THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 342 OF 2014

Arising from Criminal Session Case No. 0037 of 2010 before Hon. Justice Lameck N. Mukasa at Arua.

FABIANO MUNDUA::::::::::::::::::::::::::::::APPELLANT

VS

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

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

JUDGMENT OF THE COURT

This appeal is against both conviction and sentence arising from the decision of Hon. Justice Lameck N. Mukasa, delivered on 7-11-2011, whereby he convicted the appellant of the offence of aggravated defilement contrary to **Section 129(3) and (4)(a) of the Penal Code Act** and sentenced him to 16 years imprisonment.

The facts, as accepted by the trial Judge were that, the appellant was a step father of Amaniyo Lillian, the victim. On the 12-9-2009, the victim had supper at their home after which she requested the appellant to escort her to Naa's home where she was to spend the

night. On the way, the appellant threw her down, removed her knickers and had penetrative sexual intercourse with her. He warned her not to make any noise. Thereafter, he escorted her to Naa's home. The following day she returned to her parent's home whereupon she reported the incident to her mother. The matter was reported to police and the appellant was placed under arrest. The victim was medically examined and found to be 9 years old. She had injuries in her private parts that were consistent with sexual intercourse.

The appellant was arrested, indicted, and prosecuted of the offence of aggravated defilement. The trial Judge disbelieved the appellant's defence of alibi, convicted and sentenced him for the stated term, hence this appeal.

This appeal is premised on two grounds namely;

1. ***The learned trial Judge erred in law and fact when he pronounced a harsher sentence to the appellant.***
2. ***The learned trial Judge erred in law and fact when he convicted the appellant based on evidence that did not satisfy the standard of corroboration in sexual offences.***

At the hearing of this appeal, the appellant was represented by Mr. Odama Henry and Ms. Adubango Harriet, Senior State Attorney appeared for the respondent.

Counsel for the appellant argued ground two first. He submitted that the learned trial Judge convicted the appellant basing on a single

identifying witness whose evidence on the ingredient of participation was not corroborated. He further argued that, whereas the appellant raised a defence of alibi that was not discredited, the trial Judge did not address himself to the said defence. Counsel prayed that court quashes the conviction.

Counsel contended further on ground 2, that the appellant's mitigating factors were not considered and the trial Judge imposed a harsh sentence. He implored Court to reduce it to 8 years imprisonment.

Counsel for the respondent opposed the appeal. She argued that the learned trial Judge was alive to the danger of relying on the uncorroborated evidence of the victim. Having done so, he found the victim a truthful witness and corroboration of her evidence was therefore not necessary.

Counsel also argued that the victim could not have been mistaken in her identification of the appellant, considering she knew him very well, they moved together, and after the act he escorted her to Naa's home. In counsel's view, the trial Judge was not in error in relying on the victim's evidence alone. Counsel prayed Court to uphold the conviction.

On sentence, counsel submitted that the trial Judge took into consideration both the aggravating and mitigating factors. In the circumstances of this case, she maintained the sentence of 16 years imprisonment was appropriate.

We have carefully listened to the submissions of both counsel and we have also perused the court record. Being a first appellate Court, our duty is to review and re-evaluate the evidence before the trial court, by subjecting it to fresh scrutiny, draw inferences therefrom and reach our own conclusions, bearing in mind that this Court did not have the opportunity to hear and observe the witnesses testify as the learned trial Judge did- see **Rule 30(1)(a) of The Judicature (Court of Appeal Rules) Directions**; **Begumisa and others Vs Tibebaga SCCA N0. 17 of 2002** and **Mbazira Siragi and another Vs Uganda, Cr. Appeal N0. 07 of 2004 (SC).**

In our considered view, the possibility of mistaken identification in the instant case did not arise. The fact that the appellant was the victim's step father, which he confirmed, strongly revealed she knew him quite well. Secondly, he moved with her from his home as he escorted her to Naa's home. He grabbed and defiled her on the way.

Finally, after the act, he proceeded with her to Naa's home. The learned trial Judge considered these factors and warned himself of the need for caution when dealing with evidence of a single indentifying witness. He also considered the appellant's alibi which he disbelieved as untrue. In so doing, he considered the stated factors that accounted for the unmistaken identification of the appellant by the victim.

Additionally, the trial Judge was impressed by the victim whom he described as a "very consistent girl".

