THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT LIRA
CRIMINAL APPEAL NO. 0038 OF 2014

ANGUYO SILIVA::APPELLANT

VERSUS

UGANDA::RESP0NDENT

(Appeal from the decision of the High Court of Uganda at Arua before Okwanga, J. delivered on the 22nd day of January, 2014 in Criminal Session Case No. 0051 of 2012.) **CORAM:**

HON. LADY JUSTICE ELIZABETH MUSOKE, JA.

HON. LADY JUSTICE HELLEN OBURA, JA. HON. MR. JUSTICE REMMY KASULE, AG. JA.

JUDGMENT OF THE COURT

Background

By a decision of the High Court (Okwanga, J.) passed on 21st January, 2014 the appellant herein was convicted of the offence of Aggravated Defilement contrary to **Section 129 (3), (4) (a) and (b)** of the **Penal Code Act, Cap. 120.** On. 22nd January, 2014, the High Court imposed on the appellant a sentence of 27 years imprisonment upon that conviction.

The facts are that in the trial Court, the appellant had pleaded not guilty and was tried on an indictment which alleged that between the year of 2009 and 2010, he had, at Alia Village in the Arua District had unlawful sexual intercourse with A.S.A (the victim), a girl under the age of 14 years yet the appellant was infected with HIV/AIDS. According to the report from the medical examination of the victim (Exhibit PEI), at the material time, the victim was aged 7 years old.

The prosecution evidence was that the victim's mother (PW3) and the appellant cohabited in the same home from about 2008 to 2011. While testifying at the trial, the victim stated that the appellant had forced her into sexual intercourse at the said home on three separate occasions. On each occasion, the appellant had waited for her mother

to leave home. After the

sexual acts on each occasion, the appellant had threatened to kill the victim if she revealed the incidents to anyone else. Therefore, although she felt pain on each occasion, the victim said that she did not report the incidents to her mother for a long time between 2009 and 2011 due to the threats from the appellant.

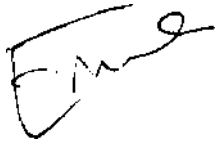
In 2011, when the appellant chased her mother from their home, the victim decided to speak out and inform her mother of the sexual acts committed on her by the appellant. The mother in turn reported the matter to the area local authorities. The appellant was subsequently arrested and charged in connection with the offence.

At the trial, the appellant denied the offence. He said that he had been framed by the victim's mother for two reasons; firstly, because he opted to call off the cohabitation with the victim's mother and secondly, because he had refused to pay dowry for the victim's mother so as to legalize their marriage although the victim's mother had asked him to do so.

At the conclusion of the trial, the learned trial Judge believed the prosecution evidence and convicted and sentenced the appellant as stated earlier. The appellant now appeals against the learned trial Judge's decision on the following grounds:

> **"1. That the learned trial Judge ignored the discrepancies and inconsistency in the prosecution evidence on record thus occasioning a miscarriage of justice.**
>
> **2. The learned trial Judge erred in law and fact when he convicted and sentenced the appellant on the uncorroborated evidence of the prosecution thus occasioning a miscarriage of justice.**
>
> **3. That the sentence was manifestly harsh and excessive in the circumstances."**

The appellant prays that this Court allows the appeal and quashes his conviction by the trial Court or in the alternative, if the conviction is upheld, this Court finds it appropriate to impose a more lenient sentence than the one imposed by the learned trial Judge.



The respondent opposed the appeal.**Representation**

At the hearing, Mr. Odongo Daniel, learned counsel appeared for the appellant on State Brief. Ms. Joanita Tumwikirize, learned State Attorney in the office of the Director of Public Prosecutions appeared for the respondent. Due to the existing Covid-19 pandemic and the restrictions put in place by the Government to reduce the spread of the Covid-19 disease, including restrictions on movement of inmates from Government Prisons, the appellant could not be brought to Court from Lira Prison so as to be physically present at the hearing. However, the appellant participated in the hearing while in the prison with the aid of Zoom video conferencing technology.

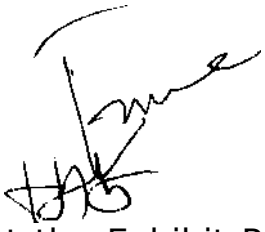
Counsel for both sides addressed Court by way of written submissions after leave was granted for that purpose. The written submissions have been considered in this judgment.

Appellant's submissions

Ground 1

Counsel contended that the learned trial Judge did not address himself to the material discrepancies in the prosecution evidence before relying on it in reaching the decision to convict the appellant, something which occasioned a miscarriage of justice. Counsel submitted that there were material inconsistences in the prosecution evidence in respect to when the appellant allegedly defiled the victim. For instance, the indictment indicated that the victim was defiled between 2009 to 2010, while Exhibit PEI, the report from the medical examination of the victim made on 25th January, 2011 indicated that the victim was also defiled on or about 22nd January, 2011.

Counsel further submitted that the prosecution case was that the victim had been defiled between 2009 to 2010 but she had not reported the matter due to the appellant's alleged threats to harm her if she did so, until about 2011 when the appellant who was cohabiting with the victim's mother chased the latter from his home. PW3 Polina Ezaru, the victim's mother had stated in evidence that her daughter reported the acts of defilement against the appellant on or about 2nd January, 2011. There was no further prosecution evidence that the appellant had defiled the victim between 2nd January, 2011 and 25th January, 2011 when the victim's medical examination was done. In



counsel's view, the fact that the Exhibit PEI indicated that the victim had been defiled on about 22nd January, 2011 cast doubt on the prosecution evidence that the victim had been defiled between 2009 and 2010, which doubt should have been resolved in favour of the appellant. Counsel argued that the fact that the offence took place in 2010, and not in 2011 as Exhibit PEI indicated, lends credence to the appellant's defence evidence at the trial to the effect that the in making the allegations against him, the victim was motivated by the desire to tell lies about the appellant who had divorced her mother. Counsel contended that the victim's report may not have been made at all if the appellant had not called off the cohabitation with the victim's mother. Counsel further submitted that the fact that the victim testified that she reported the incident only after the appellant called off the cohabitation with her mother establishes that she was lying to court in order to punish the appellant for divorcing her mother.

In conclusion, counsel prayed that this Court allows ground 1 of the appeal. **Ground 2**

Submitting on this ground, counsel for the appellant repeated his submissions on ground 1, but added that in his view, the victim's evidence was unlikely to be true because it was improbable that a sexual act could be carried out on the victim, then aged 5 to 6 years, on 3 occasions between 2009 to 2010 and go unnoticed by her mother who used to live with her. Counsel contended that the prosecution evidence that sexual acts took place on the 3 occasions between 2009 to 2010 remained uncorroborated and therefore the learned trial Judge had erred to base the appellant's conviction on the said acts. Counsel cited the authority of **Kasumba Joseph vs. Uganda [2007] 1 HCB 18** where it was held that for a sexual offence, a trial Court may convict on the uncorroborated evidence of the complainant if she is considered to be truthful but the Court must warn itself and the assessors of the dangers of convicting on such uncorroborated evidence. Counsel contended that in the present case the victim's testimony was not corroborated at all which left inconsistencies in the said evidence. Counsel prayed that this Court allows ground 2 of the appeal, too.

Ground 3

Counsel submitted that although the offence of Aggravated Defilement of which the appellant was convicted is a serious offence with the maximum sentence being death sentence, the sentence of 27 years imprisonment imposed on the appellant is harsh and excessive in the circumstances. Counsel did not substantiate any further on this ground. However, he asked this Court to substitute a reduced sentence than the one imposed by the learned trial Judge.

Respondent's submissions

Grounds 1 and 2

Counsel for the respondent argued grounds 1 and 2 of the appeal together, and supported the decision of the learned trial Judge to convict the appellant. Counsel contended that there was no miscarriage of justice contrary to the appellant's assertions. The appellant had on several occasions sexually abused the victim but the latter had not reported the abuse because the appellant had threatened to harm her if she did so. Counsel contended that the delay in reporting the abuse was the victim's way of holding some leverage over the appellant to prevent him from carrying out domestic violence on his mother.

