

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA
CRIMINAL APPEAL NO. 0655 OF 2014**

(Arising from High Court of Uganda at Masaka Criminal Session Case No. 0007/2011)

TIBORUHANGA EMMANUEL :::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Masaka before Oguli-Oumo, J. delivered on 19th November, 2011 in Criminal Session Case No. 0007 of 2011)

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA**

JUDGMENT OF THE COURT

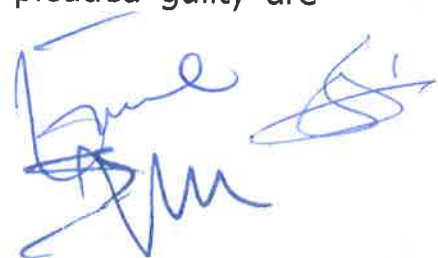
Brief Background

The appellant was convicted on his own plea of guilty of the Offence of Aggravated Defilement contrary to Sections 129 (3) & (4) (a), (b) of the Penal Code Act, Cap. 120 and was sentenced to serve a term of imprisonment of 40 years by the trial Court.

The appellant was initially charged on an indictment which stated the particulars as follows:

"Tiboruhanga Emmanuel on the 19th day of September, 2009 at Mikoni Village in the Masaka District performed a sexual act with Nakoyi Christine, a girl under the age of 13 years."

He pleaded not guilty. After the trial had commenced, the prosecution duly amended the indictment to indicate that the victim was 13 years old and that the appellant was HIV positive. The appellant pleaded guilty to the amended indictment. The relevant facts to which the appellant pleaded guilty are reproduced below:



"On 19th September, 2010 at around 7.00 p.m, in the evening, the victim N.C (a minor), a pupil at Kitengesa Church of Uganda Primary School and a resident of Mikoni Buwunga Masaka District, was in the bathroom bathing. The appellant came, grabbed her and forced her into sexual intercourse, and despite the fact that she made an alarm, no one came to rescue her. The appellant thereafter threatened to kill her, if she dared to reveal what happened to her.

The following day the victim informed a friend Nakimera Caro about the ordeal who in turn passed on the information to the victim's Aunt. The victim's Aunt interrogated her whereupon she admitted that the appellant had forcefully had sexual intercourse with her when she was bathing. Matters were referred to LCs who advised reporting to police (sic).

The appellant was arrested and girl (sic) was examined on Police Form 3. There were signs of penetration and hymen ruptured (sic). She was found to be 10 years old (sic). Accused was examined on Police Form 24 and found to be of normal mental status, no injuries, sero status HIV positive, and therefore charged with defilement. He was 28 years."

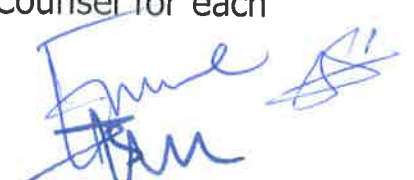
When the above facts were read to him, the appellant confirmed the same to be correct. He was thereafter duly convicted and sentenced as indicated earlier. The appellant was dissatisfied with the sentence imposed on him and preferred the present appeal against sentence only on the grounds:

- "1. That the Learned trial judge erred in law and fact when she passed an illegal sentence without considering the remand period of the Appellant.**
- 2. That the Learned trial judge erred in law and fact when she sentenced the Appellant to 40 years imprisonment, a sentence which is unduly harsh and excessive in the circumstances."**

This Court granted leave for the appeal to proceed on sentence only.

Representation

At the hearing of the appeal, Mr. Joseph Wasswa, learned Counsel represented the appellant on State Brief, while, Mr. Peter Mugisha, learned State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. The Appellant was in Court. Counsel for each



party made oral submissions which this Court considered in determining the present appeal.

At the hearing of the Appeal, counsel for the appellant submitted that in passing the sentence, the learned trial Judge did not take into consideration the period the appellant had spent on remand while attending trial. This made the sentence illegal and the same had to be set aside. Counsel for the respondent conceded to the said submission for the appellant.

The relevant excerpt of the judgment of the trial Court stating the reasons for the sentence imposed is contained at pages 16 to 17 of the record as follows:

"The accused was charged with Aggravated Defilement contrary to section 183 (a) (b) (sic) of the Penal Code Act.

The particulars of the offence are that, the accused person, on the 19th day of September, 2010 (sic) at Mikoni Village in Masaka District performed a sexual act with Nanyonyi Christine, a girl under the age of 18 years, when he was HIV positive.

Accused was convicted on his own plea of guilty.

The offence with which the convict was charged entails a maximum sentence of death.

The accused is a first offender, and has not wasted court's time and resources. He is a young man of 30 years and is capable of reforming. However, the offence with which he is charged has become rampant (sic) this society.

The accused not only violated the dignity of the victim as a woman but also violated her right as a child. He has not only affected her physically but also subjected her to psychological torture and stigma.

It does not matter whether he was mistaken about her age. The fact is that, he had sex with a girl, under 18 years of age, when he was HIV positive.

In order to deter others from doing such and in order (sic) protect the future generations of this country from such brutal and hostile persons, the court is of the view that, a sentence of 40 years imprisonment is appropriate for the convict."

A handwritten signature in blue ink, appearing to be 'Daniel', with a large flourish to the right.

It is clear from the above passage that the period spent by the appellant on remand was not taken into account at all contrary to the Constitutional requirement in Article 23 (8) of the 1995 Constitution. As the Supreme Court held in **Abelle Asuman vs Uganda, Supreme Court Criminal Appeal No. 0066 of 2016:**

"...the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that period should be credited to a convict when he is sentenced to a term of imprisonment.

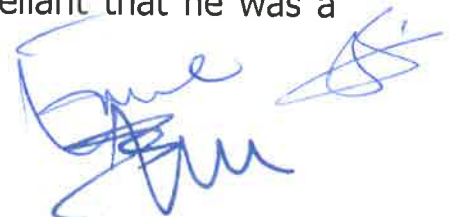
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Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23 (8) of the Constitution."

Even giving allowance for difference in style, it is incontrovertible that the learned trial Judge did not take into consideration the remand period prior to sentencing the appellant. The sentence is, therefore, hereby set aside.

We shall now proceed to determine an appropriate sentence in the circumstances. We exercise that power by virtue of **Section 11** of the **Judicature Act, Cap. 13** which gives this Court the powers of the High Court for purposes of disposing of an appeal.

During the allocutus in the trial Court the following mitigating factors were raised in favour of the appellant; he pleaded guilty and thus saved Court's time. He was also a first offender. It was also submitted in mitigation that the appellant was deceived by the victim that she was of age and capable of consenting to the sexual acts only to find out that she was not. To prove further that he was misled by the victim, the appellant said that he had voted in a general election with the victim and as such he thought she was of the age of consent. It was further submitted for the appellant that he was a



responsible caregiver for his children who would suffer in his absence. It was further submitted that the appellant was of a youthful age of 30 years who had high chances of reforming. He had been on remand for 3 years.

The following aggravating factors were raised against the appellant. He had been convicted of a grave offence which carried the maximum death sentence. The victim of the appellant's actions was a young girl, a pupil whose future was shattered by the actions of the appellant. The appellant inflicted both physical and psychological injuries as a result of the appellant's actions by which she was infected with HIV which endangered the victim's life. The offence for which the appellant was convicted was rampant in the jurisdiction of the court and the community deserved to be protected.

We recognize that the need to maintain consistence in sentences imposed for similar offences is a key principle of sentencing. **See: Mbunya Godfrey vs Uganda, Supreme Court Criminal Appeal No. 004 of 2011. Aharikundira vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015.**

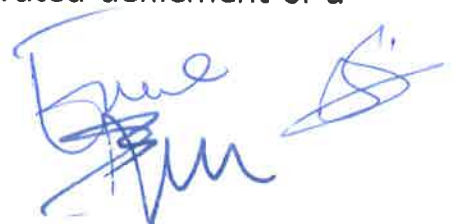
The sentencing range for aggravated defilement as imposed by the Court of Appeal in decided cases is as follows:

In **Ogarm Iddi vs Uganda, Court of Appeal Criminal Appeal No. 0182 of 2009**, the victim was 13 years old and the Court of Appeal upheld a sentence of 15 years imprisonment of the offence of aggravated defilement.

In **Ntambala Fred vs Uganda, Criminal Appeal No. 0034 of 2015**, the Supreme Court upheld a sentence of 14 years imprisonment for Aggravated Defilement which had been imposed by the trial Court and maintained by the Court of Appeal.

In **Lukwago Henry vs Uganda, Court of Appeal Criminal Appeal No. 0036 of 2010**, this Court upheld a sentence of 13 years imposed upon the appellant for the offence of aggravated defilement.

In **Kibaruma John vs Uganda, Court of Appeal Criminal Appeal No. 0255 of 2010**, the appellant was convicted of aggravated defilement of a



9 year old girl and was sentenced to 15 years imprisonment. On appeal to the Court of Appeal, his sentence was reduced to 11 years.

The sentences previously imposed by the Court of Appeal for aggravated defilement fall within the range of 11 years to 15 years. However, the cases mentioned above did not involve exposing the victim to HIV/AIDS like it was in the present appeal. We are therefore of the view that a sentence of 25 years would be sufficient given the stated aggravation and the difficulties contracting HIV/AIDS would place on the victim for which the appellant must be sufficiently punished.

From the sentence of 25 years, we shall deduct the period of 3 years which the appellant spent in custody while attending trial leaving him to serve a term of imprisonment of 22 years which shall be served from the date he was convicted. This appeal is disposed of accordingly.

We so order.

Dated at Masaka this 9th day of Dec: 2019.

June

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Elizabeth Musoke

Justice of Appeal

[Signature]

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Ezekiel Muhanguzi

Justice of Appeal

[Signature]

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Remmy Kasule

Ag. Justice of Appeal