THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 123 OF 2010

OPIO SAMUEL.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Ezekiel Muhanguzi, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF THE COURT

This appeal arises from the Judgment of Hon. Mr. Justice Simon Byabakama Mugenyi J (as he then was) in High Court *Criminal Session Case No. 0022 of 2008* at Lira dated 9th July 2010. In this case the appellant was convicted of the offence of aggravated defilement contrary to *Section 129 (3) and 4 (a)* of the Penal Code Act and sentenced to 15 years imprisonment.

Being dissatisfied with the decision of the High Court the appellant now appeals to this Court against both conviction and sentence on the following grounds:-

1) *The learned trial Judge erred in law and fact when he failed to properly evaluate the entire evidence on record and thus arrived at a wrong conclusion when convicting the appellant.*

2) *The learned trial Judge erred in law and fact in holding that the fact of sexual intercourse was proved by prosecution and that the appellant was responsible for the same.*

3) *In the alternative but without prejudice to the former , the learned trial Judge erred in law and fact when he did not take into account the mitigating factors in the appellant's sentence thereby sentencing the appellant to imprisonment for 15 years which is harsh and excessive in the circumstances.*

Representations

The appellant was represented by learned Counsel Ms. Patience Bandaru on state brief while Mr. David Ndamurani Ateenyi learned Senior Assistant Director of Public Prosecutions appeared for the respondent.

The Appellant's case

At the commencement of this appeal Ms. Bandaru abandoned the first ground of appeal. She submitted on only one ground in respect of the appeal against conviction and in the alternative on ground 3 in respect of sentence.

In respect of appeal against conviction Counsel submitted that there was no sufficient evidence to prove the act of sexual intercourse and the participation of the appellant in the commission of the offence.

Counsel pointed out that the victim was not called to testify and this rendered the prosecution evidence weak as the evidence of the rest of the prosecution witnesses was not direct in respect of sexual intercourse and on the participation of the appellant in the commission of the crime. She submitted that there were inconsistencies in the evidence of PW_2 as to who first directed him to the scene of crime. Counsel submitted that in PW_2's testimony, one Eunice Apio told him that a man had entered a forest with a young girl. He followed the lead and saw the appellant on top of a young girl. The appellant then ran away. He gave chase together with another man and both arrested the appellant, and brought him to Local Council 1 Chairman.

Counsel contend that since the said boda boda man who assisted PW_2 to arrest the appellant was not called to testify, the evidence of PW_2 ought not have been relied upon as it was not corroborated.

Counsel further attacked the medical evidence, pointing out that the injuries prescribed by the doctor in the medical examination were not consistent with the testimony of the eye witness. He submitted that the medical report described

injuries to have been on the head, face and the body of the victim but these were not mentioned by other witnesses.

Counsel asked this court to find that the evidence adduced by the appellant was insufficient to sustain a conviction. In respect of the alternative ground of sentence counsel submitted that a sentence of 15 years was hash and excessive in the circumstances.

She pointed out that sentencing notes were missing from the trial court file and as such she was unable to ascertain how the judge arrived at the decision he did.

She asked Court to quash the conviction to set aside the sentence and invoke section 11 of the judicature act and impose an appropriate sentence of 10 years imprisonment taking into account the period the appellant had spent on pre-trial detention.

The Respondents case

Mr. Ndamurani opposed the appeal and supported the conviction and sentence. He submitted that the evidence of all witnesses corroborated with each others evidence. PW_2's evidence he submitted was that the incident took place in broad day light then he found the appellant half naked on top of the victim having sexual intercourse with her in the forest.

PW2 together with another person chased the appellant arrested him and handed him to the authorities. The Local Council 1 Chairman to whom the appellant was taken also testified confirming what happened on that day. Both the appellant and the victim had been brought him after the former had been apprehended. He handed them over to the police. Pw1 the medical doctor who examined the victim confirmed she had been defiled as she had fresh bruises in her vagina and spermatozoa.

He submitted that the leaned trial Judge had properly evaluated the evidence and had come to the right conclusion even in the absence of the victim's testimony.

Counsel submitted that the victim was only 8 years and was mentally retarded and therefore a sentence of 15 years was appropriate. He asked us to dismiss the appeal.

Resolution of issues

We are required as a first appellate court to re-evaluate all the evidence adduced at the trial and to make our own inferences on all matters and issues of law and fact. *See;- Rule 30 (1)* of the rules of this Court, *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997* and *Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.* We shall proceed to do so.

