THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL NO. 671 OF 2014
(Arising From High Court Criminal Case No. 273 of 2012)

MUYAMBI LABAN :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

Introduction:

This appeal arises from the Judgment of Bashaija K Andrew, J in High Court Criminal Case No. 272 of 2012 at Rukungiri dated 30th December, 2012, in which the appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) & (4)(a)(c) of the Penal Code Act, Cap 120 and sentenced to 22 years' imprisonment.

The particulars of the offence were that on 20th June, 2007, the appellant being a primary school teacher performed a sexual act with a girl aged 6 years, his pupil. He was convicted and sentenced to 22 years' imprisonment.

With the leave of court granted under Section 132 (1) (b) of the Trial on Indictments Act Cap 23, he now appeals against sentence only as follows:-

"The learned trial Judge erred in law and fact when he passed an illegal sentence against the appellant contrary to Article 23(8) of the Constitution. In the alternative; the learned trial Judge erred in law and fact when he passed a harsh and excessive sentence of life imprisonment against the appellant."

Representations

At the hearing of the appeal, Ms. Mr. Peter Kabagambe, learned Counsel represented the appellant on State Brief, while Mr. David Ndamurani Ateenyi learned Senior Assistant Director of Public Prosecutions, appeared for the respondent. The appellant was present.

Case for the appellant

Counsel for the appellant submitted that the appellant in this matter was convicted on his own plea having admitted the fact that on 28th February 2012, he performed a sexual act with a one Natukunda Viola who was aged 6 years at the time. He was accordingly convicted and sentenced to 22 years' imprisonment, which in Counsel's view, was harsh and manifestly excessive in the circumstances.

Counsel further submitted that the appellant was a first offender and during mitigation proceedings he had pleaded that he committed the act as a result of intoxication, and sought leniency from the trial Judge.

Counsel referred Court to **Ssemanda Christopher and Muyingo vs. Uganda, Court of Appeal Criminal Appeal No. 077 of 2010,** for the

proposition that this court can only interfere with the lower court's decision if it is proved that the sentence was manifestly high or low.

He further referred Court to **Mutumbwe William vs. Uganda, Supreme Court Criminal Appeal No. 008 of 2008**. In that case the appellant had been sentenced to life imprisonment for the defilement of a minor aged 6 years and the Supreme Court reduced the sentence to 15 years imprisonment.

Counsel further relied on **Nkurunziza Julius vs. Uganda, Court of Appeal Criminal Appeal No.12 of 2009**, where the appellant in that case had committed a sexual act on a 7 months baby and this Court confirmed a sentence of 17 years imprisonment because he had pleaded guilty and submitted that the appellant in the present case had also readily pleaded guilty and saved Court's time and should have been given a lesser term.

Counsel invited Court to consider that a term of 10 years' imprisonment would be just in the circumstances of this case.

Case for the respondent

In reply, Counsel for the respondent invited this Court to look at the general circumstances under which an appellate court would interfere with a sentence imposed by the trial court. Counsel referred Court to **Ssemakula Yosam vs. Uganda, Court of Appeal Criminal Appeal No. 322 of 2009,** for the proposition that this court could not alter a sentence on the mere grounds that members of the appellate court, if they were trying the case, would have come to a different conclusion.

Counsel submitted that the appellant was convicted of a very serious offense which attracts a maximum sentence of death. According to the sentencing guidelines, the range for such offenses stretch between 30 years and death and the sentence of 22 years imprisonment was below the minimum term prescribed in the sentencing guidelines.

Counsel contended that the victim in this case was a child of tender years, aged 6 years and the appellant was her teacher at the time. The appellant breached a duty of trust required of him to mentor, guide and protect his pupils. Further that the fact that the appellant was intoxicated in the course of his duties was an aggravating factor in this case.

Counsel further contended that according to the medical report, this act was accompanied with a lot of force, the appellant removed and tore the victim's knickers. He caused her a lot of pain and she cried out for help which attracted intervention of a matron.

Taking all these aggravating factors into account, against the only mitigating factors of having been a first offender and the fact that he pleaded guilty, Counsel concluded that the aggravating factors by far outweighed the two factors given in mitigation and as such, invited Court to uphold the sentence imposed by the trial Judge.

Decision of the court

We have listened to both Counsel and carefully studied the Court record and the authorities cited to us.

We are very much alive to the duty of this Court to re-appraise the evidence and come up with our own inferences on all questions of fact and

law. **See Rule 30 (1) of the Rules of this Court and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.**

Further still, this court can only interfere with the sentence of the trial Court if that sentence is illegal or is based on a wrong principle or the court has overlooked a material factor, or where the sentence is manifestly excessive or so low as to amount to a miscarriage of Justice. **See James vs. R [1950] 18 EACA 147 and Kizito Senkula vs. Uganda Criminal Appeal No. 24/2001.**

The Judge, while passing the sentence stated as follows:-

> ***"Aggravated defilement is a grave offence which is rampant and deserves a serious punishment. It was worse where the victim was only six years old and the convict her teacher. There is need to deter such acts. I have taken into account the mitigating factors as submitted for the convict. I sentence the victim to TWENTY TWO years imprisonment."***

It is evident from the above that, the learned trial Judge did not, while passing sentence take into account the period the appellant had spent on remand as required by Article 23 (8) of the Constitution, which provides as follows:-

> ***"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."***

This Court has considered the decision in **Rwabugande Moses versus Uganda, Supreme Court Criminal Appeal No. 025 of 2014, where** the Supreme Court stated that, taking into account was necessarily an

arithmetical exercise. However, the same Court in **Abelle Asuman vs. Uganda, Criminal Appeal No. 066 of 2016,** while discussing the case of Rwabugande (supra) stated that before it became a precedent, this court and the courts below were following the law as it was in the previous decisions which held that taking into consideration of the time spent on remand did not necessitate a sentencing court to apply a mathematical formula.

On that ground alone we would have set aside the sentence, even though Counsel for the appellant only submitted against the severity of the sentence.

Be that as it may, we note the aggravating factors in this case, to wit injuries sustained by the victim, her age, the breach of a fiducially relationship between teacher and pupil as well as the fact that the offence for which the appellant was convicted carries a maximum sentence of death. We also note that the appellant was a first offender who readily pleaded guilty and did not waste Court's time. Further, he had spent 9 months on pre-trial detention and he committed the offence while under the influence of alcohol. We further note that at the age of 20 when he committed the offence, the appellant was a very young man who is capable of reforming and leading a useful life as a responsible citizen.

According to **Objective 3(e) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**, the guidelines should enhance a mechanism that will promote uniformity, consistency and transparency in sentencing. The ultimate responsibility to

determine the appropriate sentence, however, lies with the Court after weighing all relevant factors and then exercising its discretion judiciously.

In **Kizito Senkula vs Uganda, Supreme Court Criminal Appeal No. 024 of 2001**, the appellant defiled a child of 11 years. The Supreme Court found the sentence of 15 years appropriate but had to reduce the same to 13 years because the two years spent on remand had not been considered.

The Supreme Court in **Sam Buteera vs. Uganda, Criminal Appeal No. 21 of 1994**, upheld a sentence of 12 years' imprisonment as appropriate where an adult herdsman defiled an 11 year old girl.

In another case of **Rugaranwa Fred vs. Uganda, Supreme Court Criminal Appeal No. 039 of 1995**, the Supreme Court upheld the appellant's sentence of 15 years for aggravated defilement of a 5 year old girl.

In **German Benjamin vs. Uganda, Court of Appeal Criminal Appeal No. 142 of 2010**, the victim aged 5 years was sexually assaulted by a 35 year old appellant who was convicted and sentenced to 20 years imprisonment. On appeal this court set aside the sentence and substituted it with a sentence of 15 years imprisonment.

In yet another case of **Bikanga Daniel vs. Uganda, Court of Appeal Criminal Appeal No. 038 of 2000 (unreported)**, the appellant who was aged 21 years was convicted of the offence of defilement of a girl under 18 years and sentenced to 21 years imprisonment. On appeal, the sentence was found to be harsh and excessive and this court substituted it with a sentence of 12 years.

In view of the foregoing, we consider a term of 15 years imprisonment to be commensurate with the gravity of the offence. From that sentence we now deduct the period of 9 months which the appellant spent on remand. The appellant shall, therefore, serve a term of 14 years and 3 months imprisonment from the 30th day of December, 2012, the date of conviction.

We so order.

Dated at **Mbarara** this 2nd day of October 2018.

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Hon. Lady Justice Elizabeth Musoke

JUSTICE OF APPEAL

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Hon. Mr. Justice Cheborion Barishaki

JUSTICE OF APPEAL

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Hon. Mr. Justice Christopher Madrama

JUSTICE OF APPEAL