THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Kasule, Mwangusya& Egonda-Ntende*, *JJA*]

Criminal Appeal No. 177of 2014

Birungi Moses==Appellant

Versus

Uganda===Respondent

[*An appeal from a judgment of the High Court of Uganda sitting at Fort Portal (Dan Akiiki-Kiiza, J.), in HCT-01-CR-SC-0017-2004, delivered on the 11 September 2013*]

Judgment of the Court

Introduction

1. The appellant was convicted by the High Court on 11 September 2013 of the offence of Aggravated defilement contrary to sections 129(3) and (4)(a) of the Penal Code Act. The particulars of the offence were that on the 16 July 2010 at Rukunyu village in Kamwenge District, the appellant performed a sexual act with T W, a girl under the age of 18 years. He was sentenced to 30 years' imprisonment. He now appeals against both the conviction and sentence.

Duty of First Appellate Court

2. It is the duty of a first appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account of course that the appellate court did not have the opportunity to hear and see the witnesses testify. See Rule 30(1) (a) of the Court of Appeal Rules and Pandya vs R [1957] EA 336; Ruwala vs. Re [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC). We shall do so accordingly.

Prosecution case

3. Dr Mbonye examined both the victim and the accused on diverse dates. The evidence of Dr Mbonye and the medical reports were admitted by agreement of both the prosecution and defence. The doctor examined the victim, T W who was 8 years old at the time on 23 July 2010. She had bruises in the vagina; vulva was swollen and vagina was inflamed. There were signs of penetration. Her hymen was ruptured. She was too weak and too young to put up resistance.

4. The doctor examined the appellant on 27 July 2010 and found him to be with normal mental status with no physical injuries. He was of the apparent age of 35 years old. Both reports were admitted as PE1 and PE2.

5. The victim gave sworn testimony. She stated that on 16 July 2010 at about 2.00pm she left home to and gather firewood. She planned to call on Dan's children to go with her. She met the appellant near the forest. The appellant called her and she refused to go to him. He then came and forcefully got hold of her, put her down, after removing her knickers. He removed his own trousers and then had sexual intercourse with the victim. The victim felt a lot of pain but was warned by the appellant not to raise an alarm. After the sexual intercourse the victim went home.

6. She knew the appellant as he used to go to Evaristo's home who was a neighbour to the victim's parents. He used to come from hospital and go for lunch at Varisto's place. She had observed this for the last 2 months. A week after the incident the victim's mother asked her why she was not walking properly and she told her she had been defiled by Moses. The mother checked her and informed her father.

7. PW1, Edwina Tushabe, was the mother of the victim. She testified that on the 16 July 2010 her daughter went to collect firewood at about 2.00pm. She did not come back until about 7.00pm. PW1 proceeded to bathe her and found that her vagina was bruised and some whitish substance was coming from there. PW2 was feeling pain. PW1 asked her what had happened. PW2 told her she had been defiled by a man that used to stay at Kato's place. She informed her neighbours and when her husband

returned home they proceeded to the health centre to arrest the appellant. She left her husband at the health centre and returned home. The following day she took PW2 to the Health Centre for medical examination.

8. PW1 contradicted herself on the dates when she discovered that her daughter had been defiled. In cross examination she stated that she had bathed PW2 2 days after the defilement. She stated that she had told the police that the victim had been defiled three days prior to the discovery of the same. And in re-examination she stated that she had examined her on the very day she was defiled that is 16 July 2010.

9. PW3 was Zibahurise Francis, the father of the victim. He stated that on 16 July 2010 he returned home at about 8.00pm to 9.00 pm. He was informed by his wife that she had discovered that their daughter had been defiled by a man who used to stay at Kato’s place. They proceed to Kato’s place. Kato took them to another neighbour Varisto. They were told the appellant was at Rukunyu Health Centre where he was admitted suffering from TB. Both Kato and Varisto were neighbours to PW3.

10. They proceeded to the health centre and found the appellant there. The appellant was known to the witness who had previously seen him around the village for the last 4 or so days. They laid siege to the TB ward to ensure that the appellant did not escape that night. The following day they reported to the Police and the appellant was arrested. He took the victim to the police and she was referred to the Health Centre for examination.

11. PW4 was a Nursing Assistant at the material date stationed at Rukunyu Health Centre. The appellant was their patient at Rukunyu Health Centre where he was admitted on 14 July 2010. He was not so badly off and would go out to collect water, food or firewood. She came to know about charges against the appellant when he was arrested from the ward on the 23 July 2010. Men surrounded the ward the previous night and Police came in the morning and took the appellant away. She worked on 16 July 2010 on the TB ward but could not recall whether or not she had seen the appellant on the ward that day.

Defence Case

12. The appellant gave sworn testimony. He stated that he was admitted at Rukunyu Health Centre on 14 July 2010. He was suffering from TB. On 16 July 2010 he was on the ward the whole day. He stated that he used to go out to fetch water with other patients. He however denied that he had been off the ward between 14 July to 16 July 2010. He did not know PW3 and PW1 prior to the incident and saw them for the first time when he was arrested. He knew Kato and Varisto. Varisto was his brother. He had never visited Varisto before. His young brother Manuel used to bring him food at the health centre.

13. The appellant did not call any witness[es].

Counsel's Submissions

14. Mr Richard Bwiruka, learned counsel for the appellant submitted that the complaint of the appellant is that the learned trial judge erred in law and fact when he disbelieved the alibi of the appellant and convicted him on the contradictory and inconsistent evidence of the prosecution. The appellant stated that on 16 July 2010 he was at Rukunyu Health Unit where he was admitted as an in-patient from 14 July 2010. He never left the ward on that day. It was his younger brother one Manuel Mwesigye who used to bring him the food. PW4 confirmed the testimony of the appellant. She testified that the appellant was admitted on 14 July 2010. She provided his admission number. The prosecution should have investigated and taken statements from other patients in the ward to investigate the alibi.

15. Mr Bwiruka submitted that the testimony of the victim is not credible. Neither is the testimony of her mother. Given those facts the alibi of the appellant was not destroyed. He prayed that this appeal be allowed. He referred to the case of Festo Androa Andenua and Anor v Uganda SC Criminal Appeal No.91 of 1998 [unreported] in support of the case for the appellant.

16. Turning to ground no. 3 with regard to sentence Mr Bwiruka submitted that the sentence handed down by the learned trial judge was excessive in the circumstances. The appellant was sentenced to 30 years imprisonment. He considered the fact that the appellant had been on remand for 3 years. In spite of which he sentenced the appellant to 30 years. He stated that the appellant had a family and children who were now under the care of the grandmother. The appellant was a patient of TB. This is a mitigating factor. The record does not show that the appellant was given an opportunity to say something in allocutus. It is only his counsel who stated the mitigating circumstances. He was a first offender. The period of 30 years is excessive. Mr Bwiruka referred to the case of Leo Byaruhanga v Uganda SC Criminal Appeal No. 29 of 1994 [unreported]. The Supreme Court upheld a sentence of 10 years for defilement of an 8 year victim. He prayed that the appeal be allowed.

17. Ms Jennifer Amumpaire, learned Senior State Attorney, appearing for the state opposed the appeal. Firstly with regard to conviction she referred to the evidence of the victim. This was direct evidence. The crime was committed at 2.00PM. She identified the appellant. The appellant was known to her. She used to find the appellant at the home of one Evaristo, who was their neighbour. Varisto was very familiar to her. After performing the sexual act the appellant warned her not to tell her parents. Her mother PW1 stated that when she was going to bathe the appellant she discovered the injuries to the PW2. Although there was an inconsistency on the day the offence was discovered PW2 was clear that this was after one week. The appellant was arrested after one week on 23 July 2010. The inconsistency is minor given the consistency of the victim.

18. The appellant raised an alibi. In his testimony he stated during cross examination that he used to leave the ward to go and fetch water. The alibi does not account for the actual time the offence was committed. The learned trial judge rightly found the alibi false. It was destroyed by the prosecution evidence.

19. Turning to the sentence, Ms Amumpaire submitted that the trial judge considered the mitigating factors and the aggravating factors. The victim

was 8 years old. Sentence of 30 years was appropriate. She prayed that the appeal be dismissed.

Analysis

Appeal against Conviction

20. The learned trial judge believed the testimony of PW2 and rejected the alibi of the appellant holding that the alibi had been shown to be a pack of lies. The learned trial judge accepted that there was some inconsistency between the testimony of the victim, PW2, and the other witnesses (PW1 and PW3) on when the offence was discovered. Taking into the account the evidence of PW2 and the medical report with regard to examination that occurred on 23 July 2017 the learned trial judge concluded that the discovery must have been on 22 July 2010, a week after the offence was committed. He dismissed the contradiction on this issue as minor given that PW1 was an illiterate witness.

21. The major complaint against the trial judge is that he accepted the evidence of the prosecution which was inconsistent and contradictory which was incapable of destroying the alibi of the appellant. As was noted in Festo Androa Andenua and Anor v Uganda, Supreme Court Criminal Appeal No.91 of 1998,

> ‘It is trite law that by setting up an alibi, an accused does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. See Ntale vs Uganda [1968] E.A.53 and L Anisheth vs Republic [1963] E.A.206. In R vs Chemulon Wero Olango (1937) 4 E.A.C.A. 46 it was stated:
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> > “The burden of the person setting up the defence of alibi is to account for so much of time of the transaction in question as to render it impossible as to have committed the imputed act.”

22. The learned trial judge considered the alibi of the appellant together with the evidence of the prosecution. He noted the contradictions in the evidence of the prosecution over the question of when the offence was discovered. He reviewed all the evidence on record and concluded that the discovery was a week after the offence was committed. He believed the testimony of the victim. He provided his reasons for doing so. The

learned trial judge rejected the alibi of the accused concluding that it was a pack of lies. He gave reasons for doing so.

23. On our own review of the evidence available to the trial judge we do agree that the contradiction between the testimony of PW2 on the one hand and on the other hand the testimony of PW1 and PW3 with regard to the date of the discovery of the defilement was not a major contradiction. The testimony of PW2 was very clear that PW1 discovered her condition after a week from the incident. She was examined by the medical officer on 23 July 2010 a day after the crime was discovered. Given the passage of time PW1 and PW3 must have been mistaken about the dates. The evidence of PW2 is preferable and credible on this point.

24. PW2 explained to her mother the person who had defiled her pointing out that he used to visit the home of Kato. When PW1 and PW3 visited the home of Kato, who was their neighbour, he led them to Varisto’s home. The appellant was identified and his location disclosed. He was at Rukunyu Health Centre admitted in the TB ward. The appellant admitted that Varisto was his brother though he denied going there. The appellant admitted that he knew Kato and that it was Kato who had led the arresting party to his hospital bed.

25. The incident complained of took place at 2.00pm in broad daylight. The appellant was known to the victim who had seen him on the village at Kato’s place. There was no question here of a possible mistaken identity. The conditions favouring correct identification obtained.

26. The medical evidence corroborates the testimony of PW2 with regard to occurrence of sexual intercourse. Once the crime was discovered PW2 immediately revealed the identity of the perpetrator to the mother, PW1. This report is sufficient to corroborate the identity of the perpetrator. There was no grudge between the appellant and PW1 or PW3. Much as it is not contested that he was admitted at Rukuyu Health Centre, he moved in and out freely. Since Varisto was his brother it is not farfetched for him to have gone to visit and or take his meals there. Kato was from the same village as he was which would easily explain his visits to Kato as well.

27. It is not only PW2 who saw the appellant on the village prior to the commission of the crime. PW3 also testified that he had seen him around the village from about 4 days prior to the commission of the offence. The learned trial judge rightly concluded in our view that the claim by the appellant that he had not left his hospital bed from 14 July to 16 July 2010 was false. So was his alibi.
28. The appeal against conviction is without merit and is dismissed accordingly.

Appeal against sentence

29. It has been consistently held in numerous cases both by the Supreme Court and the predecessor Court of Appeal for East Africa, and more specifically in the case of Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993 [unreported]that:

> 'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.'

30. The foregoing principles are equally applicable in the instant case.

31. The sentencing order of the trial judge states,

> 'Accused is allegedly a first offender. He has been on remand for about 3 years. I take this into account and deduct it from the sentence I will impose.
> The accused is said to be remorseful and appears remorseful. He has a family to look after. His wife left him upon his arrest, leaving 2 children with their grandmother. He has prayed for leniency.
> However accused committed a serious offence. The maximum sentence upon conviction could be up to the death penalty. Hence the law treats convicted defilers with harshness. The victim in this case was only 8 years old. Hence could easily be his own daughter or at least his young sister. Society would expect him to be protective of her. He ended up defiling her.

> No doubt she underwent tremendous ordeal and pain at the hands of the accused. Girl children must be protected from people like this accused. …….. I wonder what he could not get from his wife and wanted to get it from this little girl of 8 only years. Putting everything into account. This is a case where the court must show its pleasure by imposing a deterrent sentence. I accordingly sentence accused to 30 years imprisonment. Right of Appeal explained.'
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32. Mr Bwiruka referred to us the case of Leo Byaruhanga v Uganda SC Criminal Appeal No. 29 of 1994 [supra] in which the appellant had been convicted of the defilement of an 8 year old girl. He was sentenced to 10 years imprisonment. The trial court set out to impose a deterrent sentence. On appeal the Supreme Court dismissed the appeal against sentence, suggesting the appellant was lucky not to have received a higher sentence.

33. In the case of Bikanga Daniel v Uganda Court of Appeal Criminal Appeal No. 38 of 2000 [unreported] the appellant had been convicted of defilement of a girl under 18 years of age. He detained the girl for 2 days in his house during which he repeatedly defiled her. He was sentenced to 21 years imprisonment. On appeal this sentence was found to be harsh and excessive. It was substituted with a sentence of 12 years. The age of the victim is not disclosed.

34. In the case of Kabwiso Issa v Uganda Supreme Court Criminal Appeal No. 7 of 2002 [unreported] the appellant was convicted of defilement and sentenced to 15 years imprisonment. On appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme Court the court found that the trial judge had not taken into account the period the appellant had spent on remand and reduced the sentence to 10 years imprisonment.

35. It appears to us that the learned judge discounted the fact that the appellant was a first offender with the statement that the 'accused is allegedly a first offender.' There was no need for the judge to refer to the accused as allegedly a first offender. The state had not offered any record of previous offences for the appellant. The trial judge ought to have taken the appellant as a first offender rather than taking the position that this was only an allegation. In effect the learned trial judge ignored this point

of mitigation in favour of the appellant. This was an error on the part of the learned trial judge.

36. We are satisfied that in the circumstances of this case the sentence imposed by the learned trial judge was manifestly excessive and harsh. It was out of range with sentences imposed on the cases of this nature. Secondly the learned trial judge ignored a material factor that the appellant was a first offender. We have no alternative but to set it aside.

37. This court has the same powers as the High Court, pursuant to Section 11 of the Judicature Act. It states,

> '**11. Court of Appeal to have powers of the court of original jurisdiction.**
> For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated'

38. In the instant case the appellant was a first offender. He spent 3 years on remand prior to his trial and conviction. He was 35 years old at the time of the commission of offence. He was remorseful. Nevertheless he committed a very serious offence whose maximum punishment was the death penalty.

Decision

39. We are satisfied that a sentence of 12 years imprisonment from the date of conviction [11 September 2013] will meet the ends of justice in this case. We so order.

Dated, signed and delivered at Fort Portal this 18th day of December 2014

Remmy Kasule
Justice of Appeal

Eldad Mwangusya
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal