THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

Coram: Egonda Ntende, Bamugemereire & Mulyagonja, JJA.

CRIMINAL APPEAL NO 536 OF 2014

BETWEEN

OMONA CHRISTOPHER :: APPELLANT

AND

UGANDA:: RESPONDENT

(Appeal from the decision of Dr Nabisinde, J. delivered on 22nd October 2013 in Lira Criminal Session Case No. 093 of 2011)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for the offence of aggravated defilement of a girl under the age of 12 years, contrary to sections 129 (3) and (4) (a) of the Penal Code Act. On 22nd October 2013 he was convicted and sentenced to imprisonment for 20 years.

Background

The facts upon which the appellant was convicted were briefly that Hanifa, the victim, lived with her biological parents in Telwa Cell, Atura Parish in Oyam District. They lived within the vicinity of her uncle, Okwera Musa, a peasant and fisherman. Sometime in January 2011, Hanifa's mother was summoned to her parent's home in Kampala. She left Hanifa in the care of the appellant and/or her uncle, Okwera. The appellant was a fisherman but he sometimes worked for Hanifa's father in his garden for cash. He was Okwera's neighbour but it appears he was invited by Hanifa's mother to stay in their kitchen while she was away, to safeguard their animals.

In the night of 11th January 2011, the appellant broke into the papyrus grass thatched hut where Hanifa's family lived, in which she was asleep and alone, and had forceful sexual intercourse with her. Early in the morning on 12th January 2011, she reported the incident to her uncle, Musa Okwera who in turn called in some women to examine her. They established that she was indeed subjected to sexual intercourse. The matter was referred to Local Council I Chairman who called in the Police. The victim was examined at Oyam Health Centre and it was found that she had injuries consistent with sexual assault. The appellant was arrested, indicted, prosecuted and convicted as we have stated above. He now appeals against both conviction and sentence on the following grounds:

1. The learned trial judge erred in law and fact when he convicted the appellant on the uncorroborated evidence of the victim, thus occasioning a miscarriage of justice.
2. The learned trial judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant.

He prayed that this court quashes the conviction and sets the sentence aside. In the alternative that the sentence be reduced as the court deems fit.

The respondent opposed the appeal.

Representation

At the hearing of the appeal on 30th March 2023, Mr Douglas Odyek Okot represented the appellant on State Brief. The respondent was represented by Ms Fatinah Nakafeero, Chief State Attorney, from the Office of the Director of Public Prosecutions.

Both counsel filed written submissions as directed by court before the hearing date. They each prayed that court considers the said submissions in the appeal and their prayers were granted. Both counsel

also made a few oral clarifications to the court. The appeal was therefore decided on the basis of both oral and written submissions.

Consideration of the Appeal

The duty of this court as a first appellate court was laid down in rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, SI-13-10. It is to reappraise the evidence before the trial court and draw from it inferences of fact and reach its own decision. But in doing so, the court must be cautious that it did not hear the witnesses testify. The court may also take additional evidence where necessary.

We now proceed to reappraise the evidence, on the basis of the grievances that were raised by the appellant in the appeal. We shall review the related submissions before addressing each of the grounds of appeal, which we will dispose of in chronological order.

Ground 1

In his first ground of appeal the appellant complained that the trial judge relied solely on the uncorroborated evidence of the victim to identify him and therefore occasioned a miscarriage of justice when she convicted him on that basis.

Submissions of Counsel

Counsel for the appellant submitted that he did not contest the first two ingredients of the offence of aggravated defilement since it was proved that indeed the victim was defiled. Therefore, the contest was about the identification of the person who defiled her. Counsel went on to submit that the trial judge based the conviction on the evidence of the victim alone which was not corroborated by any other evidence. He added that the evidence adduced through Musa Okwera was hearsay evidence.

Counsel relied on the decision in **Chila & Another v Republic [1967] EA 722** were the court stated that corroboration in sexual offences is a matter of practice when relying on the testimony of a single identifying witness. He went on to state that it was also the decision of the court in that case that the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so, he may convict in the absence of corroboration if he is satisfied that the evidence is truthful. Counsel further submitted that this issue was settled by the Supreme Court in **Remigious Kiwanuka v Uganda, Criminal Appeal No. 41 of 1993,** where it was held that corroboration is not essential in law but it is the practice for the court to look for it, and an established practice to warn the assessors against the danger of acting upon the uncorroborated testimony of the complainant.

Counsel then went on to state the law with regard to basing a conviction on the testimony of a single identifying witness as it was laid down by the East Africa Court of Appeal in **Abdalla Bin Wendo & Another v R (1953) 20 EACA 166** and **Roria v R [1967] EA 583**; that the testimony of a single identifying witness must be tested with the greatest care. He laid down the principles enunciated by the court in that regard in detail. He went on to submit that in the instant case the trial judge would have been correct to rely on the evidence of a single identifying witness without corroboration if she was indeed satisfied that the witness was truthful and there was no possibility of error in identification of the perpetrator; but it was not so.

Counsel then pointed out that in cross examination, as shown at page 15 of the record, the victim first stated that she had never seen the appellant before the night of the incident but she later changed her mind. That this uncertainty creates doubt as to the victim's familiarity with the appellant. Further that she testified that she recognised the

appellant's voice but was uncertain as to whether she had met him before or not. Counsel further pointed out that on the same page of the record the witness testified that on the night of her assault the room was *very* dark at the time the assailant had sex with her and it was still *very* dark when he left. Further that the place from which she was defiled was not far from the house of Musa Okwera (PW2), but Musa did not hear any noise from Hanifa's home. He then asserted that these circumstances fell short of the test that was laid down by court in **Abdalla Nabulere** (supra).

He emphasised that the circumstances under which the victim identified her assailant were unfavourable and there was therefore need for corroboration. He referred to the decision in **Mugoya v Uganda [1991] EA 202**, where it was held that in sexual offences, in addition to evidence to corroborate that sexual intercourse with the victim took place, there is also need for corroboration implicating the assailant as the person who committed the offence. That it was therefore necessary to find other independent evidence to prove that the appellant committed the offence and its absence creates strong doubt as to the credibility of the victim's statement, which the learned trial judge solely relied upon. He prayed that this court finds that the prosecution failed to prove beyond reasonable doubt either by direct or circumstantial evidence that it was the appellant that defiled the victim.

In reply, counsel for the respondent agreed that indeed the trial judge based the conviction on the sole evidence of the victim. That the victim identified the appellant as the person who came to their hut, kicked the door open, entered and had sexual intercourse with her, while threatening to kill her if she made any noise. She pointed out that the trial judge further analysed the testimony of the victim during cross examination and observed that she remained calm and answered all the questions. That she knew the appellant as someone who used to dig at

their home and she always greeted him and heard him speak. That the trial judge further noted from the victim's testimony, that the appellant spoke when he entered the house and she could easily tell it was he speaking. She referred us to the testimony of the victim at page 19 of the record of appeal.

Counsel further submitted that the trial judge demonstrated that she was alive to the law regarding conviction on the basis of the evidence of a single identifying witness. She cautioned herself on the factors favouring correct identification of the appellant. However, she opined that from the evidence of the victim it was clear that she knew the appellant and PW2 very well. That her demeanour was not seized with any ill motive and therefore she was a truthful witness. She referred court to the last paragraph of her judgment at page 46 of the record of appeal.

During the hearing of the appeal, court asked counsel for the respondent to clarify the basis for her support of the trial judge's findings about the victim's demeanour, which were at page 47 of the record. Counsel explained that the distressed condition of the victim can be a corroborative factor, that is if the victim appears distressed on the stand or breaks down. She also admitted that there was nowhere on the record that the trial judge recorded her observations about the demeanour of the victim as she testified.

In her written submissions, counsel for the appellant went on to submit that the trial judge cautioned herself on the requirement for corroboration of evidence in sexual offences in the circumstances under which the court convicts on the uncorroborated evidence of the victim, specifically where the court finds the witness to be truthful. Counsel further submitted on the basis of the decision in **Abdalla Nabulere** (supra) where the factors that ought to be considered by the courts were laid down. She asserted that the trial judge came to the correct decision.

He asserted that in the instant case the factors favouring correct identification were present and the witness remained firm event during cross examination. She submitted that the evidence was sufficient to place the appellant at the scene of the crime as the trial judge correctly found.

Counsel then went on to submit about what she called the *alibi* pleaded by the appellant. She referred to the decision in **Bumbo v Uganda, Supreme Court Criminal Appeal No 28 of 1994**, where it was held that the law is that once an accused person has been positively identified during the commission of a crime his claim that he was elsewhere must fail. She pointed out that the appellant admitted that the mother of the victim left her and her property under his care and he slept in the kitchen. That he further admitted that he always went to the victim's house at 6.30 and stayed with her "till morning hours." That in addition he stated that he did not record any statement at the police regarding his purported *alibi.* That it is a settled position that where an accused person has an *alibi* he should disclose it at the earliest stage so that it can be investigated. She referred to the decision in **Asenua & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1998** to support her submission. She prayed that this court upholds the conviction.

Resolution of Ground 1

Two issues fall for the determination of this court under this ground of appeal, and they are: i) Whether the trial judge erred when she based the conviction on the evidence of a single identifying witness; and ii) Whether there was need for corroboration of the evidence of the victim about the identity of her assailant.

With regard to the first issue, it is pertinent to reproduce the findings upon which the trial judge based the conviction of the appellant. They

were at pages 5-6 of her judgment (page 45-46 of the record of appeal) and as follows:

> *"She narrated before court the circumstances under which the accused person allegedly performed the sexual act with her, that:*
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> *'... the accused came, kicked the door open and opened, (sic) he entered and had sexual intercourse with me. He took off his trousers and slept on me. It was Omona. I did not understand what he was doing. ... I felt pain in my back, in my stomach. I know what sexual intercourse is. Yes, I know sexual intercourse between a man and a woman. He slept on me. He had sexual intercourse with me. He used his penis. He pushed it in my private parts. ... I woke up and the penis of the accused was still in my private parts. I tried to talk and he said he was going to kill me with a knife.'*
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> *During cross examination she maintained that it was the accused and pointed at him, she first said that she did not know him before but then changed and said she used to see him in the village where they lived and he used to come and dig at their home. That she had ever heard him speak and knew his voice very well. Further, that it was dark in the room with no lights but he spoke loudly although she could not see his face. She maintained in cross examination that she used to see him come to dig at their home, and that she used to greet him and hear him speak, that she knew it was him because she heard him speak with other people in the compound; that he spoke when he entered the house and she could identify his voice from other people in the area. She insisted it was his voice she heard that night and could recognise it. I have no reason not to believe that she knew what she was talking about."*

It becomes clear from the excerpt above that the trial judge did not rely on the physical identification of the appellant by the victim but on identification by voice. Clearly the emphasis on the physical identification of the appellant and the authorities that were cited by both counsel in this case seem to have been misplaced. We shall now consider the evidence on the record from the perspective that the trial judge did and establish whether she was correct when she came to her findings and conclusion about the identity of the appellant.

Okwera Musa, PW2, stated that in the morning of 12th January 2011 at 6.30 am his niece, Hanifa, went to him and reported that Omona forced

the door of the house open, entered and proceeded to have sexual intercourse with her from that time till morning. Okwera took her to women in the neighbourhood, one of whom was Nabukeera Shamim (PW3) who confirmed that she was defiled because her private parts were swollen. During cross examination, PW2 stated that he knew Omona because both of them were fishermen. Further that Omona *"used to dig for money when Muzamiru was present."* Muzamiru was Hanifa's father. He further explained that the appellant was *"common in the compound of the victim because it was close."*

The appellant tried to deflect responsibility for the crime to Okwera. At page 23 of the record he stated thus:

> *"She said she heard my voice; that is an arrangement between her and Musa. (sic) He is the person who they said should not go to her home. I found them together on 11.1.2013. I found them at the home of Akullu Jurifa seated, Immediately Musa said he did not want to see me. I told him I had not come for him but because of the child as I was instructed. I called Hanifa and took her back home. ..."*

However, earlier on in his testimony in chief, with regard to the victim's familiarity with his voice, he had already implicated himself when he sated thus:

> *"On 31 she (the mother) went and left me with Hanifa and all her properties. Everything was ok. I was to look after her in her home. This implied that during day time she should stay at her home. At night I would go there at 6:30 and stay with her till morning hours. She would sleep in the kitchen. I started sleeping there on 31.12.2010. I had begun working then on 31.10.2010. It did not happen. I used to stay with the girl up to 9pm, why would I open the door later."*

Clearly, contrary to the submission of counsel for the respondent, the appellant pleaded no *alibi*. We therefore did not consider that as his defence.

The victim's testimony was correctly summarised by the trial judge in the excerpt that we laid down above. We need not repeat it here but add

that Hanifa's testimony in chief was not shaken; she maintained her stance in cross-examination when she explained that she used to hear him speak to others in their compound and could differentiate his voice from those of other people. Musa Okwera's testimony lent credence to this when he stated that the appellant was a common person to find in the victim's parent's compound.

