THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT MASAKA

Criminal Appeal No. 46 of 2015

(An appeal from the Judgment of the High Court of Uganda (Rugadya-Atwooki, J.) sitting at Masaka delivered on 6th February, 2015 in Criminal Session case No. 080 of 2012)

Ssentongo Ronald Kyatte :: Appellant

versus

Uganda ::Respondent

Coram: Hon. Lady Justice Elizabeth Musoke, JA
Hon. Justice Ezekiel Muhanguzi, JA
Hon. Justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

The appellant aged 19 years, was indicted and convicted of the offence of aggravated defilement contrary to Sections

129(3)(4)(a)(b) of the Penal Code Act. He was sentenced to imprisonment for his natural life in prison.

The facts of the case accepted by the trial Court as proved beyond reasonable doubt are that on 20th January, 2012, at Police Zone, Lwengo District, the appellant whose status was HIV positive performed a sexual act with NG, a girl aged 11 years old at the time. The girl had gone to a party and while there the appellant grabbed her, pulled her into a nearby bush and had forceful sexual intercourse with her. He then returned to the party where the victim girl, bleeding and crying, also followed him and pointed him out to those at the party, as the one who had defiled her. The appellant managed to escape away from the party. The matters were reported to police and the appellant was arrested several days later. The victim identified him as her assailant at a police identification parade. He was indicted, tried, convicted and sentenced.

The appellant appealed to this Court against sentence on the sole ground that:

> ***"1. The learned trial Judge erred in law and fact when he sentenced the appellant to life imprisonment (imprisonment for the natural life of the appellant), which sentence was harsh, excessive and in the circumstances occasioned a miscarriage of justice."***

This Court granted leave under Section 132(1)(b) of the Trial on Indictments Act and Rule 43(3)(a) of the Rules of this Court, to the appellant and with the consent of the respondent's Counsel, to proceed with this appeal against sentence only.

At the hearing of the appeal, Learned Counsel Alexander Lule appeared for the appellant on State brief; while the learned Assistant Director of Public Prosecutions Naluzze Aisha represented the respondent.

For the appellant, it was submitted that the imposed sentence of imprisonment for life was too harsh and excessive given the mitigating factors that the appellant was aged only 19 years old was a student and thus was capable of reforming. There was also need for the sentencing court to maintain consistency and uniformity by passing sentences that were not very different from those passed by Courts in cases that had more or less similar facts and circumstances.

Respondent's Counsel opposed the appeal and submitted that the sentence passed by court was appropriate because the maximum sentence for aggravated defilement is death, the victim was only aged 11 years and her life had been greatly injured by the appellant making her to be now HIV positive.

This Court, as the first appellate Court, is being called upon by the appellant, to interfere with a sentence passed upon him by the trial court. This Court can only do so following the set principles which are that; an appropriate sentence is a matter of the judicious exercise of discretion by the sentencing Court. Each case has its own facts and the sentencing Court exercises its discretion on appreciating those facts and passes the appropriate sentence. The appellate Court will not normally interfere with the exercise of that discretion unless the sentencing Court passes an illegal sentence or one that is manifestly so excessive or so low and lenient as to

amount to a miscarriage of justice. See: **Kyalimpa Edward vs Uganda: Supreme Court Criminal Appeal No. 10 of 1995.**

It is not sufficient that the members of the appellate Court would have exercised their discretion in determining the sentence differently from that of the sentencing Court. The appellate Court may only interfere where there has been failure on the part of the sentencing Court to exercise its discretion, or to take into account a material consideration or where the said Court has made an error in principle. See: **Kamya Johnson Wavamunno vs Uganda: Supreme Court criminal Appeal No. 16 of 2002.**

It is also a principle of sentencing that while, Courts of law are alive to the fact that no two crimes are identical, they should, as much as possible, have consistency and uniformity in sentencing: See: **Mbunya Godfrey vs Uganda: Supreme Court Criminal Appeal No. 04 of 2011**.

This Court shall resolve this appeal in accordance with the above principles.

In sentencing the appellant, the learned trial Judge considered the mitigating factors that the appellant was young aged 19 at the time of the offence. He had also stayed on remand for almost 3 years.

The trial Judge then considered the aggravating factors of the appellant having been HIV positive who had made the victim also to be HIV positive and yet she was a young girl, aged only 11 years at the time of the offence.

In **Katende Ahmed vs Uganda, Supreme Court Criminal Appeal No. 6 of 2004**, a 10 year sentence for aggravated defilement was

upheld by the Supreme Court. The appellant had defiled his daughter aged 9 years.

In **Kabwiso Issa vs Uganda, Supreme Court criminal Appeal No. 7 of 2002** a 15 year sentence for aggravated defilement was reduced to 10 years imprisonment.

In **Lukwago Henry vs Uganda: Court of Appeal Criminal Appeal No. 0036 of 2010**, the appellant, defiled a 13 year old victim in January, 2009. The appellant pleaded guilty. He was sentenced to 13 years imprisonment. This Court upheld the sentence on appeal.

This Court in **Omara Charles vs Uganda, Criminal Appeal No. 0158 of 2014** held the sentences of 28 years imprisonment for count 1 and 40 years imprisonment for count 2, both counts being of aggravated defilement to be harsh and excessive and substituted the same with sentences of 17 years imprisonment for count 1 and 11 years imprisonment on count two. The Court then deducted the remand period from each one of the sentences. In the case, the victims were aged 10 and 12 years respectively at the time of the offence. They were attacked and defiled by their step father, who should have been protecting them. The appellant was HIV positive and he infected the first victim with it. The appellant was remorseful, pleaded guilty in respect of one count thus saving Court's time. He was 33 years old at the time of the offence. He spent 1 (one) year and 2 (two) months on remand.

The Court of appeal in **Dratia Saviour vs Uganda, Criminal Appeal No. 154 of 2011** substituted a sentence of 20 years imprisonment with one of 18 years imprisonment in a case where

the appellant aged 33 years, HIV positive, a guardian of the victim, had carried out the offence. The appellant had spent 2 years on remand.

A sentence of 17 years imprisonment for aggravated defilement by a stepfather against an 8 year old victim was upheld by the Court of Appeal in **Candia Akim vs Uganda, Court of Appeal Criminal Appeal No. 0181 of 2009**.

Court of Appeal Criminal Appeal No. 30 of 2010: Olara John Peter vs Uganda, is another case of aggravated defilement where the appellant pleaded guilty to the offence. He was HIV positive, aged 31 years and the victim was aged only 8 years. The sentence of 16 years imprisonment was upheld by this Court.

Having re-appraised the evidence adduced at trial, appreciated the mitigating and the aggravating factors and having analysed the past Court decisions as to sentence in cases involving aggravated defilement and particularly those, where the appellant, being HIV positive passes on the HIV to the victim, we have come to the conclusion that the sentence of imprisonment for life passed against the appellant by the learned trial Judge was too harsh and excessive and not in line of consistency and uniformity of sentences passed by the Courts in past decisions.

We accordingly set the same aside. We instead, having taken into consideration all the above stated factors as set out above as well as the period of 3 years and 17 days that the appellant spent on remand from 20th January, 2012 the date of the offence and arrest up to 6th February, 2015 the date of his conviction, this Court sentences the appellant to 18 years imprisonment.

The sentence if to run from the date of conviction of 6th February, 2015.

We so order.

Dated at Masaka this.....15th..... **day of** ..... Jan ..... **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