Chapter 4

Sexual Assault

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Sexual Assault: "Any form of unwanted sexual contact/touching that does not result in or include penetration (i.e. attempted rape). This incident type does not include rape, where penetration has occurred."

Uganda 

Uganda v Eriya Paul [2009] HC

Principle or Rule Established by the Court's Decision

When considering a charge of defilement, the court may consider indecent assault as a minor and cognate offence in the alternative even in the absence of express averment by the prosecution.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty of indecent assault	High Court (Uganda)	Criminal Case No. HCT 04-0010 of 2009	Indecent assault | Aggravated defilement

Case Summary

The victim was six years old. On 17 February 2008, while the mother of the victim was at church, the victim went to the accused's shop to "borrow" a sweet. While she was there, the accused pulled the victim from the doorway, made her sit on his lap, squeezed her thighs and "urinated white things" on to her dress. The accused then gave her a sweet. The victim told her mother. A local birth attendant who lived in the village examined the victim and found her hymen to be intact and found no evidence of defilement. The matter was reported to the police and a doctor examined the victim. The doctor's conclusions mirrored those of the birth attendant. In addition, the doctor noted some bruises on the *labia minora* and scratches on the mouth of the vagina. The doctor concluded that the cause of the injuries was "likely indecent assault". A second doctor examined the victim on 28 February 2008 and concluded that the victim had been defiled with some slight penetration.

The accused person was therefore indicted for the offence of aggravated defilement contrary to Sections 129(3) and (4) of the PCA.

At trial, the defence contended that:

i. The preponderance of evidence suggested there had not been any defilement.

ii. In any event, the defendant had not committed any offence.

The Court found that:

i. The evidence of the victim was that that "something bad happened" to her on 17 February 2008, even though she asserted that the accused's penis did not touch her vagina. The evidence of the independent doctors was that there had been some sexual interference. While the evidence was not sufficient to satisfy the Court beyond reasonable doubt as to defilement, the prosecution had proved beyond reasonable doubt that the lesser cognate offence of indecent assault had taken place.

ii. As to the identity of the offender, the victim knew the accused well. Her testimony appeared to be truthful. The accused did not challenge the assertion that he had expressed "white things" over the victim in cross-examination.

The accused was therefore found guilty of indecent assault and sentenced to a term of three years' imprisonment, excluding the time spent on remand.

Points to Note

- In this case, the judge found that a minor and cognate offence had occurred in spite of the fact that the prosecution did not make any submissions on that issue. This is an important observation coming from a gender-sensitive judge who understands the varied nature of sexual violence and the applicable legal provisos. The case is a good precedent on the proper evaluation of evidence adduced.
- In sentencing, the judge noted that, regardless of the offence being minor and cognate, it was grave and deserving of a deterrent penalty.

Senyondo Wilson v Uganda [2003] CA

Principle or Rule Established by the Court's Decision

Establishing the qualification and expertise of a medical officer examining a victim in a sexual offence case is very important when considering whether or not such evidence is admissible.

Judges: Mukasa-Kikonyogo, A. Twinomujuni and C. K. Byamugisha | JJCA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed; conviction quashed and sentence set aside	Court of Appeal (Uganda)	Criminal Appeal No. 40/03	Indecent assault

Case Summary

It was alleged that the appellant unlawfully and carnally knew a girl under the age of 18 years (aged about 3 years). The appellant shared a house with the father of the victim. Upon returning home one evening, the father found the appellant coming out of the bedroom where the young girl was sleeping. He became suspicious. On entering the bedroom, he found the underpants of the victim had been removed and placed beside her bed. He exchanged some words with the appellant, who denied having defiled the victim. At about 2 a.m. the victim was taken to a nurse for examination. She found semen in the victim's private parts. In the morning, she examined her again and found there was no penetration. Later, the victim was taken to Entebbe Hospital for medical examination. The appellant denied committing the offence and pleaded not guilty. At trial, the appellant was acquitted of defilement but convicted of the minor cognate offence of indecent assault.

On appeal, it was contended that the trial judge had erred in law and fact when he failed to adequately evaluate the evidence and thus came to a wrong decision that the evidence could sustain a charge of indecent assault.

The Court of Appeal held that the alleged incident was not witnessed by anybody. The victim did not testify and her father had not asked her any questions. Further, the judge in convicting the appellant based his decision on the testimony of the nurse who was the first to examine the victim. However, the prosecution established her qualification as a nurse. This raised some doubt as to the reliability of her conclusions.

Although the victim was examined at Entebbe Hospital, the prosecution did not produce the report from the hospital. The failure to adduce this piece of evidence left the case against the appellant very weak. This created serious doubts as to whether any assault indecent had taken place as the judge had found. In the circumstances, it was unsafe to allow the conviction to stand. The Court allowed the appeal, quashed the conviction, set aside the sentence and ordered the immediate release of the appellant unless he was otherwise lawfully held.

Points to Note

- In this case the conviction was quashed because the prosecution failed to produce sufficient cogent evidence of indecent assault.
- Establishing the qualification and expertise of a medical officer examining a victim in a sexual offence case is very important when considering whether such evidence is admissible.

Kenya 

John Irungu v Republic [2016] CA

Principle or Rule Established by the Court's Decision

If it is not possible to ascertain the age of the victim, the accused may only be convicted of an offence for which age is not an essential ingredient.

Judges: Asike-Makhandia, W. Ouko and K. M'inoti | JJCA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed, conviction quashed and sentence set aside; conviction of indecent assault with a child entered	Court of Appeal, Mombasa (Kenya)	Criminal Appeal No 20 of 2016	Sexual assault

Case Summary

The appellant had been charged with the offence of defilement, contrary to Section 8(2) of the SOA. The trial court had sentenced him to serve a term of 15 years' imprisonment. The appellant had appealed from this judgement to the High Court.

The High Court found that the age of the victim had not been proved and quashed the appellant's conviction for defilement. However, using its power to impose a conviction for offences that are cognate and minor to the offence on the indictment under Section 179 of the Criminal Procedure Code, it convicted the appellant for the offence of committing an indecent act with a child, contrary to Section 11(1) of the SOA. The same 15-year term of imprisonment was imposed. The appellant filed a second appeal to the Court of Appeal at Mombasa.

The Court of Appeal ruled that the conviction for committing an indecent act was fatally defective. There had been cogent evidence of penetration, and "indecent act" is defined in Section 2 of the SOA as excluding penetrative acts.

The Court then went ahead to consider the ingredients of the offence of defilement *vis-à-vis* those of the offence of sexual assault and ruled itself as follows:

> *The real question is whether a person charged with the offence of defilement under section 8 (1) can be convicted of the offence of sexual assault contrary to section 5(1) of the Act by virtue of the provisions of section 179 of the Criminal Procedure Code. Defilement is constituted by committing an act which causes penetration with a "child", defined to mean a person who is less than 18 years old. The Act defines "penetration" to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. Defilement therefore entails penetration of the genitals of a child, genitals qua genitals. The prescribed punishment for defilement is dependent on the age of the child defiled, classified into three clusters, so that the younger the child, the stiffer the sentence. Hence the punishment for defilement of a child who is 11 years or less is life imprisonment; that of a child of between 12 and 15 years is imprisonment for not less than 20 years and defilement of a child between 16 and 18 years is imprisonment for not less than 15 years.*
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> *Sexual Assault on the other hand is provided for in section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against "any person". That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.*
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> *We are satisfied that the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused person but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault.*

The Court of Appeal therefore allowed the appeal, quashed the conviction for the offence of committing an indecent act with a child and substituted it with a conviction for the offence of sexual assault contrary to Section 5(1) of the SOA.

Points to note

- An accused person charged with a major offence may be convicted of a minor cognate offence that flows from the same facts.

- Where an accused person is charged with defilement and there is insufficient evidence to lead to a conviction for defilement, a conviction for sexual assault or another lesser offence may be entered as the facts may prove.
- Where the evidence led does not satisfy the court as to the age of a person who has suffered non-consensual penetration, the court may instead convict for the offence of sexual assault, which is defined without reference to age.

Robert Mutungi Muumbi v Republic [2015] CA

Principle or Rule Established by the Court's Decision

An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate.

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal on sentence allowed; sentence quashed and substituted with lesser sentence	Court of Appeal, Malindi (Kenya)	Criminal Appeal No. 5 of 2013	Indecent act with a child

Case Summary

The appellant had been charged with and convicted of the offence of defilement of a girl aged nine, contrary to Section 8(1) of the SOA. No reference was made in the charge sheet to Section 8(2), which prescribes a sentence of life imprisonment for defilement of a child aged 11 years of less. He was sentenced to serve a term of 20 years' imprisonment. The appellant was aggrieved by his conviction and filed an appeal to the High Court.

In the appeal to the High Court, the prosecution asked that the sentence be enhanced from the term of 20 years to life imprisonment as is provided for in law. The High Court found that the age of the complainant had not been assessed or proved, and it was therefore handicapped for the purpose of sentencing. The High Court relied upon Section 179 of the Criminal Procedure Code, which empowers a court, if a complete minor and cognate offence is proved, to convict an accused person of such minor offence even though he was not charged with it. Using Section 179, it concluded that the evidence could sustain a conviction for the offence of committing an indecent act with a child, contrary to Section 11(1) of the SOA.

The appellant appealed to the Court of Appeal. The appellant complained that:

i. He had initially been charged with an improperly framed charge, because the charge sheet did not indicate the offence as well as the punishment.
ii. The High Court had erred in convicting the appellant of indecent assault.
iii. The sentence imposed was without foundation.

The Court of Appeal agreed with the appellant that the charge ought to include both the section creating the offence and that prescribing the punishment. However, the charge in the present case was clear enough that the appellant was charged with defilement of a girl contrary to Section 8(1) of the SOA and that the failure to refer to the punishment section in the charge sheet did not occasion a miscarriage of justice.

On whether the High Court had erred in determining that the evidence supported the charge of the offence of indecent act with a child, the Court of Appeal held as follows:

> *An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.*

Thus, the appellate court found that committing an indecent act with a child is a minor and cognate offence of defilement. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement, and the former attracts a comparatively lesser sentence than the latter. The Court therefore upheld the conviction of the appellant on the charge of committing an indecent act.

However, in this appeal, the Court found that the court had erred on the issue of sentencing. The Court stated that the High Court did not address itself to the propriety of the sentence, and more specifically whether the sentence of 20 years' imprisonment was appropriate for indecent assault, given that it was the sentence imposed for the major offence of defilement. The Court stated that it was apparent that the High Court had not considered the suitability of retaining the sentence. It therefore set it aside, substituting that sentence with one of 10 years' imprisonment.

Points to Note

- Where a charge of defilement omitted the sentence section, the charge was not defective because the accused person was aware of the charge he was facing and failed to raise the issue during the trial.
- Best practice would be to include an averment of the sentencing provision in the charge.
- An accused person charged with a major offence may be convicted of a lesser and cognate offence.
- Indecent assault is a lesser and cognate offence of defilement.