THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA
CRIMINAL APPEAL NO.198 OF 2019
[CORAM: Buteera, DCJ; Mulyagonja & Mugenyi, JJA]

BALUTWANIMANA JUMA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal against the High Court decision of Mutonyi Margaret, J, at Mukono in Criminal Session Case No. 0523 of 2017, dated 25/ 07/ 2015)

JUDGMENT OF THE COURT

Introduction

The appellant was convicted of aggravated defilement contrary to sections 129(3), (4) (a) & (b) of the Penal Code Act, Cap 120, and sentenced to 30 years' imprisonment.

Brief Facts

It was the prosecution case that on 26th February 2013 at about 9.30pm at Kiryamuli Village in Kayunga District, a fight ensued between the appellant and his lover, Kizanye Tereza. Kizanye Tereza fled to a nearby bush, leaving the victim behind. While Kizanye was away, the appellant ordered the victim to open for him. The appellant who was completely naked entered, removed the victim's knickers and performed a sexual act on her. The victim was examined and she was found to be 15 years' old with a ruptured hymen. The appellant was found to be 45 years and HIV positive. He was arrested, charged, tried, and was convicted of aggravated defilement and sentenced to 30 years' imprisonment. Being dissatisfied with that decision, he filed this appeal.

Grounds of Appeal

1. **THAT** the trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thus causing a miscarriage of justice to the appellant.
2. **THAT** the learned trial judge erred in law and fact when she sentenced the appellant to a harsh and excessive sentence of 30 years thereby occasioning a miscarriage of justice.

Representation

At the hearing of the appeal, the appellant was represented by Ms Sheila Kihumuro Musinguzi, on state brief, while the respondent was represented by Ms Anna Kiiza, Senior Assistant DPP. Both counsel applied to court to adopt their written submissions as their legal arguments. This application was granted. The court shall rely on those submissions to determine the appeal.

Case for the appellant

Regarding the duty of the first appellate court, counsel for the appellant cited the case of **Oryem Richard v Uganda; Criminal Appeal No. 22 of 2014 (SC)**, where court held that Rule 30(1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate court, to re-appraise the evidence on record and draw inferences of fact.

Ground 1

Counsel for the appellant submitted that the participation of the appellant in the commission of the alleged offence was not proved and that it was erroneous for the learned trial judge to convict the appellant and that his conviction thus occasioned a miscarriage of justice. Counsel cited **Kalinaki**

Maganda Sewanyana v Uganda; Court of Appeal Criminal Appeal No. 507 of 2016, where it was held that:

> **"All the aforementioned factors leave us with reasonable doubt about the alleged defilement of K.M. which we now resolve in favour of the appellant and find that the evidence adduced by prosecution to prove the offence of aggravated defilement of K.M did not meet the required standard of proof beyond reasonable doubt. Had the learned trial Judge properly addressed her mind to the evidence she relied on to convict the appellant she would have made the same finding. The aspect of ground 1 (a) of the appeal that relate to K.M therefore succeeds."** (Sic)

Counsel further cited **Candiga v Uganda; Court of Appeal Criminal Appeal No. 23 of 2012,** which provides for the law on contradictions and inconsistencies. She argued that the learned trial judge relied on hearsay evidence to set her verdict. That the victim's HIV status result was not tendered in court to determine if indeed she had contracted the HIV from the appellant as was alleged by the prosecution. Further, that the defense agreed on medical evidence as per PF34 and PF24A marked 'PE1' and 'PE2' respectively, as well as the trial court asking the appellant if he knew his HIV status but that it was not conclusive that he was HIV positive at the time of the commission of the offence.

Counsel argued that the insufficiency of the evidence in proving the ingredient of the appellant's participation and performance of the sexual act was grave since it went to the root of the case. She prayed that this doubt be resolved in favor of the appellant.

Ground 2

Counsel contended that the learned trial judge did not properly take into account the allocutus of the appellant thereby arriving at a harsh and excessive sentence of 30 years' imprisonment. Counsel cited **Aharikundira Yustina v Uganda; Supreme Court Criminal Appeal No.27 of 2005**, where it was held, *inter alia*, that:

> **"since the trial Judge did not weigh the mitigating factors against the aggravated factors this automatically placed a duty on the court of appeal to weigh the raised factors"** (Sic)

Counsel also cited **Epuat Richard v Uganda; Criminal Appeal No.0199 of 2011**, where the appellant was convicted of murder and sentenced to 30 years' imprisonment. On appeal, this court set aside the sentence and substituted it with 15 years' imprisonment.

Counsel argued that had the trial judge addressed her mind to the mitigating factors and this court's decision in **Epuat Richard** (Supra), she would have arrived at a more lenient sentence. Counsel prayed that this honorable court be pleased to invoke its powers under Section 11 of the Judicature Act Cap 13 to set aside the conviction and sentence, and in the alternative, reduce the sentence to a more lenient one.

Case for the respondent

Counsel for the respondent 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. He, nevertheless, proceeded to argue them.

Ground 1

Counsel for the respondent submitted that the learned trial judge properly and adequately evaluated the evidence and came to the right conclusion and that there was no miscarriage of justice that was occasioned on the appellant. Counsel pointed out that the appellant was living with the victim's grandmother as her lover. They were living in the same home with the victim who now referred to him as grandfather, and as such, he was well known to her.

Counsel submitted that the victim, PW3, gave sworn evidence in court and stated that she knew the appellant and had lived with him for a period of three years. PW3 testified further that she had no problem with the appellant and he was introduced to her by her grandmother as her grandfather. That she recognized his voice when he called out to her to open the door on the fateful night, she knew him very well and that he was holding a torch which he switched off when entering the house.

Counsel cited **Ntambala Fred v Uganda; S.C. Criminal Appeal No. 34 of 2015,** where it was held that a conviction can be solely based on the testimony of the victim provided that court finds her truthful and reliable. It was counsel's submission that the victim was in position to identify the appellant as her attacker since she had been staying with him as family for about three years and her sworn evidence given in court placed him at the scene of the crime. And that it also named him as the culprit.

Counsel further relied on **Alfred Tajar v Uganda; Criminal Appeal No. 167 of 1969** (unreported) quoted with approval in **Oketch David v Uganda; SCCA No. 24/2001.** Counsel prayed that this court finds that the prosecution proved that the sexual act occurred and it was committed by

the appellant who was not only the grandfather of the victim but also HIV positive. And as such also find that the first ground raised no merit.

Ground 2

Counsel for the respondent submitted that a sentencing court is expected to take into consideration the nature of the offence committed by an appellant. He cited **Kyalimpa Edward v Uganda; S.C. Criminal Appeal No. 10 of 1995**, where the Supreme Court held that an appropriate sentence is a matter of discretion of the sentencing judge as each case presents its own facts upon which a judge exercises their discretion.

Counsel further submitted that the appellant was convicted of aggravated defilement which attracts a maximum penalty of death. That the learned trial judge when sentencing the appellant considered the mitigation and aggravating factors and gave reasons for sentencing him to 30 years' imprisonment.

Counsel cited **Bonyo Abdul v Uganda; S.C. Criminal Appeal No.7 of 2011** in which the Supreme Court upheld a sentence of life imprisonment where the appellant was HIV positive and had sexual intercourse with a victim who was 14 years old. Counsel noted that the victim in this case was 15 years at the time of the commission of the offence. She thus submitted that a sentence of 30 years' imprisonment could not be considered to be harsh or excessive. She implored court not to interfere with the discretion of the learned trial judge, to disallow the Appeal and dismiss it accordingly.

Court's consideration

In answering this Appeal, this Court shall exercise the powers of the first appellate court as provided for under Rule 30 (1) (a) of The Judicature

(Court of Appeal Rules) Directions, S.I.13-10, and by the Supreme Court in **Kifamunte Henry v Uganda; S. C. Criminal Appeal No. 10 of 1997**.

Ground 1

The appellant disputed the learned trial judge's finding that prosecution had proved that the appellant committed the offence. In convicting the appellant, the learned trial Judge relied on the testimony of the victim whom she found to have lived with the appellant for about three years. To her, the appellant was very well known to the victim and she knew his voice. She also based on the testimony of PW4, his lover who was staying with him, and who was grandmother to the victim. PW4 testified that on the fateful night, she sneaked out of the house following the appellant's beatings, and while in the coffee plantation, she heard an alarm made by the victim. On getting there, she found the victim crying that the appellant had defiled her. The appellant was at the scene and he beat PW4's sister for mentioning that he had defiled the victim yet he was in a sexual relationship with her grandmother.

From the above evidence, we note that though the incident took place at night, the appellant was well known to the victim. He spoke to her when he asked her to open for him since he needed to pick a jerry can of waragi. He pushed her on a bed and defiled her. She made an alarm that was responded to by many people. The appellant was arrested immediately from the scene of the crime. Thus far, we agree with the trial judge's finding that the prosecution proved beyond reasonable doubt that it was the appellant who defiled the appellant. We are fortified in our finding by the appellant's conduct soon after the incident. He was violent to whoever responded to the victim's alarms, threatened people with a panga and then run away, disappearing from the village. It took the ingenuity of the

victim's grandmother who testified as PW4, to devise means to have him arrested since the village people were threatening her for hosting a criminal. We, therefore find no merit in the argument that there was no substantial proof of the appellant's participation in the commission of the offence with which he was charged.

Counsel for the appellant contended that there was no conclusive evidence to prove that the appellant was HIV positive at the time of the commission of the offence and that no evidence was tendered to prove that the victim contracted HIV from the appellant. Whereas there was no evidence that the victim contracted HIV from the appellant, a look at the record of appeal shows that at the commencement of the trial, prosecution and defense agreed to some facts and signed a memorandum to that effect. Key to the agreed facts were the medical reports showing that the appellant was HIV positive. These were PF 24A and PF32A. They were admitted by court in evidence. The Client's slip No.30370 was admitted and marked 'PE3' on record together with PF24 which was marked PE2. The appellant himself did not object to the admission of the medical evidence. As a matter of fact, he stated, '*I understood; they can admit PF24 a result slip for HIV*'.

To further confirm that the results were correct, the learned trial judge asked the appellant whether he knew about his HIV status, to which he responded, '*Yes, I knew it*'. It is our view that the medical report coupled with the appellant's admission of knowing his positive HIV status leaves no room for doubt that he was indeed HIV positive at the time of the commission of the offence.

As such, it cannot be correct as counsel for the appellant sought this court to believe that the declaration of the appellant's HIV status was based on hearsay. And that there was no medical evidence to prove it.

As to whether the victim contracted HIV from the appellant, there was no such evidence since the medical report (PF3A) that was admitted in evidence as 'PE1', in her regard, only showed that she was aged 15 years, and had a raptured hymen. As such, we find that it was not proved by prosecution that the victim contracted HIV from the appellant. That said, we observed that the trial Judge did not allude to the appellant infecting the victim with HIV. As such, we find counsel's contentions on that point redundant.

Regarding the claim on inconsistencies and contradictions, save for citing the law that defines those principles, counsel fell short of pointing out the alleged contradictions. We would have nothing useful to address on that claim. We find no merit in this ground and dismiss it accordingly.

Ground 2

Counsel for the appellant challenged the trial court's sentence for being harsh and excessive. She prayed that the same be set aside and in the alternative, it be substituted with a more lenient one. The case of **Kyalimpa Edward v Uganda; S.C.C.A. No. 10 of 1995,** has laid down the principles upon which an appellate court may interfere with the sentence passed by a sentencing court. In **Karisa Moses v Uganda; SCCA No. 23 of 2016**, the Supreme Court, 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."

In this case, counsel for the appellant submitted that the learned trial judge did not properly take into account the allocutus of the appellant thereby arriving at a harsh and excessive sentence of 30 years' imprisonment. To establish whether the learned trial Judge considered or failed to consider the allocutus, we shall look at the record of appeal, point out the allocutus and cite the relevant portion on sentencing.

Counsel for the state pointed out that the appellant was a first offender who submitted to the conviction and expressed remorse. She submitted that under Guideline 22 (d), the fact that he had knowledge of his HIV status was aggravating. That he should have protected the victim, he instead 'lived on her', traumatized her physically and mentally exposed her to HIV infection. She further pointed out that the offence was rampant in the jurisdiction and there was need to protect children from vultures like the appellant. She prayed for a deterrent sentence of 30 years.

In mitigation, counsel for the appellant observed that the appellant was a first offender who submitted to the conviction and was remorseful. That he regretted the act he did which was a result of alcoholism. He was 50 years old and the average life was 65-70 years. She contended that sentencing the appellant to 30 years would be as good as life imprisonment. She implored the Court to exercise leniency and sentence him to 12 years. That that would bring him back to society at about 62 years and the appellant believed that he would be of honorable character before he died.

In sentencing the appellant, the learned Judge stated as follows:

'I have considered both the aggravated and mitigating factors as submitted by the state and defence counsel, I have also considered the above factors under the sentencing guidelines for courts of Judicature. A libidinous man is dangerous to women in society both old and young. The convict who could not spend a night without sex because his concubine had run away from him because of evidence had to attack this young child and ravish her. He deserves to be out of circulation until his inside in law. In the result he is sentenced to 30 years' imprisonment the period on remand inclusive. This will serve as a deterrent to him and others dirty old men who jail to control their sexual lust and turn homes into places of sexual fertile.' (Sic)

The above excerpt indicates that the learned trial judge actually considered both the aggravating and the mitigating factors. These included the fact that the appellant was an old man and a first offender. However, he had misused his parental duty and abused a child he ought to have protected and might have even infected with the deadly HIV disease. She also observed that the appellant had used his place of authority to torment members of his household. Guided by the Sentencing Guidelines, she sentenced him to 30 years' imprisonment.

As to the claim that the sentence was manifestly harsh and excessive, we will cite authorities that show sentences in a similar offence and proceed to establish whether the instant sentence was in any way harsh or excessive. In **Kiiza Geoffrey v Uganda; Criminal Appeal No. 76 of 2010,** the appellant was sentenced to 30 years' imprisonment on two counts of aggravated defilement. This court confirmed the sentences which were to run concurrently.

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In **Asega Gilbert v Uganda; Criminal Appeal No 16 of 2013,** court confirmed concurrent sentences of 30 years' imprisonment for aggravated defilement. The offences were committed on victims aged 9 and 6 years respectively. They were nieces to the appellant.

In **Kalisa John Tom v Uganda; Criminal Appeal No. 45 of 2015,** a sentence of 52 years' imprisonment for the offence of aggravated defilement was set aside and substituted with one of 25 years' imprisonment.

In the instant case, the appellant was sentenced to 30 years' imprisonment, after going through a full trial. That wasted court's time yet he very well knew he had committed the offence. We find nothing illegal or irregular that the trial judge did. We would have no reason to interfere with her sentencing discretion. As such, we reject this ground and dismiss the entire appeal for lack of merit. The appellant shall continue to serve his sentence.

Dated at Kampala this ..... Day of 2023

Richard Buteera
Deputy Chief Justice

Irene Mulyagonja
Justice of Appeal

Monica Mugenyi
Justice of Appeal