

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 22 OF 2012

ANYOLITHOAPPELLANT

VERSES

UGANDA.....RESPONDENT

(Appeal from the decision of the High Court of Uganda at Arua before his Lordship Hon. Justice Lameck N. Mukasa dated 24.10. 2011)

CORAM: Hon. Justice Remmy Kasule, JA
Hon. Lady Justice Hellen Obura, JA

Hon. Justice Simon Byabakama Mugenyi, JA

JUDGEMENT OF THE COURT

Introduction

The appellant, Anyolitho Robert was indicted, tried and convicted by the High Court of the offence of aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act. He was sentenced to a period of 18 years imprisonment. He has now appealed to this Court.

Background to the Appeal

The facts of this case as accepted by the trial court is that the appellant is the paternal uncle of the victim, Anyonga Daisy (PW2), a girl aged 14 years who was a P. 6 pupil of Parobo Primary School in 2008. The parents of the victim were estranged. The appellant who is a teacher and brother to the victim's father was staying in his house with his wife and children. PW2 also stayed in the same homestead but was sleeping in the house of her other uncle, Selsi. During the month of November 2008, the appellant entered the house in which PW2 was sleeping at night. Her evidence reveals what took place. The following is the relevant part of the record showing how she narrated her testimony to the trial Judge.

".....I was sleeping in the house of my other paternal uncle called Selsi. I was sleeping alone in that house.....The accused was staying in his house.....One day he brought his bicycle in the house, then I realized that he was sitting on me. I asked who it was. He answered that 'it is me keep quiet'. I made an alarm. He told me not to shout and he went Out of the house.....the next day he came again at night. He found when I was sleeping. I woke up when he was lying on me. He wetted my bed sheets. He

had sexual intercourse with me. He inserted his penis in my vagina. / made an alarm and he left cursing me that if I ever reported the matter lightning will strike me I left that house and moved to the kitchen. He again followed me there. He continued to have sexual intercourse with me. He had sexual intercourse with me three times. I did not tell anybody because he had already cursed me. ”

During the 3rd term holiday the victim went to stay with her mother, Mono Irene, PW3. She did not disclose the incident to her mother until February 2010 when it was time for the victim to return to the appellant's home so that she could go back to school. The victim refused to go back to the appellant's home and when the mother insisted that she goes back to the appellant's place she broke down and started crying. The mother asked her why she did not want to go back and she revealed that the appellant had sexually molested her. The victim was taken by her mother to the Probation Office in Nebbi and the matter was reported to the Police in Nebbi.

The victim was taken to Nebbi hospital where Dr. Okello Nicholas (PW1) examined her on 16. 2. 2010. He established that the victim was then aged 14 years and that her hymen had been ruptured. The appellant was arrested and charged with the offence of aggravated defilement. He denied the offence and in his unsworn statement during his trial, the appellant claimed the charges were fabricated against him by the victim's mother (PW3) because he had failed to reconcile her with her husband who was the appellant's brother following their broken marriage. The assessors and the trial Judge believed PW2 and disbelieved the appellant who was found guilty, convicted and sentenced to 18 years imprisonment, hence this appeal.

Grounds of Appeal

- 1. The learned trial Judge erred in law and fact when he convicted the appellant while relying on the uncorroborated evidence of the victim.***
- 2. The learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence of 18 years imprisonment upon the appellant.***

At the hearing of this appeal, Mr. Kunya Henry appeared for the appellant on private brief and Senior Principal State Attorney, Mr. Sam Oola appeared for respondent.

Arguments for the Appellant.

When arguing the first ground, Mr. Kunya Henry, counsel for the appellant, submitted that the victim's evidence was that she was defiled in 2008 on three different occasions but she never disclosed it until 2009 on the allegations that the appellant had cursed her. He further submitted that

there was no corroboration of the victim's evidence since no one testified to the fact that she was seen bleeding or walking with difficulty, the first time the incident took place.

He contended that the medical evidence could not in any way corroborate the evidence of sexual intercourse between the victim and the appellant since the medical examination was done in 2010, almost one year and several months later. The examination revealed that the victim's hymen had been ruptured long ago. Counsel argued that much as the medical evidence confirmed the rupture of the victim's hymen, there was nothing to link the rupture to the sexual act by the appellant in 2008. He also submitted that a court will only rely on the evidence of the victim without requiring corroboration if it is credible, but in this case it was not.

Counsel argued that there was no STI test done on the victim to verify whether the STI found on the appellant was shared by the victim. He submitted that it would have been a strong indicator that the appellant was responsible if the traits of STI found on the appellant was also found on the victim. Counsel also submitted that the distressed condition of the appellant on which the trial Judge relied could not be a basis of conviction given the passage of time. The alleged curse that the victim would be struck by lightning was a lie because she eventually disclosed it and nothing happened to her. Counsel further contended that it is not enough to say that the offence was committed but it must be linked to the appellant. He urged this Court to re-appraise the evidence and quash the conviction.

On ground 2, counsel submitted that during sentencing, the trial Judge only considered the period spent on remand and dwelt so much on the aggravating factors without setting out details of the mitigating factors. He supported his submission with the case of **Korobe Joseph vs Uganda; Criminal Appeal No. 0243 of 2013**, where this Court held that the trial court should set out all the mitigating factors.

Counsel prayed that this Court exercises its discretion to set aside the sentence and in the event that the sentence is upheld, he prayed that it be reduced.

Arguments for the Respondent.

Counsel for the respondent supported the conviction and sentence. In reply to ground 1, he submitted that the conviction was not only based on the evidence of the victim. Prosecution adduced evidence of PW1 (medical officer), PW2 (the victim) and PW3 (the victim's mother). He pointed out that the sexual act was committed at the appellant's home and PW2 was emphatic that she knew the appellant very well and testified in detail how the appellant had sexual intercourse with her on 3 different occasions. He argued that despite the delay, PW1 still found that the hymen was ruptured and according to PW2, it was in November, 2008 when the first incident took place.

Counsel further submitted that PW2 was a vulnerable young girl given that the appellant had authority over her, and so it was difficult for her to report the incident. Further, that due to her fear she could not report immediately to her mother but it was not until when her mother tried to take her back to the appellant that she disclosed the matter. He cited the case of **Mayombwe Patrick vs. Uganda; Criminal Appeal No. 17 of 2002** in which this Court agreed with the decision of the Court of Appeal of Kenya in the case of **Mukungu vs. R (2002) 2 EA** where it was held that corroboration is not required in law and court can convict without corroboration. However, counsel submitted that in the instant case, the medical evidence as presented by PW1, PW3's evidence and the refusal of the victim to go back to the appellant's place were all corroborative of her evidence of a sexual act.

Regarding the issue of STI, counsel submitted that it was immaterial whether the victim was infected or not as no mandatory test is required for the victim. He prayed that this Court upholds the conviction.

On ground 2, counsel submitted that the sentence of 18 years imprisonment is not illegal as the maximum sentence is death. He also argued that it was not true that the trial Judge only relied on the period of remand and failed to consider the other factors that were put forth in mitigation. He submitted that for a person who was in the position of a parent of the victim, as the appellant was in this case, a sentence of 18 years imprisonment was appropriate.

He prayed that this Court disallows this ground and dismisses the appeal.

Decision of the Court

The duty of this Court as a first appellate Court was re-stated by the Supreme Court in the case of **Oryem Richard vs Uganda; Criminal Appeal No. 22 of 2014 (SC)** at page 5 in the following words;

“We should point out at this stage that rule 30 (1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate court, to reappraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it has neither seen nor heard the witnesses. This gives the first appellate court the duty to rehear the case....”

Mindful of that duty, we now embark on reappraisal of the evidence on record in the instant case, to determine whether the trial Judge relied on uncorroborated evidence to convict the appellant, and if so whether by so doing, he erred in law and fact as alleged in ground 1 of this appeal.

We have noted the arguments of both counsel on this ground as summarized herein above. Corroboration evidence is defined in **Osborne’s Concise Law Dictionary 5th Edition page 90** as independent evidence which implicates a person accused of a crime by connecting him with it; evidence which confirms in some material particular not only that the crime has been committed but also that the accused committed it.

The law on corroboration in sexual offences was well settled by the Court of Appeal for East Africa in the case of **Chila and anor vs Republic; Criminal Appeal No. 80 of 1967** in the terms set out below:

“The judge should warn the assessors ⁶and himself of the danger of acting on the

uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice. ”

In the case of Livingstone Sewanyana vs. Uganda; Criminal Appeal No. 19 of 2006,

the Supreme Court had this to say in regard to corroboration of the victim’s evidence in sexual offences;

“We accept the submissions of the learned Senior principal State Attorney that the reports which PW1 made to her teacher Ireta Mary Rose, PW3, and Fred Watente, PW4, corroborated her evidence that the appellant routinely had sexually abused her.....

That notwithstanding we are of the considered view that even if such corroboration was not there, as the Court of appeal held, it is the quality and not the quantity of evidence that matters and the learned trial judge was aware of that. The learned trial judge found that PW 1 was a truthful witness and believed her... ”

In that case of ***Sewanyana (supra)***, the victim was the biological daughter of the appellant. Her mother had got married to another man before the victim was born. She was born in January 1980 and she lived with her grandmother until she was 7 years old when she went to live with her father the appellant in that case. In 1993 she was aged 13 years and her father started sexually molesting her. He routinely defiled her until 1994 when the victim conceived and her father took her for an abortion. She confided in her two friends at school about what was going on between her and her father. He had threatened her with death if she ever let anyone know about it.

The two friends, without the victim’s knowledge, told the senior teacher called Ireta Mary Rose, PW3 in that case. The teacher talked to the victim’s father and advised him to let the victim stay with her biological mother for the sake of her academic performance but he refused that advice and continued with his incestuous activity with the victim. The victim conceived again in 1998 and 2000 but on each occasion her father arranged for her abortion.

There were other intervening factors which led the victim’s father and the victim to appear before Pastor Fred Watente to settle the dispute between them. The following day the victim went back to the Pastor alone and shared with him all her experiences. The Pastor advised her to report the matter to Police and she obliged. The father was arrested and indicted for the offence of defilement and incest. He was prosecuted, convicted and sentenced to 18 years imprisonment on count 1 and 19 and half years imprisonment on count 2.

He appealed to the Court of Appeal against both the conviction and sentence. The Court of Appeal upheld both the conviction and sentence. On a second appeal to the Supreme Court he criticized the trial court and the Court of Appeal for relying on uncorroborated evidence of the victim.

We have reproduced the facts of *Sewanyana case* (supra) at length because of its similarity with the facts of this case. The appellant in that case complained that there was no corroboration of the victim's evidence and so the trial Judge should have warned himself and the assessors before convicting the appellant. It was contended that the trial Judge warned the assessors but did not warn himself. The Court of Appeal was criticized for holding that although the trial Judge did not warn himself of the danger of convicting the appellant on uncorroborated evidence of the victim that did not cause a miscarriage of justice to the appellant, hence the above quoted judgment of the Supreme Court.

In that case (*Sewanyana supra*), the Justices of the Court of Appeal were also criticized for failing to consider the lapse of time the victim was defiled by the appellant and the time when the matter was reported to the Police. The Supreme Court then held thus;

“In the judgment of the trial Court the judge gave reasons why it took so long for the appellant’s crime to come to light. It is trite law that time does not run against the state in a criminal matter. The complaint by the appellant’s counsel about lapse of time is not tenable. ”

In the instant case, the appellant's complaints are also on uncorroborated evidence and lapse of time in reporting the offence. We shall deal with the complaint on lapse of time first before considering the alleged uncorroborated evidence that the trial court relied upon to convict the appellant. We are guided by the above quoted decision of the Supreme Court in *Sewanyana case (supra)* that it is trite law that time does not run against the state in a criminal matter. In other words, there is no limitation period for reporting a crime and prosecuting the suspect. For that reason, we would summarily dismiss the appellant's complaint for lacking merit.

However, we have also had opportunity to examine some jurisprudence in other jurisdictions, some of which have limitation period for criminal matters, to see how they have handled complaint of lapse of time in reporting offences and prosecuting the offenders.

In South Africa, where there is a statutory limitation to actions against perpetrators of criminal offences, the Constitutional Court in the case of *Ptrue Bothnia vs. Petrus Arnoldus Els and anor (2009) ZACC 27* where the applicant, Mrs. Bothma, instituted a private prosecution in 2007, charging that thirty-nine years before, when she was a thirteen year old schoolgirl, the first respondent, Mr. Els, a wealthy family friend much older than herself, had picked her from her home and taken her by car to his farm and raped her. She alleged further that a similar pattern of

¹ sexual abuse had continued for more than two years. Further, that Mr. Els warned her that should anyone find out about the rapes her parents would lose their jobs and so she kept quiet because she believed him.

Mr. Els vigorously denied the charge. He applied to the Northern Cape High Court in Kimberley (the High Court) for an order permanently staying the private prosecution. The High Court issued the stay of prosecution, holding that the unreasonable delay, for which it regarded Mrs. Bothma as being fully culpable, would result in irreparable trial prejudice to Mr. Els and deny him his constitutional right to a fair trial. Mrs. Bothma appealed to the Constitutional Court.

In allowing the appeal and setting aside the order for stay of prosecution, the Constitutional Court held;

In summary then, the High Court erred in two major respects. In the first place, it failed to give appropriate weight to the nature of the offence. Had it done so, and had it paid sufficient attention to the import of decisions of the Supreme Court of Appeal, it could not have come to the firm conclusion that Mrs. Bothma's explanations for the delay were unpersuasive and that she had been solely responsible for the lateness of her complaint. Given the nature of the alleged offence, it was simply not open to the High Court definitively to blame her for the delay in laying a charge, and use this finding as the basis for pre-empting the very trial that was to determine whether her delay had been reasonable; the conclusionary cart should not have been placed before the evidential horse"

In arriving at the above decision, the Constitutional Court of South Africa reviewed a number of authorities on the subject of delay especially in sexual offences. The landmark decision on which it relied, is the case of *Sanderson v Attorney-General, Eastern Cape; Constitutional Court of South Africa [1998] (2) SA 38* which laid down a balancing test in which the conduct of both the prosecution and the defence should be weighed in order to determine whether the delay in reporting complaints of sexual assaults was unreasonable, and the courts should consider the following factors; the length of delay; the reasons advanced by the prosecution for the delay; waiver of the right to a speedy trial by the accused; the prejudice to the accused; and generally, the interests of justice.

The lesson from the *Ptrue Bothma* case (supra), and which we find very in the instant case is that; when faced with the question of lapse of time, the nature of the case should be given appropriate weight by the court, and the reasons for the delay should be well considered together with other factors like length of delay, prejudice to the accused, waiver of the right to a speedy trial by the accused and generally, the interests of justice.

Another case which the Constitutional Court of South Africa reviewed in the *Ptrue Bothma* case (supra) is *Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA); [2004] 4 All SA 427 (SCA)* where the Supreme Court of Appeal of South Africa accepted that rape had the inherent effect of rendering child victims unable to report the crime, sometimes for several decades, and that the policy was not to penalise them for the consequences of their abuse by blaming them for the delay.

In another jurisdiction, the Irish Court in the case of *P.C. vs. D.P.P [1999] 21.R. 25*, (as per Keane J, as he then was) noted that;

"The fact that the offence charged is of a sexual nature is not of itself a factor which would justify the court in disregarding the delay. However, in some cases the disparity in age between the complainant and the accused is such that the possibility arises that the failure to report the offence is explicable, having regard to the reluctance of young children to accuse adults of improper behaviour.

Feelings of guilt and shame experienced by the child because of his or her participation, albeit unwillingly, in what he or she sees as wrongdoing would also explain a failure to complain sooner. In addition the use of threats, actual or implied, of punishment if the alleged offences are reported, would also be enough to convince the court that the lapse of time was reasonable.

In this case and in other cases the courts have held that the exercise of “dominion” by the applicant over the complainant would be enough to explain the delay in a particular case. Dominion in this context involves some element of threat or discouragement, coming from someone in a position of power and authority over the complainant, not to disclose the abuse to other persons. ”

Although the above authorities are from other jurisdictions whose decisions are not necessarily binding on this Court, we do find that the principles that run through all of them are universally applicable in offences of similar nature. Sexual offences against women, and more particularly against children, are of global concern because of its demeaning/degrading nature and the lifelong effects it leaves on the victims. If courts were to adopt a very strict approach on reporting time then many victims would be left without justice as the heartless perpetrator’s walk scot-free.

In the instant case, the appellant was a paternal uncle to the victim and he had authority and dominion over her as his brother had entrusted the victim under his care. The victim also alleged that she had been cursed by the appellant that she would be struck by lightning if she revealed the incident. She believed him and kept quiet in fear of being struck by lightning.

Upon re-evaluating the evidence on record and applying the principles in the above cited cases, we find that the delay in reporting the incident by PW2 was justified as she was threatened and discouraged from doing so by the appellant who had dominion over her by virtue of his position as her uncle, who was much older than her. He had authority over the victim since her parents had left her in his care. Therefore, we are not persuaded by the appellant’s argument that PW2 was lying and that is why she delayed to report the incident. We cannot also accept the appellant’s contention that the charges against him were as a result of fabrication by the victim’s mother PW 3 because he had failed to reconcile her with her husband following their broken marriage.

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On the whole, we find no merit on the issue of lapse of time since the reason for the delay in reporting the

incident was sufficiently explained.

We now turn to consider the issue of uncorroborated evidence. The decisions in *Chila case (supra)* and *Sewanyana case (supra)*, already quoted herein above are very instructive on this issue. The import of those two decisions, as we understand them, is that even without corroboration, the trial court can convict an accused person so long as it is satisfied with the quality of the evidence of the single witness especially as regards the witness' truthfulness. All that the trial Judge is required to do is to warn the assessors and himself/herself of the danger of acting on the uncorroborated testimony of the complainant.

In the instant case, the trial Judge warned the assessors of the danger of acting on uncorroborated evidence of the victim and in his judgment he also warned himself accordingly citing the case of *Chila (supra)*. While considering the second ingredient of the offence of defilement, that is, whether the victim had penetrative sexual intercourse, the trial Judge, after evaluating the evidence of the victim and noting what he had observed as she testified, pointed out that he found her evidence truthful and he was prepared to rely on it even without corroboration. However, he hastened to add, that he found corroboration in the medical evidence and the distressed state of the victim as testified about by her and exhibited in the course of her testimony. In the circumstances, he concluded that the prosecution had proved, beyond reasonable doubt, the ingredient of sexual intercourse.

The trial Judge proceeded to evaluate the evidence on participation of the appellant and more specifically the evidence of identification of the appellant by the victim. He tested the evidence of the victim against the decisions given in the cases of *Abdalla Bin Wendo & Anor vs R[1953J 20 EACA 156* and *Bogere Moses & Anor vs Uganda; Supreme Court Criminal Appeal No. 1 of 1997* and concluded as follows;

“All the above factors put together leave no doubt as to the victim’s ability to positively identify the accused. Her testimony is corroborated by her conduct as testified to by her mother that Anyonga, despite all her efforts, refused to go back to stay at the accused’s home for the first term in 2010 and that it was then that she revealed what she was going through.”

The trial Judge then proceeded to evaluate the appellant’s evidence which he disbelieved and instead believed the prosecution evidence, thereby concluding that the prosecution had proved beyond reasonable doubt that the appellant had unlawful sexual intercourse with the victim.

We ourselves have subjected the evidence on record to a fresh scrutiny in so far as the ingredient of sexual intercourse and participation of the appellant are concerned. The victim gave a detailed

account of what transpired on the three occasions that the appellant sexually molested her. Much as she said it was dark in the room where she was sleeping, she testified that she was able to identify the appellant by voice as he talked to her to restrain her from making alarm and reporting the incident. The trial Judge who observed the victim's demeanor as she testified was impressed that she was a truthful witness who withstood vigorous cross-examination by the defence counsel and was consistent in her testimony. We have no reason to doubt that observation since we ourselves did not have the opportunity to observe the witness as she she testified.

Identification of an accused person by voice has been considered by the Supreme Court in a number of cases. One of such cases is Sabwe Abdu vs Uganda; Supreme Court Criminal Appeal No. 19 of 2007. The Supreme Court, in that case, in agreement with the trial Judge's finding on the victim's evidence of identification by voice stated as follows;

" There is evidence on record that the girls were familiar with the appellant because he lived about a quarter of a mile from their home, they always passed by his home as they went to school and they used to hear him speak to other people. The appellant also used to come to their home where they would hear him speak to their father. We agree with the trial judge's finding that given these circumstances the girls would be able to identify the appellant by voice even if they had never directly talked to him. To identify a person's voice, one does not necessarily have to have talked to that person. "

In the instant case, the victim was living in the same homestead with the appellant who is her uncle. She was well conversant with his voice as she heard it daily. Therefore, we agree with the trial Judge that she could not have been mistaken in her identification of the appellant.

On the basis of the trial Judge's observation of the quality of the victim's evidence, we agree with him that he could have even convicted the appellant on the single evidence of the victim since he had warned the assessors and himself of the danger of acting on the uncorroborated evidence of the victim.

Nevertheless, we find, as the trial Judge also did, that ample corroboration was provided by the medical evidence and the victim's distressed state as testified to by herself and her mother. In addition, we also find corroboration in the victim's report of the incident to her mother.

Counsel for the appellant criticized the medical report for not linking the appellant to the rapture of the victim's hymen since it was done belatedly, more than one year after the incident. It is true that the medical examination was carried out in February 2010 yet the offence with which the appellant was indicted was alleged to have started in November 2008. The examination was therefore carried out after a period of about 15 months.

That notwithstanding, we respectfully disagree with counsel for the appellant that the medical examination did not link the rapture of the victim's hymen to the appellant. The purpose of carrying out medical examination on a victim of defilement is to confirm whether there was penetrative sexual intercourse. The medical report *per se* cannot reveal the person responsible for sexual intercourse unless some advanced tests like DNA is carried on¹⁴ the semen found in the victim's private parts and its DNA profile is compared with the sample from the suspect.

That kind of test was not carried out in the instant case and so Counsel for the appellant's submission on that point is misdirected. However, we appreciate counsel's argument that the medical report by itself could not indicate the period the hymen was ruptured and so there is a possibility that it was not connected to the alleged sexual intercourse by the appellant. We agree with that argument to the extent that the medical evidence did not indicate the period when the rupture occurred.

However, we wish to emphasize that the medical evidence was merely corroborative of the victim's evidence, which as we have already observed herein above, was found to be truthful by the trial Judge and could have been the only basis for convicting the appellant had there been no any other corroborative evidence on record.

In the case of Mujuni Apollo vs. Uganda Criminal Appeal No. 26 of 1999, this Court upheld a conviction for defilement where there was no corroboration of the victim's evidence. This Court stated;

“It is clear to us that by basing this appeal on the absence of medical evidence, Mr. Bwengye is affording medical evidence undue weight, overlooking the fact that it is merely advisory and goes to the fact and not law. The court has discretion to reject it. Rivell (1950) Cr App R 87i Matheson 42 Cr. App R.145. The court can even convict without medical evidence as long as there is strong direct evidence when the circumstances of the offence are so cogent and compelling as to leave no ground for reasonable doubt.....”

It is clear from the above authority that undue weight should not be attached to medical evidence as it is merely advisory. It cannot be a basis for setting aside a conviction that is founded on other evidence that is so cogent and compelling as it was in the instant case. For that reason, we find no merit in the appellant's complaint as regards the medical report.

In the result, ground 1 of this appeal fails.

With regard to ground 2, the appellant faulted the learned trial Judge for meting out a sentence of 18 years imprisonment upon the appellant which was harsh and excessive.

Counsel for the appellant argued that during sentencing, the trial Judge only considered the period spent on remand and did not consider other mitigating factors. Conversely, counsel for the respondent submitted that it was not true that the trial Judge only relied on the period of remand and failed to consider the other factors that were put forth in mitigation. He submitted that the trial Judge considered the other mitigating factors as well and gave a sentence of 18 years imprisonment which was not illegal as the maximum sentence is death. He argued that for a person who was in the position of a parent of the victim, as the appellant was in this case, a sentence of 18 years imprisonment was appropriate.

We note that, the trial Judge while sentencing the appellant stated;

“.....I have also considered the mitigating factors raised by both the accused and his counsel in his favor. I am also mindful of the period the convict has remained on remand.....the convict was a parent to the victim. He abused the protection the victim expected from him and turned against her. He introduced her to sexual immorality and for his selfish interest chose this young girl to stay alone in a house so as to gain free access to her. This must also have had effect on her and was further brutality towards her....the convict further abused the trust in him to care for the victim by his own brother. Further the convict is a teacher and as had double responsibility as a clan parent and also as a custodian of young children in his profession as a teacher. Society and mainly children should be protected from people such as the convict. In the premises the convict is sentenced to eighteen (18) years of imprisonment from this date of conviction. ”

In the case of *Ogalo s/o Owoura* - vs- *R (1954) 24 EACA 270*, the East Africa Court of Appeal observed that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was stated in *James vs. R(1950) 18 EACA 147*,

it is evident that the Judge has acted upon some wrong principle or overlooked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case.

In the instant case, the trial Judge gave detailed reasons for the sentence. He also stated that he had considered the mitigating factors raised by both the accused and his counsel in his favor. He considered the fact that the convict is a teacher and as such had double responsibility as a clan parent and also as a custodian of

young children in his profession as a teacher. He also observed the fact that society and mainly children should be protected from people such as the appellant. With these reasons, he sentenced the appellant to 18 years imprisonment.

Our re-appraisal of the sentencing record reproduced above, leaves us with no doubt that the trial Judge considered the mitigating factors before sentencing the appellant. He was alive to them and that is why he did not give the appellant the maximum sentence of death. We only fault the trial Judge for not

setting out those mitigating factors in his sentence. For that reason, we shall ourselves set out both the mitigating and aggravating factors as were presented by the appellant and respondent and reconsider them in the interest of justice.

It was presented in mitigation that the appellant was a young man of apparent age of 31 years. He had a family of 2 children and wife. He was the sole bread winner for his family. Further, that given the opportunity, the appellant could be useful not only to himself but to society which he has been serving as a teacher at a

low salary. We have also considered the aggravating factors that were presented by the respondent, namely that; the conduct of the appellant was merciless and inhuman to engage the victim in sexual intercourse on 3 occasions at such a tender age. He had not been remorseful during the trial. The offence is rampant in the area and being done by people meant to protect the victims.

Having re-considered the above factors, and bearing in mind the circumstances under which this Court can interfere with the discretion exercised by a trial Judge in sentencing, it is our considered view that the sentence of 18 years imprisonment meted out by the trial Judge is neither harsh nor manifestly excessive in the circumstances of this case. In the premises, we find no merit in this ground of appeal and therefore it fails.

In conclusion, we uphold the conviction and sentence by the trial

Judge and dismiss this appeal.

We so order.

Dated at Arua this 6th day of June 2016.

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

Hon.Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL