

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 0181 OF 2009

(Arising out of High Court at Arua Criminal Case No. 0013 of 2009)

CANDIA AKIM ::: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

CORAM Hon. Mr. Justice Remmy Kasule, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Byabakama Mugenyi Simon, JA

JUDGMENT OF THE COURT

The appellant appeals against a conviction for aggravated defilement contrary to Section 129(3) of the Penal Code Act and a sentence of 17 (seventeen) years imprisonment passed against him on 20.08.09 by His Lordship J.W. Kwesiga, in the High Court (Arua) Criminal Case No. 0013 of 2009.

Background:

The facts as found by the trial Court are that on 11.05.08 at about midnight, at the appellant's home at

Terevu village, Arua District, the appellant defiled one Munguci Sharon, a girl aged 8 (eight) years at the time.

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⁰Munguci Sharon, the victim, is a daughter to Pw3 Ocokoru Eunice, who at the material time was wife to the appellant.

The appellant was however not the biological father of the said victim. The father of the victim was one Edema Robert.

When Pw3 Ocokoru Eunice became the wife of the appellant, she moved together with her children, all minors, to the home of the appellant and lived with them in the said home. The minor children she moved with included the victim, Munguci Sharon, aged 8 years, Aniko Winnie aged 6 years and Econi Julius aged 3 years. There was also another child by the names of Oliga who was a child of the appellant's grandmother.

On 11.05.08 Pw3, the children remained alone at the home of the appellant and his wife, Pw3, during day time. The appellant returned home at 9.30 p.m. and found his wife who too had just returned at 8.00 p.m. from the market where she had been selling local brew.

The appellant picked a quarrel with his wife (Pw3), and fearing to be beaten, the said wife left the home and slept in the neighbouring home of one Janadri, a brother to the appellant.

The victim and the other children remained in the house together with the appellant for much of the rest of the night of 11.05.08.

In the morning of the following day, that is 12.05.08 the mother of the victim returned to the appellant's house and on inquiring from the children whether the appellant had beaten any one of them, the victim reported to her mother that the appellant had defiled her. The mother (Pw3) reported the incident to the appellant's grandfather who advised that the Local Council authorities be informed. This was done. The appellant was arrested taken to Police and subsequently charged and prosecuted. He was convicted and sentenced as already stated above.

Dissatisfied with the conviction and sentence by the High Court, he appealed to this Court.

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Grounds of Appeal:

The appeal is on two grounds:

1. The learned trial Judge erred both in law and fact when he failed to properly and

judiciously evaluate the evidence on Court record especially on the ingredients of the offence of aggravated defilement and erroneously convicted and sentenced the appellant.

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2. *In the alternative and without prejudice to the above, the learned trial Judge erred in law and fact when he sentenced the appellant to 17 (seventeen) years imprisonment which is harsh and excessive given the circumstances of the case.*

The appellant prays for the conviction and sentence to be set aside and he be set free forthwith. In the alternative he prays that the sentence be reduced.

Legal Representation:

At the hearing of the appeal, the appellant was represented by learned Counsel Samuel Ondoma of M/s Alaka & Company, Advocates, while the learned Assistant Director of Public Prosecutions Ms. Betty Khisa represented the respondent. Submissions of Counsel:

For counsel conceded that the prosecution had at trial, proved beyond reasonable doubt, that the victim was aged below 14 years. Counsel however submitted that the prosecution had not proved beyond reasonable doubt that the victim had been subjected to sexual intercourse by the appellant. The victim (Pw2) had only testified that “bad manners” had been done to her by the appellant who had tried to lift her leg and water had splashed on her thighs.

Pw3, the victim’s mother, also testified that Pw2 told her (Pw3) that the appellant had done bad manners to her (Pw2). She (Pw2) looked calm. On being examined by Rosa, who was never called as a prosecution witness, Pw2 had no swelling and showed no blood in her private parts according to Pw3 who was present at the examination. This evidence contradicted the evidence of Pw 1, the Clinical Officer, that there were injuries on Pw2’s private parts; yet the said Pw 1 medically examined Pw2 on almost 10 days after the alleged offence is said to have happened on 11.05.2008.

According to appellant’s Counsel, had the trial Judge properly evaluated the above stated aspects of the evidence, he would have come to the conclusion that the prosecution had not proved beyond reasonable doubt that sexual intercourse happened to the alleged victim, Pw2. no Appellant’s Counsel also contended that prosecution had adduced insufficient evidence of identification that it was the appellant who had defiled Pw2. This is because the offence is alleged to have been carried out at night when conditions for correct identification were not favourable.

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The only identifying witness was Pw2, the minor victim, whose evidence was not on oath and she was not cross-examined. There was no sufficient corroboration of her evidence as regards the identification of the appellant as one who defiled her.

This is the more so, as the appellant in his defence, had set up an alibi that on 11.05.2008, the date of the alleged offence, a misunderstanding had developed between the appellant and his wife, leading to the wife, Pw3, leaving the home. The appellant, also left the home, purportedly to look for the wife. When he failed to trace his wife, the appellant spent the rest of the night at the home of his brother, one Droti. Thus the victim and the rest of the children remained alone in the house, until the next morning when the wife and appellant returned to their home. The appellant then left the home and went to work in the garden.

It was appellant Counsel's submission that had the trial Judge properly evaluated the evidence on identification, he ought to have come to the conclusion that prosecution did not prove beyond reasonable doubt that the appellant was identified as the victim's assailant.

As to ground 2 of the appeal, appellant's Counsel submitted that, given the fact that the alleged offence was committed amongst family members, and as such reconciliation and unity was necessary in the family, the appropriate sentence should have been not more than 5 years imprisonment. Further, that the trial Judge had not considered the fact that the appellant was a first offender.

In conclusion, appellant's Counsel, prayed that the appellant's appeal be allowed, the conviction and sentence be set aside and the appellant be released forthwith. In the alternative, in case this Court decided to maintain the conviction, then the sentence of 17 years imprisonment be reduced by this Court appropriately.

For the Respondent:

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Counsel for the respondent opposed the appeal and supported both the conviction and the sentence of 17 years imprisonment of the appellant.

On ground 1, she maintained that the trial Judge rightly set out and properly summed up to the assessors the ingredients of the offence of aggravated defilement that had to be proved beyond reasonable doubt by the prosecution, so as to secure a conviction against the appellant.

In Counsel's view, the trial Judge properly evaluated the prosecution and defence evidence and came to the conclusion that the prosecution had proved beyond reasonable doubt that a sexual act was performed upon Pw2, aged below 14 years at the time and that the appellant had been properly identified as the one who carried out this sexual act.

As to corroboration, the trial Judge warned himself and the assessors about the need for corroboration of the evidence of Pw2 and he found this in the evidence of Pw3 and that of DW 1.

In respect of ground 2, respondent's Counsel submitted that the sentence of 17 years imprisonment imposed upon the appellant was proper in law and the same ought not to be interfered with; more so as a step father, the appellant was a guardian of Pw2. Instead of the appellant protecting Pw2, he proceeded to defile her. Counsel prayed for the appeal to be dismissed as regards both conviction and sentence.

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Resolution by Court:

Duty of Court:

In resolving the grounds of this appeal, this Court, as the first appellate Court, has the legal duty to re-appraise the evidence adduced at trial and to draw inferences of fact from that evidence. In doing so the Court has however to bear in mind that the Justices of this Court did not have the opportunity to observe the witnesses testify at trial so as to make any assessment of the demeanour of any of the witnesses. See: **Rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10**. See also: **KIFAMUNTE HENRY V UGANDA, Cr. Appeal No. 10 of 1997(SC)**.

and also **ORIANGATUM SAMUEL VS UGANDA**, Court of Appeal at Mbale Cr. Appeal No. 55 of 2008 (unreported).

Ground 1

This ground faults the trial Judge for having failed to properly and judiciously evaluate the evidence as to the ingredients of the offence of aggravated defilement thus resulting in the trial Judge erroneously convicting the appellant of the said offence and subsequently sentencing him to 17 years imprisonment. **Section 129(3) and (4)** of the Penal Code Act sets out what constitutes the offence of aggravated defilement. It provides

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(3) Any person who performs a sexual act with another person

Who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

(4) The circumstances referred to in subsection (3) are as follows:

- a) where the person against whom the offence is committed is below the age of fourteen years;*
- b) where the offender is infected with Human immunodeficiency Virus (HIV);*
- b) where the offender is a parent or guardian of or a person in authority over the person against whom the offence is committed;*
- c) where the victim of the offence is a person with a disability; or*
- d) where the offender is a serial offender. ”*

Aggravated defilement is therefore constituted by a sexual act having been performed by one person against another person under any of the conditions set out in **Section 129(4) (a) to (e) of the Penal Code Act**. A sexual act being penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ or the unlawful use of any object or organ by a person on another person's sexual organ, that is, the vagina or a penis.

It is those above stated ingredients that the prosecution must prove beyond reasonable doubt in order to secure a conviction against one accused of aggravated defilement.

It is contended for the appellant that the prosecution never proved beyond reasonable doubt that a sexual act had been performed upon the victim, Pw2, and also that it was the appellant who performed that alleged sexual act. The trial Judge was thus not justified to hold, as he did, that the prosecution had so proved the same beyond reasonable doubt.

The respondent's Counsel maintains the prosecution proved beyond reasonable doubt the two ingredients of the offence and that the learned trial Judge was right to hold as he did.

In his summing up to the assessors as well as in his Judgment the learned trial Judge, rightly in our view, set out the ingredients of the offence of aggravated defilement that the prosecution had to prove if a conviction of the accused had to be secured. The trial Judge stated in the Judgment that:

.....*The prosecution evidence must prove all the essential elements of the offence of aggravated defilement beyond reasonable doubt. Failure to prove any of them would result into the acquittal of the accused. The elements of the offence to be proved are the following:*

- 1. That the victim is a girl aged less than 14 years.**
- 2. That the victim was subjected to sexual intercourse, which is unlawful.**
- 3. That the accused person participated in the unlawful sexual intercourse.”**

The learned trial Judge then proceeded to evaluate the evidence of Pw1, the Senior Clinical Officer who medically examined the victim, that of Pw2, the victim, Pw3, the mother of the victim as well as that of Dw1, the appellant. After the evaluation of all that evidence the trial Judge concluded the prosecution had established beyond reasonable doubt that the victim was aged 8 years at the time of the alleged offence, that the medical evidence corroborated the evidence of the victim, Pw2, to the effect a sexual act was performed upon her in a period of less than two weeks prior to the medical examination carried out on 21.05.2008. It is noted the night of 11.05.2008 when the victim Pw2 was defiled falls within this period.

We are accordingly unable to accept the submissions of Counsel for the appellant that the evidence of Pw2 and Pw3 was of no value at all in proving that a sexual act had been performed to Pw2, since all that Pw2 reported to her mother in the morning of 12.05.2008 was

that the appellant had done "bad manners" to her. In our appreciation of all the evidence that was before the trial Judge on the issue of sexual intercourse, we note that Pw2, the victim of the act, stated in her unsworn evidence that **“bad behavior happened to me that (is to) a woman’s private part”**. She then added:

“We were lying down in the sitting room with Olika. He took us to the bed room where they used to sleep. Bad manners happened. He pushed his male sexual organ into mine. He tried to lift (lift) my leg, water splashed on my thighs. ”

It is the above evidence that the learned trial Judge, after warning himself and the assessors of the danger of acting on the evidence of a child of tender years and given not on oath, found to have been corroborated by the medical evidence of Pw1 and that of the victim’s mother Pw3, to whom the victim reported what happened to her immediately on seeing her in the morning following the night of the incident. The learned trial Judge also found that Pw2’s evidence was also

corroborated by the evidence of the appellant by holding that:

“The accused person in his defence corroborated the victim’s evidence that on the material night the victim’s mother Pw3 slept out of the house leaving the accused in the house with the victim and other younger children that he shifted the victim and another small girl to sleep in the bedroom. ”

The trial Judge looked at all the relevant evidence that was before him as he was duty bound to do, in deciding whether or not the prosecution had proved beyond reasonable doubt that a sexual act had been performed upon the victim, Pw2, in the night of

11.05.2008. In so doing, the trial Judge was acting within the law. In **Supreme Court Criminal Appeal No. 35 of 1995: BARITA HUSSEIN VS UGANDA**, it was held:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victim’s own evidence and corroboration by other evidence. Though deniable, it is not a hard and first rule, that the victim’s evidence and medical evidence must always be addressed in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient and puts the case beyond reasonable doubt.

We accordingly find that the learned trial Judge acted properly in evaluating all the evidence that was before him in determining whether or not a sexual act had been done upon Pw2, the victim. We also find that he arrived at the correct conclusion when he held that the evidence before him established beyond reasonable doubt that a sexual act had been performed. We thus reject the submission that the trial Judge was not justified to hold that the prosecution had proved beyond reasonable doubt that a sexual act was performed upon the victim in the night of 11.05.2008.

It was also the contention of appellant’s Counsel that there was no sufficient evidence of identification of the appellant as the victim’s assailant and therefore the trial Judge erred in so holding.

We have reviewed the evidence that was before the trial Judge and the manner the trial Judge dealt with that evidence.

The trial Judge considered in detail the alibi set up by the appellant and addressed himself and the assessors, rightly in our view, that the appellant assumed no duty to prove his alibi. The duty was upon the prosecution to disprove the alibi by adducing evidence that placed the appellant at the

scene of the crime at the time the crime was committed: **See: Criminal Appeal No. 10 of 2000: Mushikoma & 3 others v Uganda (SC)**, unreported.

The trial Judge evaluated the evidence of Pw2, found the same corroborated by the evidence of Pw3 and that of the appellant before he concluded that the victim had sufficient opportunity to identify the appellant, who was her step father and husband to her mother, Pw3. The appellant admitted being in the house with the victim at the material time, before he purportedly went away at night to look for his wife, Pw3, who had left the home as a result of a quarrel between the two. The evidence that the trial Judge accepted as credible involved all that the appellant did. This was being done in the presence and hearing of the victim, Pw2, who knew the appellant before and the act involved close contact with the victim, PW 2

As soon as the mother of the victim Pw3, returned home in the morning of 12.05.08, the victim, Pw2, reported to her what the appellant had done to her. The victim was examined there and then by one Rosa in the presence of the victim's mother, Pw3, who saw white dry semen on the victim's sexual organs.

The subsequent medical examination of the victim by Pw1 on 21.05.08, found that the victim's hymen had been ruptured about 2 weeks before and there were signs of penetration and injuries around Pw2's Private parts that were consistent with force having been used sexually.

The trial Judge evaluated all the above evidence including the alibi put up by the appellant. He appropriately directed himself and the assessors that the appellant had no duty to prove his alibi as well as the rest of his defence.

The Judge also warned himself and the assessors of the dangers of relying upon the evidence of a single identifying witness, the victim, who was a minor and having given her evidence not on oath, her evidence required corroboration as a matter of law.

The learned trial Judge then found that the evidence of Pw2, the victim had been sufficiently corroborated by the medical evidence of Pw1 and that of Pw3, her mother, as well as part of the evidence of the appellant himself.

In the Supreme Court decision of Bogere Moses and Another vs Uganda, Criminal Appeal No. 1 of 1997, the Court held:

“Where the prosecution adduced evidence showing that the accused person was at the scene of crime and the defence not only duly denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judiciously and give reasons why one and not the other version is accepted. ”

We are satisfied that the trial Judge in the instant case, considered the evidence that was before him, both for the prosecution and the defence, and rightly concluded that the appellant was properly identified and put at the scene of crime, hence the appellant’s alibi was destroyed.

Upon re-evaluation of the evidence regarding the identification of the appellant, we do find such evidence to have been free from any possibility of error.

Having subjected the evidence adduced at the trial to a fresh reappraisal, we find no reason to fault the trial Judge on any of the issues raised in ground 1 of this appeal. We accordingly find no merit in the said ground. The same stands dismissed.

In ground 2, the appellant faults the trial Judge for having imposed upon him a harsh and excessive sentence of 17 (seventeen) years imprisonment.

The law as to sentence is that an appellate Court is not to interfere with the sentence imposed by the trial Court in the judicial exercise of discretion by that Court, unless the exercise of that discretion results in such a sentence being manifestly excessive or so low as to amount to a miscarriage of justice or where the trial Court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in law or principle. See: **KIWALABYE BERNARD VS UGANDA:**

Criminal Appeal No. 143 of 2001, (SC) unreported.

The appellate Court does not alter a sentence on the mere ground that if the members of the Court had tried the appellant they might have passed a somewhat different sentence: See: **Court of Appeal at Fort Portal Criminal Appeal No. 49 of 2008: TUMWESIGYE ATANANSI V UGANDA. See also OGALO S/O OWOURA VS R [1954] 24 EACA 270.**

Counsel for appellant urged us to reduce the sentence from 17 years to 5 years imprisonment because the victim and the appellant were family members and a lower sentence would promote reconciliation in the family. The trial Judge had also not considered the mitigating factor that the appellant was a first offender.

Counsel for the respondent, in opposition to this ground, submitted that the relationship of the victim and appellant was such that the appellant, who was aged 28 years and was husband of the mother of the victim, at the time of the offence, was a guardian to the victim who was aged only 8 years. Therefore, according to Counsel, the sentence of 17 years was too lenient to the appellant. Counsel therefore prayed this court not to interfere with said sentence.

On reviewing all the factors regarding the sentence of the appellant, we note that the trial Judge did not take into consideration the fact that the appellant was a first offender, which was a mitigating factor in favour of the appellant.

Be that as it may, the trial Judge considered the fact that the appellant had a duty to protect the victim, who was a step daughter, but instead he interfered with her purity and dignity. It was by taking this factor and others into account that the trial Judge imposed a sentence of 17 years imprisonment.

We have reviewed the circumstances that the trial Judge considered and we find that the sentence of 17 years imprisonment was rather on the lenient side. Accordingly, inspite of the fact that the trial Judge overlooked consideration of the fact that the appellant was a first offender, which factor we have ourselves considered together with others, we are not persuaded that we should interfere with the said sentence. We accordingly reject ground 2 of the appeal.

Both grounds of appeal having failed, this appeal stands dismissed. We accordingly uphold the conviction and sentence of 17 years imprisonment.

It is so ordered.

Dated at Arua this 6th 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

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