THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT MBARARA

CRIMINAL APPEAL NO. 225 OF 2010

KIBARUMA JOHN.....APPELLANT

VS

UGANDA..... RESPONDENT

[Appeal from sentence of the High Court of Uganda at Bushenyi by Honourable Justice Ralph Ochan dated 10th day of June 2010 in Criminal Case No. HCT-05-CR-SC 0184 OF 2009]

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE BYABAKAMA MUGENYI SIMON,JA
HON. MR. JUSTICE ALFONSE C. OWINY-DOLLO, JA

JUDGMENT OF THE COURT

This appeal arises from the judgment of Hon Justice Ralph Ochan in High Court of Uganda at Bushenyi *Criminal case No. 0184 of 2009*; dated 10/06/2009 in which the appellant was convicted of aggravated defilement on his own plea of guilt and sentenced to 15 years imprisonment. He now appeals against sentence only.

Representations

The appellant was at this appeal represented by learned counsel **Mr. Enock Twinamatsiko** while **Ms. Adrine**

Asingwire learned Senior State Attorney appeared for the respondent. The appellant was present.

The Appellant's case.

The sole ground of appeal is set out as follows;

> ***The learned trial Judge erred in law and fact to impose a term of 15 years imprisonment which sentence was harsh and manifestly excessive under the particular facts of the case.***

Counsel for the respondent submitted a sentence of 15 years imprisonment imposed by the trial Judge was harsh and manifestly excessive in the circumstances of this case. The circumstances of this case, counsel submitted were that the appellant had pleaded guilty and was remorseful.

He cited to us his authority for this proposition the decision of this Court in ***Lukwago Henry Vs Uganda: Court of Appeal Criminal Appeal No. 0225 of 2010*** at Mbarara in which a sentence of 13 years was confirmed for the offence of aggravated defilement. In this case, the appellant had also pleaded guilty to the offence.

Counsel prayed for a lenient sentence of 9 (nine) years contending that the Judge wrongly considered the appellant's plea of guilt and his demeanour. He asked this Court to reduce the sentence to 9 years imprisonment.

The Respondent's Case.

Ms Asingwire learned Senior State Attorney opposed the appeal and supported the sentence.

She submitted that the case of **Lukwago Henry Vs Uganda (supra)** was distinguishable from the material facts in this case.

Counsel argued that although in both cases, the appellants had pleaded guilty, in the ***Lukwago case*** *(supra)* the victim was 13 years old whereas in this case the victim was only 9 years old. She asked Court to confirm the sentence.

Court Resolution.

We have carefully listened to the submissions of both counsel and we have also perused the Court record and the authorities cited to us. This Court as a first appellate Court has a duty to re-appraise the evidence and to make its own inferences in all issues of law and fact.

See: ***Rule 30(1) of the Rules of this Court, Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses Vs Uganda: Supreme Court Criminal Appeal No. 1 of 1997.***

In ***Kyalimpa Edward Vs Uganda Supreme Court criminal Appeal N0. 10 of 1995***, the Supreme Court following the holding in **Rvs Haviland (1983) 5 Cr. App. R(s) 109** stated as follows;

"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 Owoura vs R. (1954) 21 E.A.C.A. 270 and R.V Mohamedali Jamal (1948) 15 E.A.C.A 126."

While passing the sentence, the trial Judge stated as follows; at page 6 of his judgment.

" Sentence

The convict, a full adult of 29 years went off his way to have forcible sexual intercourse with a 9 year old child. The maximum punishment for this offence is the death penalty. That you pleaded guilty readily is not necessary because you are remorseful or repentant as your demeanour suggested to me. You seem to have reconciled yourself to your fate, minus the absolutely signs of remorse or request.

Your attitude seems to be "lets get on with it and sentence me" I am really to oblige. You are sentenced

ready

to 15 years imprisonment, less period spent on pre-trial remand."

With all due respect to the learned trial Judge, the wording of the sentence is problematic. It is debatable as to whether the sentence of 15 years imprisonment mentioned in the above excerpt was arrived at after the Judge had taken into account the period the appellant had spent in lawful custody prior to conviction or not. The plain reading of the excerpt appears to suggest that the period spent in lawful custody after conviction was to be deducted from the pre-trial detention, in which case the appellant who had spent 3 years and 8 months on remand would have to serve a sentence of 11 years and 2 months.

A sentence of Court should always be clear and unambiguous. An accused person is entitled to know with certainty the punishment that Court has imposed upon him or her.

The Judge appears to have found that the appellant was not remorseful. The fact that he had pleaded guilty does not appear to have impressed the trial Judge who seems not to have considered it as a mitigating factor.

Taking all the above factors together, we would set aside the sentence on account of its ambiguity. We now invoke **Section 11 of the Judicature Act** which gives this Court the same powers as that of the trial Court to impose a sentence of our own. We shall now proceed to do so taking into account the factors below.

The appellant was a first offender. He had pleaded guilty readily to the offence, thus saving court's valuable time and money. He had spent 3 years and 8 months on remand.

The aggravating factor include the fact that the victim was very young, only 9 years old, the prevalence of the offence of defilement, the need for the law to protect the girl child and to curb gender violence.

There is need to have uniformity and consistence in sentencing. We therefore have to take into consideration the sentences this Court and the Supreme Court have imposed on offenders in similar circumstances.

In ***Byaruhanga Lozio Vs Uganda: Court of Appeal Criminal No. 168 of 2009***, this Court upheld a 14 year sentence for defilement on a neighbour's daughter. He had not pleaded guilty.

In ***Kisembo Patrick vs Uganda: Court of Appeal Criminal Appeal No. 441 of 2014,*** the appellant had been convicted of aggravated defilement of a child of 4 years. He had spent 2 years on remand. His sentence was reduced from life imprisonment to18 years imprisonment. In ***Kato Sula Vs Uganda: Court of Appeal Criminal Appeal No. 30 of 1999,*** this Court confirmed an 8 year imprisonment sentence noting that it was rather lenient.

In ***Ntambale Fred Vs Uganda: Court of Appeal Criminal Appeal No. 0177 of 2009*** this Court confirmed a sentence of 14 years. The victim was a daughter of the appellant.

Taking into account all the factors above, we impose a sentence of 11 years imprisonment to commence from the 10th June 2010 the date of conviction.

Dated at Mbarara this....26th.....day of **October 2016.**

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HON. JUSTICE KENNETH KAKURU,

JUSTICE OF APPEAL

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HON. JUSTICE BYABAKAMA MUGENYI SIMON

JUSTICE OF APPEAL

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HON. JUSTICE ALFONSE C. OWINY-DOLLO

JUSTICE OF APPEAL