5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 99 OF 2012

(CORAM: F.M.S Egonda-Ntende, JA, Hellen Obura, JA and Stephen Musota, JA)

BYERA DENIS ::APPELLANT

10 **VERSUS**

UGANDA:::RESPONDENT

(Appeal from the decision of Hon. Justice Akiiki -Kiiza holden at Masaka High Court Criminal Session Case No.100 of 2010 delivered on 16/04/2012)

15 **JUDGMENT OF THE COURT**

This is an appeal against both conviction and sentence arising from the decision of the High Court at Masaka before Akiiki –Kiiza,J in which the appellant was convicted of the offence of aggravated defilement contrary to sections 129 (3) & (4) (a) of the Penal Code Act and sentenced him to 30 years imprisonment.

20 **Background to the Appeal**

The facts giving rise to this appeal so far as we have ascertained from the court record are that on 2/7/2010 at about 7:00 pm PW1 Namugerwa Josephat returned to her home from a funeral and heard the victim, Alicia Nakakande, aged 3 years crying. She flashed her phone light and saw the appellant holding the victim on top of him and across his thighs with his 25 penis in her vagina. PW1 removed the victim from the appellant while making an alarm and she inquired from the appellant why he had done that to her daughter but he replied that he would beat her and even kill her. PW1 then ran out with the victim towards her neighbor's home, a one Kemirembe Gerenotia who examined the victim in PW1's presence and she saw whitish substance in her private parts. She went to Local Council (LC) officials and the

5 Defence Secretary started looking for the appellant who had disappeared. PW1 then reported the matter to the Police Station at Malembo and she was referred to the hospital to have the victim examined.

The appellant was arrested after 2 days and charged with the offence of aggravated defilement. He was tried, convicted and sentenced to 30 years imprisonment. Being
10 dissatisfied with the decision of the trial Judge, he appealed to this Court against both conviction and sentence on the following three grounds;

1. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record as a whole and relied on insufficient, contradictory, untruthful and unreliable prosecution evidence which was full of hearsay, inherently incredible and hence arrived at a wrong conclusion*
15 *that the appellant was guilty of the offence of aggravated defilement contrary to section 129 (3) (4) (a) of the Penal Code Act Cap 120 which caused a miscarriage of justice.*
2. *The learned trial Judge erred in law and fact when he ignored and or failed to properly evaluate the appellant's claim of a grudge between him and PW1 and a frame up which he put up before court which could not be ruled out considering the deficiencies in the prosecution witnesses' testimonies*
20 *and thereby occasioned a miscarriage of justice.*
3. *The learned trial Judge erred in law and fact when he imposed a harsh and excessive sentence of 30 (thirty) years upon the appellant and failed to take into account the period spent on remand which led to a serious miscarriage of justice to the prejudice of the appellant.*

Representations

25 At the hearing of this appeal, Mr. Sserunkuma Bruno represented the appellant on state brief while Ms. Ann Kabajungu Senior State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Case for the Appellant

During the hearing of this appeal, counsel for the appellant abandoned the 2nd ground and
30 argued grounds 1 and 3 separately.

5 On ground 1, counsel submitted that there was no sufficient evidence on court record upon which the trial court would have found that the appellant committed the offence of aggravated defilement. He argued that in his evaluation of the evidence on record, the trial Judge did not consider Prosecution Exhibit 1(PExh 1) which is the medical form on which the victim was examined and the medical examiner found that there was no penetration of the victim. He
10 implored this Court as the first appellate court to re-evaluate the evidence on record as a whole and come to its own conclusion.

On ground 3, counsel submitted that the sentence of 30 years imprisonment that was imposed upon the appellant is harsh and excessive and he urged this Court to reduce it. He proposed a sentence of 12 years and also prayed that the appeal be allowed on both grounds.

15 **The Respondent's reply**

Ms. Kabajungu opposed the appeal and submitted, on ground 1, that there was sufficient evidence upon which the trial Judge relied to convict the appellant of the offence of aggravated defilement. She contended that this evidence is contained in the testimony of PW1 who clearly narrated what she observed for 3-5 minutes when she got home and what
20 transpired thereafter. Counsel added that the appellant and PW1 had been lovers for 3-4 months which aided the latter's proper identification of the former and therefore there was no possibility of mistaken identity. Further that the learned trial Judge warned himself and the assessors while summing up to them about the need for corroboration of evidence of a single identifying witness where the conditions for identification were not favorable.

25 Regarding the issue of the medical report, counsel submitted that the trial Judge at page 26 of his judgment evaluated the medical evidence vis-a-viz the evidence of PW1 and found that the ingredient of the performance of sexual act on the victim had been proved. She prayed that this Court also finds so.

