ICGLR REGIONAL TRAINING FACILITY

Access to Justice and Ending Impunity for SGBV

Case Law Compendium

Contents

FOREWORD

This case law compendium has been compiled by the RTF as a resource to be used by criminal justice sector personnel, lawyers and activists.

It contains examples of cases on SGBV from international bodies and national judiciaries of ICGLR member states.

The CEDAW Committee has considered a number of domestic violence cases where the State has been found wanting in regard to its obligation to protect women from domestic violence. The International Criminal Tribunal for Rwanda made a number of points about sexual violence in conflict which must be borne in mind even as various ICGLR member states are still embroiled in conflict and will be dealing with cases of sexual violence in the near future.

In this regard it is important to remember that Case "Law" is a tradition of Common Law countries and not civil law countries. In Common Law Countries, previous decisions of higher courts are binding on lower courts, but in Civil Law countries, previous decisions are regarded as persuasive but not necessarily as binding.

The majority of the cases are from Kenya, Tanzania, the DRC and Uganda, due to ease of access by the RTF. Nonetheless all the cases in this compendium are important in showing the circumstances under which SGBV occurs, the appropriateness of the law and issues of access to justice for victims/ survivors of SGBV. Some of the cases also reveal the reasoning used by judges during sentencing and what the courts consider as appropriate sentences for SGBV cases, taking into account various circumstances of victims and offenders. The wide variation in sentences shows that there is a need for more explicit guidelines on sentencing for SGBV than the general provisions in the Sexual Violence Protocol which merely prescribes stiff sentences.

The various national level cases tackle issues ranging from the discriminatory requirement for corroboration of evidence in sexual offences *(Mukungu v. R- Kenya),* to marital rape (Yiga *Hamidu v. Uganda).* There are cases on domestic violence, rape and defilement and forced marriage. It is hoped that the variety of cases will be used to enrich the jurisprudence of the judiciaries across the region.

The RTF would like to thank the various national experts who availed the cases included in this compendium. Thanks are also due to the research assistants who helped to read and compile some of the judgments: Cynthia Makokha-Mukiibi, Sydney Mugagga and Maurice Muhumuza.

NATHAN BYAMUKAMA,

DIRECTOR.

Fatma Yildirim (deceased) v. Austria; Communication No. 6/20051

Irfan first threatened to kill Fatma in July 2003. The couple argued frequently and Fatma wanted a divorce, but Irfan threatened to kill her and her children (from another marriage) if she divorced him. His residency permit was dependent on him staying married to Fatma. Fatma left the couple's apartment on 4 August with her 5-year-old daughter for fear of their safety. Upon returning to collect personal belongings, Irfan assaulted her and threatened to kill her. Fatma reported the incident to the police, who issued an expulsion and prohibition to return order against Irfan on the apartment, and reported the incident to the Vienna Intervention Centre against Domestic Violence ('Vienna Intervention Centre'). The police also informed the Public Prosecutor and requested that Irfan be detained. The request was rejected.

On 8 August, Fatma applied for an interim injunction against Irfan. Over the next 4 days Irfan repeatedly went to Fatma's workplace and called her to harass her and make death threats against her and her children. Each incident was reported to the police. On these occasions the police spoke with Irfan either in person or by phone but did nothing more. The Vienna Intervention Centre asked the police to pay closer attention to the case and Fatma gave a formal statement. A police request was again made to the Public Prosecutor for Irfan to be detained, and was again refused. Fatma then filed a petition for divorce. As a result, an interim injunction was issued on 1 September forbidding Irfan from going to the apartment or Fatma's workplace and their surrounds, and from contacting her. On 11 September, Irfan followed Fatma home from work and fatally stabbed her near their apartment. He was arrested on 19 September while trying to enter Bulgaria and is serving a life sentence for Fatma's murder.

The Vienna Intervention Centre and the Association for Women's Access to Justice submitted a communication to the CEDAW Committee on behalf of their client Fatma Yildirim with her children's permission. They alleged that Austria had violated articles 1, 2, 3 and 5 of CEDAW as the State failed to take appropriate positive measures to protect Fatma's right to life and personal security. In particular, the authors highlighted the failure in communications between the police and the Public Prosecutor, and the failures of the Public Prosecutor to order Irfan's detention. They also contended that the State had failed to fulfil its obligations in General Recommendations 12, 19 and 21 by the Committee, and argued that the failures of the current methods of addressing domestic violence in Austria disproportionately affect women.

Austria argued that Fatma's rights under CEDAW had not been violated and that the decisions of the Public Prosecutor had to be made using a proportionality assessment, weighing the basic right to life and physical integrity of Fatma with the basic right to freedom of Irfan, and that in light of the facts they were justifiable. They also highlighted the legislative and other measures in place and argued that these 'adequately and effectively' address domestic violence in Austria.

The CEDAW Committee concluded that Austria had violated its obligations under articles 2(a), (c) through (f) and 3 of CEDAW, read in conjunction with article 1 and General

[1] Credit for summary version to Simon Cusak (2013) at the Optional Protocol to the CEDAW blog, at https://opcedaw.wordpress.com/2013/06/29/fatma-yildirim-deceased-v-austria/

Recommendation No. 19 (violence against women) through its failure to protect Fatma's right to life and to physical and mental integrity. Recalling General Recommendation No. 19, the Committee affirmed that States can be held accountable for the private acts of non-State actors if "they fail to act with due diligence to prevent violations of rights." The fact that Irfan was prosecuted to the full extent of the law did not prevent the failure to detain him prior to the murder from constituting a breach of the State Party's due diligence obligation.

Noting that Austria had in place a comprehensive model to address domestic violence, the Committee stressed that this alone was insufficient to comply with CEDAW, as in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned [model]…must be supported by State actors, who adhere to the State party's due diligence obligations.

The Committee noted that the facts showed that Fatma had made positive and determined attempts to save her own life and sever ties with Irfan and that the Austrian authorities knew, or should have known, that she was in serious danger. As such, the failure to detain Irfan was a breach of the State's due diligence obligation. The Committee emphasised the fact that in cases of violence against women, "the perpetrators rights cannot supersede women's rights to life and physical and mental integrity." The Committee called on Austria to strengthen the implementation and monitoring of relevant law and ensure that the available criminal and civil remedies are employed vigilantly and quickly in cases of domestic violence where the perpetrator poses a dangerous threat.

Sahide Goekce (deceased) v. Austria 07-49543 Case No 5/2005, 6 August 2007[2]

Şahide Goekce (Şahide), an Austrian national of Turkish origin, lived with her husband, Mustafa Goekce (Mustafa), and their two daughters, in Austria. Mustafa subjected Şahide to physical violence, taunting and death threats for over three years, before fatally shooting her on 7 December 2002. The first reported case of violence by Mustafa against Şahide took place in December 1999, when Mustafa choked and threatened to kill Şahide. Police were called to the family apartment several times between 2000 and 2002 in response to reports of disturbances, disputes and/or battering. During this period, Mustafa was issued with two expulsion and prohibition to return orders and an interim injunction order. It is alleged that police were informed that Mustafa had breached the interim injunction order and that he was in possession of a handgun, despite being subject to a weapons prohibition. On two occasions the police requested that Mustafa be detained for making a criminally dangerous threat (a death threat) and assaulting Şahide. These requests were denied by the Police Prosecutor. It appears that no explanation was provided at the time for the refusal.

On 5 December 2002, the Public Prosecutor stayed all court proceedings against Mustafa. The Public Prosecutor claimed that there were insufficient reasons to prosecute Mustafa for causing bodily harm and making criminally dangerous threats.

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[2] Credit for case summary to Antonia Ross (2013) Optional Protocol to CEDAW blog. Retrieved from https://opcedaw.wordpress.com/category/communications/fatma-yildirim-deceased-v-austria/

On 7 December 2002, Şahide phoned a police emergency call service but no police officer was sent to the apartment in response to the call. Several hours later, Mustafa shot and killed Şahide in the family apartment, in front of their two daughters, with a handgun he had purchased three weeks earlier. Mustafa surrendered himself to police two-and-a-half hours after committing the crime. He was found guilty of murdering Şahide. Nevertheless, he was held to have committed the homicide under the influence of a "paranoid jealous psychosis" as Şahide had claimed that Mustafa was not the father of "all of her children," in an argument that preceded her murder. The court accepted that the psychosis met the requirements for a defence of mental illness. On this ground Mustafa was absolved of criminal responsibility. He is now serving a life sentence in a mental health institution.

The communication was jointly brought before the CEDAW Committee by the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, on behalf of Şahide and with the written consent of the guardian of Şahide's three minor children, the City of Vienna Office for Youth and Family Affairs.

The authors submitted that Austria failed to protect the deceased from domestic violence because the State Party did not take effective measures to protect Şahide's right to personal security and life and because it did not recognise Mustafa as an extremely violent and dangerous offender. The authors claimed that slow and ineffective communication between police and the Public Prosecutor lead to Mustafa avoiding conviction. Moreover, the authors claimed that Austria's existing domestic laws do not adequately protect women from violent persons, especially where the offender is repeatedly violent or makes death threats. The authors claimed that Austria violated articles 1, 2, 3 and 5 of the CEDAW. They cited several other international instruments in support of their claim, including General Recommendations 12, 19 and 21, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The State Party claimed that an adequate framework was in place to protect Şahide from domestic violence. It also submitted that a number of steps were taken for Şahide's protection, but that she rejected help several times, instead blaming her injuries on having epilepsy. It also alleged that Sahide provided Mustafa with a set of keys to the family apartment. The measures taken by the State Party included; legally banning Mustafa from returning to the family apartment, providing Şahide with information regarding local domestic violence services and informing her of her right to file an application for an interim injunction order against Mustafa.

The State Party submitted that it is difficult to reliably ascertain the true extent of the danger of an offender. Austria proposed that the Public Prosecutor stayed the prosecution against Mustafa because there was insufficient evidence to know with certainty that Mustafa was guilty of making criminally dangerous threats and that it was unclear which spouse had attacked whom. According to the State Party, Şahide was unwilling to assist state authorities to prosecute Mustafa. The State Party further noted that it was aware that Mustafa had a weapons ban against him, but that it was unaware that Mustafa was in possession of a handgun.

The CEDAW Committee found that Austria had violated its obligations under article 2(a) and 2(c) through (f), and article 3 of CEDAW read in conjunction with article 1 and General Recommendation No. 19 (violence against women), by failing to effectively protect Şahide's right to life and physical and mental integrity. The CEDAW Committee found that Austria did not violate article 5 of CEDAW, as the authors of the communication had submitted.

The CEDAW Committee stressed that a State Party can be responsible for acts of violence committed by a non-state actor (i.e., a private individual). A State Party can be liable where it fails to prevent violations of rights, if it does not properly deal with acts of violence or if it does not provide necessary compensation. A State Party can still be liable even where it has prosecuted a domestic violence offender to the full extent of the law.

The CEDAW Committee recognised that a national domestic violence support system, both legislative and community-based, must be adequately enforced by the State Party. On the facts, the CEDAW Committee found that Austria's comprehensive state services and legislative protections from domestic violence were not matched by satisfactory state enforcement. The CEDAW Committee concluded that the Public Prosecutor was aware of the high risk of violence that Mustafa posed to Şahide and was therefore under an obligation to detain Mustafa following his acts of violence. Further, by not responding to the emergency call from Şahide, the CEDAW Committee found that the police were "accountable for failing to exercise due diligence to protect Şahide Goekce." In the context of domestic violence, the CEDAW Committee recognised that "a person's right to freedom of movement and right to a fair trial…cannot supersede a woman's human right to life and to physical and mental integrity."

The CEDAW Committee made several recommendations, including that the State Party strengthen its implementation and monitoring of relevant domestic laws and ensure that criminal and civil remedies are vigilantly and speedily applied for the protection of persons experiencing domestic violence.

A.T. v Hungary, Communication No.2/2003[3]

The author alleged that she had been subjected to regular severe domestic violence and treatment by her common law husband and the father of her two children (L.F.) from 1998 onwards, even after he left the couple's family home. Although L.F. had allegedly threatened to kill the author and rape the children, the author did not go to a shelter because one of her children was severely brain-damaged and reportedly no shelter in the country is equipped to take in a fully disabled child together with their mother and sister. The author reported several incidents when she was beaten severely, including one incident after which she was hospitalised for one week. In proceedings regarding L.F.'s access to the family home, following the author's decision to change the locks to prevent him from gaining access, the Pest District Court found in his favour, and the decision was upheld by Budapest Regional Court when she appealed. She filed for division of the jointly owned property and instituted criminal proceedings against L.F. but these were still pending by the date of her initial submission on 10 October 2003.

The author alleged that Hungary failed to provide effective protection from her former common law husband, neglecting its "positive" obligations under the Convention and supporting the continuation of a situation of domestic violence against her. She argued that the lengthy criminal procedures against L.F., the lack of protection orders or restraining orders under current Hungarian law and the fact that L.F. has not spent any time in custody constitute

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[3] Credit for case summary to Equal Rights Trust. Retrieved from http://www.equalrightstrust.org/ertdocumentbank//A.T.%20v.%20Hungary.pdf

violations of her rights under the Convention as well as violations of general recommendation 19 of the Committee. She also called for the introduction of effective and immediate protection for victims of domestic violence into the legal system; provision of training programmes on gender-sensitivity, the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol, including for judges, prosecutors, police and practising lawyers; and provision of free legal aid to victims of gender-based violence, including domestic violence.

The author maintained that she had exhausted all available domestic remedies, and that although most of the incidents complained of took place prior to March 2001 when the Optional Protocol entered into force in Hungary, they constituted elements of regular domestic violence which continued to put her life in danger. She alleged that one serious violent act took place, in July 2001, after the Optional Protocol came into force in the 2 country. The author also claimed that Hungary has been bound by the Convention since becoming party to it in 1982, yet had in effect assisted in the continuation of violence. She also requested effective interim measures in accordance with article 5(1) of the Optional Protocol in order to avoid possible irreparable damage to her person. She noted that despite the Committee's note verbally requesting the State party to provide immediate, appropriate and concrete preventive interim measures she had not heard from any authority concerning the provision of immediate and effective protection in accordance with the Committee's request.

The State party did not raise any preliminary objections regarding the admissibility of the communication, despite maintaining that the author did not make effective use of all available domestic remedies. The State party conceded that these remedies were not capable of providing immediate protection to the author from ill-treatment by her former partner, but argued that it had in 2003 instituted a comprehensive action programme against domestic violence.

The Committee opined that a delay of over three years in legal proceedings from the dates of the incidents in question amounted to an unreasonably prolonged delay within the meaning of article 4(1) of the Optional Protocol, particularly considering that the author has been at risk of irreparable harm and received threats to her life during that period. The Committee also took account of the fact that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained. The Committee decided to hear the communication in its entirety, considering that the facts that were the subject of the communication covered the alleged lack of protection on the part of the State for the series of severe incidents of battering and threats of further violence from 1998 to the time of the decision. When addressing the merits of the communication, the Committee referred to its general recommendation No. 19 on violence against women which states that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". On this basis the Committee decided that Hungary had failed to fulfil its obligations and had thereby violated the rights of the author under article 2(a), (b) and (e) and article 5(a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women.

In reaching its decision, the Committee referred to the State party's admission that the remedies available to the author at the time could not provide her immediate relief from the abuse, and that domestic violence cases did not enjoy high priority in court proceedings, opining that woman's human rights to life should not be superseded by other rights such as the right to property. The Committee recommended that the State take immediate and effective measures to guarantee the physical and mental integrity of the author and her family and ensure that she was given a safe home, received appropriate child support and legal assistance as well as proportionate reparation. The Committee also made a number of general recommendations for the State, including assuring victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women; providing training on the Convention and the Optional Protocol to legal 3 professionals; and ensuring that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated.

Karen Tayag Vertido v The Philipines, Communication No. 18/2008[4]

In 1996, Karen Tayag Vertido worked as Executive Director of the Davao City Chamber of Commerce and Industry in the Philippines. She filed a complaint against the then President of the Chamber, Jose B. Custodio, accusing him of raping her. She alleged that the accused offered her a lift home following a business meeting one evening and that, instead, raped her in a nearby hotel.

In April 2005, after the case had languished in the trial court for eight years, Judge Virginia Hofileña-Europa acquitted the accused of raping Ms Vertido, citing insufficient evidence to prove beyond all reasonable doubt that the accused was guilty of the offence charged. Her Honour based her decision to acquit on a number of 'guiding principles' from other rape cases and her unfavourable assessment of the Ms Vertido's testimony based, among other things, on her failure to take advantage of perceived opportunities to escape from the accused.

Ms Vertido subsequently submitted a communication to the CEDAW Committee. She alleged that the acquittal of Mr Custodio breached the right to non-discrimination, the right to an effective remedy, and the freedom from wrongful gender stereotyping, in violation of articles 2(c), 2(d), 2(f) and 5(a) of the CEDAW. In her communication, she claimed that the trial judge's decision had no basis in law or fact, but 'was grounded in gender-based myths and misconceptions about rape and rape victims … without which the accused would have been convicted.' She further claimed that 'a decision grounded in gender-based myths and misconceptions or one rendered in bad faith can hardly be considered as one rendered by a fair, impartial and competent tribunal,' and that the Philippines had 'failed in its obligation to ensure that women are protected against discrimination by public authorities, including the judiciary.'

The CEDAW Committee concluded that, in failing to end discriminatory gender stereotyping in the legal process, the Philippines had violated articles (2)(c) and 2(f) of CEDAW, and article

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[4] Credit for Summary to Simon Cusack (2012) Optional Protocol to CEDAW Blog. Retrieved from https://opcedaw.wordpress.com/2012/02/13/gender-stereotyping-in-rape-trial-a-violation-of-cedaw-karen-tayag-vertido-v-the-philippines/

5(a) read in conjunction with article 1 and *General Recommendation No. 19* (violence against women). The Committee declined to consider whether or not article 2(d) had been violated, finding that it was less relevant to the case than the other articles alleged to have been violated. The Committee affirmed that implicit in CEDAW and, in particular article 2(c), is the right to an effective remedy. It explained that 'for a remedy to be effective, adjudication of a case involving rape and sexual offenses claims should be dealt with in a fair, impartial, timely and expeditious manner.' Accordingly, Philippines had failed to comply with its obligation to ensure Ms Vertido's right to an effective remedy. It noted that her case had languished in the trial court for approximately eight years before a decision was made to acquit the accused and that, consequently, it could not be said that Ms Vertido's allegation of rape had been dealt with in 'a fair, impartial, timely and expeditious manner.'

The Committee affirmed that CEDAW requires States Parties to 'take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women'. It also stressed that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or . . . have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim….

The majority determined that the trial judge had expected a certain stereotypical behaviour from the author and formed a negative view of her creditability because she had not behaved accordingly. It went on to say that the trial judge's decision contained 'several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the creditability of the victim'. The Committee called on the Philippines to provide appropriate compensation to Ms Vertido. It also made a number of general recommendations aimed at redressing the systemic nature of many of the violations. These included taking effective steps to ensure that decisions in sexual assault cases are impartial and fair and not affected by prejudices or stereotypes.

González Carreño v. Spain, Communication No. 47/2012[5]

Angela was in a violent relationship with her partner, the father of her daughter Andrea, for 20 years. In 1999, after three-year-old Andrea witnessed a violent attack on Ángela, she decided to flee the home with her daughter and break off the relationship. However, the abuser's violence against her and her daughter continued after the separation. Ángela reported each assault to the police and the courts, but the assailant was never convicted, and no measures were taken to prevent him from violating the no contact orders that were in place. She was also unable to obtain an order requiring that any visit be supervised by a social worker in order to protect Andrea, who did not want contact with her father, against physical or psychological harm. In a ruling with overtones of gender stereotypes, the court gave precedence to the father's rights over Ángela's rights and against the best interests of Andrea, whose right to be heard was also violated. In 2003, during an unsupervised visit, the abusive father murdered Andrea and then took his own life.

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[5] Credit to Oxford Human Rights Hub. Retrieved from http://ohrh.law.ox.ac.uk/cedaw-issues-a-historic-ruling-in-a-gender-violence-case/

After this failure of the authorities to act on the multiple complaints and legal actions that she had initiated, Ángela went to the Spanish courts to seek justice. In 2012, she decided to take the case to the CEDAW Committee. She was represented by Women's Link Worldwide.

In its ruling, the Committee found that Andrea's murder occured against a backdrop of domestic violence and structural violence against women. It went on to indicate that the proceedings to set visits, which the abuser took advantage of in order to continue inflicting violence on Ángela and Andrea, reflected "a pattern of conduct that reveals a stereotyped concept of visitation rights based on formal equality and which […] granted clear advantages to the father, notwithstanding his abusive behavior, and which minimized the mother and daughter's status as victims of violence, which placed them in a vulnerable situation." By ruling to allow unsupervised visits without giving sufficient consideration to the background of domestic violence, Spanish authorities failed to fulfill their due diligence obligations under the CEDAW. The Committee also found that the State's failure to provide her with restitution constituted a violation of its obligations under the Convention.

The Committee issued recommendations to the State in its ruling, including adequate restitution for Ángela and an exhaustive, impartial investigation of state structures and practices to identify the flaws that led to this lack of protection. It emphasised the need to consider any history of domestic violence when determining visitation schedules in order to ensure that they do not endanger women or children, and second, mandatory training for judges and administrative personnel on domestic violence, including training on gender stereotypes.

The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T

The ICTR found Akayesu guilty of rape as a crime against humanity by the International Criminal Tribunal for Rwanda (ICTR). They defined rape as a crime of genocide under international law, where it was committed with the intent to destroy, in whole or in part, a targeted group. The Trial Chamber found that sexual assault and rape in the Rwandan genocide formed an integral part of the process of destroying the Tutsi ethnic group. It was systematic and had been perpetrated against Tutsi women only, manifesting the specific intent required for those acts to constitute genocide. It important to note that this case was the first time that the Genocide Convention had been interpreted and applied by an international court.

The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Koran Vukovic, IT-96-23-T

The International Criminal Tribunal for Yugoslavia (ICTY) ruled that the acts of rape committed during the conflict were recognised as crimes against humanity because: they were part of a systematic and widespread campaign and they acts included elements of enslavement.

Prosecutor Vs Silvestre Gacumbitsi, ICTR-2001-64-A

The evidence of no consent does not have to be elicited from the victim if the surrounding circumstances negate the consent of the victim. In Common Law, The victim has to also prove that s/he did not consent. In the tribunals, one of the first things that the defence counsel would do is try to prove that they did indeed consent. The judges said that that had to stop. The women were being raped under circumstances where sex was the only alternative available to them to prevent death. The trial chamber said that the circumstances prescribed succumbing rather than consenting.

ICGLR MEMBER STATES' SGBV CASES

DEMOCRATIC REPUBLIC OF CONGO (DRC)

Prosecutor vs. Mfutila Ntalu, Judgement R.P.A 11.889

This is a case where a 51 year old man was accused with the rape of an 11 year old girl whom he had enticed into his compound in the absence of her parents under the pretence of buying oranges. The court of first instance sentenced him to 10 years imprisonment, a fine and full costs of the suit but he appealed against the sentence. The accused/appellant initially confessed this crime but later retracted the part of his confession that implicated him in rape but admitted to indecently assaulting her by fondling her breasts and thighs. Faulting the voire dire and entire process in collecting the information from the victim, the accused/appellant claimed that the veracity of the victims claims were never clarified. The victim was heard last (after her uncle and the retraction of the accused's confession had been heard) and there was no medical report on the file. Nevertheless the appellate court decided that the crime of rape of a child had been established but reduced the sentence to 5 years and just half of the legal costs which on its own would attract a penalty of 10 days imprisonment in the event that he failed to pay.

Prosecutor vs. Kamalebo Wilondja, Judgement RPA 2983

The accused/appellant was tried and found guilty by the court of first instance of the rape of a minor who went on conceive and give birth to a child. The case file mentions that her dowry had not been paid. The accused/appellant contended that the 'victim' was not a child but an adult under the law as she had attained the age of 19, a fact he was ready to prove by producing her voters card, a document attainable only by people over the age of 18. This appeal was successful and the accused/appellant acquitted of the crime.

Prosecutor vs. Hungu Benjamin Tarcisse, Judgement RPA 2875-2013

The offence of child rape was established by the trial court which convicted (with extenuating circumstances considered) the accused to 3 years imprisonment and a 200,000 Francs fine with the option of serving 30 days detention if the payment delayed. At a party, a 16 year old girl was offered 2 bottles of sugary coca cola after she would not be convinced to spend the night in the company of the accused's sisters. The accused's contention on appeal was with regard to the age of the victim claiming there was reasonable doubt concerning her age which was not considered in his favour, causing him to lose the case. The appellate court upheld the trial court's sentence because the accused, had in his own testimony, referred to events of the night in question that hinted at the possibility of the girl being a minor.

Prosecutor vs. Kamenga Mfutila, Judgement RPA 20.293

The accused is a domestic house help who was found by the trial court to be guilty of the rape of his next door neighbour's children. He was convicted and sentenced to 3 years imprisonment, a fine of 8,000 Francs and compensation to each victim of 800 Francs. He based his appeal on the grounds that the trial judge convicted him of rape without evidence from the victims. The court stood its ground that their testimony was sufficient and each one's testimony corroborated the others.

Prosecutor and Plaintiffs: Lotika Antoine and Nkusu Kieba vs. Mohammed Molosa Libaka Isaka Alias "Richard", Judgement RPA 11.934

The accused was charged with the rape of one of the plaintiffs after drugging her. He went on to extort her by threatening to publish photographs he had obtained of her during their liaison. This latter psychological torment caused the victim to seek psychiatric care. The accused was found guilty of the charges and sentenced to 5 years imprisonment and a fine of 150,000 Congolese Francs. The defendant appealed claiming that the plaintiff was not drugged but instead claimed the same to excuse the extramarital affair that he defendant insists he maintained with her. The defendant also appealed against the sentence but the sentence of the trial court was upheld with regard to rape but altered in as far as the fraud was concerned.

MP and PC Batachoka Mululuwa Vs. Saidi Nyanside, Judgement RPA 2817

The accused was charged with the kidnap of a 17 year old girl whom he managed to impose himself on in a manner that led to sexual intercourse that resulted first in the pregnancy of the girl and later, a promise from him to marry her. He was charged and convicted with the offence of rape of children with the admission of extenuating circumstances to a sentence of 3 years imprisonment, 800,000 Congolese Francs and damages of $10,000 payable in Congolese Francs.

In as much as the accused does not deny having sexual intercourse with the accused, his contention is as regards the age of the girl whom he refers to as his fiancée. The evidence of his contention is in the voters card issued to the girl as his proof pertaining to her age. The court opted to disregard this evidence and instead go with the word of the father who maintained that his daughter was not of legal age to give consent. Furthermore the mere fact that the accused had the card bolsters the suspicion of the court in examining the reasons as to why it is the accused in possession of the said card. The sentence was therefore upheld.

Prosecutor and PC Bulaya vs. Mulumeoderhwa Matamuabiri, Judgement RPA 2887

The accused had in the court of first instance had the charge of rape of a child dropped in favour of indecent assault without sexual violence. For this he had been sentenced to serve a 6 month imprisonment term and ordered to pay damages in the sum of $500 in the Congolese Franc equivalent to the victim.

He had been found by a 12 year old girl alone and half naked in the presence of a naked 8 year old girl in a deserted construction site. The screams from the 12 year old girl alerted others of what was going on and the accused was arrested. The trial judge had disqualified the rape charge, and on this even the appellate court agreed with the ratio decidendi of the trial judge. However, in not considering that the premeditated acts of isolating the girl and then undressing himself to the knees and her completely were the beginning of the offence of child rape that were interrupted by events outside the control of the accused person, the trial judge erred in not considering that the acts aforementioned constituted an attempt to rape the child.

The appellate court sentenced him to a 5 year imprisonment and a fine of 500,000 Congolese Francs taking into consideration the admission of extenuating circumstances, that the accused is a student and a first time offender.

Prosecutor vs. Kabamba Walosa, Judgement RPA 11837

The accused was charged with the offence of rape of a 5-year-old child while he served as a domestic servant in the household where the child lived. During the trial he was sentenced to 5 years imprisonment, 150,000 Congolese Francs and $2,000 damages in Congolese Franc equivalent to the victim's next of kin.

He was discovered by the child's aunt who found them on the sofa when she returned from the market. The accused denied these claims on the basis that his employers were using the charges to avoid paying him salary arrears due to him, jealousy by some family members desirous of benefitting in the same way that he does as a long standing servant having been there for 7 years and also the lack of intention seeing as he watched the child he is accused of raping from birth to the date on which the accusations were levelled against him. Whereas the gynaecological examination found a raptured hymen, the absence of blood and sperm was also noted. The benefit of the doubt arising from such a discovery should have been made in favour of the accused. The appellate court amended the sentence to 3 years with costs of the suit taking into account that the accused had no prior criminal record, was the head of a family and has a frail mentality.

Prosecutor vs. Mbula Bulambo, Judgement RPA 2824

The accused was charged with the crime of rape of a child and found guilty. He was sentenced to 7 years of penal servitude and to the payment of the equivalent in FC to 500$ (five hundred dollars) in damages and interest to be paid to the victim. The accused began living with an

underage girl and impregnated her. His contention is that he did this in preparation to present himself to her family for dowry negotiations and he was already well known by the victim's mother. Furthermore rather than the case being about her age it is in fact about his delay to pay the dowry. The court found that indeed the girl was a minor and the man was culpable for having sexual relations with a girl under the legal majority. However, taking note of his displayed sense of responsibility observed from his desire to take care of his wife and child the court reduced his sentence to 2 years of penal servitude and costs of the suit.

Prosecutor and Plaintiff Kilombo Sarah vs. Lukusa Kadima, Judgement RPA 11.801

The accused was convicted on the charge of rape with resort to violence but because there was an abortion, facts of which were never established, the accused was sentenced to 10 months imprisonment and a fine of 30,000 Congolese Francs. The accused, a doctor, had sexual relations with the victim, a student and this resulted in pregnancy. The accused then prescribed and administered poisonous substances to the girl in a bid to procure an abortion. In fear for her life she reported the matter to her parents who then rushed her to the hospital from where she died. This sentence was appealed as being too lenient and for the consideration of the offence of attempted abortion. The appellate court overturned the trial court's sentence and sentenced the accused to 10 years imprisonment and 1,000,000 Francs for the rape and, having established that indeed there was an attempt at abortion, 5 years imprisonment and $50,000 in damages and interest to the family of the deceased victim.

Prosecutor and P.C Bisimwa Chizungu vs. Itongwa Kibukila, Judgement R.P.A. 2727.

The accused was charged and found guilty of the offence of rape of children. For this he was sentenced to 7 years imprisonment and 5,000,000 Congolese Francs. In this case the accused admitted to having sexual relations with the victim and impregnating her, but on appeal contended that the victim was 22 years old and not 17 as claimed by her stepfather. Having no proof with which he would support these claims, the appellate court upheld the judgement and sentence of the lower court.

Prosecutor and Plaintiff Marie Kaj vs. Nzalakanda Audrien and the Democratic Republic Of Congo, Judgement RPA 11.654

The accused was indicted by the prosecutor on charges of rape with resort to violence of his 9 year old student. He was found guilty and sentenced to 18 months imprisonment, a fine of 100,000 Congolese Francs and $7,500 compensation to the victim. On an unspecified date he took her to a place he had designated and gave her a drink laced with drugs that made the victim unconscious. He took advantage of this state to rape her. When she awoke he threatened her that she would die if she revealed any of the information (including the bloodied underpants) to a third party. This was the first of what the victim called several events with a similar pattern. When the victim reported the rapes to her mother the mother immediately called a nurse and a

doctor to examine her daughter and they both established that indeed the girl had been deflowered. Claiming that there were other people using the little girl to exact revenge on him and the doubting the veracity of the unofficial medical examination, the accused appealed the decision.

The appellate court upheld the judgement of the trial court but revised the sentence to 9 years of imprisonment, a fine of 100.000 constant Congolese Francs, damages in Congolese Franc equivalent of $100.000 for the harm done and costs of the suit.

Prosecutor vs. Mbombo Keyi John, Judgement RPA 11.704

The accused had been convicted on the offence of rape with the resort to violence and sentenced to 5 years of imprisonment, a fine of 100.000 Congolese Francs, costs of the suit and regarding the civil interests of the victim, a fine of the Congolese Franc equivalent of $2000. It was claimed by the victim that the accused took her to some place, threw her onto a mattress and had sexual intercourse with her devoid of her consent. The accused averred that the sexual intercourse was consensual and contended that the trial judge did not address his mind to the absence of any proof other than that the sex was consensual. There being no evidence in fact and in law that a rape indeed occurred the accused was acquitted.

Prosecutor vs. Makiese Nzukulu Heritier, Judgement RPA 11.698

The 11 year old victim in this case claimed that on three different occasions and in diverse locations, her uncle, the accused raped her. The accused was charged, tried and sentenced to 10 years imprisonment, a fine of 100,000 Congolese Francs and 2,000,000 Congolese Francs in damages to the victim.

The appellate court found that the lower court had not established in law or in fact the requisite elements that constitute the crime of rape. The reasonable doubt raised by the consanguinity of the victim and the accused explaining how and why they would be in such close proximity was decided in favour of the accused. It held that such resemblances could not be taken as grave presumptions and agreeing elements. The court acquitted the accused.

KENYA

Mukungu v. Republic, (2003) AHRLR 175 (KeCA 2003)

Following his trial by the senior resident magistrate at Voi, for the offence of rape contrary to section 140 of the Penal Code, John Mwashighadi Mukungu, the appellant, was convicted and sentenced to ten years imprisonment with hard labour and was ordered to receive two strokes of the cane. His first appeal to the Superior Court was dismissed on 28 February 2002 by GA Omwitsa, a commissioner of Assize. Being aggrieved by the said dismissal he brought the present appeal. This being a second appeal only issues of law may be canvassed.

The alleged offence was committed on 20 October 2000 at about 7:30 pm at Mwakingali estate in Taita Taveta district of the Coast Province. Clemence Wawuda, the complainant, was returning home from Voi township after some national celebrations, when she was accosted by the appellant who dragged her into a nearby house, forcibly stripped her naked, threw her onto a mattress which was on the floor and forcibly had sexual intercourse with her. She screamed for help, but no one came to her assistance. After the act, the appellant left her inside the house and went away after bolting the door from outside to prevent the complainant from escaping. Shortly later the appellant returned accompanied by another man who also forcibly had sexual intercourse with her. She did not identify him.

It was the complainant's testimony that several people saw the appellant pulling her to the house where he raped her, but when the complainant talked to them they did not bother to go to her assistance. Her effort later to make a telephone report of the incident to the police was fruitless. She then decided to report the matter to a village elder who on account of ill health could not assist her. He, however, asked his wife and children to escort her to her house, which they did. She made a report the next day, to Phoebe Nanzala, a police constable, at Voi police station, who later arrested the appellant and charged him with the offence. Phoebe testified that the complainant reported to her that she had been raped by two men. Her evidence is however silent as to how she was able to know that the appellant was one of the two men who raped the complainant. It is, however, a matter from which an inference can be drawn that the complainant identified him to her. The complainant testified that the appellant was known to her before although not by name.

The complainant was medically examined. Her urine and a vaginal swabs were analysed. Some pus cells and spermatozoa were noted. Those confirmed she had recently had sexual intercourse. The appellant was not however, medically examined. So medical evidence did not connect him to the alleged offence.

The trial magistrate believed the complainant, looked for and found corroboration in the medical evidence and the testimony of Jenta Kwaze (Jenta) and Nyange Kwanze (Nyange). Jenta testified that someone knocked at her door on the material night seeking help. It was the complainant whom she only knew by appearance. She observed that the complainant appeared distraught and shaken, and was carrying her skirt and blouse in her hand. She had tied a sweater round her waist, and with her assistance they tried in vain to call the police. The complainant allegedly gave her the appellant's name but which she could not recall. Nyange corroborated

Jenta's story on the complainant's appearance on the material night. Those were circumstances which supported her story that she had been raped.

In reaching its decision, the Court of Appeal made the following observations:

“On the basis of the evidence we have outlined the trial magistrate found the appellant guilty, convicted him and thereafter sentenced him as we earlier stated. The Superior Court on first appeal, affirmed the decision and hence the present appeal. The only point of law raised in the appellant's memorandum of appeal is that his conviction was based on uncorroborated evidence. The other grounds, which include a complaint that the sentence imposed on the appellant was harsh, are clearly issues of fact. Under the provisions of section 361(1) of the Criminal Procedure Code, second appeals to this Court must only relate to matters of law. So this Court lacks the jurisdiction to deal with them.

“In Mutonyi v Republic [1982] KLR 203, this Court reiterated the definition of the term 'corroboration'. The Court said: an important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it see Republic v Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61. Corroboration is in effect other evidence to give certainty or lend support to a statement of fact. In sexual cases, corroboration is necessary as a matter of practice, to support the testimony of the complainant. However, there have been instances, as in Republic v Cherop A Kinei and Another [1936] 3 EACA 124 and Chila v Republic [1967] EA 722 at 723 (CA), in which it was held that a conviction on uncorroborated evidence may be had if the court or jury, as the case may be, is satisfied, after duly warning itself on the dangers of convicting on uncorroborated evidence, of the truth of the complainant's evidence.

“The need for corroboration in sexual offences appears to be based on what the Superior Court restated in Maina v Republic [1970] EA 370. There the Court said: “Before leaving the matter of the first two counts we would state in the hope it will be of use to the Magistrate on future occasions, as pointed out by the Court of Appeal in Henry and Manning v Republic 53 criminal appeal rep 150, it has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth then the fact that there is no corroboration need not stop his convicting. Most unfortunately, this was not done in the present case.”

“It is noteworthy that the same caution is not required of the evidence of women and girls in other offences. Besides there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences. And yet courts have hitherto consistently held that in sexual offences

testimony of women and girls should be treated differently. Perhaps there was nothing objectionable about that discriminative treatment before Kenya became a republic in 1964. The Republic Constitution has various provisions against discriminatory treatment on the basis of, inter alia, race and sex. Section 82 of the Constitution, as material, provides as follows: "Subject to subsections (6), (8) and (9) no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority…. In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description…. Subsections (6), (8) and (9) are not relevant to the issue we are dealing with here. The Constitution has no provision authorising any discriminatory treatment of witnesses particularly with regard to matters of credibility. It is noteworthy that even the Evidence Act (Chapter 80) Laws of Kenya, has no provision on the issue of corroboration of the testimony of adult women and girls. Section 124 thereof makes provision for corroboration of the evidence of children. It is understandable as in their case children may be of such a tender age as not to understand the duty of telling the truth. In any case the treatment given to children under the aforesaid section is to them as children irrespective of their sex or race.

"For the foregoing reasons we think that the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls. Returning to the facts of the present appeal, the complainant's condition when she was first seen by Jenta and Nyange, on the material night clearly showed that she was in shock and distraught. She was half naked as she had only a sweater tied round her waist. She was carrying her skirt and blouse. That was consistent with the story she gave to the two witnesses that she had been raped in a nearby house, and that she had just escaped further sexual assault. The trial magistrate correctly observed, that her conduct and appearance at the time she was explaining her ordeal to the two witnesses was consistent with a person who had left in a hurry and who had been sexually assaulted. No doubt that material corroborated the complainant's story that she had been raped. But that evidence in no way points to the appellant as the rapist. Nor does it or any other evidence on record save that of the complainant tend to connect him with the alleged crime. If we were to rely on existing authorities, the corroborative evidence falls short of that required to support a conviction for rape notwithstanding concurrent findings of fact by the trial and first appellate courts that the complainant was a witness of truth. With such a finding, had the charge against the appellant been murder, robbery or any other non-sexual offence the appellant's conviction would certainly be held to be sound. We think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis, if any basis existed for treating female witnesses differently in sexual cases such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no

hesitation in holding that decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with section 82 of the Constitution.

In the instant case the trial magistrate and the first appellate court having believed the complainant that she knew the appellant before, although not by name, and considering that the appellant was with the complainant long enough in a room with ample light she clearly was able to recognise him as one of the two men who raped her. She was able to point him out to the police. In those circumstances and in view of the clear provisions of the Constitution against discriminative treatment on account of sex, we think that the appellant was properly convicted of the offence of rape contrary to section 140 of the Penal Code. Consequently his appeal has no merit. It is accordingly dismissed in its entirety. We so order.

C.K. (A Child) & 11 others vs. The Commissioner of Police & 2 others [6]

The Court made a finding that the police's failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringed upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010. The court observed that by failing to enforce existing defilement laws, the police contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity. The Court also made references to the international and regional instruments protecting and promoting gender equality.

Mary Wanjuhi Muigai v Attorney General & another, [7]

The Court held provisions of the Marriage Act on polygamy as unconstitutional for violating the equality principle between women and women. In the case the Petitioner a Baha'i faithful lodged a claim against the respondents alleging discrimination against members of the Baha'i faith in the provisions of the Marriage Act of 2014. She pointed out that the Marriage Act did not recognize Baha'i religious marriages, thus compelling members of the faith to undergo civil marriages should they wish to have their marriages registered. She also challenged the provisions of the Marriage Act on provision of polygamous marriage for failure to require the consent of wives before a man can enter into another marriage and thus violates Article 45 of the Constitution on marriage among other things and sought for those provisions to be declared as unconstitutional. The judge paused and asked whether men and women ever be equal, within the meaning contemplated in the Constitution, within a polygamous marriage? She was categorical and had this to say:

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[6] W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR.
[7] Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR

"In my view, to talk of equality of men and women within a polygamous situation is a bit of an oxy-moronic phrase, if one may coin the term. Equality would presuppose that a woman has the same right as the man to take on a second spouse during the subsistence of the marriage, the practice defined as polyandry. This is not recognized in any of the cultures of the people of Kenya, so it must be accepted that polygamy precludes equality between men and women."

Premised on this the court found the petition as meritorious and held that section 6 of the Marriage Act must be read as including all marriages celebrated under all religious faiths duly recognized and registered in Kenya. Secondly and of special interest is the fact the court found that the practice of polygamy and registration of polygamous marriages without the consent of the previous wife or wives as inconsistent with the equality provisions of the Constitution.

***W.J. & another v Astarikoh Henry Amkoah & 9 others*.[8]**

In this case, the petitioners aged 12 and 13 were class six pupils at J Primary School were allegedly defiled by their teacher. A criminal matter was lodged against the culprit teacher but he was acquitted. Subsequently a civil suit was filed for compensation against the 1st to 4th respondents (that included the accused, the school and the teacher's service Commission and the Attorney General (on behalf of the State)) on allegations of failure to put in place measures geared towards curbing emerging and continuing cases of sexual abuse against children in schools in Kenya. The trial judge found that the teacher (1st Respondent) violated the constitutional rights of the minors and rests of the Respondents were found negligent and vicariously liable for the unlawful acts of the 1st respondent.

The court awarded Kshs 2,000,000 and 3,000,000 to the 1st and 2nd Petitioner respectively for damages arising from the respondents' actions or inactions. This judgment sends a clear warning to perpetrators and institutions that shield them and perpetuate impunity that there are alternatives and options that the victims can still pursue to get justice. This is the strong message echoed by Justice Mumbi Gumbi when she said the following:

"It is important to send the message that any teacher who violates his duty as a teacher, who abuses the trust of parents who leave their vulnerable children in his charge, and who turns, like a wolf, against them, will be held civilly liable, even though he may escape criminal culpability"

This was a very stern warning given to both male and female teachers as they need to safeguard the safety and rights of our children.

[8]High court Petition No 331 OF 2011[2015] eKLR

P.O v Board of Trustees, A.F & 2 others [9]

A claimant filed a suit against sexual harassment among other claims against the 1st respondent her employer and 2nd respondents her boss. The claimant was subjected to SGBV at work by the 2nd respondent hereinafter referred to as the harasser while in a Regional Conference in South Africa. The harasser made sexual advances towards the claimant which escalated to him hitting the claimant for her refusal to give in to the unwanted demands. The harasser terminated the claimant's contract in disguise and the real reason for her sacking was her rejection of the harasser's unwarranted sexual demands. She filed suit for compensation against wrongful termination and sexual harassment against both her employer and the harasser.

Her claim was successful and the court awarded damages of Kshs. 3,240,000/ specifically for sexual harassment besides other awards for breach of contract. This award is much better than what is provided for in the Sexual offences Act 2006, which has imprisonment for three years or a fine for Kshs. 100,000 or both. This fine usually paid to the state and a complainant is never compensated under the current criminal justice system

N M L V Peter Petrausch [10]

The claimant was employed as Domestic Servant help for a period of 10 months. The 10 months proved to be quite tough as the Respondent harassed her sexually by demanding sexual acts such as forcing the Claimant to watch pornographic movies with him, demanding for sexual intercourse, touching her breasts, taking video pictures of the Claimant as she bathed, to say the least. The court found that the Respondent liable for sexual harassment and ordered to pay general damages of Kshs. 1,200,000. This is a milestone considering that sexual harassment was only recognized as an offence in 2006 in Kenya and found its way in legislation namely Sexual Offences Act 2006 that criminalized it and the Employment Act 2007 that prohibited it within the workplace and required employers to come up with anti sexual harassment policy within the workplace.

Nathan Mwito M'itabari v Republic [11]

The appellant was accused charged with the offence of murder of his daughter whom he cut with a panga and attempted murder of his wife on the 6th September 2005 and confessed to his brother what he had done. During trial he denied ever having confessed to the murder to his brother and said that his daughter's death was not intentional. The trial court found him guilty of the offence of murder and sentenced him to death. Aggrieved by the trials court judgment he appealed against the sentence to the Court of Appeal urging the Court to reduce the sentence to manslaughter as the murder was not intentional. His appeal was dismissed as unmeritorious. In

[9] P O v Board of Trustees, A F & 2 others [2014]eKLR
[10] N M L V Peter Petrausch (2015) eKLR
[11] Nathan Mwito M'itabari v Republic [2015] eKLR

some cases the Court give lenient sentences where a father of family member is involved unlike when a case is between strangers. This court gave the mandatory sentence of death imposed despite the fact that this was a father to the deceased sending a signal that it does not matter the relationship, a crime is a crime and the accused person must face the full force of the law.

Charles Muli v Republic [12]

The appellant, a police officer was accused of defiling a six year old girl. He was tried and found guilty of the offence by the trial court and sentenced to life imprisonment as imposed by the law. Dissatisfied with the decision, he appealed against the both conviction and sentence to the High Court. His appeal was dismissed and conviction and sentence upheld. Similarly in ***Maxwell Mwangi v Republic*** [13] the appellant was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offence Act No. 3 of 2006. The particulars are that on the 3rd day of June, 2012 at Mbale Town, in Vihiga County, he intentionally and unlawfully caused his penis to penetrate the vagina of A.A a child 7 years. The trial court found him guilty of the offence and convicted and sentenced him to life imprisonment. He appealed to the High Court against both conviction and sentence. His appeal was dismissed in entirety and conviction and sentence upheld by the appeal court.

David Nyaruri Bosando v Republic [14]

The Appellant was charged in the trial court with defilement contrary to section 8(1) of Sexual Offences Act, 2006. The minor then was aged four and half (41/2) years. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of Sexual Offences Act. Brief facts are that PW1 M W was the complainant, a child aged 4 years. PW2 W K was the complainant's brother aged 7 years. The two children stated that on 27/4/2012 at 2.00pm they were at home alone caring for their baby sister 'G'. The accused whom they knew as 'pastor' came and called the complainant to go and see the mirror in his house. The complainant left with accused. After a while she returned crying. She had 10/= which she used to buy mandazi. The complainant informed her brother that accused had done '*Tabia Mbaya'* i.e. sexually molested her. The complainant had blood and tears from her vagina. Upon hearing this evidence the accused was put on his defence and subsequently found guilty of the offence of defilement and sentenced to life imprisonment.

The appellant appealed against both conviction and sentence on grounds that the age of the minor was not ascertained through production of documentary evidence and neither was the evidence adduced by the minor corroborated. The Court of Appeal was of the view that the evidence adduced casted sufficient doubt on the prosecution's case. The Court held that:

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[12] Charles Muli v Republic [2013] eKLR
[13] Maxwell Mwangi v Republic [2015] eKLR
[14] David Nyaruri Bosando v Republic[2015] eKLR

"For the above reasons being lack of documentary evidence to prove age of the complainant and doubt raised by the appellant's defence, I find that his conviction was unsafe. As such I do allow this appeal."

The appellant's conviction was quashed and his sentence set aside.[15]

Zamzam Mohamed Hassan v Republic [16]

The appellant was charged with benefiting from child prostitution contrary to section 15 (d) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between 1st January 2013 and 1st January 2014 in Fafi District within Garissa County being a close friend to BAF a child aged 15 years, took advantage of a relationship to procure her for sexual intercourse. She denied the charge. After a full trial she was convicted of the offence and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant moved to the court on appeal. His grounds of appeal among other things indicated that the charge preferred against him was fatally defective and therefore not sustainable. The court of appeal quashed his conviction and set aside the sentence. Reason for this once again pointed to shoddy investigation by the police and ineptness of the prosecution in handling the case. No documentary evidence to prove age of the complainant and failure to call requisite witnesses to build a strong case against the accused person.

Republic v Josephat Kipngetich Kirui,[17]

The accused pleaded guilty to a charge of unlawfully killing his cousin's wife. The evidence divulged that the accused picked up a knife from the kitchen and stabbed the deceased with it in the stomach and then ran out of the house. The post mortem examination established that the cause of death was cardiac arrest due to cardio-pulmonary arrest as a result of damage to the left lung. The trial judge sentenced the accused to ten years' imprisonment. The Court of Appeal[18] did not interfere with the sentence in its judgment delivered on 21st February 2011.

Republic v Richard Kamundu Ngungu [19]

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[15] This is unfortunate judgment that points out to issues of poor investigation on both the police and prosecution in undertaking their work. In the absence of proper evidence the courts hands are tied and must ensure that the evidence adduced meets the threshold imposed by the law.

[16] Zamzam Mohamed Hassan v Republic[2915] eKLR

[17] Nakuru High Court Criminal Case no 77 of 2007 (Unreported).

[18] *Joseph Kipngetich Kirui v Republic*, Nakuru Court of Appeal Criminal Appeal No 184 of 2008 (Unreported).

[19] Machakos High Court Criminal Case No. 115 of 1999 (Unreported).

The accused was arraigned on, tried for and convicted of the offence of murder and sentenced to death. He had seized the deceased, a daughter born to his wife before their marriage, and hurled her down twice, head first. The post- mortem report produced at the trial indicated that the deceased had a depressed skull fracture on the left temporal bone. The cause of death was stated to be intra-cranial bleeding due to head injuries.

The accused appealed to the Court of Appeal against both his conviction for murder and the death sentence imposed on him. On the basis that no *mens rea* on the part of appellant had been established, the Court of Appeal allowed his appeal and convicted him of manslaughter instead.[20] The appellant was sentenced to serve fifteen years' imprisonment on 2nd March 2012.

Republic v Alfred Otieno Omondi [21]

This was one of the first cases dealt with pursuant to the provision of section 9(1) as read with section 9(2) of the Sexual Offences Act, the latter sub- section providing for a minimum sentence of ten (10) years imprisonment upon conviction. The accused faced a charge of attempted defilement of a child contrary to section 9(1) of the Sexual Offences Act. The accused was found guilty and sentenced to serve eleven years imprisonment. In his appeal to the High Court and the Court of Appeal already referred to, the offender did not challenge his conviction, but only pleaded for his sentence to be reduced. Neither the High Court nor the Court of Appeal in spite of the latter's stated view that 'a severe sentence was called for', enhanced the sentence, but merely dismissed the respective appeals. The Court of Appeal judgment was delivered on 23rd June 2011.

CKW v Attorney General & another [22]

This was a case in which the Petitioner, through his lawyers, sought a declaration;

"Challenging the constitutional validity of the offences created in Section 8(1) and Section 11(1) of the Sexual Offences Act, to the extent that they are inconsistent with the rights of children under the Constitution".

The facts giving rise to such prayer was that the petitioner, CKW, was 16 years old at the material time he was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. In his claim, he contended that the sexual act between him and the complainant was consensual as the complainant was his girlfriend. This

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[20] *Richard Kamindu Ndungu v Republic* Nairobi Court of Appeal Criminal Appeal No. 194 of 2004 (Unreported).
[21] The case was originally tried by the Principal Magistrates Court at Siaya, a subordinate court not of record. The facts of the case have been obtained from the records of the two appellate courts to which the accused appealed against both his conviction and sentence: Kisumu High Court Criminal Appeal No. 96 of 2008 (Unreported) and Kisumu Court of Appeal Criminal Appeal No. 5 of 2010 (Unreported).
[22] CKW v Attorney General & another [2014] eKLR

brought to the fore the Constitutionality of the provisions in the said Section 8(4) of the Sexual Offences Act which provides that:

"A person who defiles a child, who is between the age of 16 years and 18 years, is liable to imprisonment for a term of 15 years."

The parameters of the petition dealt only with the consensual sexual activity between minors. It was alleged that the two statutory 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 acts proscribed by Sections 8(1) and 11(1) of the Sexual Offences Act. However in dismissing the Petition, the Judge held that the Petitioner having not demonstrated past patterns of disadvantage could not amount to a violation of the rights of the male child, to equal protection and benefit of the law. Impliedly, this failure could not be prove indirect discrimination against the male child, contrary to Article 27(5) of the Constitution.[23]

RWANDA

SOUTH SUDAN

SUDAN

RWANDA

TANZANIA[24]

Nguza Vikings @ Babu Seya And Others versus Republic, Criminal Appeal NO. 56 OF 2005

In this case a father, and his four male children, were jointly charged in the Court of Resident Magistrate with ten counts of rape contrary to section130 (2) (e) and 131 (A) (1) of the Penal Code as amended by sections 5and 6 of the Sexual Offences (Special Provisions) Act, NO.4 of 1998. They were also jointly charged with eleven counts of unnatural offence contrary to section 154 (1) of the Penal Code as repealed and replaced by section 16 of the law. The victims of the offence were ten children (girls), who, when the offences are alleged to have been committed in 2003 were aged between six and ten years old. They were all pupils of standard one at a Primary School.

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[23] This case and the arguments presented even in light of the *obiter* by the judge is an indication that there is need to address circumstances involving children in sexual offences. The judge indicated that there ought to be considered other measures which were more appropriate and desirable, for dealing with children, without having to resort to criminal proceedings.

[24] The RTF acknowledges the Jurisprudence of Equality Case Law Collection at http://www.iawj.org/JEPcases.html

According to the witnesses all the complainants explained that the acts took place at house No.607 at Sinza, which they said was the residence of the 1st appellant. What used to take place was that, the complainants were taken to the residence of the 1st appellant where they were told to undress. The appellants oiled their private parts and then had sex with them, both in the vagina and the anus. Some were placed on a mattress on the bed and others on a mattress on the floor. They were also told to suck the first appellant's penis and anus. The acts took place repeatedly between April and October 2003. All the victims were examined by Dr. Petronila Ngiloi, (PW20), a Specialist Pediatric. Her expert opinion was that three of the ten victims were sodomized, while four were raped. Two were raped and sodomized. Out of the ten children who were subjected to the sexual abuse, it was only one who, according to the medical report, was found to have survived from the sexual abuse.

In their defense, all appellants denied the commission of the offence and relied on the **defense of alibi.** Each appellant informed the trial court that given the nature of the activities they did for a living, all save the last appellant, being musicians and involved in practices daily, and at other times conducting performances outside Dar es Salaam, they could not have been at the "locus in quo" for the commission of the offences they were charged with. Moreover, the first appellant told the court that he was **impotent**. He said although he requested the prosecution to assist him in having his potency examined, he received a negative response. The fourth appellant was a Secondary School student and he said he used to **attend classes**.

The prosecution case rested mainly on the credibility of the witnesses and the identification of the appellants.

The trial court entered an omnibus conviction for all accused persons/appellants in respect of all counts. A sentence of life imprisonment was imposed on each appellant. Each accused person/appellant was also ordered to pay a compensation of shillings two million to each of the complainants. On appeal to the High Court against the judgment and the sentence, the learned judge on first appeal convicted them with gang rape and sentenced them to life imprisonment and ordered to pay compensation to the victims.

On Appeal to the Court of appeal of Tanzania appeal partly succeeded and failed as follows, the 1St appellant was found guilty of the offence of rape in counts 7 and 12 contrary to sections 130(2)(e) and 131A 1 of the Penal Code as repealed 38and replaced by sections 5 and 7 of the SOSPA. In respect of counts 10 and 18 the 1st and 2nd appellants were found guilty of the offence of gang rape contrary to section 131A of the Penal Code. Counts 1, 3, 5, 14, 20 and 22 were all dismissed in respect of all the appellants. Counts 7 and 12 were also dismissed in respect of the 2nd to 4th appellants and count 10 and 18 were dismissed in respect of the 3rd and 4th appellants. Eventually, the convictions against the 3rd and 4th appellants were quashed and the sentence and orders of compensation were set aside. As for the 1St and 2nd appellants, the order for compensation was sustained only in respect of the counts they have been convicted with and it is quashed and set aside in respect of the rest of the counts they have been acquitted.

Chilla v. Chilla, Civil Appeal No. 188 of 2000, High Court of Tanzania at Dar Es Salaam, Jan. 6, 2004.

Ivona Chilla, sister of the deceased, filed suit objecting to the appointment of Demetria Chilla, the decedent's wife, as administrator of the decedent's estate. She further argued that she should have custody over the decedent's son because his mother was a widow and would be dependent on relatives.

Judge N. Kimaro rejected the appellant's custody claim, holding that under the welfare of the child embodied in Article 3 of the Convention of the Rights of the Child (CRC), the respondent was the best person to have custody of the boy as she was his mother and had cared for him since his birth. She held that the appellant's argument that the respondent wife had no right to serve as administrator because she was not chosen to do so by her husband's clan was contrary to the equality provisions of Articles 13, 19, and 26 of the Tanzanian Constitution and Articles 2 and 16 of CEDAW. In addition, Judge Kimaro noted that the trial magistrate's gratuitous finding that only male children can inherit was both irrelevant and contrary to the Tanzanian Constitution, which bars gender discrimination in all aspects. She dismissed the appeal with costs.

Juma v. Kifulefule, Civil Appeal No. 247 of 2001, High Court of Tanzania at Dar Es Salaam, Jan. 6, 2004.

Appellant husband challenged the trial court's determination that his physical abuse of respondent wife was the source of the dissolution of their marriage. Judge N. Kimaro rejected the appellant's characterization of the dispute as a normal marital fight and upheld the decision of the trial court. She found that the husband's treatment of his wife constituted gender-based violence as defined by the Declaration on the Elimination of Violence Against Women (DEVAW). Judge Kimaro explained that domestic violence violates the right to equality and to life under Articles 12(1) and 14 of the Constitution of Tanzania, as well as the Article 5 of the Universal Declaration of Human Rights (UDHR), which is embodied in the Constitution and proscribes cruel, inhuman, and degrading treatment and punishment. The court also upheld the trial court's division of the parties' marital property, which followed the principle of equal protection under the law as required by Article 13(1) of the Tanzanian Constitution.

Marandu v. Marandu, Civil Case No. 33 of 2003, District Court of Moshi at Moshi, Oct. 10, 2003.

This case involved a dispute between the mother and other relatives of the deceased and his wife over which party had the right to bury the body of the deceased. Resident Magistrate I. P. Kitusi awarded burial rights to the defendant wife, holding that the evidence demonstrated that the decedent told his wife and children that he wished to be buried at the place of his marital home and that he was a devout Christian and no longer bound by customary law that required a first born son to be buried on ancestral land. In rejecting the reasoning of a 1986 Kenyan case, the magistrate explained that the notion that "a woman should sit by and wait for men to decide on what do to with her husband's body may have been true some years ago but it cannot be true

today, . . . the laws of this country have changed and a woman no longer sits by." He explained that while he had not found any previously decided cases on the right of a woman to bury her husband, there were several controlling precedents on the right to gender equality. These cases had clearly established the applicability of international human rights principles in Tanzania through Article 9(f) of the Tanzanian Constitution. Magistrate Kitusi further explained that customary laws that discriminate between men and women violate principles of gender equality, privacy, human dignity protected by the Constitution and international law instruments ratified by Tanzania.

Mtefu v. Mtefu, Civil Appeal No. 214 of 2000, High Court of Tanzania at Dar Es Salaam, Jan. 20, 2003.

Appellant husband argued that the trial court erred in granting the parties a divorce on grounds of his adultery and cruelty and in ordering the equal division of the marital property. Judge N. Kimaro upheld the decision of the trial court. She rejected the appellant's argument that the respondent had consented to the adulterous affair and found that the appellant was cruel in his adultery and in having his wife arrested when she protested the affair. Judge Kimaro also rejected the appellant's claim that the respondent's housework was a purely conjugal obligation that did not contribute to the marital property, explaining that such arguments are a "clear reflection of the violence and discrimination which a woman has lived with in the society for years" and that domestic services require recognition and compensation. She stated that awarding all of the marital property to the appellant husband would be contrary to the equal protection provision of Article 13(1) of the Tanzanian Constitution. Thus, Judge Kimaro held that the trial court's equal division of marital property was proper and consistent with the principles of nondiscrimination and human dignity found in Article 9(f) and 13(1) of the Constitution of Tanzania, Article 15 of CEDAW, and the UDHR.

Alli v. Elphas, Civil Appeal No. 21 of 2002, District Court of Mwanga at Mwanga, December 21, 2002.

Appellee Lukio Elphas sought to evict appellants Butuli Alli and Saidi Hassan from their residence on a plot of land that originally belonged to the estate of Alli's first husband. He claimed in part that as a widow, Alli, had no right to occupy land belonging to her late husband. The primary court ordered the plaintiffs evicted from their home. On appeal, Magistrate S.O. Msigiti reversed the lower court's decision, holding that the appellants were entitled to the plot of land and residence in issue. The court held the that the eviction rested on the discriminatory premise that women have no right to own property and do not have a full range of choices in marriage. Magistrate Msigiti stated that: "the rights of women in owning property and elimination of discrimination against women is not a Tanzania issue alone. It is an issue touching the whole international community." The court held that the appellants' eviction violated principles of equality between the sexes as to marriage, residence, and marital benefits found in Articles 13(1) and 16(1) of the UDHR, the Law of Marriage Act of 1971, and the Constitution of Tanzania. Magistrate Msigiti further questioned the standing of respondent Elphas to sue for the eviction of the appellants, explaining that he had not shown that he was

the administrator of the estate and noting that "it is not proper for every relative to appear in court for a deceased."

Ndossi v. Ndossi, Civil Appeal No. 13 of 2001, High Court of Tanzania at Dar Es Salaam, Feb. 13, 2002.

The appellant was appointed the administrator of the estate of his deceased brother by the primary trial court. The widow of the deceased successfully challenged that appointment in the appellate district court. The brother of the deceased appealed, seeking restoration of the primary court decision.

Judge E. Munuo, as she then was, held that the widow was entitled to administer the estate on behalf of her children under the Constitution of Tanzania, which provides that "every person is entitled to own property and has a right to the protection of that property held in accordance of the law." She further held that the Article 9(a) and (f) of the Constitution recognizes human rights by requiring "that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights." This clause, Judge Munuo explained, generally domesticated human rights instruments ratified by Tanzania, including the anti-discrimination principles of CEDAW, Article 2(b) & (f), and the best interest of the child principle found in Article 3 of the CRC. She found that these provisions protect widows and children from "uncouth relatives prying and/or attempting to alienate the estate of deceased fathers and mothers under the shield of custom."

Njobeka v. Mkorogoro, P.C. Civil Appeal NA. 6 of 2001, High Court of Tanzania at Dar Es Salaam, July 13, 2001.

Respondent husband issued a talak to appellant wife, divorcing her under Islamic law. BAKWATA, the National Muslim Council of Tanzania, confirmed the talak and advised the parties that respondent husband should pay his wife Tsh 500,000 as a parting gift. When the respondent failed to pay, the appellant filed civil matrimonial proceedings in the primary court. The primary court issued a decree of divorce and ordered the respondent to pay Tsh 500,000, on the ground that this had been the agreement between the parties. On appeal, the appellant argued that the primary court's award was inadequate because it failed to take into account both parties' contributions to the marital property.

Judge N. Kimaro held that the primary court erred in adopting the relief recommended by BAKWATA. She noted that BAKWATA is a reconciliation council; once reconciliation fails, its authority ends. Judge Kimaro found that the primary court erred by failing to provide the appellant an effective remedy in accordance with the principle of equal protection of the law guaranteed by Article 13(1) of the Tanzanian Constitution. Moreover, the primary court's decision was contrary to Article 2(a) of CEDAW, which requires state parties to embody the principle of equality before the law in their national Constitutions and ensure the practical realization of that principle. Judge Kimaro noted that the Tanzania Constitution expressly recognizes the UDHR, which is a source of all other international treaties dealing with human rights. She therefore set aside the lower court's order and substituted it with an order that the

appellant be awarded one of the two houses the couple had jointly acquired as her share of the matrimonial assets.

Jonathan v. Republic, Criminal Appeal No. 53 of 2001, High Court of Tanzania at Moshi, Sept. 21, 2001.

Appellant Jonathan, with 3 companions armed with sticks and machetes, forcibly seized a 23-year-old woman from her home, took her to his house, and raped her. The appellant claimed that his conduct had been permissible as a traditional marriage under customary norms. Judge E. Munuo, as she then was, found that the sexual encounter was violent and nonconsensual and held that without volition, there could be no marriage between the parties under Tanzania's Law of Marriage Act, which provides that "[m]arriage means the voluntary union of a man and a woman." She held that the complainant was further protected by Article 4 of the DEVAW, which calls upon States to reject custom, tradition, or religion as excuses to avoid their obligation to protect and offer adequate relief to women victims of violence; Article 14 of the UDHR, which requires volition and consent for a valid marriage; Article 16(b) of CEDAW, which guarantees the right to equality in entering into marriage and freely choosing one's spouse with free and full consent; and Article 23 of the ICCPR, which guarantees the same. The court thus held that the appellant was correctly convicted of rape for the complainant "never consented to the appellant carnally knowing her nor marrying her under the obnoxious customary practice of grabbing women, locking them up, and sexually assaulting them in the name of Chagga customary marriage."

Mohamed v. Makamo, Civil Appeal No. 45 of 2001, High Court of Tanzania at Dar Es Salaam, June 8, 2001.

Appellant Guliya Mohamed appealed the decision of the district court awarding the appellant wife 5 percent of the marital property and the husband 95 percent upon their divorce. Judge N. Kimaro found that the respondent had introduced no evidence of his own contribution to the property. She found that "With greatest respect to the trial magistrate the decision is discriminatory and a reflection of stereotyped concepts of the roles of man and woman. The appellant was given 5 percent division because she is a woman and women are taken to be inferior in all respects to men." This decision, Judge Kimaro explained, was contrary to Section 114 of the Law of Marriage Act and Article 13(1) of the Constitution of Tanzania, which guarantees equal protection of the law and which is a reflection of Article 7 of the UDHR and Article 15 of CEDAW. Consequently, Judge Kimaro ruled that appellant wife should be awarded 50 percent of the assets.

UGANDA

Domestic Violence

Uganda V Kamuhanda Emmanuel. HCT-01-CR-SC-0024 OF 2012

The deceased, Bangizi Dezderio, was the biological father of the accused. The deceased, according to his wife and PW1 Restetuta Ekibahirire, was a re-known perpetrator of domestic violence against her and his children. The day before the murder, the deceased returned home very drank and chased her away along with her 'cats', referring to the children. She reported the case to the LC1, who referred them to the Police. The Police referred them back to the LC1 to solve the domestic issue. The next morning, the deceased was found dead in their matrimonial home. The accused was suspected of having murdered the deceased because he had warned him against harassing the accused's mother and children. He buttressed the villagers' suspicions by escaping from the village the day of the murder. It was held that:

- Although the accused claims he acted in self-defence there was no weapon found at the scene to suggest that the deceased was armed and /or had attacked the accused. The accused had the time to cool down and take the matter to police just like the mother did but he did not. **He cannot be afforded the defence of provocation** or self-defence under the Penal Code Act.
- He used a very sharp Panga. With one cut, the hand was amputated! He then disappeared from the village in a suspicions manner after causing his father's death. Indeed when he was hard pressed in cross-examination, he conceded that his mother told court the truth. **He had killed his father because he was a perpetrator of domestic violence in their home**.

The accused was sentenced to 2 years' imprisonment. The judge had this to say about the case and why he had to give such a lenient sentence.-

- The murder arose from accumulated anger in domestic violence. It is high time courts considered this as a strong partial defence to homicides just like other defences such as provocation. When family members are subjected to constant domestic violence, they develop hatred and contempt for the perpetrator of the violence. The deceased was such a perpetrator of domestic violence. He invited this hatred upon himself.
- Because our courts have not been treating domestic violence as a serious crime, the violent members of the family, mainly MEN, have been getting away with it.
- *I am now setting a precedent by considering accumulated anger arising from repeated acts of domestic violence, and more so when they are committed with impunity, as a partial defence to murder in a domestic setting. It is also, in my opinion, a very serious mitigating factor for sentences in homicides and other crimes committed in a domestic sphere.*

Uganda V Drazua (Criminal Case No.032 of 2012) [2012] UGHCCRD 09

Drazua Emmanuel and the deceased Amaite- Erina had been married for 9 years and had 3 children. The accused had misunderstandings with the deceased because of an apparent love affair between the deceased and a 'boda-boda' man named Sadiq. The accused testified that he in fact once found the deceased in a house with Sadiq. He left Sadiq to go and gave the wife clothes to put on and go home. This evidence was meant to support the defence of provocation. On the fateful day, the accused and the deceased had an altercation. The accused shot the deceased four times. The accused also gave the defence of self-defence, which the learned judge found lacking under the circumstances.

The court therefore found that all the ingredients of murder were proven by the Prosecution beyond reasonable doubt. That is, the victim died, the said death was unlawful and that there was malice aforethought by the accused. The accused was convicted of murder contrary to Section 188 and 189 of the Penal Code Act. The accused was sentenced to death in a manner prescribed by law. The reasons given for the harsh penalty were: Counsel for the state has raised serious issues relating to Domestic Violence and the manner in which the offence was committed and the fact that in most cases, women are victims. The courts will not hide their heads under the cover of Human Rights in general to pass lenient sentences to such perpetrators of the most heinous crimes in recent times such as the one committed by the convict in this case.

Uganda V Bongomin (Criminal Session Case No. 194 Of 2011) [2014] UGHCCRD 91

The accused Bongomin Kennedy was the husband to the deceased. On 21/10/2010, the accused engaged in a serious domestic fight with the deceased Awachi Doreen for several hours. On 27/10/2010, the accused further engaged in a fight with the deceased causing her serious bodily harm. On 28/10/2010, the deceased was rushed to a near-by clinic, and then taken to Mulago two days later where she passed away as a result of the injuries caused by the accused. The accused pleaded not guilty on the charges of murder when arraigned before court.

It was held that the prosecution had ably proved all the elements of murder to wit, the victim died, the death was unlawful, there was malice aforethought by the accused and that the accused directly or indirectly caused the death. The accused was sentenced to 30years' imprisonment. Reasons for the sentence:

- Offences of domestic violence are on the increase, particularly violence against women. Domestic violence distorts family values in a society and affects the proper upbringing of children in a home.
- There is nothing normal about the brutal assault of one's wife.
- In the circumstances of the case, though the convict has children, the court would rather direct the Government through the Ministry of Gender, Labour and social development to look after them.

Uganda v Namboira (Criminal Session Case No. 32 of 2011) [2011] UGHCCRD 57

The deceased was co-wife to the deceased .The evidence available and all the circumstances surrounding the case indicate that the accused was upset as a result of her husband marrying a younger wife and providing for her using her hard earned proceeds from the sale of her crops. Her garden was also divided and the ploughed portion was given to the deceased. It was settled by both prosecution and defence that there was a death, that death was unlawful. However, defence relied on the defence of provocation, arguing that it was the accused who started the fight. In a charge and caution statement to the police, the accused admitted to have cut the deceased with a hoe upon being provoked by the deceased. It was held that the Prosecution failed to rebut the defence of provocation. Therefore, the accused did not commit the homicide with malice aforethought. Court accordingly acquitted the accused of the office of murder and convicted her of manslaughter c/s 187 of the Penal Code Act. The accused was sentenced to 2 years' imprisonment. The reason for the sentence was that there was no malice aforethought and the accused has been on remand for three years. In addition, the accused has a young family of five. The court also made the following statement:

'Court would like to send out a message that domestic violence is never justified under any circumstances and people ought to learn to settle disputes amicably. The accused ought to have used the experience of her age and found better means to discipline her co-wife.'

Uganda High Court Defilement Cases

Uganda V Ogam Iddi (Crim. Case No. 26 of 2009) [2009] UGHC 197

The accused person OGAM IDDI was indicted with aggravated defilement contrary to section 129 (3) of the penal code Act. It was alleged in the particulars of the offence that on 17th April 2008, the accused person had unlawful sexual intercourse with WIAJIK JENETY a girl of 13 years of age. That this offence was committed at Nenkuwengi village in Nebbi District. The brief facts of the case were that WIAJIK JENETY went to Nenkwengi where she watched a video show up to about 10.00 pm when she started returning home. After moving for about 500 meters from the video hall she was forcefully engaged into a sexual intercourse in addition to being assaulted by the assailant. This attack was about 100 meters from her home. She reported the matter to her parents the next morning, alleging OGAM IDDI, the neighbour in the village, was the culprit who assaulted her and defiled her.

Court considered the period of 1 year and 4 months the accused had spent on remand as well as the criminal rate of defilement in this country, which is so alarming and threatens destruction of decent upbringing of the girl child, the mother of tomorrow for this country who must be protected by the law. "The best way to do it is to keep each proven defiler out of circulation and under institutional reforms long enough before return to society. There is also need to punish the defilers sufficiently for this grave crime and considering the above, I find 15 (Fifteen) years imprisonment adequate for this purpose and he is accordingly sentenced."

Uganda V Okar both Jenesio (Crim Case No 56 Of 2008) [2009] UGHC 195

The accused person, Okarboth Jenesio, 40 years old is indicted for Aggravated defilement contrary to sections 129 (3) of the penal code Act. It is alleged in the particulars of the offence that on the 25th day of July 2007, at Afero village, in Nebbi District, the accused had unlawful sexual intercourse with BIRWINYU MANUELA a girl aged 11 which is under the age of 14 years. The accused was her brother and was also staying in the same home with her. The accused was mentally ill. In mitigation, the accused stated that he was 41 years old, married with six children. First offender. Has been on remand for about 2 years and 8 days. Court however was of the view that *"This is a serious offence, the circumstances be taken into account. He appears repentant. He prays for the court to be lenient. The convict is a first offender who has spent 2 years and 8 days on remand. He is a relative of the victim who was mentally sick and therefore deserved protection of adults including the accused person. Contrary to this expectation, the convict abused and exploited this child of tender age sexually. This Court appreciates that the purpose of the Law is to protect these weak, defenseless children against the brutal and heartless adults of this kind. This objective will be achieved by keeping such culprits out of circulation long enough to teach them a good lesson and to reform."* 17 (Seventeen) years imprisonment imposed.

Uganda v Katsigaire Apollo (HCT ((HCT) [2009] UGHC 124

The accused person KASIGAIRE APOLLO was indicted for Defilement contrary to Section 129 (1) of the Penal Code Act. It is alleged that on the 28th day of October, 2005 at Rwesigiri Village in Rukungiri District he had unlawful sexual intercourse with KYARITUHA MERABU a girl under 18 years of age..The substance of the prosecution case against him was that the victim was at the time of defilement three years old; that on 28/10/2005 the accused called her to his house to pick a pawpaw and while in the house had sexual intercourse with her.
That later in the day, around 4:00pm, the mother of the victim found her in pain and on asking her she disclosed that the accused had forced her into sex. The matter is said to have been reported to the area chairman before whom the accused admitted the offence. The accused prayed for leniency because he was a family man. However, Court noted that the nature of the offence he committed was grave. A man with such family responsibility should not be the one to indulge in acts of sexual intercourse with toddlers. He cannot be seen to be one concerned with own children when he is a danger to those of others. Nonetheless as he had been on remand for 4 years, a sentence of five (5) years was imposed.

Uganda V Lodu Eneriko (Crim. Case No. 0014 Of 2009) [2009] UGHC 193

The victim testified that the accused grabbed her and defiled her when she had gone to the accused person's house to fetch fire. She stated it was at 1.00 pm; the accused removed his shorts, pulled her clothes up, pulled out her underpants and proceeded to have sexual intercourse with her. After the act she went home crying, she found nobody at home and did not tell anybody. By the time she told her mother, the mother had been informed by the neighbor.
Court considered the period of 1 year the accused has spent on remand. "I have considered that he is 53 years old and appears to be sickly. However the offence committed is so grave considering that the victim was such a young girl. He deprived her of her innocence with brutality in broad day light. This offence is so common in this region and the offenders deserve punishment.This court has a duty to give a sentence that will teach the accused person a lesson and also to be a warning to others intending or potential defilers to take heed. I am unable to

forgive the convict as he pleads because of the above. I do hereby sentence the accused person to fifteen (15) years Imprisonment."

Uganda v Musana (CR. SESSION NO. 0011/2011) [2011] UGHC 102

The accused, Musana Luka was indicted for Aggravated Defilement contrary to section 129 (3) and 4 (a) of the Penal Code Act. The particulars were that Musana Luka, between the 19th and 23rd day of June, 2010 at Kichinjaji in Soroti district, performed a sexual act with Idiangu Catherine, a girl aged 13 years. The accused pleaded not guilty to the indictment.
The prosecution case was that the accused tricked the victim and lured her to his home, a camp at Moruapesur within Soroti district where he had sexual intercourse with her several times till she became pregnant. The judge said: " The convict introduced sexual intercourse to an underage girl of Primary five, making her pregnant. This was not only a breach of the law, but it under mines the government policy of promoting gender equity and empowerment of the girl child through equal opportunities to education. Ugandan society is sick and tired of adult men who seek sexual gratification from children as if the world is coming to an end."

Uganda Vs Bwire Moses (HCT-04-CR-SC-56-2010) [2011] UGHC 45

The accused was indicted for aggravated defilement contrary to sections 129 (3) and 4(a) of the Penal Code Act. Particulars allege that the accused on 6th June 2009 at Busulubi village, Masaba Sub-county, Busia District unlawfully performed a sexual act on Nasabu Watali a girl aged 13 years. According to the victim PW.1 Nasabu Watali, her mother left her at home with her siblings. She had gone to Tororo to sale second hand clothes. While at home, one Namulundu and Omukaga came to her on a bicycle. Namulundu told her that she wanted her to go and pick certain things on Jinja road in Busia. PW.1 was carried on a bicycle to Jinja road. At Jinja road, PW.1 was put on a motorcycle and taken to an unknown place. She later came to know the place as Busulubi village. That they arrived at Busulubi at around 4:00p.m and she was made to enter one of the houses in the compound. The compound had four houses and there were people around. PW.1 further testified that while in the house, the accused that she knew before came and found her there. He removed her clothes and his clothes and "did bad things to her in the down part," (He had sex with her), after removing her pants as well. When she tried to refuse, the accused slapped her. That he repeated the sexual act in the night at around 9:00p.m. She felt a lot of pain.
In sentencing the accused, the court took into account the long period of remand for the accused. "Considering the circumstances of this case, I will sentence the convict to 7 years imprisonment. I will consider the respective submission by both learned counsel. The convict did not waste time. I will consider that the convict committed a grave offence where he abused a little girl of 13 years after circumstances akin to abduction. I will consider the objects of sentence and the trend now that death sentences are awarded in extreme cases. I will not award such sentence. I will consider the time spent on remand and add on a sentence of 7 years imprisonment."

Uganda V Turanzomwe (CRIMINAL CASE KAB-00-CR-CSC-237 OF 2009) [2011] UGHC 56

On 1st December, 2008 at about 8:00 pm the victim/ survivor met the Accused and Muhumuza, they forcefully had sexual intercourse with her. She was able to see them because there was a moon light. They kept with her until 10:00 pm, she ran home as she made alarm, they were chasing her and they stopped about 20 to 30 metres away from her. He confirmed that the

complainant and her father knew the Accused person and their homes are separated by a valley, therefore they knew each other very well. Accused, victim was 14 years old. The Court observed: "The offence of defilement is rampant and a threat to the future mothers of this country. The offence was committed with impunity, the Accused defiled the girl with another criminal not tried, and it would have been light if it was the Accused person alone that would suggest human weakness and temptation but group defilement is a clear action of criminals who did not care about the damage caused to the victim. In view of this I will only be lenient in that I will not sentence him to death or life imprisonment with a hope that he will reform in the period for which I sentence him. The Accused is sentenced to 8 years imprisonment."

Uganda V. Candia Akim (Crim. Case No 0013 Of 2009) [2009] UGHC 192

The accused testified that she is 9 years old in primary one class. That when her mother had gone somewhere, that the accused person took her from the sitting room to the bed room and started doing to her what she called bad manners. On the night of 11th May 2008 she had a quarrel with the accused who was her husband which forced her to sleep out of the family house, leaving the victim and other young children in the house where the accused slept. The following morning, when she returned home she was informed by the victim that the accused had defiled her. Court said: "I have considered the submissions of both the state and defence Advocates. I have considered the fact that the accused has spent 1 year and 3 months on remand. However, there is nothing to show that he is remorseful for what he did. He was a person left in custody of children including the victim who was a step-daughter. He had a duty to protect the children. He abused the victim sexually, prematurely ending her purity. Not only does this violet the provisions of the Law it also offends the right of the child to being protected. I am unable to be more lenient than to sentence the accused person to 17 (seventeen) years Imprisonment. He is sentenced to 17 years in prison."

Uganda Vs. Anguyo Festo alias Opio (C rim. Session Case No 34 Of 2008) ((C rim. Session Case No 34 Of 2008)) [2008] UGHC 144 (13 October 2008);

The brief facts of the case are that all the material time the victim aged 13 years and the Accused person aged about 20 years are neighbours in the village and well known to each other. The Accused pulled the victim, on one occasion, into his house and had sexual intercourse with her. He repeated it on several occasion in his house. On the third occasion he had sexual intercourse with the victim in the bush where she had gone to collect firewood. The victim testified that she knows the Accused person as Opio, he lives in her village. The Accused is a first offender who has spent I year and 16 days on remand. The Accused person infected the victim with STD capable of ruining her Reproductive system. Defense prayed for leniency because the accused had no previous criminal record, was 19 years old and capable of reforming. Court:
"I have considered the submissions above and I have found the Accused needs a sentence that will allow him enough time to reform. I do hereby sentence him to 15 years imprisonment."

Uganda v Niwagaba Stanley (HCT-05-CR-SC-140 of 2005)

The background facts of the case were that on 2/12/2002 at 6.00p.m. at Rwerere village in Kanungu District, Nyirikiza Grace hereinafter referred to as the victim then aged 13 years was sent to inform a relative about her uncle's death. The victim went following the accused that was well known to her and heading to the same direction. The accused pretended as if he was going to urinate. When the victim reached where he was, the accused grabbed her and took her to a nearby bush and forcefully had sexual intercourse with her whereupon she felt a lot of pain. After the sexual intercourse the victim ran back home while crying and informed her aunt,

Aidah Tumukirize. The matter was reported to the local council chairman who forwarded it to the police post whereupon the accused was arrested and charged accordingly. The victim was medically examined and found to have signs of penetration. Moreover the accused was very well known to the victim who was his relative. At the time of this offence the convict was 20 years according to medical evidence while the victim was 13 years old. The court said "The circumstances under which the offence was committed were grave. The convict ambushed the victim in a lonely place whereby he could have done anything with her after ravishing her.
For the above reasons this court will take a very serious view of the offence. The same stigma will also translate to the victim because it is abominable to have sexual intercourse with a relative. This court will take consideration of the fact that the accused is still young. He should be given a chance to reform and live a useful life. For that matter he is sentenced to eight (8) years Imprisonment. The sentence takes consideration that he has been in custody since 2002 otherwise he should have deserved 12 years imprisonment."

Uganda v Ayebare (HCT-11-CSC-122 OF 2011)

The above named Accused person is indicted for Aggravated Defilement contrary to Section 129 (3) and (4) (d) of The Penal Code Act. It is alleged that Ayebare Bangye Moses, on 14 th May, 2009, at Rubuguri Kashija Village, Rubuguri Parish, Kisoro District un lawfully performed a sexual act with Kyasiimire Fortunate a girl aged 16 years knowing that she was mentally retarded. The victim PW 5 KYASIIMIRE FORTUNATE gave evidence not on oath owing to her mental retardation. She was able to clearly describe the events of the night she went to the Accused person's house. She found the Accused in his house alone and he closed her in the house and put her on the bed and went on top of her. He told her he would give her money and he gave her 500/= after sexual intercourse. Completely mentally ill when she was in primary three and since then she is mentally on and off and under medical treatment as a person living with mental disability. The Accused person and the family of the complainant lived closely almost in the same compound and he knew that this girl was mentally retarded or unstable.
In sentencing, the court observed: "The Accused/convicted person is a well-educated man who should have been a guide to his society away from living a criminal lifestyle. He defiled a child who due to mental retardation. Considering that the maximum sentence provided is death, I will be lenient and give him another chance. He will serve 14 years imprisonment to give him time to reflect on his action and reform before he returns to society.

Uganda v Kigoye (HCT- 06-CR) [2013] UGHCCRD 25

The brief facts of the case were that in January, 2013 the victim along with other children went to collect firewood. On the way they met the accused who isolated the children. He took the victim further away from the other child she was with. 12 years old. When they reached a secluded place in the forest he ordered the victim to undress and proceeded to have sexual intercourse with her. The sexual act caused the victim to cry out in pain and the dog she was with started barking. When her colleague Kamoga Jovan Ntale responded to her alarm, he found the accused lying on top of the victim and her knickers hanged on a stick. Court said: "The offence with which he was convicted has become rampant in the community and the convict violated the bodily integrity and decency of the victim who isn't only a child in need of protection from him but she is also a vulnerable child being mentally handicapped
In view of the above, court sentences him to 24 years in jail."

Uganda v Ocitti (HCT-02-CR-SC-0149-2014) [2015] UGHCCRD 2

The brief summary of the case is that the accused was staying in the home of Akumu Filda as her patient. Akumu is a traditional herbalist. On 7th October 2013, the accused spent a night in one hut with the victims after it rained and he took advantage of that and defiled the girls at night. That he threatened to knock them with a motor cycle if they revealed to their mother or any one. On that night one of the victims screamed but when the mother came in she did not say a word, but found the accused standing by her bed claiming he had just escorted them out to urinate. In sentencing, the court made the following observations:

The offence of aggravated defilement is punishable by death as the maximum penalty.
The Sentencing Guidelines however set 35 years as the starting point whereby the court may decide sentence the convict either below or above 35 years depending on the mitigating or aggravating factors.
The Resident State Attorney submitted defiling two young children in the range of 5 – to 9 years was. To acts of terrorism and prayed for the maximum penalty but in case court does not give the maximum, he prayed for 50 years on each court to be served consecutively.
The parents of the victims were also consulted on the kind of punishment that was deserving. The mother proposed 20 years for each while the father proposed 35 years.
The difference in age if it be small is a mitigating factor. In the case the victims were aged 5 and 9 years while the convict was 22 years.
The age difference aggravates the offence the convict had also lived in be home for some time much as he was a patient. The mother of the victims trusted him with the victims that night. This further aggravated the offence.
The offence of aggravated defilement is also prevalent in Acholi Sub Region compared to the other crimes of capital nature. It is tapping the cause list. Court has tried to look for mitigating factors but have not found any.
The convict has remained adamant that he did not commit the offence. He is therefore not remorseful at all.

He insisted it is the court that has decided he is guilty. The convict's conduct is vicious. He ruthlessly ravaged a small child of 9 years and used his finger on her sister of 5 years. He took advantage of a single night to sexually terrorize the two little girls and then threatened them not to reveal their ordeal to anyone. Having sexual intercourse with very young children is sexual perversion of its kind. In court's opinion, the convict is too noxious to be left in society.
However being a first offender and young man of 23 years old, I will not give him the maximum sentence. I would have given a reformative punishment, but the convict was not remorseful at all. He did not plead for mercy as a person who made errors and accepted his mistake. This leaves me with the sentence which will be deterrent and punitive. Much as he claimed to have children, his deprived conduct doesn't make him a good father. The children are better off without him. In the result, he is ordered to serve 25 years in prison on each count and since he defiled the first victim and turned to the second victim much as it was in one night, the sentences are to run consecutively. The period spent on remand is inclusive.

Uganda v Kasadha (CRIMINAL SESSION NO. 005 OF 2011) [2011] UGHCCRD 72 (12 November 2013);

The Accused is alleged to have committed the offence on 29/6/2010 at Bugugwa LC.I Kagawa Parish in Kamuli District when he performed a sexual act on Nangobi Jovia a girl aged 1 ½

years. The prosecution relied on PW1 the mother of the victim who testified that when she was at her home, at around 1.00pm -2.00pm, she took one of her children into her premises to sleep. When she came out she found the victim missing and asked the Accused who was in his room next door whether the said victim was in his room to which he answered in the affirmative.
She picked the child from the Accused's room who she found lying on the accused's bed. When she placed the child on her bed the child's skirt rolled up and that is when she saw semen in the girl's private parts. She confronted the Accused and according to her he asked for forgiveness. She locked the Accused in his room and made an alarm. He was arrested by those who responded.

Sentencing
The court has taken into account the period of remand, the age of the victim and that of the accused.
He is a young man who has a long productive age ahead of him. However, the victim is so young that there is no excuse for the accused to have been tempted into what he did.
The maximum sentence for this offence is 12 years. However, I find a term of 12 years appropriate in the circumstances.

Uganda v Twinomasiko (HCT-11- CR-CSC-134-2011) [2012] UGHC 247

Three children strayed away and the younger two returned without the victim. They informed the mother that Sarah had remained with Obed, the accused. She became suspicious, she ran to Obed's house which was partly locked and closed from inside. She called and banged the door. The Accused person opened the door and the girl came out while crying. She examined her private parts and found them bleeding. She told her Obed had sexual intercourse with her

Court: "Defilement is alarmingly high in this region and the Country as a whole. I do not find it a mitigating fact that the Accused person was married and had a child, in my mind; I use this against him because as a parent he should have had respect of the girl child his victim. Children of this country are entitled to protect against all forms of violence and sexual exploitation is the worst violence against the children. This court has a duty to contribute to the effort of protection of children against Criminal perverts of this nature by keeping them away from the villages and streets to allow the children to grow without being traumatized. For the above reasons I do hereby sentence the Accused person to (17) Seventeen years imprisonment."

RAPE

Uganda v Yiga Hamidu and Four Others High Court Criminal Session Case 0055 of 2002[25]

Defendant Yiga Hamidu was indicted on charges that he had hired two men to abduct a woman in his village and had subsequently raped her. The defendant denied the charges, raising the defense of mistake of fact or honest belief under section 9(1) of the Penal Code. He argued that he had honestly believed that the complainant was his wife because he had paid a dowry to her parents and a customary marriage had been sealed. He further submitted that under Ugandan laws, a husband cannot rape his own wife. The complainant, Nassuna Rehema, argued that she

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[25] From Jurisprudence of Equality Case database, http://www.iawj.org/JEPcases.html

had broken her engagement to Hamidu when she learned that his prior wife had died, apparently of AIDS, and had stipulated that they should each be tested for HIV before marrying. She argued that she had not consented to sexual intercourse but that the defendant had locked her in his room and forced himself on her while her two abductors held her down on the floor.

Judge V. F. Kibuuka found no evidence that a marriage had taken place in accordance with the parties' Islamic faith. Moreover, the evidence demonstrated that the complainant never consented to sexual intercourse. Judge Kibuuka stated that even if the couple had been customarily married, the facts and circumstances of the case would render the defendant guilty of rape. He noted that the provision of the penal code that deals with rape does not make an exception for married persons, and observed that some other jurisdictions have expressly constituted the offense of marital rape to counter the out-dated presumption of consent during marriage. The judge stated that the existence of a valid marriage or honest belief of a valid marriage is no longer a good defense of rape in Uganda in light of the Constitution of 1995, which provides for equal rights in marriage and full and equal dignity of the person. These provisions, he explained, exclude the operation of section 9(1) of the Penal Code to the situation in this case. Finding that the complainant was treated as a "mere sexual instrumentality" and that her "human dignity was trumpled upon significantly," Judge Kibuuka rejected the defendant's defense and convicted him of rape.

Uganda v Okiring (HCT-04-CR-SC-0080-2008) [2011] UGHC 43

The case for the prosecution was that the complainant (PW.I) Asio Jane was travelling from Pallisa Town to Katuke village. She was riding a bicycle laden with a sack of maize. Unfortunate to her, the sack of maize fell off the bicycle. At the scene of the mini-accident was the accused Okiring James and two of his colleagues one of whom was called Yobuthe other was Eseuna. The two offered to help. After that, the accused and others followed her. It would appear the accused developed ideas about the complainant. All of a sudden he held her hand backwards. Yobu kicked her legs and she fell down backwards. The accused called upon Yobu to assist because he complained PW.1 was strong. The accused removed his shorts, sat on her stomach, removed his penis and pushed it “into her” and forced her into sex. All this happened with the assistance of Yobu. As the accused played sex Yobu was holding her legs.

The accused held her mouth so that she could not make noise. After the accused finished playing sex, Yobu did the same with the help of the accused. She knew him casually because she used to pass through his village.

The convict was a first offender; however, abusing the modesty of women is deplorable and amounts to violence against women which court must prevent. The offence of rape is therefore a serious one. I will consider that the accused has spent more than three years awaiting trial and has been waiting for his part heard case to be concluded for a year.

The convict is a young man capable of reform. He appears remorseful.

I will therefore sentence him to 18thmonth’s imprisonment in addition.

Uganda v Nguche (HC -06-CR-SC 130 OF 2012) [2014] UGHCCRD 42

The particulars of the offence are that Nguche Yoweri alias Mugisu on the night of 13th May, 2012 at Bugala in Kalangala district performed a sexual Act with Namaganda Agnes without her consent. On the 13th May, 2013, at around 2:00 am, the victim was at her home sleeping, the accused came, called her. He forced her door to open and after gaining entrance he went straight to her bed, after flashing his torch on her. She had her 'Tadoba' Kerosene lamp which he snuffed out after one minute. She tried to make an alarm, but he grabbed her by the mouth, and started slapping her. She weakened and he overpowered her, tore the skirt she was wearing and thereafter had forceful sexual intercourse with her for 40 minutes. Court was of the reasoning that the convict invaded the privacy of the victim and violated her bodily integrity and also exposed her to society stigmatization as a raped woman which stigma she has to live with for the rest of her life. Consequently court sentenced him to 28 years imprisonment and informed him of his right to appeal against the conviction and sentence.

Uganda Vs. Yebuga Magidu (Crim.Case No. 99 Of 2008) [2009] UGHC 196

The victim, a woman of 30 years of age, while asleep on 18th February 2008; was attacked in darkness by a man who had sexual intercourse with her without her consent. She woke up to find him already inside her having sexual intercourse. He had a panga and threatened to cut her neck and when she struggled to push the panga away from her neck it cut her finger. After one round of sexual intercourse she managed to disengage herself, ran out of the house which was in darkness, she locked the attacker inside the house went outside to make alarm. The attacker cut the door with a panga and got out while the victim was making alarm from outside near the door. With help of moonlight she was able to recognize the attacker as YEBUGA MAJID the uncle of her husband. In sentencing, the court said: "The accused had been on remand slightly over 1 year. He committed the offence with brutality; he threatened the victim with a deadly weapon. He cut her finger. He was violent; he cut the door of the house. He raped a wife of his own Nephew for which he does not seem to regret. He shows no remorse at all, all he wants is lenience. Sentence is 15 years."

Uganda v Akankwasa & Anor (HCT-11 -CSC-NO. 14 OF 2011 KAB-00-CR-CSC-AA NO. 240/2009) [2012] UGHCCRD 3

In this case the vagina of the victim had bruises. She had gross vulva injury and the hymen was torn and she was still bleeding. The doctor's report made in Police Form PF 3 was admitted as prosecution exhibit P.1. NYIRAHABIMANA testified as PW 3. She testified that at about 12:00 noon she met A1 and A2 on the way to a market at Katuna. A1 pretended to have dropped money and A2 who was following her told her to pick it which she did not do. He picked it and held her arm deceiving her they were going to share the money off the road, A2 followed them demanding for the money as she tried to get away, A1 held her, and A2 helped A1 to remove her knickers, covered her mouth to stop her from making alarm and they had forced sexual intercourse with her in turns. She remembered that A1 raped her first and A2 raped her next. The process took about 2 hours. They left her crying. She was bleeding.

Court considered the period of three years and ten months the convicts are said to have spent on remand. However the offence of gang rape is cruel and most condemnable. The two men, with impunity raped a young girl whom they left both physically and psychologically shattered to the extent that she was left bleeding excessively and traumatized to extent of attempting to end her life by drowning in the river. These factors point to the manner the offence was committed which this court has considered seriously. The convicts deserve to be kept away long enough to protect society and to have them regret the grave criminal Acts they committed with impunity. Accused persons sentenced to (14) fourteen years imprisonment.

Uganda V Candia Charles (Crim. Sess. Case No. 35 of 2008) [2008] UGHC 145

The brief facts of the case are that on 3rd October 2007, the accused person and the complainant spent time drinking KASESE, a local crude waragi up to about 7.00 or 8.00 pm when the complainant left the drinking place known as AJIA YAKOBO'S BAR. On her way home the complainant was attacked from behind and the attacker had sexual intercourse with her. Complainant was 36 years of age.

The offence of rape is a very humiliating, immoral offence that threatens the institution of a family. This forceful and unprotected sexual intercourse is a menace which is partly contributing to the spread of deadly sexually transmitted diseases. The law was intended to protect women who are helpless in course of forceful sexual intercourse. The maximum sentence prescribed serves a purpose of punishment and sending a warning to the others, in view of the above. 10 years imprisonment accorded.

Uganda v Tumwesigye ziraba (CRIMINAL CASE NO. 092OF 2011) [2011] UGHCCRD 81

The prosecution contended that on 15/10/2010 at about midnight, Nalumansi Mary was sleeping in her house when she was awakened by some noise. She got her torch which she switched on and it flashed directly on to the Accused. The Accused hit the torch which fell down, and then he forcefully had sexual intercourse with her, without her consent. She reported the matter to the authorities and the Accused was arrested and charged with the offence of Rape.

She stated that the assailant hit the torch and it fell down but the flash enabled her to identify the accused, who she knew as Sigwa – son of the LC.I chairperson. She had known the Accused for about 3 months.The victim was a widow mourning her husband and was old enough to be his mother. The accused was unremorseful. Court held that Rape is a demeaning act as against the victim who will be traumatized the rest of her life. The circumstances the offence was committed are also so bad that the children who saw the victim being raped will remain traumatized. The convict is a young man who can get consensual sex without attacking helpless old women. He has been on remand for 3 years. A sentence of 12 years imprisonment imposed.

Uganda v Tibagwa (CRIMINAL CASE NO. 0004 OF 2011) [2013] UGHCCRD 41

The accused bought mangoes from her at Kiina Landing Site and requested her to take the mangoes to his home nearby, which he pointed out to her. She obliged. The accused walked behind her. On reaching the house, she entered the house, the door was open. As she put the

mangoes down, the accused quickly entered the house, closed the door and pulled her into his bedroom and raped her.

Justice Ralph Ochan ruled "Refugees, especially female refugees are particularly vulnerable to sexual exploits of various types and degrees. They have no voice in the camps in which they live. I take this opportunity to call for special protection for this extremely vulnerable group. The convict is a typical example of sexual predators that prey upon refugee women in the camps. I sentence him to 5 years imprisonment"

Uganda v Balikamanya (CRIMINAL CASE NO. 025 OF 2012) [2012] UGHCCRD 04 The Accused, Balikamanya Patrick, was indicted for Rape C/S 123 & 124 of the Penal Code Act. The particulars were that the accused on the 18th day of May, 2012 at Nakiwogo Trading Centre in Entebbe Municipality, in Wakiso District, had unlawful Sexual Intercourse with Nakiganda Sheila without her consent. The court said:

"The offence of rape is a very serious offence. It demeans the character of women in society and the perpetrator is gender insensitive. It carries a maximum penalty of death and in most instances; Court sentences such convicts to life imprisonment. The other factor is being a serving UPDF Officer, which army is renowned for its high level of discipline, Courts will not allow such few Officers to spoil the name. Nevertheless, Court will take into a Count the fact that convict is a first offender. 7 years imprisonment imposed."

UNSUCCESSFUL APPEALS

Silagi Buroro Gordon v Uganda ((Cr.Appeal NO.122 Of 2005)) [2010] UGCA 42

The appellant was a casual labourer employed by Natukunda Jacquiline, P.W.I, the mother of Ampire Sheila the victim, a girl of 2 years at the time of the commission of the offence. On the 13.04.2001 at about 10.am the victim who was in the area of P.W.I's canteen near its kitchen came from the direction of the kitchen where the appellant was doing some operation work. The victim came crying calling out her mother and saying that the appellant had molested her. She was also touching her private parts. P.W.I decided to examine the private parts of the victim where they found semen. When the victim was shortly afterwards examined a Doctor,she was found to have a freshly ruptured hymen.
The appellant was arrested and subsequently charged with defilement contrary to s.129 (1) of the Penal Code Act. He denied having committed the offence. The learned trial judge disbelieved and convicted him as charged and sentenced him to 15 years imprisonment, hence this appeal. The Court of Appeal (CA) said:
"In the appeal, we find no cause to interfere with the trial courts' discretion in sentencing the appellant. The judge acted properly in sentencing the appellant to 15 years imprisonment. The court was of the view that where aggravating circumstances have been considered vis a vis mitigating factors, there would be no reason to entertain alterations."

Weitire Asanasio V Uganda ((Crim. Case No. 46 of 2006)) [2010] UGCA 47

The appellant was convicted of two counts of defilement C/s 123(1) of the Penal Code Act. He was sentenced to 12 years on each of the counts to run concurrently. The victims were each aged 10 years. The appellant himself was aged 63 years old. The offence of defilement is a very

serious offence. It carries with it a penalty of death. This particular offence is actually aggravated defilement in that both victims were under 14 years old.
The court in its ruling said that the appellant defiled two defenseless children in a very cruel and most barbaric manner. He would tie one on a tree while defiling the other. Thereafter, he would tie on a tree the defiled girl and tie on a tree the one defiled while defiling the other. To us a person of the age of 63 who conducts himself in such a manner is not even fit to be called an animal because no animal has ever committed such an offence in such a manner. He is not fit to return to the society where he is still capable of doing the same thing to other young girls. We condemn this sort of behavior in the strongest terms and we think that since the appellant is receiving free medical care from the State, he should stay in custody for much longer in order to protect the young girls growing up in the village where he grew up. We feel that in the circumstances that a sentence of 12 years was too lenient. We hereby quash the sentences and substitute a sentence of life imprisonment on each count to run concurrently.

Bazirake v Uganda (CRIMINAL APPEAL NO. 73 OF 2009) [2014] UGCA 48

The appellant BAZIRAKE JOHN was tried by the High Court sitting at Fort Portal for the offence of Defilement C/S 123(1) of the Penal Code Act. It was alleged that he had had sexual intercourse with ABIGABA JOVENTA a girl under the age of 18 years. Her actual age was five years at the time he was alleged to have defiled her. At the conclusion of the trial he was convicted of the offence as indicted and sentenced to thirteen years imprisonment. He appealed against the conviction and sentence. At the hearing of the appeal Mr. Cosma Kateeba learned Counsel for the appellant, on the instructions of the appellant, abandoned all the grounds related to the conviction of the appellant. He applied to Court and was granted leave to argue the ground related to the sentence which in his submission was harsh and excessive. He submitted that Court had not taken into account the circumstances of the appellant who was aged 27 years at the time of the commission of offence and a long custodial sentence would adversely impact on his life.Court declined the prayer sought and was also of the view that the fact that the appellant has a wife and child is not a mitigating factor in a case of defilement of a five year old child because he was expected to treat the victim as his own child rather than 'shatter her innocence'. The sentence was meant to send out a clear message to persons of the appellant's ilk that no mercy will be shown to adults who defile girls as young as five years or below and we see no reason for interfering with it.

Magezi Robert Vs Uganda (Crim. Case No. 71 of 2006) [2010] UGCA 46 (10 November 2010)

The appellant at the time of the offence was mentally ill the state confirmed this fact on page 3 R/A when it stated that he was undergoing mental treatment. In his allocutus, the appellant said he had a recurring mental problem. He said it occurs during the presence of many people. The sentence of 18 years was excessive
The victim was a very young child aged only three years old. The fact that the appellant was aged 25 years is not a mitigating factor. He is expected at that age to know the difference between right and wrong. However, the record is not entirely clear on the mental status of the appellant at the time the offence was committed. Though the doctors say his mental status was normal, it is also true that he was undergoing some form of mental treatment at the time of the offence. We considered the possibility of enhancing the sentence but we have finally discounted it and a benefit of doubt in his favor of the accused on account of his mental status.
All in all, we hold that offences against children have become a menace in this country and this court must send the correct signal to the community that it will not be tolerated. The sentence of 18 years therefore must stand.

Lubanga v Uganda (CRIMINAL APPEAL NO. 124 OF 2009) [2014] UGCA 9

This is an appeal from the Judgment of His Lordship Joseph Murangira J in High Court Nakawa Criminal Session Case No. 414 of 2005.
The appellant was indicted with the offence of aggravated defilement contrary to Section 129 (3) of the Penal Code. It is also noteworthy that the appellant had exposed the victim to HIV AIDS but also that he had been in remand for a period exceeding a year thus he sought to offset the sentence
At the trial the appellant pleaded guilty to the offence and was convicted accordingly. He was sentenced to 15 years imprisonment.
Article 23 (8) of the Constitution requires Courts of law to take into account the period a convicted person has spent in lawful custody before imposing the term of imprisonment. The Constitution does not require Courts to subtract the period the convict spends in lawful custody, but requires the Court simply to take that period into account. Taking into account does not mean an arithmetical exercise thus sentence maintained.

Kaserebanyi v Uganda (CRIMINAL APPEAL N0.040 OF 2006) [2014] UGCA 89

The background to this appeal is that the victim of the offence of defilement is a biological daughter of the appellant. Her mother and the appellant had divorced.

In 2004, he collected the victim from her mother's place and she started staying with him at his home. There were step children in the appellant's home. He started subjecting her to forceful sexual intercourse with threats to throw her out of the house at night and she gave in. She became pregnant.

The neighbors then noticed that the girl's shape had changed and they informed the mother about it. The victim's mother went to the school where the victim was studying and realized that she was pregnant. The girl was aged 15 years at the time.

Medical examination of the victim revealed that she was 15 years old with a ruptured hymen (4 months to exam) and a pregnancy of 16 weeks. Court thus sentenced him to life imprisonment.

The appellant in our view deserves a sentence that is serious and deterrent. We are of the view that the trial Judge was justified in imposing the sentence of life imprisonment that he did.

He is the biological father of the victim. He was 45 years old while the victim was 15 years old at the time of commission of the tipple offence. He committed the offence under threats and force. These are extremely aggravating factors. Aggravating circumstances too glaring to ignore.

Akampurira Samuel v Uganda (CRIMINAL APPEAL NO. 209 OF 2003) [2006] UGCA 12

The following is the background to the appeal. The victim was aged 14 years. On 16/4/2001 the appellant met the victim at Bukuya Trading Centre outside a bar. He convinced her to go with him. They went together and he defiled her. Some boys who had seen them informed the victim's parents. The appellant was arrested and readily admitted that he had defiled the victim. When the appellant appeared for trial before the High Court he pleaded guilty to the indictment that charged him with defilement contrary to section 129 (1) of the Penal Code Act. He was convicted and sentenced to 6 years imprisonment. He was a first offender and was sorry for what he had done.. Hence he sat for School Certificate Examination last year while in prison.

He has also learnt skills in counseling. She prayed for his immediate release or a reduction of the sentence to three years.

It was appreciated that the appellant has done some studies while in prison as the court has been informed by his counsel. However, that is no good reason for his immediate release. The appellant is supposed to learn something while in prison if he is capable of doing so. There is no good reason to interfere with the sentence of the trial judge. He took into account all relevant factors before passing the sentence and judiciously used his discretion to impose and sentence of imprisonment for 6 years. This appeal is accordingly dismissed for lack of merit.

SUCCESSFUL APPEALS

Otema V Uganda (Criminal Appeal No. 155 of 2008) [2015] UGCA 42

The appellant was convicted by the High Court of the offence rape contrary to section 123 and 124 of the Penal Code Act and sentenced to serve a period of 13 years imprisonment from the 26 November 2008 and was ordered to pay compensation of Shs.300,000.00 within 6 months from the date of sentence. The particulars of the offence were that the accused on the 13 September 2001 at Wao Village had unlawful sexual intercourse with A M without her consent. 'The victim, Adoch Mary, suffered harm physically and psychologically. A lot of force was exerted on her. She had to incur medical and other expenses for her treatment, medical examination and travel. The appellant now appeals, with the permission of this court, only against sentence on the ground that the sentence was harsh and manifestly excessive in the circumstances of this case.

In the instant case the appellant was a first offender. He had spent 7 years on remand prior to his trial and conviction. This was an inordinate delay in determining his fate. He was 36 years old at the time of the commission of offence. He committed a very serious offence whose maximum punishment is death. Nevertheless as a first offender he would not ordinarily face the maximum punishment of death.

Court of appeal was satisfied that a sentence of 7 years imprisonment from the date of conviction [26 November 2008] will meet the ends of justice in this case. We so order.

"We agree that the trial court had the authority to order compensation in the circumstances of this case but express our reservation in relation to the order that this money must be paid within six months. The accused or convict had been on remand for 7 years prior to sentence. No inquiry was made in relation to his circumstances to establish ability to pay the said sum in 6 months. The better approach in our view is to make the order for compensation and leave it to the court that may be called upon to order distress in respect of the same to consider all the necessary matters including the provisions of section 116 of the Trial on Indictment."

Naturinda Tamson v Uganda Criminal Appeal No. 13 of 2011

The appellant was convicted by the High Court on 16 December 2010 of the offences of rape, defilement and robbery together with another co accused. The particulars of the first count of rape were that the appellant together with a co accused on the 22nd December 2008 had unlawful carnal knowledge of one KH at Kyengyeze village in Lyatonde District. The appellant and his co accused were sentenced to 18 years imprisonment. The particulars of count 2 were

that the appellant on 22nd October 2008 had unlawful sexual intercourse with NJ, a girl under 18 years of age. The appellant and his co accused were sentenced to 18 years imprisonment on this count. The trial judge ordered the said two sentences to run concurrently.

Court was inclined to agree with counsel for the appellant that a sentence of 18 years imprisonment imposed on the appellant in respect of the offence of rape is manifestly harsh and excessive citing *Kalibobo Jackson v Uganda Criminal Appeal No. 45 of 2001.*

In the instant case the victim was 16 years old. A sentence of 18 years is out of range with sentences for this type of offence as evident from the cases of *Kabwiso Issa v Uganda Supreme Court Criminal Appeal No. 7 of 2002 and Bikanga Daniel v Uganda Court of Appeal Criminal Appeal No. 38 of 2000*

The appellant was a first offender. He had spent slightly over 2 years on remand prior to his trial and conviction. He was 29 years old, a relatively young man at the time of the commission of the offences. Nevertheless he committed a multiplicity of offences whose maximum sentence is the death penalty. Court was therefore satisfied and substituted a sentence of 10 years imprisonment from the date of conviction [16 December 2010] on the count of rape; 13 years imprisonment on the count of defilement.

Ninsiima v Uganda (CRIMINAL APPEAL NO. 0180 OF 2010) [2014] UGCA 65

The facts as found by the trial Judge were that on 23.11.09 10 at Ruhangire village, Kyegegwa District, the appellant defiled Matembe Miria, a girl aged 8 years. The mother of the victim, one Mwebaze Scovia was in the garden with the victim and also with Evaline Twikirize, wife to the appellant.

The appellant being aged 29 years, a first offender, having spent 3 years and 4 months on remand, a person with family responsibilities and with dependents to support, we find that a sentence of 15 years imprisonment is appropriate and is in line with sentences passed by Courts in previous cases having a resemblance to this one.

Accordingly court set aside the sentence of 30 years imprisonment imposed upon the appellant and substituted the same with the sentence of 15 years imprisonment to be served by the appellant as from the date of his conviction that is 05.09.2013.

Kawesi v Uganda (CRIMINAL APPEAL NUMBER 0228 OF 2009) [2014] UGCA 33

The brief facts of the case as found by the trial court were that on 10th December 2005 at Bugambakimu village in Nakaseke District, the appellant defiled a young girl aged 7 years.

The appellant denied the charges and decided to remain silent during the trial. He did not call any witness. The trial court convicted him of the offence of aggravated defilement C/S 129 (3) of the Penal Code Act and sentenced him to a prison term of 16 years.

The appeal was only against sentence and it was argued that a 16 year term was harsh and manifestly excessive. Article 23 (8) of the Constitution of Uganda which provides that:

Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

However after careful perusal of the original file, it was noted that whereas the appellant was arrested and remanded in prison on 17th December 2005, his trial did not commence until 2008 and he was sentenced on 30 October 2008. Consequently, as observed by his counsel, the appellant spent close to 2 years and 10 months on remand, court substituted the sentence of 16 years imprisonment to 15 years.

German Benjamin v Uganda (CRIMINAL APPEAL NO. 142 OF 2010) [2014] UGCA 63

The appellant was indicted for the offence of Defilement c/s 129(1) of the Penal Code Act. It was alleged that on the 19th day of November 2005 at Mukaru village, Kijogobya Parish, Mpara Sub County, Kyenjojo District he had unlawful sexual intercourse with Kamashazi Hope, a girl under the age of 18 years. The facts of the case, as accepted by the trial Judge, were that the victim of the Defilement, then aged five years, was left at home by her parents, and while they were away, the accused had sexual intercourse with her.

While this Court agreed with the trial Judge that the appellant deserved no mercy for defiling a five year old toddler, it fought that a sentence of twenty years on top of the four years and six months that the appellant had spent on remand to be manifestly excessive on a first offender. It should also be observed that Courts tend to lean more on the punitive element of sentencing and lose sight of one of the most crucial elements of sentencing which is rehabilitation of the offenders

In the circumstances the appeal against sentence was allowed, the sentence of 20 years is set aside and substituted with one of 15 (fifteen) years. Mitigating factor being the period on remand.

Friday Yasin v Uganda (Criminal Appeal No. 16 of 2012) [2014] UGCA 54

The facts of the case are; On the 21 August 2005 the mother of the victim sent her to buy paraffin at a nearby trading centre. This was at about 6.00pm. The victim was 4 years old at the time. The appellant found her walking to the trading centre. The appellant carried the victim from the road into a nearby field of elephant grass and had sexual intercourse with her. They then continued to the trading centre. He cautioned her from revealing what had taken place and promised to buy her bread.

In the meantime the mother of the victim was worried as the victim had taken too long without returning. She went to the nearby trading centre and found the victim in Mukuru's shop. The appellant was also present. The mother and victim went home where the victim revealed what had happened to her. The mother made a report to the local council chairman and the appellant was arrested. The appellant was then charged with the offence of defilement and successfully prosecuted. He was sentenced to 19 years imprisonment.

It appears to us that the learned trial judge was intent on the retributive nature of punishment to the exclusion of other objectives of punishment like the possible reformative effect of the punishment on the offender. This was a very young man who in effect received a sentence of life imprisonment without being fully credited with the almost 5 years he had spent in pre-trial

detention much as the judge said he had taken it into account. In the instant case the appellant was a first offender. He had spent almost 5 years on remand prior to his trial and conviction. He was 19 years old, a very young man at the time of the commission of offence. Nevertheless he committed a very serious offence whose victim was only 4 years old.

Court was satisfied that a sentence of 15 years imprisonment from the date of conviction [24 June 2010] would meet the ends of justice in this case thus set aside the 19 years.

Mubogi v Uganda (CRIMINAL APPEAL NO.20 OF 2006) [2014] UGCA 40

This appeal arises out of the Judgment of the High Court of Uganda at Mbale, of J.B A Katutsi J, dated 6th June 2006 in which the appellant was convicted of the offence of rape and sentenced to 18 years imprisonment.

It was noted by the court of appeal that clearly, the learned judge did not specifically mention or even allude to the period the appellant had spent on remand when passing sentence. The appellant had spent one year and one month on remand a fact that had been brought to the attention of the learned judge by the prosecution.

Having set aside the sentence, court went on to impose a sentence considered appropriate taking into account all the facts and circumstances of this case. In doing so it invoked Section 11 of the Judicature Act (Cap 13)

In this case the appellant was convicted of rape, a serious offence that carries a maximum sentence of death.

At the time of the commission of the offence, the appellant was 27 years old. He is a young man capable of reform; he had been on remand for a period of one year and one month prior to his conviction. He had no previous criminal record.

The reasoning of the court was that "Rape is a serious offence that has serious consequences on the victim and society in general. A deterrent sentence would send a strong signal to any would be offender. Taking into account all the above especially the period the appellant had spent on remand before conviction, we sentence him to 17 years imprisonment from the date of conviction."

Mutumba William v Uganda (Criminal Appeal No. 08 of 2008) [2011] UGSC 14

This was a Supreme Court case. The appellant, Matumbwe William, was tried and convicted by the High Court at Mbale (F.Mwondha, J) on an indictment for the offence of defilement contrary to section 123(1) of the Penal Code. He was sentenced to life imprisonment. He appealed to the Court of Appeal which overturned the conviction for defilement on grounds that there was no evidence of sexual penetration of the victim, and, instead convicted the appellant of the lesser offence of attempted defilement contrary to section 123(2). The Court of Appeal set aside the sentence of life imprisonment and substituted therefore a sentence of 15 years imprisonment. The facts giving rise to this case are well stated in the judgment of the

Court of Appeal. They are that on 10th November 1999, at Morotome village, Kabwangasi sub-county in Pallisa District the accused was alleged to have defiled one Barbra Amacu, a minor aged 6 years at the time. The mother of the victim, one Jane Kalepo (PW2) testified that she left her daughter at home taking care of a baby. On return she found the baby alone, and the victim, Barbra, nowhere to be seen. There was a shed nearby where Kalepo sold malwa drinks. She heard some noise from shaking forms and went there to investigate. She found the appellant on top of the small girl Barbra, with his pants down and the child's dress pushed up. Her pants had been removed. The Court observed: “We would therefore dismiss the appeal allow the cross appeal and restore the conviction for defilement as held by the trial Judge. We however, think that the sentence of life imprisonment imposed by the trial judge was harsh in the circumstances. We impose a sentence of 15 years imprisonment.”