Defilement |

Case Summary

The accused was alleged to have defiled an eight-year-old child when the mother sent the child to bring a hoe from the accused's house. When the victim arrived at the accused's house, the accused immediately held her, took her into the house, removed her clothes and defiled her, leaving serious injuries as indicated in the medical report. The accused pleaded not guilty. The Tribunal of Kigali Ngali Province, having carefully considered the evidence (in particular witness testimony and a medical report), convicted and sentenced him to life imprisonment. The accused appealed to the High Court, which convicted and sentenced him to 15 years' imprisonment and a fine of 100,000FRw. This was a reduced penalty because the accused was a first-time offender. He appealed against the decision to the Supreme Court.

The accused contended that he had been wrongfully convicted:

- i. The medical report was generally unreliable because it was produced two weeks after the incident.
- ii. Even if the report was to be seen as reliable, it indicated that defilement was with a finger.
- iii. Defilement with a finger had been by the victim's mother in order to frame the accused. The accused alleged that he and the victim's mother had disagreed in the past.

The Supreme Court upheld the conviction:

- i. The period within which the medical report was produced was irrelevant. The court is concerned with the evidence contained within it.
- ii. The notion that it was a finger that caused the defilement was a misreading of the medical report. The medical report simply noted that the hymen was broken and "*allows the passage of a finger*" on examination.
- iii. Even if there was an acrimonious history between the accused and the victim's mother, this did not preclude the victim's mother from giving evidence. In any event, witnesses saw the accused at the scene of the crime, coming out of the house and tightening his belt. This suggested he had been the perpetrator.

Points to Note

- The case stands out because it brings out the fact that testimonies including those of the victim's relatives are allowed in court proceedings insofar as the law does not prohibit them.
- Testimonies cannot be disregarded merely because the person may not be entirely impartial. In many cases, evidence will be given by relations of the victim or by people with some prior dealing with the accused. Validity of testimony does not depend on the author, rather on its veracity, which is solely decided by the court following the court's assessment. The accused's mother was therefore permitted to give evidence in the case.

Prosecution v Mutabazi [2014] SC

Principle or Rule Established by the Court's Decision

- A plea of guilty late in the trial will still attract the penalty reduction that comes with a plea of guilt.
- As long as there is sufficient evidence, the court can convict in cases of defilement even without a medical report of the victim.

Judges: Mukanyondo Patricie, Gatete Gakwaya
Benoit and Mukamulisa Marie Thérèse | JJSC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|---------------------------|---|-----------------------|
| Conviction and sentence reduced | Supreme Court (Rwanda) | Supreme Court Case No. RPAA 0227/10/CS of 11 April 2014 | Defilement |

Case Summary

The appellant was prosecuted for having defiled a four-year-old girl. The appellant had confessed to the Judicial Police, and the Intermediate Court convicted him on the basis of his confession. The appellant was sentenced to 10 years' imprisonment and fined 100,000FRw because he was a juvenile offender.

The appellant appealed to the High Court, claiming that:

- The trial judge should not have put any weight on the confession made to the Judicial Police. He contended that he had been beaten and forced to sign the statement.

- ii. The Intermediate Court had wrongfully convicted him because there had been no medical report in connection with the victim.
- iii. The Intermediate Court had ignored the fact that the victim's mother had previously been in conflict with the appellant, which would have provided a motive to lie.

The High Court noted that the appellant had failed to produce any evidence to support his argument about the confession being obtained forcibly. To the contrary, it was evident that he had in fact made the statement willingly, stating how the offence was committed very clearly and in a great deal of detail. The High Court also ruled that medical evidence was unnecessary. The appellant had been seen over the child, which was sufficient evidence to constitute what is stipulated by the law as child abuse. Furthermore, the Court did not consider the alleged conflict with the child's mother because he produced no evidence thereon. Therefore, the High Court upheld the decision of the Intermediate Court.

A second appeal was made to the Supreme Court. During the hearing, the appellant retracted his submissions. He told the Court that he now sincerely pleaded guilty to the offence and sought forgiveness.

The Supreme Court reduced the sentence from 10 to 7 years of imprisonment, in accordance with Articles 82 and 83 of Decree Law No. 21/77 of 18 August 1977 Instituting the Penal Code, providing for mitigating circumstances. The relevant mitigating circumstances included his provision of a detailed explanation of how the offence was committed and his desire to seek forgiveness from the victim's family. The appellant was also entitled to a discount for his guilty plea. The Supreme Court explained that the late guilty plea of the accused could not prevent him from benefiting from a penalty reduction. He was a juvenile and a first-time offender, and therefore he should be given the chance to be reintegrated.

Points to Note

- This case serves as an authority that, in cases where there is no medical report in relation to the victim, the court may still convict the accused person if there is other evidence that is sufficient to prove guilt.
- This case is also an example of a situation in which a juvenile and first-time offender who sincerely pleads guilty and seeks forgiveness benefits from a reduction in sentence, even though the guilty plea was late (second appeal in this case).

Uganda

Uganda v Anyolitho Denis [2016]

Principle or Rule Established by the Court's Decision

Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.

Judge: Stephen Mubiru | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|------------------|---------------------|----------------------------------|-----------------------|
| Acquitted | High Court (Uganda) | Criminal Case No. 0182 of 2016 | Aggravated defilement |

Case Summary

The accused was indicted on one count of aggravated defilement, contrary to Sections 129(3) and 129(4)(a) of the Penal Code Act (PCA). The accused was alleged to have performed a sexual act on K.P., a girl aged four. The investigating officer checked the accused and found wet semen on his underpants. The victim was examined by the medical officer and found to have stains on her underpants but with no evidence of penetration. The accused pleaded not guilty.

For the accused to be convicted of aggravated defilement, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt:

- i. That the victim was below 14 years of age.
- ii. That a sexual act was performed on the victim.
- iii. That it is the accused who performed the sexual act on the victim.

In relation to each of these essential ingredients of the offence, the Court found that:

- i. Medical examination by a senior medical officer proved beyond reasonable doubt that, as at the date of the offence, K.P. was a girl aged four and therefore under fourteen years of age.
- ii. Under Section 129(7) of the PCA, "sexual act" means penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. The prosecution relied only on the admitted evidence of a senior

medical clinical officer who examined the victim and stated that the hymen was not ruptured and there were no injuries seen on the vulva or vagina. The prosecution had not proved sexual penetration beyond reasonable doubt.

- iii. The only evidence purporting to identify the accused as the perpetrator was the circumstantial evidence as to “semen” in the accused’s underpants and the victim’s underpants. However, the prosecution never explored the basis of the investigating officer’s opinion that what he saw on the underpants of the accused was wet semen. The medical examiner did not characterise or classify the nature of the stains he had found in the victim’s underpants as semen. The Court therefore found the evidence as to fluid present in underwear was inconclusive and unreliable, and with it the evidence linking the accused to the offence.

The Court went on to consider whether the available evidence was capable of establishing any of the offences that are minor and cognate to that of aggravated defilement. The usual minor and cognate offences to the offence of aggravated defilement are *simple defilement* (contrary to Section 129(1) of the PCA), *attempted defilement* (contrary to Sections 386 and 129(1) of the PCA) and *indecent assault* (contrary to Section 128(1) of the PCA):

- i. An offence of *simple defilement* could not be sustained because it still required proof of sexual penetration.
- ii. In the instant case, the evidence of an offence of *attempted defilement* or *indecent assault* could potentially have been established by the circumstantial as to “semen” in the accused’s underpants and the victim’s underpants. However, as articulated above, such evidence did not establish that the fluids were semen. There was therefore inadequate evidence to link the accused to the offence.

The judge stated that, before deciding on conviction in a case such as this involving circumstantial evidence, the Court must find the exculpatory facts are:

... incompatible with the innocence of the accused 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 accused’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.

The Court found the circumstantial evidence in the case to be most unsatisfactory.

The prosecution had failed to prove the last two ingredients of the principal offence beyond reasonable doubt, and no other minor or cognate offence could be proved. In agreement with the joint opinion of the assessors, the Court held the accused not guilty. The accused was therefore acquitted and the Court ordered that he be set free forthwith unless held for other lawful reason.

Obiter Dictum

"The most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child."

Points to Note

- The court can convict on the basis of a minor and cognate offence only if the evidence is sufficient to support such a conviction.
- In this case, the evidence of two key elements of the offence – namely, performance of a sexual act and the identity of the offender – was wholly inadequate.
- The case provides a good precedent on evaluation of all evidence: circumstantial, witness testimony and state of the victim after the act.
- The Court observed that the most reliable way of proving the age of a child was by the production of his or her birth certificate, followed by the testimony of the parents. The Court's own observation and common sense assessment of age may also suffice.