5 In response to ground 3, counsel submitted that the sentence of 30 years imprisonment is not harsh given the circumstances of the case and considering the fact that the maximum penalty for the offence of aggravated defilement is death. However, she prayed that if this Court is pleased to reduce the sentence, a term of imprisonment of 20 years be imposed.

Resolution by the Court

10 The duty of this Court as the first appellate Court is to re-evaluate all the evidence on record and make its own finding. In so doing, it should subject the evidence to a fresh and exhaustive scrutiny. ***See; Rule 30 of the Judicature (Court of Appeal Rules) Directions and Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No.10 of 1997; Pandya vs R (1957) EA 336.***

15 On the first ground of appeal, the appellant faults the learned trial Judge for failing to consider Prosecution exhibit 1, the medical report of the victim's examination which revealed that there was no penetration of the victim. According to him, there was no sufficient evidence to find a conviction for aggravated defilement. We note from the court record that the medical evidence was admitted by consent and the medical officer, Dr. Joseph Matovu found that there was no 20 penetration of the victim but there were fresh injuries around the victim's private parts consistent with the use of force.

PW1 Namugerwa Josephat testified that she knew the appellant since he was her boyfriend for 3-4 months. On 2/7/2010, she returned from a funeral at 7:00 p.m and heard her daughter the victim crying. She flashed her phone light and saw the appellant in bed with the victim 25 holding her on top of him across his thighs with his penis in her vagina. She beat the appellant with a stick on the face and removed the victim from him while making an alarm. She inquired from him why he had done that to her daughter and he replied that he would beat her and even kill her. She then ran out with the victim towards her neighbor's home, a one Kemirembe Gerenotia who examined the victim in her and saw whitish substance in her private parts.

5 PW1 reported the incident to the Local Council officials (LC) and later to the Police Station at Malembo whereupon the appellant was arrested after 2 days.

PW2 No. 23178 Sergent Mugisha John Francis testified that on 4/7/2010 while on duty, he received a file from Malembo Police post together with a suspect (the appellant). He assigned the file to a detective to carry out further inquiries. He interrogated the appellant who admitted
10 to having committed the offence. He forwarded the file to Masaka Police station for further action.

In his defence, the appellant gave unsworn evidence in which he denied committing the offence and stated that PW1 was his girlfriend and they quarreled over money (90,000/=) which he had left in the house but found missing when he returned from the bar. He added
15 that since he was drunk, a fight ensued between them and PW1 threatened to report him to the Police. He claimed that he was simply framed by PW1.

The learned trial Judge evaluated the evidence on record regarding the performance of the sexual act at page 3 of his judgment, and he observed as follows;

> *"The medical evidence which was by consent, showed that the victim's private parts had*
> 20 *some injuries in form of abrasions or inflammations in her vulva. That there injuries were consistent with force having been used sexually (See Exhibit PE1). Even before the law was enacted, the superior courts had held that, even a mere torch of a male organ on a female organ, without inflicting any injuries, was defilement. Hymen need not even be ruptured at all (see the case of* ***Mujuni Apollo vs Uganda UCA Cr. Appl. 26/99*** *and* ***Chila vs Rep.***
> 25 ***[1967] EA 722 & Oyeki Charles vs Uganda UCA Cr. App. No. 126/99.*** *Applying both case law and statutory law, it is my considered view that on the evidence as outlined above, the prosecution had proved beyond reasonable doubt that the victim had experienced a sexual act on the material day. In any case, PW1 said, she had found the victim crying. This is a depressed condition on the part of the victim which is a corroborative factor in sexual*
> 30 *offences. (See* ***Kibazo vs Uganda [1965] EA 507****)."*

5 In his conclusion at page 8, the trial Judge disbelieved the appellant's assertion of being framed and dismissed his grudge allegation as baseless and a pack of lies he made up in order to rid himself of the present charges. He found that the prosecution had proved beyond reasonable doubt that the victim had experienced a sexual act on that material day and the appellant was the one who did it. He therefore found the appellant guilty of the offence of 10 aggravated defilement.

It should be noted that in sexual offences, the medical report is not the only evidence that proves performance of a sexual act on the victim.

In our considered view, the purpose of carrying out medical examination on a victim of defilement is to confirm whether there was penetrative sexual intercourse. However, even 15 where there is no medical evidence confirming such, the court can still convict an accused person where there is strong direct evidence as was the case in the instant appeal. In ***Mujuni Apollo vs Uganda (supra)*** this Court upheld a conviction for defilement where there was no corroboration of the victim's evidence. This Court stated;

> *"It is clear to us that by basing this appeal on the absence of medical evidence, Mr. Bwengye is* 20 *affording medical evidence undue weight, overlooking the fact that it is merely advisory and goes to the fact and not law. The court has discretion to reject it. Rivell (1950) Cr App R 87; Matheson 42 Cr. App R.145. The court can even convict without medical evidence as long as there is strong direct evidence when the circumstances of the offence are so cogent and compelling as to leave no ground for reasonable doubt….."*

25 Guided by the above authority, we find that the medical evidence was merely corroborative of PW1's evidence which the trial Judge believed and could have been the only basis for convicting the appellant had there been no any other corroborative evidence on record.

In addition, the lack of penetration does not exonerate the appellant of the offence because PW1 whom the trial Judge found to be a truthful and reliable witness testified that when she

5 got to her home, she found the victim on top of the appellant's thighs with his penis in her vagina. We agree with the trial Judge that the hymen need not be ruptured at all for sexual act on a child to be proved. In ***Mutumbwe William vs Uganda, SCCA No. 08 of 2008*** this Court overturned the conviction for defilement on grounds that there was no evidence of sexual penetration of the victim and instead convicted the appellant of the lesser offence of 10 attempted defilement contrary to section 123 (2) of the Penal Code Act. However, on second appeal to the Supreme Court, it was observed and held as follows;

> *"The only issue that arises in this appeal is whether there was sufficient evidence to support a conviction for defilement. We are of the view that the Court of Appeal correctly stated the law when it stated in its judgment thus:-*
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> > 15 *"In order to prove a charge of defilement, it must be proved that the accused person had sexual intercourse with the victim. It is not, however, necessary that full sexual intercourse should have taken place. It will be enough if there is evidence showing that some penetration of the male sexual organ into the victim's vagina took place. It has been repeatedly held in our superior courts that in sexual offences, the slightest penetration* 20 *will be sufficient to constitute an offence. See Mujuni Apollo -vs- Uganda Cr. Appeal No. 26 of 1999."*
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> *In this case, the evidence is that the appellant was found by PW2 on top of the victim while his pants were pulled down and the victim's panties pulled off. On examination shortly after by the mother, PW2, she found bruises in the vagina of the child. She testified thus:-*
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> > 25 *"I checked the girl and she had bruises in the vagina as he was trying to enter. From police, I took her to the hospital Pallisa for examination."*
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> *The witness further testified under cross-examination that she was present when the doctor examined the victim.*
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> *The doctor, PW1, testified as follows:*
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> > 30 *"The age of the girl is 5 years. There was penetration, the hymen was not ruptured."*

5 *Under cross-examination, the doctor stated:-*

> *"The entry of the vagina was red. There were no signs of spermatozoa. Redness can be caused by friction. Friction can be caused by anything physical. I didn't find out what caused the redness. I concluded because the police officer told me that she was sexually assaulted."*

10 ....

From this evidence it appears to us that there was consistency in the evidence of PW2 and PW1 that there was some injury in the vagina of the victim, and the only explanation that could possibly be made for that injury was the fact that the appellant was found on top of the victim in the circumstances described above. In our view, the Court of Appeal erred in speculating that the injury in the girl's 15 *vagina could have been caused by infection or any other cause not being a sexual act. The Court's conclusion that the doctor used the word "penetration" because he was only making an inference from the fact that he was told that a sexual assault had occurred and from the inflammation (redness) of the vagina of the victim, was unfair because there was sufficient explanation how that injury got there. There was no evidence of disease or any other means by which the victim could have got the* 20 *injuries. In any case, if the court was prepared to convict the appellant of attempted defilement, it would seem to follow from evidence that in the process of that attempted defilement, some injury was caused in the entry of the child's vagina. That entry did not need to be deep enough as to break the hymen to constitute the offence of defilement. This is in fact consistent with the finding of the court when it stated thus:-*

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> *"Though we were not satisfied that penetration had occurred, yet we have no doubt that he had completed all the necessary preparations by removing her and his clothes, lying on top of her and bruising her sexual parts to enable him defile the young girl. "*

In fact, according to the evidence of both PW1 and PW2, the injuries were in the victim's vagina. There is no doubt in our mind that the offence of defilement was committed. We would therefore 30 *dismiss the appeal allow the cross appeal and restore the conviction for defilement as held by the trial Judge."*

5 In the instant case, having re-evaluated the evidence on record and on the basis of the above authority we find that there was cogent and compelling evidence that the victim was found on top of the appellant's thighs with his penis in her vagina. The medical evidence then indicated that there were injuries in her vagina. It is only logical to conclude, as held by the Supreme Court in the case of ***Mutumbwe William vs Uganda (supra)*** that the injuries were caused
10 by the fact that the appellant's penis was found placed in the victim's vagina. For that reason, we find no merit in the appellant's contention on ground 1. It therefore fails.

