THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT FORT-POTRAL
CRIMINAL APPEAL NO. 013 OF 2017
(Arising from Criminal Session Case No. 20 of 2009)

BONABANTU FRANCIS :::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

*(Arising from the decision of the High Court of Fort Portal, Akiiki Kiiza, J, dated 31st March 2011)*

CORAM: **Hon. Mr. Justice Richard Buteera, DCJ**
**Hon. Lady Justice Irene Mulyagonja, JA**
**Hon. Lady Justice Eva K. Luswata, JA**

JUDGMENT OF THE COURT

**Introduction**

This is an appeal against the decision of the Hon. Justice Akiiki Kiiza, J, wherein the appellant was convicted of Aggravated Defilement contrary to Section 129 (3) (4)(a)(c) of the Penal Code Act, Cap 120, and sentenced to life imprisonment.

**Brief facts**

The facts according to the prosecution are that; N.A, the victim, and the appellant are daughter and father respectively. They were residents of Harukoto Village, South Division, Fort Portal in Kabarole District. On the 13th day of July 2008, the victim's parents had a misunderstanding upon which the victim's mother went back to her parents' home in Bushenyi. The victim and her siblings remained with the appellant.

On the night of 17th July 2008, the appellant returned home drunk and began beating the victim and her siblings. He then got hold of the victim, took her to his bed and had sexual intercourse with her. The following day, the victim reported to the Chairperson, LC1, who in turn reported the matter to Police at Fort Portal. The appellant was arrested and charged.

The medical examination showed evidence of penetration and indicated that the victim was only 7 years old. In his defence, the appellant set up a defence of *alibi* to wit; that he was nursing his sick father at Buhinga

Hospital and could not have committed the offence. He also denied ever getting married to the victim's mother or even being the victim's father. He was tried and convicted of Aggravated defilement, hence this Appeal.

**Grounds of Appeal**

1. The trial Judge erred in law and fact when he dismissed the appellant's defence of alibi yet the prosecution did not destroy it in any way by way of evidence on record.
2. The trial Judge erred in law and fact when he held that the appellant was identified at the scene of the crime yet there is no evidence on record to support such identification and conditions favourable to correct identification were not present.
3. In the alternative but without prejudice to the above, the trial Judge erred in law and fact when he sentenced the appellant to life imprisonment which sentence was manifestly harsh and excessive.

**Representation**

At the hearing of the Appeal, the appellant was represented by Mr. Rwakatooke Mugisa Richard, on state brief, while the respondent was represented by Ms. Nakafeero Fatina, Chief State Attorney.

Both counsel applied to Court to adopt their written submissions and the Applications were granted. Court will consider the written submissions, the lower court record and the authorities cited by counsel for the parties and other relevant material to resolve the Appeal.

**Ground 1**

***The trial Judge erred in law and fact when he dismissed the appellant's defence of alibi yet the prosecution did not destroy it in any way by way of evidence on record.***

**Case for the appellant**

Regarding the duty of the fist appellate court, Counsel for the appellant cited the case of ***Kifamunte Henry v Uganda; Supreme Court Criminal Appeal No. 10 of 1997***.

He submitted that the learned trial Judge found that the appellant was around the scene of the crime, that is Fort Portal, yet according to his alibi the appellant was at Buhinga Hospital. It was counsel's opinion that though both places were in Fort Portal, there was a considerable distance between the Hospital and Harukoto where the incident took place and one person could not be at both places at the same time.

Counsel referred to the case of ***Androa Asenua & Anor v Uganda; Criminal Appeal No. 1 of 1998 UG SC 23*** cited in the case of ***Lt. Jones Ainomugisha v Uganda; S.C.C. Appeal No. 19 of 2015***, where the Supreme Court held that one way of disproving an alibi is to investigate its genuineness.

He argued that the appellant having pleaded the defence of alibi, it was incumbent upon the prosecution to investigate and establish whether the appellant's father was admitted at Buhinga Hospital and whether the appellant was taking care of him or not.

Counsel stated that the learned trial Judge rightly observed that there was no direct evidence since the victim did not testify and court only relied on the testimony of her mother and that of the area LC1 Chairperson. He thus argued that both witnesses were not at the scene of the crime and the failure of the key witness to testify is a matter that goes to the root of the case.

He also challenged the trial Judge's finding that a stranger could not frame the appellant to say that they were married for 10 years and had 4 children out of the marriage, the victim inclusive. To counsel, proof of marriage is by a marriage certificate and proof of paternity is by a birth certificate or

DNA test. Yet the trial Court relied on the testimony of the LC1 Chairperson who testified that he had stayed at Harukoto Village for only two months.

It was thus counsel's contention that the prosecution did not execute its duty of placing the appellant at the scene of the crime. He prayed that this ground succeeds.

**Ground 2**

***The trial Judge erred in law and fact when he held that the appellant was identified at the scene of the crime yet there is no evidence on record to support such identification and conditions favourable to correct identification were not present.***

Counsel submitted that the learned trial Judge relied on second hand information to find that the appellant was placed at the scene of the crime. He observed that since the victim was not produced to testify, prosecution should have called her other siblings, though younger, to testify.

He pointed out that the learned trial Judge rightly observed that the conditions for correct identification were difficult, and to him, there was a possibility that the victim and her young siblings could have been mistaken due to the fear of someone who came and quarrelled and slapped them. Counsel opined that the trial Judge ought to have taken into consideration that the younger children were sleepy and, therefore, could not have properly identified the appellant.

He stated that since the appellant was not availed an opportunity to cross-examine the eye- witness as to the identification of her assailant, PW1's testimony suggested a grudge arising from the separation though no marriage was proved. It was counsel's argument that the learned trial Judge based his decision more on the demeanour of the witnesses than the evidence on court record. In his view, prosecution did not place the appellant at the scene of the crime. He thus prayed that this ground also succeeds.

**Ground 3**

***In the alternative but without prejudice to the above, the trial Judge erred in law and fact when he sentenced the appellant to life imprisonment which sentence was manifestly harsh and excessive.***

Counsel for the appellant referred to the case of ***Kyalimpa Edward v Uganda; S.C.C. Appeal No. 10 of 1995,*** on the principles upon which an appellate court may interfere with a sentence passed by a sentencing court. He argued that at the time of sentencing, the learned trial Judge should have put into consideration the fact that he based his findings on the testimonies of PW1 and PW2, whose evidence was not direct since the key witness, the victim, was not called by prosecution to testify. He stated that PW1's testimony suggested a grudge between herself and the appellant as she alleged that she was separated from him without proof of marriage. According to counsel, it was most likely that the appellant was framed and in his view, the sentence of life imprisonment was manifestly harsh and excessive.

He pointed out that the appellant was a first time offender, a young man ready to reform, he was remorseful, and in the circumstances, a sentence of 15 years' imprisonment would have been more appropriate. Counsel prayed that this appeal succeeds, and that the conviction is quashed and the sentence set aside.

**Case for the respondent**

Counsel for the respondent opposed the appeal in its entirety and supported the conviction and sentence imposed by the learned trial Judge. She pointed out that the grounds of Appeal violated Rule 66 (2) of the Rules of this court in as far as they were vague and argumentative. She noted that whereas the appellant's counsel listed three grounds, the discussion of those grounds was a jumble and a mix- up. She cited ground 1 which was specifically framed to address the defence of alibi being dismissed in error yet its discussion handled issues of alibi, failure to call a key witness

by prosecution and also attacked the marital status of the appellant and the victim's mother.

She contended that the jumbled- up approach was not only misleading but it also made it particularly hard for the respondent to identify the issues to respond to.

She, therefore, elected to handle grounds 1 and 2 together since they both related to the evaluation of evidence, and ground 3 separately.

**Grounds 1 and 2**

Counsel stated that the appellant challenged three major issues, namely; the defence of *alibi* having been dismissed in error, identification of the appellant and the evaluation of evidence. She further stated that in so doing, the appellant majorly attacked the evidence of PW1 and PW2 regarding identification. She submitted that PW2 clearly testified that he had known the appellant and the victim's mother for about two months since they had recently relocated to his village, Harukoto. That he knew them because he used to hire a store from the appellant and knew the victim's mother as his wife. PW2 further stated that the two had separated and that was the time PW1 left her children including the victim in the care and custody of the appellant.

Counsel submitted that when the victim reported the defilement to PW2 as the Area LC1 Chairperson, PW2 traced the appellant from Kisenyi and arrested him. It was counsel's argument that PW2 knew the appellant quite well and when the victim reported to him, he knew exactly who she was talking about.

Counsel further submitted that it was the evidence of PW1 that she and the appellant were married and when they got separated, she left the children including the victim with him. It was the opinion of counsel that this evidence and that of PW2 corroborated previous knowledge of the appellant by the prosecution witnesses and the victim.

She submitted that PW1 stated on oath that the victim told her that when the appellant came back, they opened the door and then lit a lamp. That the appellant then told the victim to sleep where he was on the bed and she started crying, the appellant told her to stop crying and out of fear, she went to his bed and he then defiled her.

It was counsel's contention that the circumstances favouring correct identification were present; the previous knowledge of the appellant by the victim, source of light, distance between the two, and the duration of the time the appellant returned to the time he defiled the victim. She added that this evidence was sufficient to put the issue of paternity to rest.

She further submitted that although the victim was not called to testify, her mother, PW1, explained her absence from court on oath, stating that she was pursuing her studies in Bushenyi. She also argued that prosecution had the discretion of choosing which witness to call in a trial. She referred to ***Bukenya & others v Uganda (1972) EACA 549***. She also cited the authority of ***Patrick Akol v Uganda; SCCA No. 23 of 1992*** where the Supreme Court ruled that the evidence of the victim through another person is not hearsay but good and admissible evidence against the accused person.

Counsel argued that on the strength of the above authorities, the failure of the prosecution to lead evidence from the victim was not fatal to this case because the victim's mother, PW1, ably gave an account of what happened to the victim and what was reported to her. She also referred to ***Badru Mwidu v Uganda; SCCA No. 15 of 1995***, where the Supreme Court maintained the conviction in a defilement case where the victim had not testified.

Counsel also cited the case of ***Ndyaguma David v Uganda; CACA No. 263 of 2006.*** In that case, the appellant's counsel argued that the victim's father was only told by the victim that it was David who had defiled her and that there was no direct evidence to link the appellant to the crime.

The Court observed that '*we find that the evidence of PW2 and PW3 was admissible as to what they saw and were told by the victim about the fact that she had been defiled*'.

She further referred to ***Kobusheshe v Uganda; CACA No. 110 of 2008*** in which the case of ***Basiita Hussein v Uganda; SCCA No. 35 of 1995*** was cited and where Court observed that:

> '*the father's evidence is direct and not circumstantial. Court may convict in absence of the victim for defilement if there is sufficient proof of the offence.*'

Counsel thus submitted that based on the above authorities, the prosecution witnesses gave good corroborative evidence and it was sufficient to prove participation of the appellant. That as a result, the learned trial Judge rightly found it credible and so convicted the appellant.

Regarding the appellant's *alibi*, counsel for the respondent cited the Supreme Court decision in ***Baguma Fred v Uganda; Criminal Appeal No. 7 of 2004***, in response to the appellant's argument that his defence of alibi was disregarded. The Supreme Court in that case ruled that:

> '*where a question arises as to which witness is to be believed rather than another, and that question turns on manner and demeanour, the court of appeal always must be guided by the impression made on the judge who saw the witness...*'

Counsel then contended that the learned trial Judge did a thorough evaluation of the entire prosecution evidence after which he dismissed the appellant's *alibi* and found that the appellant committed the offence before convicting him.

It was counsel's argument that the learned trial Judge did not err in believing and considering the evidence of PW1, PW2 and PW3 over and above that of the appellant regarding his participation because he found the prosecution witnesses credible. She stated that the trial court was

following the principles laid out by the Supreme Court in ***Bogere Moses & Anor v Uganda; SCCA No. 01 of 1997***.

**Ground 3**

On the role of the appellate court, counsel referred to the cases of ***Wamutabaniwe Jamiru v Uganda; SCCA No. 74 of 2007*** and ***Kamya Johnson Wavamunno v Uganda; SCCA No. 16 of 2000***. She also referred to ***Kyalimpa Edward v Uganda; SCCA No. 10 of 1995*** on the principles upon which an appellate court would interfere with a sentence imposed by the trial court.

She stated that in arriving at the sentence of life imprisonment, the learned trial Judge comprehensively considered the mitigating factors, that the appellant was a first offender, had spent two years and 8 months on remand. He also considered the aggravating factors, that the victim was aged 7 years old vis-à-vis the appellant's age of 32 years, the appellant having been the father of the victim, plus the physical and psychological effects on the victim.

Counsel relied on the case of ***Karisa Moses v Uganda; SCCA No. 23 of 2016***, where the 22-year-old appellant was convicted of the murder of his father. The Supreme Court, while confirming a sentence of life imprisonment, in its judgment dated 22/08/2019, had this to say:

> **"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 practise 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."**

She thus submitted that the appellant was indicted for aggravated defilement whose maximum penalty is death and as such, the sentence of life imprisonment was not harsh. That the court rightly directed itself on the law and applied it to the facts.

Counsel pointed out that this Court has confirmed long custodial sentences for some of the sexual and gender based violence cases like in the instant appeal. She cited ***Bacwa Benon v Uganda; CACA No. 869 of 2014*** where this Court confirmed a sentence of life imprisonment upon the appellant who pleaded guilty to aggravated defilement.

She also relied on ***Bonyo Abdul v Uganda; SCCA No. 07 of 2011*** which was cited with approval in the ***Bacwa Benon*** case (supra) where the Supreme Court confirmed a life imprisonment sentence who was HIV positive and was convicted of aggravated defilement.

She thus prayed that Court considers the authorities above, upholds the conviction and sentence against the appellant and dismisses the appeal.

**Court's consideration**

**Duty of the appellate court**

It is our duty as the first appellate court to re-appraise the evidence at the trial court and come to our own conclusion. See **Rule 30 (1) (a) of the Judicature (Court of Appeal) Rules.** However, we have to bear in mind that we did not have the opportunity to see and hear the witnesses as they testified. See ***Selle and Another vs Associated Motor Boat Co. [1968] EA 123, Pandya vs R. [1957] EA 336, Ruwala vs R [1957] EA 570,*** **and** ***Kifamunte Henry vs Uganda Criminal Appeal No. 10 of 1997 (Supreme Court).***

Counsel for the appellant raised three grounds of Appeal. However, a keen study of the submissions for grounds 1 and 2 shows no clear distinction between the two. Therefore, we shall resolve grounds 1 and 2 together and then ground 3 on its own.

**Grounds 1 and 2**

The gist of these grounds is that the learned trial Judge wrongly relied on the evidence of witnesses other than that of the victim to place the appellant at the scene of the crime and in so doing, he wrongly rejected the appellant's defence of alibi.

We observed that the learned trial Judge relied on the testimonies of PW1, the victim's mother and that of PW2, the area LC1 Chairperson, to find that the appellant was the person who defiled the victim. In this regard, counsel for the appellant challenged the prosecution for the failure to call the victim as the key witness. He argued that the circumstances under which the identification was done by the victim were difficult as to leave no room for mistaken identity.

It is trite law that the failure by the victim of a defilement case to give evidence is not necessarily fatal to the prosecution case provided that there is other cogent evidence to support the conviction. The position was taken in the case of ***Patrick Akol v. Uganda; Criminal Appeal No. 23 of 1992 (S.C)*** (unreported).

The duty for this Court would be to establish whether there was clear and cogent evidence to prove that the appellant defiled the victim. In this case, there was the evidence of the victim's mother, PW1. She testified that when she was called by the LC1 Chairperson to return from Bushenyi to Fort Portal, she came back immediately and was informed by the daughter that the father had defiled her. The daughter narrated to the mother how the appellant returned home drunk, lit a lamp, quarreled and beat them before he asked her to go to his bed and he defiled her.

This evidence was confirmed by PW2 who testified that he found the victim at her home and the child told him that she was actually going to his place to report what the father had done to her. She then narrated how the appellant defiled her. He immediately went to search for the appellant and took him to the Police. The victim was medically examined and the report

showed that her hymen had been raptured a day earlier than the date of examination on 18/ 07/ 2008. She was defiled on 17/07/2008. The report also showed that she had injuries in her private parts that were consistent with use of force, sexually. More so, the victim was also examined by her mother who observed that the victim had been 'spoilt'.

From the above evidence, it can be confirmed that the victim was right when she told PW1 and PW2 that she was defiled. As to whether she was correct when she reported that it was the appellant whom she knew as her father, who defiled her, we are guided by the principles for identification in such circumstances. The principles were restated by this Court in ***Abdala Nabulere & Another Vs Uganda Court of Appeal Criminal Appeal No. 08 of 1978***, thus:

> **"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications, The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused.**
>
> **All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger...**

> **When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution."** (Emphasis added)

In this case, the victim informed PW1 and PW2 that the appellant returned home at night, quarreled with her and the siblings and then beat them up. She also informed them that when he returned, they lit a lamp. More so, she informed them that the appellant then asked her to go to his bed but she first refused and then out of fear she moved to his bed, where upon he put his penis in her vagina.

From the above evidence, we note that the victim who was aged 7 years old had always known who her father was for her whole life. She knew his voice and given that he first quarreled and beat them up, and that when he arrived at home, they lit a lamp, she had ample time to ably identify him. He also asked her to move to his bed. We find that though it was at night, the circumstances prevailing during the commission of the offence enabled the victim to ably identify the appellant as the person who defiled her. We would, therefore, not fault the learned trial Judge for finding that the appellant was ably identified by the victim. He was in effect placed at the scene of the crime.

That being the case, his defence of alibi collapses. See ***Alfred Bumbo V Uganda.SC Criminal Appeal No.28/2004.*** We, therefore, answer grounds 1 and 2 in the negative.

**Ground 3**

Counsel for the appellant challenged the sentence of life imprisonment for being harsh and excessive given the nature of the evidence court relied

upon to convict the appellant. He prayed that Court finds a term of imprisonment of 15 years appropriate in the circumstances of this case.

Counsel for the respondent cited a number of authorities where this court and the Supreme Court maintained the trial court's sentence of life imprisonment in sexual offences.

The law that governs the powers of an appellate court in regard to sentencing is well established. In ***Kiwalabye Bernard v Uganda, Criminal Appeal No.143 of 2001*** (unreported), the Supreme Court had this to say:

> **"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."** (Emphasis ours)

In this case, the learned trial Judge rightly considered that the appellant was a first time offender. He equally considered the period of two years and 8 months that the appellant had spent on remand. However, he equally took into consideration the fact that the victim was only 7 years old at the time of the incident and the appellant was the child's biological father.

In resolving this ground we are fully aware of the fact that each case presents unique circumstances. We are alive to the necessity for consistency while passing sentences in respect of similar offences committed in similar circumstances, as is required by the Constitution (Sentencing Guidelines) of the Courts of Judicature, 2013. We will, therefore, consider some of the sentences that have been imposed for similar offences in order to determine whether the sentence imposed was appropriate.

Counsel for the respondent referred to ***Bonyo Abdul*** (supra) which was cited with approval in ***Bacwa Benon*** (supra) where the Supreme Court confirmed a sentence of life imprisonment. It is important to note that in ***Bonyo*** (supra), the appellant was HIV positive.

In ***Anguyo Siliva v Uganda; Court of Appeal Criminal Appeal No. 0038 of 2014***, the appellant was sentenced to 27 years' imprisonment for the offence of aggravated defilement. This Court took into consideration all the relevant factors, deducted the period of three years that the appellant had spent on remand and reduced the sentence to 21 years and 28 days.

In ***Okunyu Tom v Uganda; Criminal Appeal No. 341 of 2010***, the Court of Appeal handling an appeal where the appellant was convicted of aggravated defilement and sentenced to life imprisonment, considered the aggravating and mitigating factors and sentenced the appellant to 20 years' imprisonment. From this, Court deducted the one year and 5 months that the appellant had spent on remand and sentenced him to 18 years and 7 months' imprisonment.

In the case of ***Mwanje Godfrey v Uganda; Criminal Appeal No. 266 of 2015***, this Court upheld the sentence of 22 years where the appellant pleaded guilty to two counts of aggravated defilement. This Court found that the sentence of 22 years' imprisonment was neither harsh nor excessive. Judgment was delivered on 14th March 2022.

In the instant case, considering the above range of sentences given for a similar offence, we would find that the sentence of life imprisonment was rather harsh and excessive, given the age of the appellant and the fact that he could reform if given a chance. We would, instead find that a sentence of 23 years' imprisonment would best serve the ends of justice. From this we deduct the two years and eight months' that the appellant had spent on remand prior to his conviction. He will, therefore, serve a term of imprisonment of 20 years' and 4 months running from 31st March 2011, the date of his conviction.

In the end result, this appeal succeeds only on ground 3.

Dated at Fort Portal this ..... Day of .....2023

Richard Buteera
**Deputy Chief Justice**

Irene Mulyagonja
**Justice of Appeal**

Eva K. Luswata
**Justice of Appeal**