Uganda v Dimba Pascal [2014] HC

Principle or Rule Established by the Court's Decision

- A person is "in authority" over a child in a sexual case if the relationship between the person and the child is characterised by a one-sided distribution of power, with the person being bound in equity and good conscience to act in good faith with regard to the interests of the child. It therefore includes, among other people, any person acting in *loco parentis*.
- Identification of a perpetrator may be via his voice.

Judge: Stephen Mubiru | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|---------------|---------------------|----------------------------------|-----------------------|
| Guilty | High Court (Uganda) | Criminal Case No. 89/2014 | Aggravated defilement |

Case Summary

Section 129(4)(c) of the PCA provides that a person commits aggravated defilement “*where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed*”. The accused was charged with aggravated defilement against his granddaughter, who was under his care. He had been looking after her following her mother’s remarriage.

The victim alleged that the accused came into her room in the dark of night and had sexual intercourse with her while threatening to burn down the house if she made any noise. This vocal utterance, the victim stated, is what helped her recognise the perpetrator as her grandfather – an identification that she visually affirmed as he walked out of the door after the act. The accused denied the charges, stating that the victim’s paternal uncle was framing him over a disputed piece of land.

Issues for determination by the Court included:

- i. Whether the accused was a person in authority over the victim.
- ii. Whether the evidence of voice identification evidence was sufficiently cogent to satisfy the Court that the accused was the offender.

The Court found that:

- i. “... a ‘person in authority’ is not defined by the Penal Code Act. Applying the purposive approach to statutory interpretation, for purposes of section 129(4) (c) of the Penal Code Act, a person in authority means any person acting in loco parentis (in place of parent or parents) to the victim, or any person responsible for the education, supervision or welfare of the child and persons in a fiduciary relationship, with the child i.e. relations characterized by a one-sided distribution of power inherent in the relationship, in which there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith with regard to the interests of the child reposing the confidence...” [emphasis added].

The cultural practice of the grandfather’s tribe was that, if a person has cared for a child, that person may ask for compensation. That person is entitled to retain custody of the child until such compensation is paid. No compensation had been paid to the grandfather. The accused was therefore in *loco parentis* and therefore the “person in authority” for the purpose of Section 129(4)(c) of the PCA.

- ii. The reliability of voice identification evidence required consideration of the following non-exhaustive factors:

- a. Past familiarity with the voice.
- b. Length of exposure to the voice both before and during the incident.
- c. The retention interval between the time when the witness last heard the voice and when recognition of the voice was called into issue.
- d. The degree to which the witness made a conscious effort during the crime to pay attention to the characteristics of the perpetrator's voice.
- e. Whether the perpetrator used unfamiliar language and accent.
- f. The distinctiveness of the perpetrator's voice (or lack thereof).

In the circumstances of the case, there was no possibility of error in the voice identification.

The Court found the accused guilty and sentenced him to imprisonment for 13 years and 10 months.

Points to Note

- This case fills a gap in the PCA by defining “a person in authority”. In so doing, it ensures that potential perpetrators who may not be parents or guardians but who are in positions of influence over a victim, such as teachers, local leaders, religious leaders and sponsors (among others), do not escape justice as aggravated defilers. Parliament must have been aware of the gravity and betrayal attached to using a position of influence to manipulate a girl child when it legislated that abuse of authority must lead to prosecution under the more serious offence of aggravated defilement.
- In this case, a grandfather was found to be in *loco parentis*.
- The case contributes to jurisprudence on equality, especially for blind women and girls insofar as it recognises that identification of a perpetrator may be via his voice, establishing equality insofar as similar (although for practical reasons not strictly identical) criteria apply for visual identification.

Uganda v Okwera James [2016] HC

Principle or Rule Established by the Court's Decision

A person will be treated as having committed a sexual offence in a “position of authority” if the prosecution can establish that, at the time of the act, the person is a parent or is acting in the place of a parent and is charged with any of a parent's rights, duties and responsibilities to a child, no matter how briefly.

Judge: Elizabeth Ibanda Nahamya | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|-------------------|---------------------|----------------------------------|-----------------------|
| Conviction | High Court (Uganda) | Criminal Session No. 144 of 2012 | Aggravated defilement |

Case Summary

On 8 September 2011, the accused had gone to the victim's mother's house to drink. At one point, the mother left the home and the victim and the accused were alone. The victim was doing housework and bent down to pick up some utensils. The victim realised that the accused was holding her neck strangling her. She wanted to speak but was unable to do so. The accused opened the victim's skirt and had sexual intercourse with her. This took about five minutes. The victim told the Court that the accused was not too drunk to realise what he was doing. After the sexual act, the accused left. The accused denied the charges that were subsequently brought against him.

The Court found that the accused was guilty of performing a sexual act on the victim. However, this was not while he was in a position of authority over the victim. Authority is much more than a relationship between the accused person and the victim. There must be some sort of direct control by the accused person over the victim. In this case, the accused person used to go to the victim's mother's home to drink. The prosecution had not adduced any evidence to show that the accused person had any sort of direct control over the victim or was in any way responsible for the custody or welfare of the victim. It followed that, if the Court were to find that the accused person had control over the victim, it would be out of speculation.

| Other cases/decisions referred to | |
|--|--|
| Country/jurisdiction | Decision |
| Uganda <i>Uganda v Tangit Martin</i> [2007] UGHC 18 | The accused person was a person in authority over a victim when the accused person was responsible for the welfare and custody of the victim and the victim required the permission of the accused to do something. |
| USA (Minnesota) Statutes 609 341 Subdivision 10 | "Position of authority" includes but is not limited to any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties and responsibilities to a child no matter how brief at the time of the act. |

Point to Note

For purposes of Section 129(4)(c) of the PCA, a person in authority has been defined as any person acting in *loco parentis* (in place of parent or parents) to the victim, or any person responsible for the education, supervision or welfare of the child. This implies that, on application of the *ejusdem generis*

rule of interpretation, the law applies to all persons who fall within that categorisation.

Uganda v Kasujja Ivan [2014] HC

Principle or Rule Established by the Court's Decision

- National and international laws condemn sexual violence against young girls. Sentencing should reflect such condemnation through the imposition of an appropriate punishment.
- It is an aggravating feature to deliberately target a victim as a form of revenge on the victim's family.

Judge: Henrietta Wolayo | HC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|---------------|---------------------|--|--------------------|
| Guilty | High Court (Uganda) | Criminal Session No. 0004-2014 (S.129(1)PCA) | Defilement |

Case Summary

The accused was indicted for aggravated defilement, contrary to Section 129(3)(4)(a) of the PCA. He was alleged to have performed a sexual act on a child under the age of 14 years.

The accused was indirectly connected to the victim, having previously been in a relationship with, and having had a child with, the victim's older sister. The victim had gone to the accused's house to play with that child. However, she was left alone at the accused's house. The accused held the victim's hand and took her to a coffee grove, where he removed her underpants and performed a sexual act on her. After ordering her not to reveal what had happened to anyone, he let her return home, where she recounted what had happened.

The accused denied that he had committed the offence. It was an accepted fact that, prior to the offence, the accused never supported the child that was born to the victim's sister, and that he was not wanted in the victim's family home. The accused contended that there was therefore ample reason to falsely implicate him. He contended that he was elsewhere at the time that the offence took place.

The Court decided that:

- The victim was a credible witness.
- There was clear evidence that a sexual act had been performed and that the victim was in clear distress on the night of the incident.

- iii. The accused fled and was arrested after four months. This was indicative of a guilty mind.
- iv. The accused's movements, even on his own account, would have placed him close to the scene of the crime.
- v. The offence was a deliberate action, intentionally targeting the victim as a way of "getting back at her parents for rejecting him".

The accused was therefore convicted and sentenced to 23 years and 6 months' imprisonment, with the victim's intention aggravating the offence. The offence was also aggravated by the need to send a strong message that sexual violence against young girls "*will be punished appropriately when proved*".

Points to Note

- While sentencing offenders in cases involving sexual violence against women, the intention of the offender must be considered as an aggravating or mitigating factor.
- This present case was "*aggravated by the deliberate action of the accused to target the victim as a way of getting back at her parents for rejecting him*". The case therefore highlights sexual violence as a form of punishment to a family by the convict.
- Furthermore, "*sexual violence against young girls is condemned by both international and our laws and as such, this court must send the message that it will be punished appropriately when proved...*"

Uganda v Mukiibi Godfrey [2014] HC

Principle or Rule Established by the Court's Decision

When the victim of a sexual offence complained about the offence to a third person, that third person is permitted to give hearsay evidence of that complaint. An accused can therefore be convicted in the absence of live testimony from the victim.

Judge: Henrietta Wolayo | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|---------------|---------------------|--|-----------------------|
| Guilty | High Court (Uganda) | Criminal Session No. 0008-2014; S.129(3)(4)(a)(b)PCA | Aggravated defilement |

Case Summary

The accused was indicted for the aggravated defilement of his 14-year-old daughter. The victim's mother had died, and so the accused was her sole

parent. The specific factors that aggravated the defilement were the abuse of a position of authority, and the fact that the accused was HIV-positive.

The victim did not testify despite several adjournments on summoning her. Instead, the prosecution relied on the evidence of two teachers, who testified that the victim had complained to them about being defiled by her father. Neither teacher knew the accused. The medical evidence showed that the victim's hymen had been broken.

The accused was convicted and sentenced to 14 years' imprisonment.

Points to Note

- This case demonstrates good practice where a judicial officer can convict a sexual offender despite the victim's failure to testify by invoking the exception to the hearsay rule that applies when a person has complained to another about a sexual offence.
- Moreover, the case stands out because it highlights the reality where the victim has been compromised or made to disappear in order to frustrate the justice process. This case is one of the major challenges faced during trials of sexual offences because in most cases the victim is the only eye-witness and is crucial to the case.
- This case highlights sexual violence through a serious abuse of a position of authority. It also demonstrates the vulnerability of girls who are left in the charge of their father after their mother dies.

Uganda v Muwanga Sepuya James [2016]

Principle or Rule Established by the Court's Decision

- In the absence of a scientific examination, the opinion evidence of a physician as to the age of a victim may be treated as inconclusive.
- Although circumstantial evidence can be used to prove penetration occurred at the time of the offence, that evidence must be sufficiently clear and cogent for the court to be satisfied beyond a reasonable doubt.
- A court may take into account the emotional impact on family members as an aggravating factor in cases of sexual violence.

Judge: Stephen Mubiru | HC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--------------------------|---------------------|---|-----------------------|
| Guilty of attempt | High Court (Uganda) | Criminal Sessions Case No. 0108 of 2016 (s.129(3) and (4)(c) PCA) | Aggravated defilement |

Case Summary

The accused was charged with aggravated defilement of his daughter, who was 17 years old and had a mental disability. The girl's mother and wife of the accused (P.W.3) found the accused and the victim lying together half naked, the accused behind the victim, both lying on their side. P.W.3 saw the accused remove his trousers and place his legs over the victim. P.W.3 pushed the door open and rebuked the accused. The accused pleaded not guilty, contending that he had not seen the victim that day. He contended that he was asleep at the time that the alleged offence took place.

For the accused to be convicted of aggravated defilement, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt. That:

- i. The victim was below 18 years of age.
- ii. A sexual act was performed on the victim.
- iii. The accused was a person in authority over the victim at the material time.
- iv. It was the accused who performed the sexual act on the victim.

As to the elements of aggravated defilement, the Court found that:

- i. The most reliable way of proving the age of a child is by production of her birth certificate, followed by the testimony of the parents. No such evidence was forthcoming. Although a doctor examined the victim and concluded that she was 17 years of age, the examination was not scientific. Accordingly, this evidence was inconclusive. Nevertheless, age can also be proved through the Court's own observation and common sense assessment of age. Having seen the victim in court, and in the apparent absence of any contest from the accused that the victim was under 18, the Court concluded that the victim was a girl under 18 years of age at the time of the offence.
- ii. While addressing the issue of whether a sexual act was performed on the victim, the Court referred to Section 197 of the PCA, which defined "sexual act" as including any penetration of the vagina, however slight, by a sexual organ. This ingredient is ordinarily proved by the direct evidence of the victim, but may also be proved by medical evidence (whether direct or circumstantial) or by other circumstantial evidence. Although the victim's hymen had been ruptured, the medical report did not indicate that such rupture was recent. Furthermore, there was no indication of the source of any bleeding that could have been attributable to menstruation. The prosecution therefore rested on other circumstantial evidence. The witness evidence of the girl's mother and a further witness (P.W.4) failed to prove conclusively that sexual intercourse or any

other sexual act as defined by Section 197 of the PCA occurred. The circumstances were suggestive of sexual intercourse having been the intention but did not establish as a fact that there had been contact between the sexual organs of the accused and the victim, let alone penetration.

Disagreeing with the joint opinion of the assessors, the Court found the circumstantial evidence too weak to establish beyond reasonable doubt that the girl was a victim of an unlawful act of sexual intercourse as alleged. Since the prosecution had failed to prove one of the essential ingredients of the offence, it was not necessary to evaluate the evidence relating to the rest of the ingredients. The Court accordingly acquitted the accused of the offence of aggravated defilement.

However, according to Section 87 of the Trial on Indictments Act (TIA), when a person is charged with an offence and facts are proved that reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it. The Court therefore went on to consider the offence of attempted aggravated defilement, contrary to Sections 386, 129(3) and (4)(c) of the PCA:

- i. For a conduct to constitute an attempt, the impugned act had to be more than merely preparatory. The Court found that the conduct observed by the girl's mother constituted an unequivocal step that, but for her interruption or interference, would have resulted in the commission of the offence. The prosecution therefore established beyond reasonable doubt that an attempt was made to perform an unlawful sexual act on the victim.
- ii. The prosecution had to prove that it was the accused who had attempted to perform the unlawful sexual act on the victim. In this regard:
 - a. The Court rejected the accused's denial of having seen the victim on that day after examining closely the identification evidence of the two witnesses and having found it to be free from the possibility of mistake or error because both witnesses knew the accused prior to the incident. They had also seen and spoken to him on the day in question and thus were in close proximity to him.
 - b. The Court further found that the admission of the accused that he was asleep on that day in his house when he was awoken by the police, who told him to get dressed, placed him squarely at the scene of the crime as perpetrator of the offence.

The Court found that the prosecution had proved beyond reasonable doubt that the accused had attempted to commit an unlawful sexual act with the victim.

In sentencing, the Court considered that, on the facts of the case alone, the accused should be sentenced to the maximum punishment of 18 years' imprisonment. The convict was the biological father of the victim and the victim had a mental disability. The offence was also aggravated by the embarrassment, indignity and shock suffered by the mother of the victim, who caught her husband, the convict, in the act. However, the maximum sentence was mitigated by the facts that the convict was a first-time offender at 52 years of age. He suffered from a number of ailments and was to some extent intoxicated at the material time. A sentence of 16 years was therefore imposed.

Points to Note

- This case demonstrates that circumstantial evidence may be used in appropriate cases to prove penetration occurred at the relevant time. However, in this case, the medical evidence failed to address recent penetration and the eye-witness testimony was not sufficiently probative as to relevant physical contact.
- In the absence of a scientific examination, the opinion evidence of a physician as to the age of a victim was treated as inconclusive.
- The Court treated the impact of the offence on family members, in this case the mother of the victim and husband of the convict, as an aggravating factor in sentencing the offender.

Uganda v Najja Sebango [2012] HC

Principle or Rule Established by the Court's Decision

- In assessing the evidence of a witness, his or her consistency or inconsistency is a relevant factor in determining whether such evidence should be relied on.
- Grave or major inconsistencies that go to the root of the matter unless satisfactorily explained may result in rejection of the evidence of that particular witness. However, minor inconsistencies are to be ignored.

Judge: Elizabeth Ibanda Nahamya | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|---------------|---------------------|---|-----------------------|
| Guilty | High Court (Uganda) | High Court Crim. Session No. 65 of 2012 (S.129 PCA) | Aggravated defilement |

Case Summary

The accused was indicted for the offence of aggravated defilement of his granddaughter. The victim complained to her grandmother, who had already

noticed that the granddaughter would cry at night and was walking badly. Upon informal examination, it was discovered that the victim had wounds around the vagina and bruises on her body, including between her thighs and around her vagina. The person conducting the examination slid two fingers into the victim's vagina, and they slid in easily. The grandmother and the lady conducting the examination approached a police officer. The victim told the police that her grandfather had had sexual intercourse with her and that she was afraid to reveal the truth to anyone because he had threatened her. The next day the victim was taken for medical examination and the doctor confirmed that she had had sexual intercourse. The police arrested the accused.

In his defence, the accused denied the charge. He accepted that, during the relevant period, he had been at his house. However, he denied any sexual contact, stating that, although he had sexual intercourse with his wife intermittently, he was frail and he had lost his libido long ago.