The law regarding corroboration of the victim's evidence in sexual offence cases is that, the trial Judge has to warn the assessors and himself of the danger of acting on the uncorroborated testimony of the victim. However, having done so, the Judge can convict without corroboration of the victim's evidence provided he or she is satisfied that the victim was a truthful witness – see **Kibale Vs Uganda [1999]1EA 148 (SC); Mugoya Vs Uganda [1999]1 E.A 202 (SC)** and **Mohammed Kasoma Vs Uganda, SCCA N0. 1/94.**

In the matter before us, we are satisfied the learned trial Judge properly evaluated the evidence of both sides and came to the correct finding that the appellant was positively identified and, the victim was a truthful witness whose evidence could be relied upon without corroboration.

We therefore find no merit in ground two of the appeal and it accordingly fails.

Ground one on sentence. The principles upon which an appellate Court can interfere with the sentence of the trial Court were succinctly stated by the Supreme Court in **Kiwalabye Bernard Vs Uganda, Cr. App. N0. 143 of 2001** as follows;

> ***"The appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on***

sentence, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where a trial Court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle."

In the instant case, the trial Judge considered the aggravating and mitigating factors, save for the fact that the appellant was a first offender. The trial Judge took into account the appellant had responsibilities of his own family and orphans of his deceased brother. He noted that while the objective of sentencing is reform, wrongdoers deserve punishment as well. The trial Judge also took into account that the appellant had spent three years on remand. The other aggravating factor was that the appellant was the victim's stepfather.

We have ourselves considered the said factors, as well as the fact that the appellant was a first offender. We have also considered that the victim was only 9 years of age at the time of the commission of the offence and the appellant was 38 years old. We observe that, as a stepfather the appellant was expected to be the chief protector, caretaker, provider and moral guardian of the victim. For him to have subjected her to sexual intercourse, at such a tender age, was callous and highly inconsiderate of her well-being.

In **Kobusheshe Vs Uganda, Court of Appeal Cr. App N0.110/2008,** the appellant was convicted of defilement and sentenced to 17 years

imprisonment. The victim was a daughter to the appellant's neighbour and she was aged 5 years while the appellant was 37 years when the offence was committed. This Court upheld the sentence of 17 years imprisonment.

In **German Benjamin Vs Uganda, Court of Appeal Criminal Appeal N0. 142 of 2010**, the appellant, aged 35 years was convicted of defiling a girl of 5 years and sentenced to 20 years imprisonment by the trial Court. On appeal, this Court reduced the sentence to 15 years imprisonment on grounds that, inter-alia, the appellant had spent 4½ years on remand.

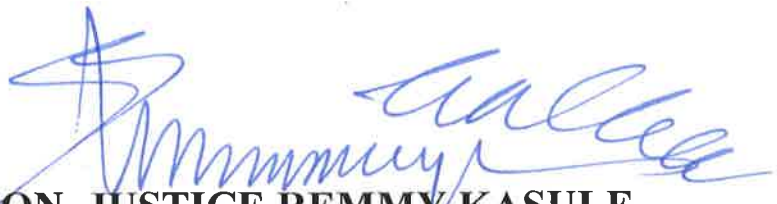
Another decision by this Court in **Ninsiima Gilbert Vs Uganda, Criminal Appeal N0. 0180 of 2010**, the appellant, aged 29 years, was convicted of defiling an 8 year old and given a sentence of 30 years imprisonment. On appeal, this Court took into account the period of 3 years and 4 months the appellant had spent on remand, considered that he had family responsibilities and reduced the sentence to 15 years imprisonment. The Court noted that the sentence was in line with sentences passed by Courts in previous cases having resemblance to the **Ninsima case**.

On the whole, considering the circumstances of this case, we are satisfied the sentence imposed by the learned trial Judge was appropriate and was neither harsh nor excessive. We are therefore not persuaded to interfere with the same.

In the premises, both grounds of the appeal having failed, we dismiss the appeal and uphold the conviction and sentence of 17 years imprisonment.

We so order.

DATED AT ARUA THIS .....6th.....DAY OF.....June.....2016.



HON. JUSTICE REMMY KASULE,
JUSTICE OF APPEAL.

HON. LADY JUSTICE HELLEN OBURA,
JUSTICE OF APPEAL.

HON. JUSTICE SIMON BYABAKAMA MUGENYI,
JUSTICE OF APPEAL