

UGANDA / JUDGMENT

Shazilly v Uganda (Criminal Appeal 40 of 2020) [2023] UGCA 221 (16 August 2023)

[2023] UGCA 221

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Gashirabake, JA, Kihika, JA

CASE / FILE NUMBER

Criminal Appeal 40 of 2020

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⁵ THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

(Coram: R. Iluteera, DCJ, C. Gashirabake, JA, O. Kihika, JA.)

CRIMINAL APPEAL NO.40 OF 2020

(Arising from Criminal Session No. HCT-00-CR-CS-020 I /20 I 8)

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SHAZILLY ABDULLAH APPEI,LANT

AND

UGANDA.... RESPONDENT

(Appeal .from the Jutlgmenl of the I iSh Court of Uganda I k den at Kampala, hy Jane I"rances Abotlo. J. delivered on 05'h Decemher, 2019) 15

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Introduction

1.1 The appellant was indicted for aggravated defilement c/s 129(3)(a)(a) and (c) of the Penal Code Act Cap 120.

- 2.] The facts of the case are that the appellant, who occasionally visited the home of the victim's auntie, had sexual intercourse with the victim twice in the month of June 2017, and promised to give her money and buy her clothes in exchange. Owing to the fact that the appellant had never honored his promise, the victim declined to have sexual intercourse with the appellant for the third time.
- 3.] On the fateful day, PW4 found the appellant seated on the bed together with the victim. On being asked why she had not done her chores and the whereabouts of the children, the victim got scared and tried to run away, prompting PW.4 to beat her up together with the appellant.

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- ⁵ 4.] PW.3, a staff working for an NGO called Crane, upon getting information that the victim had been defiled by the uncle paid her a visit at the auntie's home and reported the matter to the Police. The appellant was tried and he was convicted and sentenced to 32 years, 3 months and 28 days' imprisonment.
- 5.1 The appellant being aggrieved with the decision of the High Court lodged an appeal in this court. The appeal is premised on two grounds set out in the Memorandum of Appeal as follows; 10
- 1. That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence and apply the correct principles of law thereby convicting the appellant basing on evidence full of contradictions and inconsistencies thus occasioning ^a ^m miscarriage of justice.
- 2. That without prejudice to the foregoing, the learned trial judge erred in law and fact when she passed a sentence of 35 years' imprisonment upon the appellant which is illegal, harsh and excessive thereby occasioning a miscarriage of justice.

Representation

6.] At the hearing of the appeal, the appellant was represented by Mr. Richard Kumbuga, while the respondent was represented by Mr. Joseph Kyomuhendo, Chief State Attorney.

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That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence and apply the correct principles of law thereby convicting the appellant basing on evidence full of contradictions and inconsistencies thus occasioning a miscarriage of justice.

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⁵ Submissions for the appellant

- 7.] It was submitted that the ingredients of participation of the appellant in the commission of the alleged offence, age of the victim and Appellant being in authority over the victim were not made out. It was therefore erroneous for the learned trial Judge to decide otherwise hence occasioning a miscarriage of justice.
- 8.] On whether the victim was below 14 years, it was submitted for the appellant that there was a lot of conflicting evidence in this regard. That PW1 in her testimony stated that PW2 (victim) was 12 years old basing on PF3A- EXH. 1. Counsel argued that PW2 stated that she did not know when she was born. That upon cross examination she stated that her auntie told her that she was 16 years and she did not know how old she was in 2017. PW4, who is the auntie stated that the victim was 11 years, whereas her father stated that she was 15 years and she was born in 2005 in Police hospital in Arua. Counsel argued that the evidence of PW5 contradicted the evidence of PW1, PW2 and PW3 in regards to age of the victim.
- 9.] Counsel further contended whether there was a sexual act performed on the victim and by the appellant, counsel submitted that Exh.1, PF'3A, provided that the victim was sexually active and that is the reason she had STDS (Sexually Transmitted Diseases), however it was noted that the appellant was negative meaning PW2 contracted STDS from another person. Counsel argued that the evidence of PW4 contradicts PW2 who testified that she had sexual intercourse two times while PW4 stated that the victim had sexual intercourse 3 times.
- 10.] It was also contended whether the appellant had authority over the victim, counsel for the appellant submitted that through the trial, the victim

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⁵ never referred to the appellant as her uncle. PW3 on the other hand testified, during cross examination, that she did not know where the appellant was staying and that the aunt told her that the appellant was her husband. Counsel submitted that this leaves the possibility that the appellant was just a mere visitor. Whereas, PW4 testified that the appellant was his friend, they used to stay together as husband and wife. Counsel argued that the evidence of PW4 was not reliable because there was no proof of marriage. Counsel submitted that the evidence of the appellant was consistent and very categorical in his defence.