Counsel for the accused also argued that there was an inconsistency in the dates indicated on the indictment and in some of the evidence as to the location at which the offence occurred.

The Court noted that grave or major inconsistencies, which go to the root of the matter unless satisfactorily explained, would usually though not necessarily always result in rejection of that particular piece of evidence of a witness. However, minor inconsistencies are to be ignored. Any inconsistencies in the case were minor. The prosecution had proved all the elements of the offence beyond reasonable doubt.

As to the accused's defence, a medical practitioner had found that the accused was not in fact impotent. Both the circumstantial and direct evidence indicated that the accused was capable and strong enough to have sex with his wife and therefore with the victim. The accused was convicted and the judge sentenced him to life imprisonment.

Point to Note

In cases involving sexual assault, the judicial decision-making process requires careful consideration of the consistency of evidence. The law of evidence allows for minor consistencies because human memory is fallible. In this case, the Court ignored the minor inconsistencies in the prosecution evidence and focused on the overall strength of the prosecution evidence, as opposed to the major inconsistencies in the evidence on record and the arguments advanced on behalf of the accused.

Principle or Rule Established by the Court's Decision

Sentencing guidelines cannot wholly displace the traditional role of the trial court in bringing compassion and common sense to the sentencing process in devising sentences that provide individualised justice, so that the punishment fits the crime and the offender.

Judge: Stephen Mubiru | HC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|---------------------|--|--------------------|
| Guilty; sentenced to suspended sentence of imprisonment | High Court (Uganda) | Criminal Session Case No. 33 of 22 August 2016 | Defilement |

Case Summary

The accused was convicted of aggravated defilement. The nine-year-old victim lived with her grandfather and two other girls. In October 2015, the accused visited the grandfather's home while he was out. The accused offered the girls US\$ 500 to buy exercise books and pencils and, when the older girls went to look for their grandfather, the accused inserted a finger in the victim's sexual organ. The grandfather returned and found the victim crying and the accused still at the scene. Medical evidence confirmed a freshly ruptured hymen.

The Court placed weight on similar fact evidence because the accused had previously been convicted of defilement by the same judge and had faced rape charges in the past. It also rejected the accused's defence that he had been framed by the grandfather to cover up for the grandfather's son's defilement of his relative.

The Court had to consider what the appropriate sentence would be in light of competing considerations:

- i. On the one hand, the convict was a repeat offender. He committed the offence with a degree of pre-meditation and careful planning and deceit. He had knowledge of the tender age of the victim and "*practically defiled his great, great granddaughter*". There was a wide age difference between the convict and the victim, who were three generations apart. The convict was 103 years old at the time of the offence and the victim was only 5½. This amounted to an age difference of almost a century.
- ii. On the other hand, the convict was 105 years old at the time of sentencing. As the Court noted:

Whereas younger offenders may reasonably look forward to release after a long term of imprisonment, a high proportion of persons above seventy years subjected to a long custodial sentence may reasonably expect to die before completing their sentence. A relatively long prison sentence is a more severe punishment for someone who is already in their 60s or 70s than for someone in their 20s or 30s. To a person above 70 years, a long custodial sentence could easily be tantamount to a sentence of death.

The Court held that, although Regulation 9(4) of the sentencing guidelines recommended a non-custodial sentence where the convict is of advanced age (75 or over), the convict was a repeat offender and the offence had clear aggravating features. A period of imprisonment was merited.

The convict was sentenced to a suspended term of imprisonment of three years. The period was kept short because it was clear that a convict of such advanced years might die in prison. Despite the aggravating factors, the sentencing guidelines did not displace the traditional role of the trial court in bringing compassion and common sense to the sentencing process. It was noted that:

... especially in areas where the Sentencing Guidelines are silent, a trial court should not hesitate to use its discretion in devising sentences that provide individualized justice, since it is a cardinal principle of penology that the Punishment should not only fit the crime but also the offender.

The three-year tariff was set with reference to sentences imposed on children accused of criminality:

I am still of the view that in a way, extreme old age is a descent into a 'second childhood'. By analogy, the juvenile penal system does not permit custodial sentences beyond the period of three years, even for capital offences. I have decided to treat the convict, being a person of extreme advanced age, in similar fashion.

Points to Note

- This case is an example of the dilemma judicial officers face in sentencing, where they have to undertake a balancing act between justice for the survivors and society and justice for convicts who are vulnerable. The convict in this case was over 100 years old. Even in cases of serious sexual offending, the court should exercise its sentencing powers “in conformity with the principles of justice, equity and good conscience”.
- In the present case, the convict was sentenced to a suspended term of imprisonment of three years.

Principle or Rule Established by the Court's Decision

The age of the offender at the time when a sexual offence was committed may have a bearing on the nature and duration of the sentence, even in cases with serious aggravating features, such as extreme youth of the victim and potentially long-term physical injury to the victim.

Judges: Kakuru, Egonda Ntende, Obura | JJA

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|------------------------------------|--------------------------|---|--------------------|
| Lesser sentence substituted | Court of Appeal (Uganda) | Criminal Appeal No. 41 of 2010; 28 September 2017 | Defilement |

Case Summary

The appellant was convicted by the High Court of aggravated defilement of a two-and-a-half-year-old child and sentenced to twenty years' imprisonment. He appealed against his sentence.

On appeal it was agreed by the parties that the judge should have taken the appellant's age into consideration. He had been only 19 years old at the time of the offence. It was also agreed that the High Court had failed to take into consideration the two years and three weeks that the accused had spent in pre-trial detention when passing sentence. The Court of Appeal then had to consider what sentence it would have considered to be appropriate:

- i. By way of mitigating factors, the Court of Appeal observed that had the appellant was "barely an adult" at the time of the offence, and noted that, had he committed the offence just one year earlier, then he would have been sentenced as a child, to a maximum of three years' imprisonment. Furthermore, the appellant was of previous good character and he had been HIV-negative at the time of the offence.
- ii. On the other hand, the victim was only two and a half years old. She sustained serious injuries that might have long-term effects on her anatomy. The Court considered these to be serious aggravating factors.
- iii. The Court of Appeal considered previous case law, which suggested that the appropriate period of imprisonment would have been nearer to 12 years.

It therefore substituted the 20-year sentence for a sentence of 12 years' imprisonment.

Points to Note

- In its determination, the Court took into consideration the sentences that had been passed in previous cases. These suggested that 12 years' imprisonment would be appropriate.
- While the Court of Appeal took into account certain aggravating factors, it failed to pay attention to the criminal intent of the appellant, which can only be explained as an intention to harm and to destroy childhood innocence. In the circumstances, the sentence may be seen as too lenient and may not serve to deter potential offenders.

Candia Akim v Uganda [2016] CA

Principle or Rule Established by the Court's Decision

Sexual acts can be proved by both direct and circumstantial evidence and therefore a victim's evidence and medical evidence are not always critical in proving a sexual act.

Judges: Kasule, Obura and Byabakama-Mugenyi | JJA

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|--------------------------|--|-----------------------|
| Conviction and sentence confirmed | Court of Appeal (Uganda) | Criminal Appeal No. 181 of 2009; 6 June 2016 | Defilement |

Case Summary

The appellant was the stepfather of the eight-year-old victim and two other siblings. On 11 May 2008, the appellant returned home at 9.30 p.m. and found that his wife, who is the biological mother of the victim, had just returned from the market where she sold local brew. He picked an argument with her and, in fear of being beaten, she ran to the home of the appellant's brother, where she stayed until morning. On her return home, she asked her children whether the appellant had beaten them. The victim revealed that the appellant had defiled her. The mother of the victim reported the matter and the appellant was arrested, indicted, tried and convicted of aggravated defilement. He was sentenced to 17 years' imprisonment.

On appeal, the appellant's counsel submitted that the trial judge had wrongly relied on medical evidence when the medical examination of the victim had taken place two weeks after the alleged defilement.

The conviction was upheld and the Court of Appeal confirmed the sentence of 17 years. Both direct and circumstantial evidence can prove sexual acts. As with a victim's testimony, it is not always the case that medical evidence is the

critical piece of evidence to prove a sexual act. “*Whatever the evidence, such evidence must be such that it is sufficient and puts the case beyond reasonable doubt.*” In addition to the medical evidence, the judge had rightly relied on the testimony of the victim, the evidence of the mother, to whom the victim had reported the offence, and the evidence of the appellant himself, who admitted he had slept in the house on the night of the incident.

