



# PROSECUTING CHILD-RELATED CASES IN UGANDA

A Handbook for Directorate  
of Public Prosecutions





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## Message from the Director of Public Prosecutions



The Government of Uganda has ratified the major International and Regional instruments regarding children in contact with the law. Additionally, laws that address violence against women and children, such as the Children Act, the Penal Code Act, the Domestic Violence Act, the Prevention of Trafficking in Persons Act and The Prohibition of Female Genital Mutilation Act were passed.

Notwithstanding the good legal framework, the implementation of the law remains limited due to inadequate capacity amongst prosecutors and other actors in the criminal justice system, among others.

International, Regional and National standards encourage the use of alternatives to judicial proceedings, such as diversion. However children charged with minor offences such as theft, assault, criminal trespass, malicious damage to property, whose cases should have been handled by Local Council Courts have ended up over crowding the few remand homes and the Kampiringisa National Rehabilitation Centre.

Regarding child victims and witnesses, up until now there were no protocols or specific guidelines on child friendly procedures for prosecutors. Interviewing witnesses, using child-friendly, culturally sensitive language and preparing witnesses for the courtroom experience, to name just a few, should be standardized procedures that all prosecutors are familiar with and are mandated to undertake in order to minimize the risk of re-traumatization of children in contact with the law.

Most investigators, prosecutors, defense counsel as well as adjudicators are not adequately trained to handle child victims and witnesses. The legal system has trained them to handle cases in a combative and adversarial manner. This is the major reason why many child witnesses fail to testify in courts of law, leading to dismissals and acquittals.

This handbook is intended to assist Prosecutors and the other actors in the criminal justice system in the investigation, prosecution and adjudication of child related cases in a manner which is child friendly and gender sensitive. It focuses on a practical approach and references the international regional and national legal and policy frameworks as well as best practices that protect children's rights. It provides relevant actions to be taken at each stage of the case, principals of case management in dealing with cases involving children, record keeping and documentation as well as appeals and post - trial remedies.

I wish to thank the following organizations and individuals for their contribution to this Handbook:

UNICEF for their technical support and their hands-on approach to the partnership; Ms. Sudha Murali, Child Protection Specialist for her technical inputs.

JLOS for supporting the implementation of the regional consultative meetings that preceded the production of the Handbook.

Ms. Laura Nyirinkindi and Dr. Monica Twesiime Kirya for developing the Handbook.

The Task-Force of Senior Prosecutors led by Mr. Michael Wamasebu, Assistant DPP, for conducting regional consultations leading up to the development of the Handbook and for reviewing the handbook.

Last but by no means least, Ms. Susan Okalany Senior Principal State Attorney/Head of the Gender, Children and Sexual Offences Department, for initiating and coordinating the activities for the production of the Handbook.

A handwritten signature in black ink, appearing to read 'Mike J. Chibita', with a stylized flourish at the end.

**Hon. Justice Mike J. Chibita**

## Message from the UNICEF Representative



The UN Convention on the Rights of the Child (CRC) guarantees the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth. This should take into account the child's age and the principle of restorative justice and ensuring that the Best Interest of the child prevails. Fundamentally, the rights and unique rehabilitative potential of children in conflict with the law demand special consideration, to ensure that children are deprived of their liberty only as a last resort and for the shortest appropriate period of time.

Restorative justice approaches merit particular attention as they seek to address the root causes of offending behaviour rather than simply examine the events surrounding an offence in isolation.

Regional (African charter) and National legislation (Children's Act) uphold the need to protect and uphold the rights of children to obtain legal protection in conditions of freedom, dignity and security.

The Children Act puts in place crucial guarantees and mechanisms for child care and protection, including Family and Children's Courts, approved homes, a national rehabilitation centre and the Local Council Courts.

It is critical to build and consolidate on the standards agreed and ratified by the Government of Uganda so that resources both human and financial to achieve these goals are prioritized.

I am happy that the Directorate of Public Prosecution (DPP) in collaboration with UNICEF has taken a lead on this issue recognizing that child sensitive court room processes including asking questions, recording of evidence, protection of victims and witnesses are the foundation of a child friendly justice system. The DPP is critical in handling the sexual and gender based (SGBV) cases in a child friendly manner.

I look forward to seeing the child friendly practices integrated into the justice system in Uganda thus ensuring both the protection of children and promotion of a child friendly justice approach.

A handwritten signature in blue ink, appearing to read 'Aida Girma'.

**Aida Girma**





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## Abbreviations and Acronyms

CID	Criminal Investigations Department
CRC	Child Rights Convention
DPP	Directorate of Public Prosecutions
FCC	Family and Children Court
ICCPR	International Covenant on Civil and Political Rights
ICGLR	International Conference on The Great Lakes Region
JLOS	Justice, Law and Order Sector
LC(s)	Local Council(S)
LCC(s)	Local Council Courts
PCA	Penal Code Act
PSWO	Probation and Social Welfare Officer
SGBV	Sexual and Gender-Based Violence
UN	United Nations
UNICEF	United Nations Children's Fund

## Acknowledgements

The Directorate of Public Prosecutions wishes to thank the following people and organisations for their contribution to this handbook:

UNICEF for their technical and financial support and their hands-on approach to partnership; Sudha Murali Specialist for her technical inputs.

Ms. Susan Okalany, Senior Principal State Attorney and Head of the SGBV and Children Taskforce provided leadership to the initiative and coordinated activities for the production of the handbook. The DPP SGBV Taskforce members in their various capacities are also acknowledged for their comments and contribution.

The Directorate thanks Ms. Laura Nyirinkindi and Dr. Monica Twesiime Kirya for developing the handbook.

# Preface

## Scope of the Handbook

The handbook covers children who come into contact with the law as victims of crime and witnesses to crime; as well as those who are in conflict with the law as accused persons.

With regard to children in conflict with the law who have been accused of committing crimes, the handbook provides information regarding diversion of cases away from the criminal justice system; and for non-divertible (capital) offences, it provides information on child friendly court proceedings and appropriate orders that may be made in such cases.

There is a significant focus on sexual and gender-based violence due to its prevalence and the paradox that children are often victims, and yet sometimes perpetrators of sexual and gender-based violence. The handbook therefore aims to give prosecutors a guide on how to handle the sensitive nature of SGBV related crimes and child-to-child sex.

The handbook also alerts prosecutors to the hidden forms of child abuse and the tendency of abused and neglected children to end up in the criminal justice system as perpetrators of crime rather than as children in need of care and protection. Prosecutors can help to offset this blurring of the lines between the social welfare and criminal justice systems if they are aware of the issues. They can work with the Probation department to ensure that a thorough investigation into the social background of all children in contact with or in conflict with the law is conducted. This would ensure that children are dealt with appropriately in accordance with their background and circumstances. The handbook also outlines the elements of an emerging forms of abuse, online sexual abuse, the law that prohibits it, and considerations to keep in mind during an investigation of such an offence.

Lastly, the handbook describes matters relating to child evidence. Unfortunately, the current status of the law in this area regards child evidence as inherently unreliable. There is a lack of consistency in the conducting of voir dices, and hence suggestions are made regarding how to conduct a voir dire in such a way as to properly establish that the child is capable of testifying reliably. The negative attitude to child witnesses has led to a high number of acquittals even in cases where this need not have been so if child evidence was given due weight. Nonetheless, Prosecutors can play a significant role in changing the status quo by guiding court to international law and persuasive authorities from other jurisdictions that have more positive attitudes towards child witnesses.

# Law Applicable

## International Treaties and Standards

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985

Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985

Plan of action for the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985

The African Charter on the Rights and Welfare of the Child 1990

The United Nations Basic Principles on the use of Restorative Justice Programmes in Criminal Matters 2002

The United Nations Convention on the Rights of the Child 1990

The United Nations Guidelines for Action on Children in the Criminal Justice System 1997

The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) 1990

The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime 2005

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990

The United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) 1990

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985

## National Law

The Births and Deaths Registration Act 1973  
The Children Act, Cap 59  
The Community Service Act 2000  
The Constitution of the Republic of Uganda, 1995  
The Criminal Procedure Code Act 1950  
The Evidence Act, 1909, Cap 6  
The HIV/AIDS Prevention and Control Act 2014  
The Judicature Act 1996, Cap 13  
The Local Council Courts Act, 2006  
The Local Governments Act 2001  
The Magistrates Courts Act, Cap 16  
The Oaths Act 1963, Cap 19  
The Penal Code Act, 1950 Cap 120  
The Penal Code Amendment Act, 2007  
The Probation Act 1963  
The Prohibition of Female Genital Mutilation Act 2010  
The Prevention of Trafficking in Persons Act 2009  
The Trial on Indictments, 1971, Cap 23  
Trial on Indictments (Amendment) Act 2008  
The Anti-Pornography Act 2014  
The Computer Misuse Act 2011

## Statutory Instruments

The Children (Family and Children Court) Rules S.I 59-1  
The Judicature (Criminal Procedure)(Applications) Rules SI 13-8  
The Probation (Probation Committees) (Constitution and Duties) Rules SI 122-2  
The Sentencing Guidelines Practice Directions 2013  
Plea-bargaining Practice Directions



## Case Law

Attorney General v Susan Kigula & 417 Others, Constitutional Petition No. 6 of 2003.  
Busiku Thomas v Uganda, Criminal Appeal No. 33 of 2011  
Charles Kayumba v Uganda, Criminal Appeal No.8 of 1981  
Christopher Kizito v Uganda, Criminal Appeal No. 18/93  
Dhamuzungu v. Uganda (2002) 1 EA 49 )  
Francisco Matovu v R (1961) E.A 260  
Kibangeny Arap Kolil v R (1959) EA 92  
Kizza Samuel v Uganda. Criminal Appeal No. 102 of 2008  
Koli Jenty v. Uganda Criminal Appeal 42/2004  
Nkeza Kaloli v. Uganda Crim App 28/2000  
R –vs- Campbell (1956) 2 ALL ER 272  
Sentongo Stephen v. Uganda Criminal Appeal 57/1999  
Siraji Mulabanaku v. Uganda Miscellaneous Application No 13/95  
Susan Kigula Sserembe and Nansamba Patience v Uganda Criminal Appeal No 1 of 2004.  
Tigo Stephen v Uganda, Criminal Appeal No. 08 of 2009  
Twehangane Alfred v. Uganda Criminal Appeal No 139 of 2001  
Uganda v Bonyo Abdu, Criminal Case No. Hct-04-Cr-Sc-0017 of 2009  
Uganda v Kato Kajubi. Criminal Appeal No. 39 Of 2010  
Uganda v. Asani Siraji Criminal Case No. 83 of 2006  
Uganda v. Bainomugisha HCT-04-CR-0045-2013  
Uganda v. Businge Kugonza and 2 others Crim Case 12/2012  
Uganda v. Mukulu Nasuru and 3 others HCT-03-CR-SC-0137-2007  
Uganda v. Olowo Kamala and 3 others HCT-04-CR-SC-0074-2013

# CHAPTER

# 01

# CHAPTER ONE

## Introduction to Child-Friendly Justice

### 1.1 Background

The justice system in Uganda is premised on the rights of citizens. Where infractions occur, the justice system provides a remedy for the aggrieved person. However, the Justice Law and Order Sector (JLOS) institutions, which are charged with ensuring that the ordinary person as well as the vulnerable access justice in meaningful terms, have faced severe constraints in fulfilling their mandate in regard to child protection and justice. Children have been further marginalised by the limited application of a child rights based approach by relevant institutions charged with child justice and inadequate systems and procedures for justice for children. This has had repercussions on the welfare and care of children, for both those children who are at risk, those who are in conflict with the law and those who are in need of care and protection as victims or potential victims and witnesses.

A child rights-based approach requires implementation of international standards for the protection and promotion of children's rights at the national, community and family levels. It provides a comprehensive framework through which the human rights of all children can be enhanced.

Accordingly, International Law recognises the importance of child friendly justice. The UN Convention on the Rights of the Child (CRC) guarantees the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. To this end, States Parties shall, in particular, ensure that the principles of *nullum crimen sine lege* (where there is no law there is no crime) and "innocent until proven guilty" apply to children; that children are informed promptly and directly of the charges against them and given assistance to prepare a defence; and to a fair and speedy trial. Children are further protected against self-incrimination; and guaranteed the right to have convictions reviewed or appealed.

In addition, the United Nations has passed a number of guidelines geared towards enhancing justice for children which give further detailed guidance on promoting and protecting the rights of children who encounter the criminal justice system.

At the regional level, the African Charter on the Rights and Welfare of the Child highlights the need to promote and protect the rights of Children. It draws on important principles of non-discrimination, best interests of the Child and the right to survival and development. The Charter points to the need for the African child to obtain legal protection in conditions of freedom, dignity and security, and prohibits child labour and harmful cultural practises that put children at risk. The Charter also has very specific provisions relating to Protection against Torture and Child Abuse.

Article 17 of the African Charter on the Rights and Welfare of the Child has enabling provisions on the protection of children in conflict with the law. It specifically provides that such children are entitled to special treatment in a manner consistent with the child's sense of dignity and worth and 'which reinforces the child's respect for human rights and fundamental freedoms of others.'

At the national level, the Constitution of Uganda sets out the rights of children, including the rights of children in conflict or contact with the law. Under the Constitution, a 'child offender' who is kept in lawful custody or detention shall be kept separately from adult offenders. It also states under Article 34 (7) that special protection is to be accorded to orphans and other vulnerable children, who happen to be children at risk. However, Uganda signed, ratified and domesticated the CRC which means that the standards elaborated in the CRC are applicable in Uganda and can supplement the existing Constitutional provisions.

In response to International Law, the Children's Act Cap 59 has progressive and enabling provisions on the care and protection of children at risk and in conflict with the law. It states clearly that its guiding principle-the welfare principle -is paramount. It makes specific provision on the processes of arrest and charging, pre trial detention and hearings, adopting the child rights based approach. The Children Act puts in place crucial guarantees and mechanisms for child care and protection, including Family and Children's Courts, approved homes, a national rehabilitation centre and the Local Council Courts. It also activates the jurisdiction of Probation Services in matters involving children at risk. Several laws, regulations and statutory instruments have also been made to guide the implementing institutions in the Administration of Children Justice.

## 1.2 The concept of Child-Friendly Justice

"Child-friendly justice" refers to justice systems which guarantee the respect and the effective implementation of all children's rights. It is justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child. It respects the rights of the child including the right to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity. The key issues for consideration in determining whether or not an intervention is child-friendly are:

<sup>1</sup> Article 40 of the CRC

<sup>2</sup> For a comprehensive list of these guidelines and standards, see list of Law Applicable on page 10

<sup>3</sup> Article 34 (6)

<sup>4</sup> For more information on vulnerable children and children at risk, see the Orphans and Vulnerable Children Policy.

- Is this proposed action in the **best interests** of the children?
- Does it safeguard their **life and survival** and actively contribute to their development?
- Is it reaching/taking into consideration the needs of all children, **without discrimination** against particular groups?
- Are there adequate **resources** available?

Child Friendly justice is underlined by the following fundamental principles:

### Best interests of the child

1. The best interests of children shall be a primary consideration in all matters involving or affecting them. As discussed above, at every stage the prosecutor should assess whether actions or decisions to be made *safeguard the life and survival of a child and actively contributes to his or her development*.
2. In assessing the best interests of the involved or affected children:
  - their views and opinions should be given due weight;
  - all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times;



<sup>5</sup> This explanation of child friendly justice and the fundamental principles which it entails has been adapted from the Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice, 2010 & 2011.

<sup>6</sup> UN Committee on the Rights of the Child forty fourth session 'General Comment No. 10 (2007) Children's rights in juvenile justice CRC/C/GC/10 25 April 2007

- all relevant authorities should take into account all of the interests at stake, including psychological and physical well-being and the legal, social and economic interests of the child.
3. The best interests of all children involved in the same procedure or case should be separately assessed and balanced with a view to reconciling possible conflicting interests of the children.

The above principle is crucial, given the fact that the model of criminal justice for adults often is penal and retributive. However for children in conflict with the law, who still have a chance to reform given the right frameworks of child friendly justice, it is important to adopt restorative and rehabilitative justice models. While the judicial authorities have the ultimate competence and responsibility for making the final decisions, prosecutors, probation and social welfare officers, Local council courts, the Family and children court and all other stakeholders should endeavour to work together with the objective of assessing the best interests of children in procedures involving them.

## Participation

1. The right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected. This includes giving due weight to the children's views bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful.
2. Children should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views and the circumstances of the case.

This implies that all processes of the criminal justice system, from arrest, to evidence taking before and during trial as well as plea bargaining and sentencing should involve participation of children through seeking their views on options, processes and consequences.

## Dignity

1. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;
2. Children should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity.
3. Children shall not be subjected to torture or inhuman or degrading treatment or punishment.

Accordingly, procedures and mechanisms that promote the rights and dignity of the child should be adhered to from the time children enter into the formal justice system to completion. This treatment should be given to them, in whichever way they have come into contact with judicial or non-judicial proceedings or other interventions. *Consideration should be taken of the child's age, so that every effort is made to preserve their childhood and development as well as survival needs.* This is all the more important particularly if a decision is made to detain them, and during the trial period.



## Protection from discrimination

1. Children shall not be discriminated against on any grounds such as sex, gender, race, colour or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background, status of their parent(s), belonging to a minority group, property, birth, or other status.
2. Specific protection and assistance may need to be granted to more vulnerable children, such as migrant children, refugee and asylum seeking children, unaccompanied children, children with disabilities, homeless and street children, children from minority groups, and children in residential institutions.

It is important to seek a social inquiry report from the Probation and Welfare services or fit persons wherever possible, to have a better understanding of children who may need extra support and affirmative action measures under the OVC Policy and other laws, regulations and policies. Vulnerable children often end up being in conflict with the law and being more prone to recidivism. It is important for prosecutors not to write them off and to treat them in a manner that is not discriminatory as a result of their background.

Certain laws easily work against vulnerable children, such as stealing food and necessities of life, fights etc. It is important not to unknowingly increase re-victimisation of vulnerable groups of children through adopting criminal measures against them.

## Rule of law

1. The rule of law principle should apply fully to children as it does to adults.
2. Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child's best interests. This applies to all judicial and non-judicial and administrative proceedings.
3. In cases where there is a conflict or inconsistency between the Penal Code Act, the Criminal Procedure Code or any other law and the Children Act, the latter shall take precedence in accordance with the Interpretation Act and other generally recognised principles of statutory interpretation.

Due process should be undertaken for children particularly regarding procedural protection. This covers right to legal representation wherever possible but particularly in capital offences. The model of child justice in Uganda is restorative. This means that the usual measures of arrest, detention and sentencing need to be re-assessed when dealing with children, to ensure that the ultimate goal is rehabilitation and re-integration into society rather than incarceration.

### 1.3 Protecting children in the Justice System

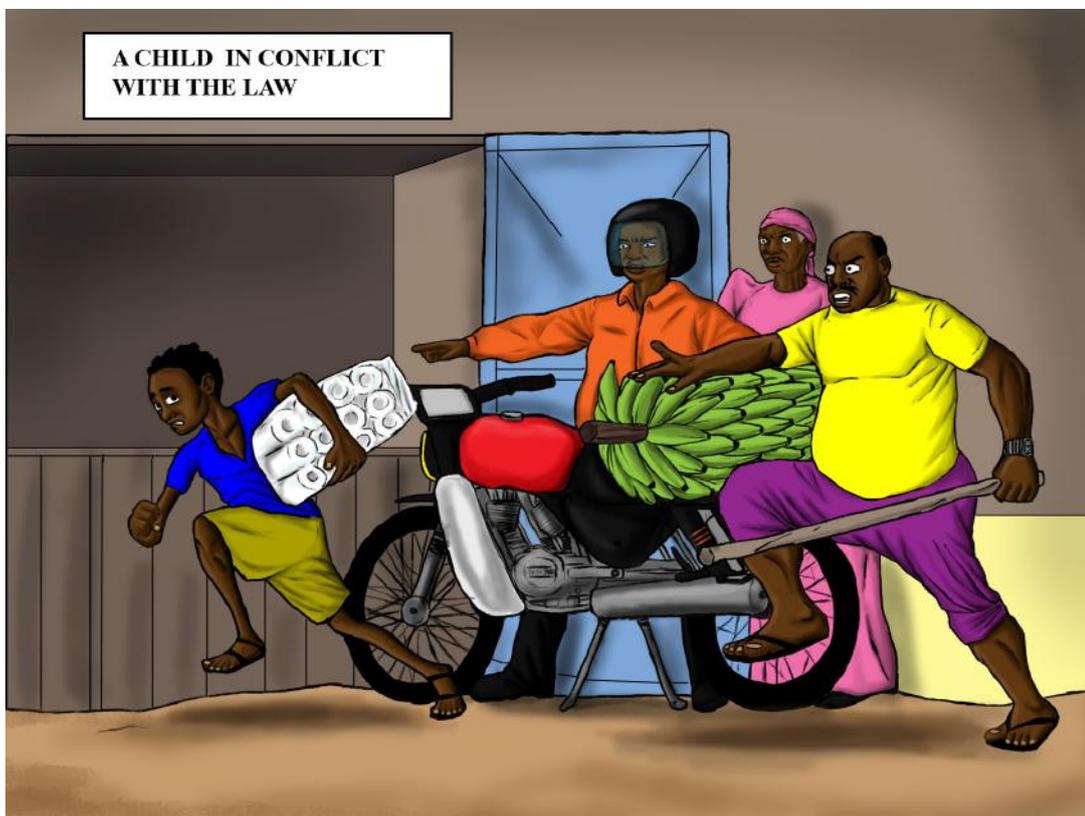
There are two important categorisations of children in the justice system: *Children in contact with the law* and *Children in conflict with the law*

1. The terminology '**Children in contact with the law at risk**' refers to child victims of various forms of abuse, neglect, violence and exploitation, including children forced into crime. It also covers those who are likely to be abused, neglected or exploited as a result of their vulnerability. The UN Guidelines on Justice in matters involving Child Victims and Witnesses of Crime recognise that children are vulnerable and require special protection according to their age, level of maturity and individual special needs, taking note that girls are especially vulnerable and may face discrimination at all stages of the justice system.
2. **Children in conflict with the law** refers to children whose actions result in a criminal law being broken and hence are exposed to criminal justice processes. Prosecutors more often come interact with children in contact with the law as witnesses and victims and those in conflict with the law. There is a challenge in that children at risk may often be brought in as children in conflict with the law if the child social welfare system does not diagnose the circumstances well. It is important for prosecutors to understand these different concepts in order to dispense child friendly justice procedures in their work.

The categories of children at risk are various and new forms of vulnerability occur. The Orphans and Vulnerable Children Policy equates vulnerability to risk, stating that it is a state of being or likely to be in a risky situation, where a person is likely to suffer significant physical, emotional or mental harm that may result in their human rights not being fulfilled.

<sup>7</sup>UN Committee on the Rights of the Child forty fourth session 'General Comment No. 10 (2007) Children's rights in juvenile justice CRC/C/GC/10 25 April 2007



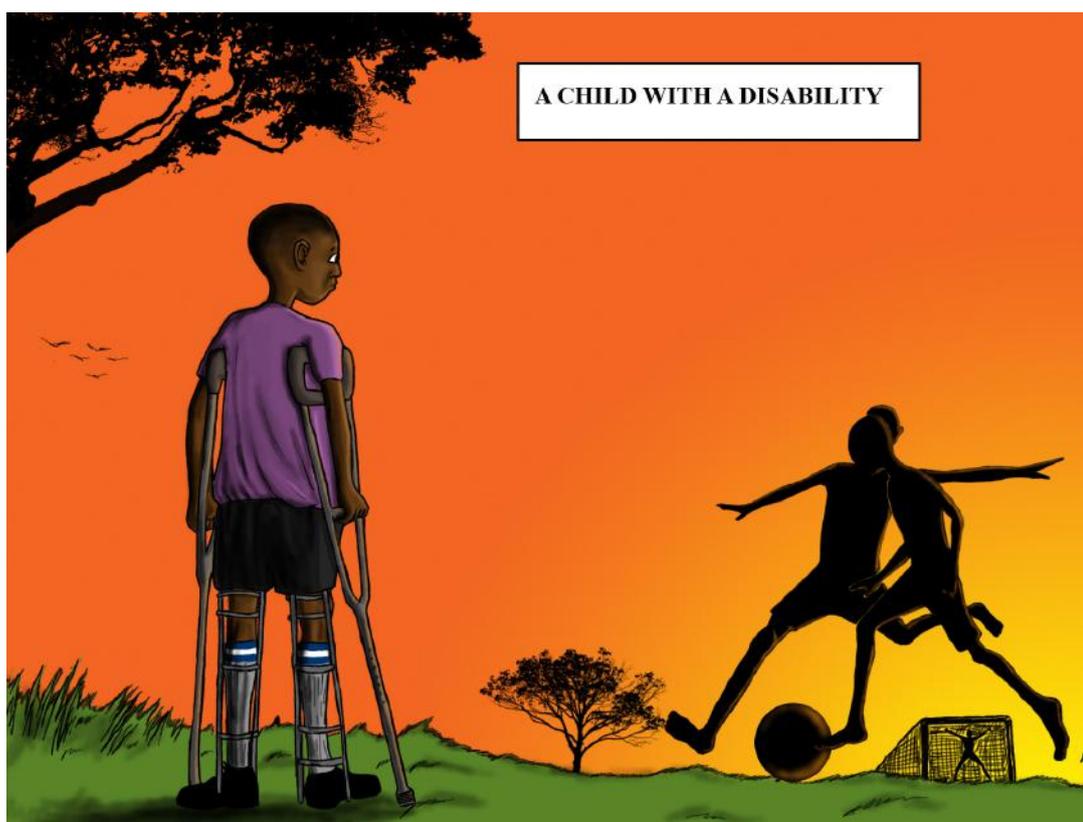




### Categories of children at risk Under the orphans and vulnerable children policy

- Orphans and orphans households
- Children affected by armed conflict
- Children abused or neglected
- Children in conflict with the law
- Children affected by HIV/AIDS or other diseases.
- Children in need of alternative family care.
- Children affected by disability.
- Children in 'hard-to-reach' area
- Children living under the worst forms of labour
- Children living on the streets
- Child migrants
- Internally displaced children

Depending on the circumstances, some children at risk, in contact with the law or in conflict with the law require preventative measures to avoid harmful situations that are imminent. While the public thinks that children in conflict with the law should be arrested, charged and convicted, it is also possible that they are also victims of abuse and neglect as well as vulnerability, requiring interventions that are geared at restoring them to become responsible people, rather than outright punishment.



### Examples of children in conflict with the law and at risk

- A 16 year old girl has been defiled and reported the case through her teacher but the relatives are trying to accept a gift from the defiler, or marriage with him (child at risk, witness, child in contact with the law)
- A street kid was caught stealing food and is about to be beaten by a mob of people (child at risk, child in conflict with the law)
- A disabled child whose parents have been charged with child neglect for locking him in the house to attend a wedding has no where else to be placed during the course of the trial (witness, victim)
- A child whose father has died has been commended by his uncle to leave the home of the deceased father because the uncle is taking over the possessions (victim, child at risk).

All of the above categories may require services of the Child and Family Protection Unit of the Police, Probation and Social welfare officials, as well as Local Council Officials in charge of Children affairs, which are charged with removing them from situations of potential harm and abuse. The office of the Administrator General is also important in safeguarding the rights of orphans.

Probation Services are crucial in the identification and protection of children at risk under the Children Act. It is also important to ensure that children at risk or victims are not handled as children in conflict with the law due to their vulnerable circumstances that may lead people to exploit or abuse them. To this effect the UN UN Guidelines on Justice in matters involving Child Victims and Witnesses of Crime recognise that children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders.

# CHAPTER

# 02

## CHAPTER TWO

### Overview of Uganda's Child Justice System & Institutional Set-Up

The Uganda child justice system consists of various institutions and officials who should work together to promote the welfare and best interests of children. They include the DPP, the Criminal Investigations Directorate (CID), the Child and Family Protection Unit (CFPU), the Ministry of Gender Department of Probation and the Department of Youth and Children. The child justice system further encompasses institutions such as the Local Councils and Local Council Courts, which are under the Ministry of Local Government, and the Approved Homes and Rehabilitation Centres for Children which are administered by the Ministry of Gender, Labour and Social Development.

#### 2.1 The Local Council System

Local Councils are established under the Local Governments Act of 1997, as amended in 2010. According to **Section 10** of the Children Act, Cap. 59, it is the general duty of every local government council from the village to the district level to safeguard and promote the welfare of children within its area and to designate one of its members to be the person responsible for the welfare of children. This person shall be referred to as the secretary for children's affairs. The secretary for children's affairs shall, in the exercise of his or her functions in relation to the welfare of children, be assisted by such officers of the local government council as the local government council may determine. In practice, the officer concerned is usually the District Probation and Social Welfare Officer.

Section 10 of the Act further provides that in particular, every local government council shall mediate in any situation where the rights of a child are infringed and especially with regard to the protection of a child, the child's right to succeed to the property of his or her parents and all the rights accorded to a child in the Act. In addition, a local government council is mandated to keep a register of disabled children within its area of jurisdiction and give assistance to them whenever possible in order to enable those children to grow up with dignity among other children and to develop their potential and self-reliance. A local government council should also provide assistance and accommodation for any child

in need within its area of jurisdiction who appears to require assistance and accommodation as a result of his or her having been lost or abandoned or seeking refuge.

Under **section 11** of the Children Act, members of the community who are aware that and have evidence of a child's rights being infringed must report to the Local Council, which must then summon the parties concerned and make a decision to remedy the situation in accordance with the best interests of the child.

***Jurisdiction of LC Courts in cases involving children in conflict with the law.***

**Local Council Courts** are established at village level in accordance with the Local Council Courts Act 2006. Jurisdiction in cases of children is however defined in the Children Act, 1996. Under Section 92(2) of the Children Act, a village LCC shall, in addition to any jurisdiction conferred on it by the LCC Act, 2006, have criminal jurisdiction to try a child for any of the following offences.

**JURISDICTION OF LC COURTS OVER CHILDREN'S CASES**

- affray, under section 79 of the Penal Code Act;
- an offence against section 167 with the exception of paragraph (b) of the Penal Code Act;
- common assault, under section 235 of the Penal Code Act;
- actual bodily harm under section 236 of the Penal Code Act;
- theft, under section 254 of the Penal Code Act;
- criminal trespass, under section 302 of the Penal Code Act;
- malicious damage to property, under section 335 of the Penal Code Act.

