THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.036 0F 2015

[Arising from the decision of the Hon. Lady Justice Elizabeth Ibanda dated 19th December 2015 at High Court (Nakawa) in Criminal Session case No. 150 of 2012]

ANUNDA SAMSON:: APPELLANT

VS

UGANDA ::: RESPONDENT

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J. A.

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, J.A.

HON. MR. JUSTICE REMMY KASULE, Ag. J. A.

JUDGMENT OF THE COURT

This is a first Appeal. The Appellant was convicted of Aggravated defilement contrary to section 129(3), (4) (c) of the Penal Code Act by Hon. Lady Justice Elizabeth Ibanda and sentenced to twenty years' imprisonment. The Appellant being dissatisfied with the Judgment lodged this Appeal.

BACKGROUND

The facts of this case as accepted by the trial court are that in 2010 the Appellant brought his daughter Anunda Aginator (hereinafter referred to as the victim) to stay with him from Kenya where she had been living with her mother. The victim was enrolled at Shimoni Demonstration School. It was at this school where the victim confided in her teacher one Kisolo Angella

Nantembe (Pw1) that the Appellant was using her sexually. The prosecution's case is that at the time of these events the victim was fifteen years old. Kisolo Angella decided to forward the matter to the Head teacher, Mr. Buyinza John (PW4). Mr. Buyinza John decided to have the victim taken for a medical checkup. On 9th March 2011, Kisolo Angella (Pw1) took the victim to Naguru teenage Centre at Kiswa where a medical checkup was conducted on the victim who was found to be pregnant. Efforts to contact the victim's mother were futile. After three days the victim stopped reporting to school and re-appeared after two weeks. The victim revealed again to Kisolo Angela (Pw1) that she had been taken somewhere near Lake Victoria for an abortion by the Appellant. The Appellant was arrested and charged with aggravated defilement. The trial court found the Appellant guilty and convicted him to serve a term of 20 years and 3 months imprisonment. The Appellant being dissatisfied with the conviction and sentence of the trial Judge, appealed to this court.

In his Memorandum of Appeal dated 19th November 2020, the Appellant raised the following grounds of Appeal;

1. **The trial Judge erred in law and in fact when she convicted the Appellant in the absence of vital evidence of the victim, investigating officer and DNA tests thereby arriving at the wrong conclusion.**
2. **The trial Judge erred in law and fact when she convicted the Appellant on the basis of insufficient circumstantial evidence and in the absence of Medical form (PF3).**

3. **The learned trial Judge erred in law and fact when she sentenced the Appellant to a sentence of 20 years and three months imprisonment which sentence was harsh and manifestly excessive given the circumstances of the case.**

Representations

Mr. Andrew Sebugwawo Advocate [on State Brief] appeared for the Appellant while Ms. Janet Kitimbo Chief State Attorney appeared for the Respondent/State.

Duty of the court

This is a first Appeal and as such we are required to re-appraise the evidence and make our own inferences on all questions of law and fact. See Rule 30(1) of the Rules of this court. This court also has the duty to caution itself that it has not seen the witnesses who testified firsthand. On the basis of its evaluation, this court must decide whether to support the decision of the High Court or not as illustrated in **Bogere Moses v Uganda SCCA No.10 of 1997** and **Kifamunte v Uganda SCCA No.10 of 1997.**

Ground 1: The trial Judge erred in law and in fact when she convicted the Appellant in the absence of vital evidence of the victim, investigating officer and DNA tests thereby arriving at the wrong conclusion.

Appellant's submissions

Counsel for the Appellant submitted that the trial court convicted the Appellant yet the prosecution's case lacked the evidence of significant witnesses.

First, he submitted that the evidence of the victim was material but was not adduced in court. He submitted that all the evidence of the other witnesses was hearsay evidence and therefore could not corroborate each other.

Secondly, counsel for the Appellant submitted that the prosecution did not adduce evidence of the investigating officer who handled the investigations in this case. He submitted that this evidence was vital to the case because it would explain the circumstances under which the Appellant was arrested and how the evidence was gathered.

Thirdly, counsel for the Appellant faulted the prosecution for not conducting any DNA or forensic evidence to prove that the Appellant was the person responsible for the pregnancy of the victim. He argued that this evidence would have proved the participation of the Appellant in the crime.

He concluded his submissions by submitting that the absence of these pieces of evidence namely; the victim's evidence, investigating officer's evidence and the DNA or forensic evidence created a big gap in the evidence of the prosecution and as such the Appeal ought to be determined in favour of the Appellant.

Respondent's submissions

Counsel for the Respondent submitted that the trial Judge was right to convict the Appellant even in the absence of the victim's testimony who could not be found. She submitted that court relied on other independent evidence to prove the offence of aggravated defilement in the absence of the victim's evidence. She submitted that the evidence of Kisolo Angella the teacher (PW1), the investigating officer and the medical evidence could be relied on instead.

She argued that Kisolo Angella (Pw1) was the one who told court that the victim had informed her that she had been used sexually by her father. Furthermore, she had taken the victim to be to be examined where they found that she was pregnant. Additionally, the victim also informed Kisolo Angella that the Appellant had taken her to a clinic where the pregnancy was aborted.

Secondly, counsel for the state submitted that all these facts were corroborated by Christine Kyamulabi (Pw2) who was employed as a nursing officer at Naguru Teenage center who examined her and found her pregnant.

Thirdly, counsel for the state submitted that Aguti Jennifer (PW3) testified as the investigating officer and this was not challenged at the trial.

With regard to the allegation that there was no evidence on the record of any DNA samples collected from the victim or the Appellant, counsel for the state submitted that this issue did not arise during the trial.

Court's findings

We have considered the submissions of all counsel to the Appeal and authorities provided for which we are grateful.

The complaint in this ground is that the Appellant was convicted even though the prosecution did not adduce the testimonies of key witnesses like the victim and the investigating officer. The Appellant also queried the prosecution because it did not conduct any DNA or forensic evidence to prove that the Appellant was the person responsible for the pregnancy. On the other hand the state submitted that there was other independent evidence that pointed to the offence of aggravated defilement.

The trial Judge took cognizant of the fact that the victim did not testify in court in her Judgment and found that it was a fact that a sexual act may be proved by the victim's own evidence and corroborated by medical or other evidence but also found that unavailability of direct evidence did not in any way do away with other cogent evidence. She relied on the case of **Omuroni Francis v Uganda Crim App No.22 of 2001** for the proposition that in sexual offences the evidence of the victim is normally the best evidence but in its absence any cogent evidence would suffice.

The trial Judge therefore relied on the evidence of Kisolo Angella (Pw1) the teacher at the school whom the victim confided in that her father was performing sexual acts on her. Christine Kyamulabi (Pw2) who was employed as nursing officer at Naguru teenage center who examined the victim and found her to be pregnant. Aguti Jennifer (Pw3) who was the investigating officer that got a statement from the victim. And finally Buyinza John (Pw4) who was the head teacher at Shimoni demonstration school where the victim was studying.

In the case of **Mutumbwe William v Uganda Criminal Appeal no.252 of 2002**, this court found that;

> *"in sexual offences, the evidence of the victim of the offence is always very essential. She is the one who experiences the act constituting the offence and is the one most suited to describe to court the nature of the experience. This does not mean, however, the sexual offence cannot be proved in the absence of the evidence of the victim. If there is cogent evidence, circumstantial or otherwise, that a sexual act must have taken place and there are no co-existent facts to suggest otherwise, a trial court can after*

warning itself of the danger of convicting in absence of the victim's evidence still go ahead and convict on that evidence.

We are certain that the trial Judge warned herself about not having the victim's evidence because she relied on the importance of first reports and how they can be handled.

She referred to the case of **Tekerali s/o Korongozi & others v Reg (1952) 19 E.A.C.A 259 at page 260** where it was observed that:

'...their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safe guard against later embellishments or the deliberately made up case. Truth will often come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

We agree with the trial Judge. There is clearly cogent evidence on record from four witnesses namely the victim's teacher Kisolo Angella (Pw1); Christine Kyamulabi (Pw2) a nurse; Aguti Jennifer (Pw3) an investigating officer and Buyinza John (Pw4) the victim's Headmaster. Not every case need be supported by DNA even though this would be ideal. Whereas this evidence is circumstantial that the victim was impregnated by her father, there are no co-existent facts to suggest that this sexual act did not take place. Furthermore, the trial court did warn itself of the danger of convicting in absence of the victim's evidence. We therefore see no reason to alter the trial Judge's finding in this regard. This ground therefore fails.

Ground 2: The trial Judge erred in law and fact when she convicted the Appellant on the basis of insufficient circumstantial evidence and in the absence of Medical form (PF3A).

Appellant's submissions

Counsel for the Appellant submitted that the circumstantial evidence surrounding the commission of this offence was so weak to sustain a conviction.

He argued that the prosecution failed to call vital witnesses to prove its case like the victim, the other children whom the victim was sharing a room with, the investigating officer and the medical evidence on PF3 and its Appendix.

He submitted that the failure to adduce this evidence rendered the Prosecution evidence weak and unsatisfactory. He submitted that it was not sufficient to sustain a conviction.

Respondent's submissions

Counsel for the Respondent submitted that there was sufficient circumstantial evidence to have the Appellant convicted. This was the evidence of Kisolo Angella(Pw1), Christine Kyamulabi(Pw2) and Aguti Jennifer (PW3) and the medical report.

As regards the siblings not testifying, counsel for the Respondent submitted that they would not be in a position to tell whether a sexual act was being performed by the Appellant so it was not fatal that they were not summoned to testify.

Counsel for the state further submitted that the absence of PF3A was not fatal to this case because there was other evidence adduced and medical reports relied on to prove a sexual act.

Counsel for the state relied on the case of **Bogere Charles v Uganda SCCA No. 10 of 1996**, where the case of **Teper v Queen [1952] AC 480** was followed where court held that it was necessary before drawing the inferences of the accused's guilt from circumstantial evidence to be sure that there were no other co-existing circumstances that would weaken or destroy the inferences. She submitted that in this case there were no other co-existing circumstances.

Court's findings

The Appellant's complaint in this ground is that the circumstantial evidence on the record was so weak to sustain a conviction against the Appellant. On the other hand, counsel for the state submits that that the evidence was enough to sustain a conviction.

In our finding, this ground is very similar to the first ground. The presence of direct evidence like a Medical Form PF3 is ideal but not fatal if there is other evidence that points to the same facts. In this case the nurse who examined the victim did testify as to the presence of a pregnancy. This was not contested. We find no reason to find to the contrary and therefore we resolve this ground in the negative.

Ground 3: The learned trial Judge erred in law and fact when she sentenced the Appellant to a sentence of 20 years and three months imprisonment which sentence was harsh and manifestly excessive given the circumstances of the case.

Appellant's submissions

Counsel for the Appellant submitted that the sentence of 20 years and 3 months was harsh and excessive. This was because the Appellant was a first time offender, had four children and had reformed. He submitted that the Appellant needed leniency to go and look after his family as a bread winner. He prayed for an alternative sentence of 12 years' imprisonment.

Respondent's submissions

Counsel for the state submitted that the sentence of 20 years and 3months was not excessive since the offence of aggravated defilement carried a maximum sentence of death. Counsel for the state submitted that the aggravating factors outweighed the mitigating factors and thus the trial Judge was correct to find so and sentence the Appellant to 20 years' imprisonment. She argued that sentence was at the discretion of the Judge and court cannot interfere with the sentence unless the trial Judge acted on a wrong principle or overlooked a material factor.

Court's findings

The complaint in this ground is that the trial Judge handed down a sentence that was harsh and excessive considering the fact that the Appellant was a first time offender and was a breadwinner to four children. On the other hand counsel for the prosecution submitted that the sentence was adequate because the offence of aggravated defilement carries a maximum sentence of death. She sentenced the Appellant to 20 years and three months after deducting the period that the Appellant had spent on remand. The reason she

handed down this sentence was because the aggravating factors outweighed the mitigating factors. The trial Judge underscored the fact that it was the father who committed this offence against her daughter to the extent of making her recluse. Additionally he procured an abortion for her which was a very traumatic experience for the victim.

Sentencing is the discretion of the Trial Judge. This court cannot interfere with a sentence imposed by a trial Judge unless it is apparent that the trial Judge acted on a wrong principle or overlooked a material factor. This court may also interfere where the sentence is manifestly harsh and excessive in the circumstances of the case. See **Kizito Senkula vs. Uganda Cr. App No.24 of 2001(SC)**

From the sentence, it appears that the trial Judge did not take into consideration the principle of uniformity and proportionality while passing her sentence as she stated;

"*...considering the aggravating and mitigating facts for the lawyers I wish to underscore the gravity of the offence. A person convicted of aggravated defilement is liable to suffer death. In this case prosecution has not prayed for a death sentence but this does not impinge the gravity of the offence.....*"

When imposing a custodial sentence on a person convicted of the offence aggravated defilement contrary to Section 129(3) and (4) (a) of the Penal Code Act, the Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice)(Directions) 2013 stipulates under item 3 of Part 1 (under sentencing ranges-sentencing range in capital offences of Third Schedule that the starting point should be 35 years imprisonment which can then be increased on the basis of the aggravating factors or reduced on the account of

the relevant mitigating factors. This court in the decision of In **Ninsiima Gilbert v Uganda Court of Appeal Criminal Appeal No. 24 of 2001** found that the sentencing guidelines have to be applied taking into account past precedents of court decisions where the facts have resemblance to the case under trial. In that case the court found that it had not come across a sentence of 30 years imprisonment imposed upon a convict of a defilement case. This court reduced the sentence to 15 years' imprisonment.

In **Ntambala Fred v Uganda Court of Appeal Criminal Appeal No. 0177** of 2009 this court confirmed a sentence of 14 years. Like in this Appeal, in the Ntambala Fred case (supra) the victim was a daughter of the Appellant.

We take into account the fact that the Appellant was the father of the victim who ought to have protected the victim but instead he was the one who defiled her. Furthermore he exposed her to emotional trauma when he procured an abortion for her.

Having thoroughly subjected the facts of this case to a fresh scrutiny and given the court precedents we have considered above we have come to the conclusion that the sentence of 20 years and 3 months imprisonment that the trial Judge imposed upon the Appellant was harsh and manifestly excessive. We accordingly set it aside.

The Appellant being aged 42 years a first offender, having four children to support, we find that a sentence of 15 years imprisonment to be served by the Appellant from the date of conviction is appropriate and is in line with the sentences passed by the courts in previous cases having a resemblance to this one.

We so Order.

Dated at **Kampala** this 27 day of April 2021

HON. MR. JUSTICE GEOFFREY KIRYABWIRE J.A.

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE J.A.

HON. MR. JUSTICE REMMY KASULE Ag. J.A.