

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 490 OF 2014

(Arising from High Court Criminal Case No. 155 of 2012)

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MUWONGE DAVID ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::::::: RESPONDENT

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**CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA
HON. JUSTICE STEPHEN MUSOTA, JA
HON. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA**

JUDGMENT OF COURT

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The appellant was indicted and convicted of the offence of Aggravated Defilement contrary to section 129 (3) (4) (a) (c) of the Penal Code Act and sentenced to 23 years' imprisonment. The appellant was dissatisfied with the decision of the trial court and filed this appeal against conviction and sentence on the following grounds;

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1. The learned trial judge erred in law and fact when she failed to properly evaluate evidence on court record and decided that

prosecution had proved all the ingredients of aggravated defilement beyond reasonable doubt and convicted the appellant thereby causing a miscarriage of justice.

2. The learned trial Judge erred in law and fact when she failed to consider the appellant's mitigating factors and sentencing principles and sentenced the appellant to 23 years imprisonment which sentence was illegal and harsh thus causing a miscarriage of justice.

Background

On 16th July 2012 at around 7:00 am, the victim's step mother left the victim at home together with her younger siblings while she went to the garden. Akampulira Suzan, the victim, was 5 years old at the time the offence was committed. A few hours later, the appellant came to the victim's home and took them to his place. While at his place, he took them inside and got hold of the victim, undressed her, carried her across his thighs and went ahead to defile her after undressing himself. At around 1:00pm, the victim's mother returned home from the garden but never found the victim and her siblings at home. She went out in search for them and found the appellant on the way back with the victim and her siblings. He handed the victim and other children to the step mother saying that during her absence, he decided to take the children to his home for safe custody.

That night, the victim did not reveal anything to her mother but a few days later, the mother was bathing the victim, she complained

of pain in her private parts and on examination, she realised the victim's private parts were starting to rot. She asked the victim what happened and the victim revealed that the appellant had defiled her when he took them to his home. The father of the victim
5 was informed and the 45 year old appellant was arrested and taken to Bugoma Police post.

Representation

At the hearing of the appeal, Mr. Alexander Lule appeared for the appellant while Ms. Ampaire Jenifer, Assistant Director of Public
10 Prosecutions, appeared for the respondent.

Because of the Covid-19 pandemic, the appellant appeared in court via zoom video link but his advocate was present in court. The respective submissions were adopted and relied upon by court.

Appellant's submissions

15 It was argued for the appellant that the learned trial Judge did not properly evaluate the evidence on record and relied on the unsworn evidence of the victim to convict the appellant. Counsel submitted that the victim gave unsworn evidence and after the court conducted a *voire dire*, it was found that the child did not know the
20 meaning of an oath. The evidence of PW1 and PW3 was that the victim was found with bad smelling discharge 3 days after she had been found with the appellant. That the victim did not have any pain on the day she was found with the appellant and therefore, it

is possible that the victim could have been injured by an object during the three days lapse.

Counsel relied on the evidence of DW1 who testified that he found the children climbing trees which might have caused injury to the victim. Counsel submitted further that the evidence of the victim and her mother had a number of inconsistencies and contradictions that should not have been ignored by the trial court. Counsel relied on the case of **SGT Baluku Samuel and another Vs Uganda S.C.C.A No. 21 of 2014** on the proposition that major inconsistencies and contradictions will usually result in the evidence of the witness being rejected unless they are satisfactorily explained away. That the victim as PW3 stated that the accused did nothing to her and told her mother that it was afande who caught her and defiled her yet she at the same time says he removed her panty and his trousers but did nothing. Counsel for the appellant submitted that this evidence is inconsistent with itself and hence not reliable.

Counsel submitted further that the learned trial Judge sentenced the appellant to a harsh and excessive sentence of 23 years imprisonment. That the learned trial Judge did not consider the mitigating factors of the case before passing sentence.

Respondent's submissions

It was contended for the respondent that ground one of the appeal is too generic and argumentative and as such, contravenes the provisions of rule 66 (2) of the Court of Appeal Rules.

Counsel submitted that whereas PW3 gave unsworn evidence, a voire dire was conducted and court was of the opinion that the child could give unsworn evidence. Counsel argued that the ingredient of a sexual act was never challenged at the trial court. Police Form 3 established after examination of the victim that her genitals were stained with foul smelling discharge, bruises on labia majora which were categorised to be due to forceful vaginal penetration.

Counsel argued in regard to inconsistencies and contradictions, that there was cogent and corroborative evidence of the victim and medical evidence to prove that the victim was defiled. Whereas the victim's testimony had a few contradictions being a child of tender years, she ably stated that the appellant known as 'Afande' had defiled her. Counsel submitted that the contradictions were minor and did not go to the root of the case. The participation of the appellant was well proved by the prosecution beyond reasonable doubt.

While arguing ground 2, counsel submitted that the learned trial judge properly exercised her discretion and considered both the mitigating and aggravating factors before passing the 23 year imprisonment sentence on the appellant.

Consideration of the appeal

This being a first appeal, we are mindful of the duty of a first appellate court to re-evaluate the evidence, weighing conflicting evidence, and reaching our own conclusion on the evidence, bearing in mind that we did not see the witnesses testify. (See **Pandya v R**

[1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997 and COA Criminal Appeal No. 39 of 1996. In the latter case, the Supreme Court held that;

5 *“We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own*
10 *mind not disregarding the judgment appealed from but carefully weighing and considering it.”*

We have kept these principles in mind in resolving this appeal. We shall resolve the grounds of appeal in the order in which the parties argued them.

15 It is trite law that the prosecution has the duty to prove each ingredient of an offence beyond reasonable doubt. The appellant in ground one of the memorandum of appeal, faults the learned trial Judge for failing to properly evaluate the evidence on record. For an
20 accused person to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim was below 14 years of age.
2. That a sexual act was performed on the victim.

3. That it is the accused who performed the sexual act on the victim.

In is not in dispute that the victim was 5 years old at the time the offence was committed. PW1, the stepmother to the victim testified to this fact and the victim herself, during the *voire dire*, stated that she was 5 years old. Therefore, we find that the 1st ingredient was proved beyond reasonable doubt.

The second ingredient is that a sexual act was performed on the victim. PW1, the step mother to the victim testified that on the day the offence was committed, she was away from home for work at Bidco, where she worked as a cleaner and weeder of the palm trees. When she returned, the children were not home so she started looking for them. She found the appellant walking with the children and when she asked him, he said they were at his home and that he had given them food and brought them back. PW1 stated that she checked the children thinking they could have been defiled but they were okay. After three days, she was bathing them and found the victim with discharged pus and blood in her private parts and she was in a lot of pain. She asked the victim what had happened to her and she said that the appellant had told her not to reveal but on the day they went missing, he took her inside his house and made her sit on his laps. He pulled out his penis and inserted it into her vagina.

PW2, the father to the victim, testified that when his wife told him that the children had been brought by the appellant, he got scared

because he had never interacted with the appellant. They used to by-pass each other without greetings and as such, he wondered where the appellant got the courage from to pick his children and take them to his home. He asked the wife to check them for fear
5 that they could have been defiled.

The victim made an unsworn statement after court conducted a *voire dire*. She stated that the appellant took her to his home and made her sit on his laps and removed her panty. He also removed his trousers.

10 The appellant, DW1, testified that on the 16/7/2012, he had come back from fishing and went to collect water. He found the children of his neighbour climbing trees and he asked them why they were climbing trees. He took them and held the two young ones and took them to their home. He found their mother who had been looking
15 for the children and he went away.

The victim was examined and the medical report indicated that the victim's genitals were stained with fowl smelling discharge. There were bruises on her labia majora and minora and the conclusion was that the cause of the injuries was due to forceful vaginal
20 penetration. We find that the element of a sexual act performed on the victim was also proved by the prosecution beyond any reasonable doubt.

To prove the third element of participation by the appellant, the prosecution relied on the evidence of the victim which was
25 corroborated with that of her step-mother. The appellant was well

known to the victim and she stated that he made her sit on his laps, removed her panty then his trousers and his penis which he inserted into the victim's vagina. Whereas there were some contradictions in the victim's evidence, these could be attributed to the court setting and the age of the child. In her statement, she stated on page 22 of the record from line 325 that;

10 *"At home, we were staying with Mama and Dad. No other people stayed. I have brothers and sisters. When Afande came for me, they came following me. When we reached Afande did not give us anything.*

I was put on his laps. He removed my panty. He removed his trousers. After that he did nothing. When my mother was bathing me, I did not feel pain in my susu and kasolo. Pus came from my susu, my vagina."

15 We have considered the nature of the contradictions in the evidence of PW1. The law on contradictions and inconsistencies was well settled in the case of **Alfred Tajar Vs Uganda Criminal Appeal No. 167 of 1969 EACA** that 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 if they point to deliberate untruthfulness on the part of the witness.

25 We have not found the inconsistencies in this case to be grave in so far as they relate the appellant having committed the offence. The victim's testimony placed the appellant at the crime scene and she

described how the appellant made her sit on his laps after removing her panty and his trousers.

In the case of **Ntambala Fred Vs Uganda Supreme Court Criminal Appeal No. 34 of 2015**, it was held that;

5 *“As stated in the Judgment of the Court, a conviction can be based on the testimony of the victim of an offence even when he/she is a single witness since the Evidence Act does not require any particular number of witnesses to prove any fact and “what matters is the quality and not quantity of evidence.” I*
10 *must however emphasize that this must be as true in a sexual assault prosecution as it is in other offences.”*

15 It is our considered view that the evidence of the victim placed the appellant at the scene of crime and we find no reason to fault the findings of the learned trial Judge. We accordingly uphold the conviction.

Consideration of sentence

20 We are mindful that an appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed by that trial court unless that trial court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda SCCA No. 10 of 1995** and **Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001 (S.C)**).

The appellant's Counsel submitted that the learned trial Judge did not consider the mitigating factors of the case and passed a harsh and excessive sentence on the appellant.

The sentencing order of the learned trial Judge was as follows;

5 *"The convict has no previous record. He is 47 years old and has been on remand for one year and nine months. Nonetheless the offence with which he was convicted carries a maximum sentence of death on conviction. The offence of aggravated defilement has become so rampant in society affecting the girl*
10 *child both physically and psychologically. Besides that, it violates their rights as children and offends their dignity as women. Perpetrators of such crime ought to be put away from society to give the girl child a chance to grow up in a secure environment without molestation.*

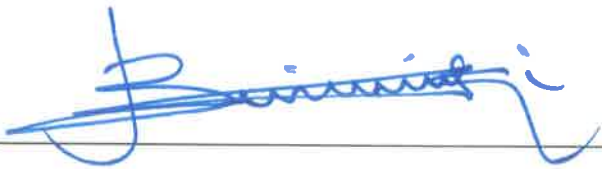
15 *I have taken note of the accused's age and the time he has been on remand however the impact of his actions are very grave and court needs to pass a deterrent sentence of 23 (twenty three) years on him."*

From the above, we find that the trial Judge put into account both
20 the mitigating and aggravating factors of the case as well as the time spent in custody and sentenced the appellant to 23 years' imprisonment. This court in **Anguyo Silva Vs Uganda Criminal Appeal No. 0038 of 2014** sentenced the appellant to 21 years and 28 days for the offence of Aggravated Defilement. The 23 years'

imprisonment sentence passed on the appellant is neither harsh nor excessive in the circumstances of the case.

We find no reason to interfere with the sentence. This ground also fails. The appeal is accordingly dismissed.

5 Dated this 13th day of September 2021



Hon. Justice Cheborion Barishaki, JA

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Hon. Justice Stephen Musota, JA

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Hon. Justice Muzamiru Mutangula Kibeedi, JA

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