

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 633 OF 2015

OKWIR WILLIAM ..... APPELLANT

VERSUS

10 UGANDA ..... RESPONDENT

*(An appeal from the decision of the High Court at Lira before Her Lordship Hon. Lady Justice Dr. Winfred Nabisinde dated the 10<sup>th</sup> day of July, 2014 in Criminal Case No. 0103 of 2011)*

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA  
15 Hon. Lady Justice Percy Night Tuhaise, JA  
Hon. Mr. Justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

20 This is an appeal from the Judgment of Hon Lady Justice Dr. Winfred Nabisinde in High Court *Criminal Case No0103 of 2011* at Lira dated 10<sup>th</sup> July 2014, in which 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 32 years imprisonment.

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

- 25 1. *The trial Judge erred in law and fact when she allowed testimonies of prosecution witnesses without administering oath thereby occasioning a miscarriage of justice.*

- 5        2. *The learned trial Judge erred in law and fact when she convicted the appellant without medical evidence and the evidence of the investigating officer for corroboration, thereby occasioning a grave miscarriage of justice*
3. *That the learned trial Judge erred in law and fact when she convicted the appellant without medical evidence establishing the appellant's health and*  
10 *mental status, thereby occasioning a miscarriage of justice.*
4. *That the learned trial Judge erred in law and fact when she disregarded grave contradictions in prosecution evidence that goes to the root of the matter occasioning a miscarriage of justice.*
5. *The learned trial Judge erred in law and fact when she relied on insufficient*  
15 *circumstantial evidence that cannot sustain a conviction against the appellant thereby occasioning a miscarriage of justice.*
6. *The learned trial Judge erred in law and fact when she convicted the appellant in disregard of prosecutorial misconduct thereby occasioning a mistrial of justice.*
- 20        7. *The learned trial Judge erred in law and fact when she imposed illegal, harsh and excessive sentence.*

### **Representation**

Ms. Shamim Amolo learned Counsel appeared for the appellant on state brief while Mr. Moses Onenchan learned Senior Principal State Attorney appeared for the  
25 respondent. The appellant was present.

### **Appellant's case**

Ms. Amolo submitted that, the prosecution evidence was too weak to sustain the conviction of aggravated defilement. She argued that, there was no medical evidence  
30 tendered in court to prove the sexual assault against the victim. Further that, the age of the victim and her mental disability, were also not proved sufficiently at the trial.

5 It was the only evidence of PW1 Akullo Margaret, the mother of the victim, who testified that, her daughter was mentally retarded. However, that disability was never proved by medical evidence. The medical doctor who examined the victim never testified in Court. The investigating officer was not called to testify in Court. Therefore there was no independent expert opinion to prove the disability of the  
10 victim. She submitted that the victim's testimony was so clear and straight forward and she was eloquent, unexpected of a mentally retarded person.

Counsel contended that, the learned trial Judge ought to have convicted the appellant of the offence of simple defilement contrary to *Section 129(1)* of the Penal Code Act and not that of aggravated defilement. The victim was 15 years old at the  
15 time the offence was committed. In the absence of proof of her disability which was the only aggravating factor, there was nothing remaining to sustain a charge of aggravated defilement. She prayed to Court to set aside the conviction of aggravated defilement and substitute it with simple defilement.

In respect of sentence, Counsel argued that the sentence of 32 years imprisonment  
20 was harsh and manifestly excessive in the circumstances of the case. She submitted that the learned trial Judge ought to have taken into account the principle of sentencing that requires consistency and uniformity. She prayed to Court to set aside the sentence of 32 years imprisonment and substitute it with 9 years imprisonment, in the event that, this Court does not allow the appeal on the issue of  
25 conviction.

### **Respondent's reply**

Mr. Onenchan opposed the appeal and supported the conviction for aggravated defilement. He submitted that, the testimony of the victim's mother was sufficient to prove that the victim was mentally retarded at the time she was defiled by the  
30 appellant.



5 In respect of sentence, Counsel conceded to the fact that the sentence of 32 years was harsh and manifestly excessive in the circumstances of the case. He proposed a sentence of 20 years imprisonment.

### **Resolution**

10 We have carefully listened to both Counsel. We have also perused the Court record and the authorities cited to us and those that were not cited.

We are alive to the duty of this Court, as the first appellate Court, to re-appraise all the evidence on record and to come up with our own inferences. See:- *Rule 30(1)* of the Rules of this Court, *Bogere Moses Vs Uganda Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No.10 of 1997* We shall proceed to evaluate the evidence and come to our own conclusion.

It was the appellant's contention that there was no evidence to prove the offence of aggravated defilement. The victim was above 15 years, the only element which would have aggravated the offence was the allegation of mental disability of the victim which was raised by PW1 Akullo Margaret the victim's mother.

20 *Section 129(3) and (4)* of the Penal Code Act stipulate as follows:-

*"(3) Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.*

25 *(4) The circumstances referred to in subsection (3) are as follows—*

*(a) where the person against whom the offence is committed is below the age of fourteen years;*



5 (b) where the offender is infected with the Human Immunodeficiency Virus (HIV);

(c) where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed;

(d) where the victim of the offence is a person with a disability"

10 The above elements have to be present and have to be proved beyond reasonable doubt before a Court can convict a person of the offence of aggravated defilement. It was pointed out by the appellant's Counsel that there was no evidence on record to prove the mental disability as stated by PW1, she stated as follows at 7:-

15 "...The victim does not go to school because she has a mental problem. She fell sick after 6 months old and could not talk. She started talking after 6 years. I don't know what the disease is called. She can cook and do house work..."

The above testimony is the only evidence in respect of the victim's mental disability. The statement was made during examination in chief, and the witness was not cross-examined on it. We have carefully analysed the record and we have not found  
20 any evidence to corroborate the statement of PW1 in respect of the victim's mental disability. Prosecution did not adduce evidence of disability through production of a medical report. The medical doctor who examined her did not indicate any mental disability on the examination form, neither was he called to testify.

25 We have looked at the evidence of the victim herself who testified as PW3. Her testimony is straight forward and well articulated. She was firm during cross examination. There is no indication that she had a mental disability and she did not state so.

30 We find that the prosecution failed to prove the ingredient of disability beyond reasonable doubt. In the premises, with all due respect to the learned trial Judge, we



5 find that the evidence adduced by the prosecution was insufficient to sustain a conviction of aggravated defilement.

In the result, we accordingly quash the conviction of aggravated defilement and substitute it with that of simple defilement contrary to *Section 129(1)* of the Penal Code Act.

10 In respect of sentence, this Court cannot interfere with the discretion of the trial Court except in specific instances set out in the law. The principles under which an appellate Court can interfere with the sentence of the trial Court were set out in *James S/O Yoram Vs R [1950] 18 EACA 147 at P. 149* as follows:-

15 *“it may be that had this Court been trying the appellant, it might have imposed a lesser severe sentence but that by itself is not a ground for interference and this Court will not ordinarily interfere with the discretion exercised by a trial Judge in the matter of sentence. Unless it is evidence that the Judge had acted on some wrong principle or over looked some material factor.”*

20 The same principles were reiterated by the Supreme Court in *Kiwalabye Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001*. See also: *Ogalo s/o Owoura Vs R (1954) 24 EACA 270*.

25 Having set aside the conviction of aggravated defilement and substituted it with simple defilement, it follows that we have to set aside the sentence too and substitute the same with one consummate with the offence of simple defilement. We accordingly set aside the sentence of 32 years imprisonment. We invoke *Section 11* of the Judicature Act which gives this Court the same powers as that of the trial Court to impose a sentence which we consider to be appropriate in the circumstances.



5 The aggravating factor against the appellant is that, he defiled a minor who was only 15 years old. However, he was a first offender. He was of advanced aged 54 years at the time of the commission of the offence. He was remorseful. He had spent 3 years and 8 months on remand. These mitigating factors were in favour of the appellant.

10 There is need to have uniformity and consistency in sentencing. We therefore have to take into consideration the sentences this Court and the Supreme Court have imposed on offenders in similar circumstances.

In *Kabwiso Issa Vs Uganda, Supreme Court Criminal Appeal No. 7 of 2002 [unreported]* the appellant was convicted of defilement and sentenced to 15 years  
15 imprisonment. On appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme Court the Court found that the trial Judge had not taken into account the period the appellant had spent on remand and reduced the sentence to 10 years imprisonment.

In *Katende Ahamad vs Uganda, Supreme Court Criminal Appeal No. 6 of 2004*, the  
20 appellant was convicted of defilement and sentenced to 10 years imprisonment. On appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme Court the Court upheld sentence of 10 years imprisonment.

In *Lukwago Henry vs Uganda, Court of Appeal Criminal Appeal No.36 of 2010*, this Court upheld a sentence of 13 years imprisonment for the offence of defilement.

25 In *German Benjamin vs Uganda, Court of Appeal Criminal Appeal No. 142 of 2010*, the appellant had been convicted of defilement. He had spent 2 years on remand. His sentence was reduced from 20 to 15 years imprisonment.

In *Kato Sula Vs Uganda, Court of Appeal Criminal Appeal No. 30 of 1999*, this Court confirmed an 8 year imprisonment sentence noting that it was rather lenient.



5 In *Bwambale Muchunguzi vs Uganda, Court of Appeal Criminal Appeal No. 96 of 2006*, this Court upheld a sentence of 16 years imprisonment for the offence of defilement.

Taking into account all the aggravating and mitigating factors of this case and the decisions of this Court and the Supreme Court cited above and those not cited and the fact that the appellant had spent 3 years and 8 months on pre-trial detention, we  
10 consider that a term of 15 years imprisonment will meet the ends of justice from which we now deduct the remand period of 3 years and 8 months. We accordingly order that, the appellant is to serve a period of 11 years and 4 months in prison from 10<sup>th</sup> July, 2014 the date of conviction

We so order.

15 Dated at Gulu this 19<sup>th</sup> day of Dec 2019.



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**Kenneth Kakuru**  
**JUSTICE OF APPEAL**

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**Percy Night Tuhaise**  
**JUSTICE OF APPEAL**

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**Remmy Kasule**  
**Ag. JUSTICE OF APPEAL**

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