**THE REPUBLIC OF UGANDA,**

**IN THE COURT OF APPEAL OF UGANDA AT ARUA**

**CRIMINAL APPEAL NUMBER 0039 OF 2014**

**ABALE MUZAMIL}..... APPELLANT**

**VERSUS**

**UGANDA}..... RESPONDENT**

*(Appeal from the judgment of Hon. Mr. Justice Vincent Okwaga delivered on 22nd January 2014 in Arua Criminal Session Case No. 73 of 2012)*

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA**

**Hon. Mr. Justice Ezekiel Muhanguzi, JA**

**Hon. Mr. Justice Christopher Izama Madrama, JA**

**JUDGMENT OF THE COURT**

**Background to the appeal**

The appellant was indicted, tried and convicted of the offence of aggravated defilement contrary to section 129 (3) and (4) (a) of the Penal Code Act Cap 120 and sentenced to 19 years imprisonment. Being dissatisfied with the judgment of the trial Court, he filed this appeal against both conviction and sentence on the sole ground that:

> "The learned trial judge erred both in law and fact when he convicted and sentenced the appellant without the victim's testimony, eye witnesses and cogent prosecution evidence on record."

The brief facts are that; on 26th September, 2011 at Drabijo village in Yumbe District, the victim S.A.S aged 9, was left at the home of her guardian, one Kapile Swale. The appellant, who is their neighbour, found her alone at her

home, pulled her by force into the house of her guardian and had forceful sexual intercourse with her. The victim reported the incident to one Khemisa in the neighbourhood who then advised her to report to the matter to her guardian who was at the trading centre at the time. The victim then immediately, reported the incident to her guardian who in turn reported the matter to the Local Council I Secretary for security. Thereafter the appellant was arrested, detained and tried whereupon he was convicted of the said offence.

**Representation**

At the hearing of the appeal, learned counsel Mr. Samuel Ondoma appeared for the appellant while learned Principal State Attorney Ms. Florence Akello Owingi appeared for the respondent.

**Submissions of the appellant**

Mr. Ondoma for the appellant submitted that the trial Judge erred when he held that a court may convict on a charge of aggravated defilement in the absence of the victim's testimony. He argued that in the circumstances of this case, the victim's testimony ought to have been taken as she was available to testify but had simply not been called. He distinguished the facts of this case from that in **Badru Mwindu v Uganda; Court of Appeal Criminal Appeal No 15 of 1997** relied upon by the trial court arguing that, in that case the victim was not available to testify.

Further, that the evidence on record was insufficient to sustain the charge as PW3, PW4 and PW5 who testified did not witness the incident. He submitted that the learned trial Judge relied on the evidence of PW4 who was an eye witness but who stated in evidence that he met the victim on the road crying and when he asked her, she said that the appellant had sexual intercourse with her. Further that, the charge and caution statement that was admitted had not been made voluntarily. Counsel referred to the

defence of the appellant. He stated that he did not know the victim and that the charge was the result of a grudge between the appellant and his uncle. In the premises, the appellant's counsel asked the court to allow the appeal and set aside the conviction and sentence.

**Submissions of the respondent**

Ms Florence Akello Owingi supported the conviction and sentence and prayed that the court upholds the decision of the trial court. She submitted that what is essential in a case of aggravated defilement is not whether the victim turned up for the trial, but whether the prosecution had produced sufficient evidence to prove beyond reasonable doubt that the accused had actually committed the offence. She further submitted that the age of the victim was not in issue having been proved by the medical report that at the time the offence was committed she was 9 years old.

Ms Florence Akello submitted further that the participation of the appellant was proved by the prosecution, based on the charge and caution statement of the appellant and the evidence of PW5 who recorded the charge and caution statement. She argued that the procedure that was followed in recording the appellant's charge and caution statement was never challenged during the trial. Counsel further submitted that the procedure set out in **Tuwamoi v Uganda [1967] 1 EA 84**; was followed in this case and as such the trial judge cannot be faulted in any way. She submitted that the prosecution proved its case beyond reasonable doubt and prayed that this court upholds the decision of the trial Judge.

**Consideration of the appeal**

We have carefully considered the facts and circumstances of this appeal from the appeal record, the submissions of counsel, judicial decisions cited and the applicable law generally. This is an appeal from the decision of the High Court made in the exercise of its original jurisdiction. The duty of this

court is to subject the evidence on record to fresh scrutiny. This duty is set out under **Rule 30 (1) (a)** of Rules of this Court which provides that:

> **"30. Power to reappraise evidence and to take additional evidence**
>
> **(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—**
>
> **(a) Reappraise the evidence and draw inferences of fact; and..."**

(See **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123**), **Kifamunte Henry v Uganda; SCCA No. 10 of 1997** and ***Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1997).*** In an appeal from the decision of the High Court in the exercise of its original jurisdiction, this court must reappraise the evidence and consider all the material facts which were before the trial Court, and come to its own conclusion regarding all issues of law and fact, having cautioned itself that it had neither seen nor heard the witnesses; and in this regard, it should be guided by the observations of the trial court regarding demeanour of witnesses.

It is now trite law that, a sexual offence of defilement may be proved in the absence of the victim's testimony. What is critical to prove in the offence of aggravated defilement does not have to be founded on the testimony of the victim. What the prosecution has to prove are the ingredients of the offence namely that:

(a) The victim was below 14 years old at the time the offence was committed.
(b) A sexual act was committed with the victim; and.
(c) The appellant/accused participated in the sexual act.

The first two ingredients are not contested in this appeal and therefore the issue of whether a sexual act was proved to have been committed against the victim of the offence is proven. Secondly, it is not in dispute that SAW was 9 years old at the time she was subjected to a sexual act. The appellant's appeal is based on the contention that the learned trial Judge convicted the appellant without the victim's testimony, any eye witness testimony or cogent evidence.

In this case there was no eye witness and the victim not only did not testify but did not identify the appellant as the person who assaulted her. The court relied on the testimony of PW3 who did not witness the offence and her testimony is clear that the victim was brought to her for examination in accordance with Islamic law, after she had been defiled. PW4 Haruna Alisoga testified that he met the victim on the road crying and she told him that the appellant had defiled her. PW4 knew the appellant and he testified as Local Council I Defence Secretary. He took the victim to PW3 to establish whether she had been defiled. His testimony to the extent of proving participation of the appellant is hearsay evidence. The cogent evidence considered by the learned trial judge is the medical report which is not in dispute and which proves the two of the essential ingredients of the offence and are the fact that the victim was below 14 years and her hymen was ruptured by a sexual act immediately before she was examined. The only matter in issue is whether the learned trial judge erred when he relied on the retracted and repudiated charge and caution statement of the appellant made to the police. The learned trial judge noted that there was a detailed charge and caution statement detailing what happened. He held that the statement was admitted without any objection from the defence as exhibit PE3 and PE4. These were the statements in *Lugbara* and were admitted together with the English translation.

The learned trial Judge relied on the evidence of PW3, PW4 and PW5 to convict the appellant. PW3 testified that the victim was brought to her by PW4 after he had gotten information that the victim had been defiled. PW4 brought the victim to PW3 because under Sharia Law, a male does not see the nakedness of a female. On checking the girl, PW3 found that she had bruises in her genitalia, which was swollen and dirty. The victim was crying. PW4 testified that he knew the appellant from Iyete Drabijo village and he also knew the victim who was staying at the home of Kapira. It was PW4's testimony that on the 21st of September 2011, he was on his way back home when he met the victim at the road crying and she told him that the appellant had had sexual intercourse with her. He took the victim to the home of PW3 and went to trace for the appellant. He found the appellant and ordered him to go with him to Iyete trading centre but he refused. The appellant's father found them and ordered the appellant to go with PW4 which he did and was taken to police.

PW5 testified that the appellant was brought to him on 21/09/2011 for a Charge and Caution statement. He read the charge to the appellant and asked him if he understood it and he affirmed with his signature. PW5 testified that he cautioned the appellant and told him that:-

> "You need not say anything unless you wish to say but whatever you may say shall be taken down in writing and be given in evidence at the trial. I asked the accused whether he understood the caution and he replied in the affirmative and he signed below the caution and I counter signed below. When I asked him whether he had any information to give me about this matter, he said yes and I started recording what he was saying to me. I recorded in Lugbara and English. I was speaking Lugbara with the accused. I used Lugbara language when recording his statement and later interpreted into English."

The charge and caution was not objected to at trial. The appellant contends that he did not know of the said confession in the charge and caution. This amounts to a retracted statement. The Supreme Court in **Matovu Musa Kassim v Uganda; S.C.C.A No. 27 of 2002** cited with approval the statement of law governing retracted and repudiated confessions in the case of **Tuwamoi v Uganda (1967) 1 E.A 84** in which the position on retracted and repudiated statements was explained:

> "We would summarise the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

We have had the opportunity to look at the charge and caution statement marked exhibit PE3 in *Lugbara* and PE4 in English. In his statement to PW5, the appellant narrated how the offence had been committed. The appellant stated that he knew the victim because she was staying at the home of Kapila. That he called the victim to go and fetch some water for him. When she entered the house, to pick the empty jerry can, he entered too, removed her skirt and held her against the wall to have sexual intercourse with her. He placed his erected penis in her vagina and started having sexual intercourse with her in a standing position.

The appellant, in his unsworn evidence stated that he did not know the victim but he knew Kapila Swalle as his stepfather. That this accusation was

a result of a grudge he had with the appellant's father over bewitchment. We agree with the trial judge that this allegation of a grudge was an afterthought and could not be relied on as evidence. In **Njuguna s/o Kimani and** 3 **Others v. R.** (1954) 21 EACA 316 it was stated that:-

> "Court can convict on a retracted or repudiated or both retracted and repudiated confession alone if it is satisfied after considering all material points and the surrounding circumstances of the case that the confession cannot but be true."

The retracted statement was corroborated with the evidence of PW3, PW4 and PW5. Further, the victim was 9 years at the time the offense was committed and we cannot say that there was mistaken identity as to who had defiled her. The detailed facts as laid out in the confession actually show that the statement was made voluntarily by the appellant.

On the legal question of whether a conviction can be founded without the testimony of a victim of the sexual offence, it is now well settled law in Uganda that in sexual offences, the court can convict on evidence of the victim without requiring an eye witnesses to corroborate the available evidence. The learned trial Judge held that it is not mandatory for a victim of defilement to testify in order to prove the charge. This court has held in **Asuman Oliborit v Uganda; Court of Appeal Criminal Appeal No. 102 of 1999** that;

> "Failure by the victim of a defilement case to give evidence is not necessarily fatal to the prosecution case provided that there is other cogent evidence to support the conviction."

This court relied on the decision in **Patrick Akol v Uganda; Court of Appeal Criminal Appeal No. 23 of 1992 (unreported)** in which the court followed the decision in **Badru Mwidu v Uganda; Court of Appeal**

**Criminal Appeal No. 1 of 1997** where the victim did not give evidence as she was out of the country. The appellant argues that the facts in this case are different from those in Badru Mwidu (supra). The trial court record reveals that there were a number of adjournments at the instance of the prosecution indicating that effort was made to trace the whereabouts of the victim and her family but to no avail. We find these facts quite similar in the sense that both victims could not be found. The only difference is that in Badru Mwidu (supra), the victim had travelled out of the country.

The victim in this case was found by PW4 crying and on asking her why she was crying, she disclosed that the appellant had had sexual intercourse with her. PW4 took the victim to PW3 who examined her and found that she had in fact been defiled. We find this evidence corroborative enough to support the prosecution case. In addition was the appellant's retracted statement which, as earlier noted, we find was voluntarily made and was rightly admitted into evidence. We thus find no reason to fault the trial Judge's finding on the conviction of the appellant.

The appellant was sentenced to 19 years imprisonment for Aggravated Defilement. No ground was raised in the memorandum of appeal as to severity or harshness of sentence and neither did the appellant's Counsel submit on the sentence passed by the trial court. This court has held in **Okello v Uganda; Criminal Appeal No. 329 of 2010** that: *"In absence of a ground of appeal this court cannot of its own volition interfere with the exercise of the trial Judge's discretion to pass a sentence which is provided by the law."*

The sentence is not illegal neither is it excessive so as to amount to an injustice. We find no reason to interfere with it especially since no appeal has been preferred in this regard.

We find that this appeal lacks merit and is accordingly dismissed.

Dated at Kampala the 24th day of January 2019

**Kenneth Kakuru**

**JUSTICE OF APPEAL**

**Ezekiel Muhanguzi**

**JUSTICE OF APPEAL**

**Christopher Izama Madrama**

**JUSTICE OF APPEAL**