THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 177 OF 2012

OTUKENE INNOCENT ..... APPELLANT

VERSUS

UGANDA.....RESPONDENT

(An appeal from the decision of the High Court at Gulu before His Lordship Hon. Justice Akiiki- Kizza dated 13th June, 2012 in Criminal Session Case No. 059 of 2012)

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE F.M.S EGONDA- NTENDE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

This appeal arises from the decision of His Lordship Akiiki- Kizza J, in High Court Criminal Session Case No. 059 of 2012 delivered on 13th June 2012, in which the appellant was convicted of the offence of aggravated defilement contrary to Section 129 (3) and (4) of the Penal Code Act (CAP 120) and sentenced to 28 years imprisonment.

Brief facts

On 3rd March, 2011 the victim a 2 ½ year old girl was left by her mother PW1 under the care of the appellant who was her step-father. In her absence the appellant was alleged to have had sexual intercourse with the victim and concealed the evidence by bathing her and changing her clothes. The victim was heard crying extra ordinarily by their neighbour one Susan Arach PW2

who didn't bother to find out why, thinking the step father was disciplining her.

In the evening when PW1 returned, she realised that the victim had been crying and her clothes had been changed. Upon asking the victim why she was crying, she replied that the appellant had done something to her private parts while pointing there. When she checked her she saw bruises and a watery substance coming out of her private parts. PW1 called PW2 and Atoo Florence PW3 who checked the victim and found the same thing. Later on, the appellant was arrested and charged with the offence of aggravated defilement. On 13th June, 2012 he was convicted and sentenced to 28 years imprisonment.

The appellant being dissatisfied with the decision of the High Court, now appeals to this Court on the following grounds;-

1. *That the learned trial Judge erred in law and fact when he relied on circumstantial evidence to convict the appellant of the offence of aggravated defilement.*

2. *That the learned trial/ sentencing Judge erred in law and fact when he imposed an illegal sentence against the appellant contrary to Article 23 (8) of the Constitution of the Republic of Uganda.*

3. *The learned trial Judge erred in law and fact when he passed an excessive and harsh sentence in the circumstances against the appellant.*

Representations

At the hearing of this appeal, the appellant was represented by *Mr. Moses Oyet* on state brief while learned Principal State Attorney *Mr. Martin Rukundo* appeared for the respondent.

The Appellant's case.

Mr. Oyet first sought and was granted leave to regularise late filing of the Notice of Appeal.

Counsel then submitted that, the learned trial Judge erred when he convicted the appellant on the basis of insufficient circumstantial evidence. He contended that, there was no direct evidence linking the appellant to the commission of the offence and that, the circumstantial evidence adduced was insufficient to prove the offence against him.

Counsel argued that, the victim was not called to testify at the trial. It was only Akello Irene PW1 and Suzan Arcah PW2 who testified in Court yet they were not eye witnesses to the crime.

Counsel submitted further that, the learned trial Judge erred in law and fact when he failed to warn himself of the fact that the evidence being circumstantial, and in respect of a sexual offence required corroboration. Further that, the appellant was not with the victim throughout the time her mother was away since at around 1pm on that day he had gone to the market. That it was only when he came back that he bathed the victim and changed her clothes as she had defecated on herself.

In support of his submissions he relied on *Ndyaguma David Vs Uganda, Court of Appeal Criminal Appeal No. 263 of 2006* and *Asuman Oliborit Vs Uganda, Court of Appeal Criminal Appeal No. 102 of 1999* and asked Court to quash the conviction.

In respect of ground two, Counsel submitted that, while passing sentence the learned Judge failed to comply with the provisions of *Article 23 (8)* of the Constitution hence rendering the sentence a nullity.

He asked this Court to find that, the sentence is a nullity, set it aside and invoke Section 11 of the Judicature Act. He asked Court to take into account the period the appellant spent on remand and proposed a sentence of 18 years imprisonment from which 1 year and 3 months the appellant had spent on pre-trial detention would be deducted. He relied on *Kisembo Partick Vs Uganda, Court of Appeal Criminal Appeal No. 411 of 2014,* for this proposition.

In the alternative, Counsel contended that the sentence passed by the trial Judge was harsh and manifestly excessive in the circumstances of this case, and asked Court to reduce it to an appropriate and just sentence.

The Respondent's Case.

Mr. Rukundo opposed the appeal and supported the sentence. Although, he conceded that the learned trial Judge had relied majorly on circumstantial evidence to convict the appellant, nevertheless he contended that, that evidence was sufficient to sustain a conviction

Counsel submitted that, the evidence of PW2 showed that, the appellant was with the victim the whole day and she heard her crying in an extra ordinary way. She added that, later the appellant took her out behind the house and bathed her. This evidence was confirmed by the appellant himself. Therefore these circumstances raise an inference that, the appellant was the one who committed the offence, as there was no other person with her that day.

He further submitted that, the circumstantial evidence was corroborated by the testimony of Atoo Florence PW3, who testified that the appellant admitted before her that he had defiled the victim. He relied on *Bassita Hussien Vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995.* He submitted that ground one has no merit and it should be dismissed.

On ground two, Counsel submitted that, the learned trial Judge complied with the provisions of *Article 23 (8)* of the Constitution. He took into consideration the pre-trial detention period the appellant had spent in custody while passing sentence. He submitted that, this ground lacks merit and should be dismissed.

On ground three, Counsel submitted that, considering all the aggravating and mitigating factors of this case, the sentence of 28 years imprisonment was appropriate. The victim was very young aged only 2 ½ years, the appellant had been entrusted with the care of the child but betrayed that trust. He contended that, ground three has no merit. He asked Court to dismiss the appeal.

Mr. Oyet reiterated his earlier submissions and asked this Court to allow the appeal.

Resolution of issues.

We have heard the submissions of both Counsel. We have also carefully perused the Court record and the authorities cited to us.

We are mindful of the duty of this Court as a first appellate Court, as set out in *Rule 30(1)* of the Rules of this Court and as it was well explained by the Supreme Court in *Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997*and *Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.*

We are required to re- evaluate the whole evidence that was adduced at the trial and to come up with our own inferences on all issues of law and fact. We shall proceed to do so.

Ground one

The issue for determination here is participation of the appellant in the commission of the offence of defilement. The evidence that directly implicates the appellant to the crime is what the victim told her mother PW1, Susan Arach, PW2 and Atoo Florence PW3. The victim did not testify in court as she was too young, but the three prosecution witnesses did testify in Court.

There being no eye witness to the commission of the crime, the appellant's conviction was based on circumstantial evidence which was corroborated by the medical evidence adduced by the prosecution.

The law on circumstantial evidence is well settled having been clearly set out by the East African Court of Appeal the predecessor to the Supreme Court of Uganda in *Simon Musoke Vs R [1957] EA 715*,where it held that;-

> *"In a case depending exclusively upon circumstantial evidence, the*
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> *Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. Teper v. R., [1952] 2 All E.R. 447, followed."*

At the trial, the prosecution called three witnesses, while the appellant gave a sworn statement but called no witnesses.

Both the prosecution and the defence, agree that, the victim was clearly below the age of 14 years, as indicated on her medical examination evidence of Police Form 3 and the evidence of her mother PW1, and the sexual act had also been proved by the medical evidence on record. The only issue in contention is the participation of the appellant. The victim was not called to

testify due to her tender age, as she was only 3 ½ years at the time of the trial. There was no eye witness to the commission of the crime.

PW1 the mother of the victim testified that she and the appellant had at the time lived as boyfriend and girlfriend for over a year, when on the 3rd of March 2011, she left the victim under his care and went to wash clothes for her customers some distance away from home. When she returned, she noticed that the victim had been crying and her clothes had been changed. In her own words, in examination in chief she stated as follows;-

> *"On 3. 3. 2011, I was washing clothes away from home. I was washing them for my customers. I was at Blue Mango in Gulu Town which is about 3 kilometers from home. I went at 10:00 am. I returned at about 5-6 pm. When I reached home, I entered the house, I found the accused ironing cloths. The victim was also in the house. I talked with both the accused and the victim. Then I walked out. I noticed that the victim had been crying and had changed clothes from what I had left her wearing. I asked the accused why the victim had cried and changed the clothes. The accused told me that the victim had defecated on the clothes and had changed them."*

She testified further that, soon thereafter, Susan Arach, PW2 her neighbor told her that the victim had been crying during her absence. Further that, when she went back home the victim told her that the appellant had done something and she touched her private parts. The victim had told PW2 and PW3 the same thing. She testified further as follows;-

> *"I then walked out. Then a neighbor (Arach Susan) told me that the victim had been crying. When I came back to the house, Accused left the house*

and the victim started crying again. The victim told me that the Accused, her Daddy, had done something and she touched her private parts.

She was talking by then. She said that, "See Daddy out and touched her private parts. I checked her vagina and found her swollen and something watery was coming from her vagina.

By then the Accused had left for the bar. I immediately called the neighbor, who earlier told me that, she had been hearing the Victim crying, then we proceeded to the L.C.1.

The neighbor is called Susan. When Susan came, she asked the victim what happened, then the victim said "Daddy out did her" and pointed to her private parts. She also put down the baby and examined the victim and saw what I had observed. Then we went to the area L.C.1 Chairman. She is called Atoo Florence. She is the chairperson to report to what had to the victim.

She also asked the victim what had happened and the victim repeated what she had told us earlier. She also examined the victim's private parts. Then she told us to take the victim to Hospital as she had started to be feverish. The L.C.1 Chairperson sent youths to arrest the Accused."(Sic).

In cross examination, she told Court that, a similar thing had happened to the victim when she was 1 ½ years, but she did not take the child to hospital and at the time not taken the matter seriously. In this regard she testified as follows;-

"I had gone to fetch water, I found the victim crying. She pointed me her private parts were painful. By then she was too young to talk. This was

before the present incident I did not take it seriously by then. By then I was still a visitor in the village, but even then, I informed the Accused's mother, who advised me to apply some medication on the victim. At that time, the victim was about 1 ½ years old

It could not talk but this time, it was about to talk and she told what had happened. By the first incident, the hospital was far away, I did not take the child there."

The testimonies of PW2 and PW3 point to the fact that, the victim had been defiled by the appellant. When they asked the victim why she was crying and what had happened to her, she said "Daddy Otu" had put something in her private parts and upon examining her they saw bruises. It was explained that "Daddy Otu" referred to Otukene the appellant. PW2 in examination in chief testified as follows;-

"...I talked to the victim, and asked her, then she called out the name "Otu" who is her father, nothing else. She was pointing to her private parts, while crying.

Lanyero was also with us in the house. I saw bruises in her private parts and something watery was coming from her vagina. The victim called the Accused's name and pointed to her private parts, thought he might have had sexual intercourse with her or had burnt on her with the iron box in the same parts as the skin in the victim's private parts had gone off."

PW3 stated as follows;-

".....in March 2011, at around 9:00 p.m, while lying down in my house, I was called by PW1 and asked her to her and examine the child. I went and found the victim lying on her back.

I saw her private parts were swollen. I asked the victim what had happened. She said daddy "Otu" had put something in my private parts by pointing there. I understood her to mean that, as the private parts were swollen. I understood, I did not know who "Otu" was, whom the victim was referring to."

We have endeavored to reproduce the relevant excerpt of the evidence upon which the appellant was convicted, in order to determine whether it was sufficient to sustain the conviction.

The learned trial Judge based the conviction on the testimonies of the prosecution witness, they all testified stating what the victim had told them, and this was corroborated by the medical evidence. He stated in his judgment as follows;-

"PW1 impressed me as a truthful witness. She gave her evidence in a straight forward manner. She clearly told court that when she returned home she found the victim had been crying and had change of clothes. When she asked the victim what had happened she named "Otu" and pointed to her private parts. Upon checking, she found some injuries in her vagina which was swollen. She called her neighbor (PW2) who also told Court the same thing. PW2 impressed me as a truthful and reliable witness. Both herself and PW1 never contradicted each other materially if at all. In implicating the accused, they were also supported by PW3, the LC Official, who also told Court that, the accused was implicated by the victim by naming him and then pointing to her private parts. According tp PW1, "Otu" was a short version of Otukene, which is the accused's name.

The accused on his part never impressed me as a truthful person. He was shaky and jumpy on the witness stand. He kept shifting and avoided eye

contact with the court. He struck me as a person who was not revealing all he knew about the case. I don't accept his assertion that, he took care of the victim and he fed her twice on the material day. PW2 told Court that she had been hearing the victim cry a lot, and at one time she cried out extraordinarily loud. PW2 told court that sometimes, the accused beat the victim a lot, and that he did not like her."

He concludes as follows;--

"All in all I find that the prosecution witnesses have successfully put the accused at the scene. He had all the opportunity to commit the offence, as he was alone with the victim throughout the day. He must have defiled his step-daughter contrary to Section 129 (7) (a) or (b) of the Penal Code Act. I believe the prosecution witnesses evidence as representing the truth and dismiss the accused's denial and allegation of grudges baseless."

We find that the evidence of all the prosecution witnesses were based on what they were told by the victim about what her step father had done to her.

This evidence however remains hearsay as to the participation of the appellant. In this case we have a child of tender years who did not testify. Had she testified, her evidence would have required corroboration as a single identifying witness.

This being a sexual offence corroboration is usually required. However a Court may convict in the absence of evidence of a victim for defilement if there is evidence sufficient to prove the offence.

In *Omuroni Vs Uganda [2002] 2 EA 508 at page 534, the Supreme Court* observed and held as follows concerning evidence of a victim who was the only eye witness:-

"The evidence was circumstantial as the victim who would have given direct evidence as the only eye witness, did not testify, but nonetheless constituted sufficient proof of the offence of which the Appellant was convicted, as it was amply corroborated by independent evidence.

Although the victim did not testify, PW1's evidence that the victim accused the Appellant of having had sexual intercourse with her, was admissible as the accusation was made contemporaneously with the offence and therefore, was part of res gestae and is an exception to the hearsay rule."

In this appeal as already stated above the victim did not testify however we find that, there was sufficient evidence that corroborated the sexual offence. The testimony of PW1, PW2 and PW3 in respect of the appellant's participation was circumstantial since it was their own interpretation that what the victim meant by pointing between her legs and mentioning the name 'Daddy "Otu" pointed at the appellant's participation. But the victim was with the appellant the whole day, and PW2 testified that she had heard the victim crying extra ordinarily on that particular day. Also the medical evidence proved that the victim had been defiled. This satisfies the test required for founding a conviction solely on circumstantial evidence. We note that the learned trial Judge warned himself and the assessors on the fact that the evidence was purely circumstantial on the dangers of convicting on such evidence.

In *Bassita Hussein Versus Uganda, Supreme Court Criminal Appeal No 35 of 1995* the Supreme Court while dealing with a sexual offence case where the Complainant had not testified and the Medical evidence had not been adduced during the trial held as follows;-

"The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical or other evidence. Though desirable it is not a hard and fast rule that victim's evidence and medical evidence must always be adduced in every case of defilement to

prove sexual intercourse of penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt" (underlining provided).

We are satisfied that in this case there was sufficient evidence to prove the appellant's participation in the commission of the offence.

We find no merit in this ground. The appeal against conviction is accordingly dismissed and the conviction is hereby upheld.

Ground two is in respect of sentence.

Counsel for the appellant argued that the learned trial Judge did not take into account the period the appellant spent on remand as required by *Article 23 (8)* of the Constitution. While passing the sentence the learned trial Judge stated as follows;-

"Accused is allegedly a first offender. He has been on remand for 1 year and 3 months. I take this into consideration while considering the sentence to impose on him...."

In *Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014*, the Supreme Court stated that, taking into account is necessarily an arithmetical exercise. Therefore, the period the appellant in this case spent in pre-trial detention ought to have been deducted from the sentence. Since the trial Judge did not do so, the sentence imposed is a nullity.

For this reason we do not have to delve into the merits of ground 3.

Having found so, we now invoke Section 11 of the Judicature Act (CAP 13) and impose a sentence we consider appropriate in the circumstances of this appeal.

It provides as follows;-

> "11. Court of Appeal to have powers of the Court of original jurisdiction
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> *For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."*

The victim in this case was only 2 ½ years old baby girl, too young to be subjected to any form of sexual assault. In this case, she sustained serious injuries that may have long lasting effects on her anatomy. The appellant defiled his own step-daughter. He had a duty to protect her. These are serious aggravating factors.

However, the appellant was a very young man, only 18 years old at the time, he was barley an adult. He was first offender. He was remorseful. He had spent 1year and 3 months on remand. He had dependants to take care of.

In *Katende Ahamad Vs Uganda, Supreme Court Criminal Appeal No. 6 of 2004,* the Supreme Court upheld a sentence of 10 years for aggravated defilement. The appellant in this case was the father of the 9 year old victim.

In *Kisembo Patrick vs Uganda: Court of Appeal Criminal Appeal No. 441 of 2014,* the appellant had been convicted of aggravated defilement of a child of 4 years. He had spent 2 years on remand. His sentence was reduced from life imprisonment to18 years imprisonment.

In *Kato Sula Vs Uganda: Court of Appeal Criminal Appeal No. 30 of 1999,* this Court confirmed an 8 year imprisonment sentence noting that it was rather lenient.

In *Ntambale Fred Vs Uganda: Court of Appeal Criminal Appeal No. 0177 of 2009* this Court confirmed a sentence of 14 years. The victim was a daughter of the appellant.

In *Candia Akim Vs Uganda, Court of Appeal Criminal Appeal No. 0181 of 2009,* this Court upheld a sentence of 17 years imprisonment for the offence of aggravated defilement. The appellant in this case was a step-father of the 8 year old victim.

Taking into account all the aggravating and mitigating factors in this case and considering the range of sentences for the offence of aggravated defilement in the above cited cases of this Court and those of the Supreme Court, we are satisfied that, a sentence of 16 (sixteen) years imprisonment will meet the ends of justice.

In line with *Article 23 (8)* of the Constitution, we deduct 1 year and 3 months the appellant had spent on pre-trial detention. The appellant will therefore serve a sentence of 14 (fourteen) years and 9 (nine) months commencing from 13th June, 2012 the date he was convicted.

We so order.

Dated at **Gulu** this.....7th.....day of .....November.....2017.

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE F.M.S EGONDA -NTENDE
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL