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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 0181 OF 2009

(Arising out of High Court at Arua Criminal Case No. 0013 of 2009)

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CANDIA AKIM ::: APPELLANT

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VERSUS

UGANDA ::: RESPONDENT

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**Coram: Hon. Mr. Justice Remmy Kasule, JA
Hon. Lady Justice Hellen Obura, JA
Hon. Mr. Justice Byabakama Mugenyi Simon, JA**

JUDGMENT OF THE COURT

The appellant appeals against a conviction for aggravated defilement contrary to Section 129(3) of the Penal Code Act and a sentence of 17 (seventeen) years imprisonment passed against him on 20.08.09 by His Lordship J.W. Kwesiga, in the High Court (Arua) Criminal Case No. 0013 of 2009.

Background:

The facts as found by the trial Court are that on 11.05.08 at about midnight, at the appellant's home at Terevu village, Arua District,

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the appellant defiled one Munguci Sharon, a girl aged 8 (eight) years at the time.

Munguci Sharon, the victim, is a daughter to Pw3 Ocororu Eunice, who at the material time was wife to the appellant.

35 The appellant was however not the biological father of the said victim. The father of the victim was one Edema Robert.

When Pw3 Ocororu Eunice became the wife of the appellant, she moved together with her children, all minors, to the home of the appellant and lived with them in the said home. The minor children
40 she moved with included the victim, Munguci Sharon, aged 8 years, Aniko Winnie aged 6 years and Econi Julius aged 3 years. There was also another child by the names of Oliga who was a child of the appellant's grandmother.

On 11.05.08 Pw3, the children remained alone at the home of the
45 appellant and his wife, Pw3, during day time. The appellant returned home at 9.30 p.m. and found his wife who too had just returned at 8.00 p.m. from the market where she had been selling local brew.

The appellant picked a quarrel with his wife (Pw3), and fearing to be
50 beaten, the said wife left the home and slept in the neighbouring home of one Janadri, a brother to the appellant.

The victim and the other children remained in the house together with the appellant for much of the rest of the night of 11.05.08.



55 In the morning of the following day, that is 12.05.08 the mother of
the victim returned to the appellant's house and on inquiring from
the children whether the appellant had beaten any one of them, the
victim reported to her mother that the appellant had defiled her.
The mother (Pw3) reported the incident to the appellant's
grandfather who advised that the Local Council authorities be
60 informed. This was done. The appellant was arrested taken to
Police and subsequently charged and prosecuted. He was convicted
and sentenced as already stated above.

Dissatisfied with the conviction and sentence by the High Court, he
appealed to this Court.

65 **Grounds of Appeal:**

The appeal is on two grounds:

- 70 *1. The learned trial Judge erred both in law and fact
when he failed to properly and judiciously evaluate the
evidence on Court record especially on the ingredients
of the offence of aggravated defilement and
erroneously convicted and sentenced the appellant.*
- 75 *2. In the alternative and without prejudice to the above,
the learned trial Judge erred in law and fact when he
sentenced the appellant to 17 (seventeen) years
imprisonment which is harsh and excessive given the
circumstances of the case.*



The appellant prays for the conviction and sentence to be set aside and he be set free forthwith. In the alternative he prays that the sentence be reduced.

80 **Legal Representation:**

At the hearing of the appeal, the appellant was represented by learned Counsel Samuel Ondoma of M/s Alaka & Company, Advocates, while the learned Assistant Director of Public Prosecutions Ms. Betty Khisa represented the respondent.

85 **Submissions of Counsel:**

For appellant:

Counsel conceded that the prosecution had at trial, proved beyond reasonable doubt, that the victim was aged below 14 years. Counsel however submitted that the prosecution had not
90 proved beyond reasonable doubt that the victim had been subjected to sexual intercourse by the appellant. The victim (Pw2) had only testified that "bad manners" had been done to her by the appellant who had tried to lift her leg and water had splashed on her thighs.

95 Pw3, the victim's mother, also testified that Pw2 told her (Pw3) that the appellant had done bad manners to her (Pw2). She (Pw2) looked calm. On being examined by Rosa, who was never called as a prosecution witness, Pw2 had no swelling and showed no blood in her private parts according to Pw3 who was present
100 at the examination. This evidence contradicted the evidence of



Pw1, the Clinical Officer, that there were injuries on Pw2's private parts; yet the said Pw1 medically examined Pw2 on 21.05.2008, almost 10 days after the alleged offence is said to have happened on 11.05.2008.

105 According to appellant's Counsel, had the trial Judge properly evaluated the above stated aspects of the evidence, he would have come to the conclusion that the prosecution had not proved beyond reasonable doubt that sexual intercourse happened to the alleged victim, Pw2.

110 Appellant's Counsel also contended that prosecution had adduced insufficient evidence of identification that it was the appellant who had defiled Pw2. This is because the offence is alleged to have been carried out at night when conditions for correct identification were not favourable.

115 The only identifying witness was Pw2, the minor victim, whose evidence was not on oath and she was not cross-examined. There was no sufficient corroboration of her evidence as regards the identification of the appellant as one who defiled her.

120 This is the more so, as the appellant in his defence, had set up an alibi that on 11.05.2008, the date of the alleged offence, a misunderstanding had developed between the appellant and his wife, leading to the wife, Pw3, leaving the home. The appellant, also left the home, purportedly to look for the wife. When he failed to trace his wife, the appellant spent the rest of the night at



125 the home of his brother, one Droti. Thus the victim and the rest
of the children remained alone in the house, until the next
morning when the wife and appellant returned to their home.
The appellant then left the home and went to work in the garden.

130 It was appellant Counsel's submission that had the trial Judge
properly evaluated the evidence on identification, he ought to
have come to the conclusion that prosecution did not prove
beyond reasonable doubt that the appellant was identified as the
victim's assailant.

135 As to ground 2 of the appeal, appellant's Counsel submitted that,
given the fact that the alleged offence was committed amongst
family members, and as such reconciliation and unity was
necessary in the family, the appropriate sentence should have
been not more than 5 years imprisonment. Further, that the
trial Judge had not considered the fact that the appellant was a
140 first offender.

In conclusion, appellant's Counsel, prayed that the appellant's
appeal be allowed, the conviction and sentence be set aside and
the appellant be released forthwith. In the alternative, in case
this Court decided to maintain the conviction, then the sentence
145 of 17 years imprisonment, be reduced by this Court
appropriately.



For the Respondent:

150 Counsel for the respondent opposed the appeal and supported both the conviction and the sentence of 17 years imprisonment of the appellant.

155 On ground 1, she maintained that the trial Judge rightly set out and properly summed up to the assessors the ingredients of the offence of aggravated defilement that had to be proved beyond reasonable doubt by the prosecution, so as to secure a conviction against the appellant.

160 In Counsel's view, the trial Judge properly evaluated the prosecution and defence evidence and came to the conclusion that the prosecution had proved beyond reasonable doubt that a sexual act was performed upon Pw2, aged below 14 years at the time and that the appellant had been properly identified as the one who carried out this sexual act.

165 As to corroboration, the trial Judge warned himself and the assessors about the need for corroboration of the evidence of Pw2 and he found this in the evidence of Pw3 and that of Dw1.

170 In respect of ground 2, respondent's Counsel submitted that the sentence of 17 years imprisonment imposed upon the appellant was proper in law and the same ought not to be interfered with; more so as a step father, the appellant was a guardian of Pw2. Instead of the appellant protecting Pw2, he proceeded to defile



her. Counsel prayed for the appeal to be dismissed as regards both conviction and sentence.

Resolution by Court:

175 **Duty of Court:**

In resolving the grounds of this appeal, this Court, as the first appellate Court, has the legal duty to re-appraise the evidence adduced at trial and to draw inferences of fact from that evidence. In doing so the Court has however to bear in mind that the Justices of this Court did not have the opportunity to observe the witnesses testify at trial so as to make any assessment of the demeanour of any of the witnesses. See: **Rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10**. See also: **KIFAMUNTE HENRY V UGANDA, Cr. Appeal No. 10 of 1997(SC)**.

and also

: **ORIANGATUM SAMUEL VS UGANDA,**

Court of Appeal at Mbale Cr. Appeal No. 55 of 2008 (unreported).

190 **Ground 1**

This ground faults the trial Judge for having failed to properly and judiciously evaluate the evidence as to the ingredients of the offence of aggravated defilement thus resulting in the trial Judge



erroneously convicting the appellant of the said offence and
195 subsequently sentencing him to 17 years imprisonment.

Section 129(3) and **(4)** of the Penal Code Act sets out what
constitutes the offence of aggravated defilement. It provides

“129

200 (3) Any person who performs a sexual act with another person
who is below the age of eighteen years in any of the
circumstances specified in subsection (4) commits a felony
called aggravated defilement and is, on conviction by the High
Court, liable to suffer death.

205 (4) The circumstances referred to in subsection (3) are as
follows:

a) where the person against whom the offence is committed
is below the age of fourteen years;

210 b) where the offender is infected with Human
Immunodeficiency Virus (HIV);

c) where the offender is a parent or guardian of or a person
in authority over the person against whom the offence is
committed;

215 d) where the victim of the offence is a person with a
disability; or

e) where the offender is a serial offender.”



Aggravated defilement is therefore constituted by a sexual act having been performed by one person against another person under any of the conditions set out in **Section 129(4) (a) to (e) of the Penal Code Act.** A sexual act being penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ or the unlawful use of any object or organ by a person on another person's sexual organ, that is, the vagina or a penis.

It is those above stated ingredients that the prosecution must prove beyond reasonable doubt in order to secure a conviction against one accused of aggravated defilement.

It is contended for the appellant that the prosecution never proved beyond reasonable doubt that a sexual act had been performed upon the victim, Pw2, and also that it was the appellant who performed that alleged sexual act. The trial Judge was thus not justified to hold, as he did, that the prosecution had so proved the same beyond reasonable doubt.

The respondent's Counsel maintains the prosecution proved beyond reasonable doubt the two ingredients of the offence and that the learned trial Judge was right to hold as he did.

In his summing up to the assessors as well as in his Judgment the learned trial Judge, rightly in our view, set out the ingredients of the offence of aggravated defilement that the prosecution had to prove if a conviction of the accused had to be secured. The trial Judge stated in the Judgment that:



245 **“.....The prosecution evidence must prove all the essential elements of the offence of aggravated defilement beyond reasonable doubt. Failure to prove any of them would result into the acquittal of the accused. The elements of the offence to be proved are the following:**

1. **That the victim is a girl aged less than 14 years.**
2. **That the victim was subjected to sexual intercourse, which is unlawful.**
- 250 3. **That the accused person participated in the unlawful sexual intercourse.”**

255 The learned trial Judge then proceeded to evaluate the evidence of Pw1, the Senior Clinical Officer who medically examined the victim, that of Pw2, the victim, Pw3, the mother of the victim as well as that of Dw1, the appellant. After the evaluation of all that evidence the trial Judge concluded the prosecution had established beyond reasonable doubt that the victim was aged 8 years at the time of the alleged offence, that the medical evidence corroborated the evidence of the victim, Pw2, to the effect a sexual act was performed upon her in a period of less than two weeks prior to the medical examination carried out on 21.05.2008. It is noted the night of 260 11.05.2008 when the victim Pw2 was defiled falls within this period.

265 We are accordingly unable to accept the submissions of Counsel for the appellant that the evidence of Pw2 and Pw3 was of no value at all in proving that a sexual act had been performed to Pw2, since all that Pw2 reported to her mother in the morning of 12.05.2008 was



that the appellant had done "bad manners" to her. In our appreciation of all the evidence that was before the trial Judge on the issue of sexual intercourse, we note that pw2, the victim of the act, stated in her unsworn evidence that **"bad behavior happened to me that (is to) a woman's private part"**. She then added:

"We were lying down in the sitting room with Olike. He took us to the bed room where they used to sleep. Bad manners happened. He pushed his male sexual organ into mine. He tried to left (lift) my leg, water splashed on my thighs."

