THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBALE

CRIMINAL APPEAL NO: 236 OF 2020

(CORAM: CHEBORION, GASHIRABAKE & KIHIKA, JJA)

AIDE JOHN:: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(Arising from the decision of Henrietta Wolayo, J. in High Court Criminal Session Case No.193 of 2016 dated 22nd February 2018 at Soroti)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted for the offense of Aggravated Defilement contrary to sections 129(3) and (4) (a) of the Penal Code Act, cap 120. He was tried, convicted, and sentenced to 25 years. The prosecution alleged that on the 10th day of June 2015 at around 1:00 pm at Nyakoi Village, Kabwalin Parish, Kachumbala Sub-county in Bukedea District, the appellant performed a sexual act with the victim, a girl aged four years old.

Background

[2] The victim returned home from school at about 1:00 pm while crying and reported to the grandmother that the appellant dragged her to a cassava garden, removed her panties, pressed her on the ground, and sexually assaulted her. The grandmother took the victim to the church where the victim's mother was and informed the victim's mother of the defilement. The victim complained of being defiled by the appellant. The matter was reported to the police. The victim and the appellant were medically examined. The Appellant was arrested, tried, convicted, and sentenced to 25 years imprisonment.

[3] Dissatisfied with the trial court's decision, the appellant lodged this appeal against his conviction and sentence on the grounds that;

(i) ***The Learned trial Judge erred in law and fact when he convicted the Appellants on the evidence of a single identifying witness of a child of tender years.***

(ii) That the learned trial Judge erred in law and or fact when he sentenced the Appellant to 25 years imprisonment, which was excessive, illegal, and or harsh.

Representation

[4] Ms. Kanyago Agnes represented the Appellant on the state brief, while Ms. Immaculate Angutoko, the Chief State Attorney(DPP), represented the Respondent. Both parties filed submissions, which were adopted for hearing.

Submissions for the Appellant

[5] Both Counsels conceded to the victim's age being four years when the allegations were made. Counsel for the appellant faulted the learned trial judge for relying on the unsworn evidence of the victim(Pw3), a minor aged seven years, concerning a sexual act having taken place. Counsel argued that P Exhibit 1, the medical examination report of the victim, revealed that the victim had a foul smell indicative of an infection. The report did not indicate any penetration, redness, or presence of sperms on the victim.

[6] Further, the doctor who examined the victim was not brought to court to explain whether the infection was due to a sexual act and whether an infection from a sexual act allegedly performed less than 12 hours before can produce a foul smell. The appellant was not medically examined to determine if he, too, had the same infection to warrant the deduction that it was a sexual act that led to the infection found on the victim. Counsel argued that P exhibit 2, the medical examination report of the appellant, established that the blood sample taken from the appellant had no pathogens. Counsel prayed that the court finds the ingredient of a sexual act not proved to the required standard.

[7] Concerning the appellant's participation, Counsel submitted that this was not proved because only the victim testified to the appellant's identity. Counsel referred to section 40(3) of the Trial on Indictment Act, which obligates a trial court to conduct a vore dire when a child of tender years is a witness to determine whether they can testify under oath. The section

further provides that where the evidence is admitted on behalf of the prosecution, the accused shall not be convicted unless the evidence is corroborated.

[8] Counsel argued that a vore dire established that the victim could not understand the nature of an oath and, therefore, gave unsworn evidence, which the Judge erroneously relied upon to convict the appellant. The trial judge also erred when she found that the evidence of Pw1 and Pw2 corroborated that of the victim when it was hearsay, given that it was a narration of what the victim told them and not independent evidence.

[9] Counsel relied on the case of ***Nsenga Edward versus Uganda, Civil Appeal No.54 of 2014,*** cited with approval in the case *of* ***Ssenyondo Umar versus Uganda, Court of Appeal Criminal Appeal No.267 Of 2002,*** *in* which the court held that

> " *... no amount of self-warning or warning of the assessors can justify convicting an accused person on the unsworn evidence of a single identifying witness of a child of tender years. ....."*

Counsel further cited the case of ***Uganda Vs. George Wilson Ssimbwa, SCCA 37 of 1995*** which, defines corroborating evidence as that which affects the accused by connecting or tending to connect him with the crime. Counsel prayed that the appeal be allowed and the conviction quashed.

[10] On sentence, Counsel for the Appellant submitted that the learned trial judge sentenced the Appellant to 25 years imprisonment without

considering the mitigating factors, which include the appellant being a first-time offender, his age (47 years) at the time of sentence, suffering from hydrosy which requires constant draining, and swollen genitals that cause discomfort and pain. Counsel referred the court to page 20 of the record of appeal. She prayed that this Court exercises its discretion under Section 11 of the Judicature Act Cap 13 to substitute the 25-year sentence with a 10-year one.

Submissions of the respondent

[11] Counsel for the respondent submitted that evidence of a child of tender years is admissible under Section 40 (3) of the Trial on Indictment Act subject to corroboration. He further submitted that the requirement for corroboration was later dispensed with. He cited the case of ***Ntambala Fred V Uganda, SCCA No. 34 of 2015***, where the Court held that a conviction could be based on the victim's testimony as a single witness, provided the court finds her truthful and reliable—the learned Justices, quoting ***Sewanyana Livingstone Vs. Uganda, SCCA No. 19 of 2006*** and section 133 of the Evidence Act unanimously held that the quality and not the quantity of evidence matters.

[12] Counsel for the respondent submitted that the victim's evidence was corroborated by the evidence of Pw1 and Pw2, the grandmother and mother of the victim, respectively, to whom the victim reported. He contended that such reports are sufficient corroboration. He cited the case of ***Bukenya Joseph Vs. Uganda, CACA No. 222 of 2003,*** where the victim narrated her

ordeal to the mother and Paul Sozi on the actual day she was defiled. The Court relied on section 155 of the Evidence Act to hold that such information supplied by the victim on the day she was defiled was sufficient to corroborate her evidence.

[13] Regarding the sentence, the respondent submitted that sentencing is discretionary. An Appellate Court will only interfere with a sentence imposed by the trial Court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive given the circumstances of the case. See ***Kiwalabye Bernard v Uganda, SCCA No 143 of 2001***, cited with approval in ***Karisa Moses v Uganda, SCCA No. 23 of 2016***.

[14] Counsel cited Section 129 (4) of the Penal Code Act, which prescribed death as a maximum punishment for Aggravated defilement. He also referred to the third schedule of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, which prescribes the starting point for aggravated defilement as 35 years' imprisonment and upon consideration of mitigating and aggravating factors, 30 years up to death. She averred that a sentence of 25 years, which was reduced to 22 years and four months after deducting the remand period, was within the precinct of the law.

[15] She cited cases in which similar sentences were ordered. In ***Kizza Geoffrey v Uganda, Criminal Appeal No. 076 of 2010,*** the Appellant was convicted

of Aggravated defilement of a victim of 12 years (as opposed to the present case in which the victim was just four years old) and sentenced to 30 years imprisonment. This Court sentenced him to 28 years and nine months upon deducting the period spent on remand. In ***Kabazi Issa v Uganda, CACA No 268 of 2015***, this honorable Court found a sentence of 32 years for aggravated defilement of two victims aged seven years and 12, respectively, to be within the permissible sentencing range. Counsel invited this Court not to interfere with the discretion of the learned trial Judge, disallow the Appeal, and uphold the conviction and sentence.

Consideration by Court

[16] As a first appellate court, we must re-appraise the evidence at the trial court and come to its conclusion. See **Rule 30(1)(a) of the Judicature(Court of Appeal) Rules.** However, we must bear in mind that we did not have the opportunity to see and hear the witnesses as they testified. See **Bogere Moses Vs. Uganda[1998]UGSC 22; Selle & Another Vs. Associated Motor Boat Co[1968] E.A 123, Pandya Vs R[1957]E.A336 and Kifamutwe Henry Vs Uganda [1998]UGSC 20**

Ground One: The learned trial judge erred when she relied on evidence of a single identifying witness of a child of tender years.

[17] Three witnesses testified for the prosecution. Pw1, the victim's grandmother, testified that the victim returned from school while crying, seemingly in pain, and narrated that the appellant had dragged her to a

cassava garden, removed her panties, showed her 'his thing,' pressed her on the ground and sexually assaulted her. The victim asked the grandmother to take her to her mother, which Pw1 did. Pw1 testified that she did not know what happened after that. In cross-examination, Pw1 admitted that she did not see the appellant defile the victim. She knew the appellant to be a well-behaved man. Pw1 stated that the victim took her to the scene about 300 meters from their home before they went to notify the victim's mother.

[18] Pw2 testified that she was at church when Pw1 and the victim found her, and Pw1 reported the defilement of the victim, see page 10 of the record of appeal. Pw2 further stated that the daughter was crying, feeling pain in her private parts, and had difficulty passing urine. In cross-examination, Pw2 testified that she checked the daughter's private parts and found her sexual organ with waterly stuff, redness, and her skirt was wet. Pw2 stated that her daughter led them to the scene, where Pw2 saw damaged grass. The accused was described as an unmarried neighbor and was arrested on the same day. In re-examination, Pw2 testified that she physically checked the child on the very day of the incident, but a medical examination was done a day after.

[19] The victim's evidence on page 11 was short. Pw3 testified, "I know the accused, Aide John. I know why he is in prison. He picked his thing and put it in my play. I was coming from school when it happened." The court noted that the victim used the diagram on PF3 to point to a female sexual organ in which the accused placed his male sexual organ.

[20] On page 12 of the record, the appellant testified that he was home at about 3 pm. He had returned from the well when a police officer and a counselor found him in his compound and arrested him on allegations of defilement. He denied the offense. The appellant stated that he knows the victim because her father is a clansmate. In cross-examination, he said that he had no grudge with the victim's family.

[21] On pages 16 and 17 of the record of appeal, the trial judge summarised the evidence of all witnesses and believed the prosecution witnesses. She believed the evidence of the victim who described what the appellant had done. The trial judge further stated that PF3, on which results of the medical examination were recorded together with evidence of Pw1 and Pw2, to whom the victim narrated what occurred, was credible.

[22] The appellant argued that the evidence of Pw1 and Pw2 was hearsay and could not corroborate that of the victim. However, in the ***Bukenya Joseph*** case (supra), the Court held that ***information supplied by the victim to witnesses on the day she was defiled was sufficient to corroborate her evidence***. Pw3 returned home crying in this case, saying the appellant had violated her. Immediately, she took the grandmother to the scene where the grandmother noted footmarks. They immediately went to notify Pw1's mother. The victim's mother saw the daughter's skirt was wet, and her private parts were red with a watery discharge. The victim was medically

examined the next day, and the PF3 revealed a foul smell and pus-like discharge in her private parts.

[23] The court notes that the victim knew the appellant well because they were neighbors. Pw1 testified that she had known the appellant to be well-behaved. The appellant admitted that he had no grudge with the victim's family. He knew them as clansmates. The totality of the evidence of an unusually distraught child crying in pain, narrating her ordeal to Pw1 and Pw2, and pointing the finger at a neighbor as the cause of her pain did not require corroboration. Hon. Justice Tibatemwa held in the Bukenya case above that ***" . . . the evidence of a victim in a sexual offense must be treated and evaluated in the same manner as the evidence of a victim in any other offense. As it is in other cases, the test to be applied to such evidence is that it must be cogent."*** The requirement for corroboration of evidence in sexual offenses has also since departed from several decided cases quoted above by the respondent. Ground one of the appeal fails.

Ground two: The learned trial judge erred when he sentenced the appellant to 25 years imprisonment.

[24] Counsel for the appellant faulted the trial judge for not considering the mitigating factors, which include the appellant being a first-time offender, his age (47 years) at the time of sentence, suffering from hydroxy, which requires constant draining, and swollen genitals that cause discomfort and

pain. She prayed that the sentence of 25 years be substituted with ten years.

[25] The respondent submitted that the sentence given was within the prescribed range of sentences for aggravated defilement. He cited cases in which the appellate court gave higher sentences. He prayed that the ground be disallowed.

[26]The law that governs appellate courts regarding sentencing is well settled. In **Kamya Johnson v Uganda, SCCA No. 16 of 2000**, the Supreme Court held:

> **"It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently."**

The learned trial Judge's sentencing order on page 20 of the record of appeal was couched as follows;

> **"Sentence**
>
> **. . . the victim was only four years old when she was sexually assaulted by the accused person, a man aged 47 years old. The tender age of the child is an aggravating factor that attracts a stiff penalty. The rampant nature of sexual violence against young girls means the perpetrators**

do not care about the consequences of their acts. This message needs to reach would be offenders that aggravated defilement attract stiff penalty. The appropriate sentence is 25 years. The accused has been on remand since 2015, and he is sentenced to 22 years and four months imprisonment."

[27] On page 19, the mitigating factor brought out by the appellant was that he suffers from hydrosy and is a first-time offender. The issue of swollen genitals was not raised at the trial court. The circumstances under which the appellate court may upset the sentence of a trial court are articulated in the Kamya Johnson case above. They do not exist in the current case. We have considered sentences imposed in previously decided aggravated defilement cases. In ***Othieno John Vs. Uganda, Court of Appeal Criminal Appeal 174 of 2010,*** this court confirmed a sentence of 29 years imprisonment for aggravated defilement where the victim was 14 years old. In ***Opio Moses Vs. Uganda, Court of Appeal Criminal Appeal 174 of 2010,*** a sentence of 27 years imprisonment was confirmed. The victim was nine years old.

[28] Given the sentencing ranges above, we find that a sentence of 25 years was appropriate. The second ground of appeal fails.

In conclusion, this appeal is dismissed. The appellant shall continue to serve the sentence that the lower court imposed.

Dated at Kampala this...26th.....day of.....November.....2024

Cheborion Barishaki

JUSTICE OF APPEAL

Christopher Gashirabake

JUSTICE OF APPEAL

Oscar Kihika

JUSTICE OF APPEAL