THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 186 OF 2018

MUWAYIRA CYRUS :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Arising from the decision of the High Court in Criminal Session Case No. 376 of 2014)

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF COURT

The appellant was indicted and convicted of the offence of Aggravated Defilement contrary to section 129 (4) (a) and (c) of the Penal Code Act and sentenced to 12 years imprisonment.

Background

The appellant run a home in Kyebando where he was looking after several children sponsored by Joanna Eliasson, a female of Swede nationality, who rented a house in Kyebando where the children stayed under the guardianship of the appellant. The appellant encouraged the children to wake up by 3:00am every day. One of these nights, the appellant took the victim to a vacant room outside and had sexual intercourse with her and warned her not to tell

anyone or else she would die. On another occasion, the victim, together with other girls went to the appellant's room for prayers at 3:00am and after the prayers, the appellant told the victim to stay behind and again had sexual intercourse with her on his bed. The sponsor got information that the appellant had lied to her that the children were orphans and when she called for a meeting, the children opened up about the actions of the appellant.

The appellant filed his appeal against conviction and sentence on the following grounds;

1. That the learned trial Judge erred in law and fact when she failed to adequately evaluate the evidence on record as regards participation hence reaching an erroneous conclusion.
2. That the learned trial Judge erred in law and fact when she meted out a manifestly harsh and excessive sentence against the appellant.

At the hearing of the appeal, Mr. Nsubuga Samuel appeared for the appellant while Ms. Immaculate Anyutulio Angutuko appeared on brief for Ms. Kabajungu Assistant DPP for the respondent. Both parties filed written submissions.

Appellant's submissions

Counsel submitted that apart from the evidence of PW1, none of the prosecution witnesses gave an eye witness' account about the appellant's alleged several sexual encounters with the victim. Counsel argued that there was a serious dispute between the

appellant and PW9 arising from the management of the organization and that the allegation of sexual acts was a result of the misunderstandings.

With regard to the sentence, counsel submitted that the appellant was a first time offender and a young man capable of reforming and being re-integrated in the society. The sentence of 12 years imprisonment was harsh and excessive in the circumstances of the case.

Respondent's submissions

In reply, counsel for the respondent submitted that the victim who testified as PW1 described in her testimony details of the sexual acts performed on her by the appellant. That the learned trial Judge considered the age of the victim and the fact that the victim knew the appellant who used to live with them at home and concluded that she could not have mistaken the identity of the appellant. The victim disclosed to her sister and eventually to her mother and that the conflict between the appellant and PW9 arose after she discovered that the appellant was assaulting the children.

In addition, the victim was very clear and consistent in her testimony that the appellant had continually assaulted her. Counsel relied on the Supreme Court decision in **Ntambala Fred Vs Uganda S.C.C.A No. 34 of 2015** in which it was held that a conviction can be solely based on the testimony of the victim as a single witness provided court finds her to be a truthful and reliable witness. Counsel

submitted that in sexual offences, it is most often the word of the victim against that of the appellant/accused person.

Counsel submitted on ground of sentence that the sentence of 12 years imprisonment was neither harsh nor excessive considering that the maximum sentence for aggravated defilement is a death penalty. The appellant was a guardian to the victim and instead of protecting her, he resorted to robbing her of her innocence when he sexually assaulted her. Counsel submitted that the 12 year sentence meted out on the appellant was a lenient one and ought to be maintained.

Consideration of the appeal

This being a first appeal, our duty, as a first appellate court, is to re-evaluate the evidence, weighing conflicting evidence, and reach our own conclusion on the evidence, bearing in mind that it 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;

> *"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 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.

It is trite law that the prosecution has the duty to prove each element 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 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.

It is not in dispute that the victim was 12 years old at the time the offence was committed. Police Form 3A, which is an examination of the victim indicated that she was 12 years old at the time the offence was committed. 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 victim, testified that she knew the appellant after he picked them from their parent's homes and took them to stay at a church house. She testified that one time, while in a meeting, the appellant told them to start waking up at 3:00am for prayers. The

next day she woke up at 3:00am and went to the living room to pray. The appellant was sleeping in the living room and he also got up and started praying. The appellant then lifted her from where she was and started kissing her and told her they should pray for the car that Joanna had brought. He then took her to the garage and told her to remove her knickers after asking her not to tell anyone. When she refused to remove the knickers, he removed them by force and laid her on the floor. He removed his knickers half way, took his penis out and put it in her vagina. Afterwards, she went back to sleep. The next day she went to school and when she got up for prayers in the night, she feared to go alone and went with Melisa, Efrance and Dora. The appellant joined them for prayers and after asked the others to go and sleep and when she remained behind, he asked her to forgive him for what he had done and then took him to his bed and had sex with her.

She then went to the bathroom and realised she was bleeding. The appellant had sexual intercourse with the victim four times and she described the colour of his bedsheets being white with pink boxes. Eventually the parents of the girls came to pick them and while at home, the victim revealed to her sister Alexandra that she had been sexually assaulted by the appellant. Her sister told the mother and Joanna got to know which led to the appellant's arrest.

PW2, the police officer who examined the victim testified that on examination, the victim had a heeled tear which was consistent with penetrating sexual intercourse. PW3 testified that she had carried

out a search at the home were the appellant and the victim used to stay and found bedsheets which the victim had described in her statement.

The prosecution evidence of PW1 and PW2 proved that a sexual act was performed on the victim. The prosecution also relied on the evidence of PW1 to prove that the appellant had performed the sexual act with the victim.

PW4, the mother to the victim confirmed that PW1 joined the singing and dancing ground of the appellant with her consent and she allowed the appellant to move the victim to lower Nsooba Primary School. PW6, Melissa, confirmed that she was in the same organisation and whenever they would wake up for prayers, the appellant would ask the victim to stay in the living room after prayers while the others went to sleep. She testified that one day the appellant called her to his room and asked her to sit on his lap, he then started kissing her and laid her on his bed until someone knocked and he let her go. The only eye witness to the sexual offences was the victim herself. The appellant denied having committed the offence.

The appellant recorded a charge and caution statement at the police marked exhibit P6. He denied the charges and stated that Joana had issues with him over the organization.

The defence also produced evidence of DW2, a parent who also had a child in the same home as the victim. She testified that Joana had asked for the children to be given to her and when they refused, the

appellant was arrested two weeks after the refusal. The victim was among the children who were picked after the meeting and in addition that the appellant used to stay with many older children than the victim. DW3 is also a parent with a child in the same organisation. She also testified that the case against the appellant was a frame up by PW9 who wanted to take the appellant's organization.

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

> *"As stated in the Judgment of the Court, a conviction can be based on the 10testimony 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 must however emphasize that this must be as true in a sexual assault prosecution as it is in other offences."*

It is our considered view that the evidence of the victim squarely placed the appellant at the scene of crime. She was living in the same home with him before the offences were committed and was well known to her. The evidence of PW1 was further corroborated with that of PW5, who used to stay in the same home with the victim who confirmed that after prayers, the appellant would ask the victim to stay behind. The appellant was the head of the organisation and PW9 was the sponsor of the organization. PW9 met the appellant in 2013 and afterwards, she rented a house for the organization and they

moved from Katanga to Kyebando with fifty children. The conflict between the appellant and PW9 arose after the sexual offences had been disclosed by the victims. The conflict could not have arisen out of PW9 wanting to take over the organisation which she was sponsoring. We find that the appellant was placed at the scene of the crime and had sexual intercourse with the victim.

After a re-evaluation of all the evidence on record, it is our considered view that the prosecution proved its case beyond reasonable doubt. We find no reason to fault the findings of the learned trial Judge. We accordingly uphold the conviction.

Consideration of sentence

It is trite law 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 12 year sentence meted on the appellant was manifestly harsh and excessive. 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.

Likewise, this court in the case of **Anyolitho Robert Vs Uganda Criminal Appeal No. 22 of 2012**, maintained an 18-year imprisonment sentence for aggravated defilement of a child of 14 years.

It is our considered view that the 12 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.

Lady Justice Catherine Bamugemereire will not sign the judgment because she does not agree with it.

Dated this 13th day of April 2022

Hon. Justice Elizabeth Musoke, JA

Hon. Justice Catherine Bamugemereire, JA

Hon. Justice Stephen Musota, JA