THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT GULU

Criminal Appeal No. 098 of 2016

(Appeal from the decision of the Hon. Lady Justice Margaret Mutonyi Judge of the High Court of Uganda sitting at Kitgum in Criminal Session Case No. 53 of 2015 dated 4th May, 2016)

1. Komakech Geoffrey
2. Okeny Boniface :: Appellants

versus

Uganda ::Respondent

Coram: Hon. Justice Kenneth Kakuru, JA
Hon. Justice Percy Night Tuhaise, JA
Hon. Justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

The appellants were convicted of aggravated defilement contrary to section **129 (3)** and **(4) (a)** of the **Penal Code Act**. It was alleged that during the month of November 2015, the appellants had penetrative sex with the victims aged 12 and 13 years respectively

at Appollo ground village, Central Division, Kitgum Municipality. Both appellants denied the offence.

At the end of the trial, the Judge convicted both appellants of the offence and sentenced each one of them to 20 years imprisonment. Dissatisfied, the appellants, with leave of Court, appealed against the sentence only on the ground that:

The learned trial Judge erred in Law and fact when she passed a harsh and excessive sentence, thereby occasioning a gross miscarriage of Justice.

At the hearing of this appeal, Learned Counsel Mr. Paul Ochaya Achellam, on state brief, appeared for the appellants; while Senior State Attorney Mr. Patrick Omia represented the respondent.

This Court granted leave to the appellants to proceed with the appeal against sentence only pursuant to **Section 132 (1)(b) of the Trial on Indictments Act.**

For the appellants, it was submitted that the sentence of 20 years imposed upon each one of them was too harsh and manifestly excessive; and was imposed without the trial Judge considering in favor of the appellants the fact that they were first offenders and still students of Greenland Institute, Kitgum. They were both young men aged 21 and 20 years respectively and had committed the crimes as a result of peer influence because they were with other boys from different backgrounds.

The 1st appellant Komakech Geoffrey was stated to be suffering from a disease known as *brucella* while at the same time his mother was weak and he needed to help her during holidays.

The 2nd appellant was stated to be the only boy at home and having a weak sickly father. Counsel submitted that taking in to account the above factors, the sentence of 20 years was too harsh, excessive and thus unjustified.

Learned Counsel cited to Court the decision of this Court in **Turyanyomwe Moses Vs Uganda, Court of Appeal Criminal Appeal No. 020 of 2013,** in which this Court reduced a sentence of 15 years imprisonment for aggravated defilement that had been passed by the trial High Court to 13 years imprisonment. Learned Counsel submitted that each one of the appellants be sentenced to 8 years' imprisonment in respect of each count and the sentences do run concurrently.

In reply, counsel for the respondent, opposed the appeal. He argued that while passing the sentence, the learned trial Judge had taken into account all the mitigating and aggravating factors before arriving at the sentences that were passed against each one of the appellants. Further that, the learned Judge had also complied with **Article 23(8) of the Constitution** as she took into consideration the period each appellant had spent on remand prior to his conviction, while determining the sentences she imposed upon each appellant.

In Conclusion, learned Counsel prayed this Court not to disturb the sentences and to dismiss the appeal as being without any merit.

Before we proceed to resolve the ground of the appeal, we feel it is important to restate the facts of the case as accepted by the High Court as they had a bearing upon the sentence that was imposed.

The Victims of the offence aged 12 and 13 years respectively, were pupils of Kitgum Public Primary School in primary four and were residents of Kitgum Municipality. The appellants respectively aged 22 and 20 years at the time the offences were committed, were students of Kitgum Greenland Vocational Institute and were residents of Kitgum Municipal Council.

During the month of November 2015, the two victims were from the primary school going back home, and when they reached Apollo Ground village, Kitgum Municipality, the appellants stopped them and they took the victims to their room which they were renting.

In the room, each one of the appellants had penetrative sex with each one of the victims, in turn, on a mattress that was in the room. The appellants then left the victims to go away warning the two of them not to tell anyone else of what had happened to each one of them.

On the 16th November, 2015, the father of one of the victims, went to Kitgum Public Primary School and reported a case of defilement of her daughter. Both victims were questioned by the school authorities and each one revealed what had happened to them. Each one of the victims also named the appellants as the ones who had defiled them in turns.

The father of the victim reported the matter to police. The victims were medically examined and their hymen were found ruptured.

The appellants were arrested on that day of 16th November, 2015. They were later charged, tried and convicted of the offences of aggravated defilement.

In sentencing the appellants, the Court considered, as a mitigating factor, that the appellants were young men who were still pursuing studies and were capable of reform. They had also been remorseful.

As for the aggravating factors, the learned trial Judge considered, the fact that the appellants had introduced the small little girl victims to immoral behaviors and subjected them to group sex which exposed them to a very high risk of early pregnancy and sexually transmitted diseases.

The trial judge also noted that defilement of primary school girls had become very rampant in the country and thus young primary school going girls needed to have protection.

The learned trial Judge thus proceeded to sentence each appellant to 20 years imprisonment with the "period spent on remand inclusive". It is this sentence that is the subject of this appeal.

In **Criminal Appeal No. 142 of 2010: German Benjamin Vs Uganda,** this Court relying on the case of **Ogalo S/O Owoura Vs R. [1954] 21 EACA 270** restated the principles upon which an appellate court will exercise its appellate jurisdiction to alter a sentence passed by the trial court in the exercise of its discretion. These are that: an appellate is not to alter the sentence on the mere ground that if the members of the Court had been trying the appellant, then they might have passed a somewhat different sentence than the one passed by the trial Court. The appellate Court will only interfere with the discretion exercised by a trial Judge, if it is evident that the trial Judge acted upon some wrong principle, or overlooked some material factor, or if the sentence

passed by the trial Court is so harsh and excessive or so low and lenient so as to amount to a miscarriage of Justice.

The **Constitution (Sentencing Guidelines for Courts of Judicature (Practice) Directions, 2013** provide guidance to Courts on sentencing.

According to these Guidelines the sentencing Court may consider in defilement cases, as mitigating factors, the lack of pre-meditation on the part of the offender, remorsefulness of the offender, being a first offender, and the difference in age of the victim and the offender, amongst other relevant factors.

The aggravating factors include the degree of injury or harm to the victim, the tender age of the victim, use of threats, force or violence against the victim and other relevant factors.

The maximum sentence for aggravated defilement is death. The guidelines give a sentencing range of 30 years up to death.

The trial Judge, took into consideration, as mitigating factors, the fact that the appellants were young and first offenders.

As to the aggravating factors, the trial Judge found the appellants' act of introducing the small little girls to immoral behavior and subjecting them to group sex which exposed them to a very high risk of early pregnancy and sexually transmitted diseases, to be very aggravating.

On subjecting the trial Court proceedings to fresh scrutiny, we feel that the youthful age of the appellants, thus the possibility that they can reform in future, being young students and first offenders, having sick parents and one having a complicated

disease of Brucella, should have been considered as mitigating factors in favour of the appellants.

On the aggravating side, the trial Judge should also have considered the degree of physical injury that each one of the victims suffered and the fact that the appellants ravished the victims in turns in their room on a mattress.

The **Supreme Court in Jackson Zita Vs Uganda SCCA 19 of 1995,** upheld a sentence of seven years imprisonment where the appellant aged about 20 years defiled a victim below the age of 18 years. The victim was pulled by the appellant to a coffee plantation at about 7:00pm, tore her pants, put her down and forcefully had sexual intercourse. The appellant was sentenced by the trial Court to 7 years imprisonment and ordered to receive a corporal punishment of six strokes of the cane. The Supreme Court upheld the sentence of 7 years imprisonment but set-aside the corporal punishment of six strokes of the cane as being illegal.

In **Criminal Appeal No. 23 of 1994, P. Akol Vs Uganda, the Supreme Court** upheld a sentence of 12 years for defilement.

In another decision of **Rugarwana Fred Vs Uganda, SCCA 39 of 1995,** the Supreme Court upheld a sentence of 15 years as not being excessive where a 5 year old victim was defiled in a latrine by the appellant who was an adult. Again in that Case the Supreme Court set aside the corporal punishment as being illegal.

In **German Benjamin Case (Supra)** the victim aged 5 years was sexually ravaged mercilessly by the appellant. The victim's mother found blood in her private parts soon after the defilement. The victim cried due to the pain. The appellant was 35 years, fit to be

a father of the victim. Appellant had spent 4 years and six months on remand. He was a first offender. He showed signs of reform. This Court set aside the sentence of 20 years imprisonment and substituted the same with one of 15 years imprisonment.

This Court also confirmed the sentence of 15 years imprisonment for defilement in **Criminal Appeal No. 46 of 2009: Wanzala Simon Vs Uganda** where the Victim was aged 13 years and the appellant, a first offender, was aged 35 years. The defilement was done in a banana plantation during day time. The victim had blood in her private parts soon after being defiled. She walked lamely with pain.

Having subjected the sentencing carried out by the trial Judge to fresh scrutiny, and having considered the law and past Court precedents, we have come to the conclusion that the sentence of 20 years imprisonment imposed upon each appellant was manifestly harsh and excessive.

We with respect, also find that it was an error for the learned Judge to just have stated that: "***They are sentenced to 20 years imprisonment, period spent on remand inclusive".*** Such a wording is not in compliance with **Article 23(8) of the Constitution** that requires the sentencing Court to take into account the period one convicted of an offence has spent in lawful custody before the conviction. The period spent in lawful custody prior to conviction has to be considered for the benefit of the convict and not merely for inclusion in the sentence. Such a sentence implies that the appellant would serve a sentence from the date of his/her detention and not from the date of conviction.

Accordingly, the phrase "period spent on remand inclusive" is inconsistent with **Article 23(8)** and as such the sentence passed by the learned trial Judge is illegal by reason thereof.

We accordingly set aside the sentence of 20 years imprisonment passed upon each appellant by reason of being illegal for non-compliance with **Article 23(8) of the Constitution**. Even if we had found that the sentence passed was legal, then the same would also be set aside for being harsh and excessive, given the facts of this case.

Under Section 11 of the Judicature Act this Court has the jurisdiction of the trial Court to pass sentence upon the appellants, now that the sentences passed upon each one of them at trial have been vacated for the reasons already stated. This Court accordingly proceeds to pass the sentences.

The Court finds from the Court record as mitigating factors that both appellants were young at the time of the commission of the offence, the 1st appellant being 21 years and the 2nd appellant being 20 years old. Both were students at Greenland Institute, Kitgum. There are prospects of each appellant to reform into responsible useful citizens.

Both appellants are first offenders and have no past criminal records. Both acted, possibly through peer pressure, given the different backgrounds of their colleagues with whom they were staying and studying in Kitgum Town.

The 1st appellant claimed to be suffering from *brucella* and had a weak mother to whom he rendered services as a son. The 2nd appellant had a weak father, and was the only one at home to keep

company and do some family work as a son to a father. Both appellants personally prayed for leniency from the trial Judge while sentencing them.

As to the aggravating factors, the offence of aggravated defilement is a capital offence with death as the maximum sentence. The victims of the offence were innocent young primary 4 pupils aged 12 and 13 years respectively. They were exposed to group penetrative sex at a very young age by the appellants who ought to have provided protection to them. The modesty and innocence of each one of the girl victims was abused by the appellants who had sex in turns with each one of the victims.

The victims were thus exposed to the dangers of early pregnancy and possible infection with sexually transmitted diseases, including HIV.

Each one of the victims, as well as their respective parents, were subjected to physical and psychological suffering by what the appellants did to the young girl victims.

The learned trial Judge also observed both appellants as being not remorseful but rather being mind depraved and perverted.

Both appellants, we observe, were very young adults still attending school. Two years prior to the incident they were minors. They deserve lenient sentences on that account.

This Court in passing sentence must not lose sight of the fact that there should be, as much as possible, where circumstances permit, consistency and uniformity in sentencing so that cases

whose facts bear some resemblance should have sentences that are not too far apart.

This Court, having considered the mitigating and aggravating factors as well as the sentences passed in past Court decisions, sentences the 1st appellant Komakech Geoffrey to 11 years imprisonment in respect of Count 1 and 11 years imprisonment in respect of Count 2.

As to the 2nd appellant Okeny Boniface, by reason of being younger than the 1st appellant, this Court sentences him to 10 years imprisonment on Count 1 and 10 years imprisonment on Count 2.

The Court record shows that each appellant was arrested on 16th November, 2015 and was in custody up to 4th May, 2016, the date of conviction. Each appellant thus spent about six (6) months in lawful custody. This period is deducted from the sentences passed against each appellant.

It follows therefore that the 1st appellant, Komakech Geoffrey, is to serve a sentence of 10 years and 6 months in respect of each Count 1 and 2. The 2nd appellant, Okeny Boniface, is to serve a sentence of 9 years and 6 months in respect of each Count 1 and Count 2 respectively.

The sentences of each appellant are to run concurrently starting from the date of conviction of 4th May, 2016.

We so order.

Dated at Gulu this.....12th **day of** .....February **2020**.

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Kenneth Kakuru

Justice of Appeal

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Percy Night Tuhaise

Justice of Appeal

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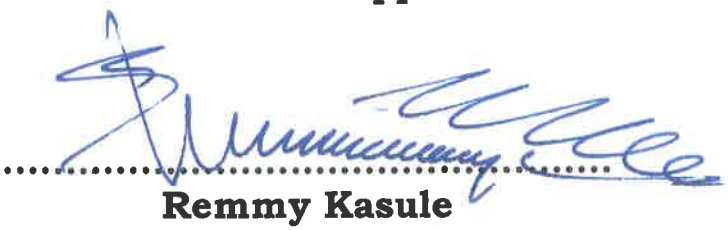

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Remmy Kasule

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