THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO 95 OF 2011

IMANIRAGUHA PAUL}..... APPELLANT

VERSUS

UGANDA}..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kabale before His Lordship Mr. Justice J.W. Kwesiga in High Court Criminal Session No. 079 of 2010 delivered on the 27th April 2011)

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA

JUDGMENT OF THE COURT

The appellant was charged with the offence of aggravated defilement contrary to section 129 (3) & (4) of the Penal Code Act cap 120 laws of Uganda in September 2009.He was tried before Kwesiga J and convicted on 27th April, 2011 at Kabale High Court and sentenced to 25 years imprisonment. The appellant lodged a notice of appeal on 10th of May 2011. Memorandum of Appeal on the record filed on 14th August, 2018 reads as follows:

1. The learned trial Judge erred in law when he did not properly evaluate the evidence on record when he arrived at wrong conclusions which caused a miscarriage of justice.

2. The learned trial Judge erred in law when he relied on extraneous matters which led him to imposing a harsh and excessive sentence in the circumstances of the case.

Learned Counsel Angutoko Immaculate Senior State Attorney represented the respondent and Advocate Collins Nuwagaba represented the appellant, who was in court when we heard oral submissions from counsel.

The oral submissions of the appellant's advocate are as follows: The appellant was convicted for Aggravated Defilement and sentenced to 25 years' imprisonment. The Appellant is aggrieved and lodged two grounds of appeal as stated above. On the first ground on whether the learned trial Judge properly evaluated the evidence and came to an erroneous conclusion, the appellant's advocate submitted that the learned trial Judge did not properly evaluate the evidence on record and arrived at erroneous conclusion to convict the appellant. He submitted that the duty is on prosecution to prove the offence and that burden is not on the defence. The prosecution should prove each ingredient of the offence beyond reasonable doubt. The appellant's advocate submitted that the conclusion that the person who subjected the victim to the sexual act was the accused, and the victim was under 14 years was erroneous because throughout the trial the prosecution failed to prove the ingredients of the offence.

The facts are that the appellant is the father of victim of the alleged offence which is alleged to have occurred on 13th September 2009. The prosecution through all its witnesses gave insufficient evidence as regards the fact that the victim was defiled. He contended that the evidence of victim at page 10 of the record does not bring out the exact date when the alleged offence was committed. The testimony of the victim's mother is reported but does not indicate when the offence occurred. The medical evidence of PW1 shows that the bruises of the victim were earlier by less than two weeks.

The victim's mother was not at home and when she was called back is when the victim reported the offence but when this happened is not stated.

Counsel submitted that a period of two weeks was too wide to assist the court to determine who defiled the victim.

The child was a school going child. The appellant's advocate submitted that it is not the accused who was the only possible person who could have committed the offence. Counsel further submitted that the examination of the victim does not corroborate the participation of the appellant. The learned trial Judge considered the medical examination and examination by the mother, but he did not use evidence which could corroborate the commission of the offence. Counsel concluded that the prosecution did not prove the offence to the required standard and the conviction was erroneous.

On the second ground Counsel for the appellant argued in the alternative that the sentence of 25 years imprisonment was harsh and excessive. The learned trial Judge also relied on extraneous matters to determine the sentence when he said that the victim's painful testimony was that the appellant defiled her 4 times, yet the charge sheet has a single count of defilement. He prayed for a reduction of the term of imprisonment to 15 years imprisonment.

Counsel Immaculate Angutoko opposed the appeal on the following grounds:

On the first ground, the learned trial Judge properly evaluated the evidence and came to the correct conclusion. His evaluation of evidence shows that the appellant only contested participation but this was proved by prosecution. The evidence of the victim PW3 described how the offence was committed on her and she proved participation. The medical report confirms penetration of victim. The learned Judge cautioned the assessors

about the evidence of a single identifying witness. There is no evidence of a grudge between the victim and the appellant. There was a misunderstanding between the appellant and victim's mother.

