THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

Coram: [Richard Buteera, DCJ, Stephen Musota and Muzamiru Kibeedi, JJA.]

CRIMINAL APPEAL NO. 100 OF 2012

ARNOLD GODFREY KAIZA::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Arising from the Judgment of Hon. Justice Akiiki-Kizza, J, at Masaka, in High Court Criminal Case No.0092 of 2010, dated the 20th day of April 2012)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted with the offence of Aggravated Defilement contrary to **sections 129 (3) (4) (a) of the Penal Code Act.** He was tried, convicted and sentenced to 28 years imprisonment.

Background

The brief facts of the case as can be discerned from the record of appeal are the following: - It was alleged that the appellant, Arnold Godfrey Kaiza on the 9lh day of March, 2010 at Maida Zone Kitooro Parish Kyazanga Sub-county in Masaka District, performed a sexual act on Mumbejja Kulusumu, a girl under the age of 14 years. The victim was 5 years old at the time the offence was committed.

The appellant, a Tanzanian by nationality was a resident of the same village. He was an employee to the victim's mother, Namutebi Hadijja, (PW1), at Sunshine Hotel. His employer had offered him a rent free room to stay at her home.

On the 9lh day of March, 2010, at around 10:00pm, the victim went outside the house to urinate and was suddenly attacked by the appellant who forced her to have sexual intercourse with him.

On the night of the 11th day of March 2010, the victim told her mother, Namutebi Hadijja, (PW1), that she was feeling pain coming from her vagina. PW1 examined the victim's vagina and found that there was pus discharge and some injuries. The victim told her mother that it was the appellant who had defiled her and that he warned her not to tell anyone as he would beat her up if she did.

On the following day, the 12th day of March 2010, PW1 reported the matter to Kyazanga Police Station and the appellant was arrested on the same day while at his work place at Sunshine restaurant.

The victim was medically examined and was found to be of 5 years of age, with a raptured hymen, with injuries and pus discharge from the vagina.

The appellant was also medically examined on Police Form 24 and was found to be mentally normal. The appellant was charged of aggravated defilement.

The appellant was tried and convicted of Aggravated Defilement. He was sentenced to 28 years' imprisonment by Hon. Justice Akiiki-Kizza, J.

Being aggrieved by the decision of the trial Judge, the appellant now appeals to this Court against both the conviction and sentence, on the following grounds: -

1. **The learned trial Judge erred in law and fact when he convicted the appellant while relying on hearsay evidence.**
2. **The learned trial Judge erred in law and fact when he dismissed the appellant's defence of alibi.**
3. **In the alternative, the learned trial Judge erred in law and fact when he meted a sentence of 28 years imprisonment upon the accused which was illegal and manifestly harsh and excessive in the circumstances.**

The appellant prayed that the appeal to be allowed, the conviction be quashed and the sentence to be set aside.

Legal Representations

At the hearing of the appeal, the appellant was represented by Ms. Nansubuga Margret while Ms. Immaculate Angutuko, a Chief State Attorney appeared for the respondent.

The appellant was not physically present in Court during the hearing due to the challenge of the COVID-19 pandemic and the Standard Operating Procedures (SOPs) given by the Ministry of Health which prohibit crowding in a place. The appellant was facilitated to attend the proceedings from Masaka prison using the aid of zoom video conferencing technology.

Both counsel filed and adopted their written submissions.

Submissions of counsel

Ground 1

Counsel for the appellant submitted that the learned trial Judge erred in law and fact when he convicted the appellant while relying on hearsay evidence as circumstantial evidence.

According to counsel, **section 51 of the Evidence Act Cap 6** provides that oral evidence must be direct. She noted that it must be evidence of a witness who says he or she saw what happened.

Counsel contended that it is an established principle of common law that hearsay evidence which is incapable of being verified by cross-examination to determine its veracity is not admissible to determine the guilt of the accused.

According to counsel, the evidence from the mother to the victim, Namutebi Hadijja, (PW1), was hearsay evidence and therefore faulted the trial Judge for having relied on it to convict the appellant.