Regarding ground 2, counsel submitted that the sentence of 30 years imprisonment was harsh in the circumstances of the case. He urged this Court to interfere with the discretion exercised by the trial Judge in arriving at this sentence by reducing it to 12 years
15 imprisonment.

We are alive to the principle that the appellate court can only interfere with the sentence of the trial court if there is an illegality, that is, if the trial court acted contrary to the law or upon a wrong principle, or overlooked a material factor. The appellate Court will also interfere if the said sentence is harsh and/or manifestly excessive. (***See: Jackson Zita vs Uganda,***
20 ***Criminal Appeal No. 19 of 1995 (SC)*** and also ***Nalongo Naziwa Josephine vs Uganda, Criminal Appeal No. 088 of 2009 (COA)***)

Bearing in mind the above principle, we shall proceed to re-evaluate the sentencing proceedings and the reasons given for the sentence imposed so as to determine whether there is any reason to interfere with the same.

25 In mitigation, it was presented for the appellant that he; has been on remand for 1 year and 8 months, is 39 years old, is still useful to the country, has learnt a lesson for the time he has been on remand and therefore he should be given a lenient sentence. On the aggravating side, it was presented that the offence is serious and its maximum sentence is the death penalty, the victim was $3^{1}/_{2}$ years old, the appellant is her step father who should have

protected her but not pry on her sexually. The appellant failed in his duties as a father and therefore should be given a long sentence.

While sentencing the appellant, the trial Judge stated as follows;

> *"Accused is allegedly a first offender. He has been on remand for 1 year and 8 months. I take this period into consideration, while considering the sentence to impose on the accused person. He is said to be repentant and prayed for leniency. He is said to be 39 years old and is capable of reforming. However, accused committed a serious offence. The maximum sentence on convicted defilers indicted before this court is a possible sentence of death. Hence the law takes a serious view of the people like the accused person. Also the victim apart from being a step daughter to him, she was a toddler of only $3^{1}/_{2}$ years. This is shameful to say the least, given the fact that he had PW1, as his girlfriend who could be presumed to be able to fulfill his sexual needs. The accused had a fiduciary relationship with the victim as a step father to the victim and is presumed to protect her from intruders. But the accused instead chose to lust against her and defile her. Such behavior cannot be tolerated by this Court.*
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> *Putting everything into account, I sentence the accused to 30 (thirty) years imprisonment. Right of Appeal explained."*

We note from the sentencing record that the trial Judge stated that the appellant is allegedly a first offender which implies that he did not consider it in favor of the appellant as a mitigating factor. However, the other mitigating factors were taken into consideration as well as the aggravating factors. The trial Judge also took into account the period of 1 year and 8 months the appellant spent on remand and sentenced him to a custodial sentence of 30 years imprisonment. In order to determine whether the sentence was harsh and excessive as alleged by the appellant, we have looked at the range of sentences for similar offences of aggravated defilement in the cases below.

5 In ***Candia Akim vs Uganda, Court of Appeal Criminal Appeal No. 0181 of 2009,*** this Court upheld a sentence of 17 years imprisonment for the offence of aggravated defilement. The appellant was a step-father of the 8 year old victim.

In ***Rugarwana Fred vs Uganda, SCCA No. 39 of 1995*** the Supreme Court upheld the appellant's sentence of 15 years for aggravated defilement of a 5 year old girl.

10 We note that the sentencing range in the above similar cases is between 15-17 years. We therefore find the sentence of 30 years imposed on the appellant in the instant case harsh and excessive. We accordingly, set it aside.

Having taken into account both the aggravating and mitigating factors set out above and the range of sentences for the offence of aggravated defilement in the above cited authorities, 15 we find a sentence of 20 years imprisonment appropriate in the circumstances of this case. However, since the appellant had spent a period of 1 year and 8 months in lawful custody prior to his conviction, we deduct that period from the 20 years and sentence the appellant to 18 years 4 months imprisonment from the date of his conviction, that is, 16/04/2012.

In conclusion, we uphold the conviction and allow the appeal against sentence in the above 20 stated terms.

We so order.

Dated at **Masaka** this..30th....day of.............July..................................2018

Hon. Justice F.M.S Egonda-Ntende

25 **JUSTICE OF APPEAL**

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

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Hon. Justice Stephen Musota

JUSTICE OF APPEAL

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