**THE REPUBLIC OF UGANDA**
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**
**CRIMINAL APPEAL NO. 110 OF 2008**
**BETWEEN**
**KOBUSHESHE KARAVERI.....APPELLANT**
**AND**
**UGANDA.....RESPONDENT**

(Appeal from a conviction and sentence of High Court of Uganda Holden at Rukungiri before His Lordship the Hon. Mr. Justice Augustus Kania dated the 25th day of September 2008 in criminal session case No. 0056 of 2007)

**CORAM:**

**HON. MR. JUSTICE RUBBY AWERI OPIO, JA**

**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA**

**HON. MR. JUSTICE KENNETH KAKURU, JA**

## JUDGMENTOF THE COURT

The appellant appeals against a conviction and sentence of the High Court of Uganda Holden at Rukungiri before His Lordship The Hon. Mr. Justice Augustus Kania J dated 25th September 2008.

The appellant who was aged 30 years at the time the offence was committed was indicted for defilement of one Susan Tumuramye a girl under the age of 18 years.

It was the prosecution's case that on the 15th day of August 2005 at Nyamiyaga Village, Kanungu District the appellant had unlawful sexual intercourse with Susan Tumuramye, a girl under the age of 18 years. The appellant denied the charge.

To prove its case the prosecution called six witnesses. The appellant testified on oath but called no other witnesses.

It was the prosecution's case that the appellant and the victim's parents were neighbours. That the victim who was at the time

aged 5 years knew the appellant very well. That the appellant lured her with a sugarcane to enter into his house, whilst she had been left alone at her home by her mother who was digging in a nearby garden.

When the victim entered the house, the appellant took her to his bed, and had sexual intercourse with her.

That the appellant threatened her not to make noise or tell anyone.

However, the victim told her mother immediately she came back home. The mother then informed the victim's uncle.

The uncle reported the matter to District authorities who arrested the appellant and took him to the Police Station. At the Police Station, the appellant admitted having committed the offence and the confession was recorded in a charge and caution statement.

The victim was then examined by a medical officer who found that there were signs of penetration and inflammation around the victim's private parts. That the victim's *labia minora* and her *hymen* were inflamed but not ruptured. He found that the injuries had recently been inflicted.

At the trial the appellant retracted the confession. The learned trial Judge then held *a trial within a trial* and established that the confession had been voluntarily made.

The leaned trial Judge believed the prosecution case and found that the offence had been proved beyond reasonable doubt. He convicted the appellant accordingly and sentenced him to 17 years' imprisonment.

Hence this appeal.

The appellant's memorandum of appeal sets out 3 grounds namely:-

1. *That the learned trial Judge erred in law and fact when he convicted the appellant on the basis of unsatisfactory prosecution / circumstantial evidence.*

2. *That the learned trial Judge erred in law and fact when he convicted the appellant in the absence of the victim's testimony.*

3. *That the learned trial Judge erred in law and fact when he sentenced the appellant to 17 years' imprisonment, which is deemed to be harsh and excessive given the obtaining circumstances.*

At the hearing of this appeal Mr. Henry Kunya learned counsel, appeared for the appellant on state brief while Ms. Josephine Namatovu Senior State Attorney appeared for the respondent.

The grounds of appeal were urged in the order in which they are set out in the Memorandum of Appeal.

Learned counsel for the appellant submitted that the appellant was not caught in the act. That the mother simply suspected that the victim had been sexually assaulted and then took her for medical examination.

That there was no direct evidence linking the appellant to the crime. The victim was never called to testify. The only available evidence was that of the mother, which was hearsay. The prosecution's only other witnesses were the uncle of the victim and Police officers. He submitted that the learned trial Judge erred when he convicted the appellant on insufficient evidence. He submitted that under Sections 58 and 59 of the Evidence Act all acts are required to be proved by direct evidence.

He prayed for the conviction to be set aside and the sentence to be quashed.

In the alternative he submitted that a sentence of 17 years' imprisonment was harsh and excessive in the circumstances and prayed for its reduction.

Learned counsel for the State Ms. Namatovu opposed the appeal and generally supported the findings of the trial Judge.

We must state from the outset, that this Court is required by Rule 30 of the Rules of this Court to reappraise the evidence on record

and draw its own inferences of fact and come to its own conclusion. We shall therefore subject the evidence to a fresh scrutiny and come up with our own Judgment. See;- **Pandya versus R. (1957) EA 336**, **Kifamunte versus Uganda**, **Supreme Court Civil Appeal No. 1 of 1997** among others which have articulated the above principle.

The essential ingredients of the offence of defilement were ably set out by the learned trial Judge as follows;-

1. *That the victim was at the time of offence under the 18 years of age.*
2. *That sexual intercourse with the victim took place.*
3. *That the accused participated in the sexual intercourse.*

It is common ground that the victim was at the time of the offence aged below 18 years. Indeed it was conceded by the defence that she was aged about 5 years. This ingredient was therefore proved.

The second ingredient seems to have also been conceded by the defence. In any event, the defence did not mount any serious challenge to the evidence adduced in Court in this regard. The medical report was admitted without objection under section 66 of the Trial on Indictments Act (T.I.A). It comprised of Police Form 3 which was completed by a medical officer who also completed an appendix to it, both of which were exhibited.

The uncontroverted medical evidence admitted in Court indicates that the victim was aged 5 years old. That she was found to have signs of sexual penetration. That her *labia minora* and her *hymen* were inflamed. That the above injuries were consistent with forceful sexual intercourse. However the medical report indicated that the *hymen* had not been ruptured. The medical report is dated 16th August 2005 one day after the alleged offence took place. The report confirms that indeed there was sexual penetration. The appellant, it appears, was never subjected to any medical examination.

On the basis of the medical report we are satisfied that the learned trial Judge came to the right conclusion that sexual intercourse had been proved.

The medical evidence was also corroborated by the evidence PW3 Molly Kyampeire the mother of the victim to whom the victim first reported and the evidence PW4 the victim's uncle to whom the victim's mother reported.

We find no reason to fault the learned trial Judge's finding that this ingredient had been proved beyond reasonable doubt.

This appeal therefore hinges on whether or not it was indeed the appellant who subjected the victim to the unlawful sexual intercourse.

PW3 Molly Kyampeire testified that her daughter aged 5 year old Susan Tumuramye, told her that the appellant had given her a sugarcane after which he lured her to his house, which was nearby, placed her on his bed and had sexual intercourse with her.

The witness had found her daughter with a sugarcane. She had immediately reported the matter to the girl's uncle, her brother in-law (PW4). The victim repeated the story to him. PW3 and PW4 together with others and the victim proceeded to the appellant's house. He was not there. But it had rained, and they saw foot prints leading to the house of the appellant, they were that of the child and an adult.

When the appellant was arrested, he denied the offence, but the victim insisted that the appellant had defiled her. Indeed medical evidence confirmed the truthfulness of her statement.

Learned counsel for the appellant argued that since the victim was never called to testify, the prosecution had failed to prove that it was the appellant who had defiled the victim.

Interestingly counsel did not challenge on appeal the admission by the trial Court of the appellant's confession.

In fact he submitted that "he had no issues with Judge's findings on the confession"

The Memorandum of Appeal itself does not in any way challenge the findings of the learned trial Judge on the confession made by the appellant and admitted by Court after holding *a trial within a trial*. At page 13 of his Judgment the learned trial Judge states as follow;-

> *"In the instant case I made a finding that the accused made the said confession in circumstances that were not calculated to make a false confession and the accused made his confession voluntarily, I have also perused the confession exhibit P4 and I find its contents very similar to the circumstances of the victim's defilement as she narrated to her mother. In the circumstances I would be prepared to act on the confession if there was no other evidence corroborating it."*

In spite of the above statement the learned trial Judge went on to show that in fact the confession was corroborated by the testimony of PW3 and PW4 and also PW1 the medical Doctor who examined the victim.

The appellant's confession that was recorded by the Police and admitted by Court states as follows;-

> *"The small girl Susan is a daughter to my neighbour Margret. It is true i defiled her. This girl found me at my home after i had earlier on given her a sugarcane. She found me alone at my home and i took her to my bed. She did not have a knicker and i defiled her. She did not resist. I ejaculated in her after which i used my trouser to remove the sperms from her after which she left"*

This admission of the offence, which is not even a subject of this appeal, was sufficient to sustain a conviction against the appellant.

We are satisfied that the learned trial Judge complied with law and procedure when he held *a trial within a trial* after the appellant had retracted the confession.

We find that the learned trial Judge came to the correct conclusion that the confession was not caused by any threat, violence, force, inducement or promise. We agree with the learned trial Judge that the appellant's evidence at *the trial within a trial* that he made the confession while under threat that was not plausible. The trial Judge was right to reject it. The confession therefore stands.

We accordingly uphold the finding of the learned trial Judge that the prosecution had proved beyond reasonable doubt that it was indeed the appellant who defiled the victim.

We do not agree with the submission of learned counsel for the appellant that the offence of defilement or any other sexual offence for that matter cannot be proved without the testimony of the victim. In this particular case there was sufficient evidence to prove the offence, the absence of the victim's testimony notwithstanding. See; **Bassita Hussein versus Uganda (Supreme Court Criminal Appeal No. 34 of 1995) (Unreported)**

We find that the prosecution proved all the essential ingredients of the offence of defilement.

The appellant's conviction is therefore upheld.

The appellant stated on oath on 2nd September 2008 that he was 40 years old. This means that in 2005 when the offence was committed he was 37 years old. He was sentenced to 17 years' imprisonment on 25th September 2008.

He has also appealed against sentence. It is the contention of learned counsel for the appellant that the sentence imposed by the learned trial Judge is harsh and excessive in the circumstances.

Sentencing is the discretion of the trial Judge. This court cannot interfere with a sentence imposed by a trial Judge unless it is apparent that the Judge acted on a wrong principle or over looked a material factor. This Court may also interfere where the sentence is manifestly harsh and excessive in the circumstances of the case.

See; **James S/o Yoram versus Rex (1950) 18 EACA 147, Ogalo s/o Owoura Versus Regina (1954) 24 EACA 270**, **Kizito Senkula versus Uganda (Supreme Court Criminal Appeal No 214 of 2001), Kiwalabye Bernard versus Uganda Supreme Court Criminal Appeal No. 143 of 2001"** and more recently this Court discussed the instances upon which it can interfere with the sentence in **Ssemanda Christopher and another versus Uganda (Court of Appeal) Criminal appeal No. 77 of 2010)**

We have not found anything in this case to suggest that the learned trial Judge acted upon a wrong principle or over looked any material factor. Taking into account the circumstances of this case, we do not think that a sentence of 17 years' imprisonment is harsh and excessive.

We note that the maximum sentence the learned trial Judge could have imposed was death.

We agree with learned counsel for the respondent that the leaned trial Judge imposed an appropriate sentence and we find no reason whatsoever to interfere with it.

Accordingly this appeal fails and is hereby dismissed.

**Dated** at **Kampala** this 22nd day of **January** 2014.

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**HON. MR. JUSTICE RUBBY AWERI OPIO**
**JUSTICE OF APPEAL**

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**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA**
**JUSTICE OF APPEAL**

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