THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Bamugemereire, Madrama, JJA)

CRIMINAL APPEAL NO 71 OF 2018

MATANDA RICHARD WAMUKOTA} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court at Kampala; the Hon. Lady Justice Jane Frances Abodo dated 19th July, 2018 in Kampala High Court Criminal Session Case No 0451 of 2015)

JUDGMENT OF COURT

The appellant was indicted of the offence of aggravated defilement contrary to section 129 (3) (4) (a) (b) of the Penal Code Act. It was alleged that on 27th July, 2015 at St John's Church of Uganda Mawanda road in Kampala district, the appellant performed a sexual act on one TF, a girl aged 4 years and that at the time, the appellant was HIV positive. The appellant was tried and convicted of a minor and cognate offence of indecent assault contrary to section 128 (1) of the Penal Code Act and sentenced to 11 years, one month and 20 days' imprisonment. Being aggrieved with the conviction and sentence, the appellant appealed to this court on 2 grounds of appeal namely:

1. **That the learned trial judge erred in law and fact when she convicted the appellant on evidence that had contradictions and inconsistencies, thereby occasioning a miscarriage of justice to the appellant.**

2. **That the learned trial judge erred in law and fact when she convicted the appellant of indecent assault and sentenced him to 11 years, one**

month and twenty days of imprisonment which is manifestly harsh and excessive in the circumstances.

At the hearing of the appeal, the respondent was represented by learned Chief State Attorney Ms Kiiza Anna while the appellant appeared via video link from Kitalya Prison. The appellant prayed that the court considers the written submissions of his lawyers Messrs Waluku, Mooli and Co Advocates on court record. With leave of court, both parties addressed the court by way of written submissions filed on record and judgment was reserved on notice.

Ground 1

The appellant's counsel submitted that the prosecution evidence relied on by the High Court to convict the appellant was marred with contradictions and inconsistencies and could not be relied upon to convict the appellant. He relied on **Twehangare Alfred v Uganda; Court of appeal Criminal Appeal No 139 of 2001** for the proposition that grave inconsistencies and contradictions, unless satisfactorily explained, will usually result in the evidence of a witness being rejected and the accused acquitted. The contradictions were that:

PW3 informed court that she checked and found that the private parts of the victim were watery as an indicator of sexual intercourse while PW1 the medical doctor concluded that there were no injuries on the genitals, and there was no penetration. There were no injuries on the body of the victim. The medical doctor was not in a position to tell whether the flesh of the accused had come in contact with that of the victim. Counsel submitted that it follows that the offence of indecent assault automatically collapsed.

Further, the appellant's counsel submitted that PW1 stated that the mother of the victim told her that the victim had been defiled at 4.00 PM on 27th of July 2015 and mother is called Kisaakye Florence. In re-examination, on the issue of whether the mother told him so; he stated that he could not remember and that he had summarised what she told him in writing.

Counsel further submitted that it was an error for the trial judge to convict the appellant in total disregard of his innocent conduct. For instance, PW3 testified that when the police came to arrest the accused, he did not resist arrest and calmly accepted to sit on a motorcycle and went to the police station. PW4 testified that the accused/appellant came and took the victim to the mother on the fateful day. Further she confirmed that the accused never tried to escape when the police came to carry out his arrest. This evidence was consistent with the defence of the appellant to the effect that he was called the next day and responded when the mother of the victim introduced a proposal for settlement, he rejected it. This angered PW3 who called the police to come and have him arrested. The appellant remained at the scene until the police arrived and carried out his arrest. The appellant's counsel relied on **Constantino Okwel alias Magendo v Uganda; SCCA No 12 of 1990** where the Supreme Court held that the accused running away from the scene of the crime after the commission of the offence may be incompatible with his innocence.

In the instant case, the mere fact that the appellant remained at the scene of the crime for two weeks and responded to the calls made is a manifestation of his innocence. The appellant's counsel submitted that the conduct of the accused person after the commission of the offence ought to have been taken into account so as to acquit him.

In reply the respondent's counsel submitted that PW3 testified that when she examined the victim she saw a watery substance which was indicative of a sexual intercourse and yet when PW1 presented his findings upon examination, he found no signs of sexual intercourse. This could be explained by the testimony of PW 3 that before going to hospital she first bathed the victim and washed her knickers as well. That explains the findings of the medical Dr PW1.

On the second aspect of contradiction that PW1 was giving evidence and said that it is PW 3 told him that a man had defied his daughter, and further the fact that he stated that he did not remember but summarised what he wrote, this response was because he had been asked whether he recalled exactly

what he had been told in detail. The witness was under oath and therefore had a duty to speak the truth. He told court that he does not recall exactly what PW 3 had told him that day but he had summarised it in writing. This did not amount to a contradiction.

The third aspect is that the appellant maintained that PW3 confused court as to whether she knew the appellant at the time. She said she had forgotten his name but did not say that she never knew him at all. She later on went to explain that she had no grudge against the appellant and often chatted with his wife. The claim of the appellant that there was a grudge between him and PW 3 is speculative and should not be relied upon.

The respondent's counsel submitted that though the police statement of PW 3 contradicts her testimony in court, the court adduced evidence must be the most preferred one because it is tested and subjected to cross examination by the defence counsel to establish its truthfulness. She relied on **Chemonges Fred v Uganda; Supreme Court Criminal Appeal No 12 of 2001** for the proposition that where a police statement is used to impeach the credibility of the witness and such statement is proved to be contradictory to his testimony, the court will always prefer the evidence of the witness which has been tested through cross examination.

Counsel invited the court to find that the contradictions and inconsistencies were minor and is not sufficient to impeach the testimony.

Ground 2

On the issue of severity of sentence, the appellant's counsel submitted that the learned trial judge ruled that there is an urgent need to send a message out for children to be left alone. Further, after taking into account the mitigating factors, she found that the starting point for sentencing was 14 years' imprisonment. The appellants counsel stressed that under section 128 of the Penal Code Act, a person found guilty of indecent assault is liable to imprisonment for 14 years with or without corporal punishment. The appellant's counsel submitted that the court could not have considered mitigating factors when starting with the maximum penalty prescribed by

the law. He contended that the appellant was a first offender who is remorseful and has attained a variety of life skills while in prison. He is the sole breadwinner of his family with young children and the youngest at the time of his conviction was 7 months (now 3 years). He is also a caretaker of his sick mother. The appellant prayed for a punishment for the time spent on remand of 2 ½ years and this was disregarded by the learned trial judge who meted the maximum penalty under the law. Counsel further submitted that the learned trial judge was emotional and held that the appellant had ejaculated into the private parts of the victim in total disregard of the evidence of the medical expert of over 30 years' experience in forensic medicine. Counsel invited the court to consider the mitigating factors and sentenced the appellant to an appropriate sentence. The appellant's counsel relied on **Ainobushobozi Venancio v Uganda (Criminal Appeal No 242 of 2014)** which cites with approval **Livingstone Kakooza vs Uganda; Supreme Court Criminal Appeal Number 17 of 1993** for the proposition that an appellate court will only alter a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material factor or where the sentence is manifestly excessive in view of the circumstances of the case or cases of a similar nature.

The appellant's counsel prayed that the appeal is allowed and the conviction of the appellant is quashed and the sentence set aside and the appellant released from custody.

In the alternative, if the court is inclined, the sentence of 11 years' imprisonment, be substituted with a sentence of one year's imprisonment.

In reply the respondent's counsel supported the decision of the learned trial judge in sentencing the appellant to the sentence of imprisonment imposed.

The respondent's counsel submitted that in arriving at a sentence of 11 years, one month and 20 days' imprisonment, the court took into account the general principles of sentencing, the gravity of the offence, the harm suffered by the victim and her family, indecently assaulting the victim when he was HIV positive, the victim was distressed, psychologically tortured and

that although the victim was young, she understood the gravity of what the appellant had done to her and she was crying. The court went ahead to acknowledge that the appellant was a first offender and appeared remorseful. However, the aggravating factors outweighed the mitigating factors hence the sentence of 11 years, 2 months and 20 days after deducting the period spent on remand was an appropriate sentence and not manifestly excessive or harsh.

In the premises, she prayed that the conviction and sentence of the appellant is upheld and the appeal dismissed.

Resolution of appeal.

We have carefully considered the two grounds of appeal, the submissions of counsel and the authorities cited. This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction. We are required to reappraise the evidence on the record of appeal by subjecting it to fresh scrutiny and coming to our own conclusions on matters of fact and law. We further bear in mind that we neither saw nor heard the witnesses testify and made due allowance for this shortcoming and have given due weight to the observation of the learned trial judge on the credibility of the witnesses. (See duty of a first appellate court under rule 30 of the Rules of this court and the decisions on the duty of a first appellate court in **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123** and **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**).

Ground 1 of the appeal:

The learned trial judge erred in law and fact when she convicted the accused on evidence that had contradictions and inconsistencies, thereby occasioning a miscarriage of justice to the appellant.

The first ground of appeal is against conviction. The appellant had been charged with the offence of aggravated defilement contrary to section 129 (3) (4) (a) (b) of the Penal Code Act in that it is alleged that the appellant on 27th of July, 2015 at St John's Church of Uganda at Mawanda road in Kampala

district, performed a sexual act with one TF, a girl aged 4 years when he was HIV positive.

Generally, the evidence that was adduced on court record is being challenged on the ground that it is contradictory. The court was therefore addressed on the contradictions in the prosecution evidence. The first contradiction relied on by the appellant is about the evidence of the sexual act in that the appellant's case is that PW3 informed the court that she checked the victim and found that the private parts were watery as an indicator of sexual intercourse while the medical doctor who testified as PW1 concluded that there were no injuries on the genitals, hymen and he was not in a position to tell whether the flesh of the accused had come into contact with that of the victim. The appellant's counsel contended that this was a grave contradiction which ought to have disposed of in favour of the appellant.

The second contradiction relied on by the appellant is that in his examination in chief the doctor informed court that it was the mother of the victim who informed him that her girl had been defiled at 4 PM on 27th of July 2015 and the name of the mother is Kisaakye Florence. The appellant's counsel submitted that it was a contradiction for the witness to later state that he could not remember what the mother told him and that he had summarised it in writing.

The appellant's counsel further found it odd that PW3 when asked whether she knew the accused, stated that she had forgotten his name but used to see him before he was arrested. On the other hand, she said that they would often chat with him and even his wife was her friend. Counsel submitted that either the witness knew the accused person or not. Counsel also relied on the fact that the appellant did not resist arrest and submitted that this was conduct inconsistent with the guilt of the accused.

We have carefully considered the evidence in light of the finding of the court that there was no sexual act committed on the victim and he was instead

convicted of indecent assault contrary to section 128 (1) of the Penal Code Act and have considered the relevant law.

The learned trial judge found that the medical evidence tendered was very clear that there were no injuries seen on the victim and there was no penetration. She however found that PW3 saw some fluid on the victim and broke the chain of evidence when she bathed the victim and washed her stained knickers before taking her to the clinic and to the police. The victim had testified that the appellant had put his penis into her vagina and mouth. However, nobody saw any sign of discharge into or near her mouth. She resolved the doubts arising in favour of the accused. She deferred with the opinion of the assessors on the issue of whether a sexual act had been committed on the victim.

The learned trial judge further considered the third ingredient as to who performed the sexual act. This contradicted her findings on the second ingredient as to whether a sexual act had been committed.

Nevertheless, the learned trial judge considered the evidence and found that the evidence of PW3 had a number of inconsistencies and disregarded it as an afterthought. She relied on the evidence of the victim as corroborated by PW4. As to whether the evidence adduced placed the accused at the scene of the crime as being the one who defiled the victim, she found that the appellant put himself at the scene of the crime in his own testimony. The church was locked but its side doors were open. PW4 saw the accused entering the church in the company of the victim. PW3 who had a view of the church directly from the kitchen did not see any other person entering the church hall. PW4 saw the victim coming out of the church while crying and shortly the accused person also came out of the church and left the premises immediately. She found that this ingredient had been proved beyond reasonable doubt. Further she found that the fact that the accused was infected with HIV was proved beyond reasonable doubt. The learned trial judge disagreed with the assessor's opinion and found that the offence of aggravated defilement had not been proved and instead convicted the accused of indecent assault.

The expression "sexual act" is defined by section 129 (7) of the Penal Code Act as follows:

> "sexual act" means -
>
> (a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ;
>
> (b) the unlawful use of any object or organ by a person on another person's sexual organ; "sexual organ" means a vagina or penis.

The above definition speaks for itself and none of the ingredients of the definition quoted above was proved to the satisfaction of the learned High Court judge who also considered the credibility of the witnesses and there is no appeal from that finding. What we have to consider is whether there was any evidence of indecent assault.

The evidence that was adduced was meant to prove a sexual act and not indecent assault. The ingredients of indecent assault under section 128 (1) cited by the learned trial judge are as follows:

> (1) Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years.

The question for consideration is whether the appellant unlawfully and indecently assaulted the victim. We have carefully considered the testimonies of the prosecution witnesses.

PW1, Dr. Barungi Thaddeus, testified as the doctor who examined the victim. His evidence is not in dispute and he clearly found that there was no sexual act committed upon the victim and so held the learned trial judge. The victim was a child of 4 years old. He found that there were no injuries on the genitals, the hymen and "introitus" (sic) were intact and looked vaginal, there were no infections and the buttocks and the anus were normal. He also found no injuries on the body of the victim. He found no purpose in removing any samples for further investigation. The medical report signed by the doctor also indicated that everything was normal.

The victim TF testified as PW2 and was 6 years old at the time of giving her testimony. She gave her testimony not on oath. In short she testified that the accused put his penis in her vagina and in her month. She felt bad and went and told her mother. When he was doing it, she did not shout or make an alarm. Her mum took her to the clinic.

The learned trial judge disregarded the testimony of PW3, the mother of the victim on the issue of defilement. This is what she found:

> The medical evidence tendered was very clear that there were no injuries seen on the victim. PW4's evidence that she saw the victim coming out of the church hall while crying suggests the stress on the victim's part. The victim herself told court that the accused removed his penis and put it in her vagina and mouth. PW3 saw a fluid on the victim broke the chain of evidence when she bathed the victim and washed stained knickers before taking her to the clinic and to the police. PW4 & PW3 whose evidence appears to corroborate the unsworn testimony by the victim is to the effect that the they saw sperms in the victim's vagina., But none said they saw any sperms in or around the mouth of the victim, the victim's private parts and knickers which would have been key exhibits in the prosecution case were washed immediately. I find that a doubt has been created on whether the victim was defiled that day. This doubt is resolved in favour of the accused. I defer from the assessor's opinion and find that this ingredient has not been proved beyond reasonable doubt. This ingredient must fail.

We have further considered the assessor's opinion on the material ingredient. The ingredient considered was whether the victim was subjected to a sexual act. The assessor opinion on the second ingredient was that:

> The victim testified that the accused removed his penis from his trousers and placed it on the vagina. PW3, the mother confirms that on the day after this incident, the victim told her she was defiled. The mother went to clinic. PW4, security guard confirms this incident. PW1 mentioned that there were no injuries, clearly explained that if a penis is placed on the vagina, there would be no hymen rapture. S. 129 (7) (b) irrespective of what the doctor said, there was sexual intercourse as per S. 129 (7) (b).

Section 129 (7) (b) of the Penal Code Act deals with the unlawful use of any object or organ by a person on another person's sexual organ and further provides that; "sexual organ" means vagina or penis."

Clearly, the assessors also agreed that there was no penetration. They therefore relied on section 129 (7) (b) to reach the conclusion that a "sexual act" had been committed. Clearly, the import of this is that the learned trial judge found that there was no unlawful use of any object or organ by a person on another person's sexual organ. This departed from the opinion of the assessors. Having found that there was no unlawful use, on what basis would the finding of indecent assault be grounded?

Further there was no basis to hold in the third ingredient on participation in a sexual act by the accused. For instance, the learned trial judge answered the question of whether the accused was at the scene of the crime and was the one who defiled the victim. She however found him guilty of indecent assault and not a sexual act as stipulated in section 129 (7) (b) that does not required penetration per se.

We have further considered the fact that thereafter, the learned trial judge considered the third ingredient of whether it was the accused who performed the sexual act on the victim and we think that this was erroneously considered as it is inconsistent with the finding on the ingredient on whether there was a sexual act that had been committed on the victim. What ought to have been considered was whether any other offence had been disclosed by the evidence but this was never considered.

The only evidence on which any other offence could be based is one which was doubted by the learned trial judge as stated above. There was no basis to find the commission of indecent assault as defined in section 128 (1) of the Penal Code Act whose proof was the act that had been discarded by the learned trial Judge because sufficient doubt had been raised which ought to be resolved in favour of the accused.

In the premises, the learned trial judge erroneously proceeded to convict the accused of indecent assault when she doubted the very evidence and the only evidence that was admissible to prove it. For that reason, the conviction cannot stand and is hereby quashed. We do not need to consider the alternative ground on sentence. We hereby quash the conviction of the

appellant and acquit him of the offence of indecent assault. We also set aside the sentence. We further note that the appellant had been in custody since 23rd of August 2015 which was a period of 2 years, one month and 20 days by the time of his conviction on 20th of July 2018. By the time of consideration of this appeal, he had spent another 3 years and 3 months giving a total of over 5 years and 4 months in lawful custody. The appellant was also found to be HIV positive. We order that the appellant be set free immediately unless held on other lawful charges.

Dated at Kampala the 15th day of Oct 2021

Fredrick Egonda – Ntende

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal