THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

(Coram: Cheborion Barishaki, Hellen Obura, Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 0082 OF 2019

BETWEEN

NYONJO SERAJE:: APPELLANT

AND

UGANDA :: RESPONDENT

[Appeal from the Judgment of the High Court sitting at Mpigi in Criminal Session No. 007 of 2017 by Hon. Justice Emmanuel Baguma delivered on 21/03/2019]

JUDGMENT OF THE COURT

Introduction

1] The appellant Nyonjo Seraje was indicted with aggravated defilement contrary to section 129(3) and 4(a) of the Penal Code Act and sentenced to 10 years' imprisonment after deducting the period spent on remand. It was stated in the indictment that on the 12th day of October, 2015 at Bukinda village, Mawuki Parish Kabulasoke Sub-County in the Gomba District, the appellant performed a sexual act with a 17 year old girl with a mental sub-normality. We shall refer the victim as NB.

2] The facts of the case as discerned from the record of court are that on 12th October, 2015 at around 12.00 noon, as NB was going to fetch water, she met the accused who kicked her. NB fell down and the appellant first removed her knickers then inserted his penis into her private parts. Before the incident, NB was with Luwagga Fahaim whom the appellant chased away before he defiled her. After the incident, NB reported the incident to one Nassali Teddy who in turn informed Nalumansi Olive, NB's mother. Nalumansi Olive examined NB and confirmed that she was defiled. Nalumansi reported the matter to the DPC of Kanoni who advised that the appellant be arrested. Nalumansi then contacted her son Julius Kibuka and Mivule Derick who arrested the appellant with the help of Sali and Mike, and handed him over to the police.

3] The appellant was charged and tried for the offence of aggravated defilement. He denied the charge, and in his defence stated that he did not know NB or the other prosecution witnesses who he claimed to have seen for the first time in court. He claimed that on the date the offence is alleged to have happened, he was in Bukindu Village working and residing in the home of his employer Naluzze, from where he was arrested. The trial Judge rejected his defence, convicted and then sentenced him as stated above.

Representation

4] At the hearing of the appeal, the appellant was represented by Mr. Stephen Birikano on state brief. The respondent was represented by Ms. Nabasa Caroline Hope, a Principle Assistant DPP, who was

assisted by Mr. Aletu Innocent a State Attorney. Both counsel filed written submissions on 10/8/2022 and 17/8/2022 (respectively) as had been earlier directed by the Registrar of the Court.

5] During the proceedings of 18/8/2022, Ms. Nabasa raised an objection against the submissions that had been filed for the appellant, stating that they contained certain errors. Mr. Birikano acknowledged his mistake and we granted him leave to file the correct submissions. It appears that no fresh submissions were filed and we accordingly considered the appellant's submissions as filed on 10/8/2022.

6] In his submissions, Mr. Birikano raised four grounds of appeal which he claimed were laid down in the memorandum of appeal as follows:

i. ***That the learned trial Judge erred in law and fact in failing to consider and or properly evaluate and weigh all the evidence laid before court thereby arriving at a wrongful determination in convicting and sentencing the appellant.***

ii. ***That the learned trial Judge erred in law and in fact when in reaching a final determination in the absence of key evidence or the key witness***

iii. ***The learned trial Judge erred in law and in fact when he convicted the appellant of this offense in the absence of evidence to prove all the essential ingredients of the offense.***

iv. The sentence of imprisonment for 12 years and 5 months was harsh and excessive in the circumstances and that the learned trial Judge erred in law and in fact when he ignored to consider important matters or circumstances which he ought to have considered before passing sentence.

7] We were unable to find the memorandum of appeal containing those grounds. Instead, we found on record a memorandum filed by the appellant on 10th May, 2019 containing seven grounds of appeal couched as follows:

Ground 1 (one) of the appeal

That the trial Judge erred in law and in fact in failing to consider and or properly evaluate and weigh all the evidence laid before court there-by arriving at a wrongful determination in convincing and sentencing the appellant.

Ground 2 (two) of the appeal

That the trial Judge erred in law and in fact in reaching a final determination in the ABSENCE of key evidence or the key witness i.e. the police investigation officer or other.

Ground 3 (three) of the appeal

That the trial Judge erred in law and in fact in shifting the liability and obligations of burden of proof beyond reasonable doubt (standard of proof) upon the prosecution and the prosecution evidence and laid such burden to the appellant that diminished her/ his final determination of the case.

Ground 4 (four) of the appeal

The trial Judge erred in law in fact when he convicted the appellant(s) of this offense in the absence of evidence to prove all the essential ingredients of the offense.

Ground 5 (five) of the appeal

That the plea of guilt and or bargain was irregular in that by any and or all of the following

(a) The charge was not read and explained to me in a language I understand.
(b) The court failed to explain to me all the ingredients of the offense(s).
(c) The plea was not unequivocal in that ignored to admit all the essential ingredients of the offense(s).
(d) The facts of the plea entered/recorded were not read back to me for final consent.
(e) The plea of guilty and or bargain was not obtained under set standards i.e. those set under held by ADAN vs Republic 1973 EA 455 and any other subsequent authorities.

Ground 6 (six) of the appeal

The trial Judge erred in law and in fact when she relied on police identification report that were not conducted and obtained vide the established set of standards and law, and that she utilized this report to determine the case.

Ground 7 (seven) of the appeal

The conviction and sentence of imprisonment for 12 years and 5 months was harsh and excessive in the circumstance, and that the trial Judge erred in law and fact when she:

(a) Ignored to consider important matters or circumstance which she / he ought to have considered before passing sentence
(b) Ordered that the sentence(s) be served concurrently

(c) *Ignored to credit me with the pre-trial period spent in custody.*

Mr. Birikano appeared to have paraphrased and then submitted on some of the grounds of that memorandum of appeal. His submissions only covered grounds 1, 2, 4 and 7.

8] We opine that a memorandum of appeal is only a pleading through which a concise statement of the objections against the judgment of the lower court are related. The appellant must support the grounds of appeal with legal arguments upon which this Court will execute her mandate under Rule 2 of the Judicature (Court of Appeal Rules) Directions (hereinafter the Rules of Court). We consider that without presenting any submissions in respect of grounds 3, 5 and 6 of the memorandum of appeal as required by Rule 102(d) of the Rules of Court, it is assumed that Mr. Birikano abandoned those particular grounds.

Grounds one, two and four

Submissions for the appellant

9] Mr. Stephen Birikano counsel for the appellant begun his submissions by pointing us to the duty of this Court as laid down under Rule 30(1) of the Rules of Court, and the decision of the Supreme Court in **Kifamunte Henry versus Uganda, Criminal Appeal No. 10 of 1997.** He then submitted that the prosecution has the onus to prove each of the ingredients of the offence beyond reasonable doubt.

10] Counsel referred to the evidence of PW1 who stated that as she was on the way to the well with PW2, the appellant forcefully had sexual intercourse with her and that she reported the defilement to one Nassali Teddy. Mr. Birikano attacked that evidence by contending that PW1 is a child with disability, and PW2 is also a child who was chased away by the appellant and never witnessed what happened to PW1. He further contended that PW3 learnt the facts of the defilement from a neighbor. That by failing to call Nassali Teddy and a police investigator to testify, the testimony of PW3 was full of hearsay and unreliable. He in that regard referred to Section 59 (1) (a) of the Evidence Act and the case of **Byaruhanga Fodori versus Uganda, SC Criminal Appeal No. 18 of 2002.**

11] Counsel went on to submit that the appellant's testimony that before the trial he had never met the victim or any of the witnesses was ignored, yet it destroyed the inference of guilt. Counsel concluded that the circumstantial evidence should not have been admitted and hence the third ingredient of the offence of aggravated defilement was not proved to the required standard.

Submissions for the respondent

Point of law.

12] Respondent's counsel raised a preliminary point of law and moved Court to strike out the appeal. Counsel reasoned that the ground of appeal raised by the appellant offends Rule 66(2) of the Rules of this Court in so far as it is not concise but rather general and

argumentative. For guidance, counsel cited **Sseremba Dennis versus Uganda, CA Criminal Appeal No. 480 of 2017.**

Grounds one, two and four

13] In response to the appeal, respondents counsel submitted that the learned trial Judge properly evaluated all the evidence adduced at the trial as he was alive to the key ingredients of the offence of aggravated defilement. In particular, with regards to the victim's age, the trial Judge relied on her immunization card (PE3) and the testimony of PW3 to determine that the prosecution had proved that the victim was below 18 years of age. Counsel then referred the Court to page 30 (paragraph 3) of the record where the Judge relied on Police Form 3, PE1, which indicated that the victim had a mental sub-normality and in addition, the Judge had the opportunity to observe the victim in Court and rightly concluded that the prosecution had proved that the victim was at the material time, a person with a disability.

14] Ms. Nabasa continued that the Judge relied on the testimony of PW1 who she considered to be a truthful witness. That PW1 testified at page 12 of the record that the appellant kicked her down, removed her knickers and defiled her. That PW1's evidence was corroborated by the uncontested evidence of "P1", which described the injuries sustained on PW1's genitals as caused by forceful vaginal penile penetration. Counsel then concluded that the performance of a sexual act had been proved. She accordingly agreed with the decision of the trial Judge.

15] In regard to participation of the appellant, Ms. Nabasa contended that PW2's testimony corroborated PW1's evidence when he testified that they met the appellant on their way to fetch water, and the appellant chased her away leaving him alone with PW1. That the evidence of PW1 and PW2 was never destroyed at cross examination yet in his defence, the appellant totally denied knowledge of the victim and other prosecution witnesses, a fact which was never put to the witnesses in cross examination.

16] In conclusion, counsel implored this Court to find that the appellant participated in sexually assaulting the victim and prayed that the three grounds of appeal be found without merit, and disallowed.

Submissions for the appellant in Rejoinder

17] In response to the preliminary objection, appellants' counsel submitted that it was not clear which of the four grounds offends the law and how, and if so, in what manner it does. Mr. Birikano contended instead that the four grounds of appeal clearly set out the points of objection to the decision of the High Court. He added that this Court as a first appellate court has the duty to appraise all matters of fact and law, and then make its own conclusions on the evidence. He cited the decision of this Court in **Ndyaguma versus Uganda, Criminal Appeal No. 263 of 2006** where a similar objection was overruled. He then invited this Court to take into account the provisions of Article 126 (2) (e) of the Constitution, to overrule the objection and hear the appeal on its

merits. Counsel in addition reiterated most of his earlier submissions.

Analysis and decision of the Court.

18] We have carefully studied the Court record, considered the submissions of both counsel, and the law and authorities cited therein. We are mindful that this is a first appeal to this Court which is governed by the provisions of **Rule 30(1) (a) of the Rules of the Court** which provides as follows:

> *(1) On any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the court may-*
>
> *a. Reappraise the evidence and draw inferences of fact;*

19] We are accordingly required to carefully and critically review the record of the High Court and re-appraise the evidence in order to make inferences of fact but without disregarding the decision of the High Court. **See Kifamunte Henry versus Uganda (supra).** Alive to the above-stated duty, we shall proceed to resolve the grounds of appeal as below;

20] We agree with Mr. Birakano that respondent's counsel raised an objection but did not specify which particular ground of appeal offended the law. It is not possible that all four grounds were similarly drafted. However, our own observation is that the first ground clearly offended Rule 66(2) of the Rules of Court which provides as follows:

"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact ... which are alleged to have been wrongly decided".

21] In the first ground, the appellant attacked the manner in which the evidence was evaluated. That there was no proper evaluation which resulted into an erroneous decision. The appellant did not specify the pieces of evidence that were not properly evaluated. It is our considered view that Rule 66(2) was enacted for a purpose. The appellant was expected to have concisely set forth the matters of law and fact on which the trial Court erred. That would have given the respondent due notice and correct direction on how to tailor their response. The Court would have been equally guided when preparing a decision. Concise pleadings save Court's time when revisiting a record. We choose to apply the law strictly as was the case in this Court's decision in **Sseremba Dennis vs Uganda, (supra).**

22] Accordingly, the first ground is struck off for not complying with Rule 66(2) of the Rules of Court.

23] Mr. Birikano argued grounds two and four together. His submission is that the trial Judge admitted uncorroborated circumstantial and hearsay evidence adduced by the prosecution and as a result, the third ingredient of the offence was not proved to the required standard, which caused a miscarriage of Justice.

Conversely, respondents counsel contended that the trial Judge was alive to all the ingredients of aggravated defilement and correctly found that the appellant participated in the commission of the offence.