**Under subsection (3) the village local council court shall be the court of first instance in respect of the criminal offences specified in subsection (2) involving children.**

When dealing with children cases, the LCC should adhere to the following guidelines:

**Standards applying to cases before local council courts**

- LCs courts are not allowed to put a child under custody or detention
- Proceeding must be held in camera
- The case must be handled within 3 months
- The case should be heard in an informal and child friendly environment
- The victim in the case should be encouraged to attend the proceedings
- Parents/guardians/fit person/PSWO of the child must attend the proceedings
- Child should be heard and his or her opinion must be taken into account
- The Court should decide quickly and not be bogged down by technicalities and rules of evidence

<sup>9</sup>Children Act, section 92 and Local Council Courts Act, Part VIII – Rules of Procedure and Natural Justice

- Each side should be allowed to bring witnesses to give evidence
- The right to appeal in 14 days must be explained to the child
- Where a child repeatedly commits offences, the LC Court should contact the PSWO
- who will arrange to take the child to the FCC for an appropriate court order
- The LC Court may ask some community volunteers to act as Fit Persons, to assist in handling supervising and guiding children

Further under subsection (4), a village LCC may, notwithstanding any penalty prescribed by the Penal Code Act in respect of the offences stated in subsection (2) of this section, make an order for any of the following reliefs in respect of a child against whom the offence is proved—

- i. reconciliation;
- ii. compensation;
- iii. restitution;
- iv. community service;
- v. apology; or
- vi. caution.

The court may make a guidance order under which the child shall be required to submit himself or herself to the guidance, supervision, advice and assistance of a person designated by the court as provided under sub-section 5. Subsection 6 states that a guidance order shall be for a maximum period of six months. Sub-section 7 emphasises that a LCC shall not make an order remanding a child in custody in respect of any child appearing before the court.



## The Local Council Courts Act

### 2.2 The Uganda Police Force (UPF)

The Police has a special unit dedicated to handling children known as the **Child and Family Protection Unit (CFPU)**. When dealing with children, the Police should be mindful of the following principles:

- Police should respect the personal rights and dignity of all children and have regard to their vulnerability, that is, take account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties.
- Whenever a child is apprehended by the police, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody. Children should be provided with access to a lawyer and be given the opportunity to contact their parents, guardians or a person whom they trust.
- Save in exceptional circumstances, the parent(s) should be informed of the child's presence in the police station, given details of the reason why the child has been taken into custody and be asked to come to the station.
- A child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child's parents or, if no parent is available, another person whom the child trusts. The parent or this person may be excluded if suspected of involvement in the criminal behaviour or if engaging in conduct which amounts to an obstruction of justice.
- Police should ensure that, as far as possible, no child in their custody is detained together with adults.
- Authorities should ensure that children in police custody are kept in conditions that are safe and appropriate to their needs.
- Child-friendly approaches should be adhered to throughout the investigation process.

The Criminal Investigations Directorate (CID) is involved in investigating children cases where a child commits a capital offence, an offence considered as “serious” by the CFPU, or where a child is jointly charged with an adult.

The Police are key in preventing harm from occurring children, to detecting instances of harm and diverting children away from the formal justice system by using non-custodial and non-adversarial measures, as well as mediation and community policing. In most instances the police are the first point of contact with the criminal justice system in its investigative/ prosecutorial or protective role.

A key challenge facing the police with regard to justice for children is that although they are largely aware of the imperative not to detain children with adults, the court practises of adjourning cases leads to the police detaining children in custody wrongfully. The lack of facilities to remand children in conflict with the law is caused by the inadequacy of remand homes.



### 2.3 The Directorate of Public Prosecutions

Under Article 120 of the Constitution of Uganda 1995, the functions of the Directorate of Public Prosecutions are:

#### MANDATE OF THE DIRECTORATE OF PUBLIC PROSECUTORS

- To direct police to investigate any information of a criminal nature.
- To institute criminal proceedings against any person or authority
- To take over and continue such criminal proceedings that have been instituted or undertaken by any other person or authority.
- To discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by the Directorate or with the consent of court, those instituted or undertaken by any other person or authority.
- To give advice and guidance to the Criminal Investigation Department (CID) in particular and other Government departments in general, on the conduct of criminal investigations or decision to prosecute and what charges to prefer.
- To collaborate and pursue appropriate, prompt and successful investigation and prosecution of complaints of a criminal nature and cases with institutions involved in identifying, investigating and prosecuting criminal complaints and cases.
- To institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial.

Prosecutors are therefore responsible for presenting criminal cases in Court on behalf of the government and people of Uganda and are obligated to enforce the Constitution and laws of the Republic of Uganda. Prosecutors have an obligation to seek justice. They are held to a high ethical standard requiring that they fairly evaluate the evidence against an accused and proceed with prosecution when charges are supported by reliable evidence. Prosecutors owe a duty to victims and to society at large to attempt by all legal means to bring perpetrators of crimes to justice according to the Constitution and laws of Uganda.

The prosecutor is at all times bound to uphold the highest standard of conduct. In Uganda, the Advocates (professional conduct) regulations define the professional responsibility of attorneys generally. The UN Havana Guidelines on the Role of Prosecutors as well as the Standards of professional responsibility and statement of the essential duties and rights of prosecutors of the International Prosecutors' Association provide additional guidance for the ethical obligations of prosecutors. They should be reviewed regularly by DPP staff to remind themselves of their duties and obligations.

<sup>10</sup> Adopted by the International Association of Prosecutors on the twenty third day of April 1999 [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999_EN.pdf) The guidelines are attached in the Appendix hereto.

<sup>11</sup> Prosecutors should also ascertain the age of child perpetrators as to decide whether the offence is divertible.

The **Prosecution Performance Standards and Guidelines of 2014** provide guidance for the DPP in child-related cases under section 2.2, which states as follows:

- (i) A prosecutor should always ascertain the age of child victims in order to determine the appropriate charge.
- (ii) During perusal and trial stage, prosecutors should always give priority to cases involving juveniles (sic).
- (iii) Prosecutors should ensure juvenile offenders are always accompanied to court by Probation Officers or their parents.
- (iv) Prosecutors should ensure that cases involving children in Magistrates' Courts are prosecuted within a period of 3 months.
- (v) Prosecutors should develop child friendly skills while handling child witnesses.
- (vi) A prosecutor should as much as possible ensure that there is no intimidation of whatever form on child witnesses by the accused.
- (vii) A prosecutor should always request the presiding judicial officer for the trial involving a juvenile to be heard in chambers.

It is hoped that the above guidelines, in conjunction with this handbook, will go a long way to improve the situation of child justice in Uganda. There are still several challenges faced by the DPP with regard to child friendly justice. Some laws are not child friendly for instance, the criminalisation of child to child sex even where the children are of a similar age, which is bringing more children within the ambit of the criminal justice system. Other challenges include lack of witness protection programmes and continued ambivalence about the value of child evidence. Another key challenge is that Prosecutors and Resident State attorneys do not conduct actual investigations—they only deal with files brought to them for sanctioning—hence they often do not know that they are dealing with children if the files do not explicitly state this. Due to transport constraints, most prosecutors are not able to meet with child witnesses to prepare them for court and create a child friendly environment for the hearings. It is also pertinent that timelines under the Children Act are very strict (Child cases must be completed in 3 months) and often times, cases are dismissed because of the Prosecution's failure to meet this deadline. Prosecutors, may however, utilise this handbook and the Prosecution Performance Standards and Guidelines 2014 to improve the situation within their means and according to the best of their ability.

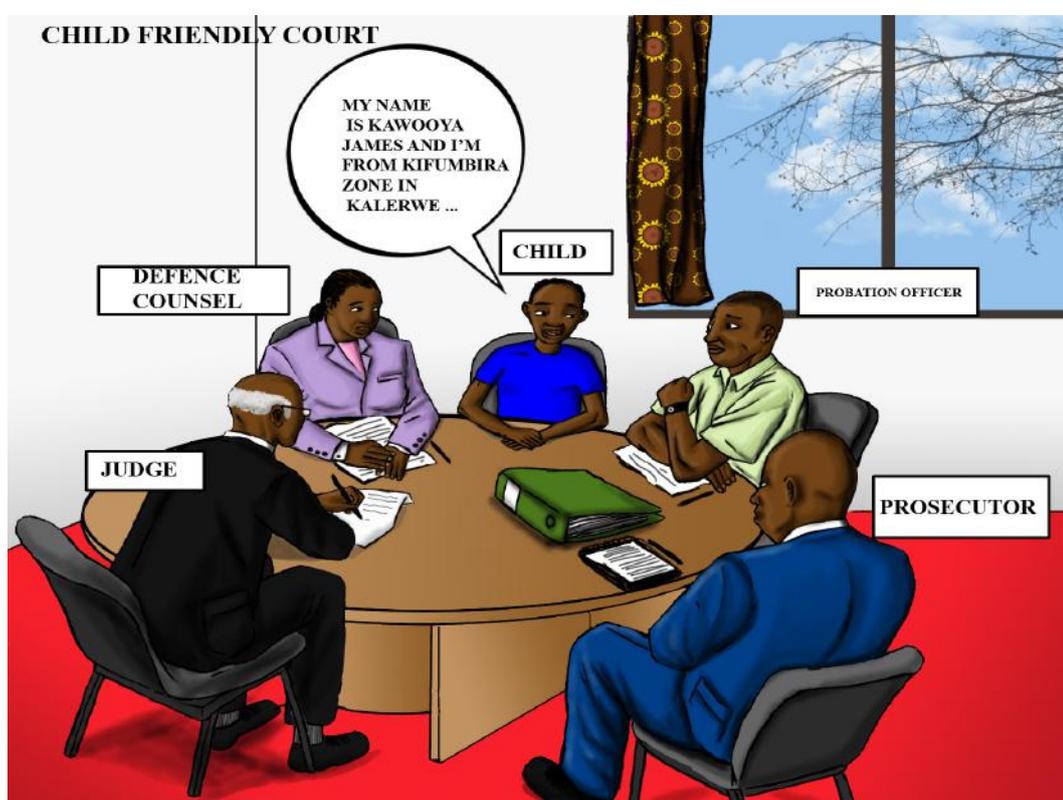
#### 2.4 The Courts of Judicature

The Family and Children Court (FCC) is established under **section 13** of the Children Act. It is established in every district and any other lower government unit designated by the Chief Justice by notice in the Gazette. A magistrate not below the grade of magistrate grade II presides over the family and children court, hence Magistrates Grade I made also hear these cases. Under **section 14** of the Act, the jurisdiction of the Court is to hear and determine—

- (a) criminal charges against a child subject to **sections 93 and 94**; and
- (b) applications relating to child care and protection.
- (c) any other jurisdiction conferred on it by this or any other written law.

**Section 15** provides that a Family and Children Court shall, whenever possible, sit in a different building from the one normally used by other courts. This is one of the ways of ensuring that proceedings are child friendly. Section 16 provides for the procedure of the FCC, which shall be in accordance with rules of court made by the Rules Committee for the purpose. Further details on proceedings in the FCC are in Chapter 2.

The High Court is granted jurisdiction under **section 104** of the Children Act to try offences where a child is accused of a crime punishable by death (for which only the High Court has jurisdiction) or where a child is jointly accused with an adult. More on the role of the High Court is discussed in Chapter 2. However, after hearing the case, the High Court must remit the file to the FCC for an order to be made in accordance with **section 100 (3)** of the Children Act.



## 2.5 The Department of Youth and Children Affairs

The Department of Youth and Children Affairs is one of the departments in the Ministry of Gender, Labour and Social Development. This department was formerly known as the department of Probation and Social Welfare. The department plays a very important role in the administration of justice and maintenance of law and order by offering probationary services for children at risk and in conflict with the law. Probationary services involve the supervision of the behaviour of a child or first-time criminal offender by a probation officer. The department is responsible for the youth and for care and protection of children in Uganda, with special responsibility towards those in vulnerable situations. The department is run by Probation or Welfare Officers found at district level. In carrying out their work, probation officers are guided by the Constitution and the Children's Act.

The functions and mandates of Probation and Social Welfare Officers (PSWO) are provided for under the Probation Act, which is a law to permit the release on probation of offenders in certain cases and

to provide for related matters. While the Probation Act does not specifically refer to children, the Children Act invokes the mandate of the Probation Act. This law is very important in ensuring that children also benefit from probation services as opposed to being incarcerated.

PSWOs facilitate courts, particularly the FCC, in identifying through the social inquiry process various pro-active emergency measures and short term to permanent solutions which are captured in the orders of the FCCs. In addition to these, PSWO are mandated to take unilateral measures for the emergency protection of a Child under the Children Act. When a PWSO has received information or has reasonable grounds for believing that a child in his or her area is suffering or is likely to suffer significant harm, he or she (after notifying the secretary for children's affairs of the LC), may take the child and place him or her under emergency protection in a place of safety for a maximum period of forty-eight hours.

Such a child must be produced before a FCC or LCC within forty eight hours. The PSWO will apply for a supervision or care order as the situation warrants. Any person who removes a child from such protective custody thereafter commits an offence. This is a powerful mandate that a PSWO can use in deserving cases to remove children from imminent or actual harm. Because PSWOs cannot have knowledge of every incidence of abuse, it is important that they work with Secretaries in charge of Children Affairs in LCs at every level, to build a network of child rights monitors who can call upon the PSWO to exercise this mandate.

In general, the PSWOs play a crucial role in helping LCCs and FCCs to conduct situational analyses regarding children at risk of abuse, exploitation and neglect. A PSWO normally captures this information into a Social Inquiry Report. Based on the findings of the PSWO, an FCC or LCC will be adequately guided to make the correct decisions to protect these children. The PSWO is also mandated to play a monitoring role over these children and see if their situation requires varying or not.

One of the key roles that a PSWO plays is the production of social inquiry reports. Social/background inquiry reports are provided for under **section 95 of the Children Act**. Social background/ Inquiry reports assist the FCC, to make appropriate orders according to the circumstances of each individual case. For instance, they can reveal whether a child is a first time offender, the circumstances that led to a child's involvement in a crime, and any other factors that have affected the child's behaviour and led to him or her being in contact or conflict with the law. This background information could be of use to Prosecutors particularly under the plea bargaining mechanism which is discussed in greater detail in **Chapter 3** of this handbook. Prosecutors should always ensure that social inquiry reports are produced in child-related cases, that they are properly received as evidence and reviewed by the Court in making its decision.

<sup>12</sup>The Annual Police Crime Report does not include statistics on crimes committed by children. This reflects inadequate data capture at the point of crime reportage and it could explain in part why children end up being treated as adults by the system. However, efforts are underway to enhance prosecution led investigations. This has been happening in corruption-related cases and has greatly improved conviction rates in the Anti-Corruption Court. Greater prosecution oversight over child related cases could result in better chances for children in the criminal justice system.

<sup>13</sup> Further details regarding the procedure of the Court are in Chapter 2.

<sup>14</sup> There are views that the requirement for the case to be remitted to the FCC for orders is unnecessary and merely leads to delays in disposing of cases. The Children Act should be amended to allow the High Court to make the necessary child-friendly orders.

## THE IMPORTANCE OF SOCIAL INQUIRY REPORTS

*In all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the child is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority. Social inquiry reports (social reports or pre-sentence reports) are an indispensable aid in most legal proceedings involving juveniles. The competent authority should be informed of relevant facts about the juvenile, such as social and family background, school career, educational experiences, etc. For this purpose, some jurisdictions use special social services or personnel attached to the court or board. Other personnel, including probation officers, may serve the same function. ... adequate social services should be available to deliver social inquiry reports of a qualified nature.*

### Section 16 UN Standard Minimum Rules for the Administration of Juvenile Justice

The PSWO is key in ensuring that children in need of care and protection of their rights and welfare are helped, as well as those in conflict with the law, without mixing the two categories in the same system. In practise, child victims of abuse, neglect and exploitation often flee from their homes and upon being arrested for one offence or another end up being treated harshly and viewed as criminals, with negative results.

Given the risks posed by failure to separate children at risk with those in conflict with the law, PSWOs should work hand in hand with the Police, particularly CFPU, to share information and expertise that will divert child victims away from harmful institutionalisation. Diversion is explained in greater detail in Chapter 3.

One of the biggest challenges for child-friendly justice in Uganda at present is the acute lack of Probation Officers. This shortage may explain many of the ills in the child justice system such as detention of children with adults, children being remanded for long periods instead of being diverted and so on. There is an urgent need for the central and local governments to employ more Probation Officers to enable the child justice system to function in a manner that promotes the best interests of children. The DPP can play a role by joining the Ministry of Gender in advocating for this anomaly to be corrected.

### SUMMARY OF DUTIES OF PROBATION AND WELFARE OFFICERS

- *Attending courts in cases involving children*
- *Carrying out social and background inquiries about children as required by courts*
- *Submitting social inquiry reports for the courts especially about child offenders and child protection cases*
- *Supervision of probationers and children placed on supervision orders*
- *Supervision of young people after release from the National Detention Center (formally referred to as Approved Schools )*
- *Supervision of Approved Children and Babies Homes*

<sup>15</sup> Section 37(1) Children Act

<sup>16</sup> Section 38.

- *Tracing, resettlement and follow-up of Children from Children's and Babies Homes*
- *Investigating reports about abuse of children and taking steps to protect them.*
- *Supporting families or children in difficult circumstance*
- *Sensitization of the community on matters concerning child care and protection*
- *Creating systems or mechanisms for the care and protection vulnerable children*
- *Providing a link between Non-Governmental Organizations engaged in child welfare program*
- *Providing professional information about child care and protection*

### Key values

In working for the care and protection of children, probation or welfare officers are guided the following:

- *Respect for children's rights*
- *Community responsibility for children care and protection*
- *Best interests of children*
- *Not subjecting children to the rigorous court system*
- *The family as the best place for a child's growth and development*

### 2.6 Fit persons

The Children Act of Uganda mentions Fit Persons under several section, although unfortunately such a person is not defined under the Act. It is up to the discretion of the Court to decide whether or not a person qualifies to be a Fit Person. Nonetheless, under the Justice for Children Project of the Justice, Law and Order Sector, there has been an initiative to establish and train fit persons in the community who act who perform various roles to promote children's rights.

Under the Justice, Law and Order Sector (Draft) Diversion Guidelines of 2015, Fit Persons have been given the following responsibilities:

- To check police registry regularly in order to determine the number of juveniles in police juvenile cells or reception centres and advice police on divertible cases
- Provide information for social inquiry reports to assist the assessing officer or LCs Courts in to take informed decisions
- Provide temporal shelter to a child where there is none as need arises
- Provide advice and counseling to the child and their parents/guardians, complainants as appropriate
- Liaise with the non-stake actors providing child related skills development services
- To attend diversion coordination meetings
- To prepare a periodic case information to the DCC/ Resident Magistrate as necessary
- Support the community rehabilitation and reintegration process of juvenile offenders (sic).

Fit persons are crucial in ensuring that the child justice system is child-friendly. They safeguard the child's best interests throughout the child's contact with the justice system. Fit persons are also important for ensuring that children diverted from the criminal justice system, or those who have served their sentence, are re-integrated into families and the wider community with minimal disruption. They serve as a link between the criminal justice system and the community.

The Children Act provides for the National Rehabilitation Centre in **Section 96**, which states that the Minister (of Gender) shall establish a National Rehabilitation Centre for Children and such other centres as he or she may deem necessary which shall each be a place for the detention, rehabilitation and retraining of children committed there. Unfortunately, to date, no such centre has been established. **Section 96(2)** therefore provides that pending the establishment of the National Rehabilitation Centre for Children, the school known as Kampiringisa Boys' Approved School shall be used as the detention centre. It emphasises that the detention centre shall have a separate wing for girls.

**Section 97** provides that the Minister shall appoint fit and proper persons to periodically visit the detained children and inspect the detention centre, and those persons shall be referred to as the "committee of visitors" under this Act. The Minister is supposed to make rules to govern the management of the detention centre.

The Kampiringisa National Rehabilitation Centre is Uganda's only juvenile detention centre (prison for children). It is located in the Mpigi District. The centre run by the Ugandan Ministry of Gender, Labour and Social Development is mandated to detain young males and females in conflict with the law from the ages of 12 to 18, however it also houses many children under 12 (as a result of children not having birth certificates) and often hundreds of street children who have not been convicted of any crime but merely rounded up and dumped from the streets of Kampala. The street children, including babies and toddlers, are housed with and looked after by much older offenders, potentially putting them at serious risk. The conditions at the centre are less than ideal for young children. The DPP can play a role by advocating for this Centre to be improved.

The Ministry of Gender also supervises several remand homes spread over the various regions of Uganda:

Remand Home	Region
Naguru Remand Home	Kampala Central
Mbale Remand Home	Eastern Region
Fort Portal Remand Home	Western Region
Arua Remand Home	West Nile Region.
Gulu Remand Home	Acholi Region
Ihungu Remand Home	Masindi Region

<sup>17</sup> Moore, S. (2010) Juvenile Detention in Uganda: A Review of Uganda Remand Homes and the National Rehabilitation Centre, at [http://www.justicestudio.org/reports/Juvenile\\_detention\\_in%20Uganda\\_October\\_2010.pdf](http://www.justicestudio.org/reports/Juvenile_detention_in%20Uganda_October_2010.pdf)

**According to section 56** of the Children Act, an approved home is a Government or nongovernmental home set up for the purposes of caring for children. It must be approved by the Minister as fit for that purpose. An example of an Approved Home is the Watoto Centre in Gulu. **Section 57** provides that an approved home shall only receive children in the following two ways—

- I. in an emergency situation from a police officer, a probation and social welfare officer or any other person for a maximum period of forty-eight hours pending production of the child in court; or
- II. on an interim care order or a care order.

**Section 58** says that the purpose of an approved home is to provide substitute family care for a child until such time as the parents of the child are able to provide adequate care to meet his or her basic needs or the child completes three years in the home or attains the age of eighteen years, whichever is earlier. It is the responsibility of the staff of the approved home, the probation and social welfare officer and any other person to assist the child to become reunited with his or her parents or guardians. After a child has been returned home from an approved home, the probation and social welfare officer shall keep in regular contact with the child and his or her family until the completion of the order or its discharge.

It is further provided that where a child is unable to return to his or her parents or to go to foster parents or has no parent, nor a foster parent, he or she shall be encouraged and assisted by the approved home and the probation and social welfare officer to become independent and self-reliant. **Section 59** emphasises that while a child is in an approved home on a care order, the warden and staff of the home have parental responsibility for the child. Nonetheless, the approved home and the probation and social welfare officer shall maintain contact with the parents or relatives of a child in the home as well as maintain contact between the child and the parents or relatives of the child.

## 2.8 NGOs and Legal Aid Agencies Dealing with Children in Contact with the Law

A number of civil society organisations are working to promote the rights of children including those in conflict or contact with the Law. Legal Aid Services Providers (LASPs) such as the Association of Uganda Women Lawyers (FIDA-U) and the Law Development Centre (LDC) Legal Aid Clinic (LAC) handle children's matters. FIDA-U handles hundreds of cases of child maintenance, while LAC is actively involved in representing children in conflict with the law. Other NGOs such as African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) is involved in advocacy against child abuse and neglect and is actively engaged in reintegrating children in conflict with the law with their families. The Uganda Child Rights NGO Network is a network organisation of various child rights NGOs working in the country.

The DPP can liaise with child rights NGOs in several ways. For instance, the DPP can work with them to advocate for changes in policies and programmes which do not comply with international law standards. NGOs can play a role in advocating for adequate recruitment of PSWOs, advocate for the improvement of the National Rehabilitation Centre for Children, and advocate for necessary changes in the law.



## 2.9 The Role of Medical Personnel and the Health System

Medical professionals working in hospitals, clinics, doctor's offices and other health care facilities provide medical treatment to victims of crime such sexual assault and abuse, or other forms of assault that result in bodily harm. The Local Council Officials and Police should encourage victims who have been sexually abused or assaulted to seek medical treatment.

Medical professionals play a role in the criminal justice process by gathering evidence from the victim's person, such as samples of bodily fluids, hairs, fibres, clothing and skin and fingernail scrapings, as well as types of bruises which may be used as evidence in a criminal prosecution. Such evidence is not always available in every case of sexual assault or abuse. Where there is such evidence, it must be properly collected, preserved and submitted for analysis by trained technicians working in properly equipped laboratory facilities in order to be of evidentiary value. Unfortunately many such facilities are not readily available in Uganda. In many cases, medical professionals are limited only to conducting physical examination of survivors and documenting the injuries. This form is normally availed by the Police Child and Family Protection Unit or Criminal Investigations Directorate when a survivor reports the crime to them.

Medical professionals perform an important function on behalf of victims of sexual assault and abuse. In that regard a medical professional must make a thorough examination and report in accordance with *the Guidelines for the Medical Examination and Filling of Police Form 3B for Victims of Sexual Assault*. With the survivor's consent, this form may be a key exhibit at trial, and the medical practitioner, or a representative, may be called to testify about its content.

During the examination, the Doctor inquires as to whether or not a sexual activity took place. This is done by inquiring into the history of the victim through medical examination. He or she will try to ascertain whether the demeanor and mental state of the victim is consistent with that of a victim of sexual assault? Most importantly, however, the Doctor will ascertain what injuries, both genital and extra-genital, were sustained, and whether the injuries are consistent with the history given and with the particular sexual offence charged. Laboratory investigations should be carried out to find out whether the victim acquired any infection including HIV. This is done both for purposes of establishing both the sexual offence and will inform the sentencing decision. Examinations should always ensure that the dignity of the victim is maintained by not asking judgmental questions, engaging in victim-blaming, or any other conduct that might humiliate and further traumatize the victim.

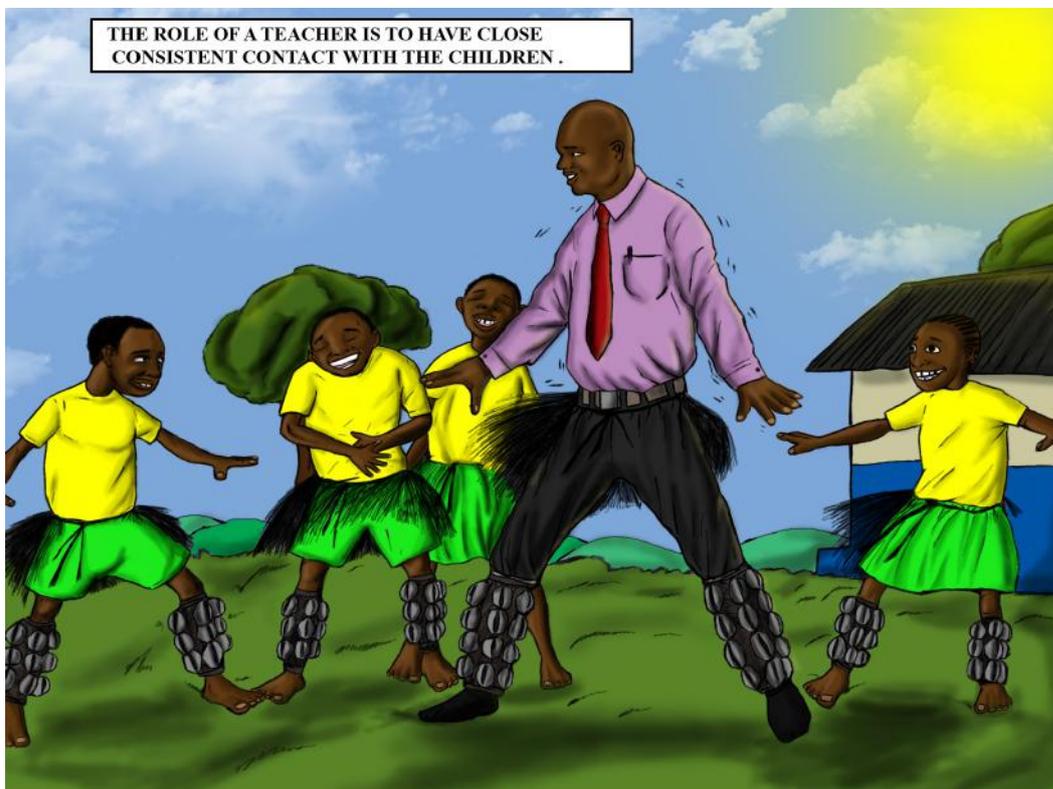
## 2.9 The Role of Teachers/children/parents

The teacher has a vital role in identifying, reporting, and preventing child abuse and neglect. There are many reasons why teachers are so vital in identifying, treating, and preventing child maltreatment. First, they have close and consistent contact with children. Second, teachers have a professional responsibility for reporting suspected maltreatment. While teachers facilitate children's learning, children cannot learn effectively if their attention or energy is sapped by the conflicts inherent in being

<sup>18</sup> Further details on handling cases of sexual and gender-based violence are provided in Chapter 3.

maltreated. Third, school personnel have a unique opportunity to advocate for children, as well as provide programs and services that can help children and strengthen families. It is important to realize that a positive relationship with a supporting adult may enhance the resiliency of children who have been abused, are at-risk for being abused, or live in a home where no maltreatment occurs but the family experiences other problems, such as alcoholism or substance abuse. Lastly, but crucially, teachers are often perpetrators of abuse.

Teachers have a professional responsibility to the children in their care. They should be concerned about the health, safety, and happiness of these children. Teachers should be role models for the children they teach. They are also an important source of support, concern, and care for many children. Teachers should do what is best for the children in their care because their professional standards require it. Teachers have the responsibility not only to report suspected abuse, but also to know how to make a report, to be familiar with child policies and reporting procedures, and to communicate with the Police if need be.



<sup>19</sup> Research and opinion vary regarding both the effectiveness and impact of corporal punishment. Most studies imply that corporal punishment, on its own, does not teach right from wrong or deter future misbehavior. See for instance, Gershoff, E. T. (2002). Corporal punishment by parents and associated child behaviors and experiences: A meta-analytic and theoretical review. *Psychological Bulletin*, 128(4), 539–579; Baumrind, D., Larzelere, R. E., & Cowan, P. A. (2002). Ordinary physical punishment: Is it harmful? Comment on Gershoff. *Psychological Bulletin*, 128(4), 580–589; Rosemund, J. K., Straus, M. A., & Larzelere, R. E. (1994). Should the use of corporal punishment by parents be considered child abuse? In M. A. Mason & E. Gambrell (Eds.), *Debating children's lives: Current controversies on children and adolescents* (pp. 196–222). Thousand Oaks: Sage.

Additionally, as adults in constant contact with children, Teachers must be aware of issues surrounding physical contact with a child; what is considered appropriate versus inappropriate in everyday classroom activities. Many teachers have been convicted of defiling their pupils. This is reprehensible and is in violation of the Teachers' Code of Conduct. Despite a Ministry of Education Directive prohibiting it, some teachers practice corporal punishment, take it too far, and end up inflicting bodily harm. This is unacceptable and a crime of assault/ and causing grievous bodily harm under the Penal Code Act.

# CHAPTER | 03

# CHAPTER THREE

## Children in Conflict with the Law

### 3.1 Introduction

As discussed in the previous section, children who commit acts that break an existing law in the penal code or Children act or any other criminal law are said to have come into conflict with the law. This section sets out the legal and institutional frameworks in place to address the consequences and implications that attach to addressing children in conflict with the law.

**Article 257 (1)** of the Constitution of the Republic of Uganda, 1995 and **Section 2** of the Children Act defines a child to mean a person under the age of eighteen years. **Section 88** of Children Act Cap 59 provides that the minimum age of criminal responsibility shall be twelve years. This makes it important therefore to establish that children being charged with a crime have attained the age of criminal responsibility and that they are under 18 years, to avoid having children undergo criminal systems and proceedings for adults.

### 3.2 Estimating the age of a child

Because of a poor culture of births registration in Uganda, often it is not easy to determine the age of a child and yet this is crucial in determining how a child should be dealt with by the justice system. The Births and Deaths Registration Act makes it compulsory for every child to be registered at birth. There is also a national directive requiring all citizens aged 16 years and above to register for national identity cards. Birth certificates and national ID cards are important because they provide conclusive proof of age.

Where the age of an accused person or victim is in doubt and the person has no birth certificate or national ID, there are administrative guidelines on determining age. Accordingly, the Police Guidelines on the Implementation of the Children Act provide as follows:

### Extract of police guidelines on the implementation of the children's act

- The Police may rely on documentary evidence to prove the age of the child to their satisfaction.
- The Police can rely on “other evidence” to prove the age of the child such as (a) the testimony of the father or mother to the child in conflict with the law or (b) the testimony obtained from members of the community where the child lives or was born from.
- Where a dispute as concerns age of the child in conflict with the law arises and in the mind of a reasonable person, the child is of apparent age of twelve years and above, such a child shall be charged with the offence committed and shall be taken to the Family Court within twenty four hours and the dispute in relation to the age of the child in conflict with the law shall be brought to the attention of court.
- A certified copy of an entry in the Birth Register issued in Uganda by the Registrar appointed under the Birth and Death Registration Act, 1970 in respect of the child shall be prima facie evidence of the facts contained in it.

Criminal justice agencies such as the Police, DPP and the Courts make use of other means of verifying age such as evidence from immunisation cards, school records and baptism certificates. Medical evidence can be relied upon to prove age. Medical professionals look at the teeth and may x-ray bones to estimate the age of a person. Such evidence can be used as corroborative evidence but might not be conclusive on its own.



### 3.3 Charging Children with Criminal Offences

Charging of children is provided for under Section 89 of the Children Act. The Police are ordinarily the first point of contact for a child with the formal justice system. As far as possible all cases involving children in conflict with the law shall be handled by the CFPU. The CFPU is an important child friendly mechanism and ensures that children are not treated in the same manner as adult offenders. Officers in this unit are required to dress in plain clothes, use child friendly language and liaise with either the parents/guardians of the child, the PSWO and LCs.

After a case has been filed by a complainant, an arrest is not to be made until enough information is got to support the case. A record of the arrest should be made by the police .

**Section 89** stipulates that where a child is arrested, the police shall under justifiable circumstances caution and release the child. The police are empowered to dispose of cases at their discretion without recourse to formal court hearings in accordance with criteria to be laid down by the Inspector General of Police as provided for under **Section 89(3)** of the Children's Act. As soon as possible after arrest, the child's parents or guardians and the secretary for children's affairs of the local government council for the area in which the child resides shall be informed of the arrest by the police. The police shall ensure that the parent or guardian of the child is at the time of the police interview with the child except where it is not in the best interests of the child. This could arise where the child is fearful, embarrassed or intimidated by the presence of an adult regardless of the relationship with the child. For instance, some cases arise out of family disputes and incest or defilement by family members.

Where a child's parent or guardian cannot be immediately contacted or cannot be contacted at all, the probation and social welfare officer or an authorised person shall be informed as soon as possible after the child's arrest so that he or she can attend the police interview. When more than one interview is necessary, it should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child. The number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span.

Where a child is arrested with or without a warrant and cannot be immediately taken before a court, the police officer to whom the child is brought shall inquire into the case and, unless the charge is a serious one, or it is necessary in the child's interests to remove him or her from association with any person, or the officer has reason to believe that the release of the child will defeat the ends of justice, shall release the child on bond on his or her own cognizance or on a cognizance entered into by the parent of the child or other responsible person.<sup>20</sup>

After the interview, if the evidence obtained is not sufficient, the police may close the case and discharge the child without any condition. The Police have discretion to use diversion in certain cases further explained below. **In cases that cannot be diverted, the police shall prepare a charge and refer the case to the prosecution (DPP) for advice.**

Where release on bond is not granted, a child shall be detained in police custody for a maximum of twenty-four hours or until the child is taken before a court, whichever is sooner. Under **subsection (8)** No child shall be detained with an adult person. A female child shall, while in custody, be under the

care of a woman officer as provided under **sub-section (9)**. **In this regard**, there are children reception centres that have been set up for children in a number of police stations; and even where they are no dedicated facilities, there are some improvisations.

#### Important principles to remember:

- Arrest is not to be made until enough information is got to support the case.
- Arrest should be as a measure of last resort.
- A child should not be kept in police custody for more than 24 hours.
- A child must not be detained with adults.
- Police should use maximum restraint during the arrest of the child – no torture, harsh treatment, caning and violence. Handcuffs and other forms of restraint should be avoided as much as possible.
- On arrest of the child, the parents or guardians, PSWO and secretary of children affairs should be informed.
- The use of separate rooms and facilities is also encouraged to avoid exposing these children to the public. These rooms and facilities should be as comfortable and child friendly as possible

### 3.3 Investigations

Investigations are undertaken by the CFPU when a case involving a child has been referred to the Police, although in practise, even CID agents investigate cases involving children, particularly those involving children who are jointly being charged with adults. The officers of the CFPU and CID should bear the following in mind when investigating cases involving children:

- Children are entitled to legal aid. The provision of legal aid services to child victims is very important in ensuring that cases are handled efficiently and expeditiously, and that child rights procedures are followed. Organisations like PAS and FHRI give legal aid to children.
- Children's files and records should be kept confidential. Access to records is allowed only for people who are directly concerned with the case and those authorised by law. Furthermore, no information that is likely to disclose the identity of the child shall be disclosed to unauthorised persons.
- The parents or guardian of the child must be present during the interview – if not available the LC Secretary for Children or the PSWO must be present.
- The interview must be conducted in a language the child understands. It should be recorded, read back and explained to the child in his or her preferred language. The statement should then be signed by the child, the police officer and those present to show that the contents are correct. Children should be interviewed by an officer of the same sex.
- If the evidence indicates a prima facie case against the child the police may take appropriate action as follows:

<sup>20</sup> In practice the police is reluctant to apply this discretion because of fear of absconding.. Also in the case of children who have no ascertainable residence, the police tend to worry about absconding and not grant bond on the child's cognizance, which accounts for the high numbers of children in detention in police and remand homes. In such cases, every effort should be made to ensure that the child is taken before a court at the earliest opportunity.



- Serious cases should be referred to prosecution department
- The Police should consider the viability of releasing the child (diversion – see details below).
- The child may be detained pending referral to a court (this should always be done only if it is in the child's best interest in accordance with section 89 (6) of the Children Act discussed below in greater detail).
- The Investigating officer should work with the PSWO as much as possible to find out detailed information about the child as discussed above; this will be of assistance to the Police or the DPP and the Court. There may be important evidence that is obtained which will guide the Police on the most appropriate actions to take.
- When a child is suspected of being in conflict with the law, the Child and Family Protection Unit (CFPU) has to:
  - Isolate cases that can be handled by the LC C
  - Isolate cases that must be handled by the Criminal Investigation Unit (CID) for capital offences
  - Isolate cases where a child is jointly charged with an adult, which should also be handled by CID

After screening and sorting out the case as above CFPU should refer it to the competent institution. Where a case is referred to the FCC, investigations must be completed within one month and 3 months if referred to the High Court. Notice should be given to the parent/guardian/fit person/PSWO.

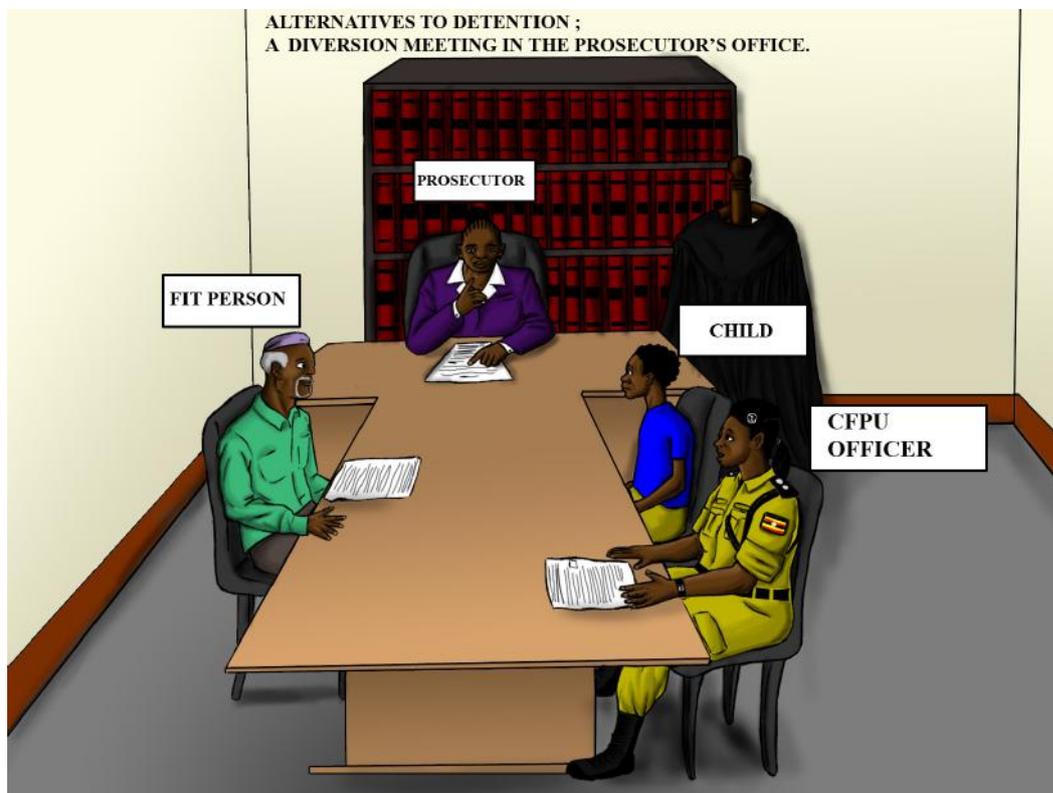
### 3.4 Diversion

Diversion is recognised as a critical child rights based approach under the Convention on the Rights of the Child (CRC), Children Act and various UN Guidelines, such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Minimum Rules on the Prevention of Delinquency. It is applied at various phases of the criminal justice process. Diversion refers to the turning away or averting from the formal criminal of children in conflict with the law. The formal system covers the criminal justice processes from the time of charges being lodged by complainants against a child, through investigations, arrest, remand, trial and detention. At any point of these processes, all attempts should be made to provide alternatives to formal justice processes for children who admit their wrong acts and have the potential to reform with the help of societal members and the PSWO.

The Convention on the Rights of the Child (CRC) recognizes the importance of a properly functioning diversion system. Article 40 of the CRC states that States Parties shall seek the establishment of "whatever appropriate and desirable measures for dealing with such children under the age of 18 years without resorting to judicial proceedings" providing that human rights and legal safeguards are fully respected.

Article 34 of the Constitution of Uganda provides for the rights of children. It is specifically stipulated that laws must be enacted in children's best interest and they must be protected from social or economic exploitation or any condition harmful to their health or physical, mental, spiritual moral or social development.

<sup>21</sup>Rule 11; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). Adopted by General Assembly resolution 40/33 of 29 November 1985



According to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"):

- Consideration shall be given, wherever appropriate, to dealing with child offenders without resorting to formal trial;
- The police, the prosecution or other agencies dealing with child cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system;
- Any diversion involving referral to appropriate community or other services shall require the consent of the child, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application;
- In order to facilitate the discretionary disposition of children's cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

According to the Juvenile Justice Law and Order Sector Diversion Guidelines 2015, diversion is meant to minimise the negative impact and trauma that results from children undergoing formal justice proceedings, prevent stigmatisation and labelling of children and their families, minimise overreaction of the system to petty offences and promote rehabilitation as opposed to recidivism. Diversion is envisaged at any stage of the formal criminal justice process from the time charges are preferred through to investigations, arrest, remand and trial, except in cases of capital offences such as murder and rape.

### Methods of Diversion under the 2015 Guidelines include:

- Verbal and written warnings
- Formal cautions
- Victim/ Offender family conferencing
- Referral to community-based programmes

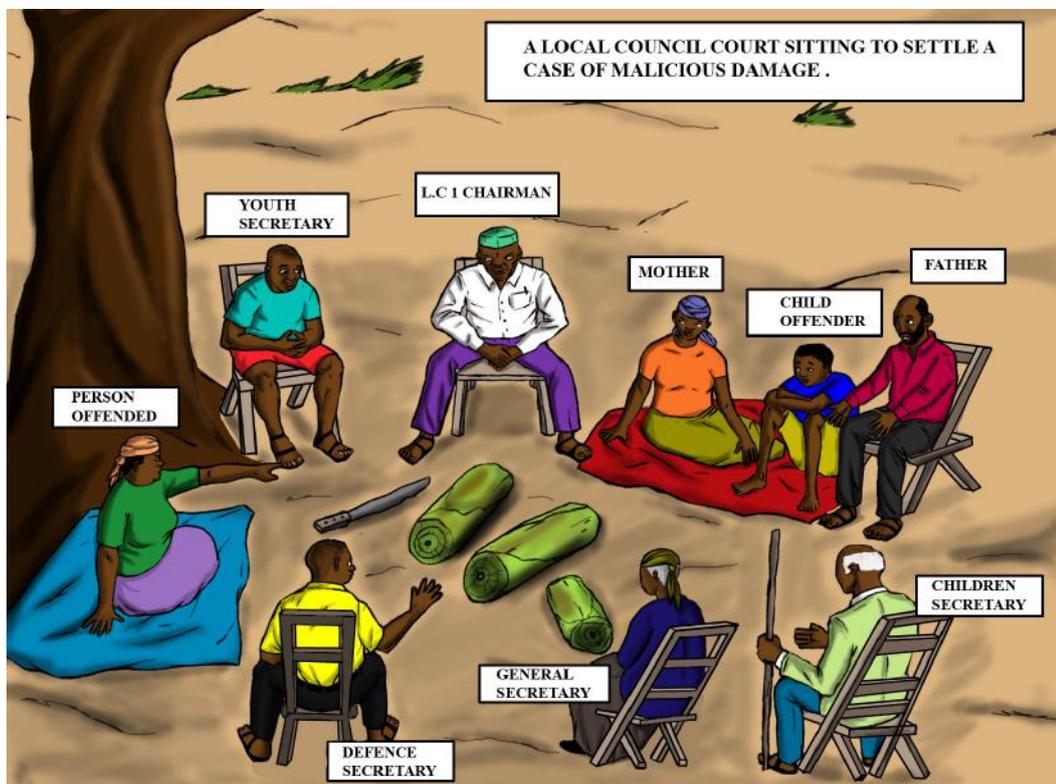
### Diversion is allowed in the following instances:

- The case is not serious (petty crimes)
- The child is a first offender
- The child is remorseful and repentant

### The Role of the DPP in diversion

According to the 2015 JLOS Standard Guidelines on Diversion, the DPP can play a role in diversion by:

- Offering preliminary assessment support on whether case is divertible and to where.
- Liaising with the police, probation and fit persons in respect of the case information.
- Maintaining a register of cases diverted.
- Advising police and court to divert minor juvenile cases from the justice system.
- Advising probation officers to prepare juveniles for court and to visit the child's home for a better social inquiry report.



### Uganda police powers of diversion

1. **Section 89 (2)** of the Children Act empowers the police to dispose of cases at their discretion without recourse to formal court hearings in accordance with criteria laid down by the Inspector General of Police.
2. The Police under **Section 89 (1)** of the Children Act also have powers to caution and release a child who has been arrested.
3. The Police have powers to release a child who is in conflict with the law and refer without a formal charge, to the Secretary for Children Affairs or to the Probation and Social Welfare Officer.
4. **Section 89 (6)** empowers the police to release on police bond any child arrested with or without a warrant who cannot be immediately taken before a court.
5. The police have powers and are required under **Section 89 (7)** to detain a child under custody where release on bond is not granted for a maximum of twenty four hours or until the child is taken before a court, whichever is sooner.

#### **According to the JLOS Standard Guidelines on Diversion, the role of the CFPU and CID in Diversion is to:**

- a) Receive complaints, screen and inform the Parent /guardian, fit person/Probation Officer immediately
- b) Caution and release the child where applicable within 24 hours of arrest
- c) Apply an enquiry approach rather than interrogation of the child
- d) Police will endeavor to promote reconciliation between parties especially in cases of caution and release
- e) Document diverted cases and follow up on progress
- f) Where there is a settlement between parties police should ensure signing of the settlement in writing in presence of all parties and their witnesses
- g) Ensure Involvement of fit persons, community volunteers or any other child rights activist's organizations available to ensure peaceful reintegration.
- h) Should keep and maintain the diversion register
- i) Explain to the child the implications of the offence committed
- j) Counsel the child against committing further crimes or misconducts
- k) Reconcile the two families of both offender and the victims
- l) Fill the diversion form and ensure that the two families sign on it
- m) Send a copy of the signed form to the LC committee or LC court, the probation officer or any other diverted to agency/ organization.

### 3.5 Detention Pending Trial

*Pre-trial detention should not be used for children other than in exceptional circumstances and under 14's should never be detained in prison establishments.*

#### ***The Right to Bail***

Penal Reform International, a leading international NGO, emphasises that children should, where possible, be released into the care of their families to await trial in their own homes. Conditional release should be accompanied by measures to support and supervise the child and family.

A maximum time limit should be set by the FCC for keeping a child on bail according to age and offence. Where it is used it should be for the shortest time, with a cut off period for which a child may be held awaiting trial, after which the child should be released on bail. Bail and other forms of conditional release should be accompanied by measures to support and supervise the young person and their family.

Separation from adult detainees and strict monitoring of the conditions of children detained pre-trial are imperative.

The Constitution under **Article 23(6)** provides for the right to bail. Further, the right to bail is further provided for under **Section 90** of the Children Act and it is to the effect that where a child appears before a court charged with any offence, the magistrate or person presiding over the court shall inquire into the case and unless there is a serious danger to the child, release the child on bail—

- (a) On a court bond on the child's own recognizance;
- (b) With sureties, preferably the child's parents or guardians, who shall be bound on a court bond, not cash.

If bail is not granted, the court shall record the reasons for refusal (**Section 90(2)** Children Act, and inform the child applicant of his or her right to apply for bail to a Chief Magistrate's Court or to the High Court.

**Section 14** of the Trial on Indictment, **Cap 23** provides that the High Court may at any stage release an accused person on bail. **Section 15(1) (a) of Cap 23** provides for release on bail based on exceptional circumstances and **sub-section (3) (c)** defines exceptional circumstances to include infancy of an accused person. The reading of **Section 14** of the Trial on Indictment Act does not stop a child from applying for bail directly to the High Court. However, based on Rule 2 Judicature (Criminal Procedure) (Applications) **Rules SI 13-8**, which provides "all applications to the High Court in Criminal cases shall usually be in writing and, where evidence is necessary, be supported by affidavit," a question arises as to whether a child can legally be allowed to swear or affirm an affidavit in support of his or her bail application bearing in mind the provisions of **Section 9 of the Oaths Act, Cap 19**.

## Remand

**Under Section 91(1)** of the Children Act where a child is not released on bail, the court may make an order remanding or committing him or her in custody in a remand home to be named in the order, situated in the same area as the court making the order.

If there is no remand home within a reasonable distance of the court, the court shall make an order as to the detention of the child in a place of safe custody as it deems fit. Unfortunately such “places of safe custody” do not exist at the moment, leaving the Courts and other agencies in a quandary regarding what to do with children. The DPP and other JLOS agencies should work with civil society child rights organisations to advocate for the government of Uganda to prioritise the need for places of safe custody.

**Section 91(3)** of the Children Act states that, a place of safe custody shall be a place which the court considers fit to provide good care for the child and assures that the child shall be brought to court when required and shall not associate with any adult detainee.

**Section 94(2)** provide that for the purposes of subsection (1)(g), detention means placement in a centre designated for that purpose by the Minister in such circumstances and with such conditions as may be recommended to the court by the probation and social welfare officer.

- (3) Where a child has been remanded in custody prior to an order of detention being made in respect of the child, the period spent on remand shall be taken into consideration when making the order.
- (4) *Detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order.*
- (5) Before making a detention order, the court shall be satisfied that a suitable place is readily available.
- (6) No child shall be detained in an adult prison.
- (7) The order under which a child is committed to a detention centre shall be delivered with the child to the person in charge of the detention centre and shall be sufficient authority for the child’s detention in accordance with the terms of the order.
- (8) A child in respect of whom a detention order is made shall, while detained under the order and while being conveyed to and from the detention centre, be deemed to be in legal custody.
- (9) No child shall be subject to corporal punishment.

Under **Section 91(4)** the local government council is mandated to provide an appropriate place of custody; and before making an order remanding or committing a child in custody, the FCC shall ascertain that there is a place readily available.

<sup>22</sup> Penal Reform International, Ten Point Plan for Juvenile Justice, a contribution to the Committee on the Rights of the Child Day of General Discussion on “State Violence Against Children”, Geneva 22 September 2000.

<sup>23</sup> Only adults of sound mind are allowed to swear an affidavit. The section therefore precludes children from swearing affidavits.

Section 91(5) of the Children Act provides that remand in custody shall not exceed—

- (a) six months in the case of an offence punishable by death; or
- (b) three months in the case of any other offence.
- (c) No child shall be remanded in custody in an adult prison.

A child who escapes from a remand home or other place of safe custody in which he or she is detained may be arrested with or without warrant and returned to that place. Pending the establishment of remand homes, the Minister may declare any establishment as a remand home and whenever possible, the court shall consider alternatives to remand such as close supervision or placement with a fit person determined by the court on the recommendation of a PSWO.

It is important for all actors in JLOS involved in justice administration and service delivery to consider the option of not remanding children but rather to consider diversion. Most of the government remand homes are constrained by resources for food, medicine and adequate living conditions. There are few programmes to reform or rehabilitate children on pre-trial remand which has adverse effects on their development.

### **The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)**

provide for alternatives to imprisonment and restorative justice. They strongly discourage the use of pre-trial detention (Rule 6). It is therefore suggested that before a decision to remand a child is made, a social inquiry report detailing the background of the child is written and availed before the court.

## **3.6 Child Friendly trial proceedings**

### *Establishing a child-friendly environment*

Criminal proceedings are complex and intimidating, even for adults. In child friendly trial proceedings, children should be treated with consideration taking into account their age, vulnerability, maturity and level of understanding, and bearing in mind any communication difficulties they may have. The trial process should be fair and equitable for them to obtain true justice.

Cases involving children should be dealt with in non-intimidating and child-sensitive settings. Before proceedings begin, children should be familiarised with the layout of the court or other facilities and the roles and identities of the officials involved. As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment. Where possible specialist courts (or court chambers) procedures and institutions should be established for children in conflict with the law. This could extend to the establishment of specialised units within the police, the judiciary, the court system and the prosecutor's office.

Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.

Language appropriate to children's age and level of understanding should be used.

When children are heard or interviewed in judicial and non-judicial proceedings and during other interventions, judges and other professionals should interact with them with respect and sensitivity.

Children should be allowed to be accompanied by their parents or, where appropriate, an adult of their choice, unless a reasoned decision has been made to the contrary in respect of that person, whose presence for example could be threatening, embarrassing or intimidating the child. Interview methods, such as video or audio-recording or pre-trial hearings in camera may be used and considered as admissible evidence.

Children should be protected, as far as possible, against images or information that could be harmful to their welfare. In deciding on disclosure of possibly harmful images or information to the child, the judge should seek advice from other professionals, such as psychologists and social workers.

**The United Nations Guidelines on Child Victims and Witnesses of Crime** provide further guidance on how children in the justice system can be treated in a child-friendly manner:

- *Child* victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.
- Every child should be treated as an individual with his or her individual needs, wishes and feelings.
- Interference in the child's private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process.
- In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.
- All interactions should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses *and understands*.

### Special sessions for children under JLOS' justice for children programme

In 2012, UNICEF and JLOS piloted a programme for child justice, known as Justice for Children. The pilot program was first implemented in the six (6) districts of Acholi Sub Region, two (2) sites in central Uganda, Entebbe and Nakawa, two (2) sites in eastern Uganda; Mbale and Bududa and two (2) sites in Western Uganda; Kabarole and Kyenjojo

<sup>24</sup> This programme was implemented by the Centre for Justice Studies and Innovations



## Important child friendly innovations were developed under the programme

### GOOD PRACTICES REGARDING JUSTICE FOR CHILDREN UNDER JLOS

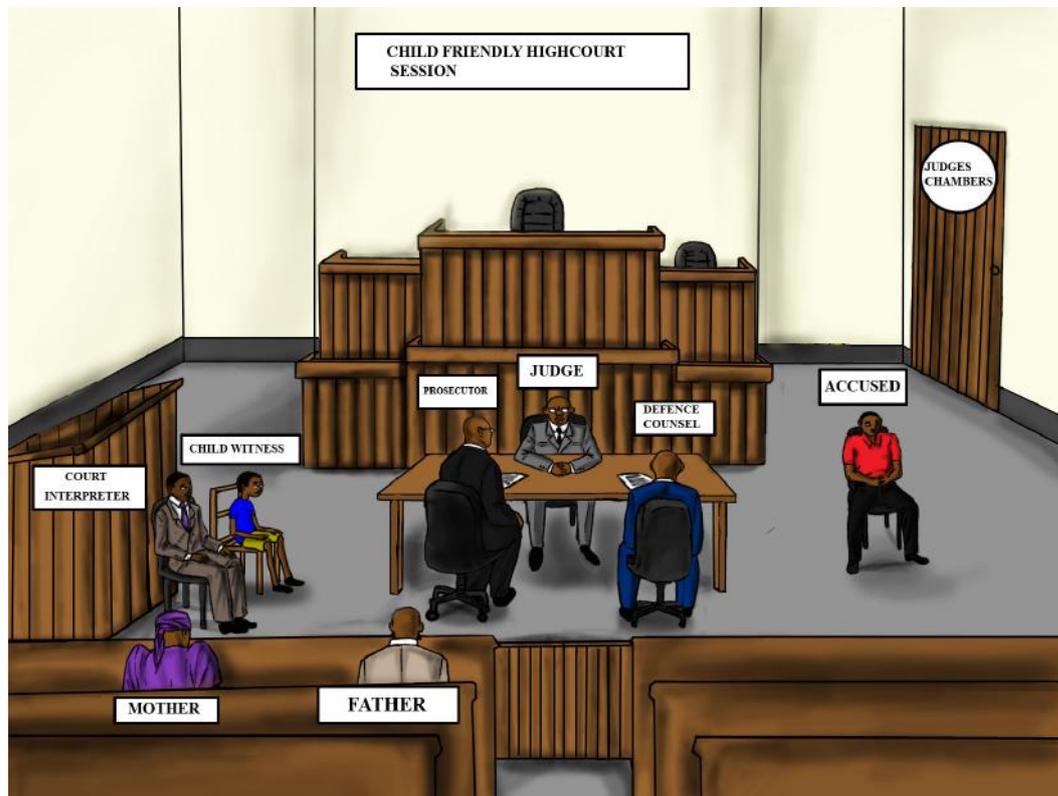
- Judges remove wigs and red gowns; lawyers are also informally dressed
- Close relatives allowed to accompany children to court; Children should be asked who they would like to accompany them
- Provide simple, affordable “refreshments” for children
- Probation officers (and Fit Persons) to prepare children for trial, i.e. reach out to the victims, offenders and witnesses before, during and after court
- Child cases heard in chambers; proceedings should be in camera for all cases involving children (only where necessary)
- Child friendly language used by ALL; child friendly questions and style to be used in court, including using inquiries rather than interrogations
- Exclude the press
- Accurate interpretation of what witnesses say: judges must emphasize to the interpreter to translate exactly what witnesses say.

CJSI also trained a group of women as “Fit Persons,” whose role during the sessions was to prepare children (in any capacity) for court appearance in the following ways:

- Preparing them on what to expect in court and from the court environment;
- Telling them about the different court officials, their roles and how to address them;
- Explaining the plea taking process and its consequences;
- Outlining the typical progression of a case and what happens when a case is proved, what is the likely order to be given and its purpose;
- Making sure children understand their right to ask and be informed about any issue;
- Explaining who they should talk to in case of any need

Fit persons have been trained in a number of districts. Prosecutors may inquire from the District Coordination

<sup>25</sup> Adapted from: Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010-2011.



## Principles of Child-Friendly Justice during Judicial Proceedings

### *Right to be heard and to express views*

As discussed earlier, children have a right to participate fully in any case against them, whether in the FCC or High Court. The trial Magistrate or Judge should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Trial proceedings should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be



consulted on the manner in which they wish to be heard. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.

The right to be heard is a right of the child, not a duty on the child. A child should not be prevented from being heard solely on the basis of age. Whenever a child seeks to be heard in a case that affects him or her, the magistrate or judge should give full effect to the child's wishes and hear him or her out during the trial, and even actively seek the child's views and perspectives.

When a case is referred to the High Court or FCC for the trial of a child, there are several important principles to keep in mind.

### Legal Counsel and representation for children

- Children should have the right to their own legal counsel and representation
- Children should have access to free legal aid, under the same or more lenient conditions as adults.
- Lawyers representing children should be trained in and knowledgeable on children's rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding.
- Children should be considered as fully-fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child.

- Lawyers should provide the child with all necessary information and explanations concerning the possible consequences of the child's views and/or opinions.
- In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian ad litem or another independent representative to represent the views and interests of the child.
- Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.

### Implications for prosecutors

Children should be provided with all necessary information on how effectively to use the right to be heard. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision. It is important to use non-complicated and non technical language so that the child can follow to the extent possible the proceedings in the case against him or her and participate. The cross examinations should not be hostile or aggressive, but rather, should promote the ability of the child to answer to queries made by the prosecutor. Proceedings, judgments and court rulings affecting children should be duly explained to them in a language that is easy to understand.

### *Avoiding undue delay*

In all proceedings involving children, the urgency principle should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law. Delays in the trial proceedings can only have a negative effect on the child's psychosocial state and affect his or her development. The Children Act has several provisions that promote the right to a fair and speedy trial in an enabling environment for children. Section 99 of the Children Act provides as follows:

#### The elements of a speedy trial under the Children Act

- *Every case shall be handled expeditiously and without unnecessary delay.*
- *Where the case of a child appearing before a family and children court is not completed within three months after the child's plea has been taken, the case shall be dismissed, and the child shall not be liable to any further proceedings for the same offence.*
- *Where, owing to its seriousness, a case is heard by a court superior to the family and children court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail.*
- *Where a case to which subsection (3) applies is not completed within twelve months after the plea has been taken, the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence.*

### **BEST PRACTICE: SOUTH AFRICA ONE STOP CHILD JUSTICE CENTRE**

South Africa has introduced an innovative multi-disciplinary team approach to juvenile justice all under one roof. The "One-Stop" model is a juvenile justice centre with specialised police, court and probation officers (social workers) all in the same location. Juveniles who are arrested are taken to the centre to be processed by the police and assessed by a social worker. The centre has special separate cells for juveniles who are detained during the investigation, as well as a specialised juvenile court. The

model has helped improve coordination between the agencies, ensure that juveniles are kept separate and apart from adult offenders, and has allowed for more appropriate and timely resolution of juvenile cases.

### 3.7 Child Evidence and Child Witnesses

The justice system in Uganda still treats child witnesses as inherently unreliable, and very little progress has been made in made to accommodate them. In other jurisdictions such as Canada, over the past several years, there have been dramatic changes in the understanding and awareness of the nature and extent of child abuse, as well as large increases in the number of reported cases. Thus more advanced justice systems have responded both to this growing understanding and to increased psychological research on the reliability of child witnesses. Judges and legislators have introduced many substantive, evidentiary and procedural reforms, which have resulted in many more successful prosecutions in cases in which children are witnesses. Uganda too, is making substantial progress in adopting a more child friendly approach. For instance, an example is under the afore-mentioned Justice for Children programme in Gulu, where the practices mentioned above were adopted in the special session for children.

In Uganda, different standards compared to adults are applied regarding the admissibility of child evidence. A child below 14 years of age has to answer general questions asked by court to determine the competence of such witness to testify. If such a child gives unsworn evidence, corroboration of child's testimony is a requirement for conviction. An example is the case of **Kizza Samuel v. Uganda, Criminal Appeal No. 102 of 2008**, where the uncorroborated evidence of a child of tender years was deemed insufficient to sustain a conviction.

**Section 1 of the Children Act** provides for child friendly procedures in handling children in the Family and Children Court (FCC). However, no specific provisions exist in the law regarding the application of child friendly procedures in the Chief Magistrates' courts, meaning that children who appear there as witnesses are more often than not subjected to the same standards and processes as adults. Regarding Children in the High Court, **section 104 (3) of the Children Act** provides that: 'In any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children.' This provision mandates the High court to apply among other standards, **section 16 of the Children Act and Rule 4 (2) of the Children (Family and Children Court) Rules (SI 59-2)**.

#### 3.7.1 Ugandan law regarding child evidence

Before a child below the age of 14 years can testify, the judge or magistrate must be satisfied that the child is 'competent' to testify. An inquiry or voir dire must be conducted by the court and the court must be satisfied that:

- the child is possessed of sufficient intelligence to testify,
- understands the duty of speaking the truth and or,
- the nature of the oath.

<sup>26</sup> For more information, see UNICEF website, at [http://www.unicef.org/southafrica/media\\_4270.html](http://www.unicef.org/southafrica/media_4270.html)

If the child testifies not on oath, that evidence must be corroborated by other material evidence.

According to Section 40 (1&2) of the Trial on Indictments Act on evidence to be given on oath:

- Every witness in a criminal cause or matter before the High Court shall be examined upon oath, and the court shall have full power and authority to administer the usual oath.
- Any witness upon objecting to being sworn, and stating as the grounds for such objection either that he or she has no religious belief or that the taking of an oath is contrary to his or her religious belief, shall be permitted to make his or her solemn affirmation instead of taking an oath, which affirmation shall be of the same effect as if he or she had taken the oath.



Section 40 (3) of the Trial on Indictments Act further states that:

“Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.”

Similar provisions are in section 101 (1&2) of the Magistrates Courts Act which states:

- (1) Every witness in a criminal cause or matter in a magistrate’s court shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.
- (2) Any witness upon objecting to being sworn, and stating as the grounds for that objection either that he or she has no religious belief or that the taking of an oath is contrary to his or her religious

belief, shall be permitted to make a solemn affirmation instead of taking an oath which affirmation shall be of the same effect as if he or she had taken the oath.

**Regarding child witnesses, the Magistrates' Courts Acts provides in section 101 (3 &4):**

- (3) Where, in any proceedings, any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, the child's evidence may be received, though not given upon oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
- (4) Where evidence admitted by virtue of subsection
- (5) is given on behalf of the prosecution, the accused shall not be liable to be convicted unless that evidence is corroborated by some other material evidence in support of it implicating him or her.

**Accordingly, it is the duty of the magistrate to carry out an investigation and make definite findings on the capacity of the child to give sworn or unsworn evidence. The inquiry the magistrate makes in this connection is the voir dire. The procedure is as follows:**

- (a) The court should first find out whether the child understands the nature of an oath in this connection the child should be questioned about him/her religious beliefs and the purpose of swearing.
- (b) If the child understands the nature of oath, he/she can be sworn, and give evidence on oath.
- (c) If the child does not understand the nature of oath, the child cannot be sworn, and the court must carry out more inquiry as to whether the child;
  - (1) Possesses sufficient intelligence and
  - (2) Understands the duty of speaking the truth.

**For this purpose the court should put questions to test the child's general knowledge and perception and find out if he/she knows the difference between truth and lies and the need to tell the truth.**

- a) If the child does not possess sufficient intelligence nor understands the duty to speak the truth, his or her evidence cannot be received in court nor can that child give unsworn evidence.
- b) If the child is possessed of sufficient intelligence and understands the duty of speaking the truth, he or she will be permitted to give evidence not on oath. *Kibangeny Arap Kolil -vs- R (1959) EA 92*)

Although it is a legal requirement that unsworn evidence of a child requires corroboration to support a conviction, in practice even a child's evidence on oath requires corroboration by some other independent evidence implicating the accused. Moreover, even a child who gives evidence not on oath is liable to cross examination just like any other witness. *In Francisco Matovu -vs- R (1961) E.A 260 and Dhamuzungu -vs- Uganda (2002) 1 EA 49* it was held that where a child of tender years gives unsworn evidence for the prosecution, the Judge must direct the assessors and himself that the child evidence requires corroboration. Similarly, sworn evidence of a child of tender years requires corroboration as a matter of practice, since children may easily be coached on what to say in Court. The case of *R -vs- Campbell (1956) 2 ALL ER 272* held that sworn evidence of a child should be corroborated.

**The child friendly approach to witnesses of tender age is enshrined in Rules 3 and 4 of the Family and Children Court Rules. Rule 4 provides the general principles as follows:**

- The general procedures relating to trials of criminal cases in a magistrate’s court apply to the trial of a criminal case in the court with the necessary modifications; and
- As far as possible, the court shall be so arranged that the magistrate presiding sits at the same table with—(i) the child; (ii) the child’s parent or guardian (iii) the child’s legal representative if any; (iv) the complainant or the prosecutor, who shall not appear in uniform; and (v) any other person permitted by the court such as the probation and social welfare officer;
- Crucially, evidence shall not be given from the witness box; and in any particular case, special safety precautions may be taken as the magistrate presiding may deem fit.

Another provision that can be taken into account to deduce the best way to approach child evidence is **Sections 150 &151** of the Evidence Act which provides for indecent and scandalous questions. It says the court may forbid any question or inquiries which it regards as indecent or scandalous, although the questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed. Further, the court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form. Thus Prosecutors and Defence Counsel alike should avoid titillating questions, character assassination of children and other behavior geared towards intimidating the child witness.

### 3.7.2 Judicial approaches to child evidence in Uganda

The case law on child evidence reveals some inconsistency with regard to child evidence. In *Christopher Kizito versus Uganda, Criminal Appeal No. 18/93*, it was held that “...Since the complainant had not given sworn evidence, her evidence alone could not establish the fact that it was the appellant who had committed the offence against her, however truthful she might have been.” The court looked for evidence of corroboration and held further that: “In the instant case the appellant put himself at the scene of crime at the material time in his unsworn statement of defense. To that extent he corroborated the evidence of the complainant, which then justified the conviction. It is for this reason and not the reason advanced by the trial Judge that we uphold the conviction”.

In *Katende Mohammed versus Uganda, Criminal Appeal No.32/2001* the court said: “...Although by use of the expression “shall not be liable to conviction”, the legislature does not seem to completely forbid conviction, it is clearly trite that no conviction of an accused can be based on the uncorroborated evidence of a child of tender years who testifies without swearing...In order to corroborate the testimony of a witness, any former statement made by such a witness relating to the same fact, at or about the time when the fact took place, or before authority legally competent to investigate the fact, may be proved....” The court went on to observe: “.....Nabasanda met her mother (PW2) immediately after the offence. She was in a distressed condition which included crying and bleeding. These conditions corroborated her evidence as to the matter of defilement. Then she reported to her mother that it was the appellant who had defiled her. By virtue of section 155 (now 156) of the Evidence Act, her statement to her mother corroborates her testimony about the identity of her defiler.”

If a court finds that the child is not possessed of sufficient intelligence to testify, it will disqualify such a child from giving evidence before it. Voir dires often result in children who are capable of giving



important evidence being prevented from testifying. In the case of *CHRISTOPHER KIZITO VERSUS UGANDA*, cited above, the court observed that the requirements for admissibility of child evidence were perhaps too onerous: “It may be that S. 38(3) (**now 40(3)**) above should be reviewed by the legislature as it imposes too high a burden on the prosecution and so makes convictions impossible in the face of an offence which is now rampant. We think that where the evidence of the complainant is strong, then it should be accepted as sufficient although it was not given on oath.”

Unfortunately, there are no guidelines on conducting voir dieres. Each Judicial officer determines how to conduct one, leading to different outcomes, which are often prejudicial to the prosecution. If the court decides that the child understands the nature of the oath, he/she will be sworn on the bible or Koran. This is unsatisfactory because it is not well known that adults, who are presumed to understand the nature of the oath, take the oath and then proceed to tell blatant lies.

On the other hand, an adult can decline to make the oath, and make an affirmation instead. Child witnesses currently do not have this option. Where the court finds that the child has sufficient intelligence to testify but does not understand the nature of the oath, it will rule that such child gives un-sworn evidence, which as stated above requires corroboration. This has led to numerous acquittals in cases deserving convictions.

Accordingly, it is pertinent to note that as observed by the Supreme Court in *Christopher Kizito versus Uganda* above, the laws governing child witnesses are outdated and not relevant, they place a high burden on the prosecution and make convictions difficult, especially in cases of sexual violence against children where there are often no witnesses and medical evidence is unavailable for one reason or another. Thus the DPP is aware of the gaps and contradictions in the system and Prosecutors are encouraged and mandated to guide the Court to adopt the best practices possible, citing cases such as this one.

It is further incumbent on the DPP to push for law reform and in the meantime, guide and convince the court of alternative ways of handling child evidence. The test to be applied by courts should be whether the witness is truthful and whether sufficient evidence exists to establish all the elements of the charge, regardless of whether or not such evidence consists of sworn testimony. Moreover, the discriminatory treatment given to the evidence of children contravenes their rights, especially the right to participation which requires that all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them. Children should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views and the circumstances of the case. Children’s right to be heard should be respected, promoted and fulfilled.

### 3.7.3 Best practice guidelines on evidence/statements by children

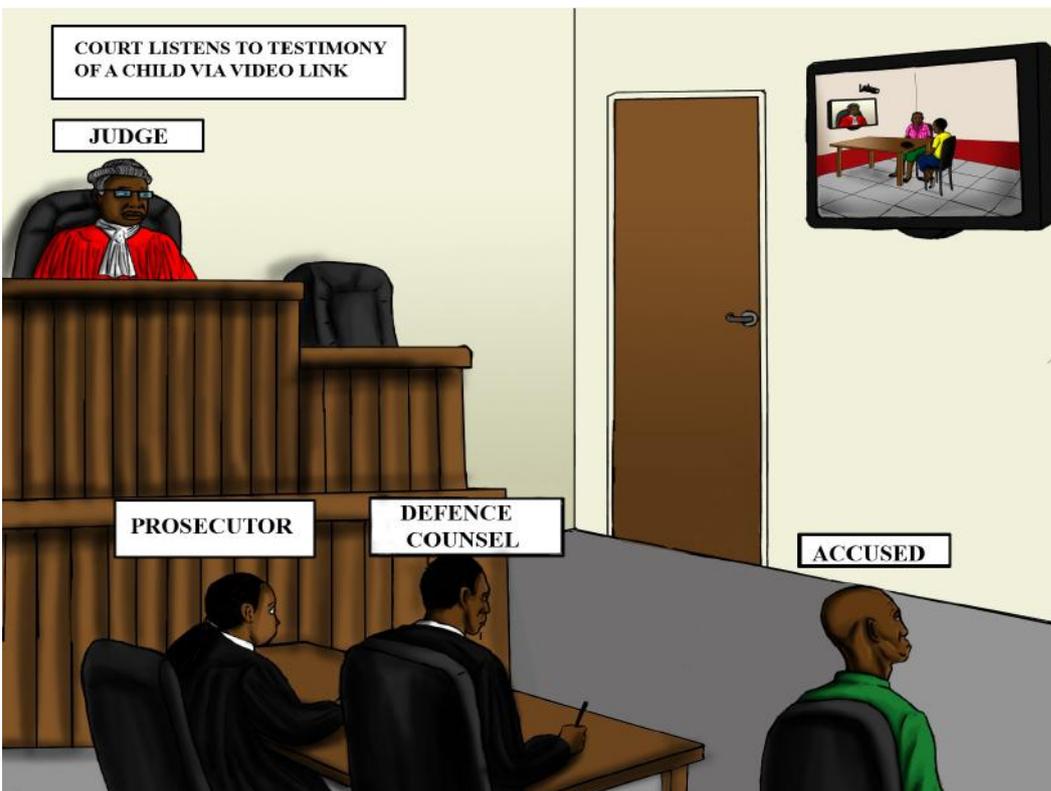
The United Nations Guidelines on Justice involving child victims and witnesses of crime, state:

Age should not be a barrier to a child’s right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not

<sup>27</sup>United Nations Economic and Social Council Resolution 20 of 2005, paragraph 18.

<sup>28</sup>Adapted from the Guidelines of the Committee of Ministers of the Council of Europe on Child friendly justice and their explanatory memorandum, 2011.

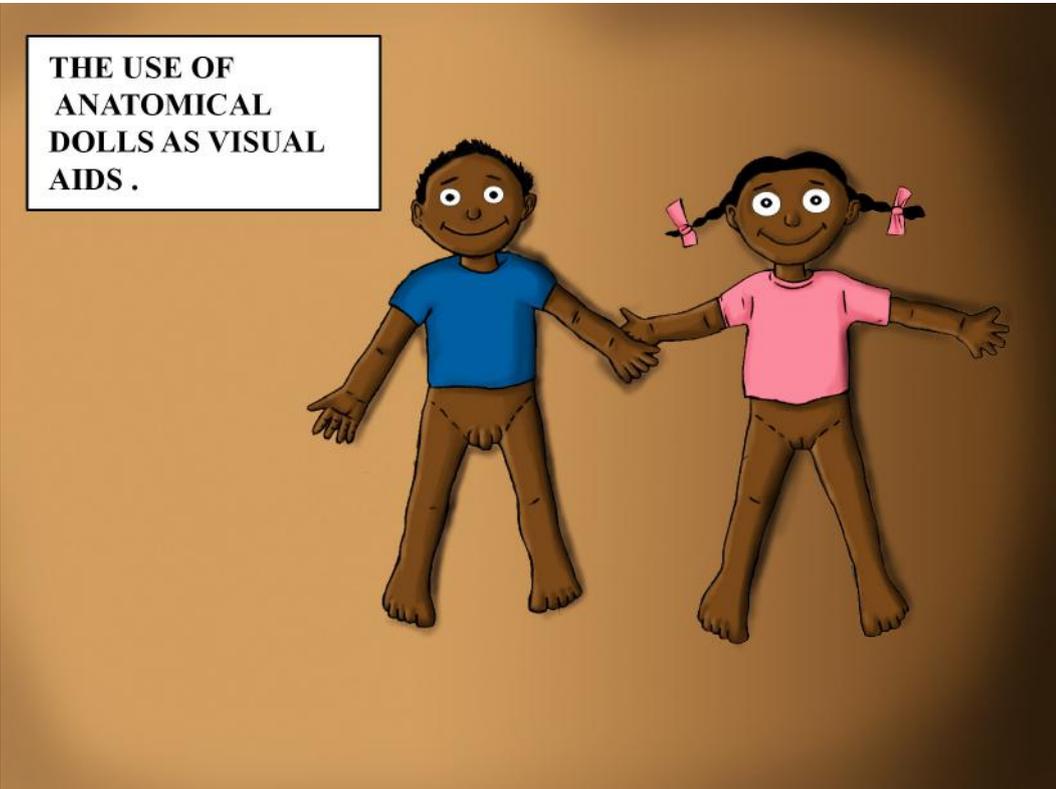
be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.



**CHILD WITNESS TESTIFIES IN COURT BEHIND A ONE WAY SCREEN .**



**THE USE OF ANATOMICAL DOLLS AS VISUAL AIDS .**



In order to avoid the child witness coming face to face with the accused, different jurisdictions have adopted creative measures. In Canada and the United Kingdom, for instance, children may testify behind a screen, through closed circuit television cameras from an area adjacent to the courtroom which relay the proceedings by live link to the courtroom, and replaying evidence earlier recorded as close to the time of the crime as possible. Further, proceedings are made more child friendly by the removal of wigs and gowns by judges, lawyers and policemen. Aids such as dolls may also be used in the interview process.

Some of these practices were successfully adopted during the Justice For Children Special Sessions in Gulu.

**The following are recommended when dealing with child witnesses:**

- Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator. Alternatively, the court room can be modified so that the child does not have to see the perpetrator or even anyone else in the court room. Screens can be used to shield the victim from other participants in the process, especially the accused. Alternatively, the examination of the child can take place in another room and proceedings relayed to the court room via camera.
- The existence of less strict rules on giving evidence such as absence of the requirement for oath or other similar declarations, or other child-friendly procedural measures, should not in itself diminish the value given to a child's testimony or evidence.
- Interview protocols that take into account different stages of the child's development should be designed and implemented to underpin the validity of children's evidence. These should avoid leading questions and thereby enhance reliability.
- With regard to the best interests and well-being of children, it should be possible for a judge to allow a child not to testify.
- A child's statements and evidence should never be presumed invalid or untrustworthy by reason only of the child's age.
- The possibility of taking statements of child victims and witnesses in specially designed child-friendly facilities and a child-friendly environment should be examined.
- Language should be adapted to suit the child's age and understanding as explained below.

<sup>29</sup>It should be noted that the DPP is reviewing and developing further directions to ensure that trials are easier to follow and understand by the public as a means of improving access to justice.

<sup>30</sup>For an excellent discussion on the Legal History and thorough analysis of the Voir Dire, see Lucy S. McGough (1988) Asking the Right Questions: Reviving the Voir Dire for Child Witnesses, Georgia State University Law Review Volume 5 Issue 2 Spring 1989, available at [www.readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2254&context...](http://www.readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2254&context...)

<sup>31</sup>Sample voir dire adapted from Robert L. Farb, North Carolina Prosecutors' Trial Manual 456-57 (UNC-CH School of Government, 4th ed. Jan. 2007). The questions suggested do not emphasise whether a child understands what an oath is, but on whether a child has sufficient understanding to give reliable testimony. Questions about understanding the nature of an oath should be de-emphasised in light of the fact that the emphasis is on reliability and not sincerity. Moreover, it is important to bear in mind that adults can give evidence on affirmation and not on oath, which is admissible before the Court.

## APPROPRIATE TERMINOLOGY TO USE CHILD FRIENDLY TRIALS

Legal Term	Child Friendly Language
The incident/ matter	What happened, etc
Indicate	Said / show
Identify	Point to / name
Description	What he/she/it looked like
Conversation	Speaking
Contact	Call / speak to
Intermittently	Once in a while
Your version	What happened
Event	What happened
Premises	Place
Procedure	Way of doing things
Evidence	What happened

### 3.7.4 Best practices for conducting a voir dire

#### The focus should be on reliability and not sincerity

Under the Common Law tradition inherited from England, child witnesses were regarded as suspect. The reasons for this attitude were not clear. However, because of the spiritual immaturity of a child, his ability to appreciate an oath taken before God eclipsed all other possible concerns. Most children were precluded from testifying "because of their supposed inability to understand the significance of the oath" in a religious sense. It is not altogether clear whether the early justification for finding children incompetent was the child's susceptibility to adult influence, the child's inability to distinguish truth from fantasy, or a combination of these two presumptions. For whatever reason, until late in the eighteenth century, English courts did not permit children under the age of fourteen to give testimony.

In spite of the above, England and other Common Law Countries have moved on, whilst Uganda is still focused on establishing whether a child understands the importance of telling the truth by asking them questions that aim to establish their understanding of religious concepts. On the other hand, in Canada, the voir dire allows questioning on an unemotional topic that will demonstrate the child's ability to communicate and to determine the child's appreciation of the truth. Children begin to lie starting around age 3. They soon learn that it is morally wrong to do so. Nonetheless, there is no evidence that younger children are more likely to lie than older children or adults.

A major pitfall with children is that they are open to suggestibility. This leaves a fine line between asking leading questions and guiding them towards giving information. Broad, open ended questions are the best way to extract the most complete, accurate and reliable evidence from children.

## SUGGESTED QUESTIONS FOR A VOIR DIRE

• What is your name? • How old are you? • When is your birthday? • Do you have any brothers or sisters? • What are their names? • Do you go to school? • What school do you go to? • What class are you in? • Who is your teacher? • Where do you live? • Do you know the difference between right and wrong? • Do you know what a lie is? • Is it right or wrong to tell a lie? • What happens if you tell a lie? • Do you know what a promise is? • What happens if you break a promise? • Do you know what it means to tell the truth? • Do you promise to tell the truth today about what happened between you and [defendant's name]?

### 3.8 Criminal Jurisdiction of Family and children court

Section 14 (1)(a) of the Children's Act provides that

- (1) a family and children court shall have power to hear and determine— criminal charges against a child subject to **sections 93 and 94**.

Section 93 of the Children Act provides that a family and children court shall have jurisdiction to hear and determine all criminal charges against a child except—

- (a) any offence punishable by death;
- (b) any offence for which a child is jointly charged with a person over eighteen years of age. A child jointly charged with a person over eighteen years of age may be tried in a magistrate's court (**section 103**).

Section 94 of the Children's Act provides that;

- (1) A family and children court shall have the power to make any of the following orders where the charges have been admitted or proved against a child—
  - (a) absolute discharge;
  - (b) caution;
  - (c) conditional discharge for not more than twelve months;
  - (d) binding the child over to be of good behaviour for a maximum of twelve months;
  - (e) compensation, restitution or fine, taking into consideration the means of the child so far as they are known to the court; but an order of detention shall not be made in default of payment of a fine;
  - (f) a probation order in accordance with the Probation Act for not more than twelve months, with such conditions as may be included as recommended by the probation and social welfare officer; but a probation order shall not require a child to reside in a remand home;
  - (g) detention for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age and in the case of an offence punishable by death, three years in respect of any child.

## CHILD SUPPORT CENTRES AT COURTS

During the JLOS special sessions for children, a room was designated in both the Gulu and Pader High Courts to become a Child Support Centre to support the children who came to the court in any capacity. It was in these Support Centres that children received pre and post-trial counselling as well as snacks and refreshments. In Gulu, the Support Centre was especially successful, as games and toys were provided for children of all ages; the walls of the centre were adorned with drawings on colourful paper (done by an alleged offender who received support there) which made the office a very welcoming and child friendly environment.



Section 100 of the Children Act provides for remission of cases from a Superior Court to the FCC in the following instances:

- Where it appears to a court other than a family and children court, that a person charged before it with an offence is a child. However, subsection (1) does not apply where a child is charged with an offence punishable by death or the child is jointly charged with an adult.
- Where a child is tried alone or jointly with an adult in a court superior to a family and children court, the child shall be remitted to a FCC for an appropriate order to be made if the offence is proved against him or her. (Sub-section 3). In **Uganda versus Mukulu Nasuru and 3 others** HCT-03-CR-SC-0137-2007, the first accused, a child, admitted to the charges and was convicted of defilement under section 129(1) of the Penal Code Act. The case was however remitted to the Chief Magistrate's Court Jinja for orders to be made under section 94 of the Children Act.

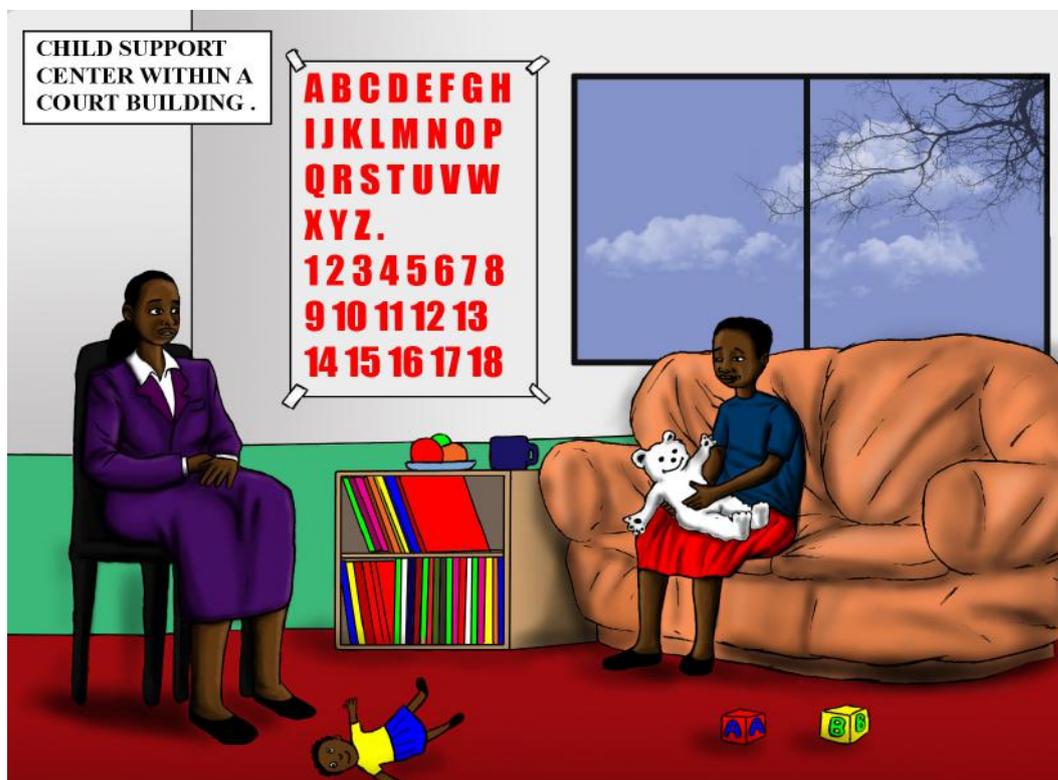
<sup>32</sup>As mentioned previously, there are views that the High Court should be allowed to make the necessary child-friendly orders in order to eliminate further delays. This will, however, require a revision of the Children Act.

<sup>33</sup>It was difficult to ascertain whether or not this is being observed in practice because the FCC is not a court of record and does not publish its judgments. Nonetheless a judicial officer who presides over the FCC confirmed that the FCC tries to comply with this section.

- A court remitting a case to a family and children court may give directions with respect to the custody or release of the child on bond or bail until he or she can be brought before the family and children court.
- A **certificate** stating the nature of the offence, the stage at which the case is and that the case has been remitted to the family and children court shall be forwarded to the family and children court.

The effect of **Section 100 (3)** is that the High Court does not have powers to issue orders regarding children. This should be done by the FCC.

**Section 101** Children Act puts restrictions on use of the words “*conviction*” and “*sentence.*” It says these words shall not be used in reference to a child appearing before a Family and Children Court; and instead, the words “*proof of an offence against a child*” and “*order*” shall be substituted for conviction and sentence respectively.



### 3.9 The High Court’s jurisdiction in cases involving children in conflict with the Law

**Section 1 of the Trial on Indictments Act** provides that the High Court shall have jurisdiction to try any offence under any written law and may pass any sentence authorised by law; except that no criminal case shall be brought under the cognisance of the High Court for trial unless the accused person has been committed for trial to the High Court in accordance with the Magistrates Courts Act.

This section is however superseded by **section 100(3) of the Children Act** cited above, which grants powers of sentencing children to the FCC only. This means that after trying a child for a capital offence, the High Court should remit the case to the FCC for appropriate order to be made as happened in the case of **Mukulu Nasuru and 3 others** cited above.



