THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CRIMINAL APPEAL NO. 0127 OF 2017
Coram: Obura, Bamugemereire & Madrama JJA)

MOSES OGWANG :: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(Appeal from the decision of Suzan Okalany J, in High Court Criminal Session Case No. .206 of 201 dated 1/8/2018 at Mbale)

Criminal Law –Aggravated Defilement C/s 129(3), (4) of The Penal Code Act- Alibi - Harsh and Excessive Sentence.
Evidence Law: Corroboration; unsworn evidence of children of tender years Identification; whether evidence of minors is sufficient for identification.

JUDGMENT OF THE COURT

Introduction

The facts of the case are that the Appellant **Moses Ogwang** was charged with the offence of Aggravated Defilement contrary to section 129(3) and (4) of the Penal Code Act. He was convicted and sentenced to 15years and 9months' imprisonment. The reason for this appeal was that the appellant was dissatisfied with both the conviction and sentence.

Background

The facts in this case as ascertained from the record of the lower court are that on 10th September 2014 at Bison "B" western Division in Tororo District the appellant entered the victim's house and performed a sexual act on **NS** a girl aged 8 years. It is alleged that when **NS** was asleep, the appellant inserted his finger into her vagina, which resulted into injuries that led to vaginal bleeding.

The appellant denied the charge and in his defence, raised an alibi. The trial Judge sided with the prosecution's evidence and convicted the appellant and sentenced him to a term of 15 years and 9 month's imprisonment after deducting the period spent on remand of 3 years and 9 months. The appellant being aggrieved with the conviction of the High Court, lodged an appeal to this court premised on the following grounds.

1. The Learned Trial Judge erred in law and fact when she convicted the appellant based on the uncorroborated unsworn evidence of children of tender years.
2. The Learned Trial Judge erred in law and fact when she disregarded the defence of alibi put by the appellant.
3. The Learned Trial Judge erred in law and fact when she passed a manifestly harsh and excessive sentence of 19 years to the appellant.

Representation

At the hearing, the appellant was in court, and he was represented by Geoffrey Nappa while the respondent was represented by Senior Asst. DPP Sam Oola. Counsel relied on written submissions that were adopted by this court.

Appellant's Submissions

Counsel for the appellant made submissions on all 3 grounds separately. On the 1st ground, counsel faulted the Learned Trial Judge relying on uncorroborated the evidence of PW3 and PW4, children of tender years in proving the appellant's participation in the offence. He relied on the authority of **Ssenyondo Vinan v Uganda CACA No. 267 of 2002** where this court emphasized the need to be cautious on

convictions based solely on the unsworn evidence of a single identifying witness of tender years. Counsel contended that the corroboration in the Judgement was in relation to the sexual act and not the participation of the appellant which was an issue in the case. Counsel averred that the conviction of the appellant was wrongfully reached. On the 2nd ground, Counsel was critical of the Learned Trial Judge for not considering the alibi put up by the appellant that he was with PW5, the victim's father on the fateful day, yet PW5 did not dispute alibi in question. Counsel also submitted that the identification evidence that the Learned Trial Judge relied on was not sufficient to enable positive identification. On Ground No.3, Counsel disagreed with the sentence of the Learned Trial Judge. He argued that the trial Judge passed a total of 19 years of imprisonment against the appellant. In his view the sentence did not take into consideration the appellants mitigating factors and the time spent on remand.

Respondent's Submission

Counsel for the respondent opposed the appeal and approached all grounds separately. On the 1st ground, counsel contended that the evidence of PW3 and PW4 was sufficiently corroborated by the evidence of PW5 and PW6. Counsel averred that the conditions of identification which enabled a positive identification included proper lighting, long duration, familiarity, and proximity. On Ground No.2, Counsel contended that the appellant's alibi was considered by the Learned Trial Judge. She correctly rejected it on the ground that it had been discredited by the prosecution evidence. On ground 3, counsel contended that the appellant got a lesser sentence in comparison to other cases of a similar nature. Counsel contended that at the very

least, the sentence is appropriate and should be left undisturbed. Counsel prayed that the appeal should fail.

Consideration by Court

We have carefully studied the court record, considered the submissions for either side, and the law and authorities cited therein. A first appeal from a decision of the High Court requires this Court to review the evidence and make its own inferences of law and fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.113- 10.**

We do agree with and follow the decision of the Supreme Court in **Kifamunte Henry v Uganda SCCA No. 10 of 1997,** where it was held that on a first appeal, an appellant is entitled to this court's review the evidence of the case and to reconsider the materials before the Learned Trial Judge. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it.

Alive to the above-stated duty, we shall proceed to resolve this appeal one ground at a time.

Ground No.1

The Learned Trial Judge erred in law and fact when she convicted the appellant based on the uncorroborated unsworn evidence of the children of tender years.

Counsel for the appellant submitted that the Learned Trial Judge for convicting the appellant based on the uncorroborated unsworn evidence of PW3 and PW4, children of tender years. However,

counsel for the respondent contends that the evidence of PW3 and PW4 was corroborated by PW5 and PW6 whom they informed what the appellant had done to PW3.

It is trite that no conviction of an accused can be based on evidence which in law requires corroboration. The law regarding evidence of a child of tender years is provided for in section 40(3) of the Trial On Indictments Act which stipulates as follows:-

> "Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this sub section is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her."

On the issue of corroboration of the evidence of PW3 and PW4, we have perceived from testimony on the record that PW5 and PW6 corroborated the evidence of PW3 and PW4 respectively. It was the testimony of PW6 that PW3 informed her that Moses (appellant) pushed his fingers into her genitals and injured her.

It is the law that where the victim or witnesses report the offence committed to a person of authority in a timely manner, the evidence

of such a witness is regarded as corroborative evidence. Section 156 of the Evidence Act provides that;

> "in order to corroborate the testimony of a witness, any former statement made by such a witness relating to the same fact, at or about the time when the fact took place, or before authority legally competent to investigate, the fact may be proved."

It was the testimony of PW4 (Isaac) that when his father (PW5) returned, he contemporaneously reported what he had seen. He told PW5 that Moses (the appellant) had come to their house with the intention to rape Sophia Nambozo. PW5 testified that PW4 had informed him that when Moses Ogwang, came to the home, he lay on the bed between the two children, fondled Sophia Nambozo and inserted his fingers in her vagina. When Isaac protested that he was assaulting Sophia. He then got up and left.

In view of the above testimony and provisions of the law, we can safely conclude that by contemporaneously reporting the appellant's offending, the evidence of PW3 and PW4 was corroborated by the evidence of PW5 their father and PW6, their mother.

The appellant was placed at the scene of the crime by the two children, PW3 and PW4.

PW3 and PW4 testified to having identified the assailant. While dealing with identification evidence, we are aware of the necessity to subject such proof to exhaustive scrutiny. The Supreme Court in **Bogere Moses & Anor v Uganda SCCA No.1 of 1997** cited with approval, the case of **Abdalla Nabulere & anor v Uganda SCCA No. 9 of 1978** where it was held that,

"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 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 to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

We note the lower court conducted ***voi dire*** hearings on both PW3 and PW4 and ruled as follows:

COURT:

Having examined Kiganga Isaac as required under s.40 (3) of the TIA I find as follows:

1. ...is possessed of sufficient intelligence to justify the reception of his evidence.
2. ...understands the duty of speaking the truth.
3. ...does not appreciate the nature of the oath.

Therefore...evidence should be taken not on oath

PW3 and PW4 are said to have given evidence, not on oath and counsel for the appellant did not cross-examine them. We however note with concern that the appellant was allowed to cross-examine

them and PW3, who had shown signs of trauma throughout her testimony, was cross-examined by the appellant whom he accuses of sexually molesting her by inserting his fingers into her vagina and breaking her virginity by serrating or partially rapturing her hymen and bruising her fourchette.

A trial court must always caution itself before depending solely on the unsworn evidence of children of tender years. More importantly where children of tender years are also the eye witnesses, the court must exhaustively review their evidence to ensure that it meets the required standard. In **Bogere Moses & anor v Uganda SCCA No. 1 of 1997** the approach to be taken in dealing with evidence of identification by eyewitnesses in criminal cases was laid down. The Supreme Court held that,

> **"The starting point is that the court ought to satisfy itself from the evidence whether conditions under which the identification is claimed to have been were or were not difficult, and to warn itself of the possibility of mistaken identity. The court then should proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence as a whole, namely the evidence of any factors favouring correct identification together with those rendering it difficult".**

In this case we note that the Learned Trial Judge then cautioned herself before relying on the evidence of children of tender years; PW3 and PW4. In her judgment, the Learned Trial Judge considered the

fact that both witnesses knew the appellant as their father's friend who regularly visited them at home, the fact that the appellant spent some time in the room eating the leftover food that PW5 had left, there was candlelight burning, even when the candle was put off, there was bright moon light coming from outside through the door that the assailant had left open. She also considered the fact that when the appellant joined the witnesses on their bed, PW4 sat up on the bed watching how he attacked PW3 which conduct he described in court, that when PW4 alarmed, the assailant went and stood at the doorway looking at the witnesses. There was bright moonlight coming in and the witnesses had another opportunity to recognize him further at the point.

This court has followed closely the decisions of the supreme court and its own decisions. In Ntabala Fred v Uganda SCCA 34 of 2015 the supreme court held that consequently, a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. As stated by this court in Sewanyana Livingstone v Uganda SCCA No. 19 of 2006) "what matters is the quality and not quantity of evidence."

From the above, we agree with the Learned Trial Judge that from the conditions highlighted in the Judgement, the conditions were favourable to enable PW3 and PW4 to identify the appellant. Considering the fact that there was light from the '*tadoba*' and the moon light and most importantly PW3 and PW4 were familiar with the appellant as he was a friend to their father and often visited their home. We noted earlier that the contemporaneous reporting of the children met the threshold of s.156 of the Evidence Act. We therefore find that this ground fails as it has no merit.

Ground No.2

The Learned Trial Judge erred in law and fact when she disregarded the defence of alibi put by the appellant.

The appellant contended that the Learned Trial Judge disregarded his defence of alibi on the basis that his defence was contradicted by the evidence of PW5. The Learned Trial Judge observed in her Judgement as follows;

> *"... the accused's statement in his defence that he was with PW5 in Bison trading centre the whole evening was contradicted by PW5 who testified in cross examination that he indeed met with the accused at Bison trading centre which is about 250 meters from the home of PW5 and they exchanged greetings and parted ways since PW5 was going to buy food for the following day. The trial Judge found PW5 to be honest and believed him in the circumstances of the case because he admitted the facts that he had met with the accused that evening."*

One of the ways of disproving an alibi is to investigate its genuineness as was stated in the case of **Androa Asenua & Anor v Uganda SCCA No 1 of 1998** where the Supreme Court of Uganda cited with approval the authority of **R v Sukha Singh S/O Wazir Singh and Ors 1939 (6 EACA) 145** where the Court of Appeal for East Africa observed that:-

> "If a person is accused of anything and his defence is an alibi, he should bring forward the alibi as soon as he can because, firstly,

if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

We have observed that the Learned Trial Judge's evaluation of evidence in respect to corroboration related mostly on identification of the victim who had put up a defence of *Alibi*. We agree entirely with the findings of the Learned Trial Judge that the victim's evidence on identification was corroborated and as such the *alibi* put up by the appellant could not stand.

In addition to the above, we note from the record that the appellant and PW5 met on the night the offence was committed, this does not exonerate the appellant in anyway. During his examination in chief, the appellant testified that,

"... during the commission of the alleged offence, I was with the father of the alleged victim. I moved with him up to home...What I know is that during the commission of the alleged offence, I was with the complainant in Bison trading Centre from 8:00 pm to 9:30 pm. We left the trading Centre together and took the same direction since we are neighbours..."

However, PW5 on the other hand testified that,

"he found the accused in the trading centre where they greeted each other like friends and parted ways. He went to shop food and that he did not know where the accused went..."

The evidence of the appellant was contradicted by that of PW5 who testified that he indeed he saw the appellant on his way to market but they parted ways and did not know where the appellant went thereafter. The defence of the appellant does not rule out the fact that he may have briefly been with the father of the victim and thereafter callously proceeded to his home and committed the offence of defilement. His other defences such as sharing or fighting over girlfriends with the father of the victim become a side-show meant to mislead the court. The evidence of identification by PW3 and PW4 was found to be positive identification. The two sufficiently placed the appellant at the scene of crime. He lay between the two children as he caressed PW3. The two witnesses put him right at the centre of this crime. **Wepukhulu Nyunguli v SCCA No. 21 of 2001** the court recognized that in sexual offences, the victim's evidence is the best proof of identification of the accused. Given the totality of the evidence adduced we find that the Trial Judge was correct in disbelieving the defence of alibi put up by the appellant. The children put the appellant squarely at the scene of crime. We therefore find no reason to interfere with the decision of the learned trial Court.

Ground No.2 of appeal fails for lack of merit.

Ground No.3

The Learned Trial Judge erred in law and fact when she passed a manifestly harsh and excessive sentence of 19 years to the appellant.

The Appellant challenged the sentence of 19 year's imprisonment in this ground as he found it harsh and manifestly excessive. He prayed that the sentence be set aside and substituted with an appropriate sentence. Before we look carefully into the law regarding sentencing, we would like to correct the impression created by the appellant. He

was not sentenced to imprisonment for 19 years. Rather he was imprisoned for 15 years and 9 months.

The law regarding to when an Appellate court may interfere with the sentencing powers of a trial court is well established in the case of Kyalimpa Edward v Uganda SCCA No. 10 of 1995, where the court considered the principles upon which an appellate court should interfere with a sentence. Court referred to R v Haviland (1983)5 Cr. App. R(s) 109 and held that;

> "an appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a judge exercised his discretion. It is the practice that as an appellate court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."

While sentencing the Appellant in this case, the Learned Trial Judge held that;

> "...Convict sentenced to imprisonment for 15 years and 3 months from the date of conviction the period spent on remand of 3 years and 9 months having been deducted. Right of Appeal explained..."

We have carefully re-evaluated the ruling of the trial Judge on sentencing. We observed that she did not consider the mitigating and aggravating factors before imposing the sentence. We however note that she considered the period spent on remand. In order for this court to assess whether the sentence was harsh it is guided by the principles laid down in the sentencing guidelines.

Under **Paragraph 19(1) of the sentencing guidelines**, the court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence. Furthermore, **Paragraph 19(2)** of the same guidelines provides that in a case where a sentence of death is prescribed as the maximum sentence for an offence, the court shall, considering the factors in paragraphs 20 and 21 determine the sentence in accordance with the sentencing range.

According to the third Schedule the sentencing range for aggravated defilement after considering both the aggravating and mitigating factors is 30 years to Death as the maximum sentence.

We have further observed that the Learned Trial Judge did not demonstrate the need for consistency with offenders in respect of similar offences committed in similar circumstances as required by **Paragraph 6(c) of the Sentencing guidelines** which provides that court should be guided by the principle of consistency while passing a sentence to a convict. Additionally, **Aharikundira Yustina v Uganda SCCA No. 27 of 2015** emphasised the need for consistency when dealing with appeals regarding sentencing that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the Rule of Law and requires that laws be applied with equality and without unjustifiable differentiation.

In mitigation, defence counsel submitted that the appellant was a first-time offender aged 25 years with potential to reform. In aggravation, counsel for the State submitted that the age difference between the appellant and the victim was wide, the victim was only 8 and the appellant was 21 years by the time of commission of the offence. Defence Counsel further averred that the victim suffered injuries in her genitalia and was traumatised. Four years down the road, the memories were still fresh making the victim was cry throughout her testimony. Counsel also submitted that the appellant traumatised two children when he defiled PW3 in the presence of PW4. We note that the respondent did not cross appeal. This means that in spite of the aggravating circumstances, the sentence of the trial Judge is only challenged by the appellant for severity.

In Ninsiima Gilbert v Uganda CACA No. 1080 of 2010 this Court found that the range of sentences for similar offences of Aggravated Defilement is 15-18 years. In that case, this Court reduced a sentence of 30 years to 15 years imprisonment for the offence of Aggravated Defilement.

Similarly, in Tiboruhanga Emmanuel v Uganda CACA No. 0655 of 2014, this Court found that a sentencing range of 11 years to 15 years in aggravated defilement cases without additional aggravating factors was suitable. In this case, the Court considered the fact that the appellant was HIV positive as an additional aggravating factor in that he had, by committing a sexual act on the victim while HIV positive, exposed her to the risk of contracting HIV/AIDS. The Court imposed a sentence of 25 years imprisonment.

In German Benjamin v Uganda CACA No. 142 of 2010 this Court set aside a sentence of 20 years imprisonment for the offence of aggravated defilement and substituted it with a sentence of 15 years imprisonment.

In Asanasio Weitire v Uganda CACA No.46 of 2006 this court substituted a 12-year sentence with life imprisonment in an aggravated defilement case. In this case, the appellant a 63-year-old man defiled two defenceless children in a cruel and barbaric manner. He would tie one on a tree while defiling the other. Thereafter, he would tie on a tree the defiled girl while defiling the other. The above case is applicable to the matter before us as the appellant in this case defiled PW3 in the presence of PW4 another child, he traumatized two siblings of tender years. This fact also aggravates the matter before us.

During sentencing the trial Judge ruled as follows:

> 31/7/2018.
>
> Mr. Nicholas Kawooya (State Attorney) for the State.
>
> Mr David Musolwa for the accused on State brief.
>
> The accused is in Court.
>
> Mr. Oboth Jadwong - Court clerk
>
> Mr. Joseph Obuan - interpreter.
>
> COURT:
>
> Sentence delivered.
>
> Convict sentenced to imprisonment for 15 years and 3 months from the date of conviction the period spent on remand of 3 years and 9 months having been deducted.

It was the submission for the appellant that the sentence pronounced above amounted to 19 years of imprisonment. His argument therefore was that the trial Judge aggregated the time spent on remand together

appellate court to consider if the sentence met the criteria set down in Rwabugande Moses v Uganda SCCA 14 of 2015. In which the supreme court held as follows:

> "We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence. **Article 23 (8) of the Constitution (supra)** makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period."

Upon making an evaluation of the above sentence we find that in this particular case, the mind of the trial Judge can be discerned. Although the trial judge did not mention the aggregate sentence of 19 years, she clearly spelt out two things. In reverse, the first was that she had considered deducted the 3 years and 9 months which the appellant had spent on remand. The operative words here were "having deducted". This means the deduction, although done by implication, was indeed carried out. In our view, her assertion therefore meets the Rwabugande test. It was absurd and illogical to introduce a 19 years' imprisonment into this case. In any case the worst that could have happened was for this court to deduct the 3 years and 9 months from the 15 years and 3 months. This would be uncalled for since the wording of the sentence, although passive, was clear enough. It is always best to state what the starting point of the sentence is and then to set off clearly, the period spent on remand and finally to pronounce the time which an appellant is expected to spend in prison. This way any doubts are cast out.

Despite not strictly applying the conditions, as set, under **Rwabugande**, the learned trial Judge clearly stipulated the sentence. The appellant was sentenced to 15 years and 3 months' imprisonment. The trial Judge considered the aggravating circumstances of this case which included the betrayal of a family friend, intruding on and compromising of the safety of a friend's children, defiling the underage-child of someone he called a friend and traumatising two children of tender age. We find that in arriving at a lenient sentence of 15 years and 9 months, the trial Judge appears to have been swayed by the mitigating factors which included the age of the appellant, he was 25 years of age, and capable ot reform, had a broken and contrite nature.

We have no reason to disturb the sentence and therefore we uphold the same. In the result, the appellant shall serve the sentence of 15 years and 9 months' imprisonment with effect from the 20th of July 2018, being the date of conviction.

Consequently, this appeal fails.

We so order.

Dated at **Kampala** this 7th **day** of ..... **2023.**

HELLEN OBURA
JUSTICE OF APPEAL

CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

CHRISTOPHER MADRAMA
JUSTICE OF APPEAL