Counsel further contended that contrary to the appellant's submissions, there was corroboration of the victim's evidence. Counsel submitted that PW3, the victim's mother had testified about the "signs" she ignored, which showed that the appellant was sexually abusing the victim. PW3 stated that in about 2010, she had seen the victim walking with some difficulty "with scattered legs". The victim's mother also testified that in the relevant period, the appellant used to ask to bathe the victim. Counsel further contended that further corroboration was in the appellant's conduct after the victim reported the incident, in that he attempted to escape from the village only to be arrested. Citing the authorities of **Kyalimpa Apollo vs. Uganda, Court of Appeal Criminal Appeal No. 560 of 2014;** and **R vs. Kipkering Arap Osike and Another (1949) 16 EACA 135** where the principles on circumstantial evidence were articulated, counsel submitted that the appellant's stated conduct amounted to circumstantial evidence pointing to his guilt.

Counsel further contended that the victim had been consistent with her testimony that the appellant had defiled her, and had not been shaken in cross examination. The appellant, who was her step-father

was well-known to the victim. In the circumstances, counsel urged this Court to find, in accordance with the principles articulated in **Sarapio Tinkamalirwe vs. Uganda, Supreme Court Criminal Appeal No, 27 of 1989** that any inconsistencies in the prosecution evidence were minor and did not affect the evidence.

In conclusion, counsel submitted that all the circumstances of the case point to the guilt of the appellant and prayed that the Court disallows ground 1 and 2 of the appeal.

Ground 3.

Counsel submitted that the sentence imposed on the appellant was neither harsh nor excessive considering the circumstances of the case. The appellant had sexually abused a child at a very tender age of 7 years, yet he was HIV positive. To aggravate matters, the appellant was a step-father to the victim and in a position of trust as a guardian with her.

Counsel further submitted that under the Sentencing Guidelines, the maximum sentence for the offence of aggravated defilement is death sentence, and the starting point for sentencing is set at 35 years. Thus, the sentence of 27 years which the trial Court imposed on the appellant was lesser than the said starting point, and that the same was neither harsh nor excessive. Counsel cited the authority of **Kiwalabye Benard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2003,** where the reasons justifying an appellate Court to interfere with the sentence of the trial Court were laid down and prayed that this Court finds no such reasons in the present case.

Resolution of the Appeal.

We have carefully studied the Court record, considered the submissions for either side, and the law and authorities cited therein; as well as those not cited but applicable to the present case

.A first appeal from the decision of the High Court to this Court requires this Court to review the evidence and make its own inferences of law and fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.** On a first appeal, this 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: Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.** Alive to the above-stated duty, we shall proceed to resolve the grounds of appeal as below.

Grounds 1 and 2.

The analysis on grounds 1 and 2 of the appeal will overlap and we find it convenient to deal with them together. The contention for the appellant is that the prosecution evidence which was relied on by the learned trial Judge in convicting the appellant contained material contradictions/inconsistencies and should not have been relied on by the trial Court in convicting the appellant. It is also contended that there was a requirement for corroboration of the victim's evidence before it could be relied on.

The law on the effect of contradictions/inconsistencies in the prosecution evidence was articulated in the authority of **Obwalatum Francis vs. Uganda, Criminal Appeal No. 30 of 2015,** where the Supreme Court held that:

> **"The Law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained."**

In **R vs. A.M, 2014 ONCA 769,** the Ontario Court of Appeal in Canada, commenting on the significance of inconsistencies in evidence stated:

> **"...Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheralsubjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned."**

With the above principles in mind, we shall consider the alleged inconsistencies in the prosecution evidence referred to by counsel for the appellant. Counsel pointed out that the indictment alleged that the sexual acts by the appellant on the victim were committed between 2009 and 2010; yet the victim's mother testified that the sexual acts also occurred in 2011. We have reviewed the evidence on this point. We observe that the victim in this case testified as PW4. The victim was familiar with the appellant, and knew him very well considering that the victim and the appellant lived together in the same house. The appellant was cohabiting with the victim's mother (PW3). Owing to the young age of the victim, she could not remember the exact dates when the appellant had committed each of the sexual acts on her. The victim testified, however, that the sexual acts by the appellant on three separate occasions happened at the house where they both lived.

The first time, was when her mother had gone to "town"; and on that occasion, the victim stated at page 15 of the record that "the appellant caught me and threw me down and had sexual intercourse with me and warned me not to tell mother. He told me that if I reveal to mother he will kill me". The victim stated that on the second occasion, she had gone into the house to get drinking water, and the appellant entered the house, closed the door and had sex with her. The third time was when her mother had gone to Meridi.

The victim testified at page 16 of the record that after the third occasion, she had felt a lot of pain and complained to her mother about the pain. Her mother had taken her to an unidentified hospital for medical attention. The victim stated that at the hospital, they were issued with a medical form. However, when the appellant got to learn about the form, he tore it up and used it for smoking cigarettes. The victim testified at page 16 of the record, that she endured the sexual abuse until the appellant chased her mother b'S* away from their home, when she decided to report the abuse to her mother. The victim's evidence was not shaken in cross-examination and was taken as truthful by the learned trial Judge.

We have also considered the evidence of PW3, the victim's mother. PW3's evidence at page 10 of the record, was that in November 2010, she noticed that the victim appearing to walk with some difficulty. PW3 stated that she was unable to find out the cause of the painful walking style, because the appellant prevented her from further questioning the victim. PW3 stated that from that time the appellant started bathing the victim. PW3 testified that during her cohabitation with the appellant, she endured several episodes of physical abuse. PW3 further stated that on 2nd March, 2011, when the appellant assaulted her, the victim broke her silence and reported the appellant's acts of defilement. We find that it is probable that the victim, may have endured the appellant's acts of defilement as a way of preventing him from assaulting her mother as he often had done. Thus we accept the respondent's submission to that effect.

It is true as pointed out by counsel for the appellant that at page 10 of the record, it is recorded that the victim's mother (PW3) stated in evidence that "I know why the accused (appellant) is now in court. Accused defiled my daughter S.A. It happened on 2/01/2011." But when taken in the context of the entirety of the prosecution evidence, this did not mean that the victim was only abused on that date. PW3 stated that it was on 2nd October, 2011 that the victim revealed the sexual abuse at the hands of the appellant to her. There were signs that the victim was subjected to sexual abuse earlier in 2010 when PW3 saw her walking with difficulty.

According to the report from the medical examination conducted on the victim on 25th January, 2011 (Exhibit PEI), there were signs on the victim's private parts such as a bruised labia minora and extensive hyperaemic lesions which indicated that there had been penetrative coitus (sexual intercourse) by use of force. We also observe that as contended by appellant's counsel, the report indicated that the victim's hymen had been ruptured about 72 hours earlier from when the report was made.*We* find from the overall evidence adduced, however, that this was a case of sexual abuse which happened to the victim on many occasions and over a significant period of time. We are satisfied that the victim knew the appellant, who lived with her for a longtime while he cohabited with the victim's mother. The cohabitation started in about 2008 and ended in November 2010. During this period the victim stayed with the appellant and her mother. This period is also satisfactorily covered in the indictment which alleged that the sexual acts committed on the victim took place between 2009 and 2010.

In the Supreme Court decision in **Ntambala Fred vs. Uganda, Criminal Appeal No. 34 of 2015,** the Supreme Court held that:

> **"...a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. As stated by this Court in Sewanyana Livingstone vs. Uganda, SCCA No. 19 of 2006 "what matters is the quality and not quantity of evidence."**

In the present case we are satisfied that the victim gave evidence which was truthful, credible and cogent about a person she had known so closely. We therefore find that there were no material contradictions in the prosecution evidence especially the evidence of the victim which requires us to reject that evidence. We also find that despite the lack of corroboration evidence, the victim's evidence alone, could be and was rightly relied on in the present case.

Grounds 1 and 2 are therefore, without merit and must fail.

Ground 3.

The appellant submitted, without substantiating that the sentence imposed by the learned trial Judge was harsh and excessive. Counsel for the respondent disagreed, and supported the sentence imposed by the learned trial Judge.

We note that counsel for the appellant never submitted that the learned trial Judge did not take into account any material factor in imposing the relevant

sentence. Counsel only challenged the severity of the sentence. This, in our view, relates to the consistency principle to the effect that the sentences passed by the trial Court must as much as circumstances may permit, be similar to those passed in previously decided cases having a resemblance of facts as the one in which sentence is being passed; and the appellate Court, may if called upon to do so, be justified in interfering with the sentences which contravene this principle. **See: Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015.**

We have therefore considered the sentences passed by this Court in previous aggravated defilement cases. In **Ntambala Fred vs. Uganda, Criminal Appeal No. 34 of 2015,** the Supreme Court approved a sentence of 14 years imprisonment imposed on the appellant by the trial Court and confirmed by the Court of Appeal, considering it appropriate for aggravated defilement. The victim of the offence was aged 14 years.

In **Byera Denis vs. Uganda, Court of Appeal Criminal Appeal No. 99 of 2012,** this Court substituted a sentence of 30 years imprisonment with one of 20 years imprisonment it considered appropriate in a case of aggravated defilement. The victim in that case was aged 3 years.

In **Tiboruhanga Emmanuel vs. Uganda, Court of Appeal Criminal Appeal No. 0655 of 2014,** this Court stated that the sentences approved by this Court in previous aggravated defilement cases, without additional aggravating factors, range between 11 years to 15 years. The Court considered the fact that the appellant was HIV positive as an additional aggravating factor in that he had, by committing a sexual act on the victim while HIV positive, exposed her to the risk of contracting HIV/AIDS. The Court imposed a sentence of 25 years imprisonment.

In the present case, the sentence of 27 years is higher than the range of sentences imposed in the cases cited above. It is therefore harsh and excessive and we hereby set it aside. We proceed to determine a fresh sentence for the appellant pursuant to Section 11 of the Judicature Act, Cap. 13 which for the purposes of determining an appeal vests this Court with the powers of the trial Court; which powers include determining a fresh sentence, where the sentence of the trial Court is set aside for being harsh and

excessive.

During the sentencing proceedings in the lower Court at page 34 of the record, the prosecution counsel submitted that the circumstances were aggravated by the fact that the appellant was convicted of a very serious offence for which the maximum penalty is the death sentence. Further, the victim of the offence was very young at only 7 years old and she stood in a position of being taken care of by the appellant who was her stepfather. In defiling the victim, the appellant violated the trust the victim had in him. Prosecution counsel submitted that the victim was left with psychological trauma which may affect her future. Counsel submitted that following the commission of the offence the appellant was examined and found to be HIV positive. Counsel also pointed out that the offence for which the appellant was convicted is rampant and there was need to impose a deterrent sentence.

In mitigation of the sentence at page 35 of the record, defence counsel submitted that the appellant was still a young man at only 32 years of age. The appellant had spent a period of about 3 years on remand while attending trial. The appellant was married and was a bread winner to his family. Counsel submitted that the appellant had a future and a long custodial sentence would not be helpful to him. Counsel submitted that the appellant was remorseful and he prayed for a lenient sentence.

We also note that the appellant was HIV positive as evidenced in Exhibit PE3, showing the results of an HIV test conducted on the appellant on 28 January, 2011. Thus, in the present case, considering all the relevant material, we find that a sentence of 25 years imprisonment is appropriate. From the testimony of the appellant, supported by the trial Court record, he was arrested on 23 January, 2011. Therefore, on 21st January, 2014 when he was convicted, the appellant had been on remand for 2 years, 11 months and 2 days. The remand period is deducted from the sentence we have imposed. The appellant shall therefore serve a sentence of 21 years and 28

days imprisonment to run from the date of his conviction on 21st January, 2014. Ground 3 of the appeal therefore succeeds.

In conclusion, this appeal is dismissed as to conviction for the reasons stated herein above and is partially allowed as to sentence on the terms herein set out.

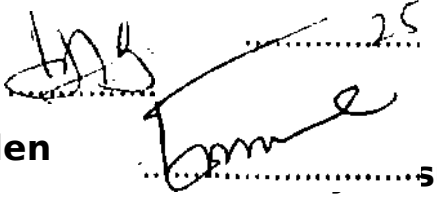
We so order.

Dated at Lira day of this

Elizabeth Musoke

Justice of Appeal.

Justice of Appeal.



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Ag. Justice of Appeal.

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