Points to Note

- Both direct and circumstantial evidence can prove sexual acts, and in proving such an act, it is not always the case that victim’s evidence and medical evidence are critical.
- In the present case, there was a range of testimonial evidence, which, when taken together, satisfied the Court beyond a reasonable doubt.
- This case highlights that sexual violence may be motivated by ill motives rather than sexual desires. The victim was turned into a target for transferred malice after her mother had fled from the house following an argument.
- The case also highlights that sexual violence may be a weapon to punish not just the victim but also those who love her.

Diku Francisko v Uganda [2010] CA

Principle or Rule Established by the Court’s Decision

A medical examination undertaken three weeks after an alleged sexual act may be credible corroborative evidence of that sexual act.

Judges: Remmy Kasule, Hellen Obura and Simon Byabakama Mugenyi, | JJA

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|-------------------------|--------------------------|----------------------------------|--------------------|
| Appeal dismissed | Court of Appeal (Uganda) | Criminal Appeal No. 304 of 2010 | Defilement |

Case Summary

The victim was on her way home when the appellant approached and offered her money. When she declined, he threatened to kill her and pulled her into the bush. He ripped off her underpants, pushed her to the

ground and had penetrative sexual intercourse with her. She bled from her private parts but did not inform her mother on getting home. Some days later she fell ill; only then did she inform her mother about what had happened.

The victim was medically examined and found to have been sexually abused. The accused was convicted and sentenced to 14 years' imprisonment.

On appeal, it was contended that the trial judge erred in failing to properly evaluate the evidence. Among other things, it was argued that the medical evidence could not be treated as corroborating the victim's account. It was said the medical evidence lacked credibility because the victim was examined three weeks after the sexual act.

The Court of Appeal upheld the decision of the trial court. Despite the delay in obtaining the evidence, the clinical officer's report revealed clear evidence of sexual force. The medical report amply corroborated the victim's evidence, despite it having been obtained three weeks after the sexual act. The credibility of the medical findings was not challenged at trial. It should have been challenged at the time if credibility was in dispute.

Points to Note

- This case stands out because it articulates that medical evidence may be admitted into evidence even when the medical examination was carried out some days after the sexual act in question.
- The case is significant in areas where victims of sexual violence may not be in a position to access medical services in a timely manner owing to remoteness or the absence of such services.
- The Court of Appeal and the trial judge took a laudable approach, delivering justice to the victim in a case where criticism was aimed at the delay in carrying out the medical examination, rather than the credibility of the clinical officer *per se*.

Juuko Musa v Uganda [2010]

Principle or Rule Established by the Court's Decision

A person may be convicted of a sexual offence occurring on an unspecified date even if there is no corroboration. The uncorroborated evidence must be sufficiently cogent, truthful or credible. It must also be sufficiently precise to afford an accused person an appropriate opportunity to defend themselves. The tribunal of fact must caution itself as to the danger of conviction without corroboration.

Judges: S. B Kavuma, Richard Buteera and Egonda Ntende | JJA

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|------------------------------|--------------------------|---|-----------------------|
| Conviction overturned | Court of Appeal (Uganda) | Criminal Appeal 180 of 2010 (S. 129(3)&(4) PCA) | Aggravated defilement |

Case Summary

The appellant was indicted for aggravated defilement. It was alleged that on 24 March 2008 the appellant had sexual intercourse with a girl aged below 14 years old. He denied having committed any offence. The trial judge found that:

- i. The victim was aged 15 years, not 14 years.
- ii. Although the two had had sex three times prior to 24 March 2008, the victim did not have sex with the appellant on the date alleged.

The appellant was acquitted of aggravated defilement but convicted of the minor or cognate offence of defilement occurring on dates unknown. He was sentenced to 12 years' imprisonment.

He appealed against the conviction and sentencing on the ground (*inter alia*) that the learned trial judge had erred in law when he failed to properly evaluate the evidence.

The Court of Appeal held that the trial judge had appropriately concluded that the victim was 15 years old and not 14 years old. The decision not to convict the appellant for aggravated defilement was therefore correct.

The conviction for simple defilement had to be quashed. There was no evidence of sexual intercourse on the date averred in the charge sheet. In fact, the victim explained in her testimony that she did not have sex on that day but that they had had sex about three times before in his house on unspecified dates. As noted by the Court, the appellant did “*not know on which dates he [was] alleged to have committed the offences. Could he defend himself in respect of those offences that occurred on unknown dates?*”

The only other evidence apart from that of the victim was that of a doctor, who confirmed that the victim's hymen had been ruptured. He could not determine when exactly this had happened. The victim herself had given evidence of having had sexual intercourse with an uncle on a previous occasion. There was therefore no corroborative evidence that the appellant had engaged in sexual intercourse with the victim, or as to the dates on which it was said that such intercourse had taken place.

The Court considered the evidence of the victim. The incidents of alleged sexual intercourse, whether with the appellant or with her uncle, had never

been reported to any person or authority. In her evidence, the victim could not state when such incidents had occurred. The Court could not say with the requisite degree of certainty that her uncorroborated evidence was sufficiently cogent, truthful or credible to be the basis of a conviction. The Court therefore quashed the conviction.

Points to Note

- If a date on which a sexual offence took place is specified, it should be supported by evidence. There is no room for estimates.
- A person may be convicted of a sexual offence occurring on dates unknown. However, the court should be particularly alive to the dangers of conviction without corroboration, and caution itself accordingly. It should convict only if the evidence is sufficiently cogent, truthful or credible, and if it is sufficiently precise to afford an accused person an appropriate opportunity to defend themselves.
- In this case, the combination of imprecise and uncorroborated evidence led to the quashing of the conviction.
- It is submitted that, while the charge sheet should be specific, cases of VAWG should be afforded special consideration, so as to give the victim time to recover from suffering trauma and therefore assist in the recall of relevant evidence.
- Particular attention should be paid to the framing of charges, which should include only information that may be proven.

Nfutimukiza Isaya v Uganda [2000] CA

Principle or Rule Established by the Court's Decision

- Penetrative sex is not essential to prove defilement; slightest penetration will suffice.
- Failure of the victim to testify is not fatal to the conviction. The court must consider the cogency and reliability of all of the other evidence in the case.

Judges: Kato, Okello and Kitumba | JJA

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|--------------------------|---|--------------------|
| Conviction and sentence confirmed | Court of Appeal (Uganda) | Criminal Appeal No. 41 of 1999; 19 May 2000 | Defilement |

Case Summary

In 1999, the appellant was convicted of defilement of a victim aged 10 contrary to Section 123(1) (now Section 129) of the PCA, who was referred to as an “imbecile girl”. On 11 July 1998, the victim was sent to the home of the appellant to pick sugarcane in the company of her elder sister. At the residence, the appellant and his friends prevented the elder sister from accompanying the victim to pick sugarcane. This meant the appellant went alone with the victim to the garden. On their return, the elder sister noticed that the victim had difficulty walking and that her skirt was wet at the back. The sister suspected that she had been defiled and reported her suspicions to her mother. The medical evidence revealed inflammation around the vulva and the presence of “thick, whitish fluid”. However, the victim’s hymen was intact. Medical examination of the appellant a matter of hours after the incident revealed the presence of sperm under the foreskin of his penis. This suggested recent ejaculation.

On a review of the authorities, the trial judge concluded that rupture of the hymen was unnecessary to prove defilement. The offence is complete on proof of even the slightest degree of penetration. The medical evidence and the circumstantial evidence of the sister was sufficient proof. The appellant was convicted and sentenced to 12 years’ imprisonment.

The Court of Appeal held that the trial judge’s approach could not be faulted. Failure of the victim to testify was not fatal to the conviction.

Points to Note

- In cases of defilement of a child with a mental disability who is not in a position to testify, unless the appellant is caught *in flagrante delicto*, the court must consider the reliability of the circumstantial evidence.
- The conviction is an excellent example of how access to justice will be afforded to persons with a disability who are unable to speak for themselves.
- This case may also be used as an authority on how conviction may be achieved in sexual offences where victims are threatened or hidden by family members.
- It is submitted that it is time that the reference to “imbecile” in Section 130 of the PCA be amended so that such victims are referred to as “persons with mental disability”.

Principle or Rule Established by the Court's Decision

Where the victim has a close relationship with the accused, the likelihood of mistaken identity is greatly diminished.

Judges: Kato, Okello and Engwau | JJA

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|--------------------------|--|--------------------|
| Conviction and sentence confirmed | Court of Appeal (Uganda) | Criminal Appeal No. 114 of 1999; 2 November 2000 | Defilement |

Case Summary

The accused was convicted of defilement and incest and sentenced to 13 years' imprisonment on each count, to run concurrently. The facts as accepted by the High Court were that, on the night of 28 January 1997, when the accused's wife was away from home, he defiled his 13-year-old daughter. The victim had been awoken by pain in her sexual organ and realised the accused was defiling her. She informed her mother about the incident on her return the next day. On being confronted, the accused fled. The mother reported the matter to the police. Medical examination evidence accepted by the Court showed the victim's hymen had been broken 72 hours earlier and there was semen in her sexual organ.

