THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT JINJA

CRIMINAL APPEAL NO. 209 OF 2014

GAGAWALA MUTAJAZI::::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA ::RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF COURT

This appeal arises from the judgment of Alvidza J. in Jinja Criminal Session Case No. 71 of 2011 in which the appellant was indicted, tried and convicted of the offence of aggravated defilement and sentenced to 20 years imprisonment. The appellant was dissatisfied with the findings of the High Court and filed this appeal on the following grounds;

1. The learned trial Judge erred in law and in fact in failing to correctly evaluate the evidence on record thus reaching a wrong conclusion.
2. The learned trial Judge erred in law and fact when she sentenced the appellant to 20 years imprisonment which sentence is excessive and harsh in the circumstances of the case.

Background

The brief background to this appeal as far as we can ascertain from the court record is that on the 17th April 2010, the mother sat her daughters, Kawangula Huda Habib, the victim (8 years old) and another Salama Habib aged 12years for a conversation. During the conversation, the victim revealed to her that when she was away, the appellant took her into the house and slept on top of her. That in the process, she saw what she called 'milky water' on herself. When asked, Salama Habib also confirmed that the victim had earlier on told her the same thing. The victim revealed that the appellant had kept doing the same thing to her on other times thereafter. The mother on examining the victim's private part realized that they were swollen and she reported the matter to police.

Representation

At the hearing of the appeal, Mr. Esarait Robert appeared for the appellant while Mr. Ssemalemba Simon, Assistant DPP, appeared for the respondent.

Appellant's submissions

Counsel submitted that the prosecution evidence had a lot of contradictions and inconsistencies. That the medical report stated that the rupture happened in less than 72 hours from 21st April 2011 and yet PW3 testified that she did not go to the scene of the crime because the crime had taken one month and her testimony was that she is the one who took the victim to the doctor. He argued that the contradictions are very major and should have been resolved in favour of the appellant.

Counsel relied on the case of **Kato John Kyambadde and another Vs Uganda S. C. Criminal Appeal No. 0030 of 2014** on the proposition that major contradictions and inconsistencies will

In regard to ground 2, counsel argued that the 20 year sentence meted on the appellant was harsh and excessive in the circumstances of the case. Counsel relied on **Livingstone Kakooza Vs Uganda S.C.C.A No. 17 of 1993** on the circumstances in which an appellate court can interfere with the sentence imposed by the trial court.

Respondent's submissions

In reply, counsel for the respondent opposed the appeal and submitted that the trial Judge duly considered both the prosecution and defence evidence and rightly convicted the appellant. That the inconsistencies as raised by counsel for the appellant were minor and did not go to the root of the case.

Regarding sentence, counsel submitted that the trial Judge took into account both the aggravating and mitigating circumstances of the case and passed a sentence of 20 years on the appellant. He prayed that the appeal be dismissed and the conviction and sentence be upheld.

Consideration of the appeal

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence, weigh conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See **Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997 and COA Criminal Appeal No. 39 of 1996.** In the latter case, the Supreme Court held that;

> *"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own*

mind not disregarding the judgment appealed from but carefully weighing and considering it."

We have carefully considered the submissions of both counsel and the authorities cited. We shall address the grounds in the way they were argued by counsel.

Ground 1

For an accused person to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim was below 14 years of age.
2. That a sexual act was performed on the victim.
3. That it is the accused who performed the sexual act on the victim.

In is not in dispute that the victim was 8 years old at the time the offence was committed. PW2, the mother to the victim testified to this fact and this was corroborated by the medical report marked PX1. Therefore, we find that the 1st ingredient was proved beyond reasonable doubt.

PW1 testified that the appellant had sexual intercourse with her seven times. Her evidence was corroborated by that of her mother who testified as PW2 that when she was informed by Salma that the appellant had done something to the victim, she checked the victim's private parts and found pus. There was also a medical report tendered in by the prosecution which indicated that the victim's hymen had been raptured less than 72 hours ago. We find that the 2nd ingredient of the offence of aggravated defilement that sexual intercourse was performed on the victim was also proved beyond reasonable doubt.

To prove the 3rd ingredient of participation, the prosecution produced evidence of the victim herself and her mother (PW2). On page 10 of the record, a *voire dire* was conducted and the court found that the victim knew the benefit of telling the truth and as such, she gave a sworn statement. The victim testified that;

> *"I know the accused, I hear him being called mutabani. He is from same clan as my father. He did bad things to me. He put his private parts in mine. It was 2011. I was at our home near the school. It happened seven times. I was feeling a lot of pain..."*

During cross examination, the victim testified that;

> *"I had gone to the toilet at around 8:00pm, he held me by my hand and took me to his room, he then slept on me and left me. I went back to where I was sleeping. It was the sixth time. The fort time I had come from class, I found him at the door, he held me and took me to his house. The second time, he waited for me when I was sleeping with my friends, he lifted me and took me outside. It was a full week these acts took place. The distance between accused's home and mother's room was 50 metres-(from gate to the chambers). We used to stay there but when he came, we left it for him. We used to sleep in that room 9 people. I was not the oldest. I have three elder sisters. There are new houses between my mother's room and the room where the accused was sleeping. There were neighbours. Whenever he used to take me, the neighbours were there but did not enter the room. No one saw me. He was holding my mouth and said if I made noise or told anyone he would cut me. He used to sleep on me at night."*

PW2 also testified that during that time, her husband was sick in Mbale and she went to take care of him. When she returned, she realised that the victim was walking differently. The victim did not first tell her what had happened but her sister, Salma, told PW2 that the appellant had done bad things to the victim. PW2 checked the victim and found pus and she was swollen.

PW3, the police officer, testified that when she received the complaint and opened up a file, the victim made a statement and revealed that the appellant had defiled her.

In his defence, the appellant testified that he was framed because he owed the victim's father money. That he had visited the home of the victim but he did not spend a night there. The victim's testimony was corroborated by that of PW2.

As a first appellate court, this court has to bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowances in that regard **(Selle and Another v Associated Motor Boat Company [1968] EA 123**). The trial Judge found the evidence of PW1 truthful. PW1 was very consistent in her testimony despite the fact that she was a minor. Her evidence was corroborated by that of PW2 who received the information from her other daughters, sisters to the victim and without doubt implicated the appellant.

We agree with the learned trial Judge's finding but do not agree with counsel for the appellant's contention that there were grave inconsistencies in the prosecution evidence. The inconsistencies were minor and did not go to the root of the case. In fact they are in regard to the time the appellant was arrested after he had returned to the home of the victim and not at the time the offence was committed.

We therefore find no reason to interfere with the trial Judge's finding that it is the appellant that defiled PW1. Ground 1 fails accordingly.

Ground 2

An appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed unless that court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda SCCA No. 10 of 1995 and Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001 (S.C).**

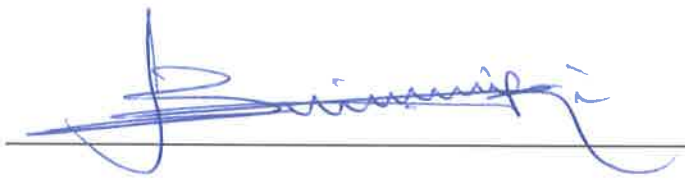
The appellant's Counsel submitted that the sentence of 20 years imprisonment was harsh and excessive in the circumstances and we should interfere with it. On the other hand, learned counsel for the respondent submitted that we should not interfere with the sentence because the learned trial Judge took into account the aggravating factors of the appellant being a relative to the victim as an uncle and the fact that the victim was only 8 years old. Further that the sentence was justifiable and appropriate in the circumstances.

The appellant was found guilty of aggravated defilement. The maximum penalty for this offence is death. In **Barugo John Vs Uganda Criminal Appeal No. 208 of 2014**, this court held that; *"the sentences for aggravated defilement since the annulment of the mandatory death penalty in 2009 range from 10 to 17 years depending on the circumstances of each case."* In our considered view there is need for uniformity in the range of sentences for similar offences. We therefore find that the sentence of 20 years was out of range and quite on the higher side in the circumstances of this case. We shall therefore set it aside and proceed to sentence the appellant afresh under S. 11 of the Judicature Act.

The appellant was a first offender who had spent 3 years on remand. He also has 7 children and was remorseful. He was still a young man capable of reforming. On aggravating factors, the appellant was related to the victim and he took advantage of his own blood. The victim was only 8 years old and the appellant had sexual intercourse with her 7 times. The offence of aggravated defilement is a serious offence that attracts a death sentence. We have considered the above aggravating and mitigating circumstances and the period the appellant spent on remand. We find that a sentence of 16 years imprisonment will meet the ends of justice in this case. We therefore sentence the appellant to 16 years imprisonment to run from 23rd April, 2014, the date of conviction.

We so order.

Dated this 17th day of July 2019



Hon. Justice Cheborion Barishaki, JA

Hon. Justice Stephen Musota, JA

Hon. Lady Justice Percy Night Tuhaise, JA