5 THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 0127 OF 2018

(Coram: Obura, Bamugemereire & Madrama, JJA)

LOCHORO APANGORIA} .... APPELLANT

10 VERSUS

UGANDA} .... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Moroto in Criminal Session Case No before Wolayo J delivered on 27th of July, 2016)

15 JUDGMENT OF COURT

The appellant had been charged with two counts of aggravated defilement contrary to section 129 (3) (4) (a) of the Penal Code Act Cap 120. The particulars of the offence were that the appellant on the 22nd of October 2014 at Nayese Village Losilang in Kotido District performed a 20 sexual act with L.A a girl aged 14 years and in the second count it is alleged that on the same date and place, he committed a sexual act with L M a girl aged 18 years.

The learned trial judge in agreement with the two assessors found that the prosecution proved the case beyond reasonable doubt in that the 25 accused person defiled the victims the same night and in the same room one after the other whereupon he was convicted as charged. Trial judge found that the conduct of the appellant in defiling two girls at the same place and in the home is an aggravating factor. It was a gender-based violence case and manifesting a pattern of violence against girls. She 30 found that the accused person being aged 20 years is a mitigating factor and therefore found that a sentence of 15 years' imprisonment on each count was an appropriate sentence from which she deducted the period the appellant had spent on remand since November 2014 whereupon he was sentenced to 13 years' imprisonment on each count.

5 The appellant was aggrieved by the conviction and sentence and appealed to this court on two grounds of appeal namely:

1. The learned trial judge erred in law and fact when she failed to properly evaluate the evidence on the court record, ignored major contradictions of the prosecution evidence and convicted the
10 appellant.
2. The learned trial judge erred in law and fact when he sentenced the appellant to an illegal 13 years' custodial sentence which was harsh, excessive and without consideration of the pre-trial period.

At the hearing of the appeal, the learned Senior State Attorney Mr.
15 Tuhairwe Julius Danxi appeared for the respondent and learned counsel Mr. Nangulu Eddy appeared for the appellant. The court was addressed in written submissions.

Ground 1:

The learned trial judge erred in law and fact when she failed to
20 **properly evaluate the evidence on the court record, ignored major contradictions of the prosecution evidence and convicted the appellant.**

The appellant's counsel submitted that the burden of proof in criminal cases rests on the prosecution and the standard of proof is that beyond
25 reasonable doubt. Counsel submitted that the prosecution failed to prove to the requisite standard the following facts: (1) that the victim was below 14 years of age; (2) that a sexual act was performed on the victim and (3) that it is the accused person who performed the sexual act.

Counsel contended that proof of age is a fundamental requirement in
30 offences of aggravated defilement and the law requires various medically accepted ways of ascertaining the age of the victim. Where there is doubt about the age of the victim, then the benefit of doubt should be given to the accused. He contended that none of the victims was certain about her age and this doubt was propagated further by PW3,
35 their mother who also stated that she did not know the ages of the victims.

5 The learned trial judge considered this shortfall in evidence and used her ocular vision to assess the age of the victims as between 14 and 15 respectively. Secondly the learned trial judge relied on prosecution evidence of a medical nature that PW 1 was 14 years old while PW2 was 12 years old at the time of commission of the offence. Counsel attacked 10 the medical evidence as unreliable because the medical examination was not conducted by a qualified person. The person who conducted the medical examination only had a certificate in nursing and was therefore incompetent for purposes of ascertaining the age of the victims. In the premises, the appellant's counsel submitted that there was no evidence 15 before the court to ascertain the age of the victims at the time of the assault and therefore the ingredient for aggravated defilement of the victims being below the age of 14 years had not been proved beyond reasonable doubt.

On the second ingredient, the appellant's counsel submitted that the 20 prosecution evidence of whether a sexual act was performed on the victims was wanting in several respects. Firstly, he contended that it was uncertain when the offence occurred in terms of whether it took place on the 22nd of October 2014 or on the 12th of October 2014 (10 days before the commission of the offence). PW2 testified that the offence occurred 25 on 22 October 2014 and the question was when the offence actually occurred. Secondly, the appellant's counsel contended that the conduct of the medical examination by unqualified personnel rendered the evidence inadmissible. That she was not possessed of the requisite medical qualifications to conduct the examination of the victims. The 30 medical officer only had a qualification of a certificate of nursing and nothing more and was therefore not a competent person.

Further, the appellant's counsel submitted that the medical report is riddled with fundamental falsehoods. This is because the medical examination was conducted a week after the alleged date of commission 35 of the offence and counsel contended that by that time, the victims must have been cleaned up and would not be possible to trace evidence of the commission of the offence on their bodies. Further, the medical report exhibit P2 only shows that the victim was depressed, crying with torn clothes. He contended that this suggested that the victim was kept in the

5 same state after the commission of the offence. Further, upon examination of the genitalia, exhibit P1 shows that there were small lacerations around the vaginal wall with fresh blood without ruptured hymen. Counsel contended that this was improbable and utterly false because there could not be fresh blood after one week. In the premises, 10 he submitted that the ingredient of a sexual act was not proved beyond reasonable doubt.

On the question of whether it is the appellant who performed the sexual act, the appellant's counsel submitted that on the day of the incident, two other gentlemen visited the home of the victims. Evidence further shows 15 that the appellant was accommodated in a house 10 metres away while the victims shared accommodation with their mother. In the late hours of the night, it is alleged that the victims who shared the same bed were attacked by an unknown person and when PW1 woke up in the night, he found the appellant committing the act. PW2 was asleep at the time of 20 the incident and stated that she noticed that she was being assaulted when she felt the weight of the appellant on her body. In other words, counsel contends that PW2 did not notice what preceded the assault on her because she was asleep and therefore cannot testify about what happened to PW1 prior to waking up.

25 Further counsel contended that PW3 did not witness the assault on either of the victims because she was not present. She was only awakened by PW1 who notified her that someone is inside the house. Counsel contended that none of the victims was certain about who the assailant was as it was dark at the time and there was no means of identifying the 30 assailant. Counsel further attacked the testimony of PW1 on the ground that she kept quiet when the appellant was committing the act. Secondly, the appellant then proceeded to PW2 who also kept quiet and made no attempt to seek rescue having discovered that an unknown person was in the house.

35 Further, the victims did not have any medical examination until almost a week after the incident. Lastly, in their respective narration of the incident to the unqualified medical personnel, PW1 stated that it was night when they were asleep in the house with her sisters and mother when someone came inside and committed the act on her. On the other hand,

5 PW2 maintained the exact narrative as PW1 that she was attacked by someone. There was no description of that person in the narration to the medical officer by both victims of the offence moreover both victims confirmed that they were not sure of the assailant.

In the premises counsel submitted that the ingredient of participation of 10 the appellant had not been proved beyond reasonable doubt.

Ground 2.

> **The learned trial judge erred in law and fact when he sentenced the appellant to an illegal 13 years' custodial sentence which was harsh, excessive and consideration of the pre-trial period.**

15 Appellant's counsel submitted that the sentence against the appellant was harsh and excessive. It was submitted on behalf of the appellant in mitigation that he had no previous record and was 20 years old. The proceedings further indicated that he had been on remand for one year and nine months. As a youth, the appellant is obviously resourceful and 20 would be able to contribute to society if he is released earlier. However, this was ignored by the learned trial judge who gave him a harsh custodial sentence of 13 years' imprisonment.

Submissions of the respondent's counsel.

Ground 1:

25 The respondent's counsel submitted that with regard to the first ingredient of the offence relating to the age of the victims, there are various ways to prove age which include medical examination, evidence of parents, witnesses, records, and the observation of the trial judge. He relied on **Uganda vs Kagoro Godfrey; Criminal Session Case No 141 of** 30 **2002** which relied on the authority of **R Vs Recorder of Premsiby Ex parte Bursar (1957) All ER 889** for the proposition that while the birth certificate may be conclusive proof of the age of the child coupled with the testimony of the parents, there are other ways to prove the age of a child that can equally be conclusive and this included observation of the child 35 and the common sense assessment of the age of the child.

5 From the facts, the respondent's counsel submitted that the learned trial judge adopted the observation of the victims and the common sense assessment when she noted that the victims were visibly below 14 and 15 years respectively. To the extent that PW1, PW2 and PW3 told Court that they were not certain of the exact age, they were being truthful 10 witnesses. This was further proved by the court in subjecting PW2 to a voire dire in light of the assessment of her age.

Learned counsel submitted that the court had an opportunity to observe the victims carefully and considered the issue of age. Further, PF3 was admitted among the agreed documents under section 66 of the Trial on 15 Indictment Act, and therefore must be taken to be duly proved and not open to challenge. The respondent contends that the totality of the admitted documents and agreed documents together with the testimony of the witnesses leave no doubt about the age of the victims.

With regard to ingredient 2 as to whether a sexual act had been 20 performed on the victims, the respondent's counsel submitted that all the prosecution witnesses testified that the act occurred on 22nd October 2014 save for PW 1 who stated otherwise. The respondent's counsel submitted that this was a minor contradiction and the, manner and place where the sexual act was committed was consistent in the testimony of 25 all the other prosecution witnesses. Further the accused was caught in the act by their mother PW3 after defiling the victims and subsequently she personally examined the victims and found semen on the victims.

In relation to the third ingredient, as to whether the appellant participated in the commission of the offence, the submission of the appellant 30 emphasises identification of the person who assaulted the victims. The respondents counsel submitted that the interpretation of the testimonies of the victims by the appellant's counsel was selective. If the testimonies are evaluated as a whole, the issue of identification of the appellant does not arise from them. In fact, it is indicated clearly from the prosecution 35 evidence that the accused was apprehended immediately and PW3 had a torch. He was arrested and tied until the morning when he was handed over to the authorities. The immediate arrest of the accused, demonstrates that the victims and their mother had ample time to identify the appellant. The trial judge found that the appellant was

5 positively placed at the scene of crime by all the eye witnesses as the person who defied two girls.

With regard to ground 2, the respondents counsel supported the finding of the learned trial judge and submitted that the sentence was not illegal. The pre-trial period was taken into account prior to the sentencing of the

10 appellant. She further relied on **Kyalimpa Edward vs Uganda; Supreme Court Criminal Appeal No 10 of 1995** for the proposition that an appropriate sentence is a matter for the discretion of the sentencing judge and each case presents its own facts upon which the judge exercises discretion. Unless the sentence is illegal or unless the court is

15 satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice, an appellate court will not interfere with the sentence.

The respondent's counsel maintained that the learned trial judge considered the mitigating factors and took into account the period spent

20 on remand and deducted it from the 15 years she found appropriate whereupon she sentenced the appellant to 13 years' imprisonment.

In rejoinder, the respondents counsel reiterated earlier submissions which we have considered as the appellant's counsel primarily drew the attention of the court to the evidence which we shall consider.

25 **Consideration of the appeal.**

We have carefully considered the appellant's appeal, the submissions of counsel the record of appeal the authorities cited to us and the law generally. This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction and this court is required to

30 reappraise the evidence and draw its own inferences of fact (See rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, which provides that: *(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may— (a) reappraise the evidence and draw inferences of fact; and*). Additionally, the court is

35 required to caution itself of the fact that it does not have the same advantage as the trial judge in observing and hearing the witnesses testify and should make due allowance for that (See **Pandya v R [1957] EA 336, Selle and Another V Associated Motor Boat Company [1968] EA 123**).

In ground 1 of the appeal, the appellant's grievance is against conviction on the ground that the ingredients of the offence of aggravated defilement had not been proved beyond reasonable doubt for reasons that: firstly, the age of the victims was not proved to be 14 years. Secondly the participation of the appellant was not proved. Lastly some evidentiary issues relating to the date of the offence, the qualifications of the medical officer to perform medical examination and produce a medical report to prove a sexual act. Counsel contended that there are some issues in the medical report which the learned trial judge ought to have had doubts about.

We have critically scrutinised the record of appeal independently of the submissions of counsel. On 5th July 2016, the parties agreed to admit PF3A as exhibits P1 and P2 for the victims and PF 24 for the accused. Secondly, the record indicates that a voire dire was conducted for LM who was of the apparent age of 15 years. Evidence was taken from PW1 who testified that on the fateful date, her parents namely the father and mother were not around and her mother returned late. The accused was at home and he was served food and he went to sleep in a different house which was about 10 metres away. While she was asleep, the accused made her his wife when she woke up at night he was having sexual intercourse with her but she kept quiet. Later on, he went to her sister. She then went to alert their mother that someone was inside the house. When she woke her mother, the mother found the appellant defiling her sister. Her mother was pregnant and she made an alarm and people arrived. She testified that she and her sister fell sick after the defilement and were taken to hospital. She felt pain in her stomach and her sister also felt pain. The accused person was taken to the police the following morning. She further testified in cross examination that she was with her sister and small children in the same house and her mother slept in a different hut.

PW2 LA testified that she did not know her age and she did not go to school. A voire dire was held to establish whether she could give evidence on oath. And the court observed as follows: "the child is old enough to understand the importance of being truthful, she will give evidence on oath." The trial judge then indicated that she was of the

5 apparent age of 14 years. She testified that on 22 October 2014 at night, she was with her sister and small children. Her father had slept somewhere and their mother had gone to the centre. When her mother came, the accused was served food and a place was prepared for him to sleep. She then testified that his place for sleeping was not in the same
10 house. While she was asleep, the accused person entered the house and made her and her sister his wives. He first started with PW1 and then he came to her. She did not notice who he was when he was with PW1. She however noticed it when the appellant made her his wife. She felt his weight and started turning whereupon PW1 called her mother. Her
15 mother was on the other side of the home and ran to the door flashing a torch. She testified that the appellant tried to run and kicked her mother in the stomach yet her mother was pregnant. Similar to PW1, she testified that he was dressed in sheets only. She came to know his name when people asked him. She also testified that she felt pain in her stomach but
20 was not taken to the hospital immediately and was taken later.

Further she testified in cross examination that she did not share the bed with PW1. It was PW1 who called their mother when the appellant was committing the offence on her. She testified that she came to recognise him when her mother flashed a torch on him.

25 PW3, the mother of the victims was aged about 40 years. When asked how old the victims were, she stated that she did not know. She however clarified that LM is the elder daughter and LA was the younger one. She came to know the appellant when he visited her on 22nd October 2012. She served him food and after serving them prepared for them with two boys
30 a place to sleep and went to sleep in her house about 7 metres away. That the accused person opened the door slowly while they were asleep. She came to know when PW1 made a noise and came to call her and reported that someone was inside the house. She flashed a torch in the net of the girls. The accused kicked her but she held him. She made an
35 alarm and men came to help her to arrest him. He was arrested and his legs were tied and he was made to remain at the scene. The next morning, he was reported to the LC 1 chairperson Lina Lukol. Police found him tied up at the home and took him. All her daughters fell sick after the incident. She checked them and found semen in both of them.

She took the children to the health centre the next day. She further clarified that the appellant is the person she arrested in the house.

In her cross examination testimony, she testified that she had never seen the accused before the incident. She came to know him as a son to her husband's friend. Further when she flashed a torch LM was in the house and he had already defiled her. She got the torch from LM.

The appellant gave testimony on oath and testified that he was near the town on his way when he was arrested of cattle rustling but does not know anything about the crime of aggravated defilement. He was driving six cows and was going to the kraal. He was arrested on the way in the middle of the road. He left the cows with the police.

We have carefully considered the evidence and it is apparent that only three prosecution witnesses testified. Secondly several exhibits were admitted. Exhibit P1 is police form 3A relates to the medical examination of the victim of sexual assault. It shows that the case was sent for examination on 27th October 2014. The report shows that LA was about 12 years old basing on her teeth. The stamp of the medical examining officer is that of Kotido district local government health centre IV. We have further considered the contention that the report indicates information of someone who entered the house and came and pushed his penis into the victim. There is no indication that this meant that the appellant had not recognised as that unknown person. What is material being that the appellant was recognised as the person who carried out the assault though he was a stranger to the girls. Regarding the fact that the victim was depressed and crying, we cannot draw much inference of facts from it other than the fact that this was the observation of the person who carried out the examination even if it relates to trauma of recalling an incident. We have considered the report about the genitalia in relation to the fact that there were "small lacerations around the vaginal wall with fresh blood without ruptured hymen". This was taken in isolation because part of the report reads "forceful insertion of penis into the minor's vagina". We noted that the medical officer did not testify. However, her qualification shows that she has a certificate in nursing.

5 We find nothing in the law that disqualifies any medical personnel from observing the physical fact in relation to a sexual offence so as to make it inadmissible. The observations of the appellant's counsel go to the weight to be attached to the medical report. Her title was M Senior. We cannot discern whether this means a senior midwife.

10 In relation to LM a similar medical report was written. Particularly it is written as follows "forceful insertion of penis into vagina". Secondly "lacerations on the vaginal wall with ruptured hymen".

The medical officer also found that this person was aged about 14 years basing on the teeth. The medical report was admitted as exhibit P2.

15 We have carefully considered the evidence and clearly the medical report is what it is. It was admitted in evidence and may have left some doubt about whether LM was under the age of 14 years. However, this goes to an issue of whether it was simple defilement or aggravated defilement.

As far as the evidence demonstrate, it shows that the PW2 was under the
20 age of 14 years while PW1 was about the age of 14 years and we find that there is reasonable doubt as to whether she was under 14 years of age.

With regard to contradictions, in dates whether as 12 of October or 22nd October, we find that this is a minor contradiction and can be an error in recording. Further there are very clear threads of evidence of PW1, PW2
25 and PW3 which are consistent and not challenged in cross examination. These include:

- LM was the first victim to be defiled.
- Thereafter the appellant went to defile LA.
- LM went and called her mother.
30
- The mother made an alarm.
- The mother was pregnant.
- The mother flashed a torch on the appellant.
- The appellant was a stranger to the victims but was served food after their mother PW3 came.
35
- The appellant was apprehended and tied and picked by the police the next day at or near the scene of crime.

The trial judge considered the evidence of the three witnesses of the prosecution. Particularly she found that the appellant had been tied up until the next morning when the LC 1 was alerted and the police came and picked him from the home. She found that the testimonies of PW 1 and PW 2 corroborated each other. This was further supported by the testimony of PW3. The trial judge also considered the medical evidence. She found that both the victims were below the age of 14 years when the offence was committed. We agree with her evaluation of evidence, clearly what is in dispute or in doubt is only whether LM was below the age of 14 years.

The learned trial judge assessed the age at the time of giving evidence by PW1 and PW2.

With regard to the medical evidence, learned counsel cited no law to support his submission that someone with a nursing certificate cannot examine the victim of a sexual assault and describe any signs of the sexual act.

Even if PW2 did not witness the assault on PW1, she testified about her part when she became aware of what was going on as she was asleep before the assault on her. Even if the hearsay testimony is severed, as should be, the testimony of PW2 remains valid on the part she could testify about and it supports the prosecution case. Similarly, even if the hearsay testimony of PW3 is severed in the part which could have been reported to her, her testimony remained valid from the time she was woken up to the time she flashed a torch, made an alarm whereupon other members of the village came to her rescue and the appellant was arrested and tied up. In the premises, the hearsay testimony does not weaken the prosecution evidence when it is severed from the testimonies of PW2 and PW3.

In the premises, we find no merit to the submissions of the appellant's counsel save for the fact that LM was below the age of 14 years. We would uphold the conviction of the appellant with regard to count one of the offence where the appellant was convicted of aggravated defilement of LA aged about 12 years. We set aside the conviction for aggravated defilement with regard to count two for the offence of aggravated

5 defilement with regard to LM and substitute the conviction with conviction for the offence of simple defilement of a child under the age of 18 years contrary to section 129 (1) of the Penal Code Act.

Ground 2.

In ground two, the appellant complains that **the learned trial judge erred**
10 **in law and fact when he sentenced the appellant to 20 years' custodial sentence which was harsh, excessive and without consideration of the pre-trial period.**

We have carefully considered this ground of appeal and find that as a question of fact, the learned trial judge considered that the appropriate
15 sentence in the circumstances was 15 years on each count. She deducted the period that the appellant spent on remand and sentenced him to 13 years on each count meaning that she discounted two years on each count. In other words, the appellant was not sentenced to 20 years' custodial sentence. In the written submissions, learned counsel
20 submitted that the sentence was harsh and excessive in light of the age of the offender at 20 years.

We have carefully reviewed the precedents for offences of aggravated defilement in similar circumstances and find that on count 1, the sentence of 13 years' imprisonment was not harsh or excessive and did not amount
25 to an injustice.

In **Kizito Senkula v Uganda; (Criminal Appeal No. 24 of 2001) [2002] UGCA 36** the victim of the offence was 11 years old and the Court of Appeal, on appeal, held that a sentence of 15 years' imprisonment was appropriate. In **Babua Roland v Uganda; Criminal Appeal No. 303 of 2010 [2016] UGCA**
30 **34**, the appellant was married to the victim's aunt. The victim was 12 years old at the time of the offence and was under the care of the appellant and her aunt. The appellant was convicted of aggravated defilement and sentenced to life imprisonment. On appeal, this court held that the sentence of life imprisonment was harsh and excessive and substituted
35 it with a term of 18 years' imprisonment. In **Lukwago Henry v Uganda; Court of Appeal Criminal Appeal No 0036 of 2010 [2014] UGCA 34**, the appellate was convicted on his own plea of guilty and sentenced to 13 years' imprisonment and this court upheld a sentence of 13 years

5 imposed on the appellant for the offence of aggravated defilement of a victim of 13 years.

In the circumstances, and in light of the precedents we have set out above, the learned trial judge did not pass any harsh or excessive sentence as to amount to an injustice. Secondly, she took into account
10 the period the appellant had spent in detention prior to his conviction. We accordingly uphold the sentence of 13 years' imprisonment in count 1.

Having set aside the conviction of the appellant in ground 2 with regard to aggravated defilement of LM, we substituted the conviction with a conviction for simple defilement. However, we find that the sentence of
15 13 years' imprisonment would be appropriate in the circumstances. We discount therefrom the period the appellant spent in pre-trial detention. The record shows that the appellant was arrested immediately after commission of the offence on 22nd October 2014. He was convicted on 22nd July 2016 which is a period of one year and nine months. We accordingly
20 take this period into account and sentence the appellant to 11 years and 3 months' imprisonment on count 2 to be served as authorised by law.

We note that the learned trial judge was silent as to whether the sentences for both counts should be served concurrently. The law is that where the sentence judge does not state how two or more offences the
25 convict is convicted of is to be served, they shall be served consecutively. The law is stated under section 122 of the Trial on Indictment Act which provides that:

> 122. Sentences cumulative unless otherwise ordered.
>
> (1) Where a person after conviction for an offence is convicted of another
30 offence, either before sentence is passed upon him or her under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him or her under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former
35 sentence or of any part of it; but it shall not be lawful for the court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under section 110(c)(i) or any part of it.
>
> (2) Where a person is convicted of more than one offence at the same time
40 and is sentenced to pay a fine in respect of more than one of those offences, then the court may order that all or any of such fines may be noncumulative.

5 In the circumstances, the sentences shall be served consecutively because there is no direction of the trial judge that they be served concurrently as directed by section 122 (1) of the Trial on Indictment Act.

Dated at Mbale the 22 day of Feb 2023

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Hellen Obura

Justice of Appeal

Catherine Bamugemereire

15 **Justice of Appeal**

Christopher Madrama

Justice of Appeal