It is the above evidence that the learned trial Judge, after warning himself and the assessors of the danger of acting on the evidence of a child of tender years and given not on oath, found to have been corroborated by the medical evidence of Pw1 and that of the victim's mother Pw3, to whom the victim reported what happened to her immediately on seeing her in the morning following the night of the incident. The learned trial Judge also found that Pw2's evidence was also corroborated by the evidence of the appellant by holding that:

"The accused person in his defence corroborated the victim's evidence that on the material night the victim's mother Pw3 slept out of the house leaving the accused in the house with the victim and other younger children that he shifted the victim and another small girl to sleep in the bedroom."



290 The trial Judge looked at all the relevant evidence, that was before
him as he was duty bound to do, in deciding whether or not the
prosecution had proved beyond reasonable doubt that a sexual act
had been performed upon the victim, Pw2, in the night of
11.05.2008. In so doing, the trial Judge was acting within the law.
In **Supreme Court Criminal Appeal No. 35 of 1995: BARITA**
295 **HUSSEIN VS UGANDA**, it was held:

***“The act of sexual intercourse or penetration may be
proved by direct or circumstantial evidence. Sexual
intercourse is proved by the victim’s own evidence and
corroboration by other evidence. Though deniable, it is
300 not a hard and first rule, that the victim’s evidence and
medical evidence must always be addressed in every case
of defilement to prove sexual intercourse or penetration.
Whatever evidence the prosecution may wish to adduce to
prove its case, such evidence must be such that it is
305 sufficient and puts the case beyond reasonable doubt.”***

We accordingly find that the learned trial Judge acted properly in
evaluating all the evidence that was before him in determining
whether or not a sexual act had been done upon Pw2, the victim.
We also find that he arrived at the correct conclusion when he held
310 that the evidence before him established beyond reasonable doubt
that a sexual act had been performed. We thus reject the
submission that the trial Judge was not justified to hold that the



prosecution had proved beyond reasonable doubt that a sexual act was performed upon the victim in the night of 11.05.2008.

315 It was also the contention of appellant's Counsel that there was no sufficient evidence of identification of the appellant as the victim's assailant and therefore the trial Judge erred in so holding.

We have reviewed the evidence that was before the trial Judge and the manner the trial Judge dealt with that evidence.

320 The trial Judge considered in detail the alibi set up by the appellant and addressed himself and the assessors, rightly in our view, that the appellant assumed no duty to prove his alibi. The duty was upon the prosecution to disprove the alibi by adducing evidence that placed the appellant at the scene of the crime at the time the
325 crime was committed: **See: Criminal Appeal No. 10 of 2000: Mushikoma & 3 others v Uganda (SC)**, unreported.

The trial Judge evaluated the evidence of Pw2, found the same corroborated by the evidence of Pw3 and that of the appellant before he concluded that the victim had sufficient opportunity to identify
330 the appellant, who was her step father and husband to her mother, Pw3. The appellant admitted being in the house with the victim at the material time, before he purportedly went away at night to look for his wife, Pw3, who had left the home as a result of a quarrel between the two. The evidence that the trial Judge accepted as
335 credible involved all that the appellant did. This was being done in the presence and hearing of the victim, Pw2, who knew the



appellant before and the act involved close contact with the victim, Pw2.

340 As soon as the mother of the victim Pw3, returned home in the morning of 12.05.08, the victim, Pw2, reported to her what the appellant had done to her. The victim was examined there and then by one Rosa in the presence of the victim's mother, Pw3, who saw white dry semen on the victim's sexual organs.

345 The subsequent medical examination of the victim by Pw1 on 21.05.08, found that the victim's hymen had been ruptured about 2 weeks before and there were signs of penetration and injuries around Pw2's Private parts that were consistent with force having been used sexually.

350 The trial Judge evaluated all the above evidence including the alibi put up by the appellant. He appropriately directed himself and the assessors that the appellant had no duty to prove his alibi as well as the rest of his defence.

355 The Judge also warned himself and the assessors of the dangers of relying upon the evidence of a single identifying witness, the victim, who was a minor and having given her evidence not on oath, her evidence required corroboration as a matter of law.

360 The learned trial Judge then found that the evidence of Pw2, the victim had been sufficiently corroborated by the medical evidence of Pw1 and that of Pw3, her mother, as well as part of the evidence of the appellant himself.



In the Supreme Court decision of **Bogere Moses and Another vs Uganda, Criminal Appeal No. 1 of 1997**, the Court held:

365 *“Where the prosecution adduced evidence showing that the accused person was at the scene of crime and the defence not only duly denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judiciously and give reasons why one and not the other version is accepted.”*

370 We are satisfied that the trial Judge in the instant case, considered the evidence that was before him, both for the prosecution and the defence, and rightly concluded that the appellant was properly identified and put at the scene of crime, hence the appellant’s alibi was destroyed.

375 Upon re-evaluation of the evidence regarding the identification of the appellant, we do find such evidence to have been free from any possibility of error.

380 Having subjected the evidence adduced at the trial to a fresh re-appraisal, we find no reason to fault the trial Judge on any of the issues raised in ground 1 of this appeal. We accordingly find no merit in the said ground. The same stands dismissed.

In ground 2, the appellant faults the trial Judge for having imposed upon him a harsh and excessive sentence of 17 (seventeen) years imprisonment.

385 The law as to sentence is that an appellate Court is not to interfere
with the sentence imposed by the trial Court in the judicial exercise
of discretion by that Court, unless the exercise of that discretion
results in such a sentence being manifestly excessive or so low as to
amount to a miscarriage of justice or where the trial Court ignores
390 to consider an important matter or circumstance which ought to be
considered while passing sentence or where the sentence imposed
is wrong in law or principle. See: **KIWALABYE BERNARD VS
UGANDA: Criminal Appeal No. 143 of 2001, (SC) unreported.**

The appellate Court does not alter a sentence on the mere ground
395 that if the members of the Court had tried the appellant they might
have passed a somewhat different sentence: See: **Court of Appeal
at Fort Portal Criminal Appeal No. 49 of 2008: TUMWESIGYE
ATANANSI V UGANDA. See also OGALO S/O OWOURA VS R
[1954] 24 EACA 270.**

400 Counsel for appellant urged us to reduce the sentence from 17
years to 5 years imprisonment because the victim and the appellant
were family members and a lower sentence would promote
reconciliation in the family. The trial Judge had also not considered
the mitigating factor that the appellant was a first offender.

405 Counsel for the respondent, in opposition to this ground, submitted
that the relationship of the victim and appellant was such that the
appellant, who was aged 28 years and was husband of the mother
of the victim, at the time of the offence, was a guardian to the victim
who was aged only 8 years. Therefore, according to Counsel, the



410 sentence of 17 years was too lenient to the appellant. Counsel
therefore prayed this Court not to interfere with said sentence.

On reviewing all the factors regarding the sentence of the appellant,
we note that the trial Judge did not take into consideration the fact
that the appellant was a first offender, which was a mitigating
415 factor in favour of the appellant.

Be that as it may, the trial Judge considered the fact that the
appellant had a duty to protect the victim, who was a step
daughter, but instead he interfered with her purity and dignity. It
was by taking this factor and others into account that the trial
420 Judge imposed a sentence of 17 years imprisonment.

We have reviewed the circumstances that the trial Judge considered
and we find that the sentence of 17 years imprisonment was rather
on the lenient side. Accordingly, inspite of the fact that the trial
Judge overlooked consideration of the fact that the appellant was a
425 first offender, which factor we have ourselves considered together
with others, we are not persuaded that we should interfere with the
said sentence. We accordingly reject ground 2 of the appeal.

Both grounds of appeal having failed, this appeal stands dismissed.
We accordingly uphold the conviction and sentence of 17 years
430 imprisonment.

It is so ordered.

Dated at Arua this*6th*.....day of *June*..... 2016.





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Hon. Mr. Justice Remmy Kasule
Justice of Appeal



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Hon. Lady Justice Hellen Obura
Justice of Appeal



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Hon. Mr. Justice Byabakama Mugenyi Simon
Justice of Appeal

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