THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

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

CRIMINAL APPEAL NO. 0384 OF 2019

MAKUBA ALIMAKS::APPELLANTS

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Kaweesa, J delivered on 26/09/2019 in Criminal Session Case No. 054 of 2018.)

JUDGMENT OF THE COURT

Introduction

The appellant was convicted of the offence of aggravated defilement contrary to section 129(3) and 4(a) of the Penal Code Act by the High Court (Henry.I. Kaweesa, J) on the 26/09/2019. He was sentenced to 20 years' imprisonment.

Background to the Appeal

The facts of this case as ascertained from the Court record are that Makuba Alimaks, the appellant on the 22/11/2017 at Lwaweba Village, Maddu Sub-county in Gomba District performed a sexual act with K.F, a girl aged 4 years and 7 months. The appellant was consequently tried and convicted of the offence of aggravated defilement and sentenced as aforementioned. Being dissatisfied with the decision of the trial court, the appellant appealed to this Court on the following grounds;

1. The learned trial Judge erred in law and fact in failing to consider, properly evaluate and weigh all the evidence laid before court thereby arriving at a wrongful determination in convicting and sentencing the Appellant.

2 The learned trial Judge erred in law and fact in reaching a final determination in the absence of key evidence or the key witness.

3. The learned trial Judge erred in law and in fact in shifting the liability and obligations of the burden of proof beyond reasonable doubt (standard of proof) upon the prosecution and the prosecution evidence and laid such burden to the Appellant that diminished her/his final determination of the case.

4. The learned trial Judge erred in law and fact when he convicted the Appellant of this offence in the absence of evidence to prove all the essential ingredients of the offence.

5. The sentence of imprisonment for 20 years was harsh and excessive in the circumstances and that the learned trial Judge erred in law and fact when he ignored to consider important matters or circumstances which he ought to have considered before passing sentence.

Representation

At the hearing, Mr. Steven Birikano represented the appellant on State brief whereas Ms. Nabasa Caroline Hope, Principal Assistant Director of Public Prosecutions assisted by Ms. Emily Mutuzo, State Attorney represented the respondent. The appellant followed court proceedings from Kigo Prison. Both Counsel filed written submissions which were adopted and have been considered in this judgment.

Appellants' Submissions

Counsel argued grounds 1, 2, 3 and 4 jointly and submitted that it is the duty of this Court to re-appraise the evidence adduced at the trial and make its inference on issues of law and fact. He referred this Court to ***Rule 30(1) of the Judicature (Court of Appeal Rules)***

Directions, S.I 13-10, and ***Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997.***

He further submitted that by his plea of not guilty, the appellant put in issue each and every essential ingredient of the offence with which he was charged and the prosecution had the onus to prove each of the ingredients beyond reasonable doubt, namely;

i) That the victim was under the age of 14 years

ii) That there was an act of sexual intercourse

iii) That the accused committed the offence

Counsel contended that there was no eye witness to the crime and that the victim did not testify in court. He faulted the learned trial Judge for relying on only the circumstantial evidence adduced by the prosecution witnesses that when the victim was not seen they were told that she had been taken to the maize plantation to play with the appellant. He further submitted that the Investigating Officer did not give his findings.

Counsel submitted that at the trial the appellant told the court that he was being framed because of a grudge he had with the victim's father but he was ignored yet this is a factor that should have not have been ignored at the trial as it destroys the inference of guilt. He added that circumstantial evidence should not have been admitted and as such the third ingredient of the offence was not proved to the required standard.

On ground 5, counsel submitted that the appellant was in lawful custody from November 2017 until September 2019 when he was convicted but that period of time was not taken into account by the trial court which makes the sentence illegal. He further submitted that the appellant was sentenced to 20 years' imprisonment without reasons being given and the sentence was excessive.

Counsel cited the decision in ***Abaasa & Anor vs Uganda, Court of Appeal Criminal Appeal No. 33 of 2010,*** where it was stated that it is now a well-settled position in law that this Court

will only interfere with a sentence imposed by a trial court in a situation where the sentence is either illegal, or founded upon a wrong principle of law. It will equally interfere with the sentence where the trial court has not considered a material factor in the case or has imposed sentence which is harsh and manifestly excessive in the circumstances. Counsel also referred to ***Ninsiima vs Uganda, CACA No. 1080 of 2010,*** where this Court found the average range of sentences for similar offences of aggravated defilement to be 15-18 years. In that case a sentence of 30 years was reduced to 15 years' imprisonment for the offence of aggravated defilement.

Counsel submitted that in ***Candia Akim vs Uganda, CACA No. 0181 of 2009,*** this Court set aside a sentence of 20 years' imprisonment for the offence of aggravated defilement and substituted it with a sentence of 17 years' imprisonment. The appellant was a step father of the 8-year-old victim. The decision in ***German Benjamin vs Uganda, CACA No. 142 of 2010*** was also brought to the attention of this Court. In that case this Court set aside a sentence of 20 years' imprisonment for the offence of aggravated defilement and substituted it with a sentence of 15 years' imprisonment.

Based on the above authorities, counsel argued that the sentence of 20 years is harsh and excessive. He then prayed that the same be set aside and a sentence of 10 years, which in his view is appropriate in the circumstances, be imposed by this Court. In conclusion, counsel prayed that the appeal be allowed and the conviction and sentence set aside.

Respondent's Submissions

Counsel opposed the appeal and supported both the conviction and sentence of the appellant by the trial court. He raised a preliminary point of law that grounds 1 to 4 of the appeal raised by the appellant offends rule 66(2) of the Judicature (Court of Appeal) Rules SI 13-10, (Rules of this Court) in so far as it is not concise but rather general and argumentative. Counsel urged this Court to follow its earlier decision in ***Sseremba Denis vs Uganda, Criminal***

Appeal No. 480 of 2017 where two grounds were struck out for offending rule 66(2) of the Rules of this Court and prayed that the appeal be struck out.

Counsel stated that in the unlikely event that the vague grounds of appeal are not struck out, she would argue the grounds 1, 2, 3, and 4 in the manner and order in which counsel for the appellant argued them. She then contended that the appellant's counsel did not demonstrate in any way how the learned trial Judge failed in fact or in law in evaluating and weighing the evidence. Counsel asserted that the learned trial Judge properly evaluated all the evidence laid before court and at page 19 of the record of appeal, he stated the 3 key ingredients in sexual offence that were earlier alluded to by counsel for the appellant.

In respect of the victim's age, it was submitted for the respondent that the trial court relied on the testimony of PW4, the victim's father that the victim was 4 years old and the court's own observation of the victim to determine that prosecution had proved this ingredient. As regards performance of a sexual act, counsel submitted that court relied on PEX1 which revealed the injuries suffered by the victim and that this evidence was corroborated by the testimony of PW1.

It was further submitted that the learned trial Judge analysed the evidence of PW1, PW2 and PW3 on account of what happened and what the victim told them and what they had observed at the scene of crime. He also considered the fact that the appellant denied committing the offence and raised an alibi that he was away visiting his friend all day. That the learned trial Judge evaluated the evidence of PW1 which was to the effect that it was the victim who had pointed out the appellant as the one who had defiled her and she led PW1 to the scene of crime. Further, that the learned trial Judge found the victim to be systematic in her accusation against the appellant and she (the learned trial Judge) also relied on corroboration by PW2 who alluded to the same. She then ruled that the circumstantial evidence adduced by the prosecution irresistibly pointed to the guilt of the appellant and found the appellant's alibi and the alleged grudge with PW1 to be farfetched. Counsel maintained that the appellant was

properly placed at the scene of crime and the learned trial Judge rightly found that he participated in the commission of the crime.

On the appellant's submission on absence of an eye witness, reliance on circumstantial evidence and failure by the Investigating Officer to give his findings, it was submitted that the appellant's counsel did not demonstrate to court how this weakened the prosecution's case against the appellant. Counsel pointed out that even in the absence of an eye witness, the evidence on record linked the appellant to the sexual assault of the victim who was aged only 4 1/2 years at the time. She argued that the learned trial Judge properly evaluated the pieces of circumstantial evidence contained in the testimonies of PW1, PW2, PW3 and PEX1, before arriving at the culpability of the appellant. Further, that the testimony of the Investigating Officer would only have served the purposes of buttressing the evidence of PW1, PW2 and PW3 but its absence did not occasion a miscarriage of justice. On this issue, counsel concluded that the circumstantial evidence was sufficient and did not fall short of the legal test and no miscarriage of justice was occasioned.

On the victim's failure to testify in court, counsel asserted that the absence of the victim's evidence did not vitiate the rest of the evidence that prove the case against the appellant. She relied on the Supreme Court decision in ***Bassita Hussein vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995*** to support her submission.

On the contention that the appellant's defence was disregarded, counsel disagreed and submitted that the same was considered and disbelieved by the learned trial Judge with reasons, and the appellant was convicted on the strength of the prosecution evidence. She implored this Court to find that the element of participation was proved.

Ground 5

Counsel submitted on the well settled position of the law as was restated in ***Kyalimpa Edward vs Uganda, Criminal Appeal No. 23 of 2016,*** that an appropriate sentence is a matter for

the discretion of the sentencing Judge. It is the practice that an appellate court will not 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 response to the appellant's submission that the period spent on remand was not considered, counsel disagreed and submitted that the record of sentencing proceedings show that the learned trial Judge considered the period spent on remand from the 1st day of remand. On the contention that the sentence was harsh and excessive, counsel submitted that the appellant was sentenced to 20 years running from the 1st day of his remand. She argued that the reduction of the period spent on remand placed the appellant in the range of cases that counsel has relied on. She concluded that the sentence cannot be said to be harsh and excessive considering that the appellant was not given the maximum sentence. Counsel prayed that the appeal be dismissed and the conviction and sentence be upheld.

Appellants' Reply to the Preliminary Objection and Rejoinder

In response to the preliminary point of law raised by counsel for the respondent, it was submitted for the appellant that the grounds of appeal clearly set out the points of objection to the decision appealed against. Counsel invited this Court to invoke the provisions of ***Article 126(2) (e) of the Constitution of the Republic of Uganda*** to overrule the objection and consider the appeal on its merits. He urged this Court to follow its earlier decision in ***Ndyaguma vs Uganda, Criminal Appeal No. 263 of 2006*** where the objection challenging the grounds of appeal for offending rule 66(2) of the Rules of this Court was overruled as the two grounds of appeal were found to sufficiently set out the objection to the decision appealed against. Counsel stated that in that appeal, this Court only observed that the grounds of appeal could have been drafted better. He prayed that the objection by counsel for the respondent be overruled and this appeal heard on its merits.

In rejoinder to the submissions on the merits of the appeal, counsel reiterated his earlier submissions and emphasised that where an accused raises the defence of alibi, he has no duty to prove it. Further that it remains the duty of the prosecution to disprove the alibi and place the accused at the scene of crime. He also submitted that the prosecution failed to adduce evidence placing the accused at the scene and disproving his alibi.

On sentence, counsel reiterated his earlier submission that the sentence of 20 years is harsh and excessive and that the time the appellant spent on remand was not considered. He relied on ***Ninsiima vs Uganda, CACA No. 1080 of 2010*** where this Court found the range of sentences for similar offences of aggravated defilement to be between 15 to 18 years and reduced a sentence of 30 years to 15 years' imprisonment for the offence of aggravated defilement. Counsel prayed that the appeal be allowed and the conviction and sentence be set aside.

Resolution by the Court

We have carefully studied the record of appeal and considered the submissions of both counsel as well as the law and authorities cited to us plus those not cited but which are relevant to the issues under consideration. We are alive to the duty of this Court as a first appellate court to review the evidence on record and reconsider the materials before the trial court, and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. **See: *Rule 30(1) (a) of the Rules of this Court.***

There are five grounds upon which this appeal is premised but we shall first consider and resolve the preliminary point of law raised by counsel for the respondent. In the event that we overrule the objection, we will resolve the grounds of appeal in the manner and order in which they were argued by both counsel.

Preliminary Point of Law

The preliminary point of law challenges grounds 1 to 4 of the appeal as framed by the appellant for offending rule 66(2) of the Rules of this Court, in so far as they are not concise but rather general and argumentative. The respondent's counsel buttressed her argument with the decision of this Court in ***Sseremba Denis vs Uganda (supra)*** and prayed that the appeal be struck out.

Conversely, it was the view of counsel for the appellant that the grounds of appeal clearly set out the points of objection to the decision appealed against. He urged this Court to invoke the provisions of Article 126(2)(e) of the Constitution and also follow its earlier decision in ***Ndyaguma vs Uganda (supra)*** to overrule the objection so that the appeal is resolved on its merits.

The impugned grounds of appeal that are the subject of the preliminary objection were set forth earlier in this judgment but for ease of reference we shall again reproduce them as follows;

1. *The learned trial Judge erred in law and fact in failing to consider and properly evaluate and weigh all the evidence laid before court thereby arriving at a wrongful determination in convicting and sentencing the Appellant.*

2. *The learned trial Judge erred in law and fact in reaching a final determination in the absence of key evidence or the key witness.*

3. *The learned trial Judge erred in law and in fact in shifting the liability and obligations of the burden of proof beyond reasonable doubt (standard of proof) upon the prosecution and the prosecution evidence and laid such burden to the Appellant that diminished her/his final determination of the case.*

4. *The learned trial Judge erred in law and fact when he convicted the Appellant of this offence in the absence of evidence to prove all the essential ingredients of the offence.*

It is apparent that the manner in which these grounds of appeal were framed offend rule 66(2) of the Rules of this Court which provides: -

> *"The memorandum of Appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative, the grounds of objection to the decision appealed against, specifying in the case of a first appeal, the points of law or fact or mixed law and fact and in the case of a second appeal, the points of law or mixed law and fact which are alleged to have been wrongly decided."*

The case of ***Ndyaguma vs Uganda, (Supra)*** relied on by the appellant's counsel is distinct from the current appeal since in that case, the grounds of appeal was found to set out the objection to the decision appealed against save for the fact that they could have been drafted better. In the current appeal the grounds do not set out specifically the grounds of objection to the decision appealed against. Neither do they specify the points of law or fact or mixed law and fact which are alleged to have been wrongly decided.

In the premises, we uphold the preliminary object and accordingly, grounds 1-4 of this appeal are struck out for offending rule 66 (2) of the Rules of this Court.

Before we take leave of this matter, we must observe with concern that this is the 2nd appeal in this session where the same counsel has neglected his duty to effectively and efficiently provide legal representation to an appellant under State brief as stipulated under rule 3(a) of ***the Judicature (Legal Representation at the Expense of the State) Rules, 2022*** (State Brief Rules) that regulates State briefs. We did encounter a similar situation in **Kayanja Hassan vs Uganda; Court of Appeal Criminal Appeal No. 206 0f 2021** where we found that the grounds of appeal offended rule 66 (2) and struck them out.

We do strongly admonish counsel Steven Birikano for the sloppy manner in which he represented the appellant in this appeal and we are of the view that such advocates should

not be appointed on State brief unless they demonstrate competence in handling their clients' cases.

Having found and ruled as above on the preliminary point of law, we shall now proceed to consider the remaining ground 5 of the appeal on sentence.

Ground 5

In ground 5, the appellant is aggrieved that the sentence of imprisonment for 20 years imposed against him was harsh and excessive in the circumstances. He also contends that the learned trial Judge erred in law and fact when he ignored to consider important matters or circumstances which he ought to have considered before passing sentence.

In his written submission, counsel for the appellant stated that the appellant was in lawful custody from November 2017 until September 2019 when he was convicted. However, the learned trial Judge sentenced the appellant to a harsh and excessive 20 years' imprisonment without giving any reason and the period spent in lawful custody was not taken into account which makes the sentence illegal. Counsel therefore prayed that the sentence be set aside and substituted with a sentence of 10 years which in his view, would be appropriate in the circumstances. In conclusion, he prayed that the appeal be allowed and the conviction be quashed and the sentence set aside.

On the other hand, counsel for the respondent supported the sentence and argued that the ruling of the learned trial Judge that the sentence would run from the 1st day of the appellant's remand, showed that the period spent on remand was taken into account and that also placed the sentence imposed within the range of sentences in the cases that counsel relied on to contend that the sentence was harsh and excessive. In counsel's view, the sentence of 20 years cannot be said to be out of range or harsh and excessive considering that the appellant was not given the maximum sentence. On the whole, counsel prayed that the appeal be dismissed and the conviction and sentence be upheld by this Court.

The record of sentencing proceedings indicates that the learned trial Judge in his sentencing ruling stated thus;

> *"The offence carries a maximum of death. The offender is a first offender and has prayed for mercy. This is an offence that must be deterred. A girl of 4½-year-old girl is too young to be introduced to sexual activity. This is aggravating. Given the above factors accused must be sentenced with a view to deterrence and reformation. His sentenced to 20 years from first day of remand."* (sic).

It can be seen from the above excepts of the record of sentencing proceedings that the learned trial Judge did not comply with the stipulation under Article 23 (8) of the Constitution which requires the period spent on remand to be taken into account while sentencing a convict. That requirement could not have been met by the learned trial Judge's ruling that the sentence is from first day of remand. In ***Rwabugande Moses vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014*** the Supreme Court guided that the period spent on remand is necessarily arithmetical because it is known with certainty and precision and its consideration therefore necessarily means reducing or subtracting that period from the final sentence. It was emphasised that the period spent in lawful custody prior to the trial must be specifically credited to the accused. The sentence that was imposed without taking into account the period spent on remand was held to be illegal.

We are aware that in a subsequent decision (***Abelle vs Uganda, Supreme Court Criminal Appeal no. 16 of 2016***, the position in **Rwabugande vs Uganda (supra)** was clarified as follows;

> *"What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of* ***Rwabugande*** *that remand period should be credited to a convict when he is sentenced to*

a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.

Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution."

With the above clarification in mind, it is our finding that in this appeal, the learned trial Judge neither deducted nor stated that he had taken into account the period spent on remand by the appellant. He may have mistakenly thought that by stating that the sentence will run from the first day of remand he was complying with Article 23 (8) of the Constitution but that, in our view, fell short of what is stipulated under that article and interpreted by the Supreme Court in the above two cases. Consequently, we find the sentence of 20 years' imprisonment imposed on the appellant illegal and thus set it aside.

In the circumstances, we now invoke section 11 of the Judicature Act which gives this Court the same powers as those of the sentencing court to sentence the appellant afresh to a sentence we deem appropriate after considering the aggravating and mitigating factors and the range of sentences in similar cases committed under more or less similar circumstances.

The aggravating factors that were presented before the trial court were that the appellant committed a serious offence, he was 30 years old at the time but he assaulted a girl of 4 years and caused injuries on her genitals and he was not remorseful. Prosecution prayed for a deterrent custodial sentence of 40 years that would separate him from society. For the appellant, the mitigating factors were that the appellant was a first offender aged 46 years

and capable of reform, he was a family man and should be given a chance to go out and look after his children. The court was informed that the appellant had spent 2 years on remand.

We shall bear the above factors in mind as we determine the appropriate sentence in the circumstances of this case. But first we shall look at a few decisions in similar cases to guide us on the range of sentences.

In ***Ngobya Aloysious vs Uganda, Court of Appeal Criminal Appeal No. 265 of 2011***, this Court found a sentence of 37 years imposed on a 23-year-old appellant who defiled a 5-year girl illegal due to the failure by the trial court to take into account the period the appellant had spent on remand. In exercise of its powers under section 11 of the Judicature Act, this Court then imposed a sentence of 13 years and 2 months' imprisonment after deducting the period spent on remand.

In ***German Benjamin vs Uganda (supra)***, a 35- year -old appellant defiled a girl aged 5 years and upon conviction he was sentenced to 20 years' imprisonment. On appeal, this Court set aside the sentence and substituted it with 15 years' imprisonment.

In ***Byera Denis vs Uganda, Court of Appeal Criminal Appeal No. 99 of 2012***, the appellant was convicted of aggravated defilement of a 3-year old girl and sentenced to 30 years' imprisonment. On appeal, this Court found the sentence of 30 years to be harsh and excessive and set it aside. A sentence of 20 years was found to be appropriate in the circumstances of the case and upon deducting the period the appellant had spent in lawful custody, he was sentenced to 18 years and 4 months' imprisonment.

The range of sentences in the above similar cases is between 13-18 years. We note that the appellant in this appeal defiled a $4^{1}/_{2}$-year-old girl and caused injuries to her tender genitals. He was then aged 30 years and fit to be the victim's father. We are however, mindful of the need to give the appellant who was a first offender opportunity to reform and reintegrate into society. Bearing these factors in mind, we find that a sentence of 20 years' imprisonment

would be appropriate in the circumstances of this case. We note that the appellant was arrested on 22/11/2017 and convicted on 26/09/2019 which means he spent 1 year, 10 months and 4 days in lawful custody. In compliance with Article 23 (8) of the Constitution, we deduct that period from the 20 years and accordingly sentence the appellant to serve a period of 18 years, 1 month and 26 days' imprisonment from the date of his conviction.

We so order.

Dated at **Kampala** this 8th day of February 2024

.....

Barishaki Cheborion

JUSTICE OF APPEAL

.....

Hellen Obura

JUSTICE OF APPEAL

.....

Eva K. Luswata

JUSTICE OF APPEAL