THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA.

CRIMINAL APPEAL NO. 045 OF 2013.

(Coram: Buteera JA, Mulyagonja JA, Luswata JA)

LUYENJE SAMUEL..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Uganda Faith Mwondha, J) at Mubende delivered on the 24th April 2013)

JUDGMENT

INTRODUCTION

1] The appellant was indicted and convicted of the offence of aggravated defilement contrary to section 129 (3) and 4 (d) of the Penal Code Act Cap 120 Laws of Uganda. He was charged of performing an unlawful sexual act with one TR, a girl aged 15 years, one with a physical and mental disability.

2] The facts admitted by the lower court are that sometime during April 2013, one Sepiryano Asaba found the appellant performing a sexual act with the child TR in a banana plantation. He reported the matter to one Ronald and Nyinakabeza Yakadia the child's mother. Nyinakabeza intercepted the appellant and with help of police in the area, had him arrested and held in custody at the Kiboga Police Station. TR was on 11/4/20 examined at the Kiboga Main Hospital after which the appellant was charged with the offence of defilement. He denied the charge and the case went to full trial.

3] On 24/4/2013, the appellant was convicted and sentenced to 37 years' imprisonment. Being aggrieved with the decision, the appellant preferred an appeal on the following grounds:

i. *The learned trial judge erred in law and fact when she convicted the appellant based on evidence marred with inconsistencies and contradictions hence occasioning a miscarriage of justice to the appellant*

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ii. *The learned Judge erred in law and fact when she passed an illegal and/or manifestly harsh and excessive sentence* without due consideration of both periods spent on remand and mitigating factors.

Representation

4] At the hearing of the appeal, the appellant was represented by Masereka Chan Geoffrey, learned counsel, and the respondent was represented by Ms. Immaculate Angutoko, a Chief State Attorney from the chambers of the Director of Public Prosecutions (DPP). Both parties filed written submissions which this court will consider while making her decision.

Ground I

Submissions of the appellant

5] Appellant's counsel pointed out what he believed were inconsistencies in some evidence. Firstly, that in PF3 the examining doctor recorded that the TR had minor injuries on her private parts that were a week old, but no evidence was adduced to show how he determine the age of those injuries. Appellant's counsel argued further that the precision of the examination was affected by the same officer's observation that TR had earlier been defiled several times. Also that PW2 Nyinakabeza who supported the presence of those injuries could not confirm who was responsible. Counsel considered that that this cast doubt over the appellant's participation. Counsel in addition submitted it contradictory that PW1, Asaba, who claimed not to have known the appellant before he found him committing the offence, could have informed PW2 that someone called "Sam" had defiled TR.

6] Counsel also pointed out that the trial Judge ought to have taken note of the fact that PW2's testimony was based on what PW1 and TR informed her yet TR was confirmed before the trial to have impaired speech, judgment, memory and insight, and an inappropriate mood. He in addition considered it contradictory that although PW1 submitted that the appellant retorted that nothing could be done to him, PW1 had a different account. That when PW2 responded to the report from PW1 she proceeded and found TR following the appellant and asking him for Shs. 200/=

and he tried to run away as she held his coat. In conclusion that, had the trial Judge considered all the above inconsistencies and contradictions, in the prosecution case, she would have found that they had not proved the case beyond reasonable doubt and accordingly acquitted the appellant.

Submissions of the respondent

7] Ms. Angutoko opposed the appeal. She contended that there was strong evidence admitted both in the preliminary stages and during the trial to prove the case beyond reasonable doubt. Firstly, PF3 which was admitted under Section 66 Trial on Indictments Act (TID) proved that TR was sexually assaulted. Secondly, the evidence of PW1 and PW2 placed the appellant at the scene of crime. In particular, PW1 who found the appellant in *flagrante delicto* with the victim immediately reported to PW2 who proceeded to the crime scene and found TR following the appellant asking for money. That the latter evidence corroborated the evidence of PW1, the eye witness. Citing authority, she argued that even if this Court were to find any contradictions or inconsistencies in the account of those two witnesses, they were minor and did not go to the root of the case or point to deliberate untruthfulness.

Submissions in rejoinder

8] Appellant's counsel rejoined by citing more authority on the principles of contradictions and inconsistencies. He then appeared to introduce a new argument that the court did not consider the settled principle that it is unsafe to rely on the testimony of a single identifying witness and thereby came to a wrong conclusion that the appellant was properly identified.

Our decision

9] We have carefully considered the appellant's appeal, the submissions of counsel and the law related to the issues raised. This being a first appeal we are required under Rule 30(1) of the COA Rules to re-appraise the evidence and make our own

inferences on issues of law and fact while making allowance for the fact that we neither saw nor heard the witnesses. See **Pandya v Republic (1957)EA 336** and **Bogere Moses V Uganda SC Cr Appeal No. 1/1997.**

10] We consider the first ground to lack specificity, which is a mandatory requirement under **Rule 66(2) Judicature (Court of Appeal Rules) Directions (hereinafter COA Rules)**. However, as a first appellate court, we are mandated to look at the whole of the record and find out whether the evidence, which is clearly related to the crucial ingredients of the offence of aggravated defilement, was blemished or spoiled by inconsistencies and contradictions, as contended for the appellant. Both counsel appear to be in agreement on the law relating to contradictions and inconsistencies. Both this Court and the Supreme Court have on numerous occasions pronounced themselves on the settled principles on this subject. We choose to rely on the decision in **Candiga Swadick V Uganda CA Cr Appeal No. 23/2012** were it was held that:

"The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will 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 also **Alfred Taja V Uganda EACA Cr Appeal No. 167/1969 and Serapio Tinkamalirwe V Uganda SC Cr App No. 27/1989.**

Mr. Masereka pointed to four areas of the prosecution evidence that he considered contradictory.

11] First, as pointed out for the respondent, P Exh. 1 the medical report was on 1/4/2015 admitted into evidence with no contest. Under Section 66 TID, its contents were deemed to be correct. We have perused the record and confirmed that the examination was carried out on 11/4/2013. The examining officer (EO) recorded observing multiple minor bruises in TR's private parts and a raptured hymen. He did not peg any age to those injuries but recorded that the reputed hymen was a sign that TR might have been defiled several times. According to both PW1 and PW2, TR

was taken for medical examination a day after she was defiled. Thus the EO's observations which were made early enough, were correct and consistent with the rest of the evidence. PW2's evidence that TR had ever been defiled before by unknown persons, did not contradict or erase the strong evidence that the appellant was found defiling her the day before.

12] It is true, as pointed out by Advocate Masereka that although PW1 claimed not to have known the appellant before the incident, PW2 conversely submitted that when he made the first report to her, he claimed one *"Sam"* was defiling TR. We do not consider this contradictory because after receiving the report, PW2 immediately proceeded towards Salongo's banana plantation that PW2 stated to be the scene of crime. Before getting there, he found TR following the appellant and asking him for Shs. 200 whereupon she apprehended him. Both PW1 and PW2 were taken to Kiboga Police Station together and PW1 again narrated what he had seen, thereby confirming that he saw the appellant and no other defiling TR. Had he not known the appellant the first time, he knew him by the time the report was made and the fact that he referred to him by name was only a minor variation that did not point to deliberate untruthfulness.

13] Again we see no contradiction or inconsistency in the testimony of PW1 that he observed the offence from a distance of 40 meters away. His evidence as an identifying witness was neither seriously challenged at the trial nor raised as a ground on appeal. On the contrary, the efforts to challenge this evidence, only resulted in further evidence to strengthen it. It was an afterthought raised by Mr. Masereka in his submissions in rejoinder. His colleague had no opportunity to rebut it and we likewise will not consider it. Further, there was no inconsistency in PW1's evidence that the appellant was boasting that nothing could be done to him and that of PW2 that she found him ahead of TR before she held him by the coat to prevent him from running away. The two incidents did not happen at exactly the same time because PW1 first left the scene and proceeded to report to PW2 what he had seen. Again if it was a contradiction, it was minor and did not, in our opinion, discredit the evidence of both PW1 and PW2.

14] We accordingly find no merit in the first ground and it fails.

Ground II

Submissions of both parties

15] Citing ample authority, counsel invited this Court to give the appellant a lesser and more fair sentence because the Trial Judge did not consider the one year and 19 days the appellant spent on remand or the mitigating factors presented at the trial.

16] Ms. Angutoko equally relied on varied authority in her reply. She pointed out that sentencing is a discretionary function of the Court and only fettered if the Court acted on wrong principle, overlooked some material fact, or where a manifestly harsh and excessive sentence is imposed in the circumstances of the case. She drew our attention to the allocution proceedings at the trial contending that the trial Judge did in his sentencing ruling, consider both the mitigating and aggravating factors as well as the Sentencing Guidelines.

17] Nevertheless, Ms. Angutoko conceded that the trial Judge did not take into consideration the time spent on remand as required of her by Article 23(8) of the Constitution. After submitting a calculation of what she believed to be the period the appellant spent on remand, and citing ample authority of this and the Supreme Court, she invited this court to consider the sentence of 37 years as appropriate in the circumstances.

Our decision

18] As pointed out by both counsel, it is now a well settled position in law, that this Court as an appellate court will only interfere with a sentence imposed by a trial court in a situation where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with the sentence, where the trial court has not considered a material factor in the case, or has imposed a sentence which is harsh and manifestly excessive in the circumstances. **See Bashir Ssali v Uganda [2005] UGSC 21, Ninsiima Gilbert v Uganda [2014] UGCA 65, Kiwalabye Bernard V Uganda SC Cr App. No. 143 of 2001 (unreported)** and **Livingstone Kakooza v Uganda [1994] UGSC 17**.

19] The appellant contended that a sentence of 37 years' imprisonment for aggravated defilement was manifestly harsh and excessive. He complained that the trial Judge omitted to consider the mitigating factors presented at the trial in his favour, which resulted in a miscarriage of justice. In response, the state argued that sentencing is a matter of judicial discretion that has to be exercised with due regard to the Sentencing Guidelines. In their view, in the circumstances of this case, the sentence suited the offence.

20] We have confirmed from pages 11 and 12 of the record that both counsel were allowed to make submissions in the allocution proceedings, by presenting aggravating and mitigating factors. Specifically, it was stated in mitigation that the appellant who was a first offender, was repentant and remorseful and regretted the act. In addition, that he was old and had a disabled wife. His counsel thereby prayed for leniency from the court. Contrary to Mr. Masereka's submissions, the trial Judge did to some extent consider those submissions before giving a sentence. She stated, and we quote:

> *"Though the convict is a first offender, this offence is very rampant in this area. People do not want to turn from their ways. The vulnerable in society should be protected by Courts of Law. The victim was an embicile (sic) and this is only 2012 case-(sic) taking all the above into account, he is sentenced (to) 37 years' imprisonment"*

21] We emphasize that the Court was not required to repeat counsels' submissions verbatim. It was enough that she took into account the appellant's record. The facts of his remorse were in fact debatable and having a disabled wife required proof. Accordingly, there would be no sound reason for us to interfere with the sentence on that account alone.

22] That said, it is evident that the trial Judge omitted to take into account the period spent on remand. Indeed, the respondent conceded to that serious mistake and even made suggestions on how this court should proceed. The provisions of Article 23(8) are clear. The time a convict has spent in lawful custody of the state must be accounted for and deducted from the sentence given. Where the Court does not do so, the sentence given is an illegal

sentence, one that cannot be allowed to stand. We therefore set aside the sentence of 37 years. Having done so, we are mandated under Section 11 Judicature Act to impose an appropriate sentence.

23] In making our decision to arrive at a just sentence that suits the facts before us, we are guided by the Supreme Court judgments in **Aharikurinda Yusitina V Uganda SC Cr Appeal No. 27/2015** and **Kakooza V Uganda (1994) UGSC 17** that the duty of appellate Courts regarding sentencing must ensure consistency with cases that have similar facts. We hasten to add that in the same case, the same court cautioned that since sentencing is not a matter of mechanical process but judicial discretion, perfect uniformity is hardly possible. We agree, but find it useful to consider similarly placed appeals previously decided by this Court on sentencing in cases of aggravated defilement of children with mental or physical impairment. We shall now consider some of them.

24] In **Kalule Ronald V Uganda, Cr. Appeal No. 132/2014**, a sentence of 30 years was reduced to 16 years. In **Apiku Ensio V Uganda Cr. Appeal No. 751/2015** a sentence of 25 years was reduced to 20 years from which the period spent on remand was deducted. We note that although the court in **Kalule's** case gave no special attention to the victim's disability, the trial Court in **Apiku** had done so. The trial Judge decried the tendency of adult males to target children with disability who were vulnerable and then called for deterrent sentences.

25] The undisputed facts here are that the victim was a child with impaired physical and mental capacity. PW1 mentioned that TR was *"deaf and could not talk but could walk like any other person"*. That disability was confirmed by both PW2 and the EO. TR would thus fall into the category of a child who was very vulnerable and required maximum protection as provided under Article 34(7) of the Constitution. She could neither fight off the aggressor, nor raise an alarm to attract assistance. PW2 mentioned that the appellant stayed in the same village. It is possible then that he knew TR before and was aware of her disabilities. It is taken then that he knowingly took advantage of her vulnerability and thereafter boasted that nothing could be done to him. He raised no defence on all those facts, which we can then safely confirm.

26] Taking into consideration all the above factors, we find a sentence of 22 years to be appropriate in the circumstances. From that sentence we deduct the period spent on remand, which is one year and 19 days, to come to our sentence of 20 years, 11 months and 19 days.

27] As a result, this appeal has succeeded in part. The appellant shall serve a term of 20 years 11 months and 19 days' imprisonment with effect from 24/4/2013, the date on which he was convicted by the trial Court.

DATED at Kampala this....23rd.....day of.....December.....2022.

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RICHARD BUTEERA JA

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IRENE MULYAGONJA JA

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EVA K. LUSWATA JA