On appeal, the accused contended, among other things, that the judge had erred in his evaluation of the prosecution evidence.

In upholding the conviction, the Court of Appeal held that:

- i. There was no possibility of mistaken identity because the victim was identifying her father's voice. She therefore easily recognised the accused as the person pleading with her not to reveal what had transpired to the mother.
- ii. The victim's evidence was detailed, including as to an offer of US\$ 1,000 to conceal the incident.
- iii. There was corroboration of the victim's evidence in the accused's conduct in running away when his wife confronted him. There was also medical evidence of a freshly broken hymen.

Points to Note

- This case is an example of sexual violence in the home by a person supposed to be protecting the victim. Young girls may be particularly vulnerable to such an abuse of position.

- Cases involving sexual violence in the home may result in more credible witness testimony as to identification. The victim is more likely to know their attacker and therefore is more likely have clear familiarity with their attacker's voice or appearance.

Otema David v Uganda [2015] CA

Principle or Rule Established by the Court's Decision

Courts must consider carefully the statutory provisions relating to compensation and ensure that any order for compensation is made pursuant to the correct statute.

Judges: Mwangusya, Butera and Ntende | JJA

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|--------------------------|---|--------------------|
| Sentence reduced; compensation order upheld | Court of Appeal (Uganda) | Criminal Appeal No. 155 of 2008; 15 June 2015 | Defilement |

Case Summary

The appellant was convicted of rape, contrary to Section 123 of the PCA. He was sentenced to 13 years' imprisonment and ordered to pay compensation of USh 300,000 within six months. The appellant appealed against sentence only.

The Court of Appeal held that an appellate court would interfere with the sentence only if it was evident the trial court had acted on an incorrect principle or overlooked a material factor, or if the sentence were manifestly excessive in light of the circumstances of the case.

As to the sentence of imprisonment, sentences imposed in similar cases afforded material for consideration. In *Kalibolo Jackson v Uganda* [2001] (Criminal Appeal No. 45), the Court of Appeal reduced a 17-year sentence for rape to 7 years where the victim was a 70-year-old woman. In *Naturinda Tamson v Uganda* [2011] (Criminal Appeal No. 13), the Court of Appeal reduced an 18-year sentence for rape to one of 10 years. The Court considered that the appellant had spent seven years on remand and reduced the sentence to seven years from date of conviction.

As to whether the court had the power to order compensation, the Court examined Section 129(b) of the PCA and Section 126 of the TIA, both of which were referred to in the judgement when making the order as to compensation. Section 129(b) prescribes compensation for defilement in these terms:

“[The] Court may in addition to a sentence, order compensation to be paid to the victim for any physical, sexual and psychological harm caused to the victim. The court takes into account extent of harm suffered, degree of force used and medical and other expenses incurred by the victim as a result of the offence..”

The Court of Appeal found that Section 129(b) of the PCA concerned only defilement and therefore the trial court had in fact been reliant on Section 126 of the TIA. Section 126 is a more general provision that empowers the trial court to order compensation in addition to a sentence where it appears any person has suffered material loss or personal injury. The Court of Appeal therefore ruled that the trial court had power to order compensation pursuant to Section 126.

The Court of Appeal expressed reservations about the six-month time period within which the compensation was ordered to be paid in light of the fact that the convict had been on remand for seven years prior to sentence. No inquiry had been made in relation to his circumstances to establish ability to pay the sum in six months. The Court opined that it would have been better to make the order for compensation and leave it to the court that may be called on to order distress in respect of the same to consider all the necessary matters, including the provisions of Section 116 of the TIA (relating to sentencing to imprisonment in lieu of distress).

Points to Note

- In this case, the Court of Appeal upheld an order for compensation after clarifying the statutory framework.
- The sentencing process is as much about punishing the perpetrator as it is about rendering justice to the victim. Therefore, an order for compensation is symbolic and tangible justice for a victim in rape cases.
- The challenge seems to be that most perpetrators do not have the means to pay whereas the victims may not be empowered enough to pursue the compensation demand to its logical conclusion.
- Furthermore, the requirement that compensation be paid after serving the sentence makes it mere rhetoric as the victim may well have moved on by then.
- There is a need to consider if the state can be made liable to pay this compensation for not doing enough to eliminate incidences of sexual violence against women, as an extension of its obligations under international law.

Principle or Rule Established by the Court's Decision

- Where a child is to be dealt with by the criminal justice system, he/she must be charged, tried and sentenced following different procedures.
- In this instance, the child's case should have been remitted to a family and children court for sentencing.

Judges: Remmy Kasule, Ruby Opio Aweri and Kenneth Kakuru | JJSC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|----------------------------|--------------------------|----------------------------------|--------------------|
| Sentence overturned | Court of Appeal (Uganda) | Crim. Appeal No. 150/2010 | Defilement |

Case Summary

The appellant was found guilty of defilement and sentenced to 20 years' imprisonment. It was alleged that the appellant had unlawful sexual intercourse with the victim, who was below the age of 18 years at the time. The alleged incident took place on 15 March 2003, when the appellant was aged 16. The appellant was 23 years old in May 2010 when he testified.

On appeal, it was contended that, among other matters, the trial judge had erred in law and fact when he sentenced the appellant to 20 years' imprisonment.

The Court of Appeal overturned the sentence. The appellant was below the age of 18 at the time of his arrest. He therefore should have been sentenced by a family and children court. Even in relation to an offence as grave as defilement, the accused fell to be sentenced in accordance with the provisions of the Children Act (1997). This prescribes a maximum sentence of three years' imprisonment for any child convicted of an offence punishable by death. The appellant had spent more than seven years in custody. He was therefore released.

Points to Note

- The case, which was decided under the previous Children Act (1997), is an example of children committing violence against other children.
- In ordering a large reduction in sentence, it emphasised that proper procedure should be followed where children are involved.
- The case sets the platform for the observance of "child-friendly justice", which is in line with the amended Children Act (2016) and the CRC. The new Act underscores justice that is accessible, age-appropriate, speedy, diligent and adapted to and focused on the needs and rights of the child.

Kato Sula v Uganda [2000] CA

Principle or Rule Established by the Court's Decision

When a victim gives unsworn testimony, probative corroborative evidence must be adduced before a court can convict the accused. This might include medical evidence, evidence of the accused's actions around the time of the incident and evidence of the victim's distress.

Judges: Kato, Okello, Kitumba | JJA

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|---|--------------------------|---|--------------------|
| Appeal dismissed conviction and sentence confirmed | Court of Appeal (Uganda) | Criminal Appeal No. 30 of 1999; 22 May 2000 | Defilement |

Case Summary

The appellant was convicted of defilement of an eight-year-old girl, contrary to Section 123(1) (now Section 129) of the PCA. On 6 August 1995, the appellant, who was her teacher, called her to his residence. She went with other children but the appellant sent the other children away. The appellant also sent the girl's uncle away to collect a Koran. The teacher defiled her and, when she did not go back to school, her grandfather asked her why. She revealed she was afraid of the teacher and that he had defiled her. The victim was examined 11 days later and her hymen was found to be ruptured.

At trial the victim gave unsworn evidence about how she was defiled. Because the evidence was given unsworn, Section 38 of the TIA (1971) (now Section 40 of the TIA as amended 2008) required corroboration of her evidence. This was provided by the doctor's evidence. There was also the evidence of the victim's grandfather, who had observed her distressed condition. The appellant was convicted and sentenced to eight years' imprisonment.

On appeal, it was contended (among other things) that the trial judge had erred in finding that the victim's evidence had been sufficiently corroborated.

The Court of Appeal held that the trial court had cautioned itself as to the dangers of convicting on the basis of uncorroborated evidence of the victim. It had then rightly gone on to find corroboration of the sexual act having taken place in the medical evidence and in the distraught condition of the girl as attested to by her grandfather. A distressed condition of a victim in appropriate cases may serve as corroboration of her evidence, and in this case it did. The conviction was therefore upheld.