On the second issue of whether the learned trial Judge relied on extraneous matters to impose harsh sentence, the respondents advocate submitted that the trial judge exercised discretion properly, he examined the demeanour and also discounted the death sentence and only sentenced the appellant to 25 years' imprisonment. Although there was evidence of the victim that she was defiled 4 times, the charge sheet had one count, the learned trial judge accordingly convicted the appellant of on the count. She prayed that the sentence of 25 years imprisonment be upheld.

We have carefully considered the grounds of appeal, the submissions of counsel, as well as the law applicable and have reviewed the record. As a first appellate court we have a duty to scrutinise the evidence and come to our own conclusion. In the East African Court of Appeal authority of **Peters v Sunday Post Limited [1958] 1 EA 424,** Sir Kenneth O'Connor P considered the power to evaluate evidence taken by the trial court and held that even a first appellate court should caution itself on interfering with findings of fact when he said:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

In **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123**, the Court of Appeal of East Africa, per Sir Clement De Lestang V-P, held at page 126 that the appellate court conducts a retrial on matters of fact and is not bound to follow the findings of fact of the trial judge but will review the evidence and may reach its own conclusion only with the necessary caution:

> "An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

In this appeal there is no issue of the impression on the trial judge being challenged. The facts are clearly established and it is the conclusion of the learned trial Judge which is being challenged.

We have carefully reviewed the evidence on record. The court considered the evidence of three prosecution witnesses as well as the testimony of the appellant who was the only defence witness. The appellant is the father of PW3 K.M the victim of the charged sexual offence. The charge sheet indicates that on 13th September 2009, the appellant had unlawful sexual intercourse with KM aged 10 years. PW2 is the wife of the appellant or according to her testimony was married by that time for about 10 years and they had four children. KM is the first born who was at the time of the

testimony on 18th of April 2011, about 12 years old. The offence was committed in September 2009 and therefore she was about barely 10 years old. PW2 the mother of KM was not at home at the time of commission of the offence. Her testimony is that her daughter informed her when she came back from her parents home. The appellant came to collect her on 16th September 2009 from her mother's place. Prior to that, the mother of KM had a misunderstanding with the appellant and went to her mother's home. When she came back she found four children at home and it is KM who told her that her father had defiled her and threatened to cut her if she informed anybody. She was also informed by her mother-in-law that she used to hear the child crying at night. The testimony is mainly hearsay and inadmissible. However, her admissible testimony is that after the child informed her of her offence, she took the child for medical examination because the child had complained of pain in the abdomen. The testimony of PW2 that she took the child for medical examination is confirmed.

PW1 Dr. Baganizi who holds a Masters Medicine from Mbarara University testified that he had practised medicine for 13 years. He was the one who filled the police form PF3. He examined KM and found that she was 10 years old. There was evidence of damaged hymen and bruises on the thighs. He established that KM had vaginal inflammation showing that it was recent. On cross examination he testified that the bruises were less than two weeks old.

The medical evidence establishes that KM had been defiled. The appellant's counsel submitted and the respondent's counsel agreed that the sole issue was whether the appellant was responsible for the commission of the offence. We have carefully reviewed the evidence and we agree with the respondent's counsel that the single testimony of PW3, the victim would be sufficient to establish the offence and participation of the appellant.

On perusal of the record we considered whether the learned trial judge duly conducted a voire dire before taking the evidence of the child. This is what the learned trial judge recorded at page 10 of the record:

> "KM: 12 years old. I go to school. I was told by my mother. I was ten years old last year. I am a catholic. I am not yet confirmed I was baptized, I do not remember. I go to Church because I love God. God loves everybody. He does not like people who tell lies.
>
> COURT. I am satisfied that the witness is capable of giving evidence on oath. She understands the duty of telling the truth."

The learned trial Judge concluded that the witness is capable of giving evidence on oath and she understands the duty of telling the truth. We have carefully considered the above record to establish whether it fulfils the requirements of law. To determine the question we have further considered the law. Starting with judicial precedents we have considered the case of **Uganda v Oloya [1977] HCB** page 5 decided by Saied C.J being a decision of the High Court. The court applied the principle on a 7 year old child and held on appeal that there was no proper voire dire nor any direction concerning corroboration of the evidence of a child of tender years. The Chief Justice held that:

> "Where the court is confronted with a child of tender years called to give evidence, it should question the child to ascertain whether he or she understands the nature of an oath and if the court does not allow the child to be sworn it should record whether in its opinion the child is possessed of sufficient intelligence to justify reception of the evidence and understands the duty of telling the truth and where the child is a prosecution witness the court should also direct itself that the child's evidence requires corroboration. The court record must make clear that such a voire dire has been held.

The investigation into the meaning of an oath need not be a lengthy one but it must be made and when made it must be recorded down. The investigation should precede the swearing and the evidence and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence.

It is manifest that religious belief is fundamental to the understanding of an oath and if the court is satisfied on this issue the child can be sworn, but, if the court is not satisfied that the child understands the nature of an oath, it remains the duty of the court to ascertain not only that the child is of sufficient intelligence to justify reception of the evidence but also that the child understands the difference between truth and falsehood."

In the case of **Fransisio Matovu v R [1961] 1 EA 260**, the appellant had been convicted of the offence of murdering his wife. One of the witnesses was a child of eight years. Sir Kenneth O'Connor P who delivered the judgement of the East African Court of Appeal held at pages 262 that:

"A judge, when confronted with a child of tender years called to give evidence, should himself question the child to ascertain whether he or she understands the nature of an oath, and, if the judge does not allow the child to be sworn, he should record whether, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth. Where the child is a prosecution witness, a judge should also direct the assessors and himself that the child's evidence requires corroboration. In the present case the learned judge did examine Iga as to his age and whether he went to school or church and his understanding of the duty of telling the truth; but, except in so far as it is implicit in the judge's permission for Iga to give evidence, there is

no finding as to the child's intelligence or his understanding of the duty of telling the truth and there is nothing in the recorded heads of the summing-up or in the judgment to indicate a direction to the assessors or to the judge himself that Iga's evidence required corroboration. This is not of great importance in the present case, the assault on Nampindi being admitted; but in another case failure to observe the provisions of s. 149 and to record compliance with them might result in the conviction being unsustainable. We draw attention to Otianga v. R. (2), E.A.C.A. Criminal Appeal No. 46 of 1960 (unreported); and to Erukana Kyakulagira v. Attorney-General, Uganda (3), [1959] E.A. 152 (C.A.) 155."

In the judgment, the central issue is whether the child understood the duty of telling the truth and whether she or he can be put on oath. The subsequent duties relate to the issue of whether the child does not understand the duty of taking oath and investigation as to the sufficiency of intelligence of the child. The East African Court of Appeal interpreted the provisions of the Criminal Procedure Code Act and a section 149 which has now been reproduced in the Trial on Indictment Act Cap 23 revised edition 2000 of the Laws of Uganda and section 40 (3) thereof which provides that:

"40. Evidence to be given on oath.

(1) Every witness in a criminal cause or matter before the High Court shall be examined upon oath, and the court shall have full power and authority to administer the usual oath.

(2) ...

(3) Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of

sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her."

The provision applies to situations where the court is confronted with the evidence of a child of tender years and investigates whether the child understand the nature of an oath. The learned trial judge allowed the child to be sworn. In fact the learned trial judge examined the child and recorded that he was satisfied that she understood the nature of an oath. He decided that she was capable of giving evidence. Though his questions to the child were not recorded, he recorded her answers. She testified that she understood the duty of telling the truth. She therefore testified on oath.

