

WAMBOOZA DISAN :::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::: RESPONDENT

(Arising from the decision of the High Court at Mbale before Her Lordship Flavia Senoga Anglin delivered on 30th August 2011)

The Appellant was indicted and convicted of the offence of Aggravated Defilement Contrary to Sections 129(3) and 4(a) of the Penal Code Act Cap 120 and sentenced to life imprisonment.

1. *The Learned Trial judge erred in law and fact when he relied on only the evidence of one witness which was not corroborated to convict the accused person.*
2. *The Learned Trial Judge erred in law and in fact when he sentenced the accused to a harsh sentence of imprisonment for life.*

The facts leading to this appeal as ascertained from the Record of Appeal are that the appellant was a very close relative (cousin) to the victim's

father. The appellant, on 27th May 2010, at about 16:00hrs. at Bugimwera village, Sironko District, performed a Sexual Act with Wanyenza Margaret a 2-year-old girl. The victim's father was moving around his house when he found the appellant defiling the victim. The appellant realizing that he had been caught in the act pleaded with the victim's father for forgiveness.

The appellant's pleas fell on deaf ears as the victim's father instead raised an alarm. Many people responded to the alarm resulting in the appellant being arrested and taken to the police. The appellant was interrogated where upon, under the charge and caution statement, he admitted to have had sex with the victim. The appellant and the victim were subjected to medical examination on 28th May 2010 on both police form 24 and police form 3. The results indicated that the appellant was found to be an adult of sound mind and that the victim was aged only 2 years with a fleshly ruptured hymen respectively. The appellant was charged with aggravated defilement and subsequently convicted.

Representation

At the hearing, the appellant was represented by Ms. Faith Luchivuya while Ms. Fatima Nakafeero, a Chief State Attorney from the office of the Director of Public Prosecutions (DPP) appeared for the respondent. Both parties filed written submissions which were adopted with leave of court. Counsel for the appellant sought leave of court to validate the notice of appeal that was filled out of time and to extend time for filing the memorandum of appeal. This court granted the appellant's prayer.

Consideration of the appeal

This being a first appeal from the decision of the High Court in the exercise of its original jurisdiction, this court is required to reappraise the evidence and draw its own inferences of fact (See **rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions**, S1 13-10, which provides that.

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

Additionally, the court is required to remind itself of the fact that it does not have the same advantage as the trial judge in observing and hearing the witnesses testify and should thus make allowance for that. In **Kifamunte v Uganda, SCCA No. 10 of 1997** the Supreme Court held that;

“We agree that on a first appeal, from a conviction by a Judge the Appellant is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. 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.”

(See also; **Pandya v R [1957] EA 336**).

We have kept these principles in mind in while resolving this appeal. We shall resolve the grounds in the order in which the parties argued them.

GROUND 1

The Learned Trial judge erred in law and fact when he relied on only the evidence of one witness which was not corroborated to convict the accused person.

Appellant's Submissions

In his submissions, Counsel for the appellant queried the authenticity of the evidence of a single identifying witness since it wasn't corroborated. Counsel contended that other witnesses like area LC chairman who took the victim to police, the arresting officer and the victim's mother were not called to testify. He averred that there was no independent evidence to corroborate the testimony of PW3. He also submitted that PW3's testimony was inconsistent with the medical doctor's report which provided that the victims' hymen had already been ruptured. Counsel submitted there should have been a DNA test carried out on the substance alleged to have been seen in the victim's vagina to determine whether it matched the appellant's person's strain. Counsel for the appellant concluded by submitting that there was no sufficient evidence on record to convict the appellant.

Respondents submissions

In reply, Counsel for the respondent relied on the authority of **Bukenya & Ors v Uganda (1972) EA 549** where the East African Court of Appeal noted that the prosecution has the discretion to decide which material witnesses to call. He further submitted that the failure to parade all the other witnesses by the prosecution was not fatal to the prosecution's case. He argued that the evidence of PW3 was direct and of high evidential value.

Counsel further submitted that there is no particular provision requiring for the ingredient of ruptured hymen in the offence of aggravated defilement. He referred to the provisions of the Penal Code Amendment Act Section 129(3) and (4) (a) under which this particular appellant was indicted. Counsel also relied on **Ntambala Fred v Uganda SCCA NO.34/2015** where the Court referred to the case of **Mukasa Evaristo v Uganda SCCS NO.53/1999** in which it was acknowledged that rupture of hymen of a victim of defilement was not essential for arriving at a verdict of defilement. What is important is whether, on the evidence available, the prosecution has proven beyond reasonable doubt that the accused had had sexual intercourse with the child. The fact that a child's hymen is already ruptured does not mean that the victim cannot be defiled subsequent to the rupture of the hymen.

Counsel for the respondent further submitted that from the record of appeal, the appellant's mental health was never disputed by the appellant during the trial, and the appellant bringing it up at this point makes it a new matter for which the learned trial judge can't be faulted.

Counsel further argued that there was no need for a DNA analysis since there was sufficient evidence to support the conviction.

Regarding the issue of corroboration of evidence, counsel referred to the authority of **Ntambala Fred v Uganda (supra)** where the justices of the supreme court found that a conviction can be based on the testimony of the victim as a single witness provided that court finds her to be truthful and reliable. Counsel further contended that the factors in this case all favoured correct identification of the appellant and the witness remained firm even during cross examination.

Counsel prayed that this Honourable Court be pleased to uphold the conviction of the Appellant and dismiss ground one of this Appeal.

Consideration of Ground 1

It is trite law that the prosecution has the duty to prove each element of an offence beyond reasonable doubt. For the Appellant to be convicted of Aggravated Defilement, the prosecution must prove, beyond reasonable doubt the following elements.

1. There was unlawful sexual act committed.
2. The victim of the offence was below 14 years of age at the time of the offence.
3. The accused person is the perpetrator of the unlawful sexual act.

In the present case, the appellant disputes his participation in the offence, this ground is solely targeting the 3rd ingredient. Although the prosecution produced 3 witnesses, only 1 witness testified to the element of participation of the appellant, PW3. The appellant now faults the learned trial judge for relying on the evidence a single identifying witnesses without corroboration.

Section 133 of the Evidence Act Cap 6 provides that there is no particular number of witnesses required to prove any fact. However, in circumstances where courts are dealing with the evidence of a single identifying witness, then courts are cautioned to look at the same carefully. In **Abudalah Nabulele & 2 Ors v Uganda Criminal Appeal No 9 of 1978** the rules for identification were laid down as stated herein: -

- a. The testimony of a single witness regarding identification must be tested with the greatest care.

- b. The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.
- c. Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.
- d. Otherwise, subject to certain well-known exceptions, it is lawful to convict on the identification of a single witness so long as the Judge adverts to the danger of basing a conviction on such evidence alone.

Furthermore, in Moses Bogere and Another v Uganda SCCA No.1 of 1997 the court laid down how a trial Court should approach the evidence of identification by eyewitnesses in a criminal case.

"This Court has in many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eyewitnesses in Criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of mistaken identity. The Court should proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction unless it is satisfied that mistaken identity is ruled out. In so doing the Court must consider the evidence as a whole, namely, the evidence if any of the factors favouring correct identification together with those rendering it difficult. It is trite Law that no piece of evidence should be weighed except in relation to all the rest of the evidence."

The conditions taken into consideration to ascertain correct identification were briefly summarized in **Asiku Jamil v Uganda Criminal Appeal No.203 of 2004**, where this Court pointed out the 4 considerations that

determine proper identification by a single identifying witness to namely: familiarity, lighting, distance between the witness and the accused and the length of time taken to observe the accused.

In this case, the victim's father caught the appellant red handed at the scene with the victim, who was naked with her legs wide apart, the victim was crying, the appellant's pants were down with his penis out. The defilement happened during the day, at around midday therefore the lighting was good to enable correct identification. PW3 was familiar with the appellant since he was his cousin and observed him at a close distance. PW3 had enough time to observe the appellant that he even called his wife and other people who all came to the scene.

So, like the learned trial judge, we too find that the conditions of identification favoured positive identification and there was no possibility however remote of mistaken identity.

Furthermore, the requirement for corroboration is not mandatory to sustain a conviction. Corroboration is required when the conditions of identification are difficult. See **Abudalah Nabulele & 2 Ors v Uganda, Criminal Appeal No 9 of 1978** which in effect held that where the conditions of identification are difficult, what is needed before convicting is "*other evidence pointing to guilt.*". In the matter before us, it is quite clear that the conditions of identification were not difficult at all.

Counsel for the appellant submitted that PW3's testimony was inconsistent with the medical doctor's report which stated that the victims' hymen had already been ruptured. Our understanding of Counsel's submission is that because the victim's hymen had already been ruptured, the appellant could not have been the one that defiled the victim.

However, courts have held that a ruptured hymen is immaterial when assessing penetration, what is important is whether, on the evidence available, the prosecution has proven beyond reasonable doubt that the accused had had sexual intercourse with the child. See **Ntambala Fred v Uganda, SCCA NO.34/2015**.

In the instant case, the appellant was found at the crime scene and secondly, appellant confessed to having defiled the victim two previous occasions. This could explain the already ruptured hymen.

Lastly, we agree with the respondents, that the appellant's mental health was not an issue at the trial court and cannot be raised at this stage of trial. In the circumstances, Ground No.1 of this Appeal fails.

GROUND 2

The Learned Trial Judge erred in law and in fact when he sentenced the accused to a harsh sentence of imprisonment for life.

Appellant's submissions

Counsel for the appellant submitted that the learned trial Judge sentenced the appellant to imprisonment for all his life which makes the sentence harsh and excessive. Counsel for the appellant, relied on the case of **Kagoro Deo v Uganda CACA NO.82 of 2011** where this court reduced a sentence of life imprisonment to 22 years where the victim was 2 and ½ years old and further submitted that since the law mandates that there should be consistency in sentencing, this court ought to set aside the sentence of life imprisonment.

Respondent's submissions

Counsel for the respondent pointed out the aggravating circumstances of the case which include the age gap, 22-year-old defiling a 2-year-old, the fact that the appellant was well fit to be the victim's guardian, the victim suffered serious injuries, she could no longer control her urine and was introduced to sex at such an early age. Counsel submitted that the physical and psychological effects of the heinous acts of the appellant on the victim are irreparable and the victim shall forever live with them as rightly observed by the learned trial judge. Counsel prayed that this court deeply evaluates into these aggravated factors to uphold the sentence of life imprisonment. Counsel for the respondent prayed that this Honourable Court be pleased to dismiss this appeal and confirm both conviction and sentence as herein before submitted.

Consideration of ground 2

This ground of appeal faults the learned trial judge for passing a harsh and excessive sentence.

We are mindful of the fact that we cannot interfere with the sentence imposed by the trial court which exercised its discretion unless such sentence is illegal or is based on a wrong principle or the court has overlooked a material factor or that the sentence is manifestly excessive or so low as to amount to a miscarriage of justice. (See **Kamya Johnson Wavamuno v Uganda SCCA No. 16 of 2000**, **Livingstone Kakooza v Uganda SCCA No. 17 of 1993**) **Kiwalabye Bernard v Uganda Criminal Appeal No. 143 of 2001**.

It was Counsel for the appellant's contention that the learned trial Judge sentenced the appellant to imprisonment for life which makes the sentence harsh and excessive. Counsel for the appellant, relied on the case of **Kagoro Deo v Uganda CACA NO.82 of 2011** for the proposition that this court while determining the sentence of the appellant should be guided by the principle of consistency in sentencing.

Counsel for the respondent in reply submitted and pointed out the aggravating circumstances of the case which include the age gap, 22-year-old defiling a 2-year-old, the fact that the appellant was well fit to be the victim's guardian, the victim suffered serious injuries, she could no longer control her urine and was introduced to sex at such an early age. Furthermore, that the physical and psychological effects of the heinous acts of the appellant on the victim are irreparable and the victim shall forever live with them.

While sentencing the learned trial Judge stated as follows;

"The accused is sentenced to imprisonment for life. The offence carries a maximum sentence of death' The accused defiled a very young child as a result of which the victim has been caused long life problem. It is on record that the accused told father of the victim that it was not the first time he did it' The damage caused to the victim is psychologically irreparable and the physical damage is yet to be assessed' While the accused has been in prison for 1 year and 2 months a deterrent sentence will keep him away from society and per chance other children will be Protected."

It appears to us that the trial Judge did not address herself to the mitigating factors before passing sentence. Having perused the record, we find that the mitigating factors submitted were that the appellant was a

first offender, aged 21 years of age and had spent 1 year and 2 months on remand. The trial Judge clearly did not consider the mitigating factors before sentencing the appellant.

In the Supreme Court case of **Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015** the court held as follows;

"Before a convict can be sentenced, the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, statutes, Practice Directions together with general principles of sentencing as guided by case law."

In the instant case, the trial judge did not weigh all the mitigating factors against the aggravated factors. This therefore places a duty on this Court, as a Court of Appeal, to weigh the raised factors given the fact that failure to consider all the mitigating factors amounts to an error in law.

In the case of **Kifamunte Henry Vs. Uganda, Supreme Court Criminal Appeal No.10 of 1997**, the court observed that

"It was the duty of the first appellate court to re hear the case on appeal by reconsidering all materials which were before the trial court and make up its own mind. Needless to say that failure by the first appellate court to evaluate the material evidence as a whole constitutes an error in law...."

We therefore set aside the sentence passed by the trial Judge and invoke the provisions of Section 11 of the Judicature Act to re-sentence the appellant.

As stated before, the mitigating factors submitted were that the appellant was a first offender, aged 21 years of age and had spent 1 year and 2

months on remand. The aggravating factors on the other hand are that the appellant repetitively defiled a 2-year-old and this affected the victims' ability to control her flow of urine and she may never live a normal life. Her parents are very poor and may not afford to rectify the problem. The appellant was an uncle to the victim and he was not remorseful.

In passing sentence we are guided by ; **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** which stipulates under Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point in cases of Aggravated Defilement should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors. We additionally take cognisance of the principle of uniformity and consistency in sentencing which we are also required to comply with.

In **Taremwa Apollo Vs Uganda, Court of Appeal Criminal Appeal No. 193 of 2014** where the girl defiled was 8 years old, while the appellant was of the age of 29 years at the time he committed the offence and a first offender, this Court reduced the sentence of 21 years' imprisonment imposed by the High Court to 15 years' imprisonment.

In **Ninsiima Gilbert Vs Uganda, Court of Appeal Criminal Appeal No.0180 of 2010**, the appellant was convicted of the offence of aggravated defilement and sentenced to 30 years' imprisonment by the High Court. The victim was 8 years old. On appeal, this court while reducing the sentence to 15 years' imprisonment stated, "*the appellant being aged 29 years, a first offender, having spent 3 years*

and four months on remand, a person with family responsibilities and with dependents to support, we find that a sentence of 15 years' imprisonment is appropriate and is in line with sentences passed by courts in previous cases having a semblance to this one"

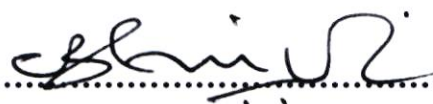
However, the Supreme Court in **Bonyo Abbdul v Uganda, SCCA No.07 of 2011** confirmed a life sentence for aggravated defilement.

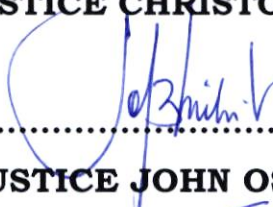
Having considered all the aforementioned factors we are of the view that the appellant be sentenced to a period of 20 years. We deduct the period of 1 year and 2 months spent on remand with the result that the appellant shall serve a sentence of 18 years and 8 months with effect from 31st of August 2011, the day that he was convicted

This appeal partially succeeds.

Dated at this ^{31st} day of ^{may} 2024


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HON. JUSTICE F.M.S EGONDA-NTENDE


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HON. JUSTICE CHRISTOPHER GASHIRABAKE


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HON. JUSTICE JOHN OSCAR KIHKA