THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL No. 217 OF 2011

AYEBARE BANGYE MOSES:::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kabale before His Lordship Justice J.W Kwesiga in High Court Criminal Case No. 122 of 2011 delivered on 8th September, 2011)

CORAM: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE BARISHAKI CHEBORION, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

Introduction

This is an appeal against the decision of J.W. Kwesiga, J in *High Court Criminal Case No. 122 of 2011* at Fort Portal wherein the appellant was indicted for the offence of Aggravated Defilement contrary to Section 129(3) and (4) (d) of the Penal Code Act, Cap 120.

Background to the appeal

The facts as accepted by the learned trial Judge were that the appellant performed a sexual act with a girl aged 16 years on the 14th day of May 2009 knowing that she was mentally retarded. The appellant pleaded

not guilty and in his defence put up an *alibi,* claiming that he was at Mwinoni Trading Centre at the time he was accused of allegedly committing the offence, and that there were misunderstandings between his family and the victim's family arising from a land dispute.

He was tried, convicted and sentenced to 14 years' imprisonment. Being dissatisfied with the decision of the trial Court, he now appeals to this court. The grounds of appeal are set out in the appellant's Memorandum of Appeal dated 13th August, 2018 stating that:-

1. ***The learned trial judge erred in law and fact when he convicted the accused on the uncorroborated evidence of a minor victim who gave unsworn evidence in court and occasioned a miscarriage of justice.***
2. ***The learned trial judge erred in law and fact when he and not the prosecution explained away the contradicting medical evidence and occasioned a miscarriage of justice.***
3. ***The learned trial judge erred in law and fact when he found the victim to be mentally retarded without sufficient medical proof or verifiable evidence on record and came to an erroneous decision.***
4. ***The learned trial judge erred in law and fact when he overlooked the allocutus of the accused and occasioned a failure of justice.***

Counsel for the appellant argued the first and second grounds together, and grounds 3 and 4 separately. Counsel for the respondent replied to the said grounds in that order. We shall determine the grounds in the order in which they were argued.

Appearances

At the hearing of the appeal, Mr. Sam Dhabangi represented the appellant on state brief, while Ms. Immaculate Angutuko learned Senior State Attorney, represented the respondent. The appellant was present.

The Submissions

On grounds 1 and 2, it was submitted for the appellant that the unsworn evidence of the victim (PW5) which the learned trial Judge relied upon to convict the appellant was uncorroborated. Counsel submitted that the evidence of Dr. Mugisha Sison (PW1) who examined the minor was contradictory and could not corroborate PW5's evidence. PW1 testified that he examined the victim on the 17th day of May 2009 and found a semen discharge yet the offence was committed on the 14th of May 2009, 4 days prior. In Counsel's view the said discharge could not have been found 4 days after the commission of the offence. Counsel further submitted that the evidence of PW3, the mother to the victim also contradicted PW1's evidence when she testified that she took her daughter for medical examination on 14th May, 2009 and yet PW1 stated that he examined her on 17th May, 2009.

It was Counsel's further submission that PW1 contradicted himself when he testified that had he examined the victim on 17th May, 2009, he would not have found the semen like discharge in her vagina and yet his report with the same findings was dated 17th May, 2009. The victim was sent for examination on the 15th day of May, 2009. Counsel contended that the learned trial Judge erred when he found that PW1 had explained the inconsistency in the dates whereas not and asked Court to disregarded that evidence.

Counsel further contended that the evidence of PW3 was wrongly relied upon for corroboration since PW3 did not witness the alleged sexual act and merely saw the appellant escorting the victim home. Further, that PW5, the victim contradicted herself when she told Court that she had had sex with the accused person but not on that day. Counsel prayed that Court resolves all the contradictions in the prosecution case in favour of the appellant.

In reply, Counsel for the respondent submitted that PW1 who examined the victim was a reliable and honest witness and the defence at trial only contested the participation by the appellant after both parties had agreed to the facts in the case. Further, that the memorandum of agreed matters was signed by all the parties showing that when PW1 examined the victim she did not have any injuries; she appeared to have had sex with consent and her hymen was not intact; the time of the rapture could not be established but there was semen like discharge suggesting recent sexual intercourse, and the victim was 16 years old. Counsel contended that PW1's testimony mirrored the findings in the memorandum of agreed matters.

