THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT JINJA
CRIMINAL APPEAL NO. 0842 OF 2014

GIDUDU SULA::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mukono before Mukasa, J. delivered on 13th October, 2014 (conviction) and 15th October, 2014 (sentencing) in Criminal Session Case No. 0151 of 2012)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

Background

On 13th October, 2014, the High Court (Lameck-Mukasa, J.) convicted the appellant of the offence of Aggravated Defilement contrary to the provisions of **Section 129 (3) and (4) (a) of the Penal Code Act, Cap. 120 (as amended).** On 15th October, 2014 the High Court sentenced the appellant to 27 years imprisonment.

The High Court decision followed the trial of the appellant on an indictment that alleged that he had, during the year 2010, at Nyenje Village, Goma Sub County in Mukono District, had sexual intercourse with B.A (the victim), a girl aged 10 years.

The facts of the case as accepted by the learned trial Judge may be summarized as follows. In 2010, PW3 B.N (a minor), a sister to the victim, left the home in Seeta Gogombe Zone, Mukono Municipality, where she lived with the victim and their mother PW1 Jamaya Gonza, without seeking permission from PW1 nor informing her of her destination. On a date shortly thereafter, the appellant met PW3 wandering and lured her to begin to live with him, with promises that he would help to find her a job. While she

stayed at his house, the appellant committed sexual acts on PW3. She became pregnant on two occasions and miscarried.

Two months after PW3 had been living with the appellant, the victim B.A was also taken to live with the appellant. The appellant also had sexual intercourse with the victim on several occasions. The appellant used to lock the victim and PW3 in the house to prevent them from escaping or reporting to Police. After, several months of enduring sexual torment at the hands of the appellant, the victims escaped and went to a nearby police station where they reported what had been happening to them. While in police custody, the victims were taken for medical examination which confirmed that they had been subjected to sexual acts. The appellant was subsequently arrested and charged accordingly.

In his defence, the appellant denied that he had defiled the victim B.A. He stated that he had had sexual intercourse only with PW3, with whom they had a secret sexual relationship. The appellant stated that he had taken PW3 and the victim to his house to give them a place of refuge from the domestic violence they had been enduring from their abusive father, while they stayed at their home. The appellant stated that the victim had fabricated the allegations that he had defiled her.

The learned trial Judge, however, believed the prosecution evidence and based on it to convict the appellant, and thereafter sentenced him accordingly. The appellant is dissatisfied and now appeals to this Court. The grounds of appeal are as follows:

> "1. **That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby convicting the appellant basing on evidence full of contradictions and inconsistencies thus occasioning a miscarriage of justice.**
>
> 2. **That without prejudice to the foregoing, the learned trial Judge erred in law and fact when he passed a sentence of 27 years imprisonment upon the appellant which is manifestly harsh and excessive thereby occasioning a miscarriage of justice."**

The respondent opposed the appeal.

Representation

At the hearing, Mr. Richard Kumbuga, learned Counsel on State Brief, appeared for the appellant. Ms. Immaculate Angutoko, a Chief State Attorney in the Office of the Director of Public Prosecutions, appeared for the respondent. The appellant followed the hearing, remotely, via Zoom Video conferencing technology, while he remained at Jinja Government Prison, where he was incarcerated. This was necessitated by the prison regulations at the time, placing restrictions on movement of prisoners from the prison facilities, as a way of preventing contracting and spreading of Covid-19, among the prison population.

Written submissions filed for both sides prior to the hearing, were, with leave of the Court, adopted in support of the parties' respective cases.

Appellant's Submissions

Ground 1

Counsel for the appellant submitted that the prosecution evidence was insufficient to form the basis for the conviction of the appellant, as it contained material contradictions and inconsistencies, a sign of deliberate falsehoods and lies, that were meant to mislead the trial Court. He referred this Court to the authorities of **Alfred Tajar vs. Uganda, EACA Criminal Appeal No. 167 of 1969 (unreported); Serapio Tinkamalirwe vs. Uganda, Supreme Court Criminal Appeal No. 27 of 1989; and Twinomugisha Alex and 2 Others vs. Uganda, Supreme Court Criminal Appeal No. 35 of 2002**, to submit that the law on contradictions and inconsistencies in evidence is that major contradictions and inconsistencies, unless satisfactorily explained must result in rejection of evidence.

Counsel highlighted several alleged contradictions in the prosecution evidence, including, contradictions regarding the circumstances under which the victim and her sister PW3 came to reside in the appellant's house. PW1 had testified that it was Issa who had taken the victim to the appellant's house, yet PW3 and the victim had told Court that the appellant had kidnapped them and forced them to go and live, as sex slaves, in his house.

He further submitted that PW3 and the victim had lied when they stated that they had been forcefully confined in the appellant's house without food and water. This was contradicted by the evidence of PW1 and PW2 who both testified that the victims were allowed free movement, while they stayed at the appellant's house.

Counsel further contended that the prosecution evidence contained contradictions on the circumstances under which the appellant performed a sexual act (s) on the victim. The victim had testified that the appellant had on several occasions, performed a sexual act on her in the presence of her sister PW3, as the two children slept on the same bed. In her evidence, however, PW3 stated that the appellant had never performed a sexual act with the victim, in her presence. PW3 testified that her knowledge of the sexual acts that the appellant performed with the victim was based on a report that the victim made to her. When this report was made, she (PW3) had examined the victim and found wounds on her private parts. Counsel submitted that the respective prosecution evidence of the victim and of PW3, was contradictory on whether the appellant ever performed a sexual act with the victim in the presence of PW3, and the trial Court erred to rely on the victim's evidence which was deliberately false and made with the intention to mislead the Court.

Further, on the unsatisfactory nature of the prosecution evidence, counsel contended that the evidence of PW3 and that of the victim, to the effect that the appellant had kidnapped and forced them to live in his house, which evidence contradicted that of PW1 their mother, was scripted to lie to the trial Court.

It was further submitted that the appellant gave concrete and unshaken evidence in his defence, which the learned trial Judge ignored. Moreover, PW1, PW3 and the victim, each mentioned a person called Issa, who was key to the prosecution evidence, yet he was not called as a witness. Counsel urged this Court to find that the failure to call Issa, as a prosecution witness, was fatal to the prosecution case.

Counsel prayed this Court to allow ground 1.

Ground 2

Counsel submitted that the trial Court erred to imposed on the appellant, a sentence that did not conform with the principle of uniformity in sentencing, as articulated in the authority of **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015 (unreported)**, to the effect that the sentencing Court should impose sentences that are consistent with those imposed in previously decided cases with similar facts. Counsel drew comparison with the sentence imposed in the previously decided case of **German Benjamin vs. Uganda, Court of Appeal Criminal Appeal No. 142 of 2010 (unreported)**, where the Court of Appeal substituted a sentence of 15 years imprisonment for that of 20 years imprisonment imposed by the trial Court. In that case, the appellant aged 35 years had been convicted for aggravated defilement. The victim was aged 5 years.

Counsel pointed out that the appellant in this case was aged 21 years while the victim was aged 10 years at the time of commission of the offence. There were several factors to mitigate the offence. The appellant had been providing shelter for the victim at the material time. Counsel submitted that the sentence of 27 years imprisonment, imposed on the appellant was unjustified in the circumstances. He prayed this Court to set the sentence aside and substitute in its place a lesser sentence of 10 years imprisonment.

Respondent's Submissions

Ground 1

Counsel for the respondent supported the learned trial Judge's decision to convict the appellant basing on the prosecution evidence, which in her view was satisfactory. The prosecution evidence proved the relevant ingredients of the offence of aggravated defilement, which in this case were as follows: 1) A sexual act was performed on the victim; 2) The victim was a person under the age of 14 years at the time; and 3) The accused was the person who performed the sexual act on the victim. Ingredients 1 and 2, were proved by medical evidence that was admitted with consent of the prosecution and the appellant. The evidence showed that the victim was 10 years of age and had a ruptured hymen consistent with a sexual act having been performed on her.

To prove that the appellant performed a sexual act on the victim, the prosecution adduced evidence of the victim, who testified that the appellant had on several occasions, performed a sexual act on her. The victim had stayed in the appellant's house for several months, and therefore there was no likelihood of mistaken identification of the appellant. Further, PW3 testified that the victim had made a report to her, that the appellant had performed a sexual act on her. Thereafter, PW3 had examined the victim and found that the victim had injuries on her private parts consistent with a sexual act having been performed on her. The victim had also made a report to PW2 that the appellant had performed a sexual act with her.

With regard to the alleged contradictions and inconsistencies in the prosecution evidence, counsel submitted that, if any, there were only minor inconsistencies in the prosecution evidence. The prosecution witnesses were truthful and did not intend to lie to the trial Court. She relied on the authority of **Alfred Tajar vs. Uganda EACA Criminal Appeal No. 167 of 1969 (unreported)** and submitted that the law on inconsistencies in evidence is that minor inconsistencies ought to be disregarded as they do not point to deliberate falsehoods. Counsel urged this Court to find that there were no inconsistencies in the prosecution evidence, and that if this Court is inclined to find any inconsistencies in the prosecution evidence, to find that those inconsistencies were minor and had been rightly ignored by the trial Court.

In conclusion, counsel prayed this Court to disallow ground 1.

Ground 2

Counsel supported the sentence that the trial Court imposed on the appellant. She reiterated the principle that an appellate Court may only interfere with a sentence imposed by a trial Court in limited circumstances, such as where in imposing the sentencing, the trial Court acted on a wrong principle or overlooked some material factor; or if the sentence imposed is manifestly harsh and excessive. She relied on the authorities of **Kiwalabye Benard vs, Uganda, Supreme Court Criminal Appeal No. 143 of 2001; and Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995**, among others.

With regard to the trial Court's failure to follow the principle of consistency in sentencing, counsel submitted that that failure alone, is not a ground for this Court to interfere with the sentence that the trial Court imposed. Counsel relied on the recent authority of **Biryomumisho Alex vs. Uganda, Court of Appeal Criminal Appeal No. 464 of 2016 (unreported),** where the Court of Appeal held to the effect that it was at the discretion of the sentencing Court to consider sentences imposed in previous similar cases. An appellate Court ought not to interfere with a sentence imposed by the trial Court merely on ground that the sentencing Court did not apply the principle of consistency in sentencing. Counsel submitted that the sentence of 27 years imprisonment, that the trial Court was appropriate in the circumstances of the case, and prayed this Court to uphold the sentence.

Resolution of Appeal

We have carefully studied the Court record, considered the submissions of counsel for both sides, and the law and authorities cited in support thereof. We have also considered some relevant law and authorities that were not cited.

This is a first appeal from a decision of the trial High Court. The duty of a first appellate Court is to reconsider all the materials that were before the trial Court and come up with its own conclusions on matters of law and fact. On the duty of the first appellate Court **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and the authority of Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997).** We shall bear the above duty in mind as we resolve the grounds of appeal.

Ground 1

The case for the appellant is that the prosecution evidence contained material inconsistencies and was therefore insufficient to form the basis of the appellant's conviction. We note that the appellant was charged with the offence of Aggravated Defilement contrary to Section **129 (3) and 4 (a) of the Penal Code Act, Cap. 120.** The parties correctly identified the elements of the offence of aggravated defilement as follows: 1) A sexual act was performed on a person (the victim); 2) The victim was below 14 years

of age at the material time; 3) The accused person performed the sexual act on the victim. In the present case, only the element of the participation of the appellant, as the person who performed a sexual act on the victim is contested.

We have found it necessary to reappraise the evidence. The victim's testimony in examination in chief at pages 20 to 21 of the record, is as follows:

> **"He (the appellant) sometime slept on me while threatening to cut our heads off. He had a knife. We were there only me and my sister. He used to sleep on me in the presence of my sister. My sister would tell him to leave me but he would threaten to cut her. He would also sleep on Nafia when I am watching. I slept there one year. He slept on me many times during that period. he would remove his trouser and insert his penis in my vagina. The first time I felt pain in my private parts. I saw blood in my private parts. I sustained bruises. When I got these injuries I told my sister. She checked me when I told her. She gave me nursing water. My sister was present and saw him having sex with me. Even on the subsequent occasions, I felt badly and would not walk properly."**

It was further the testimony of the victim, at page 21 of the record as follows:

> **"The accused could come to the house at night. Whenever the accused could come he would sleep in our room. There was one bed in that room with one mattress. I was sharing the same mattress with my sister and when the accused would come he could also sleep in our bed. Whenever he could come he would first have sexual intercourse with my sister then lie on me in the same bed."**

In cross examination, the victim testified as follows:

> **"The accused would daily have sex with each one of us. At time the accused would have sex with me when my sister would be sleeping."**

The victim testified that the appellant had on several occasions, performed a sexual act on her in the presence of her sister PW3, as the two children slept on the same bed. In her evidence, however, PW3 stated that the appellant had never performed a sexual act with the victim, in her presence. PW3 testified as follows, at page 18 of the record:

> **"I stayed with the accused for 2 months before bringing my sister. Together with my sister, we stayed there for about one year.**

During that time, I did not see accused having sexual intercourse with Aisha. It is Aisha who told me that Accused was also abusing her sexually. He told me that he had defiled her twice. She was walking limping (sic). I would see her walking with legs apart. I asked her what happened to her and that accused what she told. That the accused had even bought her eats so that she doesn't tell me. I checked her private parts. I saw wounds and started boiling water and nursed her wounds."

PW3's evidence was, therefore, that her knowledge of the sexual acts that the appellant performed on the victim were based on information she had received from the victim saying that the appellant had defiled her. Upon receipt of that information, PW3 stated in evidence that she checked the victim's private parts and saw wounds, and boiled water and nursed those wounds. It is worth bearing in mind that PW3 was not a medical expert and her evidence as to alleged injuries she found on the victim had to be considered in view of that fact. The medical evidence was not very helpful to the prosecution case either, and only indicated that the victim's hymen had been raptured at a previous time which could not be ascertained. At the time of the medical examination, the victim also had no injuries either on her private parts or other body parts consistent with a sexual act having been performed on her.

We must state that the prosecution bears the burden to prove, each element of any offence of which any accused person has been charged, beyond reasonable doubt. The prosecution will be held to have discharged its burden, if after reviewing all the evidence, a trier of fact is satisfied that the case has been proved against the accused person, beyond reasonable doubt. In **Miller vs. Minister of Pensions [1947] 2 ALLER 372**, Denning, J. stated that "proof beyond reasonable doubt":

"...need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice."

Further, in the Canadian Supreme Court decision of **R vs. Lifchus [1997] 3 S.C.R 320 (per Cory, J.)**, the Court, while explaining the meaning of proof beyond reasonable doubt, stated:

> **"...the standard of proof beyond a reasonable is inextricably intertwined with that principle fundamental to all criminal trials, presumption of innocence;**
>
> **the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;**
>
> **a reasonable doubt is not a doubt based upon sympathy or prejudice;**
>
> **rather, it is based upon reason and common sense;**
>
> **it is logically connected to the evidence or absence of evidence;**
>
> **it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and**
>
> **more is required than proof that the accused is probably guilty — a jury which concludes only that the accused is probably guilty must acquit."**

We respectfully agree with the above principles, and we shall apply them in the present case. It was demonstrated earlier in this judgment, that there was a contradiction in the prosecution evidence, as to whether the appellant performed a sexual act on the victim in presence of her sister, PW3. We shall now seek to determine, whether, that contradiction amounted to reasonable doubt entitling the appellant to an acquittal. In the **Lifchus case (supra)**, it was stated that reasonable doubt, had to be: 1) based upon reason and common sense, and 2: logically connected to the evidence. Counsel for the appellant submitted that the contradiction in evidence arose, because the victim lied to the trial Court about the alleged defilement by the appellant.

The learned trial Judge rejected the suggestion that the contradiction on whether the appellant had slept with the victim in the presence of PW3, had been caused by an intention to lie to the trial Court, and conjectured that perhaps PW3 had been asleep, and did not witness as the appellant defiled the victim. In an excerpt from the learned trial Judge's judgment, he stated as follows:

> **"The last ingredient is whether it is the accused who had sexual intercourse with her [the victim]. It is the evidence of PW3 and PW4 that**

it was the accused who had taken each one of them in the house where he confined them. In his own testimony, the accused stated that he had rented the house for them and availed provisions for them. That the girls had stayed with him for over a year. He at times used to stay with them in the house and claimed that PW3 was his lover. PW3 testified that the victim informed her that the accused had also had sexual intercourse with her. She confirmed by her findings she observed and examined the victim and established that she had been subjected to sexual intercourse and nursed her wounds with water.

The above evidence shows that PW3, PW4 and the accused stayed together for a longtime. They were in close proximity and not strangers. The accused was the male they occupied the house with. He testified that the two girls shared the same mattress. It is the testimony of the victim that the accused used to have sex with each one of them in the presence of the other. The victim stated that at times the accused would have sex with her when her sister would be sleeping. This explains PW3's testimony that she did not witness the accused have sex with the victim but it is the victim who told her of the sexual encounter with her. <u>It must be associated (sic) that both PW3 and PW4 were juveniles; one could easily sleep off and not witness what is happening to the other.</u>

Considering all the above evidence, I find that the prosecution has proved beyond reasonable doubt that the accused person had sexual intercourse with the victim."

Upon reappraisal of the prosecution evidence, and with the greatest of respect, we are inclined to reach the contrary conclusion to that reached by the learned trial Judge. The victim told the trial Court that there were occasions when the appellant performed a sexual act, in the presence of PW3. In those instances, PW3 would have witnessed the sexual act on the victim. Why, then, did PW3 say that she never at any one time saw the appellant perform a sexual act on the victim? Could it be that the victim lied about the appellant having had sexual intercourse with her?

The last question is particularly vital considering the rest of the prosecution evidence. It was stated that the victim made a report to PW3 saying that the appellant had defiled her. As stated earlier, PW3 was a sister to the victim and the two had lived in the appellant's home after leaving their parents' home in the year 2010. The report was made at unspecified time between 2010 and August, 2011, when the victims were still living at the appellant's

house. We also note that the victim also made a report to her mother PW1 Jamaya Gonza when the victims had been rescued from the appellant's house and taken to the nearest police station.

PW3's evidence was that the victim had made a report to her saying that the appellant had defiled the victim, and that she (PW3) had on receiving that report checked the victim's private parts and found wounds. PW3 stated that she had also noticed the victim to walk with difficulty or as she put it, she had observed the victim to walk while limping. However, when the victim was taken for medical examination, the examining doctor found no injuries or any inflammation around the private parts. The examining doctor also neither found injuries consistent with force having been used sexually on the victim nor any injuries or bruises on the victim's thighs, legs, elbows and back. (See: Exhibit P.1 – victim's medical examination report. We must state that the victim may have been examined after a significant period of time had passed from when she was defiled, but court is not justified to take such favourable view of the victim's evidence when the medical evidence clearly indicated that the victim had no injuries consistent with a sexual act having been performed.

The medical examination of the victim also found that the victim had a hymen raptured at an unspecified time described as "not recently". This was also not very helpful to the prosecution case.

On the other hand, the appellant was adamant that he did not perform a sexual act with the victim. He stated in evidence that he had taken the victim and PW3 to his house to look after them after their brother one Issa asked him to give them shelter from their home where the children often endured domestic violence from their father. The appellant claimed that he began caring for the children and provided for them food.

The appellant admitted to having defiled PW3 but denied having had sexual intercourse with the victim. He said that the victim was telling lies to Court. In cross examination at page 27 of the record, the appellant stated that PW3 was his lover with whom he had a secret sexual relationship. He maintained that he never defiled the victim.

In **Livingstone Sewanyana vs. Uganda, Supreme Court Criminal Appeal No. 19 of 2006 (unreported)**, the Supreme Court restated the principle that in sexual offences, a report made by the victim to another person subsequent to the commission of a sexual offence may be relied on as corroboration of the victim's testimony in Court.

Further, we note that in sexual offences, the distressed condition of a victim is capable of amounting to corroboration of the victim's evidence, but this will depend on the circumstances of the case, and a court will not convict, if in the circumstances of the case, it will be unsafe to convict despite evidence of the distressed condition of the victim. **(See: Kibazo vs. Uganda [1965] 1 EA 507)**

After reappraising the prosecution evidence, we find it unsafe to form the basis for convicting the appellant. The victim's evidence contained several contradictions as highlighted above. Moreover, the medical evidence did not support the prosecution case, and showed that as at the date of the medical examination of the victim, there were no injuries consistent with a sexual act being performed on the victim. The appellant maintained that the victim lied tto the trial Court. On our part, the evidence fills us with doubt and in terms of the **Lifchus case (supra)**, that doubt is both reasonable and is logically connected to the evidence. We are inclined to resolve that doubt in favour of the appellant.

We, therefore, allow ground 1 of the appeal.

The manner of resolution of ground 1 renders it unnecessary to resolve ground 2 of the appeal.

In conclusion, we find that the learned trial Judge erred to convict the appellant of the offence of Aggravated Defilement, yet the offence was not proved against him beyond reasonable doubt. Accordingly, we quash the appellant's conviction for aggravated defilement, and set aside the sentence imposed upon that conviction. We hereby order that the appellant be set free immediately, unless he is held on other lawful charges.

This is a judgment of the majority of the Court (Musoke and Cheborion, JJA); Obura, JA did not agree and has not signed the judgment.

We so order.

Dated at Jinja this ..... day of ..... 2021.

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Elizabeth Musoke

Justice of Appeal

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Cheborion Barishaki

Justice of Appeal

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Hellen Obura

Justice of Appeal