THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0404 OF 2019

KAWESA IVAN::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Kawesa, J. delivered on 27th September, 2019 in Criminal Session Case No. 011 of 2018)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA
HON. LADY JUSTICE EVA K. LUSWATA, JA

JUDGMENT OF THE COURT

Background

On 27th September, 2019, the High Court (Kawesa, J.) convicted the appellant of the offence of **Aggravated Defilement** contrary to **Section 129 (3) and 4 (a)** of the **Penal Code Act, Cap. 120 (as amended)**. The appellant was sentenced to 20 years imprisonment.

The decision of the High Court followed the trial of the appellant on an indictment that alleged he had on the 3rd day of May, 2017, at Busolo Village in Gomba District performed a sexual act with K.M (the victim), a girl below the age of 14 years. The victim was aged 9 years at the time.

The facts of the case, according to the findings of the trial Court, can be summarized as follows:

The appellant and the victim lived at Maseruka Village, Mpenja Sub-County in Gomba District. There was a tea plantation which was partly in that Village called Lusolo Tea Farm. On 3rd May, 2017, at around 1.00 p.m, the appellant took the victim to that plantation and had sexual intercourse with her. The victim, in the process, made an alarm that attracted the attention of PW2 Namakula Grace who, on going to the scene, found the victim crying. PW2 spoke to the victim, and she told her that the appellant had defiled her. PW2 saw the appellant at the scene but he ran away when she tried to call him.

PW2 also examined the victim and found semen and blood in her private parts. PW2 took the victim to her father PW1 Sempijja William, who reported to the area authorities. The appellant was subsequently arrested and charged with defilement. He was tried and convicted as charged and thereafter sentenced as stated earlier.

Being dissatisfied, the appellant now appeals against the decision of the learned trial Judge on the following grounds:

"1. **That the learned trial Judge erred in law and fact when he failed to appraise the prosecution evidence of the alleged crime in absence of police witnesses testimony alongside torture defense evidence and draw correct inferences of fact of fact of appellant not guilty thereby wrongly convicted appellant of offence of aggravated defilement. (sic)**

2. **That the learned trial Judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant."**

The respondent opposed the appeal.

Representation

At the hearing, Mr. Seth M Rukundo, learned counsel, appeared for the appellant on State Brief. Mr. Kyomuhendo Joseph, learned Chief State Attorney in the Office of the Director Public Prosecutions, appeared for the respondent. The appellant followed the hearing via Zoom Video Technology, while he remained at the prison facility where he was incarcerated.

The Court, at the hearing, adopted the written submissions filed in support of the respective cases for either side, and the same have been considered in this judgment.

Appellant's submissions

Ground 1

Counsel for the appellant submitted that the learned trial Judge erred when he convicted the appellant despite contradictions as to the date of commission of the crime. He pointed out that whereas the Charge Sheet indicated that the victim was defiled on 5th May, 2017, the victim testified in Court that she was defiled on 3rd May, 2017. Further, counsel contended that the prosecution should have brought a police officer to explain the

contradiction in the dates but had not done so. Further, on the same point, counsel cited the case of **Maina vs. R [1970] EA 370** for the proposition that corroboration is mandatory in all sexual offences, and submitted that the failure to bring a police officer to corroborate the victim's evidence as to the date left doubt in the prosecution case, which should have been resolved by acquitting the appellant. Counsel also cited the case of **Otti vs. Uganda [199] KALR 31**, for the proposition that failure of investigating officers to testify should lead to an inference that they would have given adverse evidence.

It was also submitted that there was no credible evidence besides that of the victim which identified the appellant as the person who defiled the victim. Counsel pointed out that besides the victim's testimony, the other evidence relied on to identify the appellant was that of PW1 Ssempijja William and PW2 Namakula Grace. Counsel contended that PW1's evidence was unreliable because it was hearsay evidence, while that of PW2 was most likely false, because as stated in the **Maina case (supra), "it is really dangerous to convict on the evidence of a girl alone because human experience has shown that girls sometimes tell an entirely false story which is very easy to refute".** Counsel seemed to suggest that PW2's evidence was most likely false because she was a woman testifying about a sexual offence. On the other hand, according to counsel, the appellant gave cogent and credible evidence denying the allegations against him, yet the learned trial Judge erroneously overlooked it.

Furthermore, counsel submitted that the learned trial Judge erred when he failed to conduct an inquiry into allegations made by the appellant that he had been tortured while in police custody. Counsel pointed to allegations made while the appellant testified, that while in custody at Maddu Police, he was assaulted and lost a tooth. According to counsel on hearing that evidence, the learned trial Judge was, pursuant to **Section 8 (1) and (2) of the Human Rights Enforcement Act, 2019** and **Article 44 (a) of the 1995 Constitution**, expected to suspend proceedings and conduct an inquiry into the appellant's allegations. Counsel further submitted that there were other instances of human rights violations which the trial Court overlooked, such as the illegal detention of the appellant for more than 48

hours before he was charged in Court contrary to **Article 23 (4) (b) of the 1995 Constitution**.

In view of the above, submissions, counsel contended that the conviction of the appellant was unsafe and ought to be set aside.

Ground 2

Counsel submitted that the sentence of 20 years imprisonment that the learned trial Judge imposed on the appellant was harsh and excessive in the circumstances of the case. According to counsel, the length of the sentence denied the appellant an opportunity to leave prison at a young age and reconcile with his community. Counsel prayed that this Court reduces the sentence to 5 years imprisonment.

Respondent's submissions

Counsel for the respondent began his submissions by raising a preliminary objection that the manner of drafting of ground 1 offended the provisions of **Rule 66 (2)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**, in that whereas the Rule requires grounds of appeal to specify the grounds of objection to the decision appealed from, the impugned ground did not do so, and instead contained generalized allegations. Counsel cited the case of **Sseremba vs. Uganda, Criminal Appeal No. 480 of 2017 (unreported)** where this Court struck out a ground that was drafted in a similar manner as ground 1 of the present appeal.

On the merits, counsel argued each ground separately.

Ground 1

On the contention that the learned trial Judge overlooked contradictions on the date of commission of the offence, counsel submitted that this was untrue as the learned trial Judge rightly considered that the offence was committed on 3rd May, 2017 although the victim was medically examined on 5th May, 2017.

With regard to the contention that the prosecution's case was affected by failure to adduce evidence of an investigating police officer, counsel responded that under **Section 133 of the Evidence Act, Cap. 6**, no

particular number of witnesses is required to prove a fact. Counsel also referred to the case of **Ntambala vs. Uganda, Supreme Court Criminal Appeal No. 34 of 2015 (unreported)** where it was emphasized that a Court can base a conviction on the evidence of the victim alone if it finds the evidence truthful and reliable.

As for the submission that the victim's evidence required corroboration, counsel responded that this was not the case. He submitted that the rule based on **Section 40 (3)** of the **Trial on Indictments Act, Cap. 23** is that only unsworn evidence of a child requires corroboration. For this submission, counsel relied on the case of **Senyondo vs. Uganda, Court of Appeal Criminal Appeal No. 267 of 2007** (unreported) quoting from **Akol vs. Uganda, Supreme Court Criminal Appeal No. 23 of 1992**. Thus, as the evidence of the victim in the present case was sworn evidence and it did not require corroboration. Further still, counsel submitted that in any case, the victim's evidence was corroborated by that of PW2 who saw the appellant escaping into a nearby eucalyptus forest after defiling the victim. Counsel contended that the prosecution evidence was credible and proved the charges against the appellant beyond reasonable doubt.

Ground 2

Counsel refuted the appellant's contention that the sentence that the learned trial Judge imposed was manifestly harsh and excessive. He pointed out that the offence of aggravated defilement, by law, carries a maximum sentence of death, which was not imposed, but the learned trial Judge after considering the mitigating and aggravating factors imposed a custodial sentence of 20 years imprisonment. Further, it was submitted that longer sentences have been deemed appropriate in similar cases, such as **Ssentogo vs. Uganda, Criminal Appeals Nos. 73 and 111 of 2016 (unreported)** where this Court imposed a sentence of 25 years imprisonment on an appellant who defiled a 5 year old girl, and in **Ouma vs. Uganda, Criminal Appeal No. 20 of 2016 (unreported)** where the Supreme Court imposed a sentence of 26 ½ years where the appellant defiled a child of 3 ½ years. Counsel contended that the sentence of 20

years was justified in the circumstances as the appellant, a 19-year-old man had defiled a 9 year old girl, and should be upheld.

Resolution of the appeal

We have carefully studied the record, and considered the submissions of counsel for either side and the law and authorities referred to therein. We have also considered other applicable authorities that were not cited.

This is a first appeal from a decision of the High Court. We are therefore mindful that this Court is, pursuant to **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions, S.I 13-10**, expected to reappraise the evidence and draw inferences of fact. This Court is also, as per the authority of **Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1998 (unreported)**, expected to conduct a review and come up with its own conclusions. In **Kifamunte**, the Court stated:

> **"We agree that on 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 shall resolve each ground separately.

Ground 1

The submissions for the appellant on ground 1 raised several points. First, counsel submitted that there was a contradiction as to the date of commission of the offence, that is, 3rd May, 2017 according to the prosecution witnesses, including the victim, and 5th May, 2017 according to the Charge Sheet. We note that the victim, while testifying as PW4, told Court that the appellant defiled her on 3rd May, 2017, and this was corroborated by PW2 Namakula Grace who testified that it was on the same date that she had met the victim and the latter had told her that she had been defiled. It is true, as submitted for the appellant, that the charge sheet, in the particulars of the offence, indicated that the victim was defiled on 5th

May, 2017, but we find that this was merely an error, which was clarified by the evidence of the prosecution witnesses given on oath.

The second point is that the learned trial Judge should not have believed the evidence of the victim and that of PW2, because it was uncorroborated yet the rule articulated in **Maina vs. R [1970] EA 370** is that evidence of women in sexual offences is inherently false and requires corroboration. We do not believe that any such rule exists. In **Ntambala vs. Uganda, Criminal Appeal No. 35 of 2015 (unreported)**, the Supreme Court held that a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. Thus corroboration is not mandatory. Moreover, as was pointed out by counsel for the respondent, PW2's evidence offered corroboration to that of the victim. We reject this second point.

We also reject a third point made by counsel for the appellant that there was a requirement to adduce the evidence of the investigating police officer to support the victim's evidence. The position is that whereas it may, in each case, be desirable to adduce evidence of the investigating police officer, a conviction may nonetheless be entered if despite that omission, the other evidence proves the case against an accused person beyond reasonable doubt. In **Bogere vs. Uganda, Criminal Appeal No. 1 of 1997 (unreported)**, the Supreme Court stated:

> **"In the Court of Appeal, the learned DPP conceded that the arresting and investigating officers ought to have been called to give evidence, He argued, however that the omission to adduce that evidence was not fatal lo the conviction because there was other evidence which proved the charges beyond reasonable doubt. In support of that argument he relied on the decision in Alfred Bumbo and Others V s Uganda Cr. App. No.28 of 1994 (unreported) in which this Court said:**
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> **"While it is desirable that the evidence of a police investigating officer and of arrest of an accused person by the police, should always be given where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of an accused. All must depend on the circumstances of each case whether police evidence is essential, in addition, to prove the charges"**

We recognise that this is a correct statement of the legal position."

In the present case, we recognize that under **Section 133** of the **Evidence Act, Cap. 6**, no particular number of witnesses is required to prove a fact, and we are satisfied that it was unnecessary to call the investigating police officer as the evidence of the victim and PW2 was sufficient to prove the case against the appellant.

With regard to the appellant's contention that the proceedings against the appellant ought to have been suspended to allow for investigation into allegations of torture against the appellant as required under the Human Rights (Enforcement) Act, 2019. The alleged human rights abuses were that the appellant was assaulted by authorities in the process of his arrest, and further that the appellant was kept in custody without charge beyond the 48-hour period prescribed under **Article 23 (4) (b)** of the **1995 Constitution**. We note that the appellant did not apply to the learned trial Judge for redress for the alleged violation of his rights, as required under **Section 3** of the Human Rights (Enforcement) Act, 2019. He cannot now on appeal fault the learned trial Judge for not taking any action. We also reject this contention. Having rejected all the points raised in the appellant's submissions, we disallow ground 1.

Ground 2

Ground 2 alleges that the sentence of 20 years imprisonment imposed on the appellant was harsh and excessive and that a shorter sentence was more appropriate. In the submissions, counsel for the appellant stressed that the sentence gave the appellant no chance to reconcile with his community, and for that reason was harsh and excessive. Counsel for the respondent submitted that the sentence imposed on the appellant was justified and similar to cases imposed in previous cases.

We must emphasize that an appellate Court may interfere with the sentence imposed by the trial Court in limited circumstances, such as where the sentence was illegal, or manifestly harsh and excessive or where the trial Court omitted to consider a material factor. **See: Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported).** An appellate Court will not interfere because, had it handled

the sentencing, it would have imposed a more lenient sentence than that imposed by the trial Court. **Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126**

The learned trial Judge made the following comments while sentencing the appellant:

> **"The maximum sentence is death. The beginning point is 30yrs. The aggravating factors are that accused was 19 yet victim was 9 years. The offence is rampant. Mitigation is that he is a first offender. He has been on remand. Court hereby passes a reformatory sentence which will also have a deterrence effect. He is sentenced to 20 years imprisonment running from the day of remand. R/A explained."**

The above comments indicate that the learned trial Judge mentioned the key aggravating and mitigating factors. However, we think that the learned trial Judge did not give due consideration to the youthful age of the appellant at the time of commission of the offence. The appellant, while testifying in Court in 2019, said that he was 21 years. He was therefore 19 years old at the time of commission of the offence, two years earlier. The learned trial Judge ought to have considered that the appellant had just passed the dividing line, of 18 years, between childhood and adulthood, and reflected that consideration with a shorter sentence than he imposed. We agree, as stated in the English and Wales Court of Appeal case of **R vs. Clarke and 2 Others [2018] EWCA Crim 185**, that the youth and maturity of an offender are factors that should inform any sentencing decision. In our view, a sentence of 20 years imprisonment for aggravated defilement is of the nature given to mature adults, and was clearly harsh and excessive in the present case. We therefore set it aside.

We shall proceed to determine an appropriate fresh sentence pursuant to the powers granted to this Court under Section 11 of the Judicature Act, Cap. 13. We also recognize that the sentences in previously decided cases range anywhere from 11 to 15 years imprisonment, although in some exceptional cases, longer sentences have been imposed. **See: Tiboruhanga vs. Uganda, Court of Appeal Criminal Appeal No. 0655 of 2014.** Having considered all the relevant circumstances, we find a sentence of 15 years imprisonment appropriate. From that sentence, we

shall deduct the period of 2 years, 4 months and 24 days which the appellant spent on remand, leaving a sentence of 12 years, 7 months and 6 days imprisonment, which the appellant shall serve from the date of his conviction on 27th September, 2019.

Ground 2 therefore succeeds.

For the above reasons, the appeal against conviction fails while the appeal against sentence succeeds on the terms stated in this judgment.

We so order.

Dated at Kampala this 7th day of Dec 2022.

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Elizabeth Musoke

Justice of Appeal

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Christopher Gashirabake

Justice of Appeal

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Eva K. Luswata

Justice of Appeal