THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[Coram: Egonda-Ntende, Bamugemereire & Mulyagonja, JJA]

CRIMINAL APPEAL NO. 170 OF 2014

(Arising from High Court Criminal Session Case No. 163 of 2008 at Lira)

BETWEEN

Ogweng Denis ==========Appellant

AND

Uganda==========Respondent

(*Appeal from a Judgment of the High Court of Uganda (Byabakama, J.) delivered on the 3rd November 2009.*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted of the offence of aggravated defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act. The particulars of the offence were that on the 30th day of July 2007 at Bar-Opuu village in Lira District the appellant had unlawful sexual intercourse with Ateng Rita a girl under the age of 14 years. He was tried and convicted on 3rd November 2009. He was sentenced to 18 years' imprisonment.

[2] Dissatisfied with the decision he now appeals against the conviction and sentence on 4 grounds set forth below.

'1. That the learned trial judge erred in law and fact when he rejected the appellant's defence of alibi thereby coming to a wrong conclusion hence occasioning a miscarriage of justice.

2. That the learned trial judge erred in law and fact when he convicted the appellant on a charge of aggravated defilement basing on uncorroborated doubtful and insufficient circumstantial evidence thereby occasioning a miscarriage of justice.

3. That the learned trial judge erred in law and fact when he convicted the appellant based on a retracted, repudiated and false confession thereby arriving at a wrong decision.

4. That the learned trial judge erred in law and fact when he imposed a manifestly harsh excessive sentence against the appellant.'

[3] The respondent opposed the appeal and supports the conviction and sentence by the trial court.

[4] The appellant was represented by Mr. Douglas Odyek Okot. The respondent was represented by Ms Nakafeero Fatina, Chief State Attorney, in the Office of the Director of Public Prosecutions and Njuki Mariam, Principal Assistant Director of Public Prosecutions, in the Office of the Director of Public Prosecutions. Counsel filed written submissions upon which this appeal proceeded.

Brief Facts

[5] On 30th July, 2007 at about 3.00pm at Bar Opuu village, Boroboro Parish Lira District, the victim aged 2 ½ years old, left her parent's home to go and play at the home of Anna Otiti. When she returned at 5pm, the mother observed mud on the victim's dress and pieces of grass on her head. The victim was crying and had difficulty in walking. The victim revealed to her mother that while on the way from Anna's home, she met an unknown person on a bicycle

who gave her a pen and took her to the bush. He put her down and had sexual intercourse with her. The victim was led by her mother to the shops where they met the appellant and she identified him as the person who had sexual intercourse with her.

[6] The appellant was traced on 2nd August, 2007 and arrested. He was taken to Lira Police Station by the Defence Secretary on instructions of the LC.I Chairperson. The victim was examined and found to be 2 ½ years old with a raptured hymen. The appellant was examined and found to be of the apparent age of 18 years old with healed and healing abrasions on his penis.

Submissions of Counsel for the Appellant

[7] Mr. Douglas Odyek Okot submitted that the appellant raised an alibi which the prosecution had to disprove or destroy by placing him at the scene of crime. He relied on LT. Jonas Ainomugisha v Uganda [2017] UGSC 12 and Kyalimpa Edward v Uganda [2003] UGCA 8 for the proposition that when the accused person puts forward an alibi in answer to a charge, he does not assume any burden of proving it. Counsel for the appellant submitted that the trial judge rejected the identification evidence and confession recorded by PW3 which would have placed the appellant at the scene of crime. He further submitted that the trial judge relied on the uncorroborated evidence of PW2 regarding the identification of the appellant.

[8] On ground 2 of the appeal, counsel for the appellant submitted that the trial judge convicted the appellant based on uncorroborated, doubtful and insufficient circumstantial evidence. Relying on Ndyaguma David v Uganda, [2016] UGCA 57 he stated that in the instant case, there were no eye witnesses. That the circumstances of this case were that there was no independent evidence linking the appellant to the commission of the offence except circumstantial evidence. Further, that it was not enough for the trial judge to convict the accused based on uncorroborated, doubtful and circumstantial evidence. Counsel relied on Byaruhanga Fodri vs Uganda

[2004] UGSC 24 and Mbazira Siragi and Another v Uganda [2007] UGSC 2.

[9] Counsel made reference to the testimony of PW6 where she stated that the appellant is the son of her co-wife and the appellant stated that he did not know her. Counsel stated that the prosecution did not provide any further evidence that the two knew each other.

[10] Counsel also pointed out the differing testimonies of PW6, PW1 and PW2 on the time when the victim left the home of PW1 and the time she returned to her parent's home. He went on to submit that the trial judge wrongly relied on the doctor's evidence, with no proof from the prosecution that the same was true. He stated that all this caused doubt about the guilt of the appellant as it was not credible circumstantial evidence that could prove beyond reasonable doubt the participation of the appellant in the commission of the offence.

[11] With regard to ground 3, counsel for the appellant submitted that the appellant denied that he made a charge and caution statement. He argued that the alleged charge and caution statement amounted to a retracted confession. He referred to Section 23 of the Evidence Act and Matovu Musa Kassim v Uganda [2005] UGSC17, where the Supreme Court cited with approval the case of Tuwamoi v Uganda [1967] EA 84 at 91 which expounds the law in relation to retracted and repudiated confessions. Counsel asserted that the trial judge conducted a trial within a trial and found that the appellant made the charge and caution statement voluntarily and admitted the same. He argued that the charge and caution was not corroborated with any form of evidence and the officer who recorded it was the only officer who testified.

[12] Counsel submitted that court had to ascertain whether the appellant made the charge and caution statement or not and it was immaterial for the trial judge to make a finding on torture of the appellant since the appellant had retracted the statement in court. He prayed to this court to find that the learned trial judge convicted the appellant based on a retracted and repudiated confession.

[13] With regard to ground No.4, counsel for the appellant relied on Kyalimpa Edward v Uganda [2003] UGCA 8 and submitted that the appellate court will not interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence by the trial judge was manifestly so excessive as to amount to an injustice. He referred to Section 11 of the Judicature Act and Mbunya Godfrey v Uganda Supreme Court Criminal Appeal No. 4 of 2011(unreported) where the Supreme Court stated that courts of law should as much as circumstances permit have consistency and uniformity in sentencing so that cases having similar facts attract similar and or uniform sentences for those convicted of similar offences.

[14] Counsel for the appellant referred to Ninsiima Gilbert v Uganda Court of Appeal [2014] UGCA 65 where the appellant was convicted of aggravated defilement and sentenced to 30 years and on appeal this court reduced the sentence to 15 years' imprisonment. He relied on German Benjamin v Uganda [2014] UGCA 63 where the appellant was convicted of aggravated defilement and sentenced to 20 years' imprisonment and on appeal this court set aside the sentence and substituted it with 15 years' imprisonment. Finally, he relied on Ntambala Fred v Uganda [2018] UGSC 1 where the appellant was convicted of aggravated defilement and sentenced to 14 years. On appeal the Supreme Court upheld the sentence of 14 years' imprisonment.

Submissions of Counsel for the Respondent

[15] In reply counsel for the respondent submitted that the learned trial judge warned himself on the kind of evidence presented by the prosecution which he classified as circumstantial evidence. She stated that the trial judge examined the appellant's defence and pointed out the duty of the prosecution which is to destroy the defence of alibi by placing the appellant at the scene of crime. She submitted that the trial judge noted that the evidence adduced in this case was circumstantial and the prosecution case destroyed the alibi put up by the appellant.

[16] Counsel for the respondent submitted that the trial Judge observed that at the time the offence was committed the victim was able to take a good look at her assailant although she did not know him previously. It enabled her to identify

him the following day while at the shops. Counsel stated that the trial judge further observed that the conduct of the appellant as narrated by PW2 could not be disregarded. It only confirmed what the victim told PW2. Counsel for the respondent submitted that the appellant was placed at scene of crime by the evidence of PW2 and his defence of alibi was disproved.

[17] Counsel for the respondent relied on Androa Asenua & Anor v Uganda [1998] UGSC 23 for the proposition that the alibi of the accused should be brought at the earliest opportunity so that prosecution is given an opportunity to investigate it. Counsel for the respondent submitted that the appellant's alibi was brought without prior notice to the prosecution and could not be investigated. She asserted that the trial judge weighed appellant's alibi against the evidence adduced by the prosecution and rejected it. She further submitted that the appellant's alibi did not create doubt in the prosecution evidence. She stated that the appellant was convicted on the strength of the prosecution case.

[18] Counsel for the respondent submitted that the trial judge believed in the evidence of PW2 on the identification of the appellant by the victim at the shops and the gathering convened by PW3. Counsel submitted the trial judge took note of the contradictions regarding the identification of the appellant in the gathering presided over by PW3 and found that they did not go to the root of the case to create doubt.

[19] Counsel for the respondent submitted that the trial judge evaluated the evidence of PW2 who was not at the scene of crime and found the same to have been sufficiently corroborated by the evidence of PW3, PW4, PW5 and PW6 which placed the appellant at scene of crime.

[20] On ground 2, counsel for the respondent submitted that prosecution was not required to prove any relationship between PW6 and the appellant but rather demonstrate the relevancy of PW6's evidence to the case. She submitted the there are no inconsistencies or contradictions in the testimony of PW6. She asserted that the prosecution pointed out that the appellant made a stopover at PW6's home while dressed in a shirt stained with soil and mud. The victim,

on the other hand, reported to their home at 5pm complaining of back pain also with stains of soil on the dress. Counsel for the respondent submitted that the evidence of PW6 pointed to the fact that the two were at the scene of crime and the evidence was corroborated by the testimonies of PW1, PW2 and PW5. Counsel argued that the regardless of the time the incident happened, it would not take the victim and appellant the same time to reach their respective destinations given the different factors which surrounded them.

[21] Counsel for the respondent argued that trial judge did not base his finding on the time the appellant reached the home of PW6 or the time the victim arrived at her parents' home. Counsel submitted that the trial Judge based his findings on the evidence of PW4 who examined the appellant and observed wounds on the penis which was proof that he had engaged in a sexual act. That the trial judge also relied on identification of the appellant by the victim while at the shops.

[22] Counsel for the respondent conceded to the fact that there is no direct evidence and agreed with the position in Ndyaguma David v Uganda, Court of Appeal Court of Appeal Criminal Appeal No. 263 of 2006 and Mbazira Siraji & Anor V Uganda Supreme Court Criminal Appeal No. 7 of 2004 cited by Counsel for the appellant.

[23] He referred to Katende Semakula v Uganda [1995] UGSC 4 and Ahibisibwe Allan & Anor v Uganda [2016] UGCA 72 which expounded the law in relation to the application of circumstantial evidence.

[24] With regard to ground 3, Counsel for the respondent submitted that the trial judge admitted the charge and caution statement as PE. IV and determined

that it was voluntarily made after conducting a trial within a trial. She relied on Matovu Musa v Uganda [2005] UGSC 27 where the Supreme Court held that court can convict on a retracted or repudiated confession, if it is satisfied after considering all material points and the surrounding circumstances of the case that a confession is true. Counsel for the respondent submitted that the trial judge had rightly held that the charge and caution statement of the appellant had been corroborated by other evidence adduced by the prosecution.

[25] On ground 4, counsel for the respondent submitted that the trial judge imposed a sentence against the appellant of 18 years' imprisonment after weighing both mitigating and aggravating factors. She submitted that the trial judge considered the age of the appellant being 20 years, a first offender with a possibility of reforming and capable of transforming into a meaningful contributor to the society. That he also considered the period the appellant had spent on remand. She referred on Livingstone Kakooza v Uganda [1994] UGSC 17 and Jackson Zita v Uganda Supreme Court Criminal Appeal No. 19 of 1995 (unreported), where court laid down the circumstances under which an appellate court can interfere with a sentence imposed by a trial court.

[26] Counsel for the respondent cited the Constitution (Sentencing Guideline for Courts of Judicature) (Practice) Directions, 2013 which provide that the maximum sentence for the offence of aggravated defilement is death and the starting point is 35 years. Counsel submitted that the trial judge would have considered the sentenced imposed in other decided cases with similar facts and apply the principle of consistence and uniformity while sentencing the appellant. She relied on Byera Denis vs Uganda [2018] UGCA 61, where appellant was convicted of aggravate defilement of a 3-year-old girl and sentenced to 30 years. On appeal this Court substituted a sentence of 30 years' imprisonment with 20 years' imprisonment.

[27] She relied on Tibowubanga Emmanuel vs Uganda [2019] UGCA 2040, where the appellant was convicted of aggravated defilement and this court imposed a sentence of 25 years' imprisonment. She further relied on Ninsiima vs

Uganda [2014] UGCA 65 where the court found the sentences for similar offences of aggravated defilement to be between 15 to 18 years. This court reduced a sentence of 30 years to 15 years' imprisonment.

[28] She referred to Candia Akim vs Uganda [2016] UGCA 27, where this court upheld a sentence of 17 years' imprisonment for the offence of aggravated defilement of a girl aged 8 years and Apiku Ensio vs Uganda [2021] UGCA 15, where this court reduced a sentence of 20 years' imprisonment to 17 years after deducting the period spent on remand. Counsel for the respondent concluded by submitting that the sentence of 18 years is not manifestly excessive since the victim was 2 ½ years old. Counsel prayed that we uphold the sentence of the lower court and dismiss this appeal.

Analysis

[29] It is the duty of this court to review and re-evaluate evidence of the trial court and reach its own conclusion, taking into account, of course, that we did did not have the opportunity to hear and see the witnesses. See Rule 30(1) Court of Appeal Rules; Pandya v R [1957] EA 336; Ruwala v Re [1957] 570; Bogere Moses v Uganda [1998] UGSC 22; and Okethi Okale v Republic [1965] EA 555. We now proceed to do so.

Ground 1

[30] The appellant contended that the trial judge wrongly rejected the alibi set up by the appellant. In his unsworn statement at the trial the appellant stated that he was in Lira town on 30th July 2007 and returned home at 9pm.

[31] We find that there was sufficient evidence to destroy the alibi of the appellant. Firstly, there was the testimony of PW6, the appellant's stepmother, whose home the appellant visited on 30th July 2007 at about 5.00pm. He could not be in Lira while visiting PW6's home. PW6's home was in the neighbourhood of the victim's parents' home where the victim lived. Secondly there is the charge and caution statement made to PW7, which was accepted by the

learned trial judge as having been made voluntarily by the appellant. In this statement the appellant admitted committing the offence in question.

[32] We cannot, in light of the foregoing evidence, fault the learned trial judge for rejecting the appellant's alibi. It had been destroyed by the prosecution evidence.

Ground 2

[33] This ground was to the effect that the learned trial judge erred in law and fact when he convicted the appellant on a charge of aggravated defilement based on uncorroborated, doubtful and insufficient circumstantial evidence, thereby occasioning a miscarriage of justice.

[34] The conviction of the appellant in the court below was based on several pieces of evidence. Firstly, there was the confession by the appellant made in the charge and caution statement to PW7 in which the appellant admitted committing the offence. Much as appellant repudiated the same it was established in a trial within a trial that it had been made voluntarily by the appellant. There was the medical evidence of PW4, Dr. Henry Yine who examined both the victim and the appellant and produced medical reports that were accepted in evidence as Prosecution Exhibits No. II and No.III. The Medical report of the victim indicated that she was 2 ½ years at the time of the offence. And she suffered injuries in her vagina that were consistent with sexual intercourse.

[35] Similarly, the report in respect of the appellant indicated that his penis had healed and healing abrasions that could possibly have been caused by sexual intercourse. He had no other injuries.

[36] The evidence of PW6 showed that the appellant turned up at her home with a shirt that was soiled. He washed it and put it on immediately. It had rained that day. Her home was not far from the home of the victim's parents. This home was therefore not far from where the crime was committed. The appellant was placed in the vicinity of the scene of crime at around the time

the offence was committed. This is evidence when considered alongside all other evidence adduced in this case which clearly points to the guilt of the appellant.

[37] The contention that the appellant was convicted based on uncorroborated doubtful and insufficient circumstantial evidence is therefore without merit. There was sufficient evidence adduced in this case to support the conviction.

[38] We find that the evidence adduced by the prosecution proved beyond reasonable doubt that the appellant had sexual intercourse with the victim.

Ground 3

[39] This ground was to the effect that the learned trial judge erred in law and fact when he convicted the appellant based on a retracted, repudiated and false confession thereby arriving at a wrong decision.

[40] At the trial counsel for the appellant had maintained that the appellant never made or signed the statement as alleged. The learned trial judge thus held a trial within a trial to determine whether the charge and caution statement recorded by PW3 was voluntarily made by the appellant.

[41] PW4, Dr Yine, and PW7, IP Odwe, testified in the trial within a trial for the prosecution. The appellant testified in his own defence. After hearing from both the prosecution and the appellant the learned trial judge in his ruling believed the prosecution version and rejected the defence version. He held that it was voluntarily provided by the appellant who signed the Luo version. He provided reasons why he believed the prosecution rather than the defence.

[42] IP Odwe testified that the appellant was brought to him for purpose of recoding a charge and caution statement by the investigating officer, D/Cpl Onen Okello. There was no other person in the room at the time the statement was recorded, the other occupants of the office, having been asked to leave. The witness recorded the statement in Luo which language the appellant

spoke, and he signed the statement. The appellant made the statement voluntarily after which the witness translated the statement into English. Both versions were tendered in court.

[43] In his testimony the appellant stated that the signature on the statement was not signed by him. He had never made any statement at or to the Police. He stated that he was not informed of the offence, and he was beaten by police. Court found that the appellant made the statement voluntarily. The statement was then admitted in evidence and marked PE. IV.

[44] The law governing repudiated and or retracted confessions was succinctly stated in Tuwamoi v Uganda [1967] EA 84 at 91 in the following words,

> '.....a trial court should accept confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all the circumstances of case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.'

[45] We are satisfied that the trial judge was alive to the above guidance. We are therefore unable to fault the trial judge in the circumstances of this case.

Ground 4: Whether the Sentence was manifestly harsh and excessive

[46] It is now well settled that this court will interfere with a sentence imposed by the trial court only when the sentence is illegal or founded on wrong principles of 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 Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001(unreported),

Bashir Ssali v Uganda [2005] UGSC 21 and Livingstone Kakooza v Uganda [1994] UGSC 17.

[47] The sentencing order of the trial judge was set out in the following words,

> 'I take cognisance of the fact that the convict is a first offender and at 20 years he is a very young man, who, if given the chances to reform, may contribute meaningfully to society. He appears to have realised the folly of his conduct. He has been on remand for 2 years 2 months to-date. I regard a sentence of 18 years' imprisonment appropriate taking into account the period spent on remand.'

[48] The learned trial judge noted that the appellant was 20 years old. We assume that this was the age of the appellant at the time of passing the sentence. We note though that what was material was the age of the appellant at the time the offence was committed. In the medical report it is stated that he was of the apparent age of 18 years old at the time he was examined soon after the offence was committed.

[49] It is unfortunate that the age was not properly ascertained by the court in light of the medical report. Considering the medical report, it could mean that the appellant may have been below or above 18 years of age. If he was below 18 years of age this was of significant consequence as he had to be, not only tried as a child, but if the charge or offence was proved he would have to be referred to a Family and Children Court for appropriate orders with a cap on detention at not more than 3 years in relation to any proved offence. See section 94 (1) (g) and 100 (3) of the Children's Act.

[50] We note that the appellant has not raised this matter both in relation to his trial, conviction and or sentence. We would point out that the trial court though was under an obligation under section 88 (5) of the Children's Act to conclusively determine the age of the appellant in light of the medical report of PW4, the medical officer, who examined him.

[51] We are inclined to the view that the appellant was hardly an adult, at about 18 years of age, for which he deserved a rather lenient sentence, taking into account that those a day below 18 years of age, which he could well be, would not incur more than 3 years' detention, if proved to have committed a capital offence. We find that the sentence of 18 years' imprisonment in the circumstances of this case was manifestly harsh and excessive. We are inclined to the view that a sentence of 9 years' imprisonment would be adequate punishment for the appellant from which we would deduct the 2 years and 2 months spent on remand.

Decision

[52] We order the appellant to serve a term of imprisonment of 6 years and 10 months from the 3rd of November, 2009, the date of conviction. As this term has long expired, we order the immediate release of the appellant unless he is being held on some other lawful charge.

Dated, signed and delivered this 2nd day of June 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Irene Mulyagonja
Justice of Appeal