Submissions for the respondent

- ^I1.] Counsel for the respondent submitted that the prosecution proved all the ingredients of aggravated defilement. 15

- 12.) It was submitted that whereas the victim told Court that she did not know the year she was born, she was 16 years old at the time of her testimony in 2019. In counsel's opinion the victim revealed the source of her information being her aunt. It was further argued that the learned trial Judge relied on the scientific evidence of PW1 who examined the victim and found her to be 12 years basing on the physical examination. This was corroborated by the PW3 which put the victim at 12 years basing on physical development that she did not have pubic hair and she had set of 25 teeth. In his view, this evidence was corroborated by the evidence of PW5, the father of the victim who stated that she was born in 2005 and that she was 15 years at the time of the testimony.
- 13.] On contradictions, inconsistencies and falsehoods of witnesses, counsel submitted that there are many authorities laying down how courts should approach such witnesses. Counsel cited *Kato Kajubi Godfrey vs. Uganda*,

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- ⁵ SCCA No. 20 2012, where the Supreme Court followed its position in *Serapio Tinkasimire*, SCCA No.27 of 1989, and it held that it was not that every inconsistency will result into the testimony of the witness being rejected.
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14.1 Counsel for the respondent submitted that the prosecution evidence was not marred by any inconsistencies or contradictions and if any, they were too minor to shake the evidence. They did not go to the root of the case and they could be explained.

- 15.1 On the performance of a sexual act, counsel submitted that it is trite that a sexual act can be proved by the victim herself for medical evidence. Counsel cited *Hussein Bassita vs. Uganda*, S. C. C. A No.35 of 1995, where court held that sexual act can be established either by direct or circumstantial evidence and it is usually the victim's own evidence that offers the best proof of penetration, and then medical evidence and or other evidence may offer corroboration. Counsel noted that the testimony of PW2 was corroborated by the evidence of PW4 and PW3.
- 16.1 On whether the appellant was a person in authority over the victim, PW4, testified that she was living with the appellant as husband and wife. The two were in charge of the victim's survival and welfare. That they were in loco parentis of the victim and no wonder the appellant took advantage of his position to defile and then promise to give her money and clothes. The appellant and PW4 had authority over the victim.

Consideration of Court

17.) The powers of this Court are spelt out in Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S. I 13-10. The appellate court is mandated to re-evaluate the evidence before the trial court as well as

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the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*, (1968) E. A 123.

18.1 The law on the effect of contradictions and inconsistencies in the prosecution evidence was articulated in the case of *Obwalatum Francis vs. Uganda*, Supreme Court 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 or of a trifling 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"

19.1 We have perused the proceedings of the trial court, PW1 testified that when she physically examined the victim, she was 12 years of age. PW2 the victim, stated that she didn't know the year she was born but her auntie told her she was 16 years. PW4, testified that she was 11 years at the time of the act. Whereas PW5, testified that the victim was 15 years at the time of the testimony meaning she was 13 years at the time of the act. In *Francis Omuroni - Versus- Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000, Court held that:

> "Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense

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20.1 The trial court in assessing the age of the victim held that; "It has been decided by courts that other ways of proving the age of a child that can equally be conclusive are; the court's own observation and common sense assessment of the age of the child. The court had an opportunity to observe the victim as she testified via video link and she appeared to be younger than 15 years. It is this court's considered view that the victim was under 14 years in 2017. Therefore in agreement with the assessors I find that the prosecution *proved this ingredient beyond reasonable doubt.*"

- Considering the evidence on record, the contradictions and \$21.1\$ discrepancies pointed out in the appellant's submissions, are very minor. They do not warrant the demolishing of the credibility of the witnesses "testimonies". In our judgment, no miscarriage of justice was occasioned by the trial court ignoring the contradictions. The fact remained that the victim

was still below the age of 14 years irrespective of the fact that there were contradictions as to the exact age of the victim. The trial court considered its own observation and common sense assessment and came to a conclusion that the victim was below 14 years of age. We therefore cannot fault it.

- The other contention of the appellant was that there was no sexual act 22.1 or penetration of PW1. There was undeniable evidence by PW1, that the victim had a ruptured hymen, though not a recent rapture. This fact corroborated the victim's evidence that the first time the appellant forced her into sex. She had sex the second time with the appellant but she resisted the third time because he failed to fulfill the promise of buying her clothes. The appellant was well known to the victim and the act was not a one off. Having evaluated the lower court record, we agree with the findings of the trial court that there was a sexual act and it is the appellant who performed the act

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- \$23.1\$ The last contention on this issue, was whether the victim was under the authority of the appellant. PW2 testified that the appellant used to come at home and visit the aunt. PW4 testified that they used to stay together as husband and wife.
- \$24.1\$ As regards the place of authority, section \$129(4)\$ (c) of the Penal Code Act gives meaning to a person in authority as being any person acting in place of parent or parents to the victim or any person reasonable for the education supervision or welfare of the child and persons in a fiduciary relationship with the child.
- 25.1 Considering the testimony of PW2 and PW4, we are convinced that the ingredients were fully proved beyond reasonable doubt as assessed by the trial court.
- \$26.1\$ This ground fails.

Ground 2

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That without prejudice to the foregoing, the learned trial judge erred in law and fact when she passed a sentence of 35 years' imprisonment upon the appellant which is illegal, harsh and excessive thereby occasioning a miscarriage of justice.

Submissions for the appellant

\$27.1\$ Counsel submitted that if this court was inclined to sustain charges against the appellant then they should be taken as simple defilement. In the alternative, give a lenient sentence as required by the principle of consistency. (See Aharikundira Yustina vs. Uganda, SCCA No.27 of 2005). Counsel cited German Benjamin vs. Uganda, Court of Appeal Criminal Appeal No 142 of 2010 where the victim was 5 years old and the appellant was 35

years old. The appellant had been sentenced to 20 years' imprisonment but on appeal the sentence was reduced to 15 years' of imprisonment.

28.1 Counsel stated that in this case, the victim was 11 years at the time of the alleged commission of the offence, the appellant was 37 years, setting an age difference of 26 years. According to the appellant, he was a first time offender. That the Judge considered all these mitigating factors, she could not have come up with a harsh sentence of 35 years' imprisonment in respect to the appellant. Counsel prayed that the conviction be quashed, sentence set aside or reduced to such terms as this court deems fit.

Submissions for the respondent

- Counsel for the respondent, was of the view that the sentence of 35 years \$29.\$ 15 was neither harsh nor excessive. That the learned trial Judge considered the mitigating factors and sentenced the appellant to 32 years, 3 months and 28 days' imprisonment.
- Additionally, counsel submitted that the offence of aggravated 30.1 defilement attracts a maximum sentence of death and starting point for sentencing is 35 years according to **The Constitution (Sentencing Guidelines for courts of judicature) (Practice) Directions 2013**. Counsel conceded to the principle of consistency as cited by the appellant counsel

Consideration of Court

\$31.\$ 25 "Section 129 \$(3)\$ provides that;

> 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.

Section 129(4) provides that; 30

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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;

(b)where the offender is infected with the 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;*

(*d*)*where the victim of the offence is a person with a disability; or (e)where the offender is a serial offender.*

- 32.1 Principle 19(1) of the sentencing guidelines provides that the court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence. According to the third schedule item 3, aggravated defilement attracts a maximum sentence of death and starting point is 35 years.
- It must be appreciated that a sentencing court has the discretion in §33.1\$ sentencing but it has to exercise this judiciously. As the first appellate court, we cannot interfere with the trial court judgment on the sentence unless it is found that the trial court has misdirected itself as regards the findings of facts and law. If the trial court misdirected itself, then this court will interfere with the said sentence on the terms it considers fit after considering both the law and the evidence on record. We are guided by the Kenyan Court of Appeal decision in **Dismas Wafula Kilwake vs Republic**, [2018] eKLR, where the Court of Appeal set out the factors to be considered in sentencing under the **Sexual Offences Act** as follows:

"[We] hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to

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⁵ impose any of the sentences prescribed, if the circumstances of the case so demand.

> On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

34.1 Under this ground this court has the role to establish whether the trial court correctly applied the law or legal principle in arriving at both the conviction and sentence. Considering whether a sentence is harsh and excessive, courts are guided by the principle of consistency provided for under principle 6(c) of the sentencing guidelines. Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, which provides that;

"livery court shall, when sentencing an offender take into account (c) the nature and gravity of the offence, the circumstances of the offence, the character and antecedents of the offender, the need to protect the public, and other means of dealing with offenders in respect of similar offences committed in similar circumstances; "

- 35.1 In *Bacwa Benon vs. Uganda*, CACA No. 869 of 2014, this court upheld the conviction of life imprisonment imposed on the Appellant who being a guardian to the ten-year-old victim had sexual intercourse with her and infected her with HIV. In *Kabazi Issa vs. Uganda*, CACA No.286 of 2015, where this court confirmed a sentence of 32 years' imprisonment upon the Appellant who had been convicted of aggravated defilement of two minors who were each below the age of 14 years.
- 36.] Having thoroughly subjected the facts of this case to a fresh reappraisal, and the fact that appellant is a first time offender, has a large family, that, a given the circumstances of five children and has been on remand for two years and given the Court precedents we have considered above, we have come to the conclusion that the sentence of 32 years, 3 months and 28 days imprisonment that the trial Judge imposed was appropriate.
- Consequently, the appeal fails. \$37.]\$

We so Order 10

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Dated at Kampala this

RICHARD BUTEERA DEPUTY CHIEF JUSTICE

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

OSCAR KIHKA JUSTICE OF APPEAL

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