THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Egonda-Ntende, Bamugemereire & Mugenyi, JJA*]

CRIMINAL APPEAL NO. 203 of 2015

(*Arising from High Court Criminal Session Case No.0084 of 2012 at Fort Portal*)

BETWEEN

Kirungi Moses *alias Ekanya*==========Appellant

AND

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

(*An appeal against the Judgement of the High Court of Uganda [Okwanga, J] at Masindi delivered on 16th December 2014*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted of the offence of aggravated defilement contrary to Section 129 (3) & (4) (a), (b), (c) of the Penal Code Act. The particulars of the offence were that the appellant on the 15th day of May 2012 at Kyegobe Village in Kabarole district, performed a sexual act upon KL, a girl aged 8 years. The learned trial judge convicted the appellant and sentenced him to 27 years' imprisonment.

[2] Dissatisfied with the decision of the trial court, the appellant appealed to this court against both the conviction and sentence on the following amended grounds:

'(1) The learned trial judge erred in law and fact when he convicted the appellant on poor identification evidence thereby occasioning a miscarriage of justice.

(2) The learned trial judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant.'

Submissions of Counsel

[3] At the hearing the appellant was represented by Mr Geofrey Chan Masereka while the respondent was represented by Ms Happiness Ainebyona, Chief State Counsel in the Office of the Director, Public Prosecution. Both counsel filed written submissions which were relied on at the hearing of this appeal.

[4] The complaint in ground 1 of this appeal is that the learned trial judge erred in concluding that the appellant had been properly identified as the perpetrator. Mr Masereka contended that PW3 stated that she was unable to the see face of the assailant given the fact that there was darkness at the scene of crime. He submitted that the appellant was not properly identified due to the darkness in the house. Counsel for the appellant relied on Abudalla Nabulere v Uganda [1978] UGSC 5 on how evidence of an identifying witness should be handled.

[5] Mr Masereka, further submitted that it was alleged in the indictment that the incident took place on 15th May 2012 and it was the prosecution evidence that the victim was examined on 17th May 2012 and found that the hymen was raptured 5-7 days previously. He contended that the number of days between 15th May 2012 and 17th May 2012 do not amount to the 5-7 days indicated in the police form 3.

[6] He submitted that PW3 and PW4 gave contradicting evidence. He stated that it was the testimony of PW4 that he saw the victim coming from school the following day and she was walking with difficulty. While PW3 stated that she did not go to school on the following day. He relied on Baitwabusa Francis v Uganda [2017] UGSC 62 for his submission that the contradictions in the prosecution evidence are grave and go to the root of the case and prayed to this court to reject the prosecution evidence.

[7] Ms Happiness Ainebyona, submitted that the prosecution adduced overwhelming evidence to prove that there was penetration of the victim and participation of the appellant. She relied on Hussein Bassita v Uganda Supreme Court Criminal Appeal No. 35 of 1995(unreported) for her submission that penetration can be proved by circumstantial evidence, direct evidence of the victim and medical evidence. She contended that PW3 in her testimony told court how the appellant had sexual intercourse with her and argued that the testimony was corroborated by the evidence of PW4 who saw the victim walk with difficulty and PF3 which indicated that the victim had a raptured hymen.

[8] She asserted that the victim told court how the appellant penetrated her with his penis and the evidence was corroborated with PF3 which indicated that the injuries the victim sustained were as a result of penetrative sex. Counsel for the respondent further submitted that the victim knows the appellant as her father, the victim was staying with the accused and her step mother. She contended that PW3 stated that she was sleeping and the appellant had sexual intercourse with her. That the victim told court that on the fateful night, it was only her and the appellant in the house. That this evidence was not rebutted or discredited by the appellant and his lawyer.

[9] Turning to the identification of the appellant, counsel submitted that despite the darkness in the house the victim was able to identify the appellant because the two knew each other. She contended that the offence was committed at close range and the victim had a long interaction with the appellant. She submitted that the appellant and the victim were the only occupants of the house at the material time.

[10] She contended that the appellant's defence that he hosted two boys on the fateful day was a diversionary theory that it could be the two boys or one of them who had sexual intercourse with the victim. Counsel argued that the appellant did not raise the issue to the victim during cross examination and prayed to court to believe the testimony of PW3. Ms Ainebyona concluded that the appellant was properly identified by the victim.

[11] Counsel for the respondent pointed court to page 34 and 35 of the court record and submitted that the trial judge correctly evaluated evidence and arrived at a fair and justice decision. She submitted that there is no contradiction in the testimony of PW3 and PF3.

[12] She contended that the medical officer who authored PF3 just estimated without precision the number of days the victim had been with the injuries. She referred to Kato Kajubi Godfrey v Uganda [2021] UGSC 57 and Serapio Tinkasimire v Uganda Supreme Court Criminal Appeal No. 27 of 1989 (unreported).

[13] Turning to ground 2 counsel for the appellant referred to Kyalimpa Edward v Uganda Supreme Court Criminal Appeal No. 10 of 1995 and Livingstone Kakooza v Uganda Supreme Court Civil Appeal No. 17 of 1993 (unreported) to support the proposition that this court can interfere with the sentence imposed by the trial court where the sentence is illegal or manifestly harsh and excessive and or some material factor was overlooked by the trial court.

[14] Counsel for the appellant contended that the trial court ought to exercise its discretion by considering meticulously all mitigating factors and pre-sentencing requirements provided for in the Constitution, statutes, practice directions together with general principles as guided by case law. He relied on Aharikundira Yastina v Uganda [2018] UGSC 49, for the proposition that this court has a duty to weigh the mitigating and aggravating factors raised.

[15] Mr Masereka further relied on Aharikundira v Uganda (supra), where the Supreme Court stated that courts need to take into account the need for uniformity and consistency in sentencing. Counsel for the appellant stated that in Ninsiima Gilbert v Uganda [2014] UGCA 65, the appellant was convicted of aggravated defilement and sentenced to 30 years of imprisonment and on appeal this court reduced the sentence to 15 years imprisonment, in German Benjamin v Uganda [2014] UGCA 63, the appellant was convicted of aggravated defilement and sentenced to 20 years of imprisonment and on appeal the sentence was substituted with 15 years of imprisonment, in Kato Sula v Uganda [2000] UGCA 24, the appellant was convicted of aggravated defilement and sentenced to 8 years of imprisonment and on appeal the sentenced was upheld.

[16] Counsel for the appellant argued that the trial judge did not consider the time the appellant spent on remand and the mitigating factors while passing sentence against the appellant. Counsel for the appellant submitted that the trial judge imposed a harsh and excessive sentence against the appellant. Counsel for the appellant prayed that this court interferes with the sentence imposed by the trial court and impose a lenient sentence.

[17] Ms Happiness Ainebyona, Chief State Attorney in the office of the Director, Public Prosecutions, contended that the trial judge considered both mitigating and aggravating factors. She relied on Byaruhanga Okot v Uganda [2022] UGCA 16 for the submission that courts are enjoined to consider the nature of offences and circumstances under which they are committed.

[18] She stated that in Bacwa Benon v Uganda Court of Appeal Criminal Appeal No. 869 of 2014 (unreported), this court confirmed a sentence of life imprisonment for the appellant who pleaded guilty of aggravated defilement. In Kiiza Geoffrey v Uganda Court of Appeal Criminal Appeal No. 76 of 2010 (unreported) the appellant was convicted of aggravated defilement of a step daughter and sentence to 28 years and 9 months' imprisonment. In Wakata Joseph v Uganda [2022] UGCA 108, the appellant was convicted of aggravated defilement of a 6-year-old child and sentenced to 35 years' imprisonment and on appeal this court reduced the sentence to 28 years, 3 months and 3 days. In Senoga Frank v Uganda Court of Criminal Appeal No. 74 of 2010, the appellant was convicted of aggravated defilement of a 10-year-old child and sentence to 30 years of imprisonment and on appeal this court reduced the sentence to 28 years' imprisonment and 4 months. In Othieno John v Uganda [2021] UGCA 100, the appellant was convicted of aggravated defilement of a 14-year-old and sentenced 29 years' imprisonment and on appeal this court upheld the sentence.

[19] In Seruyange Yuda Tadeo v Uganda Court of Appeal Criminal Appeal No. 174 of 2010, the appellant was convicted of aggravated defilement of a 9-year-old and sentenced to 33 years' imprisonment and on appeal this court reduced the sentence to 29 years of imprisonment. In Opio Moses v Uganda Court of Appeal Criminal Appeal No. 118 of 2010 (unreported), the appellant was convicted of aggravated defilement and Bony Abdul v Uganda Supreme Court Criminal Court No. 7 of 2011, the appellant was convicted of

aggravated defilement and sentenced to life imprisonment and on appeal this court upheld the sentence. The appellant appealed to the Supreme Court and the sentence was upheld.

[20] Counsel for the appellant concluded by submitting that the sentence imposed on the appellant was below the sentencing range for the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013. Counsel prayed that the conviction and sentence be upheld.

Analysis

[21] This is a first appeal. It is our duty therefore to subject the evidence on record to a fresh evaluation for this court to reach its own conclusions of fact and law, considering, of course, that we did not have the opportunity to hear and see the witnesses testify. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10; Bogere Moses v Uganda [1998] UGSC 22; and Kifamute Henry v Uganda [1998] UGSC 20.

[22] The case for the prosecution was that the appellant was the father of the victim KL. KL was 8 years at the time the offence in question was committed. On the night of 15th May 2012 the victim was home at Kyegobe village, Kabarole district. Her father joined her. They were alone at home and slept in the same bed. The appellant then ravished his daughter. She felt pain and did not go to school the following day. She subsequently told her Auntie Hellen what had happened. Her Auntie took her to Fort Portal hospital for treatment on 17th May 2012. While at the hospital PW2 the LC11, Chairperson called them to return to the village and get a police form for examination. They did so and returned to hospital. KL was examined and a report issued.

[23] As a result of the information the LC11, Chairperson obtained from the KL, she arranged for the arrest of the appellant, who was subsequently charged with the offence of aggravated defilement.

[24] The appellant denied the offence but admitted having slept in the same house with his daughter on 15th May 2012 but on separate beds. He stated that he collected his daughter that evening when he returned from work from her step mother's place and they went home. They slept in different beds as usual.

Later at night two young men came and spent the night in this home but left very early in the morning. KL did not see them. He stated that he had no problem with the Chairperson of the village though she used to say that he had failed to control his wives.

[25] The learned trial Judge on a review of the evidence believed the testimony of PW3, the victim. He found with regard to the fact of sexual intercourse that the evidence of PW3 was corroborated by the medical examination report, PF3, which indicated that the victim had been involved in a sexual act as well as the testimony of other witnesses, PW2 and PW4 who saw the victim walking with difficulty. He rejected the denial by the appellant that he did not commit the offence in question, finding that he did not set up any other possible defence to the offence. He convicted him as charged.

[26] The complaint in ground 1 is that there was insufficient evidence to prove the identification of the appellant as the perpetrator of this crime. It was submitted for the appellant that it was dark and the victim had stated that she did not see the face of the appellant. PW3 stated that she slept in her father's bed with her father. It is then that the appellant ravished her. No doubt this was a question of a single identifying witness and the evidence has to be examined closely to avoid any errors. It is clear that it is only the appellant and the victim that slept in this house to the knowledge of the victim. The appellant also testified that he slept in the same house though he denied sleeping on the same bed. Much as the appellant had alleged some 2 boys came over to spend the night in his home he stated that they came when the victim was already asleep and she did not see them. They left very early in the morning.

[27] The victim was very familiar with her father. There is no suggestion why she would concoct such a story to accuse her father of such a serious crime. She reported to her Auntie Hellen that her father had defiled her. Much as her auntie did not testify the testimony of PW3, given on oath, was truthful. The fact of sexual intercourse having occurred was not disputed. What was disputed was the participation of the appellant.

[28] In our view this was not a question of identification where one person sees another for the first time. Neither is it just recognition where one person recognises a person he or she already knows. The appellant and the victim were the only persons in this house on the night in question. Although the

appellant stated that they slept in separate beds, and the victim stated that they slept on the same bed, both the appellant and victim slept in the same room, as neither of them talked of sleeping in separate rooms. The appellant stated that the victim was not aware of any other person in the house.

[29] We are satisfied that PW3 was truthful in her testimony and that it was the appellant that performed a sexual act on her.

[30] The learned trial judge found that the prosecution had proved that the appellant was HIV positive. No such evidence is available to support such a conclusion. PW1, the Clinical Officer that examined the appellant did not carry out the tests himself. No evidence was adduced by the laboratory technician who carried out the HIV test. Nevertheless, since any one circumstance under section 129 (4) of the Penal Code Act is sufficient to raise the offence to aggravated defilement, there were 2 other such circumstances proved in this case. The victim was below 14 years of age, as provided under 129 (4) (a) of the Penal Code Act. And the perpetrator was the father of the victim as provided under section 129 (4) (c) of the Penal Code Act.

[31] We reject ground 1 of the appeal as without merit. We uphold the conviction of the appellant.

Sentence

[32] The appellant under this ground contends that the sentence imposed upon him was manifestly harsh and excessive.

[33] It is now well settled that this court will only interfere with a sentence imposed by the trial court when the sentence is illegal or founded on wrong principles of law. This court will equally interfere with the sentence where the trial court has not considered a material factor in the case; or has taken into account a factor that it ought not have taken into account; or has imposed a sentence which is harsh and manifestly excessive in the circumstances. See Bashir Ssali v Uganda [2005] UGSC 21, Livingston Kakooza v Uganda [1994] UGSC 17 and Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001(unreported).

[34] The learned trial judge stated in part, in his reasons for sentence, as follows:

> 'Needless to say that the experience she went through being meted out on her by her father must have been a very traumatic and rousting (*sic*) to her though young. Accused / Convicted not only committed this offence against his own daughter as above, but did into when he was already HIV sero positive (HIV+), which must have exposed this little girl to the great risk of contracting the deadly virus (HIV) in that process. By denying his participation in this offence even after the court has found him guilty, it means that the accused his(*sic)* not remorseful at all.'

[35] The learned trial judge took several factors into account while determining the appropriate sentence in this matter. Two of those factors were entirely unwarranted. Firstly, he considered the alleged fact that the appellant was HIV positive and had thus exposed the victim to contraction of HIV disease. No proof was laid before the court to support such a conclusion. The report relied upon was admitted only for identification purposes and could not be relied upon as evidence in these proceedings without the same being proved as required by law.

[36] Secondly, the learned trial judge took issue with the insistence by the appellant that he was innocent and concluded that the appellant was not remorseful at all. He considered this matter an aggravating factor. This was an error. See Musozi v Uganda [2022] UGCA 63; Kizito Senkula v Uganda [2002] UGSC 36 and Mattaka and Others v Republic [1971] EA 495.

[37] We are satisfied that these 2 errors must have led to a sentence of almost 30 years' imprisonment as the learned trial judge stated that he had deducted off the 2 years and 8 months spent on remand from his sentence, imposing a final sentence of 27 years imprisonment.

[38] We find that the sentence imposed upon the appellant was manifestly harsh and excessive. Ground 2 therefore succeeds.

Decision

[39] Considering all aggravating and mitigating factors on record in this case we are satisfied that a sentence of 17 years' imprisonment would meet the ends of justice. We deduct therefrom the 2 years and 8 months spent on remand

and order the appellant to serve a sentence of 14 years and 4 months' imprisonment from, 16th December 2014, the date of conviction.

Signed, dated, and delivered at Fort Portal this 8th day of Nov 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Monica Mugenyi
Justice of Appeal