She testified that her father, the appellant, "offended her" and did bad things to her at night. He would call her to bring food to his bedroom and he defiled her four times. It is immaterial whether he did it on four occasions or in one or two occasions. She felt pain and was afraid that she would fall sick. In cross examination she testified that her father, the appellant threatened to cut her if she told anybody. She however did not fear to tell her mother because she feared she would fall sick. In the premises, we agree that the appellant was properly convicted. Moreover after cautioning the assessors about the testimony of a child of tender age, and the single identifying witness, the assessors advised the court that the victim had not made any mistake of identity as to who committed the offence. We have not found any basis for the learned trial judge to depart from the opinion of the assessors about the defilement which had been proved by the medical evidence and who was responsible for the commission of the offence. In the premises, ground one of the appeal has no merit and is hereby disallowed.

Ground two is whether the learned Judge relied on extraneous matters to impose a harsh and excessive sentence in the circumstances of the case.

We have considered the submissions of counsel and the law on the sentencing discretion of the trial judge. The learned trial Judge considered the fact that the convict/appellant had been on remand for one and a half years. Secondly, he committed a sexual act with his own daughter at the tender age of 10 years. Learned counsel for the appellant criticised the learned Judge for referring to the victim's painful testimony of having been defiled four times. This was not extraneous material but the testimony of the victim herself. It is not material whether the four times was on one occasion or several occasions. In any case her testimony on cross examination clears up the matter when she said:

> "He used to do it in the absence of my mother. He would do it in intervals of days."

We agree with the respondent's counsel that the appellant was charged with one count of defilement and the learned trial Judge convicted him of a single count of the offence of defilement. As far as sentencing discretion is concerned, this is partly what the judge held:

> "Even animals do not defile their young ones. He acted as a savage. A person who defiles his own biological daughter would be a potential danger to all girl children in surroundings. I cannot find any justification for releasing him back to society very soon. No lenience available for him. The offence with which he is convicted attracts death sentence as the maximum sentence, I will give him a chance to live but for a long time away from society. His sentence will serve as a warning to the culprits of similar conduct. I do hereby sentence the accused or convicted person to (25) twenty five years imprisonment."

In the East African Court of Appeal case of **Ogalo s/o Owoura v Rex Criminal Appeal No. 175 of 1954** the appellant appealed against a sentence of 10 years imprisonment with hard labour for the offence of manslaughter and this is what the Court held:

> "The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case:"

In the instant case, it cannot be said that the learned trial Judge acted upon a wrong principle or overlooked some material factor. The only question is whether, the sentence is manifestly excessive in view of the circumstances of the case. We have carefully considered the notes of the learned trial Judge that he had discounted the death penalty which was the maximum penalty for the offence of aggravated defilement.

Having discounted the death penalty, a penalty of over 25 years imprisonment for a father of 4 children would put the children out of the care of their father until they are adults. It makes no difference to the lives of the children if the sentence is reduced by a few years. The learned trial Judge intended the sentence to act as a deterrent to other offenders.

In the premises, and in line with previous precedents were sentences range from a few years to 20 years imprisonment we will interfere with the sentence imposed by the learned trial judge as being excessive in light of those previous precedents of this Court and the Supreme Court. In the

Supreme Court case of **Katende Ahamad v Uganda, Criminal Appeal No. 6 of 2004**, the appellant defiled his biological daughter who was 9 years at the material time. The appellant was sentenced to 10 years imprisonment after deducting the period of 2 and a half years spent on remand.

In the case of **Babua Roland v Uganda Criminal Appeal No.303 of 2010**, the appellant was married to the victim's aunt. The victim was under the care of the appellant and her aunt. The appellant was indicted and convicted of aggravated defilement and sentenced to life imprisonment. On appeal, this court found a sentence of life imprisonment too harsh and excessive and substituted the sentence for a term of 18 years' imprisonment.

We reduce the appellant's sentence to 20 years imprisonment and ground two of the appeal is allowed to the extent of the reduction

In the premises, the appellant's appeal is partially allowed.

Dated at Mbarara the 2nd day of ~~September~~ October 2018

HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA