THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 265 OF 2011

(CORAM: F.M.S Egonda-Ntende, JA, Hellen Obura, JA and Stephen Musota, JA)

NGOBYA ALOYSIOUS ::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of Hon. Lady Justice Elizabeth Ibanda Nahamya holden at Masaka High Court Criminal Session Case No.005 of 2010 delivered on 14/11/2011)

JUDGMENT OF THE COURT

This appeal is against the decision of the High Court at Masaka in which the appellant was indicted, tried and convicted of the offence of aggravated defilement contrary to section 129(3)(4)(a) of the Penal Code Act Cap120 and sentenced to 37 years imprisonment.

Background to the Appeal

The facts that gave rise to this appeal as found by the trial Judge were that on the 4th January 2010, at Minziro village, Kyebe Sub-County, Kisaka village in Rakai District, PW4 Joyce Kamatensi, mother of the victim (Kanshabe Jessica) sent her to buy sugar from a nearby shop. While on her way back, she met the appellant who took her to his house and defiled her. Afterwards, the victim went to her parents' home while still crying and informed them that the appellant had defiled her. Her parents reported the matter to police and the appellant was arrested. He was indicted, tried and convicted of the offence of aggravated defilement and sentenced to 37 years imprisonment.

Being dissatisfied with the decision of the trial court, the appellant appealed to this Court on the following grounds;

1. *The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record as a whole and relied on hearsay, contradicting, insufficient, untruthful, unreliable and incredible prosecution evidence of identification and arrived at a wrong conclusion that the appellant was guilty of the offence of aggravated defilement contrary to section 129 (3) (4) (a) of the Penal Code Act which caused a miscarriage of Justice.*
2. *The learned trial Judge erred in law and in fact when she failed to properly sum up to the assessors and to give them appropriate directions as required on the law relating to evidence of a single identifying witness leading them to give erroneous opinions and thereby occasioned a miscarriage of justice.*
3. *The learned trial Judge erred in law and in fact when she ignored and failed to properly evaluate and uphold the appellant's defence of alibi thereby occasioning a miscarriage of justice.*
4. *The learned trial Judge erred in law and in fact when she imposed a harsh and excessive sentence of 37 (thirty seven) years upon the appellant and failed to take into account the period spent on remand which led to a serious miscarriage of justice to the prejudice of the appellant.*

Representation

At the hearing of this appeal, Mr. Sserunkuma Bruno represented the appellant on state brief while Ms. Ann Kabajungu Senior State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Appellant's case

Counsel for the appellant submitted that prosecution did not prove participation of the appellant in the commission of the offence. He argued that the testimony of PW3 regarding the time and date when the offence was committed contained grave contradictions which

went to the root of the prosecution case and the credibility of the witness' evidence yet the learned trial Judge ignored them.

He also contended that there was nothing in PW3's testimony which showed that the victim pointed out the appellant as the person who had defiled her or that she knew where the appellant lived. Counsel added that PW3's evidence had a component of hearsay which is not admissible under section 59 of the Evidence Act since the victim who had narrated to him the incident was not called as a prosecution witness during the trial. He referred to the case of ***Billy Max Sparks vs The Queen, [1964] AC 965 at 981*** for the proposition that there is no rule which permits the giving of hearsay evidence merely because it relates to identity. Further that, there was no corroborating evidence from a Police Investigating Officer to prove that the victim pointed out that the appellant was the person who defiled her since the matter was not investigated and therefore participation was not proved.

On ground 3, counsel submitted that the trial Judge did not evaluate the appellant's defence of alibi and the prosecution failed to discharge its burden of placing the appellant at the scene of crime as laid out in the case of ***Bogere Moses vs Uganda, SCCA No. 1 of 1997.*** He added that the claims that the appellant ran away from his residence was wrongly admitted by the trial court as it was contradictory of what was on court record.

Regarding the sentence, counsel submitted that the sentence of 37 years imprisonment imposed on the appellant was harsh and excessive in the circumstances which led to a serious miscarriage of justice. He also contended that the trial Judge did not take into account the 1 year and 10 months the appellant spent on remand which is a mandatory requirement under Article 28 (3) of the Constitution. Counsel prayed that this Court allows this appeal and sets aside the conviction.

Respondent's Case

Counsel for the respondent opposed the appeal and submitted that the evidence of PW3 is not hearsay evidence according to the authority of ***Omuloni Francis vs Uganda, CACA No.***

2 of 2000 in which this Court held that the evidence of the victim's father who was not an eye witness when the victim was defiled by the appellant was admissible as the accusation had been made contemporaneously with the offence and therefore was part of the res gestae and is an exception to the hearsay rule. She prayed to this Court to find PW3's evidence admissible.

Regarding the contradictions, counsel submitted that they were minor and did not go to the root of the case. She also added that they were satisfactorily explained and the trial Judge evaluated them alongside the evidence on record.

On ground 3, Counsel contended that the trial Judge properly evaluated the appellant's alibi vis-a viz the prosecution evidence which placed the appellant at the scene of crime.

Counsel also argued that the trial Judge properly summed up to the assessors and warned them and herself on the evidence of a single identifying witness.

In response to ground 4, counsel conceded that the wording of the sentence that *'the period of one year and 10 months should be considered against this term'* is ambiguous and therefore illegal. She prayed that this Court sets the sentence of 37 years imprisonment aside and imposes a fresh sentence of 20 years imprisonment on the appellant.

Court's Consideration

The Supreme Court in ***Kifamunte Henry vs Uganda, SCCA No.10 of 1997*** stated that the duty of the 1st appellate court is to re-evaluate all the evidence on record and make its own finding. In so doing, it should subject the evidence to a fresh and exhaustive scrutiny.

We have carefully studied the court record, the submissions of both counsel and the authorities cited to us. We shall now proceed to re-evaluate the evidence on record.

On the 1st ground of appeal, the appellant faults the learned trial Judge for ignoring the grave contradictions in the evidence of PW3 regarding the time and date when the offence was

committed which according to him, went to the root of the prosecution case and cast doubt on the credibility of PW3's evidence.

The law on contradictions and inconsistencies was well stated by the Court of Appeal of East Africa in the case of ***Alfred Tajar vs Uganda, E.A.C.A Criminal Appeal No. 167/1969 (unreported)*** in which the Court stated that in assessing the evidence of a witness, his consistency or inconsistency unless satisfactorily explained will usually, but not necessarily, result in the evidence being rejected. Minor inconsistencies will not usually have the same effect unless the trial Judge thinks that they point to deliberate untruthfulness.

We shall subject the evidence of PW3 to a fresh scrutiny to establish whether there are any major inconsistencies in his testimony which may result in his evidence being rejected. PW3, Kaliisa Edward, testified that on 1/4/2010 while he was grazing his cattle, his wife PW4, Joyce Kamatenensi called him and informed him that their daughter (the victim) had been defiled. He rushed home and asked the victim who had defiled her but she replied that she did not know the person. PW3 then asked her whether she could take him to the perpetrator's home and she led him and a one Bukulu to the appellant's house. They found the appellant standing in front of his house and he fled on seeing them. PW3 then took the victim to the Police Post at Minziro and made a report and thereafter he took the victim to Kakuuto Health Center for medical examination. The appellant was also arrested on that same day.

We note that during his examination in chief, PW3 mentioned 1st April, 2010 as the date on which the victim was defiled. However, he informed court that he could have forgotten the accurate date but that is what he recalled. During cross examination, he was shown the police statement he made dated 4/1/2010 and he confirmed it was his statement. PW4, confirmed in her cross examination that 4/1/2010 was the date when the victim was defiled. She added that the victim came back home crying and informed her that she had been defiled. PW4 examined the victim and established that she had semen in her thighs and also noted after the examination that the victim was not walking normally as she had informed PW5 that she felt as if there was red pepper in her private parts. Similarly, PW5, No. 6905 SPC Rwegaba

Charles informed court that PW3 went to Minziro Police Post and informed him that the victim had been defiled subsequent of which PW5 together with a one Sebiraato Dennis went and arrested the appellant. In addition, the medical examination report which was tendered in by consent of both parties revealed the date of examination of the victim as 4/1/2010.

The trial Judge in her evaluation of evidence noted the inconsistency in PW3's evidence and found as follows;

> *"It is therefore clear that PW3 confused 4th for "April" and in my opinion this is not fatal to the prosecution evidence because it could be satisfactorily explained by the evidence on record."*

We are in agreement with the trial Judge's finding in view of the other pieces of evidence on record which show that the victim was defiled on 4/1/2010 as opposed to 1/4/2010. This includes PW3's police statement dated 4/1/2010 in which he reported the commission of the offence and during cross examination he confirmed that he had made it on that day. We therefore find that this was a minor contradiction which did not go to the root of the prosecution case.

We cannot fault the learned trial Judge for finding this contradiction not fatal to the prosecution evidence and therefore ignoring it.

Counsel for the appellant also contended that PW3's evidence had a component of hearsay which is not admissible under section 59 of the Evidence Act since the victim who had narrated to him the incident was not called as a prosecution witness during the trial.

We observe from the record that there was no eye witness of the alleged offence and the victim herself was not brought to court to testify. This therefore implies that the evidence upon which the learned trial Judge convicted the appellant was circumstantial evidence.

The law on circumstantial evidence as stated by the Supreme Court in ***Janet Mureeba and 2 others vs Uganda, SCCA No. 13 of 2003*** is that it must point irresistibly to the guilt of the accused in order to sustain a conviction and the inculpatory facts must be

incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

Courts have in several cases accepted reports made by victims of sexual offences to a 3rd party as admissible in evidence and corroborative of the victim's evidence that she was defiled.

In ***Livingstone Sewanyana vs Uganda, SCCA No. 19 of 2006,*** the Supreme Court held that the report the victim made to her teacher (PW3) and PW4 Fred Watente was sufficient evidence which corroborated her evidence that the appellant had routinely sexually abused her. The court added that even if such corroboration was not there, it is the quality and not the quantity of evidence that mattered.

In ***Omuroni vs Uganda, [2002] 2 EA 508 at page 534,*** where the victim who was the sole eye witness had not testified, the Supreme Court found that much as the evidence was circumstantial, it nonetheless constituted sufficient proof of the offence of which the appellant was convicted, as it was amply corroborated by independent evidence. The Court added that although the victim did not testify, PW1's evidence that the victim accused the appellant of having had sexual intercourse with her, was admissible as the accusation was made contemporaneously with the offence and therefore, was part of res gestae and is an exception to the hearsay rule.

In ***Kitambuzi Ramathan vs Uganda, CACA No. 197 of 2009*** this Court upheld a conviction arrived at by the trial court having relied on the evidence of 3rd parties to convict the appellant in the absence of the victim's direct evidence.

In the instant case, the testimonies of PW3 and PW4 are to the effect that the victim reported to them that she had been defiled by the appellant. As stated in the above authorities such evidence is admissible in our jurisdiction. In addition to the evidence of PW3 and PW4, the medical examination report (PExh. 1) also indicates that the victim's hymen was ruptured, she had bruises and abrasions in private parts, there were signs of penetration, there were

inflammations around her private parts which were consistent with force having been used sexually, and the injuries in the victim's private parts were less than 3 days old. The medical examiner concluded that the injuries were consistent with defilement. We have also had the opportunity to re-evaluate the appellant's defence evidence which basically denies the offence.

We agree with the trial Judge that much as the best evidence in sexual offences is that of the victim herself, other cogent evidence can suffice. The evidence available on record upon which the conviction was founded are twofold. The first set of evidence is the report the victim made to her parents, PW3 and PW4 that she had been defiled by a man she would usually see around but whose name she did not know. The report to PW4 was made immediately after the victim returned from the shop in a distressed condition and she was asked what had happened to her. The report she made to PW3 was when PW4 called him upon learning that she (victim) had been defiled. Both reports were made by the victim herself to her parents and as already stated above, such evidence is admissible.

The second evidence on record the trial Judge relied upon to convict the appellant is his (appellant's) conduct of running away when he saw the victim coming towards his house with her father.

The issue we are now to determine is whether court can rely on the above evidence to convict the appellant in the absence of the victim's evidence. To answer that question, we have found guidance in the decision of the Supreme Court in ***Bassita Hussein vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995*** where it was held that though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced 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 to prove the case beyond reasonable

We are therefore satisfied that even in the absence of the victim's direct evidence, there was sufficient cogent and admissible evidence to prove the appellant's participation in the commission of the offence as discussed above.

In the result, we cannot fault the trial Judge for relying on the evidence of PW3 to convict the appellant of the offence of aggravated defilement. We find no merit in this ground and it thus fails.

Counsel for the appellant did not argue ground 2, and so we find no need to discuss it.

Ground 3 concerns the appellant's defence of alibi, which he faults the trial Judge for failing to properly evaluate. It is trite that when an accused person raises a defence of alibi, it is not his duty to prove it. It is up to the prosecution to destroy it by putting the accused person squarely at the scene of crime and thereby proving that he is the one who committed the crime. ***See: Sekitoleko vs Uganda, [1968] EA 531.***

The appellant gave unsworn evidence and stated that he did not know anything about the case. In our considered view, this did not amount to an alibi but rather a denial of the offence. Be that as it may, much as there was no direct evidence placing the appellant at the scene of crime, we note;

Firstly, that PW3 and PW4 testified that the victim informed them that it was the appellant who had defiled her. The victim was able to lead PW3 and a one Bukulu to the perpetrator's house which turned out to be that of the appellant and he was found there although he ran away upon seeing the victim and her father. However, PW3 testified that as the appellant fled, the victim told him that it was him (appellant) who had defiled her.

Secondly, when the appellant was put to his defence, he only denied the offence but did not raise any alibi that he was elsewhere and not at the scene of crime at the time the offence was committed.

Lastly, the appellant's reaction of fleeing on seeing the victim, her father and another person coming towards his home in itself showed that he was not an innocent person and as such it irresistibly pointed to his guilt in the commission of the crime. *In* ***Rex vs Tubere s/o Ochan***, the East African Court of Appeal held that the conduct of an accused person before or after the offence in question might sometimes give an insight into whether he participated in the crime.

The trial Judge in considering the circumstances surrounding the appellant's participation evaluated his defence vis-a- viz the prosecution evidence and found as follows;

> *"Why would an innocent man run away on seeing a six year old? The accused's defence was total denial. Consequently, taking into account the totality of both the defence and prosecution evidence, I find that prosecution proved the accused person's participation beyond reasonable doubt."*

Upon our own reevaluation of the evidence as above, we have no reason to fault the trial Judge for her finding. In the premises, we are satisfied that the appellant was placed at the scene of crime by the circumstantial evidence as we have analyzed above and we agree with the learned trial Judge on his finding that the appellant participated in committing the offence. Ground 3 therefore fails.

On ground 4, counsel for the appellant submitted that the sentence of 37 years imprisonment is harsh and excessive in the circumstances of this case. Conversely, counsel for the respondent pointed out to this Court that the wording of the sentence in taking into account the period the appellant had spent on remand was ambiguous and therefore illegal pursuant to Article 23 (8) of the Constitution. She prayed that this Court sets it aside and impose a sentence of 20 years imprisonment.

In arriving at a sentence of 37 years imprisonment, the trial Judge stated as follows;

"...For the foregoing, I hereby sentence you to 37 (thirty seven) years. The period of 1 year and 10 months should be considered against this term. Right of Appeal against sentence in 14 days explained."

We accept counsel for the respondent's submission that the above wording of the sentence by the learned trial Judge shows that she did not comply with the requirement of Article 23 (8) of the Constitution which enjoins court to take into account the period a convict spent in lawful custody prior to completion of his trial, while passing sentence. Failure to do so renders the sentence illegal. It was held by the Supreme Court in ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014***, that:-

"A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision."

We therefore find the sentence of 37 years imprisonment imposed upon the appellant illegal and thus set it aside. We invoke section 11 of the Judicature Act which gives this Court the powers, authority and jurisdiction as that of the trial court to impose an appropriate sentence of its own. In so doing, we shall consider the aggravating factors and the mitigating factors and also take into account the range of sentences for similar offences.

The aggravating factors presented are that; the offence is of a capital nature and it attracts a maximum sentence of death, the convict has been on remand for 1 year and 10 months, he defiled a 5 year old girl, the convict was 23 years old. Further, that aggravated defilement is rampant in Uganda and has to be stopped in order to protect the young girls in society. A death sentence was prayed for. The mitigating factor presented was that the convict is a first offender and long term imprisonments are not beneficial.

In ***Rugarwana Fred vs Uganda, SCCA No. 39 of 1995*** the Supreme Court upheld the appellant's sentence of 15 years for aggravated defilement of a 5 year old girl.

In ***German Benjamin vs Uganda, Court of Appeal Criminal Appeal No. 142 of 2010*** the victim aged 5 years was sexually assaulted by a 35 year old appellant who was convicted and sentenced to 20 years imprisonment. On appeal, this Court set aside the sentence and substituted it with 15 years imprisonment.

In ***Bikanga Daniel vs Uganda, Court of Appeal Criminal Appeal No. 038 of 2000 (unreported)*** the appellant who was aged 21 years was convicted of the offence of defilement of a girl under 18 years and sentenced to 21 years imprisonment. On appeal, the sentence was found to be harsh and excessive and this Court substituted it with a sentence of 12 years.

Having taken into account both the aggravating and mitigating factors set out above and the range of sentences in cases of aggravated defilement, we are of the considered view that a sentence of 15 years imprisonment would be appropriate in the circumstances of this case. However, Article 23(8) of the Constitution enjoins us to deduct the period of 1 year and 10 months from the 15 years imprisonment and sentence the appellant to 13 years and 2 months which he shall serve from the date of conviction, namely; 14/11/2011.

We accordingly dismiss the appeal against conviction and allow the appeal against sentence in the above stated terms.

We so order.

Dated at **Masaka** this..30th.....day of.....July.....2018

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Hon. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

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Hon. Justice Stephen Musota

JUSTICE OF APPEAL