THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL No.27 OF 2020
(Coram: Egonda-Ntende, Bamugemereire, Madrama JJA)

MAGINO JOSEPH :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of J.F. Abodo J, dated 22nd January 2020 in HC-CR-SC-0055-2018 at the High Court of Uganda holden at Kampala)

JUDGMENT OF THE COURT

The appellant, **Joseph Magino** was indicted for the offence of Aggravated Defilement contrary to Section 129(3) and (4)(a) of the Penal Code Act.

The facts as accepted by the lower court were that on 29th August 2017, at Kasambya zone, Wakiso district while **B** (the 7year old victim) was washing the plates in the kitchen, the appellant called her out. He then took her behind the kitchen, removed her clothes and penetrated her vagina with his penis. The neighbours were not around that day. She told her father later in the evening that the appellant had performed a sexual act on her. Previously, the appellant did odd jobs for the family and hence was known to the victim and her family. The appellant was arrested, and the victim taken for medical examination. The appellant was subsequently convicted for the offence of aggravated defilement and subsequently sentenced to 28 years, 7 months, and 16 days imprisonment. Dissatisfied, the appellant appealed against both the conviction and sentence on three grounds.

1. THAT the learned trial judge erred in law and fact when she convicted the Appellant based on unsatisfactory evidence of the victim, PW4 and inconclusive medical evidence.
2. THAT the learned trial judge erred in law and fact when she denied the appellant an opportunity to re-call prosecution witnesses for cross-examination hence infringing on his rights to a fair hearing.
3. THAT the learned trial judge erred in law and fact when she imposed a harsh and manifestly excessive sentence against the Appellant.

At the hearing of the appeal the Appellant was represented by Learned Counsel Henry Kunya of Ms. Henry Kunya & Co. advocates on State Brief while the respondent was represented by the Learned Senior Assistant Director of Public Prosecutions Oola Sam. The appellant appeared via an audio-visual link from Murchison Bay Prison due to the prevailing Covid-19 restrictions and safety measures. Both Counsel filed written submissions prior to the hearing date.

The Appellant's Case

Counsel for the appellants argued all grounds separately, on Ground No.1 he submitted that the differences in the time at which the sexual act was committed cast doubt on the prosecution evidence. PW1 (the victim)had earlier on testified

that the incident happened during daytime after lunch yet PW3 (her elder sister) on the other hand, stated that the appellant came to their home at around 5pm and left them at home and later returned at 6pm. The detective, during cross examination told court that the offence must have been committed between 2pm and 3:30pm. Counsel submitted that the evidence adduced supports the fact that the offence could not have happened behind the kitchen since the kitchen is quite small. In addition, counsel submitted that upon evaluation of the evidence there was no sexual act committed. He defined a sexual act under as one envisaged under **Section 129(7)(a)** of the Penal Code Act. It was his contention that in this case, the victim's hymen was still intact basing on Exhibit P1. He suggested that on the whole the evidence remained uncorroborated and unsatisfactory.

Regarding Ground No.2 counsel submitted that section39 (1) of the Trial Indictment Act gives courts power to re-call and re-examine any person at any stage of the trial. Counsel submitted that defence counsel in the trial court made an application to re-call all prosecution witness but, unjustly, the trial Judge declined to grant the application.

As regards Ground No.3 he submitted that the trial judge totally ignored the requirement for following precedent and upholding consistency in respect to custodial sentences meted out against convicts. He prayed that the appeal be allowed and conviction quashed.

The Respondent's Case

Counsel for the respondent handled all grounds separately. On Ground No.1 Counsel did not agree with the appellant's submissions on the conviction being based on unsatisfactory evidence. He submitted that the incident happened in broad day light at 5pm and PW1 knew her attacker. Counsel argued that the size of the kitchen was immaterial since the sexual act took place behind the kitchen not inside. He submitted that the victim's evidence was clear since she was alone at home and there were no neighbours present. He submitted that the slightest penetration is enough to prove a sexual act. He further argued that there was no need to re-call witnesses since the prosecution witnesses had already been examined in the court by the advocate on state brief. Counsel for the appellant did not present a compelling reason to interfere with the sentence of 28 years 7 months and 16 days. Counsel for the Respondent argued that there was no merit in the appeal and that it should be dismissed.

Consideration by Court

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.113-10** to re-appraise the evidence and make its inferences on issues of law and fact. In **Uganda v George Wilson Simbwa SCCA No. 37 of 2005**, the Supreme Court while discussing the duty of the first appellate court held that.

"This being the first appellate court in this case, it is our duty to give the evidence on record as a whole that fresh and exhaustive scrutiny which the appellant is entitled to expect and draw our own conclusions of fact. However, as we never saw or heard the witnesses give evidence, we must make due allowance in that respect."

Bearing the above principles in mind, we shall handle all grounds separately.

Ground No.1

THAT the learned trial judge erred in law and fact when she convicted the Appellant based on unsatisfactory evidence of the victim, PW4 and inconclusive medical evidence.

Counsel for the appellant contended that the evidence on record was unsatisfactory because of the inconsistences in the testimonies as to what time the offence happened. He submitted that the victim PW1 testified that the incident happened after lunch and that the sister PW3 testified that it could have happened around 5:00pm yet the police officer at the scene PW5 testified that it may have happened between 2 and 3pm. We have carefully analysed the record of proceedings and found that, PW 1 (the victim) testified that *"it happened in the evening, it was after lunch. We had finished eating lunch…"* PW3 Pamela, the victim's older sister aged 22 testified that *"on that day, the accused came at 5pm…"* and lastly PW 5, D/ AIP informed court that *"the crime was committed between 2pm – 3:30pm that was what I was told."*

We find that it is only practical for a 7-year-old girl to describe time in accordance with the events of the day. The victim testified that the crime happened in the evening, "after lunch." This is not a contradiction since the evening comes after lunch depending on when such a family has lunch.It could be anything between 2:00pm and 5:00pm. PW3 testified that the incident occurred at 5pm; this estimation of time is more acceptable since it correlates with the description of PW1.

We find that PW5's testimony that the crime happened between 2pm and 3:30 pm does not affect the evidence, since he was not at the scene when it happened, and he also never disclosed to the court the source of that information. We find this to be a minor inconsistency which does not go to the root of the matter.

The law on minor inconsistences in evidence is clear. Major contradictions and inconsistencies will usually result in the evidence of the witnesses 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 deliberate untruthfulness on the part of the witness; see **Alfred Tajar v Uganda E.A.C.A Cr. Appeal NO. 167 of 1969 (unreported); Sarapio Tinkamalirwe v Uganda, Cr. Appeal NO. 27 of 1989 (SC) and Twinomugisha Alex and 2 others v Uganda, Cr. Appeal No. 35 of 2002 (SC).**

In the matter before us, our considered view is that the contradictions were minor and did not point to deliberate untruthfulness. The victim testified that the crime happened

after lunch, in the evening, this time could encompass 5pm as testified by the sister. We find this to be a minor inconsistency and not a deliberate untruthfulness.

Counsel for appellant submitted that PW1's evidence ought to be discounted since the space behind the kitchen was too small for the appellant to defile the victim without anyone noticing. Counsel should have keenly addressed his mind to the ingredients for the offence of aggravated defilement, and that the size or location of the crime scene is not an ingredient. We find that the trial judge addressed her mind to all the ingredients in this offence and the required standard of proof thereto and was correct in concluding that the offence of defilement was disclosed. Counsel for the appellant contended that no single soul witnessed the defilement which happened in broad day light. We have carefully reviewed the record and found the evidence explains why no one witnessed the defilement. PW1 testified that at the time the offence took place the neighbours were not home. We wonder why counsel for the appellant finds this unusual since as counsel submitted, no one would defile a girl with an audience.

Counsel for the appellant invited this court to find that there was no evidence of defilement since the hymen of the victim PW1 remained intact. His argument was that there was no proof of penetration.

In **Adamu Mubiru v Uganda Criminal Appeal No. 47 of 1997 (unreported)**, it was foundthat **however slight the penetration may be, it will suffice to sustain a conviction for the offence**

of defilement. We therefore agree with the learned trial judge who found that the bruises around the right vaginal surface and the mucous-like substances ***mucosa*** found on the child amounted to proof that penetration however slight, happened and there was a discharge which was from a foreign body.

Counsel for the appellant drew court's attention to the fact that it was only the victim's evidence against that the appellant and nothing else on record links the appellant to the said offence. We carefully reviewed this submission and having analysed the evidence of the child and the medical report, we find that the evidence of the victim in this case is primary, and it was corroborated by the medical report Exhibit P.1 which was PF3A, the medical preport. In **Baseeta Hussein v Uganda, SCCA No.35 of 1995**, it was held that:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

It is our finding that the victim was familiar with the appellant, that she properly identified the appellant. There is sufficient

proof of penetration. It is trite that penetration, however slight, is sufficient. We equally do find that Exhibit P1, the PF3A, the medical report, corroborates the testimony of PW1 that she was defiled.

Ground 1 of this appeal fails.

Ground No.2

THAT the learned trial judge erred in law and fact when she denied the appellant an opportunity to re-call prosecution witnesses for cross-examination hence infringing on his rights to a fair hearing.

Counsel for the appellant submitted that section 39(1) of the Trial on Indictment Act Cap 23 grants to the High Court power to re-examine any person already examined at any stage of any trial if it appears that the evidence of such person is essential in aiding court to arrive at a just decision of the case. The section in point stipulates as follows.

> **"The High Court may, at any stage of any trial under this Act, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his or her evidence appears to it essential to the just decision of the case."**

From the reading of this section, this power is discretionary and dependant on whether the court deems the evidence essential to the justice of any each individual case. The Evidence Act provides for the procedure on the order of examinations in Section 136. This order commences with the examination in chief, followed by cross examination, and lastly there may be re-examination. There is no law providing for recall of witnesses for a second cross-examination. From the perusal of the record of proceedings we are satisfied that the appellant had proper legal counsel, provided by the State who ably cross-examined all the witnesses. Although the appellant later engaged services of private counsel, it did not render the previous proceedings ineffective. As a matter of fact the trial judge in her ruling found that the accused was well-represented. Failure to recall prosecution witnesses for further cross-examination had no material effect on the evidence on record. Ground No.2 of this appeal fails.

Ground No. 3

THAT the learned trial judge erred in law and fact when she imposed a harsh and manifestly excessive sentence against the Appellant.

The principles that govern the appellate courts powers to interfere with sentence were laid down in **Kyalimpa Edward v Uganda SCCA No.70of 1995**, as follows

> "An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts

upon which a judge exercises his discretion. It is the practice that as an appellate Court, this Court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal, or unless Court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice. **Ogalo s/o Owura v R [1954] 21 E.A.C.A. 126, R v Mohamedali Jamal [1948] 15 E.A.C. A. 726**"

The Constitution (Sentencing Guidelines for Courts of judicature) (Practice) Directions 2013, provide for the sentencing range for the offence of aggravated defilement as 35 years and up to death. The trial judge sentenced the appellant to 28 years, 7 months and 6 days taking into consideration the mitigating factors.

Counsel for the appellant however challenged the severity of the sentence arguing that the learned trial judge totally ignored the requirement of following precedent and upholding consistency in respect of custodial sentences. The sentences passed by the trial Court must as much as circumstances may permit commensurate to those passed in previously decided cases having a resemblance of facts as the one in which sentence is being passed. The appellate Court, may if called upon to do so, be justified in interfering with the sentences which contravene this principle.

The trial judge in the instant the case took cognisance of the need for deterrence and reformation while passing sentence. In **Ederema Tomasi v Uganda Criminal Appeal No.554 of 2014** the appellant was convicted for the offence of aggravated defilement and sentenced to 25 years imprisonment. This court set aside the sentence of 25 years and replaced them with 18 years. Similarly, **in Byera Denis v Uganda Criminal Appeal No. 99 of 2012,** this Court substituted a sentence of 30 years' imprisonment with one of 20 years' imprisonment that it considered appropriate in a case of aggravated defilement. The victim in that case was aged only 3 years. Although she also considered the appellant's ***allocutus,*** mitigating factors and time spent on remand, we still find that a sentence of 28 years, 7 months and 16 days in this case is manifestly harsh and excessive. In **Ayugo silver v Uganda Criminal Appeal No.38 of 2014** the appellant was HIV positive and defiled a 7-year-old girl. This court considered the 2 years he had spent on remand and sentenced the appellant to 21 years' imprisonment.

Clearly, the sentence of 28 years, 7 months' and 16 days is much higher than the range of sentences imposed in the cases cited above. We also find that the trial Judge took into consideration the time spent on remand. We, however, find the sentence harsh and excessive, and we hereby set it aside.

In determination of a fresh sentence, we shall invoke **Section 11 of the Judicature Act, Cap. 13** which for the purposes of determining an appeal vests this Court with the powers of the

trial Court, these powers include determining a fresh sentence, where the sentence of the trial Court is set aside for being harsh and excessive. The appellant was a first-time offender aged 22, we sentence him to 15 years' imprisonment from the date of conviction.

In conclusion appeal succeeds in part. The conviction is sustained for the reasons above-stated. The sentence is accordingly reviewed.

Dated at **Kampala** this ..... **day** of **2022**

HON. MR. JUSTICE FREDERICK EGONDA NTENDE
JUSTICE OF APPEAL

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

HON. MR. JUSTICE CHRISTOPHER MADRAMA
JUSTICE OF APPEAL