THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT FORT PORTAL

(Coram: Geoffrey Kiryabwire, Muzamiru M. Kibeedi & Margaret Tibulya, JJA)

CRIMINAL APPEAL NO. 0134 OF 2014

KULE RASHID :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the conviction and sentence arising from the Judgment of Hon. Justice Dan Akiiki Kiiza delivered on the 16th day of October, 2013 in Criminal Session Case No. HCT-01-CR-SC-018-2012 of the High Court of Uganda at Fort Portal]

JUDGMENT OF THE COURT

Introduction

[1] The Appellant was indicted with the offence of Aggravated defilement contrary to Section 129(3) and (4)(a) of the Penal Code Act, Cap 120 (PCA) of the 2000 edition of the Laws of Uganda and sentenced to 32 years' imprisonment term.

Background facts

[2] The prosecution's case before the trial Court was that on the 28th day of September 2011 at Kikonzo village, the victim, "ME", aged 4 years was going to school when she was intercepted by the Appellant. The Appellant gave the victim Ug Shs 100/=, then took her to the bathroom of one of the nearby houses and had sexual intercourse with her. Due to the pain the victim felt in her stomach, she cried, and this prompted PW1- Lydia Biira who was passing by to stop and check what was going on. When PW1 got to the bathroom, she

found the Appellant, who was well known to her for over two years and six months, on top of the victim sexually assaulting her.

[3] On seeing PW1, the Appellant ran away prompting PW1 to raise an alarm. The matter was immediately reported to the authorities. The Appellant was arrested and taken to the Police where PW1 confirmed that he is the one who had defiled the victim.

[4] At the trial, the Appellant denied the charge of aggravated defilement and raised the defence of alibi to the effect that on the material date, he was at Railway Hospital in Kasese from where he was arrested without being informed of the reason for his arrest.

[5] The Appellant underwent full trial, was convicted and sentenced as already stated in this Judgment. Being dissatisfied with decision of the High Court, he appealed to this court against both the conviction and sentence.

Grounds of appeal

[6] The Appellant set out three grounds of appeal, namely: -

a) ***That the learned trial Judge erred in law and fact when he failed to consider the alibi but instead merely dismissed the same stating that the Appellant is a mere liar there by occasioning a miscarriage of justice.***

b) ***That the learned trial Judge erred in law and fact when he sentenced the Appellant to a manifestly harsh and excessive sentence, hence occasioning a miscarriage of justice.***

c) ***That the learned trial Judge erred in law and fact when he did not deduct the period spent on remand, hence occasioning a miscarriage of justice.***

Representations

[7] At the hearing of the appeal, Mr. Geoffrey Chan Masereka represented the Appellant on State brief; while Mr. Sam Oola, Senior Assistant Director of Public Prosecutions, and Mr.

Sam Nabimanya, Senior State Attorney, both from the Office of the Director of Public Prosecutions (DPP) represented the Respondent.

[8] The parties proceeded by way of Written Submissions as directed by the Court. This Judgment has therefore been prepared largely on the basis of the Written Submissions.

Duty of the Court

[9] The duty of this Court as a first appellate Court is to reappraise all material evidence that was adduced before the trial Court and come to its own conclusions of fact and law while making allowance for the fact that it neither saw nor heard the witnesses testify. See: ***Rule 30(1)(a) of the Judicature (Court of Appeal) Rules, Baguma Fred Vs Uganda, Supreme Court Criminal Appeal No. 7 of 2004; Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997;*** and ***Pandya Vs R [1957] EA 336.***

[10] We shall bear in mind the above principles when resolving the grounds of appeal in the order they were argued by the parties.

Ground One – Alibi

[11] Ground one was couched as follows:

"That the learned trial Judge erred in law and fact when he failed to consider the alibi but instead merely dismissed the same stating that the Appellant is a mere liar there by occasioning a miscarriage of justice."

Appellant's submissions on ground one

[12] The Appellant faulted the trial Court for dismissing his defence of alibi and making a finding that the Appellant was a mere liar bent on a futile attempt to escape the consequences of his actions. The Appellant contended that his testimony as DW1 indicates that he was not at the scene of crime. Being unwell, he had gone to the hospital for treatment which is the only hospital in the area and from where he was arrested.

[13] The Appellant argued that his alibi was corroborated by the testimony of DW 2- Mumbere who stated on oath that on the fateful day, at 7:00am, he went to the Appellant's home, found him still sleeping and feeling unwell with a general body weakness. He went with the Appellant to hospital at the Railway, and found it closed. As they were waiting for the doctor, they saw some people come towards them, arrested the Appellant and DW2 went and told the Appellant's parents about the arrest.

[14] Counsel for the Appellant concluded that the trial Judge erred in law and fact when he dismissed the Appellant's defence of alibi. He prayed for the conviction to be set aside by this Court.

Respondent's submissions on ground one

[15] In response, Counsel for the Respondent submitted that whereas the Appellant raised the defence of alibi, the same was disproved by the prosecution evidence. That the Appellant was well known to PW1 and PW3, the incident happened in broad day light and PW1 and PW3 observed the Appellant at close range.

[16] Counsel argued that the trial Judge considered the alibi of the Appellant together with the evidence of prosecution and noted the contradictions in the Appellant's and DW1's testimonies. The learned trial Judge then rejected the alibi of the Appellant, concluding that it was a pack of lies and also gave reasons for doing so. The Respondent submitted that in the circumstances there is no basis for faulting the trial Court.

Resolution of ground one

[17] We have reviewed the evidence before the trial Court and the resultant Judgment as we are required to do as a first appellate Court. The trial Judge first set out the ingredients of the offence of aggravated defilement which the prosecution was duty bound to prove, namely: 1) The victim was below 14 years of age at the time; 2) She experienced a sexual act; and 3) the accused person is responsible for the sexual act.

[18] The trial Court rightly found that the only contentious issue in the instant case was identification of the Appellant as the person responsible for sexual act. The Court then proceeded to evaluate the prosecution's evidence and found that the conditions in existence at the material time favoured a proper identification of the Appellant. PW1 knew the Appellant well before the incident and this fact was likewise admitted by the Appellant in his evidence. Second, the incident occurred during broad day light, between 7:00am and 11:00am. Third, PW1 was in close proximity and clearly saw the Appellant. The trial Court Found thus:

> *"... I have carefully considered all the evidence on record and have critically analysed the evidence of both the prosecution witnesses and that of the accused person and his witness(DW1). I find that the victim and her witnesses were more convincing and struck me as reliable witnesses than the accused person and his witnesses.*
>
> *PW1 calmly and vividly told court how they found the accused on top of the victim defiling her. It was in a bath room, it was during broad day light between 7am and 11am. On the other hand, the accused impressed me as a mere liar, bent on a futile attempt to escape the consequences of his actions. He was shaky and jumpy while testifying. He struck me as a person who was telling court less than he actually knew about this case. PW1 told court that she knew accused before as a brother to one Iddi, who was their neighbour and used to study with her. The accused also acknowledges knowing both PW1 and PW2. He was found defiling the victim. The victim told court that, while on the way to school, the accused defiled her. She pointed him out in court as the man who had defiled her."*

[19] One of the ways of disproving an *alibi* is for the prosecution to adduce cogent evidence which puts the accused at the scene of the crime. See: ***Jamada Nzabaikukize Vs Uganda, Supreme Court Criminal Appeal No.01 of 2015.***

[20] In the instant matter, upon re-evaluation of both the prosecution evidence and the appellant's defence of alibi, the trial Judge cannot be faulted for finding that the Appellant was properly identified and put at the scene of the crime. In the circumstances we find no merit in this ground and it therefore fails.

Grounds two and three – Illegality and severity of the sentence

Appellant's submissions on grounds two and three

[21] The Appellant faulted the learned trial Judge for sentencing him to what he termed as an illegal sentence of 32 years' imprisonment in so far as the Court did not arithmetically deduct the time the Appellant spent on remand. In support of his submission, the Appellant cited the case of ***Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014***

[22] The Appellant further faulted the trial Judge for failing to consider the mitigating factors as presented by the Defence at the trial namely, that the Appellant was a young man aged 20 years, and a first offender with chances of reformation.

[23] The Appellant contended that as a result of the aforesaid, the sentence is illegal, manifestly harsh and excessive, as well as inconsistent with decided cases in similar offences. Counsel cited the case of ***Birungi Moses Vs Uganda, C.A Crim. Appeal No. 177 of 2014*** where a sentence of 30 years' imprisonment was reduced to 12 years' imprisonment in respect of a 35-year-old Appellant who was convicted of defiling an 8-year-old girl. The appellant urged this Court to set aside the sentence and substitute it with an appropriate one.

Respondent's submissions on grounds two and three

[24] The Respondent disagreed and supported the findings and decision of the trial Court. She argued that the instant case involved a little girl aged 4 years only, very innocent who was still taking "baby steps" with her whole life ahead of her, still at the first stages of building

her dignity in society, innocently exercising her right to education and the Appellant chose her as his day's catch from his malicious, ill will and evil hunt.

[25] The Respondent implored this Court to uphold the sentence which she contended was given in accordance with the law. The Respondent cited the case of ***Kabazi Issa Vs Uganda, Court of Appeal Criminal Appeal No. 268 of 2015,*** where the Appellant was convicted of Aggravated Defilement of two girls below the age of 14 years and sentenced to 32 years' imprisonment on each count, to run concurrently. This was after deduction of the period of 3 years spent on remand by the Appellant. On appeal to this Court by the Appellant, the sentence was upheld. In ***Abingoma Defonzi Vs Uganda, Court of Appeal Criminal Appeal No. 0284 of 2016,*** the Appellant was convicted of Aggravated Defilement of a girl aged 10 years and sentenced to 40 years' imprisonment. His appeal to this Court against the sentence was dismissed.

[26] The Respondent prayed for dismissal of the appeal.

Resolution of grounds two and three

[27] It is now settled that for this Court, as a first appellate Court, to interfere with the discretion of the sentencing Judge, it must be shown that any one or more of the factors below exist(s):

1. The sentence is illegal.
2. The sentence is harsh or manifestly excessive.
3. There has been failure to exercise discretion.
4. There was failure to take into account a material factor.
5. An error in principle was made.

See: ***Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014; Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995; Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No. 16 of***

2000; and ***Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001***

[28] Further, the appellate Court may not interfere with the sentence imposed by a trial Court simply because it would have imposed a different sentence had it been the trial Court. See***: Ogalo S/O Owoura Vs Republic [1954] 24 EA CA 270.***

[29] The sentencing order of the trial Judge states:

> ***"COURT: SENTENCE AND REASONS THEREOF:***
>
> *Accused is alleged to be a first offender. He has been on remand for about 2 and ½ years. I hereby deduct this period from the sentence I will impose on him. He is said to be a young man of 20 years by the time the medical officer examined him (see PE2). He should be 22 years now. He has told court that he feels pain in the chest and wants court to release him. The Resident State Attorney has proposed a maximum sentence which is a death penalty. The defence counsel proposed 15 years.*
>
> *On the other hand, the accused committed a serious offence. The maximum is a possible death penalty. This shows how harsh the law treats convicted people like the accused. In this particular case, the victim was only 4 years old, fit at the time to be accused's young sister. Society would certainly expect the accused to protect the victim, but instead he chose to sexually ravage her. It is my considered view that girl children must be protected from people like the accused person.*
>
> *How could he expect any sexual satisfaction from a young four (4) year old girl child?*
>
> *In my view he deserves no mercy. Putting everything into consideration, I sentence the accused to 32 (Thirty-two) years' imprisonment.*
>
> *Right of Appeal explained.*
>
> *AKIIKI -KIIZA*
>
> *JUDGE*
>
> *16/10/2013"* [Emphasis added]

[30] From the above excerpt, it is clear that the Appellant's complaint that the sentence was illegal on account of the failure of the trial Judge to arithmetically deduct the remand period

in accordance with the Supreme Court decision in ***Rwabugande Moses v Uganda*** (supra) is not born out of the Court record. The sentencing proceedings indicate that the trial Judge clearly stated thus, "*...He [the accused] has been on remand for about 2 and ½ years. I hereby deduct this period from the sentence I will impose on him.*" Therefore, it is false that the time spent on remand was not deducted.

[31] Needless to add, the sentencing Order of the trial Court was made on 16th October 2013. This was long before the Supreme Court decision in ***Rwabugande Moses v Uganda*** (supra) which was rendered in March 2017. The decision did not have retrospective application. See: ***Nashimolo Paul Kibolo Vs Uganda, Supreme Court Criminal Appeal No. 46 of 2017.*** As such, in accordance with the principle of *stare decisis*, all that the trial Court was obliged to do was to comply with the then prevailing interpretation of Article 23(8) of the Constitution by the Supreme Court where the court's constitutional duty of taking into account the remand period was held not to necessarily mean an arithmetical exercise in all cases. See: ***Kizito Senkula Vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2001 (unreported)***

[32] Accordingly, the claim that the sentence is illegal is without basis. Ground three, therefore, fails.

[33] The Appellant's complaint that the trial Court did not consider the mitigating factors of the Appellant's age and being a first offender are likewise not born out of the Court record whose relevant excerpt has already been set out in this judgment. It is accordingly rejected.

[34] As regards the sentence being alleged to be harsh and manifestly excessive for being out of range with the decided cases, we note that the sentencing order of the trial Court, which we have already quoted verbatim in this judgment, does not give any indication that the trial Judge considered any decided cases of a similar nature and circumstances while sentencing the Appellant. However, for this omission to be fatal, a miscarriage of justice

must have been occasioned. See: *Section 139 of the Trial on Indictments Act, Cap. 23 and Section 34 of the Criminal Procedure Code Act, Cap. 116.*

[35] The obligation of the court to ensure consistence of its sentences with those of decided cases is set out under Sentencing Principle No.6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 – Legal Notice No. 8 of 2013 in the following terms:

> *"Every court shall when sentencing an offender take into account ... the need for consistence with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances."*

[36] The importance of the principle of consistency in sentencing was stated by the Supreme Court of Uganda in the case of ***Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015***, thus:

> *"... It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases 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."*

[37] We have looked at the cases cited by both the Appellant and the Respondent in this matter. Each case must be evaluated in the context of the unique facts and circumstances applicable to it since no two situations are identical. We have also considered some additional cases of this Court which were not cited to us by the parties.

[38] In ***Byera vs Uganda [2018] UGCA 61***, the Appellant who was 39 years old was convicted of the offence of aggravated defilement and sentenced to 30 years' imprisonment by the High Court. The victim was 3½ years old and a stepdaughter of the Appellant. This court found the sentence of 30 years to be harsh and excessive. In substitution thereof, a sentence of 20 years' imprisonment was found to be appropriate and upon deducting the

period spent on remand, the Appellant was sentenced to 18 years and 4 months' imprisonment.

[39] In ***Sseruyange vs Uganda, Court of Appeal Criminal Appeal No. 080 of 2010,*** where the victim was 9 years, this Court imposed a sentence of 27 years upon the Appellant who was 24 years at the time of commission of the offence.

[40] In ***Kabagambe Yoweri vs Uganda, Court of Appeal Criminal Appeal No. 659 Of 2015***, the Appellant, who was 20 years old while the victim was 11 years, pleaded guilty to the offence of aggravated defilement, and on appeal this Court did not interfere with the sentence of 22 years' imprisonment that was imposed by the trial Court.

[41] In ***Nshemeire Denis Vs Uganda, Court of Appeal Criminal Appeal No. 131 of 2014 this court*** *(Egonda-Ntende, Catherine Bamugemereire and Christopher Madrama, JJA)* found the sentence of 18 years' imprisonment to be appropriate in the circumstances. The Appellant in the said appeal was 30 years at the time he defiled the girl child aged 5 years.

[42] In ***Abale Muzamil Vs Uganda, Court of Appeal Criminal Appeal No.0039 of 2014***, this court confirmed a sentence of 19 years' imprisonment for the offence of aggravated defilement. In that case, a neighbour defiled the victim who was aged 9 years at the time of the offence.

[43] In ***Moses Hoke alias Champion Vs Uganda, Court of Appeal Criminal Appeal No. 107 of 2019***, the sentence of 22 years and 6 months' imprisonment was upheld by this court. The victim was a girl aged 5 years.

[44] We find that in the circumstances of this case, the failure of the trial Court to consider the principle of consistency, resulted in the trial Court imposing a sentence which was out of range with the decided cases of this court in similar matters. One of the circumstances under which the appellate Court may interfere with the sentence of the trial Court is where "... *it is evident that the [trial] Judge had acted on some wrong principle or overlooked some material factor.*

(See: ***James S/O Yoram V R [1950] 18 EACA 147 at page 149*** *and* ***Muhwezi Bayon Vs Uganda, Court of Appeal Criminal Appeal No. 198 of 2013.)***

[45] On account of the aforesaid, we allow the appeal against sentence and set aside the sentence of the trial Court. We shall now proceed to sentence the Appellant afresh pursuant to **Section 11** of the **Judicature Act** which provides as follows:

> ***"11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *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."*

[46] In our exercise of the above mandate, we are cognizant of the fact that aggravated defilement is a very grave offence and carries a maximum penalty of death. The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions set out 35 years' imprisonment term as the minimum sentence for a person convicted of aggravated defilement.

[47] We have considered the appellant's age of 20 years at the time of commission of the offence, a first offender and capable of reform as valid mitigating factors. This court also considers the following aggravating factors: the age of the victim at the time of commission of the offence of 4 years, and the fact that sexual offences were rampant in the area which calls for a deterrent sentence.

[48] Lastly, we have considered the range of sentences in the cases of Aggravated defilement as detailed in this judgment. We consider the term of 20 years' imprisonment as the appropriate sentence in the circumstances of this case. From that sentence, we deduct the period of about 2 years and 6 months spent by the Appellant in pre-trial remand. Accordingly, the Appellant shall serve a term of 17 years and 6 months commencing from the 16th October 2013, the date of conviction.

[49] **Disposition**

1. The conviction of the Appellant is upheld.

2. The sentence imposed by the High Court is hereby set aside.

3. The Appellant shall serve a term of 17 years and six months commencing from the 16th October 2013, the date of conviction

We so order.

Delivered and Dated this 14th day of October 2024.

.....

GEOFFREY KIRYABWIRE
Justice of Appeal

14/10/2024

.....

MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal

.....

MARGARET TIBULYA
Justice of Appeal