THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT LIRA

CRIMINAL APPEAL NO. 751 OF 2015

(Coram: Elizabeth Musoke, Hellen Obura, Remmy Kasule, JJA)

APIKU ENSIO ::: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Arua in High Court Criminal Session Case No. 0042 of 2013 before Hon. Justice Okwanga T. Vincent, dated 17th September, 2014).

JUDGMENT OF THE COURT

Introduction

This is an appeal from the decision of the High Court holden at Arua before Hon. Justice Okwanga T. Vincent in Criminal Session case No. 0042 of 2013. The appellant was tried and convicted of the offence of aggravated defilement contrary to section 129 (3) (1) (4) (a) of the Penal Code Act and sentenced to 25 years imprisonment.

Background to the appeal:

The facts of this case as found by the learned trial Judge are that on the 7th day of October, 2011, at Pawinyo Village, Adjumani District, the appellant had unlawful sexual intercourse with I.J (the victim), a girl under the age of 14 years who was dumb and with a mental disability.

The prosecution case was that on the said date at around 5:00 pm, the appellant was seen walking around with the victim. The victim could not be found by her mother who moved around the neighborhood looking for her. At about 7:00 pm, the victim was heard crying in the

bush. The neighbors who heard the victim crying went towards the direction of the victim's cries. They then met the appellant coming out of the bush with the victim following him. The victim was examined and found to be below 14 years, dumb and with cerebral palsy. She was found with bruises around her private parts and with signs of penetration.

The appellant denied the charges brought against him and pleaded not guilty at trial. He opted to exercise his right to remain silent upon being put to his defence.

The trial Court found the appellant guilty of the offence of aggravated defilement and sentenced him to 25 years imprisonment. He was aggrieved, hence this appeal.

Grounds:-

The appellant appealed on 3 grounds as follows:

1. *The trial Judge erred in law and fact when he failed to evaluate the whole evidence heard at trial and basing his judgment on the prosecution case and thereby occasioning a miscarriage of justice;*

2. *The trial Judge erred in law and fact when he convicted the appellant on a charge of aggravated defilement basing on doubtful and insufficient circumstantial evidence thereby occasioning a miscarriage of justice; and*

3. *The trial Judge erred in law in sentencing the appellant to 25 years imprisonment which was excessive in the circumstances thereby occasioning a miscarriage of justice.*

At the hearing of the appeal, learned Counsel Christine Atyang appeared for the appellant on State Brief while Assistant Director of Public Prosecutions Richard Okello appeared for the respondent.

Counsel for either side filed their respective written submissions which shall be relied upon in determining this appeal.

We are alive to the duty of the 1st appellate court, being to re-appraise the evidence adduced at trial and draw inferences therefrom, bearing in mind that this Court did not have the opportunity to observe the demeanor of witnesses at the trial. (***See Kifamunte Henry vs Uganda, SCCA No.10 of 1997, Bogere Moses vs Uganda, SCCA No.1 of 1997***).

As rightly put by the learned trial Judge regarding the offence of aggravated defilement contrary to section 129 (3)(4)(a) of the Penal Code Act for which the appellant was convicted, the prosecution had a duty to prove the following ingredients beyond reasonable doubt:

i. That the girl is below 14 years;
ii. That sexual intercourse took place;
iii. That the girl is a person with a disability; and
iv. That it is the appellant who had sexual intercourse with the victim.

Counsel for the appellant addressed grounds 1 and 2 together and concluded with ground 3 of the appeal. We shall follow the same approach, considering that grounds 1 and 2 are related and raise the same arguments.

Grounds 1 and 2

"The trial Judge erred in law and fact when he failed to evaluate the whole evidence heard at trial and basing his judgment on the prosecution case and thereby occasioning a miscarriage of justice;"

"The trial Judge erred in law and fact when he convicted the appellant on a charge of aggravated defilement basing on doubtful and insufficient circumstantial evidence thereby occasioning a miscarriage of justice."

Counsel for the appellant submitted that there was no eye witness to the crime. He made reference to the evidence of Mangbwi Donald (PW2) that they were told by a one Celina that the appellant was seen moving with the victim before the incident. However, Celina could not testify since at the time of the trial, she was deceased. The victim could not testify in Court on what exactly happened to her.

It was counsel's further submission that the prosecution did not present direct evidence but rather relied on circumstantial evidence to connect the appellant to the crime. Counsel relied on ***Teper vs Republic (1952) AC 480 – 489*** for the preposition that before drawing an inference of guilt from circumstantial evidence, court needs to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Counsel submitted that the prosecution witnesses did not place the appellant at the scene of crime and that the victim being seen walking behind the appellant did not prove the appellant's participation.

Counsel invited Court to allow the appeal and set aside the trial Court decision.

In reply, counsel for the respondent admitted that indeed the prosecution relied on circumstantial evidence to connect the appellant to the offence. He pointed out that the learned trial Judge was alive to this and evaluated the evidence well aware that the evidence put across against the appellant was purely circumstantial.

Counsel further submitted that the learned trial Judge sufficiently adhered to the principles in regard to relying on circumstantial evidence to draw an inference of guilt against the appellant.

He invited this Court to disallow grounds 1 and 2 of the appeal.

We have considered the submissions of Counsel of either side and carefully perused the court record and the judgment of the learned trial Judge.

From the evidence adduced at the trial, it is apparent that this case essentially depended on circumstantial evidence, and the learned trial Judge was alive to this fact. In reaching his decision, he stated as follows:

> *"I find that the prosecution's case rests mainly on circumstantial evidence as there is no evidence from the victim herself.*
>
> *This type of evidence has often times been held to be the best type of evidence capable of proving certain propositions in law with mathematical accuracy".*

Regarding circumstantial evidence, the court in ***Byaruhanga Fodori vs Uganda, SCCA No.18 of 2002,*** stated as follows;

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must before deciding upon a conviction find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt.*

In evaluating the evidence before us, we shall determine whether the learned trial Judge was justified in relying on the circumstantial evidence that was adduced at trial to conclude that the appellant was guilty as charged.

It was not contested that the victim was under the age of 14 and that she was dumb with cerebral palsy, thus making her a child with a disability.

The Medical Examination Report (EXH P1) from the examination of the victim which was admitted under agreed facts, indicated that the victim had injuries on both sides of the labia minora and that there was partial penetration with an intact hymen. Further, that the injuries were less than 48 hours old.

As rightly found by the learned trial Judge while relying on ***Muzee Imana vs Uganda, CACA No. 85 of 1999***, the fact that the victim's hymen was intact did not rule out the fact of penetration, since the slightest penetration suffices in proving sexual intercourse.

Therefore, ingredients 1, 2 and 3 of the offence were accordingly proved beyond reasonable doubt and were never in contention. What is contested is the participation of the appellant in the commission of the crime.

The evidence of PW1 Mangbwi Donaldo was that on the fateful day at around 7:30 pm, the victim's mother went to his house looking for the victim. Then a one Celina Pijirio (deceased) told them that at around 5:30 pm while at her home, she saw the appellant holding the victim's hand. Further, that the appellant had said that he would move around with the victim until she talked. Since it was threatening to rain, people dispersed to their homes. After about 15 minutes, Celina and a one Vundru called him and told him that they had heard the victim crying in the bush. They then started running towards where the victim was crying from. They met the appellant and the victim was following closely after him. The appellant explained to them that on his way to Odilong, he heard the victim crying. Upon the appellant being asked to move along with the rest so that the victim could be taken home, he declined and branched off to his home. The victim was taken to her mother and upon being checked by her grandmother and Celina, she was found with dirty soil on her back.

PW1 and others not mentioned, then went to the appellant's home but the appellant refused to come out of his house. A one Ojaa forced the appellant's door open and the appellant started fighting him. The appellant was taken to Police and then arrested.

PW3 Mandera Joyce, who is the victim's mother testified that on the fateful day, she moved around the neighborhood looking for the victim. Then Celina Pijirio told her that she had seen the victim with the appellant. After searching for the victim in vain, she then went back home

and entered the house. Upon PW2 and Celina bringing the victim home, she was checked and found with particles of soil and grass on her back.

At the trial, court subjected the victim to a special inquiry to determine whether or not she was possessed with knowledge and ability to give evidence in Court. Court then made a finding that the victim was dumb and mute and incapable of answering all questions put to her so as to give meaningful evidence. Relying on sections 118 and 117 of the Evidence Act, Court dispensed with her testimony.

It was never in contention that on the fateful day, indeed the victim was found with the appellant by PW2 and a one Celina. The appellant did not deny this fact at any one point. According to PW2, the appellant's explanation was that on his way to Odilong, he heard the victim crying. As per the learned trial Judge's analysis, the appellant was presumably playing the role of a good Samaritan. However, surprisingly upon the appellant being asked to join PW2 so that the victim could be taken home, he declined and branched off to his house. Indeed this conduct was not that of an innocent person. We find that the appellant's explanation was, therefore, a lie.

Further conduct that brings the appellant's innocence into question is when he declined to open his door of his house and then fought with a one Ojja upon forceful entry. We find that the appellant had all the reasons to be afraid because of the shameful crime he had committed, hence his hostile conduct. His behavior after the incident was an indicator of guilt.

