THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 614 OF 2014

OCHEN DAVID.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal against sentence of the High Court at Masaka in Criminal Case No. 0060 of 2013 before Oguli Oumo, J dated 22/4/2013)

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 of Uganda at Masaka delivered on 22nd April, 2013 wherein Oguli Oumo, J. convicted the appellant of the offence of Aggravated Defilement on his own plea of guilt and sentenced him to serve a term of imprisonment of 15 years.

Brief background

The relevant facts to which the appellant pleaded guilty were that:-

"The appellant was a resident of Sembalule District. He had on several occasions engaged in sexual intercourse with the victim. As a result, the victim got pregnant and eloped with the appellant to Mbalala in

Mukono District where they hid until March 2012. Thereafter, the victim returned to Sembabule District and later gave birth to a baby around April, 2012 though the baby died only two weeks later.

The victim was taken back to school and she was in Primary Seven. On 7th October, 2012, the appellant came back to Sembabule Trading Centre. He booked a room in Vision Hotel in Sembabule Town Council and called the victim. They were found having sexual intercourse. The police was tipped by the residents. Soon after, the Police stormed the Hotel and found the victim having sexual intercourse at the Hotel. Both the appellant and the victim were escorted to Sembabule Police Station. The appellant was charged with Aggravated Defilement as he claimed that the victim was his wife.

On 8th October, 2012 the victim was examined on Police Form 3 and found to be 16 years with a ruptured hymen. On 12th October, 2012, the appellant was examined on Police Form 24 and was found to be 21 years and mentally normal. Further medical examination found that he was HIV positive." The appellant was charged, tried, convicted and sentenced to 15 years imprisonment.

Being dissatisfied with the said sentence, the appellant appealed to this court on one sole ground of appeal that states:-

> ***"The learned Judge erred in law and fact when she sentenced the appellant to 15 years imprisonment which sentence is illegal in the circumstances."***

Representation

At the hearing of this appeal, Ms. Regina Tronera Babukiika, learned counsel appeared for 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 in court.

Submissions for the appellant

Counsel sought and was granted leave to appeal against sentence only under section 132(1) (b) of the Trial on Indictments Act, Cap. 23 and Rule 43 (3) of this Court's Rules. She then submitted that the learned trial Judge did not take into consideration the period of 6 months the appellant spent on remand and therefore the sentence was illegal and should be set aside. Counsel prayed that this court allows the appeal, sets aside the sentence and impose a fresh appropriate sentence.

Submissions for the respondent

In reply, counsel for the respondent conceded that the learned trial Judge did not consider the period the appellant spent on remand contrary to the provisions of Article 23(8) of the Constitution. He prayed court to invoke its powers under section 11 of the Judicature Act, Cap. 13 and impose an appropriate sentence in the circumstances.

Consideration by court

We have carefully studied the court record and considered the submissions of both counsel.

We are alive to the duty of this court as a first appellate court to re-appraise the evidence on record and come up with its own conclusions as provided under ***Rule 30 of the Judicature (Court of Appeal Rules) Directions SI No. 10-13***. The duty of a first appellate court was discussed by the Supreme Court in ***Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997***, where the learned justices of the supreme court stated that:-

"The first appellate 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."

We are also mindful that this court as an appellate court can only interfere with the trial court's discretion in sentencing on limited grounds as has been set out in various decisions of the Supreme Court such as ***Livingstone Kakooza Vs Uganda, Supreme Court Criminal Appeal No. 17 of 1993***, where it was stated that: –

"An appellate Court will only alter a sentence imposed by the trial Court if it is evident that it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo s/o Owoura vs R. (1954) E.A.C.A. 270."

The same principles were stated by the supreme court in ***Kyalimpa Edward V. Uganda, Supreme Court Criminal Appeal No. 10 of 1995*** where court stated that:-

"…. an appropriate sentence is a matter for the discretion of the sentencing judge, each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to an injustice".

In ***Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001***, the Court expanded the principle further when it stated as that: –

"The appellate Court is not to interfere with the sentence imposed by the 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 while passing the sentence, or where the sentence imposed is wrong in principle."

Upon careful perusal of the record, it is indicated that while sentencing the appellant at pages 13 and 14 of the record of appeal, the learned trial Judge stated thus:-

"The court took into account the following aggravated circumstances into account in passing sentence (sic).

The offence carries a maximum death sentence on conviction. The convict engaged in sexual intercourse with the victim, when he was aware he was HIV positive.

The convict turned the victim into his wife and still believes she is his wife.

The convict had sexual intercourse with a child whom he knew was a school going and even made her pregnant. The fact that he did not know her age is of no consequence.

Being a teacher by profession, whether teacher or not, he stood in a position of authority over her and took advantage of it. The court also took into the following aggravating factors (sic)

The convict is a first offender. The convict pleaded guilty at the earliest and so saved court's time and resources.

Even if he was a young man of 21 and trying to found a family, he had no business praying (sic) on school children, who he was a teacher had a duty to protect (sic), but took advantage of his position, not only to infect her with HIV Aids, but impregnated her also leading to her dropping out from school.

In the circumstances, court sentences the convict to 15 years imprisonment."

We note from the above sentencing record that the learned trial Judge did not consider the period of 6 months, the appellant had spent in pre-trial detention. We therefore accept the submissions of both counsel that failure to comply with Article 23 (8) of the Constitution renders the sentence illegal. The supreme court in ***Rwabugande Moses v Uganda, Supreme Court Criminal Appeal No. 25 of 2014***, explained what taking into account as provided under article 23 (8) of the Constitution entails. The Supreme Court stated thus:-

> ***"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."***

The learned trial Judge should have complied with the constitutional provision by deducting the period the appellant spent on remand from the final sentence. We therefore find the sentence of 15 years imprisonment imposed upon the appellant illegal and accordingly set it aside.

We now invoke section 11 of the Judicature Act, which gives this court the same powers as the trial court to impose a sentence we think would be appropriate in the circumstances of this case.

The aggravating factors are that the appellant was in a position of authority over the victim. He exposed the victim to HIV and he impregnated her, which led the victim to drop out of school. The offence of aggravated defilement carries a maximum sentence of death upon conviction.

The mitigating factors are that the appellant was a first offender who pleaded guilty. He was relatively young aged 21 years old.

We are alive to the principles of maintaining consistency and uniformity in sentencing. We shall hereunder consider the sentencing range of decided cases in similar circumstances.

In ***Olara John Peter v Uganda, Court of Appeal Criminal Appeal No. 30 of 2010,*** the appellant was convicted of aggravated defilement and sentenced to 16 years imprisonment. He appealed to this court on the ground that the sentence was harsh and excessive. The court upheld the sentence by noting that:-

> ***"It should also be observed that an eight year girl was exposed to the dangers of HIV by an adult and on this consideration alone the sentence could have been higher."***

This court in ***Dratia Savior v Uganda, Criminal Appeal No. 154 of 2011,*** reduced a sentence of 20 years imprisonment to 18 years imprisonment for the offence of aggravated defilement. In that case the appellant was HIV positive.

In ***Kisembo Patrick v Uganda, Court of Appeal Criminal Appeal No. 411 of 2014,*** this court reduced a sentence of life imprisonment to 18 years imprisonment. In that case court noted that the victim was exposed to a seriously life threatening disease of HIV.

In ***Ederema Tomasi v Uganda, Court of Appeal Criminal Appeal No. 554 of 2014,*** court set aside a sentence of 25 years imprisonment due to the fact that the trial court did not comply with Article 23 (8) of the constitution and substituted it with a sentence of 18 years imprisonment. In that case the appellant knew that he was HIV positive but nevertheless defiled the victim.

Having looked at the sentencing range in the above cited cases of similar circumstances, we take into consideration that the offence of aggravated defilement is a grave one which carries a maximum sentence of death. The appellant eloped with the victim and exposed her to HIV. We also consider the fact that the appellant was a first offender who pleaded guilty. He was aged 21 years with a possibility of reform if given a chance.

Therefore, we find a sentence of 17 years imprisonment appropriate in the circumstances, and will meet the ends of justice. We deduct the period of 6 months the appellant had spent on remand. He shall now serve a sentence of 16 years and 6 months to run from 22/4/2013 when he was convicted. It is so ordered.

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