THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion Barishaki, Hellen Obura, Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 403 OF 2019

BETWEEN

KIGGUNDU GERALD ::APPELLANT

AND

UGANDA :::RESPONDENT

(Appeal from the Judgment of the High Court sitting at Mpigi in Criminal Session Case No. 36 of 2018 by Hon. Justice Henry Isabirye Kawesa delivered on 26th September, 2019)

<u>JUDGMENT OF THE COURT</u>

Introduction

1] The appellant was indicted with aggravated defilement contrary to Section 129 (3) and 4(a) of the Penal Code Act and sentenced to 20 years' imprisonment.

2] The particulars of the offence as set out in the indictment are that Kiggundu Gerald in the month of July, 2017 at dates unknown at

Mitala Maria village in Mpigi district performed a sexual act with NS a girl aged 4 years (below the age of 14 years).

3] The facts of the case as discerned from the record of court are that on 29/7/2019 Nakayemba Lydia left home and went to the market. She left the appellant home with other children namely, Namuyomba, Nabukeera, Sarah, Brian Kasozi, Baseke Fred and NS. The appellant carried NS as usual and nobody took particular notice. That when Nakayemba Lydia came back at 7:00am (could have been 7pm) she found Nabukeera and Namuyomba very annoyed and informed her that the appellant had used NS. Nakayemba Lydia checked NS's private parts and the child was feeling pain. NS then informed Nakayemba Lydia that he had "used" her three different times, and that on each occasion he would remove her knicker and also undress. Nakayemba Lydia and her husband reported the matter to Buwama police station resulting into the arrest of the appellant at a salon. NS was examined by a doctor at Buwama Health Centre who reported that although the child's hymen was intact, there were soft tissue injuries around her vagina, the child was injured. The appellant was tried, convicted and sentenced to 20 years' imprisonment.

4] The appellant being aggrieved with the decision of the High Court lodged an appeal to this court. The appeal is premised on two grounds set out in the Memorandum of Appeal as follows;

i. That the learned trial Judge erred in law and fact when he disregarded the appellant's alibi which was credible.

ii. That the learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence against the appellant.

Representation

5] At the hearing of the appeal, the appellant was represented by Mr. Henry Kunya on State brief, while the respondent was represented by Sherifah Nalwanga, a Chief State Attorney. Both Counsel filed written submissions as directed by Court. We have considered those submissions and in addition authorities provided by counsel and those sourced by Court.

Ground one

Appellant's submission

6] Mr. Kunya submitted that whereas PW1 Nakayemba Lydia the mother to NS testified that her child was defiled by the appellant for the third time on 29/7/2017, the appellant on his part testified that during the said period, he was on remand for charges of being idle and disorderly and that evidence was never challenged during cross examination. Mr. Kunya referred us to page 9 line 24, page 10 lines 1-3 of the record of appeal and page 14 lines 7 -18 of the record of appeal. Mr. Kunya then submitted that the appellant by that evidence raised an alibi, but which the trial Judge failed to correctly apply.

7] Counsel further submitted that the settled position of law is that the burden of proof does not shift from the prosecution even where the defence of an alibi is raised. He referred us to **Sekitoleko versus Uganda (1967) E.A 531 at 533** for guidance. He then concluded that

it was grossly erroneous for the learned trial Judge to shift the burden of proof to the appellant to prove the alibi.

8] He invited this Honourable Court to re-evaluate the evidence on record and find that the appellant's alibi was credible and thus prayed that this ground be allowed.

Submissions for the respondent.

9] In response, Ms. Sherifah Nalwanga opposed the appeal and submitted that the learned trial Judge rightly disregarded the appellant's alibi both in law and fact. In her view, the learned trial Judge correctly found that the evidence of PW1 and PW2 squarely placed the accused at the scene of crime, thus rendering the accused's defence of alibi resistible. Ms. Nalwanga added that on page 24 of the record, the Judge evaluated the evidence of NS to find that she testified to the fact that the appellant had defiled her three times, which meant that the accused was familiar with the victim and that there was more than one factor to favour a correct identification of the appellant by NS.

10] Ms. Nalwanga contended then that in spite of the appellant's testimony that he was in detention at the material time, there was no proof adduced to support his claim yet NS pointed to the appellant as her ravisher on inquiry, which corroborated NS's testimony. Counsel in particular drew our attention to the evidence of PW2 where she testified that she knew the appellant as Kiggundu Gerald, the one who

"did something to her". That she went on to testify that the appellant removed her knickers and that he slept on her three different times; the first time being in the maize of Blaza, the second time he took her to their house, and the third time, he took her to the toilet. That in cross examination, PW2 confirmed that nobody else had ever defiled her save the accused. Counsel concluded this point by submitting that the factors of correct identification were favourable and this destroyed the alibi raised by the appellant as there was no doubt that it was the appellant who defiled PW2. Counsel based her submission on the decision in **Abdallah Nabulere and Ors versus Uganda, CA Criminal Appeal No.9 of 1978** and **Bogere Moses & Anor vs Uganda, SC Criminal Appeal No.1 of 1997**.

11] In conclusion, counsel prayed that this honourable court dismisses this ground of appeal and upholds the conviction.

Analysis and decision of court.

12] We have carefully studied the court record, and considered the submissions filed by both counsel. We have in addition considered the law and authorities counsel cited as well as those sourced by the Court. We are mindful that this is a first appeal to this court which is governed by the provisions of Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions SI. 13-10 or Rules of Court. We are in accordance with that law required to carefully and critically review the record from the court below and in doing so, reappraise the evidence and make inferences of fact, but taking caution that we did not see the witnesses testify and also, without disregarding the

decision of the High Court. **See Kifamunte Henry versus Uganda Supreme Court Criminal Appeal No. 10 of 1997**. Alive to the above-stated duty, we shall proceed to resolve the two grounds of appeal as below;

Ground one

13] Both NS and PW1 stated and it was confirmed at the trial that NS was defiled sometime during 29/7/2017. The appellant denied the participating in the offence and stated that on that same date he was on remand after being arrested for being found without identification. By doing so, the appellant raised an alibi indicating that he was not at the crime scene at the material time of the offence. In rebutting that defence, the prosecution submitted that NS properly identified the appellant as the one who had defiled her, which placed him at the crime scene. The contest is that the trial Judge disregarded the alibi, which was credible.

14] The settled legal position is that an accused person who raises an alibi, has no duty to prove it. See for example: **Sekitoleko versus Uganda 1967 EA 531**. Once evidence of an alibi is raised, then the prosecution must disprove it with evidence placing the accused at the crime scene. The Court must equally consider the facts of the alibi. It was held by the Supreme Court in **Bogere Moses versus Uganda, Criminal Appeal No. 1 of 1997**, that:

> *"Where prosecution has adduced evidence showing that the accused was at the scene of crime and the defence not only denies it but adduces evidence showing that the accused person was*

elsewhere at the material time, it is incumbent on the court to evaluate both versions judiciously and give reasons why one and not the other version is accepted."

The same Court in **Lt Jonas Ainomugisha v Uganda, Supreme Court Criminal Appeal No. 19 of 2015,** in addition discussed what it takes to disprove an *alibi* in the following passage:

> *"One of the ways of disproving an alibi is to investigate its genuineness as was stated in the case of* ***Androa Asenua & Another Vs Uganda (Cr. Appeal No 1 of 1998) [1998] UG SC 23*** *where the Supreme Court of Uganda cited with approval the authority of* ***R Vs Sukha Singh s/o Wazir Singh and Others 1939 (6 EACA) 145*** *where the Court of Appeal for East Africa observed that:*
>
> *'If a person is accused of anything and his defence is an alibi, he should bring forward the alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.'"*

15] Further, NS the victim was the sole eye witness to the offence. The principles to be followed when considering such evidence has been outlined in several well followed decisions. We shall consider the decision of the Supreme Court in **John Katuramu versus Uganda, Criminal Appeal No. 2 of 1998** where it was held that:

> *"the legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should warn itself of the danger of possibility of mistaken*

identity in such case. This is particularly important where there are factors which present difficulties for identifications at the material time. The court must in every such case examine the testimony of the single witness with greatest care and where possible look for corroborating or other supportive evidence. If after warning itself and scrutinizing the evidence the court finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity.

16] Furthermore, the Court of Appeal in the well followed decision of **Abdalla Nabulere & Another versus Uganda, CA Criminal Appeal No. 09 of 1978, UGCA 14 [5 December 1978] laid down principles to be noted when considering evidence of a single witness.** it was held that;

(a) The testimony of single witness regarding identification must be tested with the greatest care.

(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the Judge adverts to the danger of basing a conviction on such evidence alone.

17] The appellant's evidence that he was in custody on the date of the offence would be a defence of alibi. Mr. Kunya's submissions that the appellant was only required to raise the alibi, but not to prove it, was

correct. His submission that the Judge shifted the burden from the prosecution to prove the alibi, appeared to stem from the Judge's finding at page 24 of the record that save for stating that he was in dentation, the appellant adduced no further proof to reinforce his denial. Even so, the Judge still went ahead as required in law to consider the alibi against the prosecution evidence to find that the appellant was placed at the scene of crime. He made quite an extensive evaluation of the two versions before coming to the decision that the appellant was correctly identified as the one who defiled NS on the fateful day.

18] Our own re-evaluation of the evidence leads to a similar conclusion. The appellant stated that he was on 15/6/2017 arrested by unidentified men but did not mention where he was held in custody, or where exactly he served a sentence of community service. He claims to have been informed of new charges after 14 days of his first arrest which would be around 29/7/2017 (the date of the offence) and then spent three weeks in custody at the Mpigi Police. In cross examination he changed his testimony to state that he was taken to Mpigi on 19/7/2017, where he spent two weeks and 4 days and that reporting of this offence happened while he was on remand.

19] Although under no obligation to prove those facts, it would have strengthened his alibi if he adduced evidence to support it. It would also have aided his case if the alibi was raised earlier during investigations before his trial. Proof of his custody could have readily been verified by the police during investigations and if true, his

prosecution would have in fact never happened. It is strange that he did not raise that fact immediately upon his arrest. Conversely, the prosecution disproved the alibi with evidence that placed the appellant at the crime scene through evidence of identification, as we shall now show.

20] NS testified that she knew the appellant and it is the appellant, and no other who had sexual intercourse with her. She explained that the sexual encounters happened three different times; first in the maize of Blaza, the second time at his house, and thirdly inside a toilet. That on all three occasions, he removed her clothes before inserting his private parts or penis into her vagina. PW1 corroborated that evidence when she testified that she knew the appellant as her employee who worked as a gardener in her field. That on 29/7/2017, she left the appellant at home together Namuyomba, Nabukeera, Sarah, Brian Kasozi, Baseka Fred and NS. That when she returned at 7:00am, she found the older children Nabukeera and Namuyomba very annoyed, and they told her to send the appellant away because he had used NS. That NS herself confirmed that report and even narrated the three times the appellant had defiled her. That PW2 was prompted by that report to check NS, who felt pain when she touched her private parts.

21] The above facts indicate that prior to the incident, NS knew the appellant well and in court identified him as Kiggundu Gerald. She must have seen him before as her mother's employee. Although the appellant denied ever working for PW1, he admitted knowing both NS and PW1 as village mates. In terms of proximity and duration, the

appellant had sexual intercourse with NS on three different occasions, which she explained well to her mother. Those episodes were long enough to aid correct identification, and dispel any possibility of mistaken identity. It was recorded in PE1 that NS was medically examined on 30/7/2019, just one day after the incident. That evidence coupled with NS' evidence of the identification would defeat the alibi.

22] In his judgment, the trial Judge appeared to be well aware of the law relating to identification. In addition to citing extensive relevant authority, he stated in his judgement as follows;

> *"It is clear that the prosecution evidence is purely based on identification of the appellant by PW2, the law as regards identification has been settled in several cases by Court to wit; Bogere Moses vs. Uganda SCCA No.1 of 1997; Abdalla bin Wendo & another vs. R (1953) Z0 EACA 116; Rovia vs. Republic (1967) EA 583; Abudala Nabulere & Others vs. Uganda, criminal Appeal No. 10 of 1977. According to these authorities, the starting point when dealing with such evidence is for court to satisfy itself whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In in so doing, the court must consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult. when the factors favouring a correct identification are 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 of caution."

23] The trial Judge found as we have done, that the quality and conditions of identification by PW1 were in the circumstances favourable and satisfactory for a positive and correct identification. In light of that evidence, it appears to us that the defence of alibi put up by the appellant was effectively disproved by the prosecution evidence, which squarely placed the appellant at the scene of crime, as the perpetrator of the offence for which he was convicted.

24] We therefore find no error by the Judge to disregard the appellant's alibi and his decision that the appellant was positively identified.

25] This ground of appeal therefore fails.

Ground Two

Appellants submissions

26] Mr. Kunya directed our attention to the settled principle that an appellate court is not to interfere with a sentence imposed by the trial court which exercised its discretion whilst sentencing unless the exercise of the discretion was such that the trial court ignored to consider an important matter or circumstances which ought to have been considered when passing the sentence. He referred to the case of **Kiwalabye versus Uganda, (SC Criminal Appeal No. 143 of**

2001) cited in **Kimera Zaverio versus Uganda, CA Criminal Appeal No. 427 of 2014.**

27] Counsel then repeated the mitigating factors that were presented at the trial that the appellant was a first time offender of youthful age of 26 years, hence capable of being reintegrated into society. He in addition mentioned the period of two years the appellant had also spent on remand at the time of his sentencing. Counsel then invited this Court to find that the sentence of 20 years' imprisonment imposed by the learned trial Judge was manifestly harsh and excessive, one that was outside the sentencing range for similar cases. For guidance, he referred to **Nkurunziza Geoffrey versus Uganda, CA Criminal Appeal No. 686 of 2014.**

28] In conclusion, counsel prayed that this Honourable Court be pleased to allow the appeal, quash the conviction and set aside the sentence. He prayed in the alternative, for the sentence to be set aside and substituted with an appropriate one in order to meet the ends of justice.

<u>Respondent's submissions</u>

29] In response, Ms. Nalwanga agreed with the sentence of 20 years that was imposed. In her view, considering the circumstances of the case, it was neither harsh nor excessive. She drew our attention to the findings of the Judge at page 18 of the record that the offence of aggravated defilement carries a maximum sentence of death, and that NS who was a victim of repeated defilement, was only four years old.

She added that the trial Judge did consider the mitigating factors when he mentioned that the appellant was a first offender and capable of reform, before arriving at a sentence of 20 years' imprisonment.

30] To support her submissions, Ms. Nalwanga referred to the decision in **Twinamatsiko Peter versus Uganda, CA Criminal Appeal No. 073 of 2010** where this Court upheld a sentence of 20 years pronounced against an appellant who had defiled a 7 and half year-old girl. That in contrast, the victim in this case was only four years and was repeatedly defiled by the appellant.

31] In conclusion, Ms. Nalwanga prayed that this honourable court upholds the sentence of 20 years.

Analysis and decision of the Court

32] The issue for this courts determination is whether the sentence of 20 years' imprisonment was manifestly harsh and excessive in the circumstances of this case. We are aware that when exercising its discretion, the sentencing court is guided by established principles in order to achieve the ends of justice. The agreed legal position well-articulated by both counsel, is that an appellate court should not interfere with a sentence imposed by the trial court which has exercised its discretion, unless it is shown that the sentence is illegal, or it is evident that in the exercise of its discretion, the trial Court ignored to consider an important matter or circumstances which ought to have been considered before passing the sentence, or where the sentence is manifestly excessive or too low as to amount to an

injustice. See for example, **Livingstone Kakooza versus Uganda, SC Criminal Appeal No. 17 of 1993.**

33] It is argued in this appeal that the Judge neglected to consider the mitigating factors before meting out a sentence of 20 years' imprisonment. In his sentencing ruling, the Learned Trial Judge stated *inter alia* that;

> *"The offence carries a maximum sentence of death. The aggravating factors show that the victim was only four years. There was repeated defilement. So there is need for deterrence. Mitigations show that the accused is a first offender and capable of reform. There is need for a reformatory sentence. The above move the penalty from maximum and accused will serve 20 years' imprisonment running from first date of remand."* Emphasis applied.

34] In our view, the trial Judge did a fair job in considering both the aggravating factors and mitigating factors. He was careful not to give one more prominence than the other. However, it is significant that he omitted to deduct the period of two years that the appellant spent on remand. He rendered his judgment on 26/9/2019, and was as such, bound by law to follow the Supreme Court decision of **Rwabugande Moses versus Uganda, Criminal Appeal No. 25 of 2014.** In that case, the Court not only held that Article 23(8) demands that the remand period be accounted for to the benefit of the convict, but also that the deduction ought to be clear and arithmetically determined. It was specifically held that:

> *"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical.*

This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."

35] In our view, the omission of the trial Judge resulted into a sentence that offended the Constitution and is thus, illegal. We hereby set it aside. We then invoke the provisions of Section 11 of the Judicature Act, which grants this Court the same powers as the trial court to impose a sentence on the appellant.

36] When determining an appropriate sentence, we shall take into consideration the peculiar facts of the case, as well as the mitigating and aggravating factors presented during the allocution proceedings. Further, we shall be guided by the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 (hereinafter Sentencing Guidelines). According to the Third Schedule, the sentencing range for aggravated defilement after considering both aggravating and mitigating factors is, 30 years to death, the latter being the maximum sentence. The same Sentencing Guidelines in Paragraph 6(c) provide for the principle of consistency; a well followed doctrine by all sentencing Courts by which similarly decided cases are considered as a way of maintaining uniformity in sentencing, and is in itself a measure of whether in given circumstances, a particular sentence is manifestly harsh and excessive. In the case of

Aharikundira Yustina versus Uganda, SC Criminal Appeal o. 27 of 2015, it was held by the Supreme Court that:

> *"... it is the court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. 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 unjustifiable differentiation."*

37] We shall therefore consider sentences given in previous decisions for example, that of **Ssentongo Latibu versus Uganda, CA Criminal Appeal No. 73 and 111 of 2016**. In that case, this Court gave a sentenced of 23 years (post deduction of remand period) to an appellant who had repeatedly defiled a child of 5 years. Yet in **Senoga Frank versus Uganda, CA Criminal Appeal No. 74 of 2020,** the same court confirmed a sentence of 28 years and 4 months for an appellant who had defiled a 10-year-old girl. In **Sseruyange Yuda Tadeo vs Uganda, CA Criminal Appeal No. 080 of 2010,** this Court imposed a sentence of 27 years' imprisonment after deducting the period spent on remand. The appellant had defiled a 9-year-old girl. In Nkurunziza Geoffrey versus Uganda, (supra) this Court reduced a sentence of aggravated defilement from 20 years to 18 years. The appellant had defiled a four-year-old child.

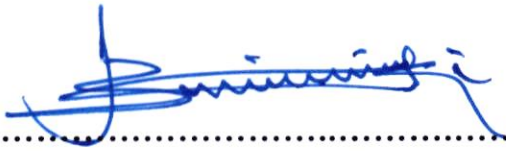
38] In this case, the prosecution proved that the appellant defiled NS a 4-year-old girl on three different occasions. It was presented for the prosecution that the repeated defilement should be considered as an aggravating factor, but they admitted that the appellant was a first

time offender of 26 years. Conversely, it was presented in mitigation that the appellant who was a young man when he offended, had learnt his lesson and was willing to reform. He too prayed for leniency from the Court, for the reason that he had a number of responsibilities.

39] We have carefully weighed the submissions by each counsel during the allocution proceedings. We agree that the appellant was a relatively young man who showed remorse by begging for leniency. However, the offence is grave and attracts the maximum sentence of death. The appellant an employee of NS's mother and sharing their home, should have protected NS but not repeatedly defiled her. He took advantage of their familiarity to painfully take her innocence. He was old enough to know that that he had a duty to protect, but not to harm the child.

40] Earlier decisions used for comparison indicate a sentencing range for 18 years upwards to 28 years for the same offence. Thus, taking into account the gravity of the offence, and after weighing the aggravating and mitigating factors, and upon considering similarly decided cases, we consider a sentence of 20 years' imprisonment as appropriate in the circumstances. We are enjoined under Article 23(8) of the Constitution to take into account the period of 2 years and 2 months the appellant spent on remand, which we do. Therefore, the appellant shall serve a sentence of 17 years and 10 months' imprisonment with effect from the date of conviction on 26/9/2019.

Dated at Kampala this ....8th..... day of .....May....., 2023.



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HON. CHEBORION BARISHAKI
JUSTICE OF APPEAL

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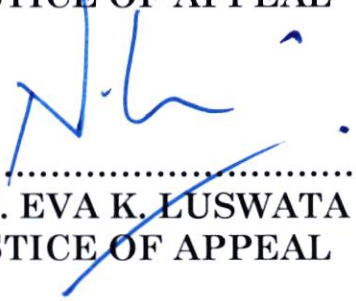
HON. HELLEN OBURA
JUSTICE OF APPEAL



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HON. EVA K. LUSWATA
JUSTICE OF APPEAL