The above evidence was further corroborated by the fact that the appellant had been seen with the victim prior to the disappearance of the victim. We note that the person who saw the appellant with the victim did not testify in Court. However, this evidence remained unchallenged and the appellant did not deny having been with the victim at the material time.

Counsel for the appellant raised an argument that this Court should set aside the trial Court decision since there was no direct evidence to link the appellant to the commission of the

crime. However, as per the decision in ***Byaruhanga Fodori vs Uganda (supra)***, as long as the court is sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt, then circumstantial evidence can be relied upon to sustain a conviction.

In this case, we find that the inferences relied upon by the prosecution and which were believed by the learned trial Judge prove the participation of the appellant in the defilement of the victim, beyond reasonable doubt.

We, therefore find no reason to fault the learned trial Judge on grounds 1 and 2 of the appeal.

Ground 3

The trial Judge erred in law in sentencing the appellant to 25 years imprisonment which was excessive in the circumstances thereby occasioning a miscarriage of justice.

On this ground of appeal, counsel for the appellant submitted that this Court has the mandate to interfere with the discretion exercised by the trial Court in cases where it appears that in assessing the sentence, the learned trial Judge acted upon some wrong principle or has imposed a sentence that is either inadequate or manifestly excessive.

It was counsel's submission that in the present case, the learned trial Judge imposed a very harsh and manifestly excessive sentence. In comparison, counsel relied on ***Ninsiima Gilbert vs Uganda, CACA No. 1080 of 2010***, where this Court reduced the appellant's sentence of 30 years imprisonment for the offence of aggravated defilement to 15 years imprisonment.

Counsel prayed that this Court reduces the sentence from 25 years imprisonment to 15 years imprisonment.

In reply, counsel for the respondent submitted that the learned trial Judge had reasons in sentencing the appellant to 25 years imprisonment which were pointed out.

Further, that a more aggravating factor which the learned trial Judge should have taken into consideration but inadvertently over looked was the age gap between the appellant and the victim. While the victim was 6 years at the time, the appellant was aged 36 years.

Counsel prayed this Court to uphold the sentence as passed by the trial Court.

It is trite law that this Court can only interfere with the discretion exercised by the lower Court in imposing sentence where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. ***(See Kiwalabye Bernard vs Uganda, SCCA No.143 of 2001)***.

In imposing a 25 year sentence against the appellant, the learned trial Judge took into consideration the fact that the appellant was a first time offender, was aged 39 years at the time and that he had spent 2 years and 11 months on remand. He further went ahead to give reasons for his sentence as follows:

> *"He defiled a very young child of 6 years old at the time. This child was closely related to him by blood as the daughter of his own niece – niece to his father. This victim Janet Iracha was not only a young child but one with disability of mind. The tendency of adult males targeting children with disability as their vulnerable victims of sexual orgies calls for deterrent sentence".*

From the above, it is evident that the learned trial Judge took into consideration the aggravating and mitigating factors.

We are alive to the fact that the offence with which the appellant was convicted carries a maximum penalty of death. However, taking into account the mitigating factors, we find that the sentence was harsh in the circumstances. This is also taking into account the sentences passed in cases of a similar nature in the recent past in this Court ***(See Kagoro Deo vs Uganda, CACA No. 82 of 2011)***.

In ***Ninsiima vs Uganda, CACA No. 1080 of 2010*** this Court found that the range of sentences for similar offences of aggravated defilement is 15-18 years. In that case, this Court reduced a sentence of 30 years to 15 years imprisonment for the offence of aggravated defilement. In ***Candia Akim vs Uganda, CACA No. 0181 of 2009,*** this Court upheld a sentence of 17 years imprisonment for the offence of aggravated defilement. The appellant was a step-father of the 8 year old victim. In ***German Benjamin vs Uganda, CACA No. 142 of 2010*** this Court set aside a sentence of 20 years imprisonment for the offence of aggravated defilement and substituted it with a sentence of 15 years imprisonment.

Guided by the above authorities, we find that the sentence of 25 years imprisonment is out of range of the sentences in similar offences.

Section 11 of the Judicature Act gives this Court all the powers, authority and jurisdiction as that of the trial Court to impose an appropriate sentence of its own.

Taking into account the aggravating and mitigating factors, we are of the view that a sentence of 20 years imprisonment is appropriate. However, we are enjoined by Article 23 (8) to deduct the period of 2 years and 11 months the appellant spent on remand. In the premises, we sentence the appellant to 17 years and 1 month imprisonment to be served from the date of conviction which is 17/09/2014.

Consequently, this appeal is partially allowed.

We so order.

Dated at **Lira** this.....30th.....day of.....March.....2021

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Elizabeth Musoke

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL

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Remmy Kasule

JUSTICE OF APPEAL

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