THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 873 OF 2014

(Arising from High Court Criminal Session Case No. 216 of 2012 before Hon. Justice Catherine Bamugemereire)

KULABA MOSES::APPELLANT

VERSUS

UGANDA:::RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE NIGHT PERCY TUHAISE, JA

JUDGMENT OF COURT

The appellant was indicted and convicted of the offence of Aggravated Defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act and sentenced to 27 years imprisonment. The appellant was dissatisfied with the sentence passed by the trial court and filed this appeal on grounds that;

1. The trial Judge erred in law and in fact when he imposed an illegal sentence against the appellant.
2. In the alternative, the trial Judge erred in law and in fact when she passed a manifestly harsh and excessive sentence against

the appellant thereby failing to exercise her discretion judiciously.

Background

On the 11th day of April 2012, the victim one Alisaga Ruth went to the bush at Lwambogo village to collect some mangoes. While in the bush, the victim was approached by the appellant, a person she had known very well. The appellant then led the victim into nearby sugarcane plantation from where he forced her into sexual intercourse. Shortly after the commission of the offence, the appellant left the victim to go. The victim then went straight home and informed her mother, one Mwajuma Nanyonjo of what had happened to her. Later on, the mother informed the area L.C's and also reported a case at Mutai Police post.

Representation

At the hearing of the appeal, Mr. Mangeni Ivan Geoffrey appeared for the appellant while Mr. Peter Mugisha appeared for the respondent.

Appellant's arguments

Counsel for the appellant sought and was granted leave to appeal against sentence only under section 132 (1) (b) of the Trial on Indictments Act which was granted. Counsel submitted that the sentence passed by the trial court is illegal because it did not take into account the period spent on remand. Counsel relied on the case of **Rwabugande Moses Vs Uganda S.C.C.A No. 25 of 2014** on the proposition that the period spent on remand has to be calculated while passing sentence.

In addition, counsel argued that the sentence of 27 years meted out on the appellant was harsh and excessive. He relied on **Bikanga Daniel Vs Uganda Criminal Appeal No. 38 of 2014** in which the appellant was sentenced to 21 years imprisonment for defilement and on appeal, the sentence was reduced to 12 years. Counsel prayed

that the appeal be allowed and a sentence of 7 years be given to the appellant.

Respondent's arguments

Counsel submitted that the period the appellant spent on remand was well considered by the learned sentencing Judge. He relied on the Supreme Court decision in **Abelle Asuman Vs Uganda S.C.C.A No. 66 of 2016** which departed from the earlier decision in **Rwabugande Moses Vs Uganda S.C.C.A No. 25 of 2014** cited by the appellant. That Article 23(8) of the Constitution does not state that the period spent on remand must be deducted in an arithmetic way. What is material is that the trial Judge put into account the period of 2 and a half years that the appellant had spent on remand.

Regarding ground 2, counsel submitted that the sentence was neither harsh nor excessive considering that the victim was only 13 years old and was an imbecil. That the trial Judge put into consideration both the aggravating and mitigating factors and passed an appropriate sentence of 27 years. For court to interfere with the sentencing discretion of the trial Judge, it must be satisfied that; the sentence imposed is manifestly excessive, if it is so low as to amount to a miscarriage of justice, where the trial court ignores to consider an important matter, or circumstances which ought to be considered when passing the sentence and where the sentence is wrong in principle. That none of the above circumstances exist in this case and as such, the appeal should be dismissed.

Court's consideration of the appeal

We have listened and carefully considered the submissions of both counsel and we have also read the record and the authorities cited to us.

Whereas this is an appeal against sentence only, we must remind ourselves that as a first appellate court, we have a duty to reappraise the evidence and to make our own inferences, on both issues of fact

and law. This we are required to do under **Rule 30** of the Rules of this Court. The duty of the first appellate court to reappraise the evidence has long been established. A number of authorities in this court and in the Supreme Court have laid down this duty. See **Bogere Moses vs Uganda (Supreme Court Criminal Appeal No. 1997)** and **Kifamunte Henry vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997).**

As an appellate court, we should not interfere with the discretion of a trial court in the determination of a sentence imposed by that trial court unless that trial court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001(S.C).**

Likewise, the Supreme Court in **Kyalimpa Edward v. Uganda SCCA No. 10 of 1995** had this to say;

> *"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 court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owuora Vs R (1954) 21 E.A.C.A 126, R Vs Mohamedali Jamal (1948) 15 E.A.C.A 126."*

Article 23(8) of the Constitution requires court to take into account the period the person has spent on remand. The sentencing order of the trial Judge states;

> *"Though he was a first offender and not any more, the offence the convict committed was heinous and he was awfully heartless. The child was only 13 and she also has a learning disability, a condition which should have drawn pity and*

protection and not abuse. This is not a jungle where survival is for the fittest, there is rule of law in this country and we do protect the most vulnerable. This court would like to send out a message to the like minds that all children, particularly the more vulnerable ones must be protected and not violated. The accused is sentenced to 27 years in prison and the time spent on remand has already been taken inti account..."

In **Abelle Asuman Vs Uganda S.C.C.A No. 66 of 2016**, the Supreme Court held that;

"The Constitution provides that the sentencing Court must take into account the period spent on remand. It does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in ***Article 23(8) of the Constitution*** *is for the Court to take into account the period spent on remand."*

Clearly, the learned trial Judge took into account the period the appellant had spent on remand.

Mr. Mangeni's argument is based on the decision in **Rwabugande Moses versus Uganda S.C.C.A No. 25 of 2014** which was overturned by **Abelle Asuman Vs Uganda** (supra). To take into account is to bear in mind or consider the remand period before imposing a sentence. It does not mean the period spent on remand has to be deducted in an arithmetic way. We therefore reject the appellant's argument on the legality of the sentence passed by the trial court and dismiss ground 1 of the appeal.

Ground 2 concerns severity of sentence. It is a well settled principal that while passing sentence, courts have to consider the principle of uniformity and consistency in sentencing in similar offences. In the instant case, the learned trial Judge sentenced the appellant to 27 years imprisonment for aggravated defilement. The trial Judge gave no reasons why the appellant deserved more punishment than other

persons convicted of the same offence in quite similar circumstances. We do not find the aggravating factors of the case so grave so as to attract a sentence higher than those given to other persons convicted of the same offence. We accordingly set aside the sentence and under S. 11 of the Judicature Act which gives this court the same power as that of the trial court to impose a sentence of its own proceed to sentence the appellant afresh.

This court found in the case of **Barugo John Vs Uganda Criminal Appeal No. 208 of 2014** that;

> *"the sentences for aggravated defilement since the annulment of the mandatory death penalty in 2009 range from 10 to 17 years imprisonment depending on the circumstances of each case."*

In the present case, the victim was 13 years old and was mentally retarded. The appellant was 50 years at the time the offence was committed and should have been in parental status with the victim. This is a serious aggravating factor. The mitigating factors are that the appellant was a first offender and was remorseful. He had spent 2 and a half years on remand.

In **Katende Ahamad Vs Uganda S.C.C.A No. 6 of 2004**, the victim was a 9 year old daughter of the appellant and the Supreme Court upheld a sentence of 10 years imprisonment for aggravated defilement.

In **Ntambala Fred Vs Uganda S.C.C.A No. 34 of 2015**, the Supreme Court upheld a sentence of 14 years for the offence of aggravated defilement of an 8 year old victim.

Sentencing as a punishment for an offence is meant to be a retribution as well as a deterrent. It is also meant to rehabilitate the offender. Having considered all the aggravating and mitigating factors, and having taken into account the period the appellant spent on remand, we find that a sentence of 14 years imprisonment from the date of conviction will meet the ends of justice. The appeal

succeeds in part. The appellant is sentenced to 14 years imprisonment from the date of conviction which is 30th October, 2014.

We so order.

Dated this 17th day of July 2019

Hon. Justice Cheborion Barishaki, JA

Hon. Justice Stephen Musota, JA

Hon. Lady Justice Night Percy Tuhaise, JA

17/7/19

Appellant present.
Mr. Mugizi for the Resp.
Mr. Muwonge for the Appellant
Order: clerk.

17-7-19