**Section 94 of the Children Act** grants jurisdiction in all criminal cases concerning children to the FCC except (a) where the offence is punishable by death or (b) where the child is jointly charged with an adult. **It should be noted that certain offences have been decriminalised for children, namely section 167(1)(b) on idle and; disorderly conduct and section 168 (on rogues and vagabonds) of the Penal code Act.** This means that no child can be convicted of behaviour that amounts to a breach of these laws.

### **Section 104 of the Children Act provides for the trial of children in the High Court:**

A child shall be tried in the High Court for an offence with which the child is jointly charged with a person over eighteen years of age and for which only the High Court has jurisdiction.

Where a child is tried jointly with an adult in the High Court, the child shall be remitted to the family and children court for an appropriate order to be made if the offence is proved against the child.

In any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children.

### **Protection of privacy and restriction on publication (Section 102 Children Act).**

The child's right to privacy shall be respected throughout the court proceedings in order to avoid harm being caused to him or her by undue publicity; and no person shall, in respect of a child charged before a family and children court, publish any information that may lead to the identification of the child except with the permission of court.

### **Any person who contrary to subsection (1) publishes—**

- the name or address of the child;
- the name or address of any school which the child has been attending; or
- any photograph or other matter likely to lead to the identification of the child,

**commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment not exceeding six months or to both.**

### **3.10 Sentencing of children**

When praying for sentences against children, State Attorneys and Prosecutors should bear in mind the Sentencing Guidelines Practice Directions. Rule 21 thereof defines a young offender as a person who is or was below the age of 18 years at the time of committing the crime. Under Rule 22, the guiding principles on sentencing of juvenile offenders (sic) mention the importance of Uganda's obligations under the United Nations Convention on the Rights of the Child, which provides principles to be considered in sentencing of children. Accordingly, the court in implementing these guidelines should be guided by the following principles:

<sup>34</sup>The use of the word "juvenile" is discouraged because it stigmatises children in conflict with the law. It appears to have been an omission in the Practice Directions which overall had adopted using "young offender" instead of "juvenile offender."

## SENTENCING GUIDELINES RELEVANT TO CHILDREN

- participation of the child;
- best interests, namely, the well-being of the child;
- protection of the community from real harm and ensuring people's personal safety;
- rehabilitation of the child;
- the punishment should not be cruel, inhuman or degrading;
- application of any alternative sentencing options to imprisonment as provided in (f) Section 94 of the Children Act, including Care and Supervision Orders;
- proportionality of sentence in accordance with the child's circumstances and the seriousness of the offence;
- shortest appropriate period of detention where this is the only appropriate sentencing option;
- courts are bound to consider detention as a last resort unless in all the circumstances it is the most appropriate sentence.

### Furthermore, a sentencing court should:

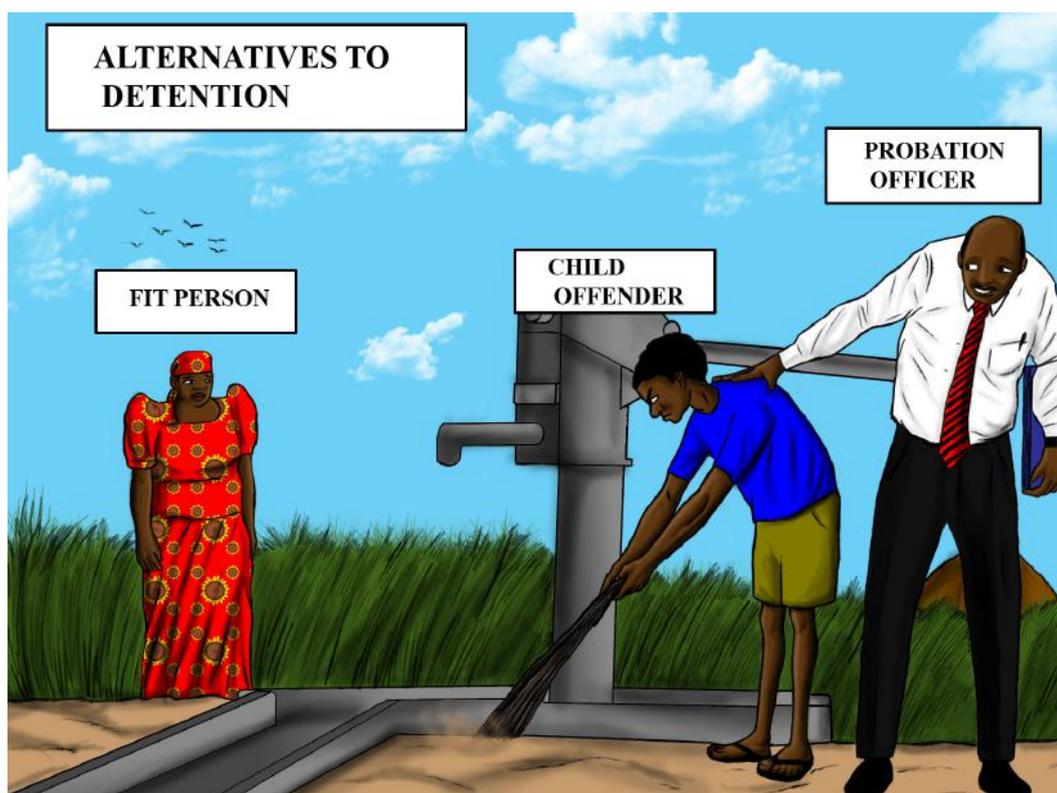
- ascertain the effect of a custodial sentence on a young offender if such a sentence is being considered;
- where the appropriate sentence is clearly non-custodial, be determined bearing in mind the interests of the child;
- apply the welfare principle as an important guide in deciding which sentence to impose;
- ensure that the sentence is least damaging to the interests of the young offender.

### 3.11 The Probation and Social Welfare Officer's Role in Criminal Proceedings

Under **section 95(1)** of the Children Act, after a charge has been admitted or proved, when court is considering making a detention or probation order, a written social background report shall be prepared by a probation and social welfare officer and shall be taken into account by the court before making the order. The court shall ensure that the contents of the report are made known to the child and that a copy of the report is provided for the child or the child's legal representative. In all other cases, the court may request an oral report.

### 3.12 Alternatives to Detention

**Section 94(4) of the Children Act** emphasises that detention of children should only be used as a matter of last resort. This is one of the ways in which diversion can be applied, in recognition that it is alright to initiate diversion at any stage of the criminal proceedings. Therefore Prosecutors should be mindful of this when praying for orders to be applied to children in conflict with the Law.



Alternative Orders are provided for and they include:

- absolute discharge;
- caution;
- conditional discharge for not more than twelve months;
- binding the child over to be of good behaviour for a maximum of twelve months;
- compensation, restitution or fine, taking into consideration the means of the child so far as they are known to the court; but an order of detention shall not be made in default of payment of a fine;
- a probation order in accordance with the Probation Act for not more than twelve months, with such conditions as may be included as recommended by the probation and social welfare officer; but a probation order shall not require a child to reside in a remand home.

*Justification and Rationale for leniency towards children*

*Children's brains are still developing and they often make bad decisions and hence mistakes. The emphasis is rehabilitation and not punishment.*

*See Appendix: Child Psychology: An Overview*

### 3.13 Plea bargaining for children

Plea bargaining refers to the practice whereby a defendant pleads guilty rather than exercise their right to stand trial before the court. It is an agreement, approved by a judge, in a criminal case between prosecutor and the defendant whereby the defendant agrees to plead guilty to a particular charge in

return for some concession from the prosecutor, usually in form of a reduced sentence. It may also mean that the defendant will plead guilty to a less serious charge or to one or several charges, in return for the dismissal of other charges. In this way, both parties avoid a lengthy criminal trial.

Plea bargaining has become the predominant mode of conviction in some jurisdictions such as the US where over 95% of cases are resolved through it. In Africa, it is also being used in Kenya, South Africa and Nigeria. While it has several advantages such as saving time and reducing the case backlog, it has been criticised because it overrides some of the in-built safeguards of the criminal justice system such as the state's responsibility to prove its case beyond reasonable doubt, the presumption of innocence and the right of a defendant not to incriminate him/herself as provided for instance, under the CRC Article (40) (2) (iv).

Plea bargaining can proceed in any criminal proceeding by the defendant pleading guilty. However, the following **necessary preconditions** must be met:

- Accused must have counsel;
- The prosecution must disclose the evidence in its possession;
- There must be sentencing guidelines in place.

With regard to plea bargaining for children, it is crucial for the child to understand the full implications of what it means to plead guilty. In addition, it is important to bear in mind that there should be no criminal record kept of the child and that there should be follow-up safeguards in place to ensure the well-being and best interests of the child. Plea-bargaining simply for administrative good practice – to reduce case back-log must proceed with caution in order to avoid infringing the rights of children in conflict with the law.

### PLEA BARGAINING FOR CHILDREN: THE NEED FOR CAUTION

Plea bargaining for children was piloted in Uganda under the J-FASTER (Judiciary Facilitating Access to Speedy Trial and Efficient Resolution) programme in 2012. During phase 1 of the project, children on remand at Naguru and Masindi were identified. PSWOs filled in a form designed by the project to capture biographical information of children as well as information on arrest, charge and remand. Lawyers from Uganda Christian Lawyers Fraternity (UCLF) provided pro bono legal services. Pre-session conferences were organised for purposes of disclosure. Conferences involved:

- Reading of form 2 (explanation of pilot programme and rights of accused)
- Disclosure and exchange of information and evidence between the DPP and the Defence
- Scheduling JFASTER session (trial dates)

**In Phase 2, investigations were held following this format:**

1. Child meets with UCLF lawyer
2. PSWO and UCLF lawyer complete Form 3 no later than 20 days after pre-session conference
3. Prosecutor completes Form 4 summarising case against the child no later than 20 days after Pre-Session Conference

**In Phase 3, the resolution phase, the following took place:**

1. Form 5 detailing whether charges are dismissed, a guilty plea or a plea bargain filled.
2. Judicial Order is made on form 6, and then forwarded to Magistrate who is given 7 days to make an order in a child's case in accordance with the Children Act.
3. Proceed to phase 4 if case is resolved.

**If the case is unresolved:**

Court proceeds to final trial which must occur within 30 days of JFASTER session. This final trial will follow the procedure in the Children Act. If the child is found to have committed an offence, the PSWO recommends a judicial order using Form 6, which order must be made by the Magistrate within 7 days. The case proceeds to Phase 4.

**Phase 4 Resettlement:**

1. PSWO, with the help of relevant stakeholders, facilitates the resettlement of the child in his or her home community.
2. Satisfaction of order: If the child accepts the charges or is found to have committed an offence, he or she must satisfy the judicial order before beginning the resettlement process.

During the pilot project, most of the children were sentenced to the time they had already served in the Remand Home; less than 10% were sentenced to additional time in Kampiringisa. 90% of the cases were resolved without trial. While this seems advantageous on the face of it, it is not clear whether any follow-up mechanisms were arranged for the children who subsequently had to be incarcerated. Hence all instances of plea bargaining for children should proceed with care to protect the rights of accused persons.

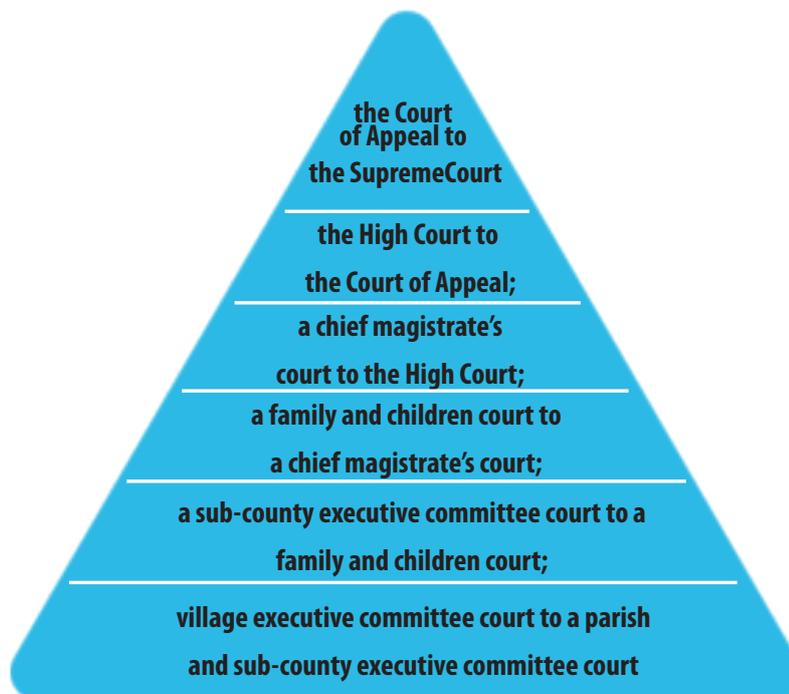
Following the success of the pilot, special JFASTER sessions for children in conflict with the law have been organised in Naguru (again) and in Mbale since the format above, resulting in faster disposal rates for children and reducing on unnecessary time spent in incarceration. These sessions are expected to become regular practice in JLOS. They are expected to greatly enhance justice for children, especially the requirement that children's cases be tried within the 3 months' time frame under section 99 of the Children Act.

<sup>35</sup>See section 5 of the Judicature Act, Cap. 13



### 3.14 Appeals in cases of children in conflict with the Law

According to the Children Act, appeals shall be made against convictions as follows:



**In criminal matters, in the case of an offence punishable by a sentence of death, an appeal shall lie to the Supreme Court as follows —**

- where the Court of Appeal has confirmed a conviction and sentence of death passed by the High Court, the accused may appeal as of right to the Supreme Court on a matter of law or mixed law and fact;
- where the High Court has acquitted an accused person, but the Court of Appeal has reversed that judgment and ordered the conviction of the accused, the accused may appeal to the Supreme Court as of right on a matter of law or mixed law and fact;
- where the High Court has convicted an accused person, but the Court of Appeal has reversed the conviction and ordered the acquittal of the accused, the Director of Public Prosecutions may appeal as of right to the Supreme Court for a declaratory judgment on a matter of law or mixed law and fact;
- Where the Court of Appeal has confirmed the acquittal of an accused by the High Court, the Director of Public Prosecutions may appeal to the Supreme Court on a matter of law of great public importance.

Subsection (1) shall apply with necessary modifications to an appeal to the Supreme Court from a conviction and sentence or acquittal in the case of an offence not punishable by a sentence of death, in respect of convictions and acquittals by the High Court and the Court of Appeal; except that in any such case, an appeal shall lie on a matter of law only.

In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of the sentence.

Where the Supreme Court varies a conviction, by reducing the offence to a lesser offence, thereby necessitating a variation of sentence or any order, including the imposition of a statutory order, the Supreme Court shall impose such term of imprisonment or fine or both and make any such order as is prescribed by law.

Where the appeal emanates from a judgment of the chief magistrate or a magistrate grade I in the exercise of his or her original jurisdiction, and either the accused person or the Director of Public Prosecutions has appealed to the High Court and the Court of Appeal, the accused or the Director of Public Prosecutions may lodge a third appeal to the Supreme Court, with the certificate of the Court of Appeal that the matter raises a question of law of great public or general importance or if the Supreme Court, in its overall duty to see that justice is done, considers that the appeal should be heard, except that in such a third appeal by the Director of Public Prosecutions, the Supreme Court shall only give a declaratory judgment.

Where a person under the age of eighteen years is subject to the order of the Minister, having been found guilty of an offence punishable by a sentence of death, and the Court of Appeal has confirmed that order, that person may appeal as of right to the Supreme Court on a matter of law.

If the Court of Appeal has acquitted the person referred to in subsection (6), there shall be no further appeal.

No appeal shall be allowed in the case of any person who has pleaded guilty in his or her trial by the High Court, the chief magistrate or a magistrate grade I and has been convicted on the plea, except as to the legality of the plea or to the extent or legality of the sentence.

Subject to this section, the Supreme Court may, in an appeal under this section confirm, vary or reverse the conviction and sentence appealed against or confirm or reverse the acquittal of the accused person.

A declaratory judgment under this section shall not operate to reverse any acquittal but shall thereafter be binding upon all courts subordinate to the Supreme Court in the same manner as an ordinary judgment of that court.

**Section 132(4) and (5) of the Trial on Indictments Act shall, with necessary modifications, apply to the Supreme Court.**





# CHAPTER

# 04

## CHAPTER FOUR

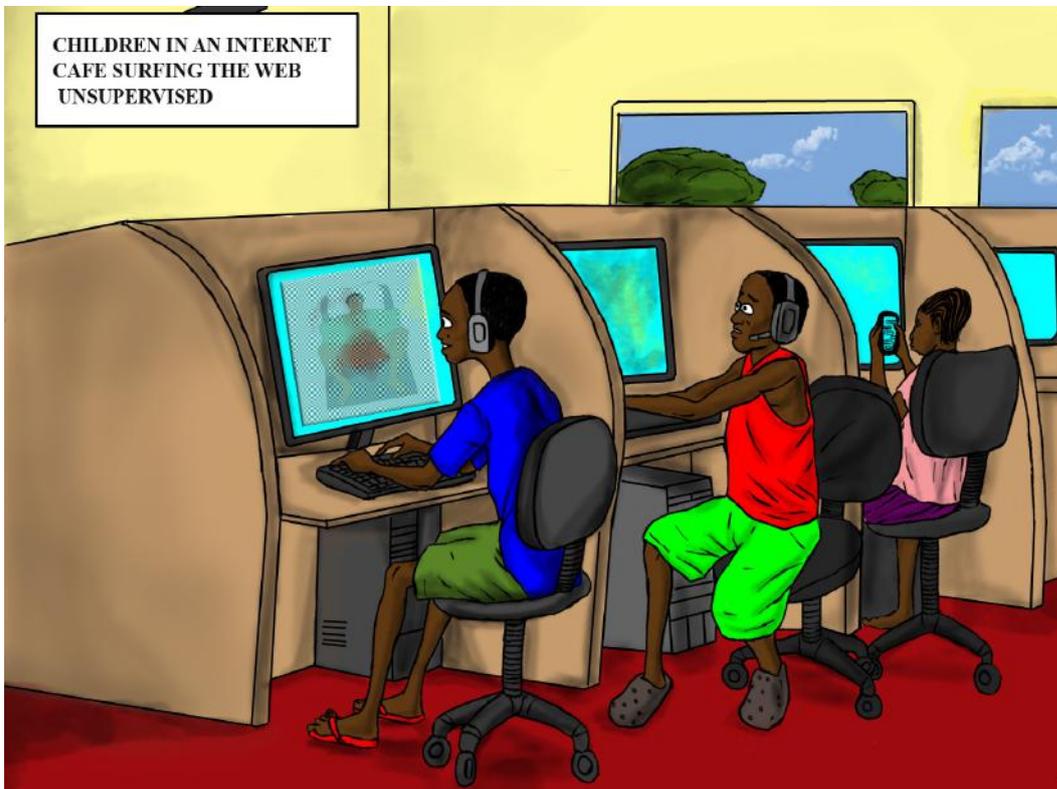
### Child Victims of Sexual and Gender-Based Violence

#### 4.1 Defining Sexual and Gender-Based Violence (SGBV)

This section focuses on male and female victims of sexual and gender based violence. One important issue to address at the beginning is the context of this section regarding sexual violence. In addition to other forms of violence already existing, the Penal Code Act, Section 129 (1) thereof was amended in 2007 to criminalise defilement committed by a boy or a girl as opposed to the previous situation where only girls were the victims of defilement. In reality, boys and girls may agree to consensual sex even before attaining the age of 18 years and they fall within the ambit of sexual offences, but their actions may not qualify as violence. There may be other situations where the actions of the child in conflict with the law amount to violence. Additionally, under the law, the offender is a child in conflict with the law and a victim at the same time. All these scenarios, pose multiple challenges for the prosecutor and other JLOS actors in the criminal justice system.

Mention must be made of non-contact violence that occurs online. Online sexual abuse of children refers to the “grooming” or luring of a child to share pictures of themselves nude, in a sexual act or what appears to be a sexual act. Specifically, it refers to the:

**...producing, possessing or distributing of sexual abuse material, making harassing or sexually suggestive comments to children, advertising sexual services of children on the Internet, and actively employing or viewing children in live online sex shows.[1]**



## DEFINITION OF SEXUAL VIOLENCE UNDER THE GREAT LAKES 2006 PROTOCOL ON THE PREVENTION AND SUPPRESSION OF SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN

Any act which violates the sexual autonomy and bodily integrity of women and children under International Criminal Law. This includes, sexual assault; Grievous bodily harm; Assault and mutilation of female reproductive organs; Sexual Slavery; Enforced prostitution; Forced pregnancy; Enforced Sterilisation ;Harmful practices, Sexual exploitation or the coercion of women and children to perform domestic chores or to provide sexual comfort; Trafficking in, and smuggling of, women and children for sexual slavery or exploitation; Enslavement by the exercise of any or all of the powers attaching to the right of ownership over women and includes the exercise of such power in the course of trafficking in women and children; Forced abortions or forced pregnancies of women and girl children arising from unlawful confinement of a woman or girl child forcibly made pregnant, with the intent of affecting the composition of the identity any population or carrying out other grave violations of international law, and as a syndrome of physical, social and psychological humiliation, pain and suffering or subjugation of women and girls; Infection of women and children with sexually transmitted diseases, including HIV/AIDS and; Any other act or form of sexual violence of comparable gravity.

There are a number of crimes that fall within the ambit of SGBV described above, criminalized under the Penal Code of Uganda and other Statutes such as the Domestic Violence Act. A list of crimes is provided below<sup>37</sup>:

OFFENCE	ELEMENTS OF OFFENCE	JURISDICTION
RAPE C/S 123	<p>Unlawful sexual intercourse by a man against a woman who is not his wife by force or threat and against her will.</p> <p>UGANDA V KALAWUDIYO WAMALA HCCS CASE NO. 442 OF 1996</p> <ul style="list-style-type: none"> <li>-Sexual intercourse between a man and a woman.</li> <li>-The male must be the accused before the court and the female the complainant.</li> <li>-The sexual intercourse must have taken place without the consent of the complainant.</li> </ul>	
AGGRAVATED DEFILEMENT C/S 129(3) AND 129(4)	<ul style="list-style-type: none"> <li>-The victim is below the age of 14 years.</li> <li>-Offender is infected with Human Immunodeficiency Syndrome (HIV).</li> <li>-Offender is a parent or guardian of or a person in authority over the victim.</li> <li>-The victim is a person with a disability.</li> <li>-Offender is a serial offender.</li> </ul>	HIGH COURT

<sup>31</sup> UNODC, Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children, New York, United Nations, May 2015, p7.

<sup>36</sup>The Penal Code Act of Uganda does not recognise that men can be raped, and therefore such crimes can only be charged under Sexual Assault.

<sup>37</sup>The list includes common charged crimes related to SGBV but is not fully comprehensive.

DEFILEMENT C/S 129(1)	UGANDA V PETER MATOVU HCCS NO. 146 OF 2001 -The victim is below 18 years of age. -The victim had sexual intercourse. -The accused is the person who committed the offense in question.	CHIEF MAGISTRATE
CHILD PORNOGRAPHY Sections 29 – 30, Computer Misuse Act and Section 14, Anti-Pornography Act	-The victim is below 18 years -Offender participated in production, offering/making available, distribution or transmission, procurement or possession ) of child pornography	CHIEF MAGISTRATE
CHILD TO CHILD SEX C/S 129A	-The victim and offender had sexual intercourse. -Both victim and perpetrator are below the age of 18 years.	FAMILY AND CHILDREN COURT
TRAFFICKING IN PERSONS C/S 3,4 & 5 (AGGRAVATED TRAFFICKING)	-Transports, transfers, harbours or receives a person (OR CHILD), -By means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person -Having control over another person, -For the purpose of exploitation; OR -Any person who:- -Recruits, hires, maintains, confines, transports, transfers, harbours or receives a person or facilitates the aforementioned acts through force or other forms of coercion -For the purpose of engaging that person in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, death bondage, forced or arranged marriage;	MAGISTRATE G 1
TRAFFICKING IN CHILDREN c/s 5	-Does any act referred to under Section 3 in relation to a child (Trafficking in persons); -Uses a child in any armed conflict; -Removes any part, organ or tissue from the body of a child for purposes of human sacrifice; -Uses a child in the commission of a crime; -Abandons a child outside the country; -Uses a child or any body part of a child in witchcraft, rituals and related practices;	HIGH COURT

<p>ENGAGING IN DOMESTIC VIOLENCE C/S 4.</p>	<p>Domestic violence constitutes any act or omission of a perpetrator which</p> <ul style="list-style-type: none"> <li>-Harms, injures or endangers the health, safety, life, limb or well-being of the victim or tends to do so and includes causing physical abuse, sexual abuse, emotional, verbal and psychological abuse and economic abuse.</li> <li>-Harasses, injures or endangers the victim with a view to coercing him or her or any other person related to him or her to meet any unlawful demand for any property or valuable security.</li> <li>-Has the effect of threatening the victim or any person related to the victim by any conduct mentioned in paragraph a) or b): or</li> <li>-Otherwise injures or causes harm, whether physical or mental to the victim.</li> </ul> <p>Economic abuse is further defined by the Act to include:</p> <ul style="list-style-type: none"> <li>-Deprivation of all or any economic or financial resources to which the victim is entitled under any law or custom, whether payable under an order of a court or otherwise or which the victim out of necessity including but not limited to the victim or the victim's children's household necessities, property jointly or separately owned by the victim; or payment of rent related to the shared house hold and maintenance.</li> </ul>	<p>LOCAL COUNCIL COURT</p>
	<ul style="list-style-type: none"> <li>-Disposal of household effects, alienation of assets whether movable or immovable, shares, securities, bonds or similar assets or property in which the victim has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the victim or his or her children or any other property jointly owned or separately held by the victim: and</li> <li>-Prohibiting or restricting access to resources or facilities which the victim is entitled to use or enjoy by virtue of the domestic relationship, including access to shared household.</li> <li>-Emotional, verbal or psychological abuse is defined to mean:-</li> <li>-Repeated insults, ridicule or name calling:</li> <li>-Repeated threats to cause emotional pain:</li> <li>-The repeated exhibition of possessiveness or jealousy which is such as to constitute a serious invasion of the victim's privacy, liberty, integrity or security.</li> <li>-Any act or behaviour constituting domestic violence within the meaning of the Domestic violence Act where it is committed in the presence of a minor member of the family and which is considered as abuse against the minor member and likely to cause him or her injury.</li> </ul>	

**Article 1 of the UN Declaration on the Elimination of Violence against Women (DEVAW), Resolution 48/104 of 20 December 1993, defines the term “violence against women” as:**

“Any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life

***General Recommendation 19 of the United Nations Committee on the Elimination of All Forms of Discrimination Against Women defines gender-based violence as***

Violence that is directed against a woman (girl) because she is a woman (girl) or that affects women (girls) disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”

#### **4.2 Role of the Prosecutor in handling SGBV cases**

Because of the sensitivities and difficulties involved in prosecuting sexual offenses, is more involved and more challenging than in other types of cases and more so in cases involving children. This is also because the victim of the crime of a sexual offence who has come in contact with the law is also a witness. The chances are high that the trauma from the sexual assault will affect the ability of the victim to be objective, confident and open to interactions with the offender and the offender’s lawyer and the whole judicial system.

According to the ICGLR Declaration on SGBV of 2011, governments are mandated to establish Special Courts and Special Procedures for dealing with SGBV. The DPP has established the Department of Gender, Children and Sexual Offences to handle these cases. It will be necessary for the DPP to have an in-house investigation unit in order to enhance prosecution-led investigations. Investigations of SGBV related cases require special training.

#### **ESTABLISHMENT OF AN SGBV REGIONAL TRAINING FACILITY UNDER THE INTERNATIONAL CONFERENCE OF THE GREAT LAKES REGION (ICGLR) FRAMEWORK**

The Regional Training Centre was launched in Kampala in December 2013 and will provide training for judicial officers, police officers, medical officers, social workers, attorneys and prosecutors on SGBV issues. Hosted by the Uganda Ministry of Gender and Community Development, it will focus on providing consultancy services and training on DNA evidence gathering and analysis, and creation and maintenance of a DNA database. Thus it will address a crucial issue that is currently hindering justice for survivors of SGBV. It will be funded by contributions to the ICGLR Special Fund for Reconstruction and Development.

It is hoped that with the above initiative and the establishment of the DPP Department of Gender, Children and Sexual Offences; SGBV Crimes will be thoroughly investigated and there will be enhanced justice for survivors of SGBV.



### 4.3 Responsibilities of a Prosecutor in SGBV Cases

#### i. *Keep the victim informed about the case*

The prosecutor should work with the police and victim service providers to guide the victim through the legal process, explain whether and why the prosecutor has decided to prosecute the case, and notify him or her of any progress or delays in court proceedings. The prosecutor should ensure that the survivor of SGBV is made aware of and is able to attend hearing and trial proceedings, arranging transportation to and from court, if needed. In the case of a child victim, this becomes more imperative as without this support, the child may be unable to attend court or be discouraged from attending the same. As mentioned earlier, it is important to inform the child in a language that he or she understands taking into consideration the age of the child.



#### ii. *Coordinate with police and others.*

To effectively respond to sexual assault, abuse and exploitation cases, prosecutors must coordinate effectively with police and other actors working to address sexual and gender based violence such as health professionals, advocacy groups and psycho-social counsellors.

Coordination between prosecutors and police is particularly essential in sexual assault and abuse cases. This coordination must continue from the outset of an investigation to final legal resolution to ensure the criminal justice system fairly, justly and effectively addresses sexual and gender based violence and prevents further victimization of survivors by the legal system. When police communicate with prosecutors during the early stages of investigation into a complaint of sexual assault, abuse or exploitation, police are able to share information about the facts of a case, allowing prosecutors to guide the police to collect the evidence needed to build a strong case.

For example, the prosecutor may facilitate the police to understand the elements of a sexual offense under Ugandan Law, to draft a charge sheet that establishes these elements, and to gather and preserve the right type of evidence to establish that a sexual offence took place. When prosecutors and police work within their respective roles as a team with victims and witnesses, they build strong cases supported by reliable evidence. Where these strong cases result in conviction, they build public confidence in the criminal justice system as a whole.

As discussed in this manual, a child in contact with the law may find the complexity of the trial proceedings difficult to deal with through their psychosocial challenges as a result of trauma. Dealing with various strangers and the prospects of interfacing with the offender could aggravate this situation. The Prosecutor can work with a PSWO or any other court appointed counsellor or specialist in child welfare to ensure that the child is not further re-victimised or harmed through the formal justice processes.

### iii. Evaluate the evidence to determine whether or not to prosecute.

Despite the fact that there is a child victim involved, Prosecutors must decide whether there is sufficient evidence to support prosecution of a criminal case. This is a heavy responsibility that requires prosecutors to be quite conversant with the applicable law, the facts and the evidence in each case they evaluate. In cases involving allegations of sexual assault or violence where the stakes are high for the victim, the accused and the community, prosecutors must act expeditiously and take every step necessary to avail all legally available information and evidence to evaluate a case.

In order to accurately assess the strength of a case and determine whether sufficient evidence exists to proceed with a prosecution, the prosecutor must analyse all police reports, statements of victims, witnesses and suspects, review the physical evidence and analysis of that evidence, and meet with the victim and witnesses. After thoroughly reviewing the facts of the case, the available evidence and the applicable law, the prosecutor will compare the evidence with the elements of the crime and determine whether or not the evidence is sufficient to proceed with prosecution. Where sufficient evidence exists the prosecutor will proceed to preliminary hearing or grand jury proceedings presenting only such evidence as to demonstrate that probable cause exists to support further prosecution.

Where there isn't enough evidence to develop a prima facie case, the Prosecutor has the duty to convey this information in a manner that the child will understand and seek the views of the victim on how else the victim can be helped in conjunction with other actors.

### iv. Try the case.

After analysing the evidence and being satisfied that there is a potential case to be made, the prosecutor should identify the elements of the crime, and then devise a strategy to prove each of the elements. The prosecutor will interview and prepare the victim and other witnesses for testifying at trial and ensure that all available evidence is available and ready for presentation at trial. In addition, the prosecutor will prepare each aspect of his or her case thoroughly and present the case to the court.

#### v. Appeal cases or represent the government on appeal.

Prosecutors are required to file and argue appeals from preliminary rulings and to file and argue responses to appeals by the defence against preliminary rulings and convictions. Final decisions in appeals become law. Therefore, prosecutors should be aware of appellate issues throughout a case and present their case in such a way as to prevent “bad law” from being made through appellate decisions.

#### vi. Educate the community.

The prosecutor also has a broader role within the community – to educate stakeholders about the law and raise awareness about the damaging effects of SGBV in Uganda. Prosecutors may also play a key role in prevention efforts by increasing public awareness of sexual violence and the criminal justice system’s response. Prosecutors are encouraged to participate in SGBV task forces or other inter-agency programs that coordinate service providers’ responses to GBV in the community. Prosecutors may also join other partners in conducting outreach to women’s groups involved in anti SGBV campaigns, caregivers, youth groups, school children and community leaders. Such measures build confidence and trust between the public and law enforcement agencies and demystify the criminal justice process.

#### vii. The Prosecutor and the Press

The prosecutor shall not discuss a pending or anticipated criminal prosecution with a reporter or the public. In the rare event that extreme circumstances justify a statement to the public, the prosecutor shall only refer to the facts and the papers on record with the court.

#### vii. Duty of Honesty

The prosecutor shall be candid and fair, and therefore shall never:

- Knowingly misquote the contents of a paper, the testimony of a witness, the language of the argument of opposing counsel, or the language of a decision or a text book.
- Cite as authority a decision that has been overturned or recalled, or a statute that has been repealed.
- Assert as fact that which has not yet been proved.
- Offer evidence which he or she knows the court should reject.

#### ix. Duty of disclosure

Trial by ambush goes against the presumption of innocence and is to be avoided. A proposed amendment to the Trial on Indictments Act places a duty of disclosure upon the prosecution. Section 49A provides:

The prosecution shall disclose to the accused person all relevant information, documents or other evidence obtained during the investigation that might reasonably be expected to assist the case for the accused person. The disclosure by the prosecution shall include -

- (a) a copy of the charge sheet;
- (b) the list of witnesses proposed to be called at the trial by the prosecution;

- (c) copies of statements made to the police during investigations;
- (d) copies of documentary exhibits proposed to be tendered at the trial by the prosecution;
- (e) a list of physical exhibits to be tendered in court during the trial;
- (f) where any expert witnesses are proposed to be called at the trial by the prosecution, copies of any reports by them that are relevant to the case.

The duty of the prosecution to disclose is continuous and where new information is received after disclosure has been made under the above section, the information shall be disclosed to the accused persons as soon as practicable.

#### 4.4 Working with Child Victims and Witnesses in SGBV cases

One of the objectives of the Department of Gender, Children and Sexual Offences at the Directorate of Public Prosecutions is to improve SGBV survivors' access to and confidence in the criminal justice system. In prosecuting sexual offenses, every effort should be made to respect the wishes of the victim and to prevent further trauma to him or her. As discussed earlier, child victims require interventions that may go beyond the skills and knowledge of the prosecutor, therefore training on related issues and inter-institutional cooperation is critical in child friendly justice.

In all types of cases, the prosecution is responsible for arranging for the attendance of child witnesses, and notifying victims of upcoming trials. This role is ever more important in the context of a sexual offense case, where extra measures may be necessary to protect the child victim from further harm and to provide moral and emotional support for him or her during court appearances.

#### The State Attorney or Prosecutor should work with other stakeholders in JLOS to:

- Give the victim an opportunity to be heard in court through child friendly mechanisms such as those piloted by the Justice for Children Programme;
- Assist the victim to understand the court proceedings;
- Address the safety concerns of the victims, their families and witnesses;
- Shield victims, their families and witnesses from any form of intimidation, harassment or inducement to withdraw or alter his or her complaint;
- Avoid unreasonable or unnecessary delay in the disposition of cases

It is important for the prosecutor to be mindful of the fact that the victim is neither a party to the case nor the prosecutor's client, the state being the complainant. Therefore, the victim of any crime, including sexual assault and abuse, should be treated as the Republic's key witness but not as a party. This concept has two implications:

- i. The prosecutor's client is the Republic of Uganda, and therefore the primary responsibility is not to solely to secure a conviction, but to see that justice is done.
- ii. Because the victim is not the complainant in the case, it is not his or her responsibility to push the case through each phase of the system. Once he or she has reported the case to law enforcement, the state has the responsibility to investigate the case, prosecute the offense where there is sufficient evidence, and ultimately punish the offender. The victim should not be asked to compensate

the police for their time or resources to investigate the crime. Nor should the victim be asked to pay for an indictment. Such an approach would increase the marginalisation of children as a vulnerable group as they or their parents/guardians will incur costs that they should not be incurring, which can act as a deterrent to access to justice.

#### 4.5 PSWOs and Care of Child Victims of Crime

Often times a child victim of SGBV has been abused by a person in a familiar relationship such as a family member, a neighbour or close family friend or relative and that home might not be the best place for the child to stay in. Approved homes are places that receive children in an emergency situation from a PSWO, or upon receiving a care order or interim care order. A child can be referred by the PSWO to stay there until the PSWO is of the view that the situation has changed for the better, or until the child reaches eighteen.

There are Children's villages that have been that seek to recreate a family environment for the child by putting him or her in the custody of a primary care giver who is looking after a small group of children. These are known as Children's Villages. Approved homes have been set up in Naguru, Mbale, Fort Portal, Arua, Gulu and Masindi.

#### 4.6 Rights of defendants

State Attorneys should also bear in mind the rights of accused persons. These are extensively provided for in International Law and in the Uganda Constitution of 1995 and may be briefly summarised as:

- No person should be charged with a criminal offence unless at the time, the act constituted an offence. This is known as the principle of legality or doctrine of *nullum crimen sine lege*. (Article 28 of the Constitution).
- A defendant in a criminal action is presumed to be innocent until proven guilty beyond a reasonable doubt. (Article 28(3)(a) of the Constitution).
- The prosecution must be able to prove beyond a reasonable doubt that the defendant committed the offense. In case of a reasonable doubt as to the defendant's guilt, he or she is entitled to an acquittal. (Sections 101,102, 103 of the Evidence Act.) *Woolmington versus DPP (1935) A.C. 462*
- A defendant in any criminal action has the right to counsel, or representation by an attorney.
- Under Article 28(11) of the Constitution of Uganda a defendant (and his or her spouse) may not be compelled to incriminate himself or his or her spouse respectively. Note, however, that the right against self-incrimination does not apply to physical attributes. The defendant must submit to examination of his physical features or conduct, such as handwriting samples or fingerprints.

Where the accused person is a child in conflict with the law, all the principles discussed in the previous chapters apply to them regarding their treatment and standing under the law.

<sup>38</sup>Section 57 Children Act

<sup>39</sup>MGLSD National Framework for Alternative Care Ministry of Gender, Labour and Social Development

## 4.7 Prosecuting SGBV cases

Successfully prosecuting a sexual offense takes diligence, time and patience. It involves several steps, from investigation through sentencing. Because these cases take time to investigate and prosecute, you may find that more than one prosecutor is involved in the case. Although the best practice is to have one prosecutor work with a victim and prosecute a case from beginning to end, one may take over a case in the middle of the process. There are several stages in the prosecution of SGBV offences and these are explained in detail below.



### 4.7.1 Reporting the case to the Police- Child and Family Protection Unit

A victim of SGBV may tell a friend or family member about the assault. In most cases, the first entry point of call is the LCs. Hence LCs should be prepared to refer the victim to the resources he or she needs, including psychosocial or medical care as well as legal recourse through the Police and the Criminal Justice System.

In a case of sexual assault, it is critical that the victim be examined at once by medical professionals. It is important to ensure that each gender of the victim is examined by a professional of the same gender to the extent possible.

It is important that LCs, Police and community members involved in the initial stages of reporting a case do not traumatise a victim further by repeated physical examinations. A physical examination should only be carried out ONCE by a Medical Doctor, who shall make a report of the case in accordance with Guidelines for the Medical Examination and Filling of Police Form 3B for Victims of Sexual Assault published by the Uganda Police Force.

When a victim of SGBV reports at the Police that he or she has been violated, the police will take his or her statement of the crime. This statement is called a complaint.

**When taking the victim's statement, the police should:**

1. Treat the victim with dignity (as elaborated below)
2. Interview the victim in private – in a separate room, outside the earshot of other police officers or people.
3. Never rush to record the statement – interview the victim first and get a story of what happened firmly in your mind and take notes.
4. Remember the elements of the crime(s) and make sure that that all necessary data has been included. The statement must be relevant to the crime or issue in question.
5. If the victim is illiterate, a third person should read the final statement to him or her and ask him or her if it is accurate. The victim may use a fingerprint as his or her signature.

Like most community members, the victim may not be familiar with the details of a criminal justice response to sexual violence. Therefore, when the matter is brought to police, they should:

1. Patiently explain the legal process to the victim and what will happen next.
2. Provide contact information for the officer who will be handling the investigation.
3. Explain that disclosure is a process and encourage the victim that he or she may contact them with more information at any time.
4. Make sure to get the contact information – and location – of the victim. Ask whether it is safe for someone to call or follow up with her.

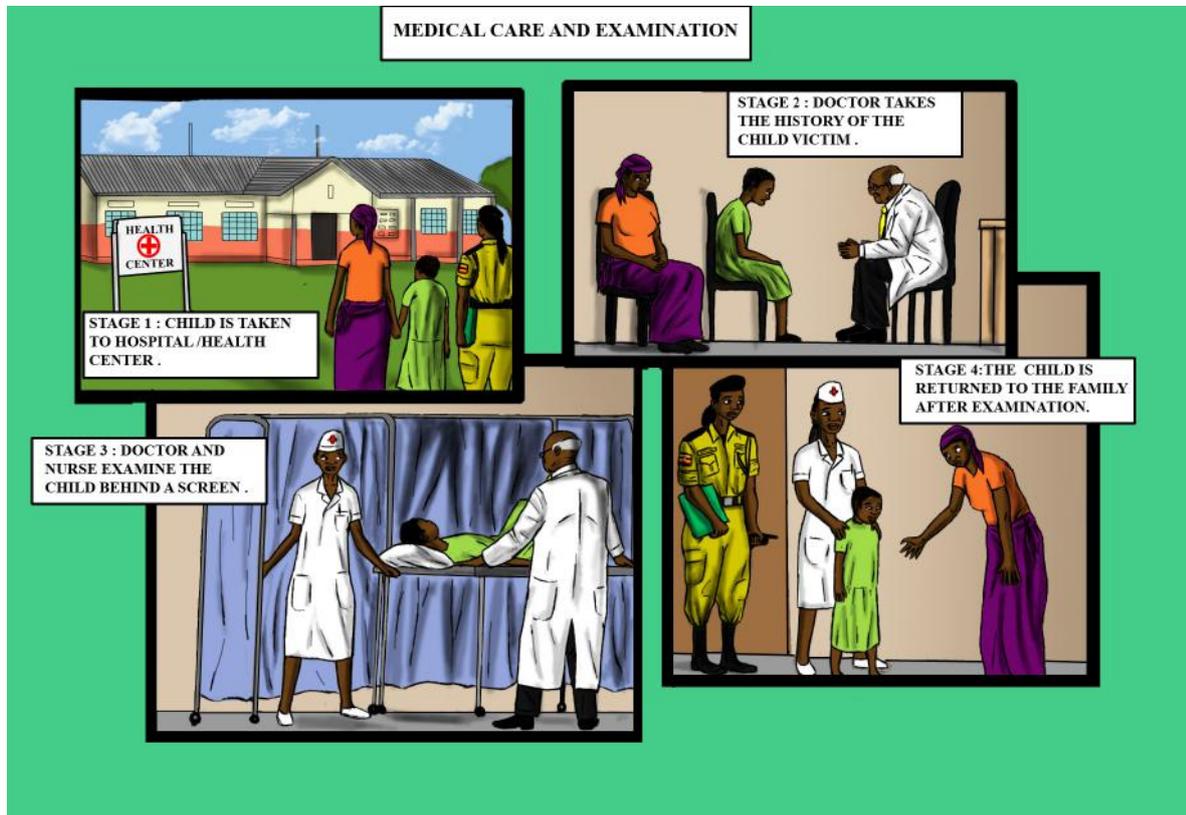
#### **4.7.2 Medical Care and Examination**

One of the critical elements in SGBV cases is access to the appropriate medical care he or she needs. All actors in the Health System should ideally, be trained to on how to treat victims of sexual offenses, and great efforts have been made by legal aid NGOs like FIDA Uganda to train health professionals on appropriate responses to SGBV.

If the offense has occurred recently, it is crucial that the victim be taken immediately to a health care centre to get treatment. For both medical and evidentiary reasons, a victim should be treated within 72 hours.

However, a victim should still go to a health care centre even if he or she cannot get there within this time frame. He or she may have untreated infections or health problems as a result of the violation. Where resources allow, the police, community members, NGOs or other advocates should provide transportation to the victim for immediate medical attention.

The health practitioner will test and treat the victim and provide necessary drugs to prevent pregnancy (in the case of a girl) or HIV transmission. If available, the clinician may use a “rape kit,” which is a set of items used by medical personnel for treating a girl and gathering and preserving physical evidence following a sexual assault.



He or she will also be helped to fill out a standardized report that records the victim’s medical injuries and the treatment given. This Medical Report Form, known as Police Form 3b, shall later be used in a criminal proceeding. The Health professional should provide the victim with a copy of the medical report free of charge.

Health records are confidential and fall under the doctor/patient privilege; they should be treated with care and confidentiality

It should be noted that under Section 129 of the Penal Code Amendment Act of 2007, the alleged offender charged with any sexual assault offence under that section must undergo a medical examination as to his or her HIV/AIDS Status.

### TREATING VICTIMS WITH DIGNITY

Victims of sexual assault will have been through an incredibly traumatic experience, and they may not trust the police or the criminal justice system. They are often scared to report the crime because they believe they will be blamed or shunned in their communities. Too often, they are right. Each actor in a victim’s pathway to justice, from a friend or family member, to the police investigators, doctors, Magistrates, judges, and prosecutors must do their part to build the trust of both this victim and future



victims by treating victims with dignity and respect.

**In practice, treating the victim with dignity and respect means:**

1. Never blame or judge the victim. No one, under any circumstances, deserves to be violated.
2. Assure the victim that the rape was not his or her fault. A victim should understand that he or she is not at fault and did not deserve the assault.
3. Never ask the victim about his or her prior sexual history. It does not matter whether he or she has had other sexual partners in law or in fact.

Never ask a victim of SGBV to repeat his or her story unnecessarily or ask unnecessary questions. Unfortunately, victims are often asked to repeat their story over and over again – to the doctor, psycho-social worker, police, state attorney, judge or magistrate. Re-living the act of sexual violence can be traumatic. Wherever possible, limit the number of times the victims must recount the events of the crime.

When talking to victims of SGBV, be honest about the challenges of the legal process. Prosecuting a case is often a long and painful process for a victim. If a victim testifies (and in most cases that testimony is critical), he or she will be subject to an unpleasant cross-examination. And because of the practice and conditions of most courts in Uganda, a victim will likely have to see his or her perpetrator in the courthouse or courtroom in the course of testifying.

Nonetheless, one of the purposes of this Handbook is to minimise such unpleasant experiences by alerting prosecutors to the challenges in this regard. Prosecutors and State Attorneys should try as much as possible to minimize the trauma experienced by the victim.

### 4.7.3 Confidentiality in SGBV Cases

It is essential to keep personal information about the victim completely confidential. Obscure or censor personal information (such as the address of the survivor/victim) from any court documents that will be filed and made public. The Prosecutor should only share information about the sexual offense when it is necessary to provide assistance and intervention (such as a referral), and even then, only with the written permission of the victim. Within the prosecutor's office, all written information should be kept in secured locked files. The Prosecution could also consider working with the Court to assign the victim a pseudonym or use initials for purposes of the proceedings. This is important because if a child is publicly identified as a victim of sexual violence it can lead to discrimination and stigmatisation against the child in the social arena, which must be avoided at all costs.

### 4.7.4 Witness Protection and Measures to Minimize Retaliation

Often, witnesses and victims are too intimidated when the accused suspect is in a position of authority or influence in their lives or social spaces. This could lead to a culture of silence for fear of re-victimisation or due to pressure from third parties such as the accused's relations or friends.

<sup>40</sup>Witness Protection Bill 2012

<sup>41</sup>A list of shelters is included in the Appendix

## CASE STUDY OF INTIMIDATIONS FACED BY CHILD VICTIMS OR WITNESSES

*For example, the Justice for Children special sessions established that a victim who has reported a sexual offence is vulnerable to attack by his or her perpetrator or by the perpetrator's friends or family. Many child victims reported that there was a lot of intimidation from families of the offenders directed towards them. In one case, a young female victim of defilement was being harassed by the offender's wife and children who would continuously beat and abuse her. The intimidation also reached a level where she was threatened by the offender's wife even on the court premises. The victim told a Fit Person that the fact that no one had come to rescue her at the court had made her feel unprotected by the justice system. The Fit Person advised her mother to open up a case of threatening violence at the police station. The mother reported that to avoid conflict with the offender's family she had opted to transfer her child to a different school and location.*

The Criminal Justice System should address this kind of behaviour, if victims are to build up the courage and confidence required to help the state in its case against a perpetrator. A victim will have faced not only the trauma of defilement, but also violence, fear and possibly having to cope with adjusting to new social settings and conditions as coping or emergency mechanisms in the short term, as a result of sexual violence. Unfortunately, even though there is a witness protection law under consideration, there is no mechanism in Uganda's justice system to protect victims from such attacks.

Nonetheless, the police are responsible when a victim has reported, to make sure his or her safety. The Prosecutor could liaise with the police to work towards protecting the victim by creating a safety plan. The police could encourage the child to:

- Tell a trusted person like a family member, counsellor, doctor, or spiritual or community leader about his or her experience and why he or she feels he or she is at risk.
- Think of safe places to go to in case of an emergency, like a police station or a church and talk to the religious leader or a shelter if there is one available.
- Advise him or her to make an alarm so that neighbours can come to his or her rescue.
- Keep away sharp instruments or weapons that could be used to hurt him or her.
- Always have a packed bag of essential items at home and keep them in a safe place (e.g., important papers, extra clothes, identification, etc.)
- Keep telephone numbers of close friends, relatives, police, religious leader or family doctor.
- The police may also make referrals to a domestic violence shelter or other place of safety. Police and prosecutors should keep on hand a list of local resources for victims, including shelters. The location of safe houses should be kept confidential to prevent further harassment to victims. If the victim is taken to a safe dwelling, this information must not be disclosed in any record.

### 4.7.5 Investigations – The Role of the Prosecution

While investigation is principally the responsibility of the Police, the prosecutor can play an important role in the investigation of the offence. As a lawyer, the prosecutor understands the elements of the crime that must be proven in court. The prosecutor can work with the police to obtain the best evidence to establish each of these elements.

The means of obtaining the evidence, however, is as important in the prosecution of a crime as the evidence itself. If officers do not conduct the investigation properly, the evidence may not be admissible. For example, if the police mishandle evidence or forget to advise the defendant of his or her rights, the evidence or any confession made will be excluded at trial, and the offender may go free. The successful work of the Police in evidence gathering plays a central role in making the prosecutor's work easier; the police officer's diligent work in many respects provides the foundation for the prosecution's case. Therefore, the prosecutor should work alongside the police to educate them about the legal implications of their actions during investigation and to ensure that the proper legal procedures are followed. Investigation of online sexual abuse of children requires careful handling of computers, cell phones, external hard drives et cetera to ensure that forensically analyses can be performed on them. Using image analysis and image databases, data mining and analytics, digital forensics and automated search are some of the tools used to investigate this vice.[2]



The Uganda Police Child and Family Protection Unit (CFPU) and the Criminal Investigations Directorate are charged with investigating all cases against children including sexual offenses. They handle process issues regarding victims and accused persons; gather evidence, both written and forensic, find witnesses and prepare court documents that may determine whether a prima facie case is made against the accused person.

When a complaint of crime is made to the police, it is recorded in the Police Station Diary, Form 86. The officer in charge of a file will also record the offence in the Criminal Register Book (CRB). The investigating officer must then visit the scene of the crime to collect available evidence, recover exhibits and submit them for analysis, and record witness statements.

There are on-going efforts to involve the prosecution more in investigations and have prosecution-led investigations. Thus, the police and the prosecution should work together through this process. A prosecution led investigation will improve the chances of success at trial and it will also save time and resources if the Prosecutor decided that there is not enough evidence to sustain a case against the suspect.

#### 4.7.6 Taking Statements of Witnesses

At this stage, the officers should confirm the age of the perpetrator and the victim, and the alleged crime that was committed. The police should interview witnesses who were present before, during, or after the offence. As soon as possible after the crime, they should return to the crime scene and inquire whether anyone saw or heard anything. They may talk to friends or family members, inquiring whether the victim mentioned anything about the incident or if they too saw anything unusual. The police may also interview health professionals about the treatment of the victim or any evidence that was obtained during the examination. The police must fill in part (a) of Police form 3 requesting for a medical examination of the victim. These witnesses may later testify at trial.

**Below are useful guidelines that the police and prosecutors can take note of when taking statements during investigations.**

#### IMPORTANT QUESTIONS FOR POLICE STATEMENTS

**WHAT happened:** Before - During – After

**WHAT was used:** Exhibits such as weapons, clothing, etc.

**WHEN:** Dates (Day, Month, Year-approximate times)

**WHERE:** events took place - Address or general location

**WHO:** How many people - Distinguishing features or dress – Known people and how known - Identification - Names - Witnesses to the events

**HOW:** event happened - details, threats either physical or mental - Was anything said - Any witnesses to the events and how or where they can be contacted

**WHY:** the event happened - Did anyone say anything prior to the event - Where any threats, either physical or mental, - What was said or done after the event

**WHAT:** happened after the offense?

**WHO:** was an eyewitness or who can corroborate your interview/statement?

#### STATEMENT OF THE ACCUSED

The police may also take the statement of the accused, if the accused agrees to speak with them. This statement must be voluntary. In fact, if the statement is not voluntary, it will not be admissible at trial under section 24 of the Evidence Act.

Confessions. The accused may admit to the crime in his or her statement. While a voluntary confession is helpful evidence in a prosecution, it is important to understand the circumstances under which a confession is admissible as evidence. Under Section 23 of the Evidence Act, a confession is only

admissible if it is made to a Police Officer above the rank of Assistant Inspector or if made in the immediate presence of a magistrate.

In *Swaibu versus Uganda*, Criminal Appeal No. 47 of 2000 (unreported) section 23 of the Evidence Act on the admissibility of confessions was upheld. Details on the requirements for taking down confessions are in the Administrative Instruction Reference issued by the Chief Justice 2 March 1973 entitled ‘Recording of Extra Judicial Statements’.

#### 4.7.7 Evidential Issues in SGBV Cases

Evidence in sexual assault and abuse cases is most often found in three sources—on the victim, on the suspect and at the crime scene. Crime scenes in respect of online sexual abuse may not be a physical location, but can be on a computer, cell phone or an external hard drive. Crime scenes in respect of online sexual abuse may not be a physical location, but can be on a computer, cell phone or an external hard drive. When the police are conducting their investigation, they are encouraged to consider the likelihood that the evidence will deteriorate or be lost completely and prioritize accordingly including collaborating with foreign Police Forces for identification of victims or perpetrators that may be across Uganda’s borders. A police officer or investigator should work with health professionals to:

1. **Gather evidence from the victim.** Victims should always be encouraged not to change clothes or bathe before going to the health clinic. A victim’s underwear or body may have blood or semen remnants from the violation, and health professionals using a rape kit may take a sample. If the victim consents, police may request that the victim bring his or her clothes and underwear to them after he or she has been to a clinic. This evidence should be kept in a secure place to later be used at trial. In some jurisdictions such as Liberia, the police, working with health professionals, may take non-genital photos, but must work with the health professionals to take photos of the genital area. In Uganda, the Guidelines for the Medical Examination and Filling of Police Form 3B for Victims of Sexual Assault are very thorough and detailed regarding how evidence from victims should be gathered. They do not envisage or recommend taking photographs.
2. **Gather evidence from the suspect.** The police should gather evidence from the suspect, such as the clothes that he or she was dressed in the day of the incident.
3. **Visit the crime scene.** It may also be necessary to search the crime scene i.e. the location of the assault. The police should take photos of the crime scene, or if they do not have access to a camera, they should make sketches of the scene. In sexual assault cases, it may be difficult to determine what is relevant and what is not. Photos and sketches could potentially provide documentation and evidence that was overlooked but may not be available later because of changes to the scene over time.

<sup>41</sup> UNODC, Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children, New York, United Nations, May 2015, p 45.

<sup>42</sup> An extract of the reference and a more detailed explanation on the rules governing confessions is available in the Prosecutor’s Manual on Illicit Trade in Uganda, pages 48-50.

## IMPORTANT EVIDENCE IN A SEXUAL ASSAULT OR ABUSE CASE

Prosecutors should inform the police of the most important evidence to gather in a sexual offense case, including:

1. Identification of the offender and victim's description
2. Police Form 3b describing the injuries, duly filled and signed by a competent health professional.
3. Eyewitness statements
4. Statement by the offender
5. Any objects that were used during the offense
6. Description or photograph of the crime scene
7. The victim's undergarments
8. Any blood, semen, or other substance on the suspect's clothing or victim's clothing

In **Uganda versus Byansi Sempa & Anor**, High Court Criminal Session Case No. 33 of 1987 (unreported) it was held that a State Attorney has the obligation to direct police on the improbability of sustaining a charge especially where the evidence is weak or marred by grave inconsistencies.

In many sexual assault cases, there is no medical evidence or visible injury due to mistakes made by victims, or where child on child defilement was consensual but still amounts to a crime. Law enforcement institutions should therefore continue to investigate sexual assault or abuse even where there is no medical evidence, no medical report, or the medical report does not describe an injury. In these cases, the prosecution should continue to prosecute so long as sufficient non-medical evidence supports the allegation of the offence.

In **Uganda v. Bonyo Abdu**, Criminal Case No. 17 of 2009, **it was held that** medical evidence is good independent evidence to corroborate a complainant's evidence as proof of penetration.

### Testimony of the health professionals

Prosecutors should always remember that a health professional is not a forensic expert. His or her role is primarily to examine and treat the survivor/victim. Despite conducting an examination, a medical professional may not be able to determine whether or not a sexual assault took place. The medical report form, Police Form 3b, allows the medical professional to document the injuries they saw and the treatment that they provided.

## THE ROLE OF HEALTH PROFESSIONALS

In SGBV cases, health practitioners may assist law enforcement by gathering physical evidence, including:

- Detailed description of the injuries. (In some jurisdictions, photos of the survivor/victim);
- Clothing worn by the survivor/victim at the time of the crime, including undergarments; and
- Blood, semen, or other substance on the survivor/victim's person
- Evidence gathered by the health clinic shall be:
  - Placed in secure, sealed containers to prevent tampering;
  - Marked with the name of the survivor/victim, date of examination, and the name of the health practitioner who took the evidence; and
  - Stored in a secured location.

While medical evidence is helpful for a sexual offense prosecution, its absence is not necessarily prejudicial to the case. A medical professional should never be pressured to state whether a rape did or did not occur, as that determination may not be possible. It is up to the prosecutor to explain to the Court, with the help of the medical professional, that the absence of injury or bodily fluids does not equate to the absence of a sexual assault.

### Hymens and virginity

A common myth is that all virgins have an intact hymen. This is not true as it may be damaged by extreme sports or rapture for any other non sexual related causes. Some girls are born without a hymen. A medical examination may determine if the victim's hymen is broken, but this information is not necessarily conclusive.

- If the victim's hymen is not broken, she may not have been penetrated vaginally, or she may not have had an intact hymen prior to the sexual assault. She may, however, have been assaulted vaginally or in other ways.
- If the hymen is broken, it is impossible to conclude whether or not the victim is a virgin. However it is not a prerequisite in any trial of a sexual offence against a girl or woman that she should have been a virgin.

### Maintaining the Chain of Custody of Evidence

To present evidence at trial, the prosecutor must show that the evidence is what the prosecutor claims it to be and is in the same condition as it was at the time of the crime. To do so, the prosecutor will have to establish who had access to the item from the moment of crime to the time of trial. Police and prosecutors must document this "chain of custody" for each item. Law enforcement should:

1. Take actual physical possession of an object so that it is kept in the same condition until trial. If this is not possible, as discussed before, a photograph or report of the condition of the item or object before it deteriorated may suffice if, after it was taken, it was kept in safe custody. (If possible, the evidence should be kept in a sealed container).



