THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 613 OF 2014

KAJUBI RONALD.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal against sentence of the High Court of Uganda at Masaka in Criminal Session Case No. 0122 of 2012 before Margaret Oguli Oumo, J dated 23/4/2013)

Coram: Hon lady justice Elizabeth Musoke, JA

Hon. Mr. justice Ezekiel Muhanguzi, JA

Hon. Mr. justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

Introduction

This is a first appeal against the decision of the High Court at Masaka, wherein the appellant was convicted of the offence of aggravated defilement on his own plea of guilt and sentenced to 18 years imprisonment.

Brief background

The facts giving arise to this appeal are that on 29th January, 2012 at around midday, the victim went to fetch water where she found the appellant digging in his garden. The appellant convinced the victim and they had sexual intercourse. On her way home, she met her sister's

husband who asked her why she had delayed at the well. The victim told her sister's husband that the appellant had had sexual intercourse with her against her will and that it was not the first time she had had sex with him. Matters were reported to local authorities and later to police who tried to arrest the appellant but he escaped from the village.

The appellant was later seen at his home on 9th March, 2012 and upon a tip he was arrested. The victim was examined on Police Form 3 and found to be 12 years old. There were signs of penetration and a ruptured hymen. The accused was examined on Police Form 24 and found to be 24 years old with no injuries and with a normal mental status. He was charged with Aggravated Defilement. When the above facts were put to him, the appellant confirmed the same to be correct. He was thereafter duly convicted on his own plea of guilt, and sentenced as earlier indicated.

Being dissatisfied with the sentence alone and having been granted leave under section 132 (1) (b) of the Trial on Indictments Act, Cap. 23 and Rule 43 (3) (a) of the Rules of this court, the appellant appealed to this court on the following ground:-

> ***"The learned trial Judge erred in law and fact when she sentenced the appellant to 18 years imprisonment which sentence is harsh and manifestly excessive in the circumstances."***

Representation

When this appeal was called for hearing, Ms. Edith Namata, learned counsel on State Brief appeared for the appellant while Mr. David Ndamurani Ateenyi, Senior Assistant Director of Public Prosecutions appeared for the respondent. The appellant was present in court.

Submissions for the appellant

Ms. Namata argued that the learned trial Judge erred in law and fact when she sentenced the appellant to 18 years imprisonment considering the fact that the victim in this case was 12 years old and the appellant was 23 years old. In support of her argument, she relied on ***Lukwago Henry v Uganda, Court of Appeal Criminal Appeal No. 36 of 2010,*** where the appellant was sentenced to 13 years imprisonment for defiling a 13 year old girl. The appellant was aged 35 years. Counsel submitted further, that the appellant was a first offender who had pleaded guilty to the charge thus saving court's time and resources. Counsel asked court to substitute the sentence of 18 years imprisonment with a sentence of 10 years imprisonment.

Submissions for the respondent.

The learned Senior Assistant DPP opposed the appeal and supported the sentence of the High Court on the ground that the offence which the appellant was convicted of carried a maximum sentence of death. He submitted that the victim in this case was still a child of tender years and was defiled by the appellant several times.

Counsel argued that the learned trial Judge took into consideration all the mitigating factors before sentencing the appellant and the sentence of 18 years imprisonment was not harsh or excessive in the circumstances of this case. He asked court to uphold the sentence of the trial court.

Consideration by court

We have carefully considered the submissions from both counsel, perused the court record and the law and considered the authority cited

to us, and those not cited, but relevant to the determination of this appeal.

We are mindful of our duty as a first appellate court, to re-evaluate all the evidence adduced at the trial and come up with our own conclusions on all issues including sentence. See: Rule 30 of the Judicature (Court of Appeal Rules) Directions SI 13-10 and ***Bogere Moses v Uganda, Supreme Court Criminal Appeal No. 1 of 1997.***

The Supreme Court discussed the principles under which an appellate court can interfere with the sentence imposed by the trial court in ***Kizito Senkula v Uganda, Supreme Court Criminal Appeal No. 024 of 2001.*** The learned justices noted as follows:-

> ***"...in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by the trial judge unless, as was said in James v R, (1950) 18 EACA 147, it is evident that the judge had acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."***

The same principles were reiterated in ***Kiwalabye Bernard v Uganda,*** *Supreme Court Criminal Appeal No. 143 of 2001* as follows:-

> ***"The appellant court is not to interfere with 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."***

While sentencing the appellant, the learned trial Judge noted at pages 11 and 12 of the record of appeal as follows:-

"In passing sentence, court took into account the following circumstances:-

The convict is a first offender. That the convict has been on remand for 11 months. He is 23 years of age and therefore has chances of reforming.

The accused pleaded guilty at the earliest opportunity and has saved court's resources. He has a big family to look after, a sick mother.

That he committed the offence out of peer pressure and he has now realized the consequences of his actions.

He has pleaded to go out to try to influence his peers about the dangers of committing crimes.

Court has also looked at the aggravating facts. The convict is charged with an offence that carries a maximum sentence. It was not the first time, the convict was having sex with the girl.

The victim was only 12 years and he exposed her innocence and did not negate his with him and would not have stopped if the whole thing was not revealed.

In the circumstances court passes a sentence of 18 years imprisonment on the convict."

It is clear from the above passage that the learned trial Judge took into account the appellant's and the victim's age before sentencing. However, upon proper consideration of the circumstances of this case the sentence of 18 years imprisonment was harsh and excessive. The appellant was a first offender who had pleaded guilty and was of youthful age of 23 years old at the time of the commission of the offence. This Court and the Supreme Court have imposed lower sentences in similar circumstances for the offence of aggravated defilement.

In ***Bukenya Joseph v Uganda,*** *Court of Appeal Criminal Appeal No. 222 of 2003,* the appellant aged about 65 years and married with three wives,

defiled a victim aged 6 years. On appeal, this court confirmed the sentence of life imprisonment which at that time still meant 20 years imprisonment according to the Prisons Act.

The Supreme Court in ***Sam Buteera v Uganda,*** *Supreme Court Criminal Appeal No. 21 of 1994*, upheld a sentence of 12 years imprisonment as appropriate where an adult herdsman defiled a victim aged 11 years only.

In ***Kizito Senkula V Uganda***, *Supreme Court Criminal Appeal No. 24 of 2001,* the appellant an adult male defiled a victim of 11 years. The Supreme Court found the sentence of 15 years imprisonment appropriate but had to reduce the same to 13 years because it was not clear whether the learned trial Judge had considered the period on remand.

This court in ***Ninsiima Gilbert v Uganda,*** *Court of Appeal Criminal Appeal No. 0180 of 2010*, reduced a sentence of 30 years imprisonment to 15 years imprisonment. In that case, the appellant was aged 29 years old and the victim was 8 years. Court took into account that the appellant was a first offender and had family responsibilities.

In ***Bikanga Daniel v Uganda***, *Court of Appeal Criminal Appeal No. 38 of 2000,* the appellant had been convicted of defilement of a girl under 18 years of age. He detained the girl for 2 days in his house during which he repeatedly defiled her. He was sentenced to 21 years imprisonment. On appeal this sentence was found to be harsh and excessive. It was substituted with a sentence of 12 years imprisonment.

In the premises, we consider a sentence of 18 years harsh under the circumstances. We set it aside and substitute it with 15 years imprisonment which we find appropriate in the circumstances considering the fact that the appellant was aged 23 years old and had

pleaded guilty. We deduct the 11 months the appellant had spent on remand. He shall now serve a sentence of 14 years and 1 month's imprisonment to run from 23/4/2013 when he was convicted. We so order.

Dated at Masaka this 9th day of Dec 2019.

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Elizabeth Musoke
Justice of Appeal

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Ezekiel Muhanguzi
Justice of Appeal

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Remmy Kasule
Ag. Justice of Appeal