Counsel pointed out what he described as inconsistencies/contradictions in the prosecution evidence. She noted that on the accused's/appellants indictment, at page 3, paragraph 4 of the record of proceedings has divergent facts stated as: *the victim was playing when she went out for a short call, then the accused carried the victim to his room. The accused made the victim lie down and had sexual intercourse with her.*

Counsel argued that the above facts are inconsistent with those from PW1's testimony where she testified that the victim was defiled outside the house. That the appellant lifted her up against the wall and defiled her daughter.

Counsel also noted that from PW1's testimony, the victim did not tell her the date when she was defiled by the appellant.

She contended that such evidence was hearsay evidence and casts more doubt on the prosecution evidence.

On the unsworn testimony made by the victim, counsel argued that her testimony did not provide any clarity on the evidence adduced by the prosecution as she only stated that the appellant attacked her behind their house but did not explain what she meant by the phrase *"the accused attacked me"*. Counsel contended that the victim's evidence was wanting and below the required standard of proof beyond reasonable doubt.

Counsel further submitted that the proceedings ought to have captured the part where the victim broke down in tears while she was testifying before Court to properly re-appraise the evidence on record. She argued that if the victim broke down during the hearing, Court ought to have helped her compose herself and then proceed with the hearing.

She relied on this Court's decision in ***Ndyaguma Dvid vs. Uganda, Criminal Appeal No.263 of 2006,*** where Court held: ***"in this appeal as already stated above the victim did not testify and as such there was no evidence to be corroborated. The evidence of both PW2 and PW3 in respect of the appellant's participation being circumstantial since it was their own interpretation of what the victim meant by pointing between her legs and mentioning his name "David" did not irresistibly point at the appellant's participation. It did not satisfy the test required for founding a conviction solely on circumstantial evidence."***

Counsel argued that the victim's evidence is not capable of sustaining a conviction as it does not prove the appellant's participation in the alleged offence beyond reasonable doubt. She maintained that whatever the victim's mother alluded to is merely hearsay evidence which the trial Court ought to have found inadmissible.

Counsel for the respondent agreed that the legal principle as found in **section 59 (a) of the Evidence Act Cap 6** was that the oral evidence must be direct evidence of a witness who states what he or she saw.

Counsel submitted that the evidence being called 'hearsay' evidence by counsel for the appellant was the evidence of PW1, the victim's mother who was simply giving a report of what the victim had told her happened when the appellant attacked and defiled her. She noted that PW1 was duly subjected to cross examination to test the veracity of her evidence and her evidence was never in any way destroyed or discredited in cross-examination.

She relied on the case of ***Mayombwe Patrick vs. Uganda, Criminal Appeal No.17 of 2002*** which was cited by the trial Judge in ***Kavuma Matayo vs. Uganda, Criminal Case No.175 of 2015*** and the Court held that "*a report made to a 3rd party by a victim in a sexual offence where she identifies her assailant to a 3rd party is admissible in evidence. Moreover, even if the victim failed to testify, that failure would not be fatal to the*

prosecution as was held in Patrick Akol vs. Uganda, Supreme Court Criminal Appeal No.22 of 1992."

Counsel further contended that, PW1's evidence was corroborated by other cogent evidence such as exhibit PE2, the medical examination report of the victim and the evidence from PW2. The victim herself testified in Court about the way the appellant defiled her. Counsel noted that, although PW2 failed to elaborate on how the appellant attacked her as she broke down and cried during her testimony, the trial Judge found her to be truthful in respect of what she stated. She knew the accused/appellant as the person who attacked her.

She submitted that all the prosecution evidence irresistibly point to the guilt of the appellant as having committed the offence.

Counsel argued that the victim's testimony cannot be referred to as circumstantial evidence as it was direct evidence of identification of the appellant.

She prayed that Court disregards the appellant's contention that the prosecution's evidence is circumstantial evidence and that the evidence of PW1 is merely hearsay evidence and inadmissible.

Ground 2

Counsel for the appellant submitted that the learned trial Judge erred in law and fact when he dismissed the appellant's defence of alibi.

She submitted that the appellant testified that he had not worked at PW1's restaurant for two days as someone else took him to cook for him on Saturday and he returned on Monday. From that, counsel for the appellant argued that the accused raised an alibi that he was somewhere else on the material day. She argued that the burden remained with the prosecution to place the appellant at the scene of crime. She relied on the case of ***Ssekitoleko v Uganda (1967) E.A page 537,*** to support her argument.

Counsel further referred to the ***Supreme Court Criminal Appeal No.0029 of 2015, Bitwabusa vs. Uganda,*** which re-stated the guidelines as to what amounts to putting the accused at the scene of crime as laid down by the same Court in ***Bogere and another vs. Uganda, Supreme Court Criminal Appeal No.0029 of 2015.***

She argued that the appellants alibi was not rebutted by the prosecution and faulted the trial Judge for calling the appellant a liar.

Counsel further submitted that the prosecution evidence is full of contradictions and inconsistencies in regard to the defence raised.

She averred that while PW1 testified that *"the victim said that it was around 10pm at night when she had gone to urinate. She did not tell me the date when the accused defiled her"*, this is a major contradiction and inconsistence with PW2's testimony who testified that *"he found me behind our house. I was playing behind our house, outside. I do not remember what happened. But the accused attacked me, I do not remember the details"*. Counsel argued that the victim could not have been playing outside the house at 10pm at night and therefore this casts doubt as to when the deceased was defiled.

Counsel submitted that, in cross examination, PW1 testified that "*Apart from working for me, he was working at my place alone only. I do not know whether he had cooked rice for other people."* Counsel added that PW1 contradicts herself further in cross-examination when she testified that *"I came to know the victim being defiled on a Sunday at night"* and that *"the accused had worked the entire week for Dr. Monday for the week, up to Friday when the victim had told me"*.

Counsel noted that the prosecution did not attempt to rectify the above stated contradictions and inconsistencies.

She submitted that the position on contradictions and inconsistencies was stated by this Court in ***Candiga Swadick vs. Uganda, Court of Appeal Criminal Appeal No.23 of 2012,*** where it held:- ***"The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the***

witness being rejected unless they are satisfactorily explained away/ Minor ones, on the other hand, will only lead to rejection of the evidence if they point to the deliberate untruthfulness on the part of the witness."

Counsel argued that the appellant raised an alibi that weakened the prosecution evidence. She submitted that the overwhelming contradictions and inconsistencies in the prosecution's case show that the appellant did not participate in the alleged offence. She prayed that the contradictory prosecution evidence be rejected.

On the other hand, counsel for the respondent submitted that the appellant did not raise an alibi. She contended that, although the appellant stated that someone took him to cook on Saturday and he returned on Monday, the offence was committed on the 9th day of March 2010 which was a Tuesday and the appellant was arrested on the 12th day of March 2010 which was a Friday from Sunshine restaurant where he was working at the time. Counsel added that the appellant even confirmed having worked on Tuesday and Wednesday.

Counsel contended that the prosecution discharged its burden of placing the accused at the scene of crime as required in the case of ***Ssekitoleko v Uganda (1967) E.A. 537,*** when PW1, the victim's mother testified that the daughter (victim) told her that it was the appellant who defiled her behind their house and was told not tell anyone as he would beat her. This was confirmed by the victim when she testified that she was attacked by the appellant whom she knew as a cook at her mum's restaurant. The appellant lived at the victim's home.

She argued that the prosecution evidence of identification was not destroyed during cross examination as the appellant was well known to the victim, in fact the appellant resided at their home and there was no room for mistaken identity.

Counsel prayed to Court to dismiss the defence of alibi as it was destroyed by the prosecution who placed the appellant at the scene of crime.

Ground 3

Counsel for the appellant submitted that the learned trial Judge erred in law and fact when he sentenced the appellant to 28 years' imprisonment which was illegal, harsh and manifestly excessive in the circumstances.

She submitted that **Article 23 (8) of the Constitution of Uganda** provides that where a person is convicted and sentenced to a term of imprisonment of an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

Counsel contended that while the trial Judge considered that the period the appellant spent on remand was 1 year and 6 months, it was 2 years, one month and 8 days as the appellant was arrested on the 12th day of March 2010 and was sentenced on the 20th of April 2012. She thus argued that the trial Judge did not take into account the period of 7 months and 8 days, which makes the sentence of 28 years' imprisonment illegal.

She further submitted that considering the fact that the appellant was a first offender, at a youthful age, was repentant and prayed for leniency, the sentence of 28 years' imprisonment meted upon the appellant was harsh and excessive in the circumstances.

Counsel argued that there is need for maintaining consistency or uniformity in sentencing although crimes are not identical or committed under similar circumstances. She relied on the case of ***Bunya Godfrey vs. Uganda, Supreme Court Criminal Appeal No.4 of 2011***, to support her argument.

She further referred to ***Ntambala Fred vs. Uganda, S.C.C.A No.34 of 2015, Katende Ahmad vs. Uganda, S.C.C.A No.06 of 2004, Bukenya Joseph vs. Uganda, S.C.C.A No.17 of 2010, Ninsiima Gilbert vs. Uganda, C.A.C.A No.0180 of 2010*** and ***Birungi Moses vs. Uganda, C.A.C.A No.177 of 2014***, where Court convicted the accused for defilement or aggravated defilement and they were sentenced to imprisonment terms within the range of 10 to 20 years.

Counsel prayed that the sentence be set aside for being illegal, harsh and excessive. She prayed that the 28 years' sentence be substituted with a more lenient sentence of 10 years' imprisonment in order to maintain uniformity and consistency in sentencing.

Counsel for the respondent, on the other hand, submitted that the trial Judge considered all the mitigating factors as well as the period spent on remand as required by **Article 23 (8) of the Constitution.**

She argued that the appellant was represented by defence counsel who did not any one-point object to the 1 year and 6 months that the trial Judge considered as the period spent on remand. She added that the defence counsel did not even state the remand period during mitigation.

Counsel further contended that the sentence in particular was passed on 20th April 2012 way before the decision in ***Rwabugande Moses vs. Uganda, S.C.C.A No.25 of 2014,*** which requires that taking into account be arithmetic. She argued that the said sentence of imprisonment was passed on the appellant during the regime of ***Kizito Senkula vs. Uganda, S.C.C.A No.06 of 2004,*** where taking into consideration of the time spent on remand did not necessitate a sentencing Court to apply a mathematical formula.

She prayed Court not to interfere with the sentence as it was passed by the trial Judge in accordance with the law in existence then.

She prayed that the appeal be dismissed, the conviction and sentence be upheld.

Resolution of the appeal

This is a first appeal and as such this Court is required under **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10** to review and re-evaluate the evidence before the trial Court and reach its own conclusions, taking into account the fact that the appellate Court did not have the opportunity to hear and see the witnesses testify. See ***Bogere Moses and another vs. Uganda, Supreme Court Criminal Appeal No.01 of 1997*** and ***Pandya v. R [1957] EA 336.***

We have carefully studied and considered the Court record, the submissions of both counsel and the law cited. We shall, in accordance with the above authorities, proceed to re-appraise the evidence and to make our own inferences on both issues of law and fact.

Ground one

It was the appellant's contention that the learned trial Judge erred in law and fact when he convicted the appellant while relying on hearsay evidence.

Section 59 of the Evidence Act Cap 6 provides that oral evidence must be direct. The section provides as follows:-

> **"59. Oral evidence must be direct**
>
> **Oral evidence must, in all cases whatever, be direct; that is to say—**
>
> **(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it;**
>
> **(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it;**
>
> **(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner;**
>
> *(d)* **if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds."** *Underlining is ours.*

In the instant case, the victim, PW2 Mumbejja Kulusumu, gave an unsworn testimony after the trial Judge held a voire dire, as the victim did not understand the nature of an oath. The victim was 7 years old by the time of the trial.

The victim gave direct evidence when she testified that:-

> ***"My mother is called Namutebi Adija. I know the accused person. I know his name. He is called Arnold. He is our Cook at Sunshine restaurant. The hotel is***

owned by my mother - Namutebi Adija. I do not remember very well what happened between me and him, but I recall he attacked me and warned me not to tell anybody. He found me behind our house. I was playing behind our house, outside. I do not remember what happened. But accused attacked me, I do not remember the details."

According to the trial Judge, when the victim saw the accused while testifying, she immediately broke down and started crying. That she could not talk properly any more. For that reason, there was no cross examination of the victim.

As a matter of law, the victim's unsworn testimony required corroboration under **section 40(3) of the Trial on Indictments Act**. The section provides: -

"Where in any proceedings any child of tender years does not in the opinion of the court understand the nature of an oath his evidence may be received though not on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth. Provided that where the evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some material evidence in support thereof implicating him."

The law governing corroboration is well established. In ***Chila v R (1967) 722, R v Baskerville (1916) 2 KB 658*** and ***Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No.19 of 1995 (unreported),*** Court noted that it is trite that where a child of tender years gives unsworn evidence, that evidence must be corroborated with independent material evidence before a conviction can be based on it. It was stated in ***R v Chila*** (*supra*) that the Judge must warn himself/herself of the dangers of conviction of an accused with uncorroborated testimony and may convict in the absence of corroborating evidence if he or she is satisfied that the evidence is truthful.

Section 156 of the Evidence Act defines what is sufficient to corroborate evidence and provides:

> **"156. Former statements of witness may be proved to corroborate later testimony as to same fact-**
>
> **In order to corroborate the testimony of a witness, any former statement made by the witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."**

In the instant case, the victim's unsworn testimony was corroborated by the victim's medical examination report, Exhibit PE2. The report confirmed that the victim was 5 years old at the time the offence was committed. It reported that the victim's hymen was raptured, with injuries and pus discharge from the vagina. It concluded that the above stated features are a suggestion of defilement.

The victim's unsworn testimony was further corroborated by her mother's sworn testimony, Namutebi Hadijja, (PW1). PW1 testified that she knew the appellant who had been working in her restaurant called Sunshine, as a cook for a month prior to the fateful incident. She stated that on the night of 11th March 2010, the victim told her that she was feeling pain somewhere. That she was sleeping with her legs apart and raised. She checked the victim's private parts and found there a pus discharge and some injuries.

PW1 stated that when she asked the victim what had happened, the victim told her that it was Arnold (the appellant) who had defiled her. She added that the victim told her that the appellant attacked her while she had gone to urinate behind the house at around 10:00 pm. That there were electric lights. That he lifted her and put her against the wall, untied his belt, removed his trousers and that he put his penis in her. She noted that the victim showed/pointed to her private parts to indicate that he put his penis in her vagina. She added that the victim told her that the appellant warned her not to tell anybody,

otherwise he would beat her. She stated that the victim did not tell her the date when the appellant defiled her. PW1 noted that she had a good working relationship with the appellant before the incident.

PW1 further stated that, on the following day, she reported the case to Kyazanga Police Station and the appellant was arrested from Sunshine restaurant while he was cleaning the floor.

During cross-examination, PW1 testified that the appellant was staying at her place as she had given him a rent free room. She stated that she did not know whether the appellant had cooked rice for other people. She specified that she came to know about the victim being defiled on a Sunday night. She stated that the appellant had worked the entire week for Dr. Monday up to Friday when the victim told her.

Counsel for the appellant, however, argued that the evidence from PW1 is hearsay evidence and therefore inadmissible.

This Court in ***Mayombwe Patrick vs. Uganda, Criminal Appeal No.17 of 2002***, held that a report made to a third party by a victim in a sexual offence where she identifies her assailant to a third party is admissible in evidence. Such evidence can be used to corroborate other credible evidence.

A similar issue was recently handled by this Court in the ***Consolidated Criminal Appeals No's.0359 and 0740 0f 2015, Madrama Mischeal vs. Uganda***, where Court found that reports made by the victim to a third party provided sufficient corroboration to the victim's evidence that the appellant had defiled her. Court stated as follows:- ***"Thus, in our view, corroboration is achieved where there exists evidence which confirms or supports a witness' evidence. In the present case, pursuant to section 40 (3), such corroborating evidence would confirm or support the evidence of the victim, a child of tender years. We note that corroborating evidence may be constituted in evidence of a report made by a victim in the immediate aftermath of the commission of the offence. In Bukenya Joseph vs. Uganda, Supreme Court Criminal Appeal***

No.17 of 2010, it was held to the effect that pursuant to section 156 of the Evidence Act, Cap. 6, evidence that the victim, prior to the trial, reported alleged acts of defilement to witnesses who came to testify during the trial about the victim's report amounts to sufficient corroboration of the victim's testimony."

In the present case, the victim herself gave direct evidence about the alleged defilement in her unsworn testimony. Prior to the trial, she had made a report to her mother, PW1, that the appellant had defiled her. As discussed earlier in the Judgment, PW1, in her testimony, narrated to Court about what the victim told her happened on the fateful day. PW1's and the victim's evidence was further corroborated by the evidence from the victim's medical examination report, Exhibit PE2, which specified that the victim's hymen was raptured, with injuries and pus discharge from the vagina, features which the medical examiner attributed to defilement. The medical examiner noted that the injuries were recent and estimated that the Hymen had raptured about 24 years ago.

In our view, although the victim's evidence was not very elaborate, the mother's testimony as well as the medical report sufficiently corroborated her testimony. We ought to note that the little girl was only 5 years old when the incident happened and 7 years old at the trial, one would not expect a young girl like her to be as eloquent and easily remember every little detail of the events of what happened 2 years ago on the fateful day. Her saying that *"**he attacked me and warned me not to tell anybody"**,* was clear enough to indicate that the appellant defiled her. It is also important to note that the victim broke down in tears upon seeing the appellant. We agree with the trial Judge that this showed that she was still depressed and traumatised and reflected that she was still in fear as the appellant who had warned her not to tell anyone or he would beat her.

In the result, we find that the report made by the victim to her mother, PW1 provided corroboration to the victim's evidence that the appellant defiled her. We find that the trial Judge properly analysed the evidence on record which was credible for the conviction of the appellant. We would dismiss ground one of the appeal.

Ground 2

Counsel for the appellant contended that the learned trial Judge erred in law and fact when he dismissed the appellant's defence of alibi.

The principle on the defence of alibi was laid down in ***Criminal Appeal No.02 of 1997, Bogere & Anor vs Uganda,*** where this Court held:

> ***"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable."***

In the present case, the appellant denied the said allegations and testified that he had worked on Tuesday and Wednesday at Sunshine restaurant then he was arrested on a Thursday on 11th March 2010. He stated that he had spent 2 days when he did not work because someone else took him to cook on Saturday and came back on Monday. He noted that he did not work on Monday as he was tired. The appellant stated that he knew the victim as he met her at her mother's home. He denied having defiled her.

The appellant further argued that he had a disagreement/grudge with PW1 because he had rejected her love affair advances. He stated that he had a girlfriend with whom he worked at the restaurant but PW1 dismissed her due to their disagreement. He concluded

that the said allegations were fabricated against him due to the said grudge between him and the victim's mother, PW1.

The trial Judge in considering of the evidence of record on this issue stated that PW1 told Court that the accused had worked throughout and was never absent from duty. He stated that the appellant was residing at PW1's home and was never absent on the material night. She noted that PW1 denied having any grudges with the accused and that they were in good terms with the appellant. He noted that there was no reason for a young girl to be involved in adult affairs and frame the appellant with such a heinous crime if he did not defile her.

The trial Judge found the victim and PW1 to have been truthful and dismissed the appellants alibi as false as well as his allegations of a frame up due to grudges with PW1 as mere lies and a concoction of his imagination.

The appellant faults the trial Judge for that finding. We shall therefore proceed to revaluate the evidence on record in regards to the appellant's alibi.

From the Indictment, the offence was committed on 9th March 2010 which was a Tuesday. The appellant in his defence, stated that he had spent 2 days without working at Sunshine restaurant because someone else took him to cook on Saturday and he came back on Monday. According to the appellant, he did not work on Monday as he was tired.

We note that, the three days i.e. Saturday, Sunday and Monday, that the appellant alludes to having been absent from work are irrelevant as the offence is said to have taken place on Tuesday, the 9th of March 2010, when the appellant was around.

The appellant himself stated that he was around on Tuesday and Wednesday, working at Sunshine restaurant. This clearly places him at the scene of crime as he was around on Tuesday the 9th of March 2010, the day the offence was committed.

It is pertinent to note that the appellant resided at the victim's home and the offence happened at night when he was home. We believe that in the circumstances the victim could not have been mistaken about the identity of the defiler as she knew him before as he had been living at their home for a couple of months while he was working at her mother's restaurant.

The evidence from the victim's medical examination report, Exhibit PE2, also confirmed that the victim's injuries were recent and that her hymen raptured about 24 hours ago.

In our considered view, the prosecution evidence discussed above sufficiently placed the appellant at the scene of crime.

Counsel for the appellant, however, argued that the prosecution evidence contained material contradictions/inconsistencies that should not have been relied on by the trial Judge to convict the appellant.

The law on contradictions/inconsistencies in prosecution evidence was discussed by the Supreme Court in ***Criminal Appeal No.21 of 2001, Wepukhulu Nyuguli vs. Uganda.*** Court held:

> ***"It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses, should be ignored and that major ones which go to the root of the case, should be resolved in favour of the accused (See Alfred Tajar -V- Uganda Cr. Appeal No. 167 of 1969 EACA) (unreported)."***

In the present case, the inconsistencies complained of by counsel for the appellant were the following: -

1. PW1 testified that *"the victim said that it was around 10pm at night when she had gone to urinate. She did not tell me the date when the accused defiled her"*, whereas the victim (PW2) testified that *"he found me behind our house. I was*

playing behind our house, outside. I do not remember what happened. But the accused attacked me, I do not remember the details". Counsel argued that the victim could not have been playing outside the house at 10pm at night and therefore this casts doubt as to when the deceased was defiled.

2. While PW1 testified that the victim told her that: *"the appellant attacked her while she had gone to urinate behind the house at around 10:00 pm. That he lifted her and put her against the wall, untied his belt, removed his trousers and that he put his penis in her."* The accused's/appellants indictment, has divergent facts stated as: *"the victim was playing when she went out for a short call, then the accused carried the victim to his room. The accused made the victim lie down and had sexual intercourse with her."*

3. In cross examination, PW1 testified that *"Apart from working for me, he was working at my place alone only. I do not know whether he had cooked rice for other people."* According to counsel, PW1 contradicts herself further in cross-examination when she testified that *"I came to know the victim being defiled on a Sunday at night"* and that *"the accused had worked the entire week for Dr. Monday for the week, up to Friday when the victim had told me".*

4. The appellant stated that he was arrested on a Thursday on 11th March 2010 while the evidence from the arresting officer, No.37277 D/CPL Kizza Hassan, in exhibit PE3 is to the effect that the appellant was arrested on 12th March 2010.

In our considered view, the above listed contradictions and inconsistencies were not so crucial so as to go to the root of the case. The victim and her mother (PW1) were testifying from their own memory without the aid of any written record about the fateful day which had taken place about 2 years ago before the hearing. It would be natural for them to make some slight mistakes.

We further note that the trial Judge found that the prosecution through PW1 was more truthful than the accused. The trial Judge noted that PW1 gave her evidence in a straight forward manner and impressed him as a reliable person, whereas, the appellant appeared shaky, hesitated before answering simple and straight forward questions. According to the trial Judge, the appellant struck him as a liar who was desperate to say anything so as to free himself. We agree with that assessment.

We therefore find that the said contradictions and inconsistencies were minor as they did not go to the root cause of the case.

Having re-evaluated the evidence as a whole, we find that the prosecution placed the appellant at the scene of the crime.

We find that the trial Judge rightly dismissed the appellants alibi as false as well as his allegations of a frame up due to grudges with PW1 as mere lies and a fabrication.

We agree with the trial Judge that the prosecution proved the case beyond reasonable doubt and uphold the appellant's conviction.

Ground 3

Counsel for the appellant contended that the learned trial Judge erred in law and fact when he failed to consider the whole period the appellant spent on remand while sentencing him to 28 years' imprisonment.

The appellant argued that he spent 2 years, one month and 8 days on remand rather than the 1 year and 6 months that the trial Judge considered.

It is trite law that the appellate Court is not to interfere with a sentence imposed by the trial Court which has exercised its discretion on sentence unless the sentence is illegal or the appellate Court is satisfied that in the exercise of the discretion the trial Court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence or the sentence was manifestly excessive or so low as to amount to an injustice. See: ***Livingstone Kakooza vs. Uganda, Supreme Court***

Criminal Appeal No.17 of 1993 [unreported] and *Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No.19 of 1995.*

Article 23 (8) of the Constitution of the Republic of Uganda provides:-

> **"(8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."**

The trial Judge while sentencing stated as follows:-

> ***"Accused is allegedly a first offender. He has been on remand for about 1 year and 6 months. I take this period into consideration while considering the sentence to impose on him. He is said to be still young and could be of use to the country. He is repentant and prayed for leniency.***
>
> ***However, the accused committed a serious offence. The maximum sentence upon conviction could be up to a death penalty, the victim in this case was only 5 years old at the time. As a worker for the mother, and who was staying with the family, he had a fiduciary relationship with the victim and would be expected to protect her. Instead accused decided to sexually gratify himself on her. This cannot be tolerated by this Court. It is my considered view that, the sentence must also match the gravity and circumstances of the case. In this case, the accused deserves a stiff sentence.***
>
> ***Putting everything into consideration I sentence the accused person to 28 (twenty eight) years imprisonment."***

From the above quoted, the trial Judge considered both the aggravating and mitigating factors while sentencing. The trial Judge considered the fact that the appellant was of the first offender and was of the youthful age of 27 years by the time the offence was

committed. We note however, that the trial Judge did not give adequate weight to the fact that the appellant was a first offender capable of reform.

We note also that the trial Judge made an error when he only considered 1 year and 6 months as the period the appellant had spent on remand rather the 2 years, one month and 8 days. In our considered view, the error made by the trial Judge does not make the sentence passed illegal as this could have been easily corrected by this Court.

In this case, we only fault the trial Judge for not giving adequate consideration to the fact that the appellant was a first offender and that he was at a youthful age by the time the offence was committed. In the circumstances of this case, we find that the 28 years' imprisonment sentence passed the trial Judge, to be manifestly excessive. We therefore set it aside for that reason only.

We invoke **section 11 of the Judicature Act (CAP 13)** which vests this Court with powers of original jurisdiction to determine an appropriate sentence in the circumstances of this case.

The **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013,** provide for the starting point in sentencing for aggravated defilement as 35 years and the maximum sentence being death.

The Supreme Court in ***Criminal Appeal No.34 of 2014, Okello Geoffrey vs Uganda,*** confirmed a sentence of 22 year's imprisonment for aggravated defilement as it found no reason to interfere with it.

We have considered all the mitigating and aggravating factors in this case and hereby sentence the appellant to 22 year's imprisonment. From the record, the appellant was arrested on 12th March 2010 and he was convicted on 20th April 2012. The appellant therefore spent 2 years, one month and 8 days on remand.

Taking into account the 2 years, one month and 8 days that the appellant spent on remand in accordance with **Article 23 (8) of the Constitution**, the appellant will

therefore serve a sentence of 19 years and 11 months' imprisonment. The sentence shall run from 20th April 2012, the date of conviction.

We so hold.

Dated at Masaka this 20th day of August 2021

Richard Buteera
Deputy Chief Justice

Stephen Musota
Justice of Appeal

Muzamiru Kibeedi
Justice of Appeal