2. Label the evidence with the name of the defendant, description of the object, and a note on how and when it was obtained.
3. Keep this evidence in a secured area such as a locked drawer, file box, or cabinet.

The case of Uganda versus Bonyo Abdu, Criminal Case HCT-04-CR-SC-0017 of 2009 illustrates the importance of medical evidence in SGBV cases. The accused Bonyo Abdu was indicted for the offence of Aggravated Defilement contrary to Section 129 (3) and (4) (a) and (b) of the Penal Code amendment Act 2007. It is alleged that on the 30th November 2008, the accused performed an unlawful sexual act with Nakiryra Jesca, a girl aged 14 years. The law stipulates that a person convicted of this offence shall be liable to suffer death. PW1 (Nakiryra Jesca) the alleged victim testified that she was 14 years at the time the accused had sexual intercourse with her. On the 30th November 2008, she was taken to Banuli's house and the accused inserted his penis in her vagina. Doctor Angiro John (PW6) a Medical officer from Pallisa Hospital examined the victim and made a Medical Report made on PF3 and PF3 Appendix admitted as (P Exh. 1). The Report which was dated 1st December 2008 indicated that the victim was 14 years of age at the time of the commission of the offence. PW6 stated that the victim had a ruptured hymen and that this had occurred sometime back. Dr. Angiro also found bruises and inflammations on PW1's vagina, on the thighs, legs, elbow and the back.

PW7 (Kalere Kasifa) testified, inter alia that she carried out the HIV test on the accused. She explained the process of testing and methods she used. She found out that the accused is HIV positive. It was held that medical evidence is good independent evidence to corroborate a complainant's evidence as proof of penetration. Further, that the documentary evidence on the accused's HIV/AIDS status before Court was more cogent than the oral statement of DW1 denying it.



#### 4.7.8 Interviewing Victims of Sexual Violence

Once the prosecutor has become familiar with the documents in the file, including the victim's statement to the police where a complaint has been made, the prosecutor should make an appointment with the victim for an interview. This section provides guidance for this very delicate interview process.

1. The prosecutor should familiarise himself or herself with the provisions of the law applicable before the interview.
2. During the interview, the investigating police officer should also be present. This team should meet before the interview to acquaint themselves with each other and with existing information about the case.
3. Victim interviews should be as minimal as possible. Only one person should be interviewing the victim at all times. Identify the individual who will lead the interview ahead of time. Once the leader has finished asking questions, the others can follow up with any additional questions and only on a need to know basis.

Wherever possible, the police and the prosecution should conduct an interview together. Having both the police and prosecution present for the initial interview will limit the trauma of the victim because he or she will only have to tell his or her story once.

4. The prosecutor should review the case file, including the evidence, the law and other documents and determine what queries need to be put to the victim. Existing information can be divided into three categories:
  - Information that needs to be confirmed
  - Information that has already been corroborated
  - Information that the victim is likely to have but whose details the prosecutor is unclear about.

#### SUPPORT GIVEN TO VICTIMS IN THE JUSTICE FOR CHILDREN PROGRAMME

It is a good idea to involve a social worker e.g. PSWO, a Fit Person or someone from a CSO that supports victims of SGBV e.g. Hope After Rape, Defence for Children, FIDA Uganda in the interview process. This person serves as a "Victim Advocate," providing support throughout the legal process, including explaining legal issues, helping to prepare the victim for the trial, and advising him or her of the progress of the case.

During the Justice for Children Special Sessions, a group of ladies belonging to Laroo Peche Women's Association (LAPEWA) – an association of women identified and trained as fit persons to support children in judicial processes – performed the crucial role of preparing and counselling children who were to appear in court during the Sessions together with officials from the remand home and the Probation officers in Gulu. Although the LAPEWA women and obviously the officers work regularly with children, a training session was organised directly after the workshop to outline their responsibilities during the court session, to create consensus on the working relationship between them and the justice system actors and to align expectations in terms of logistical and technical support.

<sup>43</sup>International best practice recommends that names of victims in SGBV cases should be redacted from the record. Initials or pseudonyms should be used to protect the victim's confidentiality and protect them from the social stigma associated with SGBV.

In the above trainings, Counsellors were given skills on how to best prepare children (in any capacity) for court appearance and how to handle them after court. For example, by:

- Preparing them on what to expect in court and from the court environment;
- Telling them about the different court officials, their roles and how to address them;
- Explaining the plea taking process and its consequences;
- Outlining the typical progression of a case and what happens when a case is proved, what the likely order to be given is and its purpose;
- Making sure children understand their right to ask and be informed about any issue;
- Explaining who they should talk to in case of any need

A State Attorney will likely get the file of a sexual offense case long after the police have interviewed the victim. The LCs and the Medical Practitioner would also have talked to the victim. So the prosecutor may be the third or the fourth officer interacting with the victim. If this is the case, it is even more important to be prepared for the interview. Review the notes from these previous interviews in the file a. And then only ask clarifying questions where gaps or ambiguities exist.

## PREPARE THE VICTIM FOR THE INTERVIEW

A victim is more often than not likely to be unfamiliar with the legal system. By the time of the initial meeting with the prosecutor, the may already be frustrated by how many individuals have asked very personal questions. It is therefore important to patiently explain why he or she has been called for the interview.

It is important for the Prosecutor to remember that the legal process can be emotionally, physically, and financially taxing for victims. Impress upon them the importance of their statements and the benefits others may gain as a result of their courage ie they can help the state ensure that the person who committed this crime is brought to justice. Let them know that they are not 'taking revenge' but that the government prosecutes crimes to protect its citizens from future harm. They are providing assistance because they were a witness (and a victim) of a crime against the state. Remind and reassure them that they are not accused of having committed a crime themselves.

The Prosecutor should reassure the victim that he or she will have full control of the interview process. Before beginning the interview, introduce him or her to each person who will be present during the interview. Tell the victim that he or she may bring a counsellor or a family member with him or her - a person whom he or she trusts to support him or her during the interview process.

Explain to the victim that he or she will be asked to appear before a court to repeat the testimony given during the interview and that there may be a considerable period of time between the present statement and the court appearance.

Explain the process and rationale of direct and cross examination. Let the victim know that the people who are accused of the crime will have access to his or her statement and may ask questions about the testimony of the victim in court.

Explaining defence tactics and strategies: There is a very real risk that a witness, and particularly a victim of a crime, could feel attacked or on trial at the time of testifying. Defence counsel will try to challenge the victim's version of events and undermine his or her credibility. Take time with the victim in advance to explain that the legal process allows the defendant to present a defence and often that process can be uncomfortable for a victim. For example, the defendant in a rape case may argue that the victim consented to sexual intercourse. The defence may point to the previous sexual relationship of the parties or to the behaviour of the victim before or after the offense to prove that he or she consented to sexual intercourse with the defendant. Questions about what was said, what the victim or accused was wearing, body language, reaction to the sexual assault etc can be extremely intrusive for a victim and indeed is not permitted in many countries. But depending on the judge or magistrate, this testimony may be tolerated to the extent that it is relevant to establishing or challenging consent, a crucial element of the crime of rape. Alternatively, the defendant may argue that there was no penetration, and therefore no crime of rape. Or in certain scenarios, the defendant might argue that the victim was or is mistaken as to the defendant's identity. Explain to the victim that he or she can help the prosecution prepare for the defence by sharing details of the crime in this interview and any excuses that the accused person may raise incriminating the victim.. Are there any defences that he or she believes that the defendant will raise?

6. Choose an appropriate place for the interview: Ideally the interview should take place in a neutral environment, where the victim feels safe and comfortable. The interview location should:
  - a. Not be in a custodial environment (such as an interrogation room at a police office or a prison);
  - b. Not be a place where the perpetrator has access to the victim;
  - c. Not be used for other purposes during the course of the interview; AND
  - d. Not allow access other than to those directly responsible for the interview

## CONDUCTING THE INTERVIEW - GENERAL GUIDELINES

While this handbook has already discussed at length principles of interviewing, there are special measures that are required when interviewing victims of sexual assault.

### 1. Don't judge the victim.

Since sex crimes revolve around the aspect of consent and/or the lack of consent. It is easier to believe that a younger child was assaulted, but the older a child is, the more sceptical one may become. It is important for the prosecutor to refrain from forming personal judgments based on personal biases or prejudices rather than the evidence before him or her.

The prosecution should be aware, however, of the typical defences based on gender stereotypes that often arise in sexual offense cases, some of which actually violate the child's right to dignity and non discrimination; in the case of vulnerable children, certain factors may easily be used against them, e.g poverty, truancy, past history etc.

## 2. Listening to the victim

The importance of listening during interviewing skills cannot be over emphasised. Listening is a key part of communication skills, as it facilitates understanding about the victim's circumstances and maybe, personality. It can greatly improve the productivity of the Prosecutor in shaping an opinion about the case. Effective listening will help the prosecutor to pick up certain nuances like trauma, fear, intimidation, inconsistencies and gaps.

If the victim feels that the Prosecutor and other stakeholders are not listening to what he or she is saying, this can lead to frustration and to the victim closing up. The following is what to do when a victim is speaking.

- a. **Create an enabling atmosphere:** If inadequate space or time is given to the victim to speak in the interview, if the victim is constantly interrupting with questions or if the prosecutor interrupts the interview by narrating his or her own experiences, answering calls, speaking to other people etc it becomes difficult for the victim to say what he or she wants to. Dedicate one on one time with the victim in a closed session interview. The use of open ended questions allow the victim to speak for a while and then the prosecutor can follow up with short, probing or clarifying questions. If the victim pauses due to failure to recollect or trauma for the memories, do not press on, be silent to allow the victim to compose themselves and their thoughts.

Be careful to make sure that the victim your language. A prosecutor may realize late in the interview that the silence he or she attributed to the victim being sad is actually due to the victim not knowing what was being said. This could be in terms of the technical language or the English language barrier. Adjustments should be made to ensure the language is well understood by the victim in every sense.

- b. **Be flexible:** It is important to know what issues need to be covered, an interview should not be unnecessarily formal, as children may not adapt well to serious structured interviews, particularly the younger ones. After some guidance on the objectives of the interview, wherever possible, allow the victim to answer at his or her pace and way.. Follow his or her lead and explore what he or she is saying as you would in any conversation. If there are things that not clear, follow up questions can be use. It may be necessary to use hypothetical questions or build hypothetical scenarios to probe or project difficult or sensitive issues around circumstances of the case.
- c. **Show interest:** It may be important to listening without reacting and showing any emotions even when the facts are shocking or painful. However, it is important to project through your facial and body language that you are attentive and interested in what the victim is saying. It is a challenge to respond to the pain and anguish by validating it and yet to refrain from guiding the victim about what he or she should say. One of the deterrents to effective listening is failure to maintain eye contact with the victim because you are recording the events, so a balance between writing and eye contact is required.
- d. **Control reactions and emotions:** Sometimes the story told by the victim during the course of the interview may make a prosecutor angry, frustrated, or emotional for any number of reasons, including empathy. It is important to recognize this response early and take a break in the interview at that point and refrain from expressing the response in front of the victim. However, the prosecutor should still show that he or she cares about the welfare of the victim by communicating understanding of the feelings the victim may convey.

- e. **Manage expectations:** The victim may seek reassurances from the prosecutor about the conduct and success of the case, or seek protection from backlash and discrimination. For example the victim might want you to promise that you will not share some parts of what he or she tells with anyone. It will be difficult to make a commitment to that effect. It is best to be transparent and address the victim's anxiety about confidentiality of the process. However, some things are outside the control of the prosecutor, who should not make promises on such issues, but should encourage the victim to share challenges as they arise and work with other JLOS stakeholders to address them to the extent possible.

**The Prosecutor must never promise a successful outcome – despite his or her best intentions, this is out of the Prosecutor's control, and the same must be communicated to a victim in a constructive way. The child should not be burdened with carrying the success of the case too.**

## UNDERSTANDING VICTIMS' CHALLENGES

It is important to keep in mind that the victim might be facing multiple challenges to to his or her vulnerability as a child. Often, perpetrators target child victims who are already vulnerable. And victims might be anxious about expressing these problems. Victims often face some of the following challenges:

## DIFFICULTIES FACED BY CHILD VICTIMS

- Difficulties in making a choice about being a witness
- Coping with new environment at the home or shelter
- Painful and traumatic memories
- Invasion of privacy particularly medical examinations of sexual organs
- Depression, shame, self blame and low self esteem
- Anxiety about the future
- Being aggressive
- Being isolated
- Being unable to control their anger
- Being unable to express their needs
- Having negative thoughts and feelings about themselves and their future
- Trying to please everyone
- Fear of saying 'no' to requests by JLOS actors
- Possible addiction to tobacco, and/or alcohol, and/or drugs
- Living with HIV/AIDS and other sexually transmitted infections

If the victim breaks out into tears or becomes silent, there are some strategies the Prosecutor can resort to;

**If the victim is silent:**

- a. If the prosecutor is meeting the victim for the first time, the prosecutor can:
  - Introduce himself or herself and the prosecutor's role.
  - Invite the child to ask questions or speak
  - If he or she still does not speak, repeat the information in different words. If he or she still does not talk:
- b. Reflect: for example a prosecutor can attempt to break the ice by saying "You may be finding it difficult to say what you want to. It is difficult to talk to a stranger about what you are feeling, but I am here to help you if you are willing to explain what happened."
- c. Give space, if the silence continues. Just being present with the child in a reassuring silence can be effect in drawing out the story in time. The tone and posture of the Prosecutor is also important in sending an empathetic message to the child/victim.
- d. Highlight the need: A prosecutor may say "I know that you are trying to make a decision whether to talk or not. It may be helpful to at least say how you feel about sharing your story with me."
- e. Re-establish credibility by talking about how people feel when they are able to work with the prosecution and normalize the experience of not being able to talk.

**If the victim is crying:**

Since interviewing and preparing the victim is the most difficult part of prosecuting a sex crime, gaining the victim's confidence is a crucial component of preparing for the trial.

- Reassure the victim that crying is normal and acceptable, and get some water and a tissue. Do not try to tell the victim to be tough or strong or grow up, as a child may feel isolated and misunderstood and become withdrawn
- Assure the victim that at any point of the interview if he or she is overwhelmed, it will stop to accommodate the victim's feelings ; the victim should feel that he or she is in charge of the interview.

**CONCLUDING THE INTERVIEW**

At the end of the interview with the victim the prosecutor should

- i. Thank him or her for their time and acknowledge the fact that this is a painful process which the prosecutor will give due diligence to.
- ii. Share his or her contacts with the victim in case he or she or a guardian has any follow up information or queries about the case. Ensure that the victim or guardians also share their contact information to enable effective feedback and communication around the case.

#### 4.7.9 Bringing the case to Court

After gathering evidence, the investigating officer should make a report to the Officer in Charge / CID who then refers the matter formally to the DPP or relevant Resident State Attorney. The DPP or State attorney will peruse the file and either:

- sanction the charges,
- request further investigations,
- decline to prosecute and opt for diversion in deserving cases
- decline to prosecute and close the file if the evidence is insufficient, unreliable or contradictory.

After charges are sanctioned, the police will prepare a charge sheet, for cases in the Magistrates' Court. The charge sheet is the first identification of the crime. For cases triable in the High Court, the charge is contained in an Indictment drawn up and signed on behalf of the DPP or an officer authorised by him or her.

The prosecutor should ensure that the charge sheet should establish all of the elements of the offence. For example, the elements of a rape are i) penetration, ii) without consent of the victim. The charge sheet, therefore, should establish that there was penetration and that the victim did not consent to sex.

Failure to correctly frame a charge is a fundamental mistake which can render a trial a nullity, as was held in *Judagi & Ors versus West Nile District Administration* (1963) EA 406. It is the responsibility of the Prosecution to ensure the correctness of a charge sheet or indictment as was also held in *Uganda versus Paulo Muwanga* (1988-90) HCB 72

In some cases, the perpetrator will have committed more than one offence. It is important for the police to charge him or her with all offences committed. For example, the perpetrator may have forced the victim out of her home and defiled her in captivity. He will have committed the offence of 126 of the Penal Code in addition to defilement and therefore he should be charged with both offences.

Annex 4 sets out various types of SGBV crimes and jurisdiction for them. Cases of SGBV may be tried in the LC Courts, Magistrates' Courts or the High Court, depending on the case and the penalty for it. All Criminal trials commence in the Magistrates' Courts, but some SGBV cases involving domestic violence lie in the Local Council Courts as laid out in Annex 4.

**The Prosecutor must prepare for the case in the following activities**

#### PREPARATION FOR TRIAL BY THE PROSECUTOR

- Research statutes and the elements of the crimes you will need to prove as enumerated above.
- Compare the evidence to the elements of the offense that must be proven.
- Then identify areas for further investigation and work with the police to develop the evidence
- Interview witnesses, including medical professionals who treated the victim

- Interview the victim
- Talk with defence counsel
- Prepare subpoenas (summons) and pretrial motions if necessary
- Review rules of evidence
- Create a trial notebook

After a prosecutor receives the file from the investigator, he or she should ensure it is marked “CONFIDENTIAL” because of the confidential nature of SGBV cases. It is crucial to read the file and review all the documents as much as possible before holding the interview with the victim.

**The following documents should already be in the file:**

- Police Report
- Statements – complainant, accused, other witnesses
- Charge Sheet
- Copies of any documents and evidence
- Medical Report Form

These documents are crucial to the case. If one of them is not in the file, it is important to obtain it as soon as possible. Throughout the case, it is important for the Prosecutor to maintain a complete file with all necessary documentation and notes. The following organization is recommended:

### 1. Court documents

- Pleadings
- Discovery
- Motions
- Orders
- Warrants
- Indictment
- Subpoenas

### 2. Prosecutor records

- List of witnesses and contact information
- Chronological log of activity
- Notes of interviews
- Correspondence
- Legal research



### 3. Evidence

- Statements
- Police report
- Medical Report Form
- Photographs, diagrams, maps, and charts .

**Remember to always identify the weakest areas of the case for further investigation.**

One of the most challenging aspects of prosecuting cases is keeping track of contacts and witnesses. It is important to maintain a contact list for each case, including the following: (a) Victim (b) Investigating Police Officer (c) PSWO / Counsellor / Fit person (d) Witnesses (e) Health professional

#### PREPARING WITNESSES TO TESTIFY

Notify witnesses as soon as a trial date is set and make appointments to prepare them their testimony. This is not the same thing as coaching but refers to informing each witness about the process and procedures eg examination in chief, cross examination and clarification from the trial judge or magistrate etc. Here are some guidelines for this preparatory meeting:

- **Introduction.** If you have not met previously, introduce yourself and describe your role in the legal process.
- **Explain the role and rights of a witness.** Thank the witness for serving the state and the victim in this way. Ask whether he or she has any safety concerns. (If concerns exist about safety, contact the police and contemplate a safety plan.)
- **Explain witness tampering.** Explain that witnesses are not to accept bribes. Explain what a bribe is: any exchange of money or something of pecuniary value for the witness's promise to say or do something.
- **Advise the witness how to answer questions.** Explain that the witness should try to respond to questions with truthful answer to the best of his or her knowledge and memory. There is no right or wrong answer. If a witness does not understand the nature of a question, he or she can ask for the question to be repeated. It is important to warn the witness that the defendant's lawyer is likely to ask offensive or upsetting questions which must be answered regardless, unless the Prosecutor intervenes with an objection which is sustained by the trial judge or magistrate, or if the magistrate or judge directs so.
- **Practice the testimony.** Practice the whole testimony with the witness at least once, and several times if possible. Begin with the oath. Explain what the oath means, and ask the witness to repeat after you for practice. Go through the direct examination and then act as the role of the defense attorney and practice cross-examination. If the witness is a child, explain to them the procedure for a voir dire. Child evidence is covered in greater detail in Chapter 4. Inform the witness that if an offensive or upsetting question is asked, the prosecutor has a right to object to the magistrate or judge and depending on what the trial magistrate or judge

determines, the witness may be protected from harmful or upsetting questions or attacks.

- **Explain basic logistics.** Tell the witness what time they should arrive in court and where they should wait. Invite them to visit the court before the trial if they would like to see the layout. Use a drawing of the courtroom to show the witness where he or she will sit during testimony. Explain who the various players will be in the courtroom (the judge or Magistrate, defence counsel, defendant, clerk, stenographer, etc)

The following advice is also useful for sharing with the witnesses to boost their performance in court.

## 10 TIPS FOR WITNESSES WHEN GIVING TESTIMONY

- Listen carefully to the question. If you don't understand, ask the attorney to clarify.
- Don't interrupt the prosecutor, defence lawyer or magistrate or judge. Make sure that the lawyer has finished asking the question before you answer.
- Tell the truth always.
- Don't guess. You can always say, "I don't know." or "I'm not sure."
- Don't volunteer information you were not asked. Answer the question and then stop.
- Don't argue with the defence during cross-examination.
- Never get angry or lose your temper.
- Speak clearly and loud enough to be heard.
- Never say "never" or "always." These exaggerations are usually not correct and will subject you to cross-examination.
- If you need a break, ask for one

Under the Evidence Act of Uganda, witnesses are very important to a criminal trial. The general rule is that anyone may be a witness, but there are circumstances under which a court will not allow a person to give evidence if it is satisfied that the person does not understand the questions put to him or her or cannot give rational answers due to being of tender years, advanced age, disease of body or mind or a similar cause. Section 58 provides that all facts except the contents of a document must be proved by oral evidence. Section 59 emphasises that such oral evidence must be direct, that is, a first hand account of the situation. Section 40 of the Trial on Indictments decree states that every witness in a criminal trial shall be examined upon oath.

The attendance of witnesses at a trial can be secured using summons in accordance with sections 65 and 94 of the Magistrates Courts Act. These are documents issued by court directing the person to whom they are addressed to appear in court or produce documents or some other evidence in court at a date and time specified in the summons. There must be proof of service of summons in accordance with the law. Arrests may be used as a means of last resort to secure the attendance of witnesses.

#### 4.7.10 Special Procedures for Sexual and Gender-based Violence Cases

##### Prosecution Strategy for Rape Cases

Prosecution needs only establish the existence of coercive circumstances which vitiates the possibility of meaningful consent instead of discussing the personal circumstances of the victim, such as whether or not the victim did consent. Instead, probing should focus on eliciting the existence of coercive circumstances to create the presumption that there was a lack of consent.

It should also be remembered that just because the victim was below 18, defilement is the appropriate charge. A perpetrator can be charged with both rape and defilement on the same charge sheet.

1. It has been recommended that “As a result of the fear that many females have of revealing the extent and details of violations against them for fear of shame and stigmatization, mechanisms put in place should provide a scope for them to testify before women’s groups about their experiences of sexual and other forms of violations and any testimony before males, should be done in camera.” This is more imperative when the victim is a girl.
2. There is a case to be made that only judicial officers who have received specialized training should deal with SGBV cases. Indeed, training should not just be limited to judges and prosecutors, but also to translators, language assistants and all other officials involved in the court process, who need to display proper understanding of child friendly justice approaches.
3. It is recommended that all trials for sexual offenses be held in camera. Trials may be held in the courtroom, but the judge may clear both the courtroom and the environment to ensure that the public does not crowd the windows. In the case of a child victim, the identity of the victim must be completely concealed.
4. Due to the taboo of talking openly about sexual intercourse, it is important that judicial officers understand the cultural nuances around sex and be aware of the euphemisms used to describe body parts and sexual matters. It is even more critical in the case of a child to use appropriate language as advised by health professionals, to avoid re-victimisation and taking into account the age of the child.

##### Protecting victims from the trauma of seeing the perpetrator repeatedly

During the JLOS Justice for Children Special Sessions held in Northern Uganda, a very common concern that emerged amongst children victims was having to see the accused and/or be in the same room with him:

“I did not like seeing the offender in court after all the bad things he did to me.” -15 year old female, victim of defilement.

“What did not go well was when I showed that man who defiled me also entered the same room where I was taken behind. I was scared.” -10 year old girl, victim of defilement

“I remember my uncle who defiled me stood opposite me at the court and was seriously looking at me. I was really scared.” -7 year old girl, victim of defilement.

<sup>44</sup>ACORD (Agency for Cooperation and Research in Development) Uganda, (2010) Protection and Restitution for Survivors of Sexual and Gender Based Violence in Uganda: The legal peculiarities, the possibilities and the options.

<sup>45</sup> For instance, during the International Criminal Tribunal for Rwanda Proceedings, rape victims would refer to rape or penetration with phrases such as “he married me,” “he made me a woman,” “he made me his wife,” etc. who’s meaning can easily be lost in translation. See Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, 2014. See Uganda v. Apai (CSC. No. 23 of 1994) where the failure of the victim, an old woman, to describe penetration in a straightforward manner resulted in an acquittal. However, in Uganda v. Peter Matovu (CSC No. 14 of 2001), the same trial judge exhibited more gender sensitivity.

It is worth discussing with the Magistrate or Judge how this issue might be addressed, for instance; could the accused be identified and then removed from the room? One recommendation that might help came from the diaries kept by the Judges that presided over the Justice for Children Special Session: “The accused should be made to sit down while in chambers as at times their presence was intimidating to the child victims.”

#### 4.7.11 Prayers and Sentencing in SGBV Cases

Prosecutors should bear in mind that victims of SGBV are entitled to compensation - incarceration of the offender is not the only remedy available. Section 126 of the Trial on Indictments Act provides that when any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.

**According to the Sentencing Guidelines Practice Directions of 2013 paragraph 10; sentencing options available to courts include:**

#### OPTIONS TO IMPRISONMENT OF ACCUSED PERSONS IN SEXUAL OFFENCES

Death penalty; imprisonment; fine; community service; probation; caution and discharge without punishment; compensation; suspended sentence (available on appeal only); preventive detention; restitution; conditional discharge; costs.

The Guidelines further provide guidance on compensation / reparation in Paragraph 13 as follows:

- (1) Reparation involves both restitution (restoration of property to the owner) and compensation (making good of damage resulting from the crime).
- (2) The imposition of sentences of which restitution and compensation are elements, is one way of intervening for the sake of the victim.
- (3) Court shall consider reparations in the following circumstances:
  - where there is damage or loss or destruction of property including money, as well as physical, psychological, physiological or other injury;
  - where there is loss or injury resulting from the commission of the offence.
- (4) In doing all this, court must consider the means of the offender as well as the reparation appropriate for purposes of restitution and compensation.

<sup>46</sup>Prosecutors should also bear in mind the case law on sentencing generally and sentencing for SGBV in particular, some of which is provided in the Appendix.

## The ICGLR Special Fund for Reconstruction and Development

Under article 10 of the 2011 Kampala Declaration on Sexual and Gender-Based Violence, a fund is established, one of whose main purposes is to make available compensation for victims of SGBV. The financing of this fund is ensured by mandatory contributions by Member States and voluntary contributions of Cooperating and Development Partners. It is hosted and managed by the African Development Bank (ADB). The signing of the Trust instrument for the administration and management of the SFRD took place on the 10th September 2008. The bank account was opened on 06th November 2008 with ADB, in New York, United States.

It is therefore crucial that Prosecutors remember to pray for reparation for victims of SGBV when prosecuting such cases.

### 4.8 When Children Harm One Another: the conundrum of Child to Child Sex

Section 129 of the Penal Code makes it an offence for anyone below 18 years of age to engage in sexual activity. This has created a situation where 2 children can be accused of committing a crime against each other even in circumstances where they are having consensual sexual relations.

In jurisdictions such as Canada, Australia and the UK, the principle regarding child to child sex is that criminal charges will not be made where the children are of similar age or close in age, usually not more than 2 years. Sexual intercourse must have been consensual, and should not have occurred between related persons or family members (incest).

South Africa has adopted a more radical approach since a successful constitutional petition challenging the criminalisation of child to child sex. In *Teddy Bear Children's Home versus the Attorney General of South Africa*, the Constitutional Court held that the Criminal Law cannot be used as a substitute for parenting. Court held that children are human beings with full rights and not just little adults in waiting. They therefore have a right to bodily integrity and to privacy, and the criminalisation of consensual sexual activity between unrelated children of similar age violates these rights.

In 2014, a Justice for Children Steering Committee meeting advisory taskforce on this matter noted that the rationale for this provision was to protect girl children who were considered more vulnerable than boys and therefore in need of protection from underage sex and its impact which disproportionately affects girls through early pregnancies and all its health and social implications. It was observed that section 129 A (2) creates ambiguity by making reference to Part X of the Children Act. However, sexual offences under section 129 are not considered offences where children can be diverted from the criminal justice system. This has led to a complex situation where such cases of children having consensual sex have to be charged and cannot be diverted, further increasing the case backlog and the work load of the DPP.

<sup>47</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013). Available at <http://www.saflii.org/za/cases/ZACC/2013/35.html>

The committee made the following recommendations for handling such cases:

### RECOMMENDATIONS FOR HANDLING CHILD TO CHILD SEX MADE UNDER THE JUSTICE FOR CHILDREN PROGRAMME

- In view of the fact that the day to day practice seemed to focus on punishing only the boys, it was important for a fair standard to be observed and for both children to be charged.
- The Charge sheet should have 2 counts; one for the boy and one for the girl.
- A social inquiry report should be requested from the PSWO prior to sanctioning charges.
- It is important to establish that intercourse was consensual.
- It is irrelevant if one of the children is HIV positive.
- There should be a social inquiry report to establish whether one of the children (presumably the boy) is a “habitual” offender, in which case it should be treated as a defilement case.
- Where the female has conceived and is pregnant, for the sake of the unborn child, neither of the children should be charged and instead they should be referred to the PSWO who should support their resettlement and reintegration into society.
- Sentencing should be proportional and custodial sentences should be a last resort.
- The prosecution should not object to bail unless denial of bail is in the best interests of the child.
- The prosecution should scrutinise borderline cases regarding age determination and recommend further investigations including evidence such as immunisation cards, school records and baptism certificates, statements of parents or guardians; and lastly, medical evidence of dentition and bones.
- All JLOS institutions should keep age disaggregated data about children offences including child to child sex

## ANNEX 1: CHILD PSYCHOLOGY AND ITS RELATION TO CRIMINAL JUSTICE

There is more to a crime than the action/ omission constituting it. Science allows us to go into the mens rea component of criminal acts and get closer to what drives motive. Criminal acts may be viewed from a 'social ecological perspective', that is, as the result of the interaction between the person and the environment. Children who are offenders are usually often victims themselves. Exposure to violent situations may lead children to commit crimes. Children develop developmental patterns at an early age but environmental and social factors may lead them to become antisocial. Their early development could impact them as adults, leading to criminal behaviours. Developmental psychologists emphasize childhood as they review possible influences that could lead people to commit crimes. In a sense then, the criminal is a product of their environment, upbringing, exposure, experience and understanding (or lack thereof). With most jurisdictions recognising that justice must not only be done but also be seen to be done, the connection beyond basic legislative provisions for what indeed constitutes a crime and how this in effect goes into understanding the criminal, more so when the offender is a minor, cannot be overlooked.

The link between the social psychological theory and criminal justice requires an understanding of not just the facts constituting the crime, but also the events leading up to the commission of the crime as well as what was going on at the time the crime was being committed. The technical terms for this are proximal variables which are those occurring close to the time of the event and distal variables which are those occurring in the distant past relative to the event. The two, when put together give a better, if not bigger, picture of the factors at play and what they translate into.

It is important to say that the recognition of situational determinants of criminal behaviour is not meant to imply that the individuals personal responsibility for engaging in antisocial acts be reduced or diminished in any way. Rather it is meant to acknowledge many factors - both situational and individual differences- are needed to fully explain crime. In other words, when dealing with child offenders and victims, there is certainly more than meets the eye.

**There are four broad theories that examine crime and its likely origins or aggravators, namely:**

- i. The biological theory
- ii. The sociological theory
- iii. The subculture theory
- iv. The social psychological theory

Under the biological theory, the things that aggravate crime or significantly increase its likelihood are those completely out of the control of the child such as genetics, psychophysiology, neurological functioning and biochemistry. The sociological theory looks at crime and the social elements of class, poverty, and inequality. This particular theory is more skewed to the older children (teenagers)

<sup>48</sup>David M. Day & Stephanie B. Marion: Applying Social Psychology to the Criminal Justice System at P. 246, Published at [www.sagepub.com](http://www.sagepub.com)

<sup>49</sup>From: Attorney General's Office and the Rt Hon Dominic Grieve QC delivered on 12th December 2011 (The Barnardos Lecture), published at [www.gov.uk/government/speeches/the-barnardos-lecture](http://www.gov.uk/government/speeches/the-barnardos-lecture)

<sup>50</sup>Psychology plays a role in Criminal Justice, published at [www.ccj.pdx.edu](http://www.ccj.pdx.edu)

<sup>51</sup>Ibid.

<sup>52</sup>David M. Day & Stephanie B. Marion: Applying Social Psychology to the Criminal Justice System at P. 248, Published at [www.sagepub.com](http://www.sagepub.com)

<sup>53</sup>Ibid.

than to the younger ones per se because of the awareness it looks into. In examining factors key to society, the underlying consideration is that the child is one able to assess and understand these often subtle concepts that are not typically within the realm of understanding of a younger child. A lower socioeconomic status is associated with a higher rate of crime . This lower socioeconomic status and its attendant limitation of education and destructive environment quite literally spells out crime as the simplest way to upgrade or close the gap.

The subculture theory states that individuals who engage in criminal activity are merely conforming to the hedonistic, hostile and destructive values of lower class culture . The social psychological theory , as aforementioned portends that deviant/ antisocial behaviour is learned by the interaction of a person and their environment. In short, deviant behaviour is learned through processes that include observing and imitating the criminal behaviour of others, receiving positive consequences such as peer approval for engaging in negative behaviour, realising that such behaviour can effectively lead to desired outcomes and developing a high sense of efficacy in using antisocial means to achieve one's aims<sup>62</sup>.

### Some risk factors were identified that increased the likelihood of a person's involvement in crime, namely

1. Early age of onset for antisocial behaviour.
2. Temperamental and personal characteristics conducive for criminal activity.
3. Antisocial attitudes and beliefs.
4. Association with pro-criminal peers and isolation from non-criminal associates.
5. Negative parenting and family experiences.
6. Low levels of school or vocational or school achievement
7. Poor use of leisure time and low levels of involvement in pro-social leisure pursuits and recreational activities.
8. Abuse of drugs and/ or alcohol.

When these distal variables are looked at together with the proximal variables, it becomes clearer what the interplay is and how important it is in understanding the crime as well as the criminal. The two together can create triggers for deviant behaviour. If for example, a child has antisocial attitudes/beliefs and is also temperamental, when put in a situation that enhances these dispositions, s/he is primed for antisocial behaviour and only awaits an opportunity to present itself for this behaviour to manifest.

The impetus for young children to offend is higher where there are family factors but with adolescents, the greater driving force is peer pressure/influence.

Further, a distinction needs to be made between whether such behaviour is temporary or likely to be permanent.

<sup>54</sup>David M. Day & Stephanie B. Marion: Applying Social Psychology to the Criminal Justice System at P. 249, Published at www.sagepub.com

<sup>55</sup>Studies have noted a greater preponderance of criminals among sons whose parents were also criminals.

<sup>56</sup>Lack of proper nutrients postnatally or exposure to toxic agents may result in mild to severe deficits in cognition (e.g. learning disabilities, social information-processing deficits) and behaviour (e.g. poor motor, coordination and poor self-control). All these are known to be markers of aggressive behaviour in children.

<sup>57</sup>Males have a greater propensity for physical aggression than females and this has been attributed to higher levels of testosterone (Dabbs, Carr, Fradyy and Riad, 1995).

<sup>58</sup>Ibid at 7

<sup>59</sup>Ibid.

<sup>60</sup>

<sup>62</sup>Ibid.



The brain gets more organised and dense with age. Juveniles function very much like the mentally retarded. The biggest similarity is their cognitive deficit. They may be highly functioning but that doesn't make them capable of making good decisions. Because of their disabilities in reasoning, judgement and control of their impulses, (mentally retarded persons) do not act with the level of moral culpability that characterises the most serious adult criminal conduct. Teenagers have trouble generating hypotheses of what might happen partly because they do not have access to the many experiences adults do. Uganda's position on the same is similar: The Sentencing Guidelines Practice Directions 11 (2) (e) recognises that young offenders do not have the same insight and powers of resistance to temptation as adults. The brain's frontal lobe, which exercises restraint over impulsive behaviour does not begin to mature until 17 years of age therefore the very part of the brain that is judged by the legal system comes on board late.

<sup>63</sup>David M. Day & Stephanie B. Marion: Applying Social Psychology to the Criminal Justice System at P. 250, Published at [www.sagepub.com](http://www.sagepub.com)

<sup>64</sup>Vincent Schmithorst, Children's Medical Centre in Cincinnati, Ohio, quoted by Beckman, M: Crime, Culpability and the Adolescent Brain and published at [www.deathpenaltyinfo.org/node/1225](http://www.deathpenaltyinfo.org/node/1225)

<sup>65</sup>Steven Drizin, Law Professor at North Western University, quoted by Beckman, M: Crime, Culpability and the Adolescent Brain and published at [www.deathpenaltyinfo.org/node/1225](http://www.deathpenaltyinfo.org/node/1225)

<sup>66</sup>Justice John Paul Stevens in *Atkins Vs Virginia* US Supreme Court 2002, quoted by Beckman, M: Crime, Culpability and the Adolescent Brain and published at [www.deathpenaltyinfo.org/node/1225](http://www.deathpenaltyinfo.org/node/1225)

<sup>67</sup>Abigail Baird, Harvard Medical School, , quoted by Beckman, M: Crime, Culpability and the Adolescent Brain and published at [www.deathpenaltyinfo.org/node/1225](http://www.deathpenaltyinfo.org/node/1225)

<sup>68</sup>Ruben Gur, Neuroscientist, University of Pennsylvania in Philadelphia, by Beckman, M: Crime, Culpability and the Adolescent Brain and published at [www.deathpenaltyinfo.org/node/1225](http://www.deathpenaltyinfo.org/node/1225)

## ANNEX 2: CRIMINAL LAW CASES

### BUSIKU THOMAS V UGANDA, CRIMINAL APPEAL NO. 33 OF 2011

#### Brief Facts

The appellant, (Thomas Busiku) was found guilty of having defiled Wataka Mary, a girl aged 7 years. He was sentenced to 12 years imprisonment. His appeal to the Court of Appeal against both his conviction and sentence were unsuccessful and instead, the Court of Appeal enhanced his sentence to 20 years imprisonment. The Court of Appeal based on the accused's lack of remorse in enhancing the said sentence. However, the State had not prayed for the enhancement of the sentence. It was therefore by court's own motion that the sentence was enhanced.

Being dissatisfied with that decision, the appellant lodged a second appeal in this Court. The standing ground for appeal was that "The learned judges erred in law when they enhanced the prison sentence of the appellant from 12 years to 20 years."

#### Decision

1. The Court of Appeal or any other appellate Court has power to vary a sentence imposed by the lower Court by reducing or increasing it. The question in this appeal is whether the Court of Appeal followed the correct procedure before enhancing the sentence against the appellant. The Court of Appeal erred in the procedure it adopted in enhancing the sentence.

Ratio-Without the State praying for the enhancement of the sentence by cross appeal, the Court of Appeal erred in law when they enhanced the prison sentence of the appellant from 12 years to 20 years.

2. The learned Justices of Appeal erred in law to have regarded the appellant's absence of repentance as an aggravating factor in sentencing him.

Ratio- A person who has pleaded not guilty and has maintained his innocence throughout and, who intends to appeal cannot be expected to express repentance, which would amount to a confession of guilt, because that would derogate from the right of every accused person to be tried on the charge laid against him.

#### Obiter

- If it is considered proper or desirable for the DPP to appeal against sentence, the state should seek for Section 132 of TID to be amended to provide for this.

#### Dissenting judgement of Kisaakye JSC

- Director of Public Prosecutions (hereinafter referred to as the DPP), having given the appellant adequate warning before the hearing that his Sentence could be enhanced, ensured that the procedure followed by the Court of Appeal was lawful in enhancing the sentence.

## ATTORNEY GENERAL V SUSAN KIGULA & 417 OTHERS, CONSTITUTIONAL PETITION NO. 6 OF 2003

### Brief Facts

The Respondents/Cross Appellants filed their Petition in the Constitutional Court under Article 237(3) of the Constitution challenging the Constitutionality of the death penalty under the Constitution of Uganda. They contended that the imposition on them of the death sentence was inconsistent with Articles 24 and 44 of the Constitution. To the Respondents the various provisions of the laws of Uganda which prescribe the death sentence are inconsistent with Articles 24 and 44 of the Constitution. (Freedom from torture, degrading and inhuman treatment and its non-derogability).

### They appealed in the alternative that:-

1. The various provisions of the laws of Uganda which provide for a mandatory death sentence are unconstitutional because they deny the convicted person the right to appeal against sentence, thereby denying them the right of equality before the law and the right to fair hearing as provided for in the Constitution.
2. The long delay between the pronouncement by Court of the death sentence and the actual execution, allows for the death row syndrome to set in. Therefore the carrying out of the death sentence after such a long delay constitutes cruel, inhuman and degrading treatment contrary to Articles 24 and 44(a) of the Constitution.
3. Section 99(1) of the Trial on Indictments Act which provides for hanging as the legal mode of carrying out the death sentence is cruel, inhuman and degrading contrary to Articles 24 and 44 of the Constitution.

The Attorney General appealed and the respondents also cross appealed against certain parts of the judgement.

### Held:-

- Provided the conditions stated in article 22(1) of the Constitution are fulfilled, the death penalty is constitutional. Therefore what remains to be determined is the manner of carrying out the constitutionally permitted punishment.

Ratio- Article 22(1) is clearly meant to deal with and do away with extra judicial killings by the state. The article recognises the sanctity of human life but recognises also that under certain circumstances acceptable in the country, that right might be taken away.

- The pain and suffering experienced during the hanging process is inherent in the punishment of the death penalty which has been provided for in the constitution. We would therefore not say it is unconstitutional in the context of article 24 of the Constitution. (It does not amount to torture)

Ratio- Hanging has been used in Uganda to carry out death sentences since 1938. The framers of the Constitution were aware of the method used when they provided for the death sentence.

**HOWEVER:**

- The Court is denied its function as an impartial tribunal in trying and sentencing a person where the sentence has already been pre-ordained by the Legislature, as in capital cases. This compromises the principle of fair trial.

Ratio- A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence.

- By fixing a mandatory death penalty Parliament removed the power to determine the sentence from the Courts and that is inconsistent with article 126 of the Constitution (Exercise of judicial power and independence of the judiciary). Therefore, all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency.

Ratio- The Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution.

- Section 98 of the Trial on Indictment Act cap 23, which allows the court to make inquiry before passing sentence in all cases except when the sentence to be passed is of death is inconsistent with the principle of equality before and under the law.

Ratio- The accused person is given this right to an inquiry is so that he may present some mitigating factors, even at this late stage, which may affect the sentence to be passed on him or her. Not all murders are committed in the same circumstances, and all murderers are not necessarily of the same character.

- Section 98 T.I.A is also inconsistent with Article 121(5) of the Constitution which requires the trial judge presiding over the case in which a person is sentenced to death to submit a written report of the case to the Advisory Committee on the Prerogative of Mercy.

Ratio- If the judge will have been prevented by Section 98 of the TID from carrying out an inquiry when the accused person is still before him; he will have no basis for writing the report required of him under article 121(5) of the Constitution.

- To hold a person beyond three years after the confirmation of sentence is unreasonable. As soon as the highest court has confirmed sentence, the Advisory committee on the Prerogative of Mercy and the Prisons authorities should commence to process the applications of condemned persons so that the President is advised without unreasonable delay.

Ratio- To hold otherwise would mean that the President could withhold his decision indefinitely or for many years, and the person would remain on death row at the pleasure of the President. In our view this would be contrary to the spirit of the Constitution.

## CHARLES KAYUMBA V UGANDA, CR.APPEAL NO.8 OF 1981

### Brief Facts

The appellant, Charles Kayumba, was convicted in the High Court at Masaka of the murder of one Innocent Kalemera, the deceased, contrary to section 183 of the Penal Code. The doctor who carried out the post—mortem examination did not testify. The prosecution did not bother to obtain the post-mortem report.

The trial judge and the assessors rejected the appellant's alibi which was that he had left the Farm immediately after work on the material day and had gone to his girlfriend's place where he had spent the night. The trial judge found that the appellant was not a witness of truth and that in any case his alibi had been completely disproved by the evidence of P.w.4 and P.w.5 whose testimony clearly showed that he was at the scene of crime on the night of the murder.

The appellant was sentenced to death. He appealed against both conviction and sentence.

**There were two grounds of appeal namely,**

“(a) that the learned trial judge erred in law when he held that the Defence of alibi as set out by the appellant had been disproved by the prosecution;

(b) that the learned trial judge erred in law when he held that the prosecution had proved

**its case beyond any reasonable doubt.”**

**Held:-**

1. Appeal denied.
2. However, failure by the prosecution to produce medical evidence available was not favourable to the prosecution's case. The prosecution ought, whenever it is possible to do so, to lead the medical evidence as to the cause of death of the deceased person. Such evidence will certainly be vital in a case where death by natural causes cannot be ruled out or where there are other possible violent and or unnatural causes of death.
3. Circumstantial evidence amply justified the trial judge's conclusion that the deceased had met his death at the hands of the appellant. The appellant's alibi was quite rightly rejected.
4. As we understand it, Ilanda s/o Kisongoro v R 1960 E.A. 780 decided, inter alia, that the onus is on the prosecution to prove that an accused person was not so drunk as to be capable of forming intent to kill.
5. The summing-up notes show that the trial judge summed up thirteen different items to the assessors. The seventh item dealt exclusively with the circumstantial evidence.

**This is what he told them,**

“There was no direct evidence. Evidence is circumstantial. Accused hated the deceased. Threatened to kill the deceased; the night before the deceased died told P.W.4 he was leaving the area and would never write to anyone of them, next day, deceased with whom he shared a house, whom he hated, was found stabbed many times, dead, missing from the house, accused absent from entire area, most of his property gone and four months later found, as far away as Kampala. To whom else does the evidence point an accusing finger?”

6. In his summing up to the assessors the trial judge read out to them the evidence of Detective Corporal Ochom as it appeared on the Summary of Evidence. With respect, we feel this was a classic case of how not to conduct a Preliminary hearing. The matters agreed ought to be set out clearly and must be read, out to the assessors in summing up as they and not what appears in the Summary of Evidence, form part of the evidence in the trial. As it is, the Memorandum is useless as it does not set out the agreed facts. The summing up fell short of what is required. A proper summing up should include a statement that a conviction based solely on circumstantial evidence can only be justified where the inculpatory facts are not compatible with the innocence of the accused person, and are incapable of explanation upon any other reasonable hypothesis than that of his guilt.

### SUSAN KIGULA SSEREMBE AND NANSAMBA PATIENCE VERSUS UGANDA (CRIMINAL APPEAL NO OF 2004).

#### Brief Facts

- The two appellants, Susan Kigula Sseremba and Nansamba Patience (hereafter referred to as the 1st appellant and the 2nd appellant respectively) were convicted by the High Court of Uganda at Kampala, of murder and sentenced to death. Their appeals to the Court of Appeal against both the conviction and sentence were dismissed. They have now appealed to this Court on a second appeal.
- The 1st appellant was married to the deceased Constantine Sseremba. The 2nd appellant was a house maid of the Sserembas, and lived with the couple in the same house. The family had a two-roomed flat which had a sitting room and a bedroom. In addition to the 2nd appellant, the couple lived with their three children, who included Herbert Sseremba (PW6) who was aged about 3 to 4 years at the time of the murder. PW6 shared the same bedroom with the couple and witnessed the murder of the deceased.
- According to PW6, he saw the 1st appellant cut the neck of the deceased while 2nd appellant was holding the legs of the deceased. PW6 had earlier in the day seen the 1st appellant bring a panga wrapped in a polythene bag and hide it under their bed.
- It was argued that PW6 being a young boy of three years must have been asleep at 2.30 a.m. and, therefore, unable to see the events he claimed to have witnessed. However PW6 stood firm in cross-examination on this issue and stated that he had no sleep on that night. It may well be that the assailants believed the child to be asleep at that time. Unfortunately for the appellants he was awake and witnessed the well-executed murder of his father by them. His testimony shows that he was a very intelligent and impressive witness.
- The question that arises then is what is the corroboration required to support the unsworn evidence of a child of tender years?

#### Held:-

- i. Corroboration in part corroborates the whole. Therefore, if a material part of the child's evidence is corroborated, not only may that part of his evidence be relied upon but also that part which is not corroborated, the corroboration of a material part being a guarantee of the truth of this evidence as a whole: See R V Tarbhai Mohamedbhai (1943) 10 EACA 60.
- ii. The subsequent conduct of the two appellants constituted corroboration.

## UGANDA V BONYO ABDU (CRIMINAL CASE NO. HCT-04-CR-SC-0017 OF 2009)

### Brief Facts

The accused Bonyo Abdu was indicted for the offence of Aggravated Defilement contrary to Section 129 (3) and (4) (a) and (b) of the Penal Code amendment Act 2007. It is alleged that on the 30th November 2008, the accused performed an unlawful sexual act with Nakiryia Jesca, a girl aged 14 years. The law stipulates that a person convicted of this offence shall be liable to suffer death.

PW1(Nakiryia Jesca) the alleged victim testified that she was 14 years at the time the accused had sexual intercourse with her. That on the 30th November 2008, she was taken to Banuli's house and the accused inserted his penis in her vagina.

Doctor Angiro John (PW6) a Medical officer from Pallisa Hospital examined the victim and made a Medical Report made on PF3 and PF3 Appendix admitted as (P Exh. 1). The Report which was dated 1st December 2008 indicated that the victim was 14 years of age at the time of the commission of the offence. PW6 stated that the victim had a ruptured hymen and that this had occurred sometime back. Dr. Angiro also found bruises and inflammations on PW1's vagina, on the thighs, legs, elbow and the back.

PW7 (Kalere Kasifa) testified, inter alia that she carried out the HIV test on the accused. She explained the process of testing and methods she used. She found out that the accused is HIV positive.

### Held:-

- Medical evidence is good independent evidence to corroborate a complainant's evidence as proof of penetration.
- The documentary evidence on the accused's HIV Aids status before Court is more cogent than the oral statement of DW1 denying it.

## CHRISTOPHER KIZITO V UGANDA, Criminal Appeal No. 18/93

### Brief Facts

The facts as found by the trial Judge were that on the day of incident the seven year old complainant paid a visit to her little girl-friend Mega at her parents' home. Mega was a sister of the appellant. She found Mega and the appellant at home. While there the appellant called the complainant into his parents' bed-room where he defiled her. That was at about 5.00 p.m. The fact of defilement was established by Nurse Ruth Nyanzi (PW4) and Dr. Balungi (PW5). They examined the complainant at different times but within a space of five days from the day of incident. Both found that the complainant's hymen had been ruptured recently. PW4 who was the first to examine her saw bruises in the vagina. The appellant denied the allegation against him and pleaded alibi. The appellant was 16 years of age at the time of the incident and thus a child offender.

The appellant's complaint in this appeal is that as the complainant's evidence which was not given on oath as the complainant was found (in a voir dire) to be incapable of understanding the nature and meaning of an oath, that evidence required corroboration.

**Held:-**

Since the complainant had not given sworn evidence her evidence, alone could not establish the fact that it was the appellant who had committed the offence against her, however truthful she might have been.

In the instant case the appellant put himself at the scene of crime at the material time in his unsworn statement of defence. To that extent he corroborated the evidence of the complainant, which then justified the conviction. It is for this reason and not the reason advanced by the trial Judge that we uphold the conviction.

The ground of appeal against sentence must succeed. The appellant was 16 years old when he committed the offence and barely 18 years old when he was sentenced. We think that the sentence of 12 years imprisonment was in the circumstances manifestly excessive. We set it aside and substitute a sentence of 8 years imprisonment. The appeal is avowed to that extent.

**NKEZA KALOLI V UGANDA (CRIMINAL APPEAL NO. 28 OF 2000)****Brief Facts**

The appellant, Nkeza Kaloli, was charged together with one Rwamunono Robert, a juvenile. The charge brought against the two was that of assault occasioning actual bodily harm, contrary to section 228 of the Penal Code Act. For the purposes of this appeal, the appellant was convicted as charged and sentenced to two years' imprisonment. He appeals against conviction and sentence.

**The appellant set out six grounds of appeal and these were as follows:**

1. The trial magistrate erred in law and in fact in his interpretation and application of the well-established law and principles regarding identification.
2. The learned trial Magistrate erred in law and in fact in the assessment, interpretation and application of the law on contradictions and inconsistencies.
3. The learned trial Magistrate erred in law and in fact when he considered the contradictions and inconsistencies made by the defense only.
4. The learned trial Magistrate erred in law and in fact when he ruled that there was a prima facie case against the defendant whereas not.
5. The trial Magistrate erred in law and in fact in accessing the whole evidence the matter and consequently reached a wrong decision thereof.
6. The trial Magistrate erred in law and in fact in passing a severe sentence when there was no sufficient evidence against the appellant.

**Held:-**

- The learned trial judge erred in law and fact in accessing the evidence.
- The appellate judge stated- 'I do not accept the authorities quoted as persuasive in the least. There were two accused persons in court at the trial. The relevant record for 29th March 2000 reads in part.



“PW1.....The following day I went to police and made a statement those who were assaulted were given PF 3 for medical checkup.

**This is the form that was given to me from police.**

**PROSS: I wish tender the Police form 3 as exhibit PW1.**

**ACC: No objection.**

**COURT: Police form 3 is admitted in evidence and marked P 1/2000.”**

- I find much amiss. First, there were two accused persons in court on that day. It is not clear which one of the two accused had no objection to the tendering of the Police Form 3. As it is, there is no way of telling that the accused (appellant) at any time consented to the tendering of the form as court came to hold. I do not find that he did consent. Secondly, the Police Form 3 which was exhibited is a photocopy and not the original. No explanation is available as to why this should be so. There is every reason why the author of the medical report should have attended court in order to explain away the doubts that attended to the document so curiously admitted in evidence. In the result I cannot help but agree with counsel for the appellant that Police Form 3 was wrongly admitted in evidence and that it does not, contrary to the finding of the learned trial Magistrate, import the element of ‘harm’ in the assault.
- Appeal allowed for the above reason.

### **UGANDA V KATO KAJUBI. CRIMINAL APPEAL NO. 39 OF 2010**

This was an appeal against the ruling of the High Court of Uganda in which the learned trial judge acquitted the respondent of the indictment of murder c/s 188 and 189 of the Penal Code Act on a submission of No Case to Answer. The Director of Public Prosecutions was not happy with the ruling and hence this appeal.

#### **Brief Facts**

“On the 27th day of October, 2008 at Kayugi village in Masaka District Kato Kajubi Godfrey, with the aid of Umaru Kateregga (PW3) and Mariam Nabukeera (PW4), allegedly murdered Kasirye Joseph, aged 12 years.

#### **Issues.**

- Whether the key prosecution witnesses PW3 and PW4 were accomplices or not.
- Whether their evidence required corroboration.
- Whether the learned trial judge evaluated the evidence properly to the standard required when deciding whether a *prima facie* case has been made out or not.

#### **Held:-**

Issue 1. PW3 and PW4 were not accomplices and therefore their evidence did not require corroboration based on *R V BASKERVILE*, one accomplice’s evidence is not corroboration of the testimony of another accomplice. During the trial, the defence and to some extent the prosecution assumed that PW3 and PW4 were accomplices. This contributed to the conclusion that their evidence could not be relied upon.

### **Definition of an accomplice.-**

“In a criminal trial a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after a trial. However, even in absence of such confession or conviction, a court may find, on strength of the evidence before it at the trial, that a witness participated in the offence in one degree or another. Clearly, where a witness conspired to commit, or incited the commission of the offence under trial, he would be regard as an accomplice.” - Nasolo v Uganda [2003] 1 EA 181 (SCU).

However, PW3 and PW4 are not accomplices since they never confessed to Police at any point in time that they had committed the murder. If the trial judge had not at all times laboured under the impression that the two key prosecution witnesses were accomplices, which they were not, he would have found it irresistible to find that the prosecution had established the prima facie case against the respondent as required by law.

### **Issue 2. Corroboration.**

The court found that PW3 and PW4, upon whose evidence the court relied to find that there was no case to answer, was corroborated and that although the two witnesses stated that they sometimes lie for a living as witch doctors, there was no reason to believe that they lied under oath.

### **Issue 3.**

On re-evaluating the case, we find that the prosecution had established a prima facie case.

A definition of a prima facie case was given by Sir Newhan Worley D, in Ramalal T. Bhatt v R (1957) E.A 332 ABR 335, as follows:

‘It may not be easy to define what is meant by a prima facie case, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.’

### **In the Practice Note (1962) ALL ER 448, Lord Parker stated**

‘A submission that there is no case to answer may properly be made and upheld; (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.’

But it must be emphasised that a prima facie case does not mean a case proved beyond reasonable doubt.

## KIZZA SAMUEL V UGANDA. CRIMINAL APPEAL NO. 0102 OF 2008

### Brief Facts

The appellant was charged with the offence of defilement contrary to Section 123 (1) of the Penal Code Act. He prays for the conviction to be quashed and for the sentence to be set aside.

“The victim, Nsungwa Rose aged 3 years in year 2003 was staying with her parents at Kibasi village, Kibasi Parish, Hakibaale Sub County in Kabarole District. The accused was a neighbour to the home of the victim. On the 17th day of March 2003 at around 5.00pm he came to the home of the victim and called her to his home. He led her to his house and to his bedroom. He put her on the bed, inserted his penis into her vagina and had sexual intercourse with her.

The matter was reported to Local Council Chairman of the area. The accused was arrested and handed to Police. The victim was medically examined and the report thereof revealed a recently ruptured hymen and that she had inflammation / injuries around her private parts consistent with force having been used sexually. The accused was also medically examined and found to be normal. He was accordingly charged.”

### Held:-

- No conviction can be based on the unsworn evidence of a child of tender years unless as a matter of law such evidence is corroborated by some other material evidence implicating the accused.
- The evidence of the victim in regard to penetration was wanting. She simply stated as follows;-
- “When he lay on top of me he had sex with
- me (sexual intercourse) and I cried because
- I heard mother looking for me”
- This evidence in itself is not sufficient to prove penetration beyond reasonable doubt, even if it required no corroboration. Even if the victim had testified that indeed there had been penetration that evidence would still have required corroboration under Section 40 of the Trial On Indictments Act already set out above.
- The medical officer’s evidence is inconclusive, to say the least, on the issue of penetration. The witness clearly stated that he had not established that the victim had had sexual penetration the day before he examined her.
- The burden of proof in criminal cases remains upon the prosecution throughout the case. We find that the burden was not sufficiently discharged regarding the question of penetration. Penetration is an essential element of the offence of defilement.
- Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his /her evidence.

- This court points out to the trial courts below of the necessity, upon those courts in the course of the trial, to ascertain the age and mental status of every accused person at the time the alleged offence was committed. The necessity for this is because the age and or mental status of an accused at the time of the commission of the offence have a vital bearing on the whole trial, including the conviction and or sentencing process, amongst other considerations.

### **TIGO STEPHEN V UGANDA, CRIMINAL APPEAL NO. 08 OF 2009**

#### **Brief Facts**

This is an appeal against the decision of the Court of Appeal confirming the sentence of life imprisonment imposed by the High Court against the appellant who had been convicted of the offence of defilement contrary to Section 127(1) (now Section 129(11) of the Penal Code Act.

The appeal raises a substantial point of law concerning the meaning of life imprisonment in our Penal system having regard to the provisions of Section 47(6) of the Prisons Act which states that for the purpose of calculating remission, a sentence of imprisonment for life shall be deemed to be twenty years imprisonment. This point of law assumes greater significance following the case of *Attorney General Vs. Susan Kigula & 417 Others* Constitutional Appeal NO.3 of 2006 where this Court decided that the death penalty though Constitutional was not mandatory but discretionary. This would make a sentence of life imprisonment the next most severe sentence and probably the most effective alternative to the death sentence.

#### **Held:-**

- We hold that life imprisonment means imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned.