24] We observe that Mr. Birikano's submissions did not quite address grounds 2 and 4 of the appeal. In ground 2, the appellant contested the fact that the key witness and police investigator were not called to testify. However, his submissions extensively cover PW1's evidence, a witness we regard as the key person adduced by the prosecution. In ground 4, he argues that all three ingredients of the offence were not proved to the required standard, but in his submissions, he concentrates only on the appellant's participation. We regard this a departure or at least, disorganized submissions. However, we choose not to visit counsel's poor representation on the appellant his client. Since this is a matter on appeal we are mandated to re-appraise all evidence on record. We shall therefore endeavour to address the retained grounds of appeal in the best manner possible.

25] The essential ingredients for the offence of aggravated defilement, the type for which the appellant was convicted are laid down in **Section 129 (3) and (4)(d) of the Penal Code Act** (as amended). The prosecution is mandated to prove the following:

i. That the victim was below 18 years
ii. That the victim is a person with disability
iii. That the sexual act was performed on the victim

iv. That it is the accused who performed the sexual act on the victim.

As enunciated in the well followed decision of **Woolmington versus DPP (1935) A.C. 462**, before they can procure a conviction, the prosecution must prove all the above ingredients beyond reasonable doubt. The accused person has no burden to prove his innocence and the burden to prove his/her guilt always lies on the prosecution and does not shift because an accused is only convicted on the strength of the prosecution case, and not because of weaknesses in his/her defence. See also **Sekitoleko versus Uganda [1967] EA 531.**

26] The prosecution called three witnesses to prove their case. The appellant who gave a sworn testimony, called no witness to support his evidence. We shall now proceed and evaluate each ingredient to ascertain whether the trial Judge came to a correct decision that the offence of aggravated defilement was proved beyond reasonable doubt.

That the victim was below 18 years

27] The age of a victim of a sexual offence can be proved by a statement of the witness or the production of their birth certificate or other similar document. The Court may also take the testimonies of persons who were present at the birth of the victim e.g. parents and guardians, or by the court's own observation and common sense assessment of the age of the child. See for example, **Christopher Byagonza versus Uganda, SC Criminal Appeal No. 43 of 1999**.

28] PW1 the victim of the offence, testified that she was aged 17 years at the time she was defiled. Her evidence was corroborated by her mother PW3 who confirmed that fact and gave PW1's birth date as 9th July, 1999. She presented to Court PW1's immunization card which contained that date of birth. PF3A the medical report which was generated after PW1 was examined was adduced without contest and marked as PE1. PW1's aged was recorded as *"approximately to be between 16-17 years based on dentition."*

29] The above is strong unrebutted evidence that at the time she was defiled, PW1 was below the age of 18 years. Accordingly, the Judge was correct in his finding on PW1's age.

That the victim is a person with disability

30] **Section 129(7) of the Penal Code** Act defines disability to mean;

> *"a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation".*

31] PW3 the mother to NB testified that NB suffered from a disability. She categorized her as an "imbecile" who befell the ailment after suffering a terrible fever and even had to stop attending school. In addition, the mental status of PW1 as described in P1, the medical report, is that *"she has mental sub- normality"*. At page 32 of the record, the Judge observed and recorded PW1's ailment as one *"with mental sub-normality"*.

32] The evidence of PW3, the uncontested documentary evidence, as well as the trial Judge's own observations of PW1, confirm that the victim was a person with mental disability at the time she was defiled. That ingredient was also proved beyond reasonable doubt.

That the sexual act was performed on the victim

33] **Section 129 (7) of the Penal Code Act** defines sexual act to mean:

> *(a) penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ; or*
>
> *(b) the unlawful use of any object or organ by a person on another person's sexual organ.*

The ingredient is satisfied even with the slightest penetration of the victim's vagina or annus. In **Mutumbwe William versus Uganda Criminal Appeal No. 252 of 2002**, this court held that:

> *"In order to prove a charge of defilement, it must be proved that the accused person had sexual intercourse with the victim. It is not, however, necessary that full sexual intercourse should have taken place. It will be enough if there is evidence showing that some penetration of the male sexual organ into the victim's vagina took place. It has been repeatedly held in our superior courts that in sexual offences, the slightest penetration will be sufficient to constitute an offence."*

Also see: **Mujuni Apollo vs Uganda CA Criminal Appeal No.26 of 1999.**

34] Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. In this case, the prosecution adduced the victim's evidence which was corroborated by two other witnesses as well as medical evidence, the latter which was admitted into evidence without contest from the appellant.

35] PW1 testified that as she was going to fetch water she met the appellant who kicked her down, removed her knickers and then inserted his penis into her private parts. PW3 testified that after receiving a report of the defilement, she examined PW1 and confirmed it. Further that PW1 was taken to Kinoni Health Centre IV where she was medically examined. The examining officer observed and recorded that PW1's genitals were inflamed and had minor lacerations with a raptured hymen. He explained the probable cause of the injuries to be "*vaginal penile penetration which is forceful*". In his defence, the appellant only put up a general denial and stated that he did not know NB and he had never met her or any other witnesses before meeting them in court.

36] After evaluating the above evidence, we agree with the finding of the trial Judge that the prosecution proved beyond reasonable doubt that a sexual act was performed on PW1. It was proved to the required standard that a penis was inserted into PW1's vagina. She suffered a raptured hymen and other injuries due to penile penetration, which was forceful.

That it is the accused who performed the sexual act on the victim.

37] Evidence of participation can be proved through direct evidence or witnesses to the offence of circumstantial evidence that should place the accused at the crime scene and confirm with no doubt that he/she participated in the offence. PW1 the victim, was the single direct witness to the offence.

38] The law relating to identification of a single identifying witness was extensively discussed in the well followed case of **Abdalla Nabulere & Another versus Uganda, [1979] HCB 77**, it was held that:

> *"where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality the greater the danger.*

When the quality is good, as for example when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence, provided the Court adequately warns itself of the special need for caution."

39] The Supreme Court in the case of **Bogere Moses & Others versus Uganda, SCCA No. 1 of 1997** following her earlier decision of **Suleimani Katusabe versus Uganda, SCCA No. 7 of 1991** offered more guidance. The Justices held that the Court is required to consider the evidence as a whole namely; factors favouring correct identification together with those rendering it difficult. No piece of evidence should be weighed except in relation to all the rest of the evidence available on record. That for cases where the conditions for identification are not favourable, corroboration must be sought to support it.

40] PW1 was the prosecution's principal and single identifying witness. She testified that she previously knew the appellant as she used to see him in their village and also knew his residence. That on an unspecified date at around noon, she met him on the way to the well. That the appellant kicked her, threw her down, removed her knickers and inserted his penis into her private parts. She continued that before being kicked to the ground, she was in the company of Luwagga Fahaim, who the appellant chased away. The appellant in his defence denied knowing or defiling NB.

41] Our evaluation of PW1's evidence is that she knew the appellant well as one who lived in the same village. She observed and was positive that it was him and no other who kicked her to the ground and defiled her. She made the identification at midday and the defilement must have taken a sufficient time for her to make a correct identification. The Judge who observed PW1 testify was impressed with her as a witness. He stated in his judgment that:

> *"I have observed the victim in Court, though with mental sub-normality, she was consistent in her testimony and knew what she was talking about."*

The appellant's defence that he had no knowledge of the PW1 and had never met her before, would pale against such strong identification evidence placing him at the crime scene, and confirm his participation.

42] The Supreme Court has in the decision of **Ntambala Fred versus Uganda, Criminal Appeal No. 34 of 2015,** found that cogent evidence of a victim of a sexual violence requires no corroboration. When we consider the strong evidence of PW1, and the fact that the trial Judge found her to be a consistent and credible witness, her evidence alone would have proved the appellant's participation. However, in this case, the prosecution adduced other evidence to corroborate her testimony.

43] It was the testimony of PW2, that on 12th October, 2016 at 10:00am, as he walked to the borehole with PW1 to fetch water, the appellant found them at a tree picking fruits and chased him away. That PW2 left the appellant with PW1 and overheard him

telling her that he was going to give her *"mpafu"*. That later, PW2 saw PW1 when she returned home crying and he also saw her talking to one Nassali. The evidence of the distressed condition of PW1 when she returned home would corroborate her story that she had been defiled. PW2 who stated that he knew the appellant as one who resided on the same village, is an indication that he was not mistaken of the identity of the person who chased him away while he was standing with PW1. PW3 gave additional corroboration. She stated that on 12th October, 2016 at 10:00am, she sent PW1 and PW2 to the borehole. However, at 11:00am PW1 came back home and went to Nassali who later notified PW3 that PW1 had informed her that she had been defiled. This prompted PW3 to examine PW1 and she confirmed that PW1 had been defiled.

44] Appellant's counsel considered the report made to Nassali who was never called to testify, as hearsay evidence. We disagree. The report made to Nassali who in turn reported the defilement to PW3 would fall under the evidence or statements described in Section 156 of the Evidence Act which provides that:

> **156. Former statements of witness may be proved to corroborate later testimony as to same fact**
>
> *"In order to corroborate the testimony of a witness, any former statement made by the witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved".*

45] In **Kamwize Kassim versus Uganda, CA Criminal Appeal No. 032 of 2018,** this court referred to the decision in **Uganda versus Okumu Joseph, HC Criminal Session Case No. 0029 of 2019,** a persuasive decision. Hon. Justice Mubiru stated as follows:

> *"... Section 156 of the Evidence Act envisages two categories of statements of witnesses which can be used for corroboration. First is the statement made by a witness to any person at or about the time when the fact took place. The second is the statement made by him to any authority legally bound to investigate the fact. It is clear that there are only two things which are essential for this section to apply. The first is that a witness should have made a statement with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place. The former statement may be in writing or may be made orally to some person at or about the time when the fact took place, that person would be competent to depose to the former statement and corroborate the testimony of the witness in Court"*

46] PW2 testified that he saw PW1 talking to Nassali when she returned home crying. Although he did not testify on what they discussed, Nassali's statement to PW3 about the defilement is relevant because she reported it to PW3 who herself checked PW1 and confirmed the defilement. PW2 himself testified during cross examination that PW1 informed him that the appellant had defiled her. Stemming from the above analysis, we are in agreement with the trial Judge that the appellant was positively identified as the person who defiled PW1.

47] Thus ground two and four of the appeal fail.

Ground seven

Appellants submissions

48] For this ground of appeal, appellant's counsel referred to a few cases for our consideration. Firstly, he referred to the case of **Abaasa & Anor versus Uganda, CA Criminal Appeal No. 33 of 2010** which discussed the circumstances under which an appellate court may interfere with a sentence. In addition, he cited the case of **Bikanga Daniel versus Uganda, CA Criminal Appeal No. 38 of 2000** which emphasized the convict's age as one factor to be considered before sentence. Counsel concluded by submitting that the sentence given was in the circumstances harsh. He suggested a reduction to 8 years' imprisonment and thereby prayed that the appeal be allowed by this Court setting aside the conviction and sentence.

Submissions for the Respondent

49] In response, respondent's counsel submitted that sentence is a discretion of a sentencing judge. Citing the decision of **Blaiso Ssekawooya versus Uganda, CA Criminal Appeal No. 1071** of 2009, [which followed **Kiwalabye Bernard versus Uganda, SC Criminal Appeal No 143 of 2001**], they also mentioned the factors an appellate court would consider before interfering with a sentence. Respondent's Counsel then contended that the appellant did not demonstrate how the sentence of 10 years was

harsh and excessive when the prescribed maximum sentence for aggravated defilement is death. Counsel referred to the finding of this Court in **Othieno John versus Uganda, Criminal Appeal No. 174 of 2020** (that followed this Court's decision in **Aharikundira Yustina versus Uganda, CA Criminal Appeal No. 104 of 2009**), where it was emphasized that interference with sentence should be based on a matter of law, but not emotions.

50] Counsel contended that the trial Judge properly exercised his discretion within the precincts of the law. They invited the court to consider the 10 years' imprisonment handed to the appellant as being lenient considering the fact that the appellant preyed on a victim, a person with mental sub-normality, who deserved protection from members of her community.

51] In conclusion, counsel prayed that Court dismisses the appeal, and upholds the conviction and sentence of the trial court.

Analysis and decision of court

52] The issue for this courts consideration is whether the sentence of imprisonment of 12 years and 5 months was harsh and excessive in the circumstances. Both counsel made substantial submissions to explain when an appellate court can interfere with a sentence. We agree with those submissions and the authorities provided. We would add that this Court's powers to intervene and set aside a sentence, are quite limited. We may interfere only in cases where it is shown that:

a. The sentence is illegal.

b. The sentence is manifestly harsh or excessive or too low as to amount to an injustice.

c. There has been failure to exercise discretion.

d. There was failure to take into account a material factor.

e. An error in principle was made.

See ***Ogalo S/O Owoura versus R (1954) 21 E.A.C.A. 270,*** **Kyalimpa Edward versus Uganda, SC Criminal Appeal No. 10 of 1995; Kamya Johnson Wavamuno versus Uganda, SC Criminal Appeal No. 16 of 2000 and Kiwalabye versus Uganda, SC Criminal Appeal No. 143 of 2001.**

53] The appellant considers a sentence of 12 years and 15 months' imprisonment as manifestly excessive in the circumstances. His counsel suggested a reduction to 8 years. Conversely, respondent's counsel submitted that the learned trial Judge properly exercised his discretion within the relevant law, and that in fact, 10 years' imprisonment handed to the appellant was in consideration of the facts, lenient.

54] The trial Judge delivered a brief sentencing ruling which we have obtained from the handwritten record. He stated in part that:

"the accused is a first offender but still showed no degree of remorse. I have considered that the victim was 17 years. I have looked at the aggravating and mitigating factors. The accused is sentenced to 12 years and 5 months. Since the

accused has been on remand for 2 years and 5 months. I reduce the sentence to 10 years."

55] Although he did not repeat the submissions made in the allocution proceedings, it is clear that in his ruling, the trial Judge gave attention to both the mitigating and aggravating factors in equal measure. Although not a legal requirement, it would be a better approach for a trial Judge to mention those factors in brief. We say so because this court has previously held that "*a decision on whether a sentence was so manifestly excessive as to amount to an injustice will depend on the circumstances of each case.*" See: **Basiku versus Uganda, CA Criminal Appeal No. 33 of 2011**.

56] The above notwithstanding, we have equally perused the record and agree that the sentence suited the circumstances of this case. The appellant at the time aged 39 years, defiled a girl of 17 years. The victim who at the time ailed from a mental disability, would be categorized as vulnerable and in need of exceptional protection from those around her residence. The Judge who observed the appellant in the trial, commented that he showed no remorse for his actions. We cannot on appeal dispute that observation.

57] Should there be doubt in our decision here, we seek additional guidance from Rules 19(1), (2), 20 and 21 and Schedule III of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 (hereinafter referred to as Sentencing Guidelines) for guidance on whether the sentence given was excessive. The sentencing range for aggravated defilement after

considering both the aggravating and mitigating factors is 30 years to death as the maximum sentence. Therefore, a sentence of 10 years' imprisonment would in fact appear lenient.

58] Further applying the consistency principle enunciated in the Supreme Court decision of **Aharikundira Yustina versus Uganda, (supra)** would also be useful. It was held there that consistency in sentencing with cases with similar facts augments the rule of law for the law is then applied with equality, and devoid of unjustifiable differentiation. The principle would thereby provide guidance of whether a particular sentence was in fact harsh and excessive.

59] In **Nfutimukiza Isaya versus Uganda, CA Criminal Appeal No. 41 of 1999,** this court confirmed a sentence of 12 years' imprisonment where the appellant defiled an imbecile girl aged about 10 years. Yet in **Apiku Ensio v Uganda, CA Criminal Appeal No. 136 of 2012**, the appellant was convicted of aggravated defilement and sentenced to 25 years' imprisonment. The victim was under 14 years, dumb and with mental disability. This court reduced the sentence to 20 years' imprisonment, and after deducting the remand period, the appellant was sentenced to 17 years and 1 month imprisonment. In **Ogarm Iddi versus Uganda, SC Criminal Appeal No. 182 of 2009** this court upheld a sentence of 15 years' imprisonment for the offence of aggravated defilement of a victim of 13 years' old.

60] A cross section of similarly decided cases by this Court and the Supreme Court indicates a sentencing range of 12 years upwards to 20 years' imprisonment. In the circumstances, we find a sentence of 10 years' imprisonment after deducting the period spent on remand, as appropriate. We therefore find no reason to interfere with the decision of the trial Judge.

61] This appeal accordingly fails. We uphold the conviction and the sentence of 10 years' imprisonment imposed upon the appellant.

Dated at Kampala this 8th day of NOV, 2023

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HON. CHEBORION BARISHAKI
JUSTICE OF APPEAL

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HON. HELLEN OBURA
JUSTICE OF APPEAL

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HON. EVA K. LUSWATA
JUSTICE OF APPEAL