It is important to note that *'ear witness evidence'* may present its own challenges just as eye witness evidence does. In **R v Robinson [2005] EWCA Crim 1940,** at page 5, the Court of Appeal of England and Wales observed that:

> *"We see the force of his observations about the problems associated with voice recognition evidence and the other associated difficulties in this particular case. However, it seems to us that these problems are no different in their general nature from the problems frequently encountered with visual identification. In fleeting glimpse cases where conditions are poor it is common place for the judge to have to give a detailed warning about the dangers of reliance on the evidence, yet those problems are not usually perceived to be such as should result in the evidence being regarded as inadmissible, as having no weight at all. ..."*

This court in **Twesigye Stephen v Uganda, Court of Appeal Criminal Appeal No. 290 of 2010,** considered the evidence of the survivors of an armed robbery whose only mode of identifying one of the assailants, the appellant, was by his voice. The victims, a man and his wife, were very sure they positively identified the assailant by his voice because he was known to them before. The wife testified that in fact he was a friend to their son and she used to interact with him. The court relied on a passage in Sakar on Evidence, 14th Edition at page 170, where it is stated that:

> **If the Court is satisfied about the identification of persons by evidence of identification of voice alone, no rule of law prevents its acceptance as the sole basis for conviction. Possibilities of mistakes in identifying persons by voice especially by those who are closely familiar with the voice could arise only when the voices heard are different from the normal voices on account of the**

situation or when identical voices are possible from other persons also ...

The Supreme Court in **Kooky Sharma v Uganda, Criminal Appeal No 44 of 2000 [2002] UGSC 18**, considered a situation where the voice identifying witness did not understand the language spoken by the suspects. Neither had she interacted with them face to face before the offence was committed. Before rejecting the witness' identification of the assailants by voice, the court held thus:

> *"In our view, although it is not necessary for a witness to understand or be literate in a language being spoken in order to identify the speaker with whose voice she is already familiar, identification becomes a crucial issue if the identifying witness is unable to physically see the speaker whose voice she claims to identify. This is the problem we see in this appeal; ..."*

However, that is not to say that it is not possible to positively identify a suspect whom the witness has not seen by voice and have them convicted on the basis of such evidence. In **Kansiime Brazio & Another [2014] UGCA 71,** this court confirmed the conviction of one of the appellants on the basis of the voice identification evidence of a single witness. The court agreed with the trial judge because it was established that the witness testified that he knew the assailant all of his life. She was a regular visitor at their home and a close friend of the deceased. The witness therefore testified about a normal call of the friend to her mother, whom he and the mother knew very well, but who turned into her assailant.

Finally, in **Sabwe Abdu v Uganda, [2010] UGSC 15,** the court upheld the conviction of the appellant who kidnapped two girls when they were blind folded and defiled one of them who was below the age of 18 years. While finding for the respondent the court held thus:

> *"There is evidence on record that the two girls were familiar with the appellant because he lived about a quarter of a mile from their home, they*

always passed by his home as they went to school and they used to hear him speak to other people. The appellant also used to come to their home where they would hear him speak to their father. We agree with the trial judge's finding that given these circumstance the girls would be able to identify the appellant by voice even if they had never directly talked to him. To identify a person's voice, one does not necessary have to have talked with that person."

In the instant case, Hanifa had not only seen the appellant before but has seen him many times in her father's compound and heard him talk to others persons. He talked to her while he defiled her and threatened to kill her if she revealed his dark deed to anyone. We found no need for corroboration of her evidence because the appellant placed himself at the scene of the crime at the appropriate time that the offence was committed.

But before we take leave of this ground of appeal, we found it necessary to comment about the trial judge's observations about the demeanour of the victim while on the witness stand. At page 7 of her judgment she stated thus:

*"During cross examination, **I observed her demeanour and observed that she was not seized with any ill motive or guile to place the offence on the accused person** as the defence argued (sic) the court to think. I concluded that she was truthful and at her age, she could easily differentiate the voice of a person she had known before from other persons."*

{Emphasis added}

"Demeanour" is defined by Black's Law Dictionary, 9th Edition, West, as *"Outward appearance or behaviour, such as facial expressions, tone of voice, and the readiness to answer questions."* The authors add that in evaluating credibility, the jury may consider the witnesses' demeanour. The Dictionary goes on to define *"demeanour evidence"* as *"the behaviour and appearance of a witness on the witness stand, to be considered by the fact finder on the issue of credibility."*

The rule of thumb with regard to the demeanour of witnesses, as it relates to the role of the appellate court, was re-stated by the Supreme Court in **Kifamunte Henry v Uganda, Criminal Appeal No. 10 of 1998, [1998] UGSC 20** as follows:

> *"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.* ***When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses.*** *However, there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972) E.A. 32, Charles B. Bitwire vs Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.*
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> *{Emphasis added}*

The dictum above implies that the findings based on evidence of demeanour should not be taken wholesale by the appellate court. The manner in which the evidence is given by witnesses is only part of the process of arriving at the decision in the particular case before court.

In **Sewanyana Livingstone v Uganda, Supreme Court Criminal Appeal No. 19 of 2006. [2010] UGSC 16**, the conclusions of the judge based on demeanour were challenged because he did not record any observations on the manner in which the evidence of the witness was given while he was in the dock. The trial judge had in his judgment given details of his impression of the demeanour of the witness as she testified as follows:

> *"Sentiments are a poor guide to justice. But I will say this without fear or favour. Looking at this girl in the witness box, all I could see was a pristine face of innocence. I subjected her demeanour in witness box to an intensive and anxious examination. I followed every movement of her eyes. I studied her body language with meticulous care and curiosity. I*

followed her body expression when faced with an embarrassing situation and revelation and I can say with full confidence that I could not detect any sign of sinister in this girl. (sic) In short, I can say with confidence that she was a truthful witness. This is a young girl of some remarkable beauty. Why should she put her name, beauty and future to a ruin. (sic) If she did not have a wrong to put right? She would have been much, nay, very much better off by keeping silence. Why did she open up? There must be a strong motive and I find that motive to be in the search for justice."

Finding in favour of the respondent, the Supreme Court held that:

"We have perused the record and observed that PW1 testified on 24/02/2005. The trial judge delivered his judgment on 22/3/2005. This is a period of less than a month. He must have had full impression of demeanour of PW1. ***The best course of action would have been to record impressions but in this particular case the judge was alive to the facts of the case and they were very fresh in his mind.***

The law is that the trial judge must adopt the impression on the demeanour of the witness by testing it against the evidence given by the witness in the case as a whole. The learned trial judge did that. ***Lugolobi Lwetute and another Vs Uganda, Criminal Appeal No 150 of 2002 C.A.***

In the premises we cannot fault the learned Justices of the Court of Appeal when they held that the trial judge is the best judge on the demeanour of the prosecution witness ..."

{Emphasis added}

The negative aspects of the practice were demonstrated in **Baguma Fred v Uganda (Criminal Appeal 7 of 2004) [2005] UGSC 24.** The appellant in that case appealed against the decision of this court upholding his conviction on the sole ground that the court failed to re-evaluate the evidence and confirmed his conviction. The Supreme Court found that it was evident from his judgment that the trial judge relied *"virtually exclusively"* on the demeanours of witnesses to determine the credibility of the evidence. The court observed that the trial judge's evaluation of the evidence was not balanced because there were other material aspects of the evidence bearing on credibility that he ought to have taken into consideration, but he did not do so. The Supreme Court thus found that the Court of Appeal failed to re-evaluate the evidence, making it necessary for the second appellate court to do so. On doing so, the Supreme Court found that assessment of the credibility of the

witnesses by the trial judge was wrong, though he had the advantage of seeing and hearing them testify. The conviction was quashed and the appellant set free, but the court further observed as follows:

> *"Before taking leave of this case, we are constrained to comment on a tendency of some trial judges to short-circuit evaluation of evidence by stereotype lauding of the manner and demeanour of witnesses for the party that the trial judge has decided should win and damning those of the opposite party. An observation in the judgment that the witnesses were straightforward, unshaken and/or consistent, or were shaky, evasive, and/or shifty, to illustrate the manner and demeanour of the witnesses, is hardly impressive where it appears to be a mere recollection of what transpired during the hearing. It is more reliable and carries more weight with the appellate court, when it is accompanied by corresponding notes that the trial judge made contemporaneously with the recording of evidence as he/she heard and observed the witnesses."*

We note that unlike the situation in civil proceedings where Order 18 rule 10 of the Civil Procedure Rules provides that the court may record such remarks as it thinks material respecting the demeanour of any witness under examination, there are no rules about the taking of evidence in Criminal Trials under the Trial on Indictments Act (TIA). Instead, the TIA provides in section 143 that where no express provision in made in the Act, the practice of the High Court of Justice in England in its criminal jurisdiction shall be assimilated as nearly as circumstances will admit. The practices of recording evidence have significantly metamorphosed with technology being used almost exclusively in the courts in the United Kingdom. Regardless of that fact, the obligation of trial judges to make notes about the demeanour of witnesses that they find significant during the trial cannot be overemphasised. This is especially so in view of the fact that even in Uganda, evidence in the High Court is at present largely recorded electronically.

Nonetheless, even in the absence of a recording by the trial judge on the demeanour of the victim as she testified, and though solely based on her identification of the appellant by voice, we are satisfied that the conviction in the case now before us was safe. We hereby uphold it and Ground 1 of the appeal fails.

Ground 2

In this ground of appeal, the appellant was aggrieved that the sentence that was imposed on him by the trial judge was manifestly harsh and excessive in the circumstances of the case.

Submissions of counsel

Counsel for the appellant submitted, on the basis of **Kyalimpa Edward v Uganda, Criminal Appeal No 10 of 1995,** that an appropriate sentence is a matter for the discretion of the sentencing judge. That it is normally the practice that the appellate court will not interfere with the discretion of the sentencing judge unless the sentence is illegal or where the court is satisfied that the sentence imposed was manifestly so excessive as to amount to an injustice. He further referred to the decision of the Supreme Court in **Kiwalabye Bernard v Uganda, Criminal Appeal No. 143 of 2001**, for the same principle.

Counsel went on to submit that in the case of **Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No. 34 of 2015**, it was held that sentence is not a matter of emotions but of law. He referred us to the decision of the Supreme Court in **Mbunya Godfrey v Uganda, Criminal Appeal No. 4 of 2011,** for the principle that there is need to maintain consistency while sentencing persons convicted of similar offences. He then referred to the decision of this court in **Ntambala Fred v Uganda, Criminal Appeal No. 34 of 2015**, where a sentence of 14

years' imprisonment was confirmed in respect of the appellant who committed aggravated defilement against a victim aged 14 years.

Counsel further referred to the decision of the Supreme Court in **Katende Ahamad v Uganda, Criminal Appeal No. 6 of 2004**, where the appellant who defiled a child aged 9 years was sentenced to 10 years' imprisonment. He also drew our attention to the decision in **Kizito Senkulu v Uganda, Court of Appeal Criminal Appeal No. 36 of 2010,** where the appellant who was convicted of the defilement of a girl aged 13 years was sentenced to 13 years' imprisonment. He prayed that in the event that the challenge to the conviction of the appellant fails, the court should reduce his sentence to 10 years' imprisonment.

In reply, counsel for the respondent agreed with the principles stated by counsel for the appellant in relation to the powers of this court to interfere with the sentence of a trial court. With regard to the proposition that the appellant's sentence should be reduced to 10 years' imprisonment she pointed out the aggravating circumstances in this case that counsel submitted about before sentence. Further, that the victim knew the appellant as their neighbour, but he heartlessly grabbed her at the age of only 13 years and mercilessly defiled her in her mother's house, instead of exercising his duties as a trustee. That the appellant was 64 years old and more than double the age of the victim and fit to be her guardian. That the victim suffered serious injuries and was introduced to sexual intercourse at a very early age.

Counsel for the respondent further emphasised that the maximum penalty for aggravated defilement is death and according to the 3rd Schedule of the Sentencing Guidelines for the Courts of Judicature the starting point for aggravated defilement is stated to be 35 years. Further that the sentencing range is 30 years to death. She concluded that the sentence of 20 years' imprisonment imposed on the appellant was not

manifestly harsh and the court rightly directed itself on the law and applied it to the facts.

Counsel went on to submit that in **Bonyo Abdul v Uganda, Supreme Court Criminal Appeal No 7 of 2011**, the court confirmed a sentence of life imprisonment for aggravated defilement of a 14-year-old victim who was exposed to HIV infection. Further that in **Mbachwa Benon v Uganda, Court of Appeal Criminal Appeal No 869 of 2014**, this court confirmed the sentence of life imprisonment for aggravated defilement of a victim who was 10 years old and exposed to HIV infection by her assailant. She also drew our attention to the decision in **Bukenya Joseph v Uganda, Supreme Court Criminal Appeal No. 17 of 2020**, where the Supreme Court confirmed a sentence of 20 years' imprisonment for aggravated defilement, and **Mubiru Andrew v Uganda, Criminal Appeal No. 374 of 2019**, where this court reduced the sentence of 22 years by the period spent on remand and sentenced the convict to 17 years 9 months and 5 days' imprisonment. She further cited **Tiboruhanga Emmanuel v Uganda, Court of Appeal Criminal Appeal No. 655 of 2019,** where a sentence of 25 years' imprisonment for aggravated defilement, in which the victim was exposed to HIV AIDS, was imposed. She prayed that this court dismisses the appeal and confirms both conviction and sentence.

Resolution of Ground 2

We observed that in his submission in mitigation of sentence counsel for the appellant, at page 32 of the record, emphasised two points. The first was that the convict was 63 years old at the time he committed the offence and thus was in the evening of his life. Further, that he spent two and a half years on remand before he was convicted, making him 65 ½ years old at the time of his conviction and sentence. In arriving at what she considered an appropriate sentence the trial judge, at page 50 of the record of appeal, ruled as follows:

"It is true the maximum sentence in such cases is the death penalty, but be that as it is, (sic) the circumstances of each case are judiciously considered. I have therefore looked at the aggravating circumstances in this case vis-à-vis the mitigating circumstances. The victim in this case was only 12 years of age; she was subjected (to) sex at a very early age and as a result was traumatised. The convict is an old man, fit to be her grandfather and was entrusted to care for her, but instead, he abused that trust. ***I find that the fact that he is old actually aggravates his case, he should have known better, (I) therefore find that the aggravating circumstances outweigh the mitigating circumstances.*** *While it would be appropriate to sentence him to 35 years in prison, I have taken note of his demeanour and the time he has spent on remand. In the circumstances, I find that 20 years' imprisonment will be an appropriate sentence in this case."*

{Emphasis added}

The factors that aggravate a sentence for defilement are stated in paragraph 35 of the Sentencing Guidelines. We observed that though it is not included among the mitigating factors for aggravated defilement, advanced age is one of the mitigating factors for the death sentence in paragraph 21 (1) thereof. Advanced age is also considered as a factor that would entitle a person indicted for trial under the TIA to bail, as an exceptional circumstance under section 15 (3) (c) thereof. It is also recognised as a factor that mitigates sentence in common law jurisdictions and on this continent, in the Republic of South Africa, among others.

The Supreme Court of South Africa articulated the principles related to advanced age as a mitigating factor in **S v Munyai, 1993 1 SACR 252 (A),** where the appellants committed the murder of a 2 ½ year old boy as a human sacrifice. The convicts were sentenced to suffer death and they appealed the sentence. While considering the appeal of the 1st appellant who was of advanced age, the court made the following observations:

"Despite the fact that he too is a first offender and that he is an unsophisticated person with a low level of education, there is in the

circumstances, and but for one factor, no basis on which he should not also be sentenced to death. That one factor is his age. At the time of the trial (in June 1990) he was 77 years old. That means he is now 79. One instinctively baulks at the thought of a person of this advanced age being sent to the gallows. And, it seems to me, the objects of punishment do not require this. It is true that there is Roman-Dutch authority to the effect that, save where there is a loss of mental capacity and in relation to the imposition of corporal punishment, old age is, generally speaking, not a ground for leniency ... Nevertheless, our courts have (as for example in S vs Heller 1971(2) SA 29(A) at 55 C) treated old age per se as a mitigating factor when deciding on an appropriate period of imprisonment. This has been done on the basis of compassion coupled I think with the perception that the community expect old people to be treated with sympathy ... Even in the absence of any evidence that the first appellant suffered from diminished insight or responsibility, I think that this approach should apply here. Of course, in sentencing, misplaced pity must be guarded against ... But the first appellant is close to 80. This being so and notwithstanding the extreme repugnance of his crime, society would understand that, unlike in the case of the second and third appellants, the imposition of the death sentence on the first appellant is inappropriate. It is therefore not the (only) proper sentence. The proper sentence, in my view, is one of life imprisonment."

The same principles are espoused by the courts in Zimbabwe, England and Australia, among others. Marita Carnelley, & Shannon Hoctor (2022)[1] state that,

"The basis for the principle is compassion and mercy ... In Zimbabwe the courts have (been) known to go further as it has been noted that the courts would rather err on the side of leniency when sentencing an elder ... The relevance of mitigation increases with old age especially if it is combined with another mitigating factor such as poor health and a shortened life expectancy ... With regard to deterring the elderly from offending, there is generally no need for such deterrence as there are very few potential offenders ... In Australia maturity alone may be mitigating depending on the circumstances of the case, as long as it does not downgrade the seriousness of the offence to the detriment of the general deterrence objective ... The argument is that to imprison an elderly person for retributive purposes would be pointless and the concept of special

[1] *Advanced Age as a Mitigating Factor. Obiter, 29*(2). https://doi.org/10.17159/obiter.v29i2.13255

deterrence would be irrelevant ... The court cannot overlook the fact that each year of the sentence represents a substantial portion of the period of life left to the offender ... and as such mercy is afforded to the elder offender ..."

What constitutes advanced/old age for purposes of sentencing is indeterminate and best left to the sentencing judge. Further to that, what amounts to old age can change over time as the average lifespan increases and may vary according to the particular circumstances of the offender, including his or her mental and physical health and lifestyle. (See: **Kaye v The Queen [2004] WASCA 227**).

We observed that there has not been much analysis or justification for the application of the principle that advanced age may be considered as a mitigating factor by the courts in Uganda. That may be the reason why it is glaringly missing from the factors that may mitigate sentence in cases of defilement laid down in the Sentencing Guidelines. But in **Kereta Joseph v Uganda, Court of Appeal Criminal Appeal No. 243 of 2013**, referred to in **Abaasa & Anor v Uganda (Criminal Appeal 33 of 2010) [2016] UGCA 71**, the appellant was sentenced to 25 years' imprisonment for murder. This Court reduced the sentence to 14 years' imprisonment for the reason that he was advanced in age and had shown remorse.

It was therefore not correct for the trial judge in this case to consider the advanced age of the appellant as an aggravating factor before she determined that 20 years' imprisonment was the appropriate sentence for him in the circumstances of the case.

We also accept the submission by counsel for the appellant that the trial judge did not consider the principles of uniformity and consistency while sentencing the appellant. Paragraph 6(c) of the Sentencing Guidelines requires that while sentencing an offender, every court **shall** take into account the need for consistency with appropriate sentencing

levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances.

The sentence imposed was therefore based on a wrong principle. In addition, the trial judge failed to consider one of the basic/general sentencing principles in the Sentencing Guidelines. We therefore set the sentence aside and shall impose an appropriate one pursuant to section 11 of the Judicature Act.

Sentence

We have considered the submissions of both counsel at page 32 of the record of appeal. We agree that the offence that was committed was grave and that it traumatised the victim. Further that the appellant, given his age ought to have known better. On the other hand, the parents of the victim abdicated their responsibility when they left an adolescent with two adult males to take charge of her, while she slept in a grass thatched hut. Her only source of safety was a hasp on the door in which she inserted a stick to keep intruders out. Even though due to his advanced age the appellant ought to have known better, we do not think that a deterrent sentence would be appropriate for him while in the evening of his life. He is now almost 10 years older since he was convicted on 22nd October 2013. This makes him 71 years old. We also note that he had at the date of concluding the hearing of his appeal in this court been in custody for 12 ½ years, given that he was in prison for 2½ years before his conviction.

We have also considered the sentencing levels for similar offences that were commended to us by counsel for both parties in this case. We observed that in the majority of cases cited by counsel for the respondent higher sentences than those that were referred to by counsel for the appellant were imposed. The reason for the higher sentences was that the assailants in those cases not only defiled young girls but they

exposed them to the possibility of contracting the virus that causes HIV and AIDS. We need not consider them in this case where that was not one of the facts upon which the appellant was convicted.

From the authorities cited by counsel for the appellant, we note that the range of sentences for the offence of aggravated defilement was 10 to 14 years' imprisonment. We see no need to consider more sentences in this case. We think that a sentence of 13 years' imprisonment would serve the cause of justice in this case. From that, we deduct 2½ years that the appellant spent in prison before his conviction and we sentence the appellant to serve 11 ½ years' imprisonment from the date of his conviction.

Dated at Gulu this 18th day of May 2023.

Frederick Egonda Ntende
JUSTICE OF THE COURT OF APPEAL

Catherine Bamugemereire
JUSTICE OF THE COURT OF APPEAL

Irene Mulyagonja
JUSTICE OF THE COURT OF APPEAL