THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Kasule, Mwangusya & Egonda-Ntende, JJA*]

Criminal Appeal No. 411 of 2014

Kisembo Patrick==========Appellant

Versus

Uganda==========Respondent

[*An appeal from a judgment of the High Court of Uganda sitting at Fort Portal (Batema, J.), in HCT-01-CR-SC 0160 of 2011, delivered on the 14 January 2014*]

Judgment of the Court

Introduction

1. The appellant was convicted of the offence of aggravated defilement contrary to sections 129 (3) & (4) (a) & (b) of the Penal Code Act. The particulars of the offence were that on the 14 May 2011 at Central Ward, Kyarusozi Town council in Kyenjojo district the appellant performed a sexual act with Adijah Happy, a girl aged 4 years. He was sentenced to life imprisonment. He now appeals against both conviction and sentence on the following grounds:

> '1.The learned trial judge erred in law and fact when he failed to judiciously evaluate the prosecution evidence against the appellant as being insufficient to support a conviction.
> 2. The learned trial judge erred in law and fact in convicting the appellant on the basis of unsatisfactory and uncorroborated circumstantial evidence.
> 3 That the learned trial judge failed to evaluate the evidence of the prosecution side by side with that of the defence arriving at the wrong conclusion which occasioned a miscarriage of justice to the appellant.
> 4. That in the alternative but without prejudice to the aforesaid, in the circumstances the sentence of life imprisonment imposed on the appellant was harsh and excessive.'

Duty of First Appellate Court

2. It is the duty of a first appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account of course that the appellate court did not have the opportunity to hear and see the witnesses testify. See Rule 30(1) (a) of the Court of Appeal Rules and Pandya vs R [1957] EA 336; Ruwala vs. R [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC). We shall do so accordingly.

Prosecution Case

3. The prosecution called 2 witnesses, PW2 Fahamu Mawazu, the mother of the victim and PW3, Akena Michael, a security supervisor at the firm the appellant was employed at as a security guard. The story was that on the 14 May 2011, PW2 came back home from work. PW2 started bathing her children. She bathed Amim and told her to call Happy. Amim came back and reported that she had heard Happy crying in the appellant's house. PW2 ran to the appellant's house. She heard Happy crying. The door was locked. She called the appellant. He did not answer.

4. PW2 ran to the camp and reported to the security office. PW3 came back with her as well as other people. PW3 called out the appellant and told him to open. The appellant opened. They found the appellant and Happy naked, inside the house. Happy was crying. The appellant was arrested and taken to a nearby police station.

5. Happy was crying and in pain. She was also bleeding. She was taken to a clinic and subsequently to Virika Hospital and thereafter to the Government hospital. A police form 3 was tendered in evidence by agreement of the parties. The victim was examined on 16 May 2011. She was found to be aged 4 years. She had signs of penetration and had a ruptured hymen which was estimated to be between 5-7 days old. Though the victim appeared at the trial she was unable to testify.

Defence case

6. The appellant testified on oath. He stated that on the day and time in question he was sleeping at his house when he was woken up by people's voices. He opened his door. There was a crowd. Some people said let us lynch him. He was whisked away to the police station. At the police station he was told that he had defiled Happy. This was not true. Though

he knew Happy and her mother he had not defiled her as alleged. He stated he had previously arrested PW2 stealing scrap metal and she had threatened to cause him to be chased from his job. That is why PW2 had framed him with this offence.

Submissions of Counsel

7. Mr Collins Accellam, learned counsel for the appellant, abandoned ground 1 of the memorandum of appeal and argued grounds 2 and 3 together. He submitted that there was the evidence of the medical officer that was admitted. The evidence of PW2, the mother of the victim, was important for 2 reasons. She describes what she saw and what the victim told her. The third of piece of evidence was that of PW3 to whom PW2 reported. The defence of appellant was a denial of the offence. The learned trial judge relied on the evidence of the prosecution to convict the appellant. This evidence was too weak to found a conviction.

8. PW2 stated that she found the appellant and the victim in the appellant's house. The medical report contradicts the evidence of PW2. This creates a doubt as to whether the appellant committed this offence. It does not support performance of a sexual act. The evidence was too weak. The judge relied wrongfully on the evidence of PW2.

9. Turning to ground 4 of the appeal, Mr Accellam submitted following the decision of the Supreme Court in Tigo Stephen v Uganda SC Criminal Appeal No. 8 of 2009life imprisonment now means serving imprisonment for the natural life of the convict. He submitted that that sentence was excessive considering the circumstances of this case and comparative decisions in respect of similar cases. He referred to the case of Kabwiso Issa v Uganda SC Criminal Appeal No. 7 of 2007. The sentence was 15 years. He referred to the case of Katende v Uganda SC Criminal Appeal No. 6 of 2007. The victim was 9 years old. 15 years was reduced to 10 years. He prayed that that the court takes into account that the appellant used a finger. Whatever the circumstances of the offence the sentence of life imprisonment was excessive.

10. Ms Barbra Masinde, the learned Principal State Attorney, appeared for the respondent. She opposed the appeal. She submitted that there was ample circumstantial evidence which the judge analysed at page 4 of the judgment. This evidence was from the testimony of PW2 and PW3. PW2 had heard her child crying in the house of the appellant. She went and

called PW3 who returned to the scene. PW3 knocked and the appellant opened. The victim was in the house of the appellant.

11. The learned Principal State Attorney further submitted that the appellant in his defence places himself at the crime scene. There was no one else in that house at that time. The incident occurred at 1.00PM in broad daylight. From the above circumstances there was only one inference, a sexual act by the appellant on the victim.

12. The alleged rupture of the hymen 5-7 days ago as opposed to the offence taking place a few days ago. If the rupture of the hymen occurred before the offence was committed the medical officer still found that there had been penetration. It is clear that a sexual act had been performed on the victim. It could only have been the appellant who performed that sexual act.

13. With regard to the sentence it was the contention of the respondent that the judge properly weighed the mitigating and aggravating factors. No medical examination was done on the victim to determine her HIV status. Her status was therefore not known. However, she was put at risk of contracting HIV by the appellant who was positive. In light of the age of the victim and the age of the appellant who was old enough to be her father the sentence was appropriate. She prayed that this court does not tamper with the sentence.

Analysis

14. The learned trial judge reviewed the evidence before him. He noted that the victim did not testify and there was no direct evidence of the commission of the offence. He considered whether the circumstantial evidence available pointed to the guilt of the accused or not. He believed the evidence of PW2 and PW3 and disbelieved the denial by the appellant that Happy was not found at his house. No reason was provided why PW3 would have told lies against the appellant.

15. PW3 was an independent witness. As a result of a report he received from PW2 he proceeded to the home of the appellant. He ordered him to open. He opened the door and he found him naked with the victim inside the house. He was a security supervisor. There is no suggestion that he had any grudge against the appellant. He is the one who effected his arrest at the scene of crime and took him to the police station.

16. Prior to the arrival of PW3 at the scene, PW2 had heard her daughter crying in the appellant's house. The appellant had declined to open his door. It is upon that refusal that PW2 went to the Camp and reported to PW3.

17. On the other hand, the appellant admits to have been found in his home on the day in question but that Happy was not found at his home. He was at home sleeping alone. Much as he explained that PW2 had a grudge against him the appellant admitted that there was no grudge between him and PW3. There is no reason why PW3 would concoct a story against appellant.

18. Mr Accellam argued that the medical evidence admitted in this case showed that the victim had been defiled between 5-7 days prior to her examination which would suggest that she had been defiled earlier than the 14 May 2014. The finding that rupture of hymen had taken place 5-7 days prior to examination is really not a finding of fact observed by doctor. It is only the doctor's opinion. And it is in fact only an estimate. The findings of fact are the factual observations made in examining the victim like whether or not the hymen had been ruptured or other injuries that were observed.

19. It would have been preferable for the medical practitioner who had examined the victim to be called to testify in person and explain his opinion and the basis for the same. Notwithstanding the foregoing, we are satisfied that in any case this evidence in no way contradicts the testimony of PW2 and PW3 with regard to what happened on the 14 May 2014.

20. We are unable to fault the learned trial judge for believing PW2 and PW3 and rejecting the appellant's version of events. The evidence of prosecution was credible and led to only one inference that the appellant had performed a sexual act on or with the victim in this case.

21. With regard to the sentence the learned trial judge stated as follows:

> 'Considering that the convict is a first offender, is HIV positive, and has spent 2 years on remand, also considering the seriousness of the offence I sentence the accused to life imprisonment.'

22. Ever since Tigo Stephen v Uganda SC Criminal Appeal No.08 of 2009, [unreported], it has been suggested that life imprisonment means imprisonment for the natural life of the convict. This finding which was really obiter, as it was not essential for the decision in that particular case, runs counter to an earlier decision of the Supreme Court where it had been held that life imprisonment means essentially a sentence of 20 years imprisonment in light of Section 47 (7) of the Prisons Act. See Livingstone Kakooza v Uganda Criminal Appeal No. 17 of 1993.

23. We hasten to add that even if the decision of Supreme Court in Tigo Stephen v Uganda [supra] was obiter on this particular point, this does not detract from or diminish the weighty nature of this particular opinion or any other opinion advanced by the Supreme Court, especially on lower courts. We are fully aware of the binding nature of all the decisions of the Supreme Court upon all courts in Uganda.

24. In Livingstone Kakooza v Uganda [supra] the Supreme Court stated,

> 'We agree with the learned counsel for the Appellant that the sentence of 18 years was harsh and manifestly excessive. The appellant had been on remand for two years and the learned judge took this factor in passing sentence. In effect the Appellant received a life imprisonment sentence which is twenty years according to section 49 (7) of the Prisons Act, Cap. 313……'

25. In effect there are 2 conflicting decisions of the Supreme Court on this point and it does not appear to us that Tigo Stephen v Uganda [supra] set out to depart from the earlier decisions of the Supreme Court since it did not discuss Livingstone Kakooza v Uganda [supra] or any other decision of the Supreme Court at all. Nor did the Supreme Court state itself to be expressly over ruling itself on that point.

26. The Supreme Court in Tigo Stephen v Uganda [supra] made no reference to the legislative history of this provision in Uganda which would have made it very clear that the legislature had decided to define life imprisonment. Act 1 of 1970, the Prisons Amendment Act, 1970, provided in section 1, which is the only section of that Act,

> ‘The Prisons Act is hereby amended by substituting the word “sixty” for the word “twenty” occurring in subsection (7) of section 49 thereof.’

27. On 6 August 1971 a decree was promulgated by the legislature that had 2 sections which we reproduce below.

> ‘1. The Prisons Act is hereby amended by substituting the expression “twenty years” for the expression “sixty years” occurring in subsection (7) of section 49 thereof.
>
> 2 The amendment made by this Decree shall have effect in relation to a sentence imposed before this Decree came into force as it applies to a sentence imposed after it comes into force.’

28. It is clear that the intention of the legislature was very clear that a sentence of life imprisonment was to be defined, in law, as a sentence of 20 years imprisonment. If one reads the whole provisions of section 47 of the Prisons Act, (formerly section 49), rather than simply looking at subsection (7) in isolation it would be clear that the legislature had set in place a statutory scheme to manage sentences including the provision of remission in respect of all sentences in excess of one month, and in the process defined what life imprisonment, being a sentence of imprisonment, means.

29. In light of the conflict between Tigo Stephen v Uganda [supra] on the one hand and Livingstone Kakooza v Uganda [supra]on the other hand, as well as the legislative history and section 2 of Decree 28 of 1971we prefer to follow the latter rather than the former.

30. We take it that the trial court sentenced the appellant to life imprisonment rather than imprisonment for the remainder of his natural life which in effect was twenty years. Though the learned trial judge stated that he took into account the fact that the appellant was a first offender and had spent 2 years on remand, we are of the view that not sufficient credit was given to these mitigating factors. We are aware of course that the offence in question was a very serious offence. We are also aware that taking into account the period spent on remand is simply not an arithmetical exercise.

31. We would hesitate to treat the fact that the appellant was HIV positive as a mitigating factor given the risk of exposure of the victim to a seriously

life threatening disease. Unfortunately there is no evidence that the victim was ever examined for her HIV status, an omission which we view with apprehension. In cases of this nature it is important the victims are examined given the possible exposure to infection so that the trial court can be availed with all facts that would be relevant at sentencing as well as of course starting early treatment should infection have occurred. We implore the High Court in cases of this nature where there has been a risk of exposure to HIV infection to order the examination of the victim and a report tendered in evidence.

Decision

32. We agree with the appellant that a sentence of life imprisonment [whether it was for the remainder of the natural life of the appellant or was in effect 20 years imprisonment] was harsh and excessive in the circumstances of this case. We set it aside and substitute it with a sentence of 18 years imprisonment to run from the date of conviction, 17 January 2014.

Dated, signed and delivered this 18th day of December 2014

Remmy Kasule
Justice of Appeal

Eldad Mwangusya
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal