THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: [Richard Buteera, DCJ; Elizabeth Musoke, JA and Cheborion Barishaki, JA]

CRIMINAL APPEAL NO. 268 OF 2015

KABAZI ISSA::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Arising from the decision of the High Court by Elizabeth Jane Alividza, J in High Court Criminal case No.093 of 2012, dated the 23rd day of July 2015)

JUDGMENT OF THE COURT

Introduction

The appellant, Kabazi Issa was indicted with 2 counts of Aggravated Defilement contrary to **Section 129 (3) and (4) of the Penal Code Act.** Justice Elizabeth Jane Alividza, J, convicted and sentenced the appellant to 32 years imprisonment on each count, the sentences were to run concurrently.

Background to the appeal

It was alleged that in the month of March 2012 at Lwanjaba landing site in Wakiso District, the appellant performed sexual acts with Nakabuye Joan (count 1) and Nakanwagi Passy (count 2), girls under the age of 14 years.

The case for the prosecution was that the appellant defiled several girls, gave them money and threatened to bewitch and kill them if they told anyone.

In March 2012 at Lwajaba, Nkumba, there was a misunderstanding between a group of girls who were fighting over the fact that one of them had more money than the others. When the adults inquired further, it was discovered that they had been getting money from the appellant who was performing sexual acts on them. The victims' mothers reported the matter to the LC1 Chairman who reported the matter to the Police. The appellant was beaten by the residents and he was later arrested and taken to Kasenyi Police post.

The appellant was charged, tried and convicted of both counts of Aggravated Defilement. He was sentenced to 35 years imprisonment on each count, from which the trial Judge deducted the 3 years spent on remand, which left the appellant with 32 years' imprisonment to serve. The sentence was to run concurrently.

Being aggrieved by the decision of the trial Court, the appellant appeals before this Court against conviction and sentence on the following grounds:

1. **The learned trial Judge erred in law and fact when she disregarded the discrepancies and inconsistencies in the prosecution evidence on record thereby occasioning a miscarriage of justice.**

2. **Without prejudice to the foregoing, the learned trial judge erred in law and fact when she sentenced the appellant to 32 years imprisonment, which sentence is illegal, manifestly harsh and excessive in the circumstances.**

Legal representation

At the hearing, Mr. Kumbuga Richard appeared for the appellant on State brief. Ms. Fatina Nakafeero, a Chief State Attorney, appeared for the respondent.

Due to the COVID-19 pandemic restrictions, the appellant was not physically present in Court but attended the proceedings via video link using Zoom technology from Prisons.

Both counsel filed their written submissions.

<u>Submissions of counsel on ground 1</u>

1. **The learned trial Judge erred in law and fact when she disregarded the discrepancies and inconsistencies in the prosecution evidence on record thereby occasioning a miscarriage of justice.**

Counsel for the appellant submitted that the ingredient of participation was not proved by the prosecution. He argued that there were major inconsistencies in the evidence of the prosecution witnesses as seen below:-

1. That the evidence of the victim's medical reports on Police form 3A is to the effect that both the victim's hymens were intact and there was no sign of defilement. Counsel argued that this evidence is inconsistent with the victim's evidence in which they state that there was actual sexual intercourse.
2. The retraction of PW1's statement that the appellant had confessed to committing the offence.
3. Inconsistencies in the prosecution witness evidence as to which exact girls were quarrelling about who had more money.
4. Inconsistencies as to who told PW3 about what the appellant was doing to the victims.
5. Inconsistencies as to whether PW4's mother found out about PW4's defilement while she was in P.4 or P.5.
6. Whether PW5 (the 2nd victim) really knew the appellant as she stated that when she left the appellant's home, she told the mother what happened and the appellant was arrested, yet the appellant was arrested under different circumstances.

Counsel argued that the inconsistencies and contradictions raised above show that the appellant did not perform the alleged sexual acts upon the victims and that he was being framed. He relied on the case of ***Candiga Swadick vs. Uganda, Court of Appeal Criminal Appeal No. 23 of 2012,*** where Court held: ***"The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on other hand will only lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness..."***

Counsel therefore submitted that had the learned trial Judge addressed her mind to all the contradictory facts, she would have reached a conclusion that the appellant did not perform the alleged sexual acts upon the victim's or that he was being framed.

On the other hand, counsel for the respondent submitted that **section 129 (3) of the Penal Code Amendment Act 2007**, provides:

> **"Any person who performs a sexual act with another person who is below the age of 18 years in any of the circumstances specified in sub**

section (4) commits a felony called aggravated defilement and is on conviction by the High Court liable to suffer death."

She submitted that **section 129 of the Penal Code Amendment Act 2007**, defines a sexual act for purposes of the section to mean:-

a) **"Penetration of the vagina, mouth or anus however slight, of any person by a sexual organ.**
b) **The unlawful use of any object or organ by a person on another person's sexual organ."**

Counsel thus submitted that, from the foregoing definition of a sexual act, the presence of penetration or injuries is not mandatory in proving defilement anymore. She averred that the intention of the amendment Act was to widen the definition of defilement and it's implication is that even a mere touch of the victim's sexual organ by either the sexual organ of the suspect or even an object used by the suspect is sufficient to prove a sexual act in defilement.

She contended that the position on proof of a sexual act has been laid down in several cases of this Court and the Supreme Court. Counsel cited the case of ***Baseeta Hussein vs. Uganda, Supreme Court Criminal Appeal No.35 of 1995,*** where Court held: ***"the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victim's own evidence and corroborated with medical or any other evidence."***

Counsel further relied on the case of Private ***Wepukhulu Nyunguli vs. Uganda, Supreme Court Criminal Appeal No.21 of 2001,*** where Court held: ***"whether or not sexual intercourse took place in a particular case is a matter of fact to be established by the evidence. Normally in sexual offences, the victim's evidence is the best evidence on the issue of penetration and even identification but other cogent evidence may also suffice to prove acts of sexual intercourse."***

Counsel submitted that the flow of the testimonies of PW2, PW3, PW4 and PW5 was highly corroborative and had no major contradictions as to the identification of the appellant as the suspect.

Counsel contended that the victims were in close proximity in time and place as well as duration of observation to the appellant. She submitted that the factors favouring identification were present and the witnesses could not have

mistaken the appellant. She relied on the case of **Abdulla Nabukere & Another vs. Uganda, Supreme Court Criminal Appeal No.19 of 1978.**

As regards the inconsistency about who among the witnesses was quarrelling for the money given to them by the appellant, counsel submitted that these contradictions or inconsistencies are minor and do not touch the root of the case. She prayed that they be disregarded. Counsel cited the Supreme Court case of ***Kato John Kyambadde & anor vs. Uganda, Criminal Appeal No.0030 of 2014,*** which referred to the famous ***Alfred Tajar vs Uganda, EACA, DR Appeal No.167 of 1969,*** where Court held: ***"where there are contradictions in the evidence of a witness, the deciding factor in law is whether they point to deliberate untruthfulness..."***

Counsel prayed that Court finds that the contradictions and inconsistencies were minor and did not touch the root of the matter in the circumstances of this case. She prayed that the decision of the trial Judge be upheld.

Submissions of counsel on ground 2

2. **Without prejudice to the foregoing, the learned trial judge erred in law and fact when she sentenced the appellant to 32 years imprisonment, which sentence is illegal, manifestly harsh and excessive in the circumstances.**

Counsel for the appellant submitted that the learned trial Judge did not properly take into account the principle of uniformity and the mitigating factors while sentencing thereby arriving at a harsh and excessive sentence.

He relied on the Supreme Court decision in ***Criminal Appeal No.27 f 2005, Aharikundira Yustina vs. Uganda,*** where Court held: ***"consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without differentiation."***

Counsel submitted that in the case of ***Anguyo Siliva vs. Uganda, Court of Appeal Criminal Appeal No. 38 of 2014,*** this Court quoted with approval the case of ***Tiboruhanga Emmanuel vs. Uganda, Court of Appeal Criminal Appeal No. 38 of 2014,*** where it was held that in the absence of any other aggravating

factors like HIV, the sentencing range for aggravated defilement is 11-15 years imprisonment.

Counsel submitted that, in the instant case, the appellant was found to be a first offender, aged 50years, a family man with a wife and 5 children, a responsible man taking care of his blind mother and his 5 siblings.

He contended that had the trial Judge addressed her mind to these mitigating factors and this Court's decision in **Tiboruhanga** (*supra*), she would have arrived at a more lenient sentence.

Counsel concluded that without prejudice to the other grounds of appeal, the sentence of 32 years be found to have been harsh and excessive and substitute it with a lenient sentence of 15 years on each of the counts to run concurrently, upon consideration of the period spent on remand.

On the other hand, counsel for the respondent submitted that an appellant Court will normally not 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 to amount to an injustice. See: ***Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No.10 of 1995.***

Counsel contended that the learned trial Judge considered both the mitigating and aggravating factors, as well as the period spent on remand.

As regards the argument on consistency in sentencing and that the argument that the sentencing range for aggravated defilement does not exceed 15 years, counsel submitted that for the offence of aggravated defilement, the starting point in sentencing is 30 years and the maximum being death, as per the Constitution (sentencing guidelines for Courts of Judicature) (Practice) Directions 2013.

She contended that each case presents its own facts upon which Court exercises its discretion to determine an appropriate sentence. she relied on the case of ***Sekitoleko Yudah & others vs. Uganda, Supreme Court Criminal Appeal, No.33***

of 2014, where Court held: *"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..."*

Counsel submitted that in ***Muwonge Fulgensio vs Uganda, Court of Appeal Criminal Appeal No. 0586 of 2014*** and ***Kaddu Kavulu Lawrence vs. Uganda, Supreme Court Criminal Appeal No.72 of 2018,*** Court diverted from the principle of consistency in sentencing and emphasised that an appropriate sentence is a matter for the discretion of a sentencing Court as each case presents its own facts upon which Court exercises its discretion.

She further submitted that in the case of ***Bukenya Joseph vs. Uganda, Supreme Court Criminal Appeal No.17 of 2019,*** Court confirmed a sentence of 20 years imprisonment for aggravated defilement. Counsel thus argued that this disaproves the appellant's submission that the sentencing range for aggravated defilement is between 11-15 years imprisonment.

Regarding counsel for the appellants' submission that the appellant is a family man with 5 children and a blind mother to take care of and therefore deserves a more lenient sentence, counsel for the respondent submitted that the same argument was disregarded by the Supreme Court in the case of ***Ojangole vs. Uganda, Supreme Court Criminal Appeal, No.33 of 2014*** and Court upheld a 32 years imprisonment sentence for the offence of aggravated robbery.

Counsel therefore submitted that the sentence passed was neither illegal, harsh nor excessive in the circumstances of this case. She prayed that the decision of the trial Judge be upheld.

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.I 13-10** to re-appraise the evidence and make its inferences on issues of law and fact. See ***Bogere Moses and another vs. Uganda, Supreme Court Criminal Appeal No.01 of 1997.***

We have carefully studied and considered the court record, the submissions of both counsel and the law cited. We are also alive to the standard of proof in criminal cases and the principle that an accused person should be convicted on the strength of the prosecution case and not on the weakness of the defence, save in a few statutory exceptions. see ***Sekitoleko v. Uganda [1967] EA 531***. If there is any doubt created in the prosecution case, that doubt must be resolved in favour of the accused person. See: ***Woolmington v. DPP [1935] AC 462***.

We shall, in accordance with the above authorities, proceed to re-appraise the evidence and to make our own inferences on both issues of law and fact.

Resolution of ground 1

It was counsel for the appellant's contention that the learned trial Judge erred when she disregarded the following discrepancies and contradictions in the prosecution evidence:-

1. That the evidence of the victim's medical reports on Police form 3A is to the effect that both the victim's hymens were intact and there was no sign of defilement. counsel argued that this evidence is inconsistent with the prosecution witness evidence in which they state that there was actual sexual intercourse.
2. The retraction of PW1's statement that the appellant had confessed to committing the offence.
3. Inconsistencies in the prosecution witness evidence as to which exact girls were quarrelling about who had more money.
4. Inconsistencies as to who told PW3 about what the appellant was doing to the victims.
5. Inconsistencies as to whether PW4's mother found out about PW4's defilement while she was in P.4 or P.5.
6. Whether PW5 (the 2nd victim) really knew the appellant as she stated that when she left the appellant's home, she told the mother what happened and the appellant was arrested, yet the appellant was arrested under different circumstances.

The law on contradictions/inconsistencies in evidence was articulated by the Supreme Court in **Obwalatum Francis vs. Uganda, Criminal Appeal No. 30 of 2015,** where the Court held that:

"The Law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained."

In the instant case, PW4, Nakabuye Joan (1st victim) and PW5, Percy Nakanwagi (2nd victim), who knew the appellant well as he defiled them several times in his garden, testified that the appellant used to rub his penis on their private parts and a white substance would come out. According to the victim's, the appellant threatened to bewitch them and kill them if they told anyone.

PW2, Halimah Naluggwa, the mother to the second victim testified that she took her daughter to the doctor who examined her and confirmed that the appellant's penis did not enter the girl's vagina but the penis had been used on top of her vagina as it had reddened. This explains why when they were medically examined by Police, the report on Police Form 3, showed that their hymens were intact. The trial Judge was alive to this issue and stated as follows:-

"Court has to determine whether sexual acts were performed on the victims. Section 129 of the Penal Code Act as amended defines "sexual act" to mean;

(a) Penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ;
(b) The unlawful use of any object or organ by a person on another person's sexual organ;
"sexual organ" means a vagina or a penis.

In the case of Baseeta Hussein vs. Uganda, Supreme Court Criminal Appeal No.35 of 1995, that was relied on in the Uganda vs. Busuulwa Kenneth, it was held that: "the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victim's own evidence and corroborated with medical or other evidence." I believe this applies to all sexual offences especially rape and defilement given the private nature of the offences.

This section implies that even with or without penetration, a sexual act is committed by mere touching in a sexual manner, the private parts of a girl. It is also trite law as was held by the Supreme Court in Private Wepukhulu Nyunguli vs. Uganda, Criminal Appeal No.21 of 2001 (unreported): that whether or not sexual intercourse took place in a particular case is a matter of fact to be established by the evidence. Normally in sexual offences, the victim's evidence is the best evidence on the issue of penetration and even identification but other cogent evidence may also suffice to prove acts of sexual intercourse: Also see PATRICK Akol vs. Uganda, Supreme Court, Criminal Appeal No,23 of 1992 (unreported). "

We agree with the learned trial Judge that, following **section 129 of the Penal Code Amendment Act 2007** and the authorities cited, a sexual act is committed by mere touching in a sexual manner, the private parts of a girl under the age of 14 years with or without penetration.

The victim's testimonies, which the trial Judge found to be truthful, clearly proved beyond reasonable doubt that the appellant performed sexual acts on the little girls.

As regards the other inconsistencies/contradictions raised by counsel for the appellant, in regards to:-

1. The retraction of PW1's statement that the appellant had confessed to committing the offence.
2. Inconsistencies in the prosecution witness evidence as to which exact girls were quarrelling about who had more money.
3. Inconsistencies as to who told PW3 about what the appellant was doing to the victims.
4. Inconsistencies as to whether PW4's mother found out about PW4's defilement while she was in P.4 or P.5.
5. Whether PW5 (the 2nd victim) really knew the appellant as she stated that when she left the appellant's home, she told the mother what happened and the appellant was arrested, yet the appellant was arrested under different circumstances.

A reading of the record of proceedings, disclosed that the above stated inconsistencies or contradictions are minor as they did not point to

untruthfulness on the prosecution witnesses' part. The said inconsistencies/contradictions are comprehensible. The offence was committed in 2012 while the trial Court hearing took place in 2015, the victim's aged 7 and 12 years could not be expected to remember every little detail of what transpired in 2012 considering their tender age and the passage of time. What is important is that the victims were able to articulate the relevant facts of what transpired between them and the appellant when the offences were committed.

The prosecution evidence provided irresistible inference that it was the appellant who committed the crime. We therefore find that the learned trial Judge rightly convicted the appellant for two counts Aggravated Defilement. Ground 1 therefore fails.

Resolution of ground 2

Counsel for the appellant argued that the trial Judge did not properly take into account the principle of uniformity and the mitigating factors when sentencing thereby arriving at a harsh and excessive sentence.

The Supreme Court in ***Kyalimpa Edward vs. Uganda, Criminal Appeal No. 10 of 1995,*** laid down the principles that govern an appellate Court's powers to interfere with sentence 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. 126"***

The **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013,** provide for the sentencing range for the offence of aggravated defilement as 30 years and up to death.

In the instant case, the trial Judge while sentencing stated:-

"This case is very sad, the convict could collect a group of girls and call them one by one and use them sexually warning them not to tell anybody else and warning them that you are going to bewitch them.

I believe that if you were not caught, you would be having sex orgasms in your garden taking advantage of these young girls. Court also noted the fact that there were other victims in this case but because their mothers could not afford the money to pay for medical examination and transport for the policemen you were not charged with these charges.

However, I also note that the injuries were not too much, you would not penetrate any of them but I am sure with time that was going to be your next step if you were not interacted. Therefore, there is need to send a message to the public because you are an old man, if you were a small boy I would understand but a man of almost 20 or 30 years older.

If you had even got this money you were giving these children and you went and paid a prostitute, you would be better off. But you keep inducing young children with money 500, 1000 that culture should stop so you are going to serve as an example to others so that other elderly men at your age should learn to respect the rights of these young children. Because most of the people are poor in this country so giving 500/= to a young girl is very tempting.

Therefore, I am sentencing you to 35years imprisonment on each count. I will reduce 3 years for the period you have spent on remand, so you will serve 32 years on each count and they are to run concurrently."

From the above, the learned trial Judge thoroughly considered both the aggravating factors and the mitigating factors and rightly used her discretion to sentence the appellant to 35 years imprisonment on each count, from which she deducted the 3 years the appellant spent on remand, which reduced the sentence to 32 years imprisonment on each count. The sentences were to run concurrently.

We appreciate the principle of uniformity in sentencing as submitted by counsel for the appellant. The principle, however, ought to be applied considering the circumstances of each case along with guidance from the sentencing ranges

provided by **the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013,** since this case was decided in 2015 when the sentencing guidelines were already in effect.

The Supreme Court in **Criminal Appeal No. 41 of 2016, Katureebe Boaz and Muhereza Bosco vs. Uganda,** stated:-

> ***"Consistency in sentencing is neither a mitigating nor an aggravating factor in our view to render a sentence passed illegal. After considering the mitigating and aggravating factors, the sentence imposed lies in the discretion of the Court which in exercise thereof, may consider sentences imposed in other cases of similar nature."***

This Court in ***Criminal Appeal No. 016 of 2013, Asega Gilbert vs. Uganda,*** confirmed a concurrent sentence of 30 years imprisonment for an appellant who was convicted of two counts of aggravated defilement. The offences were committed on victims aged 9 and 6 years old, who were nieces to the appellant.

The Supreme Court in the case of ***Okello Geoffrey vs. Uganda, Criminal Appeal No.34 of 2014***, confirmed a sentence of 22 years imprisonment as upheld by the Court of Appeal for the appellant who defiled a child below the age of 18 years.

The authorities above cited demonstrate that the sentencing range for the offence of aggravated defilement is not limited to 10-15 years as argued by counsel for the appellant. The sentence imposed in each case lies in the discretion of the sentencing Court as seen in ***Katureebe Boaz*** *(Supra).*

In the instant case, the trial Judge found that the aggravating factors outweighed the mitigating factors and rightly used her discretion to sentence the appellant to a concurrent sentence of 32 years imprisonment for two counts of aggravated defilement, having considered the period spent on remand. In **Aharikunira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015,** Court held:-

> ***"There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The***

key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation."

The sentence of 32 years imprisonment for two counts of aggravated defilement as imposed on the appellant was well within the permissible sentencing range of 30 years up to death as provided by the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013.**

The sentence was not illegal nor based on wrong principles and neither was it manifestly harsh nor excessive given the circumstances of this case. We find no reason for Court to interfere with it.

In the result the appeal is dismissed and the decision of the trial Court is upheld.

Dated at Kampala this 7th day of February 2022

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RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

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ELIZABETH MUSOKE
JUSTICE OF APPEAL

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CHEBORION BARISHAKI
JUSTICE OF APPEAL