Points to Note

- This is a case in which the unsworn testimony of a minor was sufficiently supported by corroborative evidence to satisfy the court beyond a reasonable doubt that the accused was guilty of defilement.
- Section 38 (now Section 40) of the TIA requires corroboration of evidence given by victims who give unsworn testimony because of an inability to understand the importance involved in the taking of an oath. While the provision makes sense, the fact that many girls under the age of eight years do not understand the importance of taking the oath means the cautionary rule still applies. The provision therefore takes away the gains made in whittling down the cautionary rule. However, this may be alleviated through current practice, which is to permit cross-examination of children who give unsworn testimony. This allows the court to assess the credibility of the witness. While the Court of Appeal noted that this was irregular, it chose not to interfere with the conviction as a result of the irregularity. If such practice continues to be used, the strict application of Section 38 may be unnecessary in future.
- It is submitted that proof of pre-planning and clearing the vicinity of any potential witnesses increases the gravity of the sexual violence. Such cases need to be widely publicised so that parents appreciate the vulnerability of potential victims and sensitise them appropriately.

Kaserebanyi James v Uganda [2018] SC

Principle or Rule Established by the Court's Decision

When sentencing an offender for defilement, incest and the use of threats and force are aggravating factors.

Judges: Katureebe, Tumwesigye, Arach-Amoko, Mwangusya and Ekirikubinza | JJSC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|---|------------------------|---|---------------------|
| Appeal dismissed; sentence confirmed | Supreme Court (Uganda) | Criminal Appeal No. 10 of 2014; 25 May 2018 | Defilement Incest |

Case Summary

The appellant was tried and convicted of defilement of his 15-year-old daughter by the High Court. In 2004, the appellant collected the victim from her mother's home and began living with her. He began having forceful sexual activity with her on pain of being thrown out of the house if she resisted. The activity led to pregnancy and that led to her mother reporting the matter. The appellant did not contest the charges. He was sentenced to life imprisonment by the High Court. In determining the appropriate sentence, the High Court considered:

- i. As mitigating factors, that the accused was a first-time offender; that he had pleaded guilty and saved the state's resource; and that he had been on remand for one year and three months.
- ii. As aggravating factors, that the accused was the biological father of the victim; that the victim was 15 years old while he was 45 years old; and that he committed the offence with threats and force.

The Court of Appeal upheld the sentence. A further appeal was made to the Supreme Court.

Section 5(3) of the Judicature Act provides for appeals against sentence only on a matter of law and not against the severity of a sentence *per se*. The Supreme Court will not interfere with the sentence imposed by the trial court unless the sentence was either manifestly excessive or so low as to amount to an injustice, or where the trial court fails to consider an important matter or circumstance that ought to be considered or where the trial court applied the wrong principles.

The Supreme Court took a serious view of the repeated defilement. As rightly identified in the lower courts, the case involved threats and force, thereby causing trauma, as well as incest. A deterrent sentence was therefore appropriate. The Supreme Court would not interfere with the sentence of life imprisonment.

The Court further clarified that the meaning of life imprisonment as articulated in the case of *Tigo v Uganda* [2011] UGSC 7 applies to cases of defilement. In the context of defilement, as with any offence that carries the maximum penalty of death, life imprisonment means the remainder of the natural life of the convict. The provisions relating to remission under the Prisons Act do not apply.

Points to Note

- In confirming the sentence, which is the second most severe (second only to death), the Supreme Court held that the trial court and Court of Appeal had rightly considered as aggravating factors the fact that the appellant was the biological father of the victim

and that incest was an abomination in society; and the fact that the offence was committed under threats and force.

- Force and threats used against the victim are weapons perpetrators use in sexual violence. Bringing out this aspect of sexual violence drives home the vicious nature of defilement and incest. As in this case, such offending should attract harsh penalties.
- The Court of Appeal was bound by doctrine of precedent to follow the decision of the Supreme Court in *Tigo v Uganda* relating to the meaning of imprisonment for life in the context of defilement. This doctrine is constitutionalised in Article 132(4) of the Constitution, which directs all courts to follow decisions of the Supreme Court on questions of law.

Ntambala Fred v Uganda [2018] SC

Principle or Rule Established by the Court's Decision

A court may convict an accused in a sexual case where the sole or decisive evidence is provided by the victim, provided that the court finds the victim's evidence to be of sufficiently good quality in terms of its cogency, reliability and truthfulness.

Judges: Tumwesigye, Mwangusya, Opio-Aweri, Mwendha and Ekirikubinza | JJSC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|------------------------|---|--------------------|
| Appeal dismissed; conviction and sentence confirmed | Supreme Court (Uganda) | Criminal Appeal No. 34 of 2015; 18 January 2018 | Defilement |

Case Summary

The appellant was convicted of aggravated defilement, contrary to Section 129(1) of the PCA, and sentenced to 14 years' imprisonment. On 26 March 2006, village children, who believed that the appellant was defiling the victim, were found throwing stones at the house of the appellant. The appellant came out armed with a *panga* (machete) to chase them. The defence secretary of the village noticed the scuffle and the children informed him that the appellant was defiling his 14-year-old daughter. The defence secretary asked the victim if her father had had sexual intercourse with her. She replied, "Yes". The defence secretary also found used condoms.

In convicting the appellant, the High Court relied on the victim's testimony that she and her younger sister had shared a bed with the appellant and that

the appellant had used that opportunity to sexually violate her almost every day for two years. The court further relied on the evidence of a used condom found in the house. The appellant was sentenced to 14 years' imprisonment.

The Court of Appeal confirmed the conviction and sentence. A further appeal was lodged with the Supreme Court. It was contended that the victim's testimony had not been sufficiently corroborated so as to warrant a finding that the appellant committed the offence.

The Supreme Court noted that Section 133 of the Evidence Act provides that, "*Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.*" Consequently, a conviction can be based solely on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. The Court approved the dictum of the Supreme Court in *Sewanyana Livingstone v Uganda* [2006] (SCCA No. 19) that, "*What matters is the quality and not quantity of evidence.*"

Justice Tibatemwa Ekirikubinza reinforced the point, holding that the cautionary rule that required courts to look for corroboration in sexual offences "*discriminates against women who are the majority of victims in sexual offences. Evidence must be evaluated in sexual offences must be evaluated in the same manner as other cases; the test is whether it is cogent evidence; the test is quality of evidence and not quantity.*"

In this case, the Supreme Court was satisfied that the quality of the evidence was sufficient to uphold the conviction. The complainant swore an oath and the trial judge found her to be a truthful witness. Furthermore, the evidence of other witnesses, including medical evidence, indirectly supported the victim's account.

Points to Note

- Corroboration is evidence from other sources that supports the testimony of the complainant and connects or tends to connect the accused person to the commission of the crime. Its value is rooted in the legal standard (proof beyond reasonable doubt) that the prosecution must meet in order to secure a conviction. Consequently, in certain cases, the prosecution may find it necessary to adduce evidence from more than one witness in order to prove their case beyond reasonable doubt.
- This case finally puts to rest the debate on the cautionary rule that requires a judge to warn him or herself that corroboration is essential in sexual offences. It determined that the cautionary rule was not good law. A conviction can be based solely on the testimony of the victim as a single witness provided the court finds her to be truthful and reliable

- The Court found that the cautionary rule discriminated against women, who are the majority of victims in sexual offences.
- It is noteworthy that it was children who secured justice for their fellow children when they drew attention to the plight of the victim, by throwing stones at the appellant's house, which precipitated the report to the police.

Muhwezi Alex and Hassan Bainomugisha v Uganda [2010] SC

Principle or Rule Established by the Court's Decision

- There is no minimum number of adult witnesses whose evidence must be given in order to secure a conviction. The question is one of quality rather than quantity.
- Police statements may be used to discredit evidence given in court only if the police officer who recorded the statement is called for cross-examination.

Judges: Tsekooko, Katureebe, Kitumba, Tumwesigye, Kisaakye and Ekirikubinza | JJSC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|------------------------|---|--------------------|
| Appeal dismissed; conviction upheld | Supreme Court (Uganda) | Criminal Appeal No. 21 of 2005; 13 April 2010 | Defilement |

Case Summary

On the night of 10 June 1999, the two appellants broke into the home of man, whom they robbed violently. While the robbery was going on, Muhwezi took the victim, the daughter of the homeowner, from her bedroom to the sitting room, where he defiled her. Muhwezi was convicted of robbery and defilement and sentenced to 12 years' imprisonment. Muhwezi was jointly indicted with Bainomugisha for aggravated robbery. He alone was indicted for defilement. Both appellants were convicted, and the Court of Appeal upheld these convictions.

A further appeal was made to the Supreme Court. Muhwezi contended that the evidence supporting the prosecution's case was insufficient to satisfy the Court beyond reasonable doubt as to guilt.

Upholding the convictions, the Supreme Court ruled that any argument as to corroboration was unfounded. The witnesses were all adult witnesses who gave evidence on oath. There is no minimum number of witnesses required in law to secure a conviction. In any event, the defilement of the victim was

corroborated by her testimony of her mother, who saw Muhwezi take the girl to the sitting room where she was defiled.

There was a discrepancy between the victim's police statement and the evidence on oath of the victim. The police statement omitted that fact that the victim used to see the appellants in town. However, the contents of the police statements were of no value in this case because they had not been proved in court. Before seeking to discredit evidence given on oath on the basis of the contents of a police report, the police officer who recorded the information in court had to be called for cross-examination. This had not been done.

Point to Note

- This case affirms that there is no minimum number of adult witnesses required to secure a conviction. The question is one of quality rather than quantity of evidence.
- This case also clarifies that police statements may be used to contradict the sworn testimony of a witness but the police statement must first be proved by the police officer who recorded it.

Sabwe Abdu v Uganda [2007] SC

Principle or Rule Established by the Court's Decision

Reliability of identification of an accused person by voice may depend on prior familiarity with the voice. Such familiarity need not arise through direct conversation with the accused. It may arise through having heard the accused's voice in a locality.

Judges: Tsekooko, Katureebe, Okello, Tumwesigye and Kisaakye | JJSC

| Decision | Court/ jurisdiction | Date & case reference (citation) | VAWG incident type |
|--|------------------------|---|--------------------|
| Appeal dismissed; conviction and sentence confirmed | Supreme Court (Uganda) | Criminal Appeal No. 19 of 2007; 3 February 2010 | Defilement |

Case Summary

The appellant was convicted of defilement at the High Court. On 14 September 2000, four girls, including the victim and her sister, were returning from a well. They met the appellant, who was disguised in a bark cloth and looked to them like a ghost. The victim and her sister tried to flee but the appellant ordered them to come back. The appellant let the other girls

go. He then ordered the victim and her sister to remove their clothes. He blindfolded them and led them to a swamp, where he sexually assaulted the victim. He left them in the bushes, where they spent a night.

Because their father was searching for the victims, at 8 p.m. that night the appellant went to the home of the father. The appellant told him that, in exchange for two goats and two chickens, he would use his witchcraft powers to find the girls. The following day, the father complied with the appellant's request, and, after conducting some rituals, the appellant went to the swamp and collected the girls. He claimed the girls were possessed by evil spirits and took them to his home for two nights, ostensibly to cleanse them.

The father went to visit the girls and the victim told her father the appellant had defiled her. The appellant was arrested. Medical examination of the victim revealed that her hymen had been broken and that the inner layers of her vagina were red and tender.

At his trial, the appellant denied it was he who had abducted the two girls and had sexual intercourse with the victim. In his unsworn statement, he said he went to see the father and told him a ghost had abducted his two daughters. He then offered to assist the father to get back his daughters if the father gave him two goats and two chickens to sacrifice for the ghosts. He said he used his witchcraft powers to get back the two girls and took the girls to his home for treatment because they were not in a normal state of mind.

The Court accepted the evidence of the two girls as to the identity of the perpetrator. They had identified the appellant by voice and by sight. They had become familiar with his voice because he lived about a quarter of a mile from them, they passed his home as they went to school and they had heard him speak to other people. The appellant also used to come to their home, where they would hear him speak to their father. They could also identify him by sight because, when he came to collect them the next day, he was not disguised and they were not blindfolded. This evidence was supported by the fact that the accused knew where to find the girls.

The Court of Appeal and the Supreme Court could not find fault with the trial judge's reasoning in relation to the identity of the offender and the conviction was upheld.

Points to Note

- In this case, the two girls properly identified the appellant, as they knew him by voice and sight because he lived only a quarter of a mile from their home.
- When combined with the medical evidence and the fact that the accused was able to locate the victim without difficulty the

following day, the evidence that the appellant abducted the girls and defiled the victim was overwhelming.

- The invocation of magical or metaphysical powers to dupe and subdue a victim and then invoking the same powers to locate the victims is a form of manipulation and abuse that targets vulnerable persons, especially young girls.

Uganda v Mujuuzi Kaloli [2009] HC

Principle or Rule Established by the Court's Decision

Evidence to corroborate the unsworn testimony of a witness in a sexual case may include medical evidence and evidence of a complaint to another about the offence.

Judge: Elizabeth Ibanda Nahamya | HC

| Decision | Court/jurisdiction | Date & case reference (citation) | VAWG incident type |
|---------------|---------------------|----------------------------------|-----------------------|
| Guilty | High Court (Uganda) | Criminal Session No.116-2009 | Aggravated defilement |

Case Summary

The accused was indicted for aggravated defilement of a seven-year-old girl. While living with her father and stepmother, the victim shared a bedroom with the stepmother's brother, the accused. The victim referred to the accused as "Uncle Kaloli". The accused defiled her three times. Whenever the victim would report the accused's behaviour to the stepmother, she would warn the victim not to implicate the accused, threatening to kill her if she ever revealed what had taken place to anyone.

On the third occasion, the victim woke up in the morning and found that her dress and bedding were covered in blood. As a result of repeated sexual activity, she developed a protruding "mass" in her private parts that she showed to her stepmother. Her stepmother advised her to pull the "mass" anytime she felt it, particularly during urination. The victim testified that, whenever she pulled it, she would feel a lot of pain and, whenever she urinated, blood would ooze from her vagina.

The victim's father telephoned the biological mother to inform her about the victim's condition and the victim went to hospital. The biological mother noticed the victim's distressed condition. The victim's clothes were soaked in blood. The biological mother asked the stepmother why this was so.

The stepmother gave her different explanations, including that the victim was suffering from boils caused by syphilis and also that the victim had started menstruating. When the victim was asked, she told her mother that the accused had defiled her several times. This was corroborated by medical evidence. The doctor's report confirmed the existence of the "mass", which protruded through her vagina with abrasions of the *labia majora*, and noted that, although she had pain in her lower abdomen, there was no active bleeding.

The accused claimed he was not guilty and had been falsely accused because his sister (the stepmother) had a grudge against him. He also alleged that the mother of the victim had a grudge against him.

The defence counsel submitted that his role as an officer of court was to assist it to reach the best decision. He did not dispute the age of the victim or that a sexual act had occurred. In his closing remarks, the defence counsel conceded that the prosecution's evidence was meritorious but argued that the Court should consider the accused's defence. He left it to the Court to weigh the entire evidence in its totality but asked the Court to resolve the case in the favour of the accused.

The Court found the accused guilty. The victim was of tender years and gave evidence unsworn. However, corroboration for her evidence was found in the medical evidence and that of the biological mother, which included evidence of complaint about the sexual offences. As to the accused's defence, the prosecution's case was that the stepmother, far from trying to inculcate the accused (her brother), was in fact helping cover up the crime. The allegation of a grudge with the mother could not be true since she had never met or known the accused. The accused was sentenced to a deterrent sentence of imprisonment of 30 years.

Points to Note

- The case demonstrates the slowly changing typology of perpetrators of VAWG, to include stepmothers. Ordinarily, VAWG is carried out by men. This case exposes "step-mother cruelty" to children of their husband. It also highlights the helplessness of such children and illustrates the need for places of refuge, for example sexual referral centres.
- The victim was eight years old at the time of the defilement and had to contend with a protruding "mass" in her vagina. She underwent physical and psychological torture and had no recourse to any help. Her own father trusted the stepmother to care for her, which she failed to do.

- Section 19 of the PCA, which treats an aider as a principal offender, should have been used to indict the stepmother. The non-prosecution of the stepmother reflects the constraints of police-led investigations as against prosecutorial-led investigations. The prosecution should have amended the indictment to include the stepmother as a co-accused because she tried to conceal her brother's act.
- By virtue of Section 40(3) of the TIA, the unsworn evidence of a child of tender years needs to be corroborated regardless of what crime is committed. Failure to distinguish between the crimes for which corroboration should be needed has the effect of bringing the legal provision in conflict with the Court of Appeal decision in *Basoga Patrick v Uganda* [2001] (Criminal Appeal No. 15), which held that no corroboration is necessary in sexual offences.
- Corroborative evidence of a sexual offence may be a complaint made to the third party.
- The sexual act need not be accompanied by the rupturing of the hymen, ejaculation or visible injuries to the female's private parts. However, the existence of these features may amount to strong corroborative evidence that some act of sexual intercourse has taken place.
- The case demonstrates the professionalism of the defence lawyers in the case. The defence lawyer conceded that he was an officer of the court after realising the unusual circumstances and facts in this case.
- The case indirectly reflects the weakness of the Domestic Violence Act in terms of sentences.