We have carefully listened to both Counsel. We have perused the Court record and the authorities cited to us.

In this case the prosecution called three witnesses. PW2 – Alube Joel testified that he together with another man, a boda boda rider, having been alerted by a passerby that a man had been seen entering a forest with a young girl decided to go to the forest and find out. In the forest they saw a man half naked on top of a girl having sexual intercourse. They challenged him and he attempted to run away. They gave a chase and caught up with him, apprehended him, together with the young girl and took both of them to the Local Council 1 Chairman PW3. The fact that the appellant was arrested on that day 30 of July 2008 at about midday at corner Kamudin forest is not disputed. What is disputed is the appellant's participation in the commission of the crime.

PW_1, the medical doctor who examined the witnesses found that she was 8 years old and had sexual intercourse forcefully. He also indicated that girl was mentally

retarded. He also examined the appellant and found him to have had bruises on his penis consistent with recent forced act.

PW_2 the Local Council 1 chairman to whom the appellant were first brought also testified and confirmed that, the victim and the appellant were on 30th July 2008 brought to his home by a crowd that included PW_2 who had apprehended the appellant. They also brought the victim who had torn clothes and blood flowing from her front. The appellant admitted to him that he had had sexual intercourse with the victim.

We are satisfied that the learned trial Judge properly evaluated the evidence and came to a correct conclusion that the prosecution had proved the case against the appellant beyond reasonable doubt.

We have no reason in faulting his findings. The absence of the victim's testimony was not fatal to the prosecution case. There was the testimony of PW_2 who witnessed the appellant having sexual intercourse with the victim. The appellant was arrested by PW_2 immediately thereafter, so there is no question of mistaken identity. It was broad day light at midday. There is no question that the witness PW2 could have mistaken the fact that the appellant was naked having sexual intercourse with the victim.

We find no merit in ground one and we dismiss it.

In respect of sentence this Court can interfere with the sentence of the trial Court in limited instances. Those instances were set out in by the Supreme Court in *Kiwalabye Bernard vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001* (Supra) as follows:-.

> *"The appellate Court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the*

discretion is such that its results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."

Following the decision of the Court of Appeal for Eastern Africa in *Ogalo s/o Owoura Vs R (1954) 24 EACA 270.*

In this case however, we are unable to ascertain the reasons why the learned trial Judge arrived on the sentence that he did because his sentencing notes were missing on the original trial Court file.

Accordingly we now invoke the provisions of Section 11 of the Judicature Act which allows this Court to exercise the power of the trial Court to impose an appropriate sentence.

The appellant was a first offender, he was a relatively young man of 28 years at the time. He was on remand for 2 years. The victim was only 8 years old and mentally retarded.

The sentences for aggravated defilement in respect of years, since the annulment of the mandatory death penalty in 2009 range from 10-17 years imprisonment, depending on the circumstances of each case. We think the fact that the victim was only 8 years and retarded are serious aggravating factors. However the appellant is young and capable of reform. He was on remand for 2 years, which we are required to consider.

In *Katende Ahamad Vs Uganda, Supreme Court Criminal Appeal No. 6 of 2004,* the Supreme Court upheld a sentence of 10 years for aggravated defilement. The appellant in that case was the father of the 9 year old victim.

In *Dratia Saviour Vs Uganda, Court of Appeal Criminal Appeal No. 154 of 2011*, the appellant was convicted of the offence of aggravated defilement and sentenced to 20 years imprisonment. The appellant was 33 years old, he was HIV positive and a guardian of the victim. This Court taking into account the period of 2 years the appellant had spent on remand reduced the sentence to 18 years imprisonment.

In *Kabwiso Issa Vs Uganda, Supreme Court Criminal Appeal no. 7 of 2002,* the Supreme Court, reduced a 15 year sentence for aggravated defilement to 10 years imprisonment.

In the circumstances we consider that a sentence of 14 years imprisonment to be appropriate. Accordingly the appellant is sentenced to serve 14 years in prison commencing from the date of conviction.

Dated at Arua this .....28th.....day of...December.2018.

.....

Hon. Kenneth Kakuru
JUSTICE OF APPEAL

.....

Hon. Ezekiel Muhanguzi
JUSTICE OF APPEAL

.....

Hon. Christopher Madrama
JUSTICE OF APPEAL