Counsel further submitted that the contradiction in the dates was clarified by the evidence of the arresting officer, PW4, P/C Bagwaneza, who testified that the offence was committed on 14th May 2009, and that very night the victim was referred for examination without Police Form PF3. PW4 also arrested the appellant on 14th May 2009 after PW3 had reported a case of defilement at about 10:00pm. PW1 examined the victim that very night but transferred the information onto the PF3 on 17thMay 2009, leading to the discrepancy of the date, which was very minor.

Counsel contended that a voire-dire was conducted by Court which found that the witness was unable to answer questions in a straight manner. She explained that the notes arising from the said voire-dire were not included in the record of proceedings by omission. However, no miscarriage of justice was occasioned. Counsel further contended that there were a number of contradictions in the victim's testimony which proved that she was not somebody of stable mental status, and that the learned trial Judge cautioned himself and the assessors about the need for corroboration of her evidence which was well corroborated by PW3.

Learned Counsel Angutuko, concluded that, even though there were some contradictions in the victim's evidence, those contradictions were minor and did not go to the root of the case.

In the alternative Counsel submitted that if Court were inclined, while re-appraising the evidence, to find that the mental disability of the victim was not proved, it should find that since there was sexual intercourse, there was simple defilement.

On ground 3, Counsel submitted for the appellant that the victim was not mentally retarded and was very alert when answering questions which were put to her in Court. Further, that the Clinical Psychiatrist, Mr. Nyonsaba Charles, PW2 testified that he examined the victim and found that she had below average mental status and a learning disability, but during cross examination he clarified that whatever he had told Court was not in the medical report since he did not record any findings of his examination.

Counsel pointed out submitted that the offence was committed in 2009 and the case heard in 2011 whereby a fundamental witness testified that she did not make findings of what she found 3 years prior, and as such this contradiction was very fundamental since the victim managed to answer all the questions put to her by the learned trial Judge. In his view, the victim might have had a mild learning problem as the psychiatrist said but not a retarded mind.

In reply, Counsel for the respondent submitted that according to the evidence of PW2, he examined the victim and found that she had below-average mental status and a learning disability even though she was able to communicate. As per appendix to PF3, the victim had a mild hearing disability. Further still, a voire-dire had been conducted and the witness was found to be unable to comprehend questions put to her even though the notes were not on the record of the Court.

Counsel referred Court to **Section 129(4) of the Penal Code Act, Cap 120** (as amended) under which the appellant was charged which states that any person who performs a sexual act with another person who is below the age of 18 in any of the circumstances specified including a person with a disability commits aggravated defilement. She defined disability under sub-section (vii) thereof to mean a substantial functional limitation of daily life activities caused by physical, mental, or sensory impairment and environment barriers resulting in limited participation. In Counsel's opinion, a mild hearing disability was a substantial functional limitation within the confines of Section 129(4)(vii) and it was substantiated by other evidence of PW3 the mother, who though not an expert, described how this victim had been having

difficulties in her day to day activities and that this testimony amounted to sufficient corroboration in the circumstances.

On ground 4, **it was the appellant's Counsel's submission that this Court** may not interfere with a sentence by the trial Court except when it is evident that the trial Court acted on a wrong principle and overlooked some particular material or factor. (See **Court of Appeal Criminal Appeal No. 147 of 2009, Muhwezi Obed vs. Uganda** and **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 017 of 1993)**.

The above notwithstanding, the learned trial Judge while passing sentence, did not take into account the period spent on remand as required under Article 23(8) of the Constitution.

Further, that the appellant was a first offender whose age of 29 years made him a young man capable of being useful citizen and he was remorseful. He was also looking after three orphans at the time, and had spent 3 years on remand.

Counsel submitted that had Court taken into account all mitigating factors, it would have come to the sentence imposed. Counsel invited Court to consider all mitigating factors in this case and come up with a lesser sentence.

In reply, Counsel for the respondent conceded that the period spent on remand was not taken into consideration by the learned trial Judge at sentencing but argued that the sentence was not harsh. Counsel invited this Court to uphold the conviction and proposed a term of 20 years

imprisonment since the victim had a disability and the appellant was an educated and reasonable person who had the ability to discern that his conduct was bad.

In rejoinder, Mr. Dhabangi, learned Counsel for the appellant submitted that making concessions on any ingredient did not lessen the burden of the prosecution to prove their case against the accused. The prosecution had a duty to prove all the ingredients of the offence beyond reasonable doubt.

Counsel rejoined further that the testimony of the psychiatrist could not be relied upon because what he told court was not in his report.

Decision of the Court

We have carefully studied the record of appeal and considered the submissions of both counsel and the law and authorities cited to us.

The duty of this Court as a first appellate Court was re-stated by the Supreme Court in the case of **Oryem Richard vs. Uganda; Supreme Court Criminal Appeal No. 22 of 2014** at page 5 in the following words:-

> ***"We should point out at this stage that rule 30 (1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate court, to re-appraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it has neither seen nor heard the witnesses. This gives the first appellate court the duty to rehear the case...."***

Mindful of that duty, we have re-appraised the evidence on record in the instant case, to determine whether the learned trial Judge relied on uncorroborated evidence to convict the appellant, and if so whether by so doing, he erred in law and fact as alleged in grounds 1 and 2 of this appeal.

On grounds 1 and 2, it was the appellant's contention that the learned trial judge erred in law and fact when he convicted the accused on the uncorroborated and unsworn evidence of a minor as well as conflicting medical evidence which occasioned a miscarriage of justice.

We find it pertinent at this stage to deal with the evidence of the prosecution witnesses which the learned trial Judge relied upon to convict the appellant.

PW5, Fortunate Kyasimire (the victim) testified that:-

> ***"The accused is Ayebare. He is from Rubuguri. I know his home. I have ever gone to his home. I had gone to do nothing. It was at night. I went alone. My sisters were at home. I found Ayebare at home. He was alone. He closed me in the house. He raped me from the house where he sleeps. There was a bed. He put me on the bed and went on top of me... I was naked. I had left the dress at home. He raped me. I had not agreed, he came and took me. He told me he was going to give me money. He only gave me 500/=... he opened and told me I get out and he escorts me. He escorted me up to the door of our house. I saw my mother. The accused ran away. It was 10:00pm at night. I was taken to hospital. I was not sick, they were examining me in the private parts. The place had been spoilt by the accused person when we were in his house. It was another time not that day. It was a***

Thursday, the day I went to the accused's home. We met my mother as he escorted me at home."

During cross examination she stated:-

"The gate was opened when he came. He found me washing my feet. He held me by the arm. He took me to give me money. My mother did not beat me. I felt pain. I did not bleed. He is the only one that raped me. Nobody had ever done it. I do not go to school. I stopped in P.3. I know to count. Today is Friday. Yesterday was Thursday. I would have reported if my mother had not found us. I would have told her. Doctor examined me."

PW1, Dr. Mugisha Sison testified that:-

"PF3 was written on 15th May 2009 and sent to me by Police at Rubuguli. The victim was Kyasimire Fortunate, I examined her. She had sex. No injuries found. Found semen like discharge suggesting sexual intercourse, she was 16 years old, there were signs of penetration. No bruises elsewhere. Vaginal examination showed semen discharge. I examined her on 17th may, 2009. I cannot tell the time of examination. I returned the forms immediately after signing them. Semen would not have been seen if she had bathed. It appeared to have occurred within one hour before examination. There are times when I examine patients without the police forms. I write findings on patient's record note books."

During cross-examination he testified thus:-

"The form was sent on 15th may, 2009. I made my report on 17th may, 2009. I made the report the day I examined the victim."

In re-examination he testified that:-

It is not mentioned in the report the day I examined is the day I made the report. I ruled out infection. The discharge was semen.

This appeared to be an hour before I examined. I cannot tell the time when I examined the victim. If I had examined her on 17th May 2009, I would not have found the semen like discharge.

PW3, Garahweza Vastina testified that:-

"I am a cultivator from Rushaka Cell, Rubuguri, Kisoro District. I know Kyasimire fortunate. She is my daughter...She went up to P.3 and because she is mentally sick, she got out of school. She used to fall down from time to time. She was three years, when she went to school she got completely mentally ill. She is on and off. She is mentally sick. I know the accused. We are immediate neighbours. On 14th may, 2009, I was at home. The victim stays in a room alone. We went to bed at 8:00pm. I heard the door make sound. All the children had already gone to sleep. I went to go and check, her bedroom was closed from outside. All other children were in their rooms. She was not in her room. We started to search for her. I saw Ayebare escorting her from his house. I got hold of the girl. Ayebare ran back into his house and closed the door. I found him immediately in front of his house. I was looking at him as he entered the house. I left the other children with Fortunate and went to Rubuguri Police. At about 9:30pm Fortunate was taken for medical examination."

During cross-examination she stated:-

"We took her for medical examination about 9:30pm. He examined her that night. The doctor's medical findings were given to the police. He was arrested when I had taken the child for medical examination. I saw him in the process of giving her a coin; I immediately held her hand out and demanded she explains what she was getting. The doctor examining her immediately confirmed that she had had sexual intercourse..."

PW4, P/C Bagwaneza Amos testified thus:-

"I know the accused person. He was arrested on 14th may, 2009, after Vastina Garahweza reported a case of defilement of Kyasiimire fortunate. It was 10:00pm. I sent 2 police officers to arrest him. I followed after he refused to open. He asked for the presence of the chairman called Tumuheirwe. He was arrested and taken to the police post. I took the victim to Rubuguri health centre for examination. I detained him. I forwarded the accused's case to Kisoro Police. That is all I did. I referred her under PF 03. I prepared the documents the following day, I do not recall who retrieved the forms from the medical officer. The forms returned sometime later before I took the suspect to Kisoro Station."

During cross-examination, he testified that:-

"I took the victim to hospital that night. She was examined by Mugisha Sison. I did not go with the PF3 that night. The doctor recorded his findings. He did not give me recordings that night. He told me verbally after the examination. I was outside the room where examination took place. I relied on the verbal report to detain the accused. "

We have reviewed the evidence of all the witnesses. It was the contention of the Counsel for the appellant that the evidence of PW1 was marred with major contradictions. PW1 who examined the victim testified that he examined her and found semen her private parts on 17th May, 2009. He also testified that the document, PF3 sending the child for medical examination was forwarded to him on 15th May, 2009. This, in counsel's view, was contrary to the evidence of PW3 and PW5 who testified that the victim was examined that same night on 14th May, 2009.

Having reviewed the evidence as a whole, we find that the exact date of examination was 15th May, immediately after the offence was committed. This is confirmed from the testimonies of PW3 and PW5, and PW1's own evidence that he did not have PF3 on the date of examination but recorded the results elsewhere and transferred them on 17th May 2009.

Regarding the voire-dire, the learned trial Judge noted at page 16 of the record of proceedings that:-

> ***"PW5: Fortunate Kyasimire***
>
> ***I come from Rukungiri***
>
> ***Court: I have noted that this witness is unable to answer questions in a straight manner and does not understand God and cannot take oath."***

We note that although the law, that is, Section 40(3) of the Evidence Act Cap 23 generally does not prohibit a child from giving evidence in a criminal case, there are preconditions which must be complied with before receiving his or her evidence.

Section 40(3) of the Trial on Indictment Act states:

> ***"Where in any proceedings any child of tender years does not in the opinion of the court understand the nature of an oath his evidence may be received though not on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth.***
>
> ***Provided that where the evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some material evidence in support thereof implicating him."***

Section 155 of the Evidence Act Cap 6 defines what is sufficient to corroborate evidence and provides:

> ***"In order to corroborate the testimony of a witness, any former statement by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."***

In **Jafaso Samuel Vs. R. Court of Appeal of Tanzania Criminal Appeal No. 106 of 2006,** it was held that the law imposes the duty on the trial Magistrate or Judge to investigate whether the child witness knows the meaning of an oath so as to give evidence on oath or affirmation. If the child does not know the meaning of an oath, then the trial Magistrate or Judge must investigate whether he/she is possessed of sufficient intelligence and understands the duty of speaking the truth. If he/she is satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth, he may receive his evidence though not given on oath or affirmation. This, the trial Judge, does by conducting a voire dire examination. How a *voire dire* test is conducted appears to be a matter of style. But recording questions and answers appears to be a better way because this enables even an appellate court to know whether the questions asked and the answers given were such that any court of law would have come to the conclusion that the child was possessed of sufficient intelligence and understood the duty of speaking the truth.

In the instant case, as already indicated, the trial Judge recorded that he had examined the victim in the scanty *voire-dire* examination. Curiously, however, we are unable to understand what exactly happened. While on one hand the record shows that PW5 was examined and found unable to answer questions clearly, her testimony shows that she was able to

articulate and answer questions. We need not go further in speculating on what might have happened in this regard. It would indeed be most undesirable in judicial proceedings.

We accordingly find that since her intelligence and understanding of the importance of speaking the truth was not properly tested, it cannot be held with certainty that she was possessed of sufficient intelligence and understood the duty of speaking the truth. In the circumstances of the case, the unsworn statement of PW1 required corroboration to found the conviction of the appellant.

Corroboration evidence is defined in **Osborne's Concise Law Dictionary 5th Edition page 90** as independent evidence which implicates a person accused of a crime by connecting him with it; evidence which confirms in some material particular not only that the crime has been committed but also that the accused committed it.

The law on corroboration in sexual offences was well settled by the Court of Appeal for East Africa in the case of **Chila and Anor vs Republic; Criminal Appeal No. 80 of 1967** in the terms set out below:-

> ***"The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."***

In the case of **Livingstone Sewanyana vs Uganda; Criminal Appeal No. 19 of 2006**, the Supreme Court had this to say in regard to corroboration of the victim's evidence in sexual offences:-

> ***"We accept the submissions of the learned Senior principal State Attorney that the reports which PW1 made to her teacher Ireta Mary Rose, PW3, and Fred Watente, PW4, corroborated her evidence that the appellant routinely had sexually abused her...***
>
> ***That not-withstanding we are of the considered view that even if such corroboration was not there, as the Court of appeal held, it is the quality and not the quantity of evidence that matters and the learned trial judge was aware of that. The learned trial judge found that PW1 was a truthful witness and believed her..."***

Further still, in the case of **Mujuni Apollo vs. Uganda Criminal Appeal No. 26 of 1999,** 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 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 ..."***

We note that even thought there were contradictions in PW1's testimony regarding the date of examination, the same were very minor. All the other three witnesses that is PW3, PW4 and PW5 squarely placed the

appellant at the scene of crime. He defiled PW5 and escorted her home, he was seen by the mother, PW3 who immediately reported to Police. Police came to arrest him that very night and he requested for the presence of the Chairman. He was taken into custody while the victim was examined by PW1. There was no PF3 that night so PW4 forwarded it the following day, and the doctor recorded his findings at a later date.

We do not accept Counsel for the appellant's contention that the victim's mother could not corroborate her daughter's evidence because she did not witness the sexual act. The mother testified that on that fateful night, having realised that her daughter was missing, she started looking for her. She saw the accused person escorting her back from his house which was almost in the same compound. The accused ran back to his house. She testified that the compound was lit with electricity at about 9:30pm and she clearly identified the appellant. We find that PW3 confirmed the story of the victim that she was defiled by him the appellant and he escorted her back home. PW4, P/C Bagwaneza Amos confirmed that he got a complaint of defilement of the victim on the night of 14th May, 2009. The victim was examined that very night and the clinical officer verbally explained that there had been a sexual act done to the victim. This witness confirmed that he made a formal request for the medical findings under PF3 which was exhibited. This further clarified that PW1 dated his medical report on 17th May, 2009, the date he filled in the PF3, having earlier carried out the medical examination without a police form, and recorded his findings on a piece of paper.

Moreover, the learned trial Judge having found that even though the victim seemed unable to answer questions in a straight manner and gave unsworn evidence, he warned himself and the assessors of the need for corroboration as required by law and found the same in the evidence of PW1, PW3 and PW4. Accordingly, we find that the contradictions in PW1 and PW5's evidence were very minor and did not go to the root of the case. In our view, the ingredients of performing a sexual act with a girl aged 16 years and participation of the appellant were proved beyond reasonable doubt.

Grounds 1 and 2 of appeal have no merit and must accordingly fail.

On ground 3, Counsel for the appellant submitted that the learned trial Judge erred in wrongly finding that the victim was mentally retarded because she was unable to answer questions in a straight manner whereas not, and as such convicted the appellant of aggravated defilement, when the said ingredient had not been proved in Court.

Further still while evaluating this evidence in the trial Court, the learned trial Judge at page 4 of his Judgment had this to say:-

> ***"My impression is that this witness, despite being a person living with mental disability, after being led by the prosecution patiently and in as simple a manner as possible, she gave a consistent account of the events of the night. It is immaterial that she does not remember the exact date when the events occurred. The witness gave her evidence not on oaths and section 10 of the Oaths Act required that her evidence be corroborated before any conviction could be based on her testimony."***

The learned trial Judge in resolving this issue relied on the evidence of PW3 the victim's mother who testified that the victim became completely mentally ill when she was in Primary three and she has since then been on and off under medical treatment as a person living with a mental disability. Further, the evidence of PW2, Nyonsaba Charles was also relied upon. PW2 testified in Court as follows:-

> ***"I have a Diploma in Clinical Psychiatric Clinical work of 2008 from Butabika Hospital. I have worked for three years. I examine and treat psychiatric cases. I examine people on police forms upon request. I do mental assessment, record my findings, sign the report and return the report to police while keeping a hospital copy. Upon a request from Kisoro CID in respect of Kyasimire Fortunate, a victim, I examined her and noted that she had below-average mental status, she had a learning disability. She was able to communicate. I signed and stamped the report."***

During cross-examination, he stated:-

> ***"She was not in School. What I have told Court is not in the report. Before, she used to come to Kisoro Hospital for treatment. I did not record any findings of my examination."***

See pages 10 and 11 of the record of proceedings.

We have also perused Exhibit PE II, the medical report upon which the victim was examined dated 26th August, 2011. The victim was examined in 2011 when the offence was committed in 2009. PW2 was requested to examine the mental status of the victim and in giving the results of the examination, he stated that:-

> ***"She has a mild hearing disability"***

Having reviewed all the evidence on this issue, we respectfully disagree with the learned trial Judge's finding that the victim was a person living with a mental disability and that the appellant who lived near the victim knew that she was mentally retarded. The evidence of the mother that her child was mentally ill because she constantly fell down when she was three years, and that she had been treated with mental illness over time could not stand on its own. Considering the alleged gravity of the victim's mental status, medical reports showing that indeed the victim was mentally ill should have been presented to substantiate on these assertions. None was presented; even the one made by PW2 could not stand as he only found a mild hearing disability.

We note that **Section 129(4) (vii) of the Penal Code Act Cap 120** defines disability as:-

> ***"a substantial functional limitation of daily life activities caused by physical, mental, or sensory impairment and environment barriers resulting in limited participation."***

In our view, a mild hearing disability does not fall within the confines of Section 129(7), supra and cannot be said to be a substantial functional limitation of daily life. According to P.E I, the PF3, there was no force used and no injuries and/or bruises on the victim's body. The victim testified that she left her home at night and went to the appellant's house. She had no mental illness and knew exactly what she was doing. This ingredient was, in our opinion, not proved by the prosecution against the appellant. Ground 3 of appeal, therefore, succeeds.

Having found as we have on ground 3, we set aside the conviction on aggravated defilement and substitute it with a conviction of simple defilement contrary to section 129(1) of the Penal code act, Cap 120.

We shall now proceed to determine ground 4 on the sentence. We note that the sentence hearing was brief and so was the order. We shall set the sentence out in full as hereunder:-

> ***"The accused/convicted person is a well educated man who should have been a guide to his society away from living a criminal lifestyle. He defiled a child who due to mental retardation not fully differentiate the genuineness of the accused who told her he was taking her to give her money but later alone turned against her sexually, exploited her. This man needs adequate time in the institution that rehabilitates people of this kind, the prison. Considering the maximum sentence provided is death, I will be lenient and give him another chance. He will serve 14 years imprisonment to give him time to reflect on his action and reform before he returns to society."***

It is evident from the above that, while the learned trial Judge considered the mitigating and aggravating factors in this case, he did not while passing sentence, consider the period the appellants had spent on remand as required by **Article 23 (8) of the Constitution**, which provides as follows:-

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

Further still, it is now settled from the Supreme Court decisions of **Abelle Asuman vs. Uganda, Supreme Court Criminal Appeal No. 066 of 2016**, **Rwabugande Moses vs. Uganda, Supreme Court Constitutional Appeal No.025 of 2014** and **Oshurera Owen vs. Uganda, Supreme Court criminal Appeal No. 050 of 2015**

(unreported) all relied upon in the case of **Muyitira Sande versus Uganda, Court of Appeal Criminal Appeal No. 126 of 2013,** that the position is that a sentencing Court can either take into account the period spent on remand and apply the non-mathematical formula as per **Kabwisso Issa vs. Uganda Supreme court criminal Appeal No. 007 of 2002;** or it can deduct the period spent on remand from the appropriate sentence (apply a mathematical formula as per Rwabugande vs Uganda (supra)). Either option will be found to comply with Article 23(8) of the Constitution. This Court is duly bound to comply with the Supreme Court decisions."

Therefore, the period the appellants had spent in pre-trial detention ought to either have been considered or deducted from the sentence arithmetically. Since the learned trial judge neither considered it, nor made any arithmetical deduction from the sentence imposed, the said sentence was a nullity. The sentence is, therefore, hereby set aside.

Having held as we have, we now invoke the provisions of **Section 11** of the Judicature Act Cap 13, which grants this Court the same powers as that of the trial Court in circumstances such as we now find ourselves, to impose a sentence we consider appropriate in the circumstances of this appeal.

In determining the appropriate sentence in the instant case before us, we have to be guided by sentences in cases similar with this one in the commission of the offence. In **Sam Buteera vs. Uganda, Supreme Court Criminal Appeal No. 021 of 1991**, the Court confirmed a sentence of 12 as being appropriate for the defilement of a victim of 11(eleven) years by an adult.

In **Bashir Ssali vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995**, the appellant was sentenced to 16 years imprisonment for defiling a school girl-child of P.3 class. However, of its own volition, the Supreme Court, raised and addressed the issue of legality of the sentence imposed on the appellant. This was because the trial Court had not complied with Articles 23(8) of the Constitution, which enjoins Courts to take into account the period a convict has spent in lawful custody, while sentencing him or her.

Accordingly, in that case, the Supreme Court took into account the four years the appellant had spent on remand by the time of his conviction, and reduced the sentence from 16 to 14 years. In the instant case, the appellant was a first offender. He had spent 3 years on remand prior to his trial and conviction. He was 29 years old, relatively young man at the commission of the offence looking after 3 orphans. Nevertheless he committed a very serious offence.

We are satisfied that a sentence of 12 years imprisonment will meet the ends of justice in this case. From that sentence we deduct the period of 3 years which the appellant spent in pre trial detention. The appellant shall serve a sentence of 9 years imprisonment from 8th September 2011, the date of conviction.

The appellant has been in prison since 14th May, 2009, making it 9 years and 3 months in prison; very much in excess of the sentence of 9 years which we have sentenced him to serve in detention. In the event we find that the appellant has already more than served the punishment that he should have been subjected to; and accordingly, we are left with no other option but to set him free. He should therefore be released

forthwith; unless he is being held on account of some other lawful orders.

We so order.

Dated at **Mbarara** this ..2nd.. day of ..October.. 2018

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Hon. Lady Justice Elizabeth Musoke
JUSTICE OF APPEAL

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Hon. Mr. Justice Cheborion Barishaki
JUSTICE OF APPEAL

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Hon. Mr. Justice Christopher Madrama
JUSTICE OF APPEAL