THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 206 OF 2021

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

KAYANJA HASSAN ::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Winifred N. Nabisinde, J in Criminal Session Case No.022 of 2019 delivered on 6/03/2020)

JUDGMENT OF THE COURT

Introduction

This is an appeal against both conviction and sentence arising from the decision of the High Court at Mpigi (Winifred N. Nabisinde, J). The appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) & (4) (a) of the Penal Code Act (PCA) and sentenced to 22 years and 1 month's imprisonment.

Background to the Appeal

The facts giving rise to this appeal as admitted at trial are that between the year 2017 and March 2018 at Buyinja village in Mpigi District, the appellant performed sexual acts with N.W (the victim) a girl then aged 15 years while he was infected with HIV. At the time of the offence, the victim was in senior four at Uganda Martyrs in Buwama while the appellant was a boda boda rider. The appellant lured the victim into a relationship that led her to escape from her home and stay with him. During that period the two engaged in sexual acts. Upon a search and recovery of the victim, she was medically examined and found with a ruptured

hymen suggestive of penetration and she was HIV positive. The appellant was subsequently arrested and upon examination he was found to be 18 years and above, mentally sound and HIV positive. He was charged as aforementioned. At the trial, prosecution presented evidence of 5 witnesses and admitted 3 documentary exhibits. The appellant denied the charges and gave sworn testimony wherein he alleged a grudge with the victim's mother after he refused to have an affair with her. Upon proper evaluation of both the prosecution and defence evidence, the court believed the prosecution case, found the appellant guilty and convicted him. He was sentenced to 22 years and 1 month after deducting the period spent on remand.

Being dissatisfied with the decision of the trial Judge, the appellant has now appealed to this Court against both the conviction and sentence on the following four grounds;

i. *That the learned trial Judge erred in law and fact in failing to consider and, or properly evaluate and weigh all the evidence laid before court thereby arriving at a wrongful determination in convicting and sentencing the appellant which resulted into miscarriage of justice.*

ii. *That the learned trial Judge erred in law and in fact in reaching a final determination in the absence of key witness/evidence which resulted into miscarriage of justice.*

iii. *That the learned trial Judge erred in law and in fact in shifting the liability and obligations of burden of proof beyond reasonable doubt (standard of proof) upon the prosecution and the prosecution evidence and laid such burden to the appellant which resulted into miscarriage of justice.*

iv. *That the sentence of imprisonment for 22 years and 1 month was harsh and excessive.*

Representation

At the hearing of this appeal, Mr. Steven Birikano represented the appellant on State brief whereas Ms. Caroline Hope Nabasa, a Principal Assistant Director of Public Prosecutions represented the respondent. The appellant was not physically present in Court but he was

facilitated to attend the court proceedings from Kigo Prison where he is incarcerated. Both parties filed written submissions which were adopted and have been considered in this judgment.

Appellant's Submission

In his written submission, counsel jointly submitted on grounds 1, 2 and 3. He contended that the victim was the only one eye witness to the alleged offence and throughout her oral testimony, she maintained that after her mother saw her with the appellant, she was scared of going home. Counsel also pointed out that the appellant testified that the mother of the victim had a grudge against him because he had refused to have sex with her. That she had vowed that she would only get off him in the grave. Counsel opined that the victim could have told court that she had been having sex with the appellant because her mother intimidated her, which suggests that the appellant was framed.

Counsel also submitted that the medical report by PW1 showed that the victim had a ruptured hymen and the likely cause was sexual intercourse involving penetration of the genitalia. He however, argued that the report did not show when the hymen had been ruptured since the appellant in his defence denied ever having sex with the victim. He contended that it was therefore, the duty of the prosecution to prove to court that it was the appellant responsible for the rupture of the victim's hymen and not the duty of the appellant to prove his innocence. Counsel argued that the trial court failed to analyse the evidence before and came to a wrong conclusion. This is because, in counsel's view, the only evidence adduced to prove that the appellant had had a sexual affair with the victim was the rapture of her hymen and the report does not show when the same happened. Counsel therefore prayed that the conviction be quashed since the case against the appellant was not proved.

In regard to ground 4 on sentence, counsel submitted that the sentence of 22 years and 1 month was harsh and excessive. He added that the sentence was passed in disregard of the

mitigating factors. He prayed that it be set aside and substituted with a sentence of 10 years' imprisonment. Counsel relied on the decisions in ***Ntambala Fred vs Uganda, Criminal Appeal No. 34 of 2015*** and ***Ninsiima vs Uganda, CACA No. 1080 of 2010*** to support his submissions.

In conclusion, counsel prayed that the appeal be allowed and the conviction and sentence be set aside.

The Respondent's Reply

In her response, counsel opposed the appeal and raised a preliminary point of law to strike out the appeal on the following 3 grounds;

1. *Counsel for the appellant's submissions are premised on a MOA filed by the appellant on the 2/8/2021. Upon perusal, it is clear that this document had been prepared as a template with details that are irrelevant to this case.*
2. *The four identifiable grounds from the said template are not only argumentative but are also narrative and do not raise any specific points of law or fact alleged to have been wrongly decided.*
3. *Instead of amending or filing a supplementary MOA, counsel for the appellant attempted to modify some of the grounds in his submissions which are irregular and deserve to be condemned by this court.*

Counsel contended that this appeal is bad in law in as far as the grounds raised offend rule 66(2) and (4) of the Court of Appeal Rules. She relied on the decision in ***Sseremba Dennis vs Uganda, CACA No. 480 of 2017*** in which this Court pronounced itself on the need to comply with the rules of court when it struck out the grounds of appeal that offended rule 66(2) of the Court of Appeal Rules. Counsel therefore invited court to restate its position on the matter and strike out the memorandum of appeal and dismiss this appeal summarily.

Without prejudice to the objection, counsel responded to the grounds of appeal in the order set out by counsel for the appellant. On grounds 1, 2 and 3, she submitted that counsel for the appellant's omnibus submissions do not address any of the three identified issues of concern that were vaguely raised by the appellant in his memorandum of appeal. She argued that counsel failed to demonstrate which part of evidence was not evaluated, which key witness was never produced, and which part of the judgment indicates that the burden was shifted to the appellant.

She further argued that apart from stating the law, counsel for the appellant offered his supposition and conjecture when he submitted that the victim could have decided to tell court that she had been having sex with the appellant because she had been intimidated by her mother. Counsel contended that this argument was a creation of counsel from the bar as it is not borne out of the evidence on record. She submitted that the whole of the victim's evidence was never challenged at trial since she was not cross examined thus leading to an inference that all that she told court including the fact that she used to have sex with the appellant, were true. Counsel also submitted that it is clear from the court record that the learned trial Judge correctly analysed the victim's evidence as a single identifying witness and rightly applied the law. She added that the learned trial Judge found corroboration in the evidence of PW3 who found the appellant walking with the victim days after her disappearance from home.

In regard to the medical evidence, counsel submitted that the appellant's argument that the medical report was not conclusive on the person who ruptured the victim's hymen and the time it took place was devoid of merit since medical examination is not expected to identify who raptured the hymen but, rather whether a sexual act had been performed on the victim. She added that the medical report offered corroboration to the victim's own account about her engagement in sexual acts with the appellant, which evidence was never challenged by the appellant who was properly represented at the trial.

Counsel argued that there was overwhelming evidence from the 5 prosecution witnesses and the 3 exhibits that were presented before court which proved beyond reasonable doubt all the ingredients of the offence in issue, including participation of the appellant in defiling the victim and infecting her with HIV. Counsel contended that this evidence was properly evaluated against the defence case which was full of lies and the appellant's claim regarding the perceived grudge between him and the victim's mother was rejected since it came as an afterthought during the defence hearing. Counsel implored this Court to find that the trial court justifiably convicted the appellant and as a result disallow grounds 1, 2 and 3 of the appeal.

In response to ground 4, counsel submitted that the facts of this appeal are undoubtedly distinguishable from those in the cases cited by counsel for the appellant to support the consistency argument. She contended that considering the fact that the appellant was spared a maximum sentence provided under the law, the sentence of 22 years is lenient. Further, that the learned trial Judge judiciously exercised her discretion in a well-reasoned sentencing ruling and found that the sentence imposed was the most appropriate for the appellant. The learned trial Judge stated that the sentence would send a message to other would be offenders in his status and position to learn that a girl child in the community needs to be protected and not violated.

Counsel prayed that the appeal be dismissed and the conviction and sentence of the trial court be upheld.

Appellant's Reply to the Preliminary Objection

In rejoinder, counsel submitted that the grounds of appeal clearly set out the points of objection against the decision and in the interest of justice, he invited this Court to take into account the provisions of Article 126(2) (e) of the Constitution and reappraise all the evidence and come up with its own conclusion.

Counsel also submitted that this Court being the first appellate court in this case has the jurisdiction to entertain appeals based on points of law or fact or mixed law and fact under Rule 66(2). He relied on the decision in ***Ndyaguma vs Uganda, Criminal Appeal No. 263 of 2006***, in which this Court overruled an objection challenging the grounds of appeal for offending Rule 66(2) and found that the two grounds sufficiently set out the objection to the decision appealed against. Court also observed that the grounds of appeal could have been drafted better. In light of the above decision, counsel prayed that the preliminary objection be overruled and the appeal be heard on its merits since there is no law that bars an unrepresented litigant from filing the appeal himself. He reiterated his earlier submissions as summarised above.

Resolution by the Court

The duty of this Court as the first appellate court is to re-evaluate all the evidence on record and make its own finding. In so doing, it should subject the evidence to a fresh and exhaustive scrutiny. ***See; Rule 30 of the Judicature (Court of Appeal Rules) Directions; Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No.10 of 1997 and Pandya vs R (1957) EA 336.***

Before we delve into the merits of this appeal, we shall first of all consider the preliminary point of law that was raised by counsel for the respondent. Counsel argued that this appeal is bad in law as far as the grounds raised offend rule 66 (2) and (4) of the rules of this Court. She cited the decision in ***Sseremba Dennis vs Uganda (supra)*** to support her submissions. In response, counsel for the appellant prayed that the preliminary objection be overruled and the appeal be heard on its merits because the grounds of appeal clearly set out the points of objection against the decision. He argued that there is no law that bars an unrepresented litigant from filing the appeal himself. He then urged this Court as the first appellate court to invoke Article 126 (2) (e) of the Constitution and reappraise all the evidence and come up

with its own decision. He relied on what this Court stated in ***Ndyaguma vs Uganda (supra)*** to support his submission.

We have carefully perused the grounds of this appeal and considered the arguments of both counsel and the authorities cited to us. In the 1st ground of appeal, the appellant faults the learned trial Judge for failing to consider and, or properly evaluate and weigh all the evidence laid before court thereby arriving at a wrongful determination in convicting and sentencing the appellant which resulted into miscarriage of justice. Clearly this ground of appeal which is framed in an omnibus manner offends the provisions of rule 66(2) & (4) of this Court as it does not set forth concisely the grounds of objection to the decision appealed against, specifying the points of law or facts or mixed law and facts which are alleged to have been wrongly decided.

The 2nd ground of appeal where the appellant contends that the learned trial Judge erred in law and in fact in reaching a final determination in the absence of key witness/evidence which resulted into a miscarriage of justice also offends rule 66(2) of the Rules of this Court for the same reason. The ground does not mention the key witness who was absent and the ingredient(s) that was required to be proved by that witness.

In the 3rd ground the appellant contends that the learned trial Judge erred in law and in fact in shifting the liability and obligations of burden of proof beyond reasonable doubt (standard of proof) upon the prosecution and the prosecution evidence and laid such burden to the appellant which resulted into miscarriage of justice. We find this a general narrative that does not specify the particular ingredient(s) of the offence where the learned trial Judge erred by shifting the burden of proof from the prosecution to the appellant (defence).

In his rejoinder, counsel urged this Court to take into account the provisions of Article 126(2) (e) of the Constitution and reappraise all the evidence and come up with its own conclusion. By so saying, counsel seems to be down playing the mandatory statutory requirement for

concise drafting of memorandum of appeal that point to specific points of law or facts or mixed law and facts that are being challenged, which in our view, is intended to narrow down the real issues for consideration on appeal.

Counsel pointed out that the appellant was self-represented at the time he drafted and filed the memorandum of appeal. While we appreciate that fact, we hasten to point out that the purpose of appointing counsel to represent the appellant on State brief was for ensuring that the appellant gets an effective and efficient legal representation. This is clearly stated under rule 3(a) of the Judicature (Legal Representation at the Expense of the State) Rules, 2022 (State Brief Rules) that now regulates State briefs. Rule 13(2) of those Rules provide that a State appointed advocate shall at all times comply with all applicable laws, rules and regulations. Therefore, upon accepting the appointment to represent the appellant, counsel was under a duty to give the appellant all the necessary professional advice and service after getting specific instructions from him. That necessarily included amending whatever documents that were already filed on record by the appellant which do not comply with the statutory requirements. It is apparent that counsel did not do what was required of him. We therefore find him culpable for neglecting his duty to give the appellant proper representation and caution him to pay more attention to his work.

We also find the decision in ***Ndyaguma vs Uganda (supra)*** that counsel implored us to rely on not helpful because the two grounds of appeal that were challenged in that appeal were much better framed and Court found that they clearly set out the objection to the decision appealed against, unlike the ones in this appeal.

Having so found, we uphold the preliminary objection and accordingly strike out the offending 3 grounds of appeal.

We now proceed to consider ground 4 of the appeal on sentence. Counsel for the appellant submitted that the sentence of 22 years and 1 month's imprisonment was harsh and

excessive in the circumstances of the case. He urged this Court to invoke section 11 of the Judicature Act and interfere with this sentence by reducing it to 10 years' imprisonment. We are alive to the principle that an appellate court can only interfere with the sentence of the trial court if there is an illegality, that is, if the trial court acted contrary to the law or upon a wrong principle, or overlooked a material factor. The appellate Court will also interfere if the said sentence is harsh and/or manifestly excessive. (***See: Jackson Zita vs Uganda, Criminal Appeal No. 19 of 1995 (SC)).***

Bearing in mind the above principle, we shall proceed to re-evaluate the record of sentencing proceedings so as to determine whether the sentence imposed was harsh and excessive as contended by the appellant. The aggravating factors as submitted by the state are that the appellant was unremorseful throughout the trial and exposed such a young girl to HIV. She prayed for a deterrent sentence. In mitigation it was submitted that the appellant was a first offender and still a young man capable of reforming and turning into a better person. She prayed for a lenient sentence given that he is HIV Positive.

In his own words, the appellant prayed for leniency and requested that the remand period be considered. He also stated that he has eight siblings to look after and his mother died leaving a father who is diabetic for whom he was responsible. While sentencing the appellant, the learned trial Judge stated as follows: -

> *"Having taken all the above into consideration, I have taken cognizance of the circumstances under which this offence was committed; I have noted that the victim in this case was an adolescent girl aged 15 years old at the time, while the convict is an adult man at the time the offence was committed and is of sound mental status. The victim in this case was very vulnerable and could take care for herself or make any informed decisions regarding her life because of her age. Although the facts reveal that she willingly ran away with the convict after her mother caught them together in the night, it is still no excuse that the convict who knew her as a young Senior 2 school girl took advantage of her naivety and lived with her for over a month while regularly engaging in sexual intercourse with her without any protection, well knowing he was infected with the HIV(sic). The fact that he already*

knew his positive HIV status and deliberately lured and engaged such a young girl into sexual intercourse without revealing to her his status or using any measure of protection was tainted with malice to infect her as well. The offence committed against her put her life at great risk of contracting HIV /AIDS (which she indeed contracted), other STDs and unwanted pregnancy.

I have also cautioned myself of the evil of engaging underage girls in sexual activities and the court condemns the acts of the convict because of the impact it would have on the health of this young girl for the rest of her life, the family to which both the victim and convict belong and the community generally. She will have to live the rest of her life as an HIV positive patient and this will greatly impact on her life.

It is also apparent that the convict is still in the prime of his life, however at his age; he ought to know that the victim was naive to run away with him from her parents and ought to have guided her instead of taking advantage of her ignorance and fear of her mother. His actions are also condemned by this Honorable Court because they are a bad example to other young men. The facts also reveal that these were repeated acts of sexual intercourse which caused the victim to be infected by HIV. The offence is also very rampant in this area and it is the duty of this court to protect such young girls from the likes of the convict; the sentence should also serve to deter other people who may be tempted to do the same.

Both the State Attorney and defence counsel agreed that there are no previous known records against the convict; this court will therefore treat him as a first offender.

I have noted that in such a case, the maximum sentence would have been the death penalty; however, I find that this sentence will not serve the ends of justice in this case and is too harsh in this particular case. I have also checked the file to ascertain the time spent on pre-trial remand, it is; it comes to 1 year and 11 months.

While I believe that while he deserves a second chance in life to mend his ways, it should be long enough to assist him to reflect and mend his ways. I therefore believe that he deserves a sentence that is reflective of his crime and which will allow him to reform.

While the starting range in terms of years would be at least (35) years imprisonment, taking into account all the circumstances of the case and the provisions of the law as noted above, I find that a sentence of (25) twenty five years imprisonment would have been justified; I have however deducted

the period spent on pre-trial remand. The final sentence he will serve is therefore 22 years and 01 months (twenty two years and one months) which I have found as appropriate taking into account the circumstances of this case."

We note from the sentencing record that the learned trial Judge took into consideration both the mitigating and aggravating factors, although she appeared to have given more attention to the former than the latter. However, we find that in the circumstances it did not occasion a miscarriage of justice. We also note that the learned trial Judge took into account the period of 1 year and 11 months which the appellant had spent on remand and sentenced him to a custodial sentence of 22 years and 1 month's imprisonment. In order to determine whether the sentence was harsh and excessive as alleged by the appellant, we have looked at the range of sentences for similar offences of aggravated defilement in the cases below.

In ***Tiboruhanga Emmanuel vs Uganda, CACA No. 0655 of 2014***, this Court stated that the sentences approved by this Court in previous aggravated defilement cases, without additional aggravating factors, range between 11 years to 15 years. This Court considered the fact that the appellant was HIV positive as an additional aggravating factor in that he had, by committing a sexual act on the victim while HIV positive, exposed her to the risk of contracting HIV/AIDS and imposed a sentence of 25 years' imprisonment. In ***Anguyo Siliva vs Uganda, CACA No. 0038 of 2014*** the appellant who was HIV positive was charged with the aggravated defilement of a girl under the age of 14 years. He was tried, convicted and sentenced to 27 years' imprisonment. On appeal to this Court, his sentence was reduced to 21 years and 28 days.

We note that the sentencing range in the above similar cases where the appellants were HIV positive is between 21-25 years' imprisonment. We therefore find the sentence of 22 years and 1 month's imprisonment imposed on the appellant is within the sentencing range and it is lenient in the circumstances of this case where the appellant infected the victim with HIV. In the circumstances, we decline to interfere with the sentence imposed by the learned trial

Judge because it is neither harsh nor manifestly excessive. In the premises, we uphold both the conviction and sentence of the lower court and we accordingly dismiss this appeal.

We so order.

Dated at **Kampala** this....2nd.....day of.....February.....2024

.....

Cheborion Barishaki

JUSTICE OF APPEAL

.....

Hellen Obura

JUSTICE OF APPEAL

.....

Eva Luswata

JUSTICE OF APPEAL