THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

Coram: *(Cheborion Barishaki, Stephen Musota, Muzamiru M. Kibeedi, JJA)*

CRIMINAL APPEAL NO.068 OF 2015

KASIBANTE SSEMANDA MOSES::APPELLANT

VERSUS

UGANDA::RESPONDENT

(An Appeal from the sentence of the High court of Uganda sitting at Masaka delivered on 20th January, 2015 in criminal session case No.0151 of 2011 by Justice Rugadya Atwoki)

JUDGMENT

The appellant was indicted of the offence of aggravated defilement contrary to sections 129 (1) (3) and (4) (a) of the Penal Code Act, Cap 120. The particulars of the offence were that on the 22nd day of July 2011 at Kyambogo village in Ssembabule District he performed a sexual act with Nangoze Sylvia a girl aged 7 ½ years. He was convicted on his own plea of guilty and sentenced to 25 years imprisonment.

The appellant appeals against sentence only, with the permission of this court, in terms of section 132(1) (b) of the trial on indictment act. The appellant set forth one ground of appeal. He contends that the learned trial

judge erred in law and in fact when he meted a sentence of 25 years imprisonment upon him which was manifestly harsh and excessive in the circumstances.

At the hearing of the appeal, Ms. Nansubuga Margaret appeared for the appellant while the respondent was represented by Ms. Kiiza Anna Chief State Attorney. The appellant was present in court via video link.

Both parties filed written submissions which were adopted.

It was submitted for the appellant that the learned trial judge considered the appellant`s failure to plead guilty instantly and his failure as a convict to apologise to the victim and her mother as aggravating factors and hence considered the same when arriving at the sentence of 25 years imprisonment. She contended that the appellant`s failure to plead guilty instantly should not have been treated as an aggravating factor because this would derogate from the right of every person to be tried on the charge laid against him.

She referred court to **Mataka & Others versus Republic (1971) E.A 495** which was cited with approval in **Kizito Senkula v Uganda SCCA No. 24 Of 2001** for the proposition that a plea of guilty springing from genuine repentance may be treated as a factor in mitigation and a person not pleading guilty may not be treated as an aggravating factor because that would derogate from the right of every accused person to be tried on a charge laid against him.

She further cited **Kizito Senkula versus Uganda** supra for the proposition that it's a misdirection for the learned trial judge to have regarded appellant`s absence of repentance as an aggravating factor in sentencing him. Absence of repentance by an accused person should never be an aggravating factor in considering what sentence a trial judge should impose.

She contended that the learned trial judge misdirected himself when he had regard to the failure by the appellant to apologise as an aggravating factor in sentencing him, thus acting on a wrong principle and meted out a harsh sentence.

Counsel further submitted that the appellant never used force on the victim as stated in police form 3 the medical examination report. However, the learned trial judge while sentencing relied on the aggravating factors and considered that the manner in which the offence was committed was forceful. That guideline 35(h) of the **Constitution (Sentencing guidelines for Courts of Judicature) Practice Directions, 2013** provides that use of force is an aggravating factor and that in this case no such force was used which factor ought to have been considered in mitigation. Counsel submitted that the trial judge`s reliance on force as an aggravating factor was contrary to the evidence on record.

It was submitted for the appellant that the learned trial judge did not take into account the period of 3 years and 5 months the accused had spent on remand but merely made assertions that the accused never apologised to the victim and her mother and that he pleaded guilty belatedly. In her view, the judge was not lenient and did not consider the aforementioned period.

Counsel further submitted that the learned trial judge did not consider past decisions for guidance as to the proper sentence. That the trial judge did not address himself on the necessity of consistency and uniformity when sentencing the appellant. He cited **Mbunya Godfrey versus Uganda SCCA No.4 of 2011** relied on by this court in **Abaasa Johnson and Anor versus Uganda CACANo.33 of 2010** for the proposition that no two crimes are identical however Court should try as much as possible to have consistency in sentencing.

Counsel cited **Zziwa Mohammad versus Uganda CACA No. 217 of 2003** where court upheld a sentence of 5 years where the appellant aged 29 years had defiled a 15 year old girl. The appellant in that case had been convicted on a plea of guilty. Counsel also referred to **Lukwago Henry versus Uganda CACA No. 0036 of 2010** where court upheld a sentence of 13 years imprisonment upon the appellant`s plea of guilty to a charge of aggravated defilement of a 13 year old girl.

In reply, it was submitted for the respondent that court`s mention of the fact that the appellant seemed unremorseful did not occasion an injustice to the appellant. She contended that the court was not biased in its finding since it considered both aggravating and mitigating factors prior to sentencing the appellant as shown by the record. That in the authority of **Mattaka & Others vs Republic** cited with approval in **Kizito Senkula versus Uganda** Supra court went ahead to add that such a misdirection by court did not cause an injustice.

Regarding non consideration of the remand period, it was submitted for the respondent that the trial Court`s sentence was neither illegal nor harsh. She cited **Wamutabanewe Jamiru versus Uganda SCCA No.74 of 2007** where court while quoting **Kiwalabye versus Uganda SCCA NO. 143 of 2001** held that the appellate court is not to interfere with the sentence imposed by the trial court which has exercised its discretion, unless the exercise of the discretion is such that it results in the sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principal. She also referred to **Kyalimpa Edward versus Uganda SCCA No. 10 of 1995.**

Counsel submitted that before sentencing the appellant, Court noted that he had spent 3 years and 5 months on remand prior to conviction and sentence. That this was taken into account in accordance with article 23(8) of the Constitution. That if the appellant wanted an arithmetic deduction as held in **Rwabugande Moses versus Uganda SCCA 025 /2014** this would not apply because it was decided on 3/3/2016 yet his sentence was passed on 20/1/2015. He contended that the trial court exercised its discretion judiciously having taken into account all circumstances of the case and thus the appellant was rightly sentenced.

This being a first appeal, we are required by law to re-evaluate the evidence at the trial and come up with our own decision on all matters of law and fact. This requirement is set out in Rule 30(1) of the Rules of this Court.

See also: Fr. Narcensio Begumisa & others vs Eric Tibebaaga Supreme Court Civil Appeal No. 17 of 2002, 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.

We have carefully perused the court record and considered the submissions of both learned counsel as well as the law and authorities cited to us.

The learned trial judge is faulted for mentioning and considering as aggravating factors the fact that the appellant's plea of guilty was entered after all prosecution witnesses had arrived in court, his failure to apologise to the victim and her mother, relying on the fact that the offence was committed in a forceful way, failure to take into account the 3 years and 5 months the appellant had spent on remand and court`s failure to follow the uniformity principle in sentencing.

While sentencing the appellant the learned trial judge stated as follows;

"The accused pleaded guilty to aggravated defilement. This was after all the prosecution witnesses had arrived in court including the victim. Court was about to conclude a trial within a trial when the accused changed his plea from not guilty to guilty, as indeed his right.

Court considers the aggravating factors in this case which include age of the victim 7 ½ years, manner in which offence was committed-forceful. Nature and type of injuries-hymen ruptured. This was a family friend who misused the trust of the parents who left him to care for and guard their children as they visited a sick person

...while defence counsel told court that the accused is remorseful. I did not hear accused say any such a thing. The victim and her mother guardian were in court and he did not offer any apologies though he pleaded guilty. These are the factors which court will consider in arriving at the appropriate sentence"

The authority cited by counsel for the respondent, **Mattaka and others versus Republic (1971) E.A 495** cited with approval in the case of Kizito Senkula versus Uganda is instructive, the Supreme Court therein stated

"In the instant case, it is clearly our view that it was a misdirection in law for the learned trial judge to have regarded appellant's absence of repentance as an aggravating factor in sentencing him. Equally, with respect, the learned Justices of Appeal failed to direct themselves on the matter. We agree with the view of the law as stated in the decision in **Mattaka's** *case (supra). Absence of repentance by an accused person should never be an aggravating factor in considering what sentence the trial court should impose. However, we are of the view that in the instant case, the misdirection by the trial court and the failure of the learned Justices of Appeal to direct themselves on the matter, did not cause a failure of justice. There were legitimate aggravating factors which the learned trial judge took into account, namely, that what the appellant did to the victim was treacherous; and that he spoilt her when he introduced her to sex at such a young age of 11 years."*

The record shows that the learned trial Judge made mention of the appellant`s plea of guilty being entered after the trial had started, the appellant`s failure to apologise to the victim and her mother who were in

court. However, he was neither influenced by the appellant`s late plea during his sentencing nor did he consider the same as an aggravating factor. He however, seemed to have been influenced by the appellant`s failure to apologise. Be that as it may, there were legitimate aggravating factors which the learned trial Judge took into consideration when sentencing the appellant. These included; the age of the victim being 7 ½ years, the nature and type of injuries, the manner in which the offence was committed, the fact that the appellant was a family friend and the fact that the offence of defilement was rampant. We note that the learned trial judge also took into account certain factors in favour of the appellant including the fact that the appellant pleaded guilty. In our view, the learned trial judge`s mention of the appellant`s late plea and consideration of his failure to apologise did not in any way cause a failure of justice.

The appellant faults the learned trial judge for relying on the use of force as an aggravating factor when there was no evidence that force was used. That his consideration of force as an aggravating factor was a misapplication of the law, facts and evidence.

Exhibit PE1 the victim`s Medical Examination report, noted that the victim was aged 7 years, and at the time of her examination she had no bruises, no scratch marks, no bleeding, no signs of inflammation. However, the report further states that the hymen was ruptured and the victim was not strong and capable of putting off some resistance. The offence was committed on 22nd day of July 2011 as shown in the indictment and the medical examination was conducted on 27th July 2011, 6 days after the incident.

Further, the learned trial Judge also took in to consideration the appellant`s mitigating factors. These included; he had pleaded guilty, saved court`s time, aged 34 years and was capable of reforming, he has family responsibilities. In light of the above, it's our view that the trial judge`s consideration of the use of force in the commission of the offence as one of the factors while sentencing the appellant did not in any way occasion a miscarriage of justice.

The learned trial judge is faulted for taking into consideration the appellant`s late plea and failure to apologise to the victim and to her mother. That in so doing he was never lenient to the appellant. He is also faulted for failure to take into account the period the appellant had spent on remand.

Although it is true that the appellant entered the plea of guilty late and did not apologise to the victim and her mother, as earlier noted the trial Judge was alive to the appellant`s failure to apologise. Be that as it may, these in our view were extraneous and minor matters which the judge should not have been alive to. However, considering the sentence which he passed, these factors appear not to have been given much weight.

On failure to take into account the period spend on remand, the learned trial judge stated as follows;

> *"Court noted also that the accused has spent three years and five months on remand which I took duly into consideration."*

The learned trial judge was alive to the period the appellant had spent on remand of 3 years and 5 months which he duly made mention of and took

into consideration before meting out the sentence of 25 years to the appellant. The appellant`s counsel`s submission that the learned trial judge did not consider the appellant`s remand period was a farfetched argument with no merit at all. The learned trial Judge duly considered the appellant`s period spent on remand in line with the provisions and wording of Article 23 (8) of the Constitution. We find no reason to fault him in deciding the way he did.

The judge was also faulted for not following and applying the uniformity principle while sentencing the appellant. It was argued that had he done so, he would not have meted out a harsh and excessive sentence against the appellant.

The Supreme Court has in ***Mbunya Godfrey V Uganda, Supreme Court Criminal Appeal No.4 of 2011,*** emphasized the need to maintain consistency while sentencing persons convicted of similar offences. Court stated that; *"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."*

The victim was aged 13 years, consequently, the offence committed by the appellant was aggravated defilement as defined by Section 129 (3) and (4) (a) which provides that;

Any person who performs a sexual act with another person who is below the age of fourteen years commits a felony called aggravated defilement and is on conviction by the High Court liable to suffer death.

The maximum sentence for aggravated defilement is death. The **Constitution (Sentencing guidelines for Courts of Judicature) Practice Directions, 2013** in the **3rd schedule part 1** state the sentencing range in capital offences is from 30 years to death and the sentence of 25 years imprisonment is below that sentencing range.

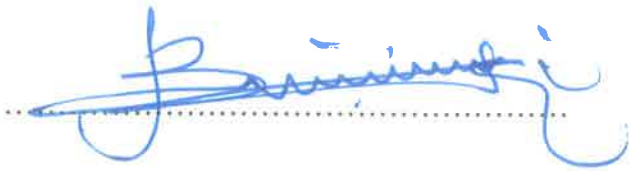
The cases cited by the appellant`s counsel are distinguishable from the present case. In **Zziwa Mohammad versus Uganda** Supra **the offence was simple defilement**, the appellant aged 29 years had defiled a 15 year old girl although he pleaded guilty and was sentenced to 5 years imprisonment. In **Lukwago Henry versus Uganda** Supra the appellant defiled a girl aged 13 years and was sentenced to 13 years imprisonment on his own plea of guilty which sentence was upheld on appeal.

In the instant case, the victim was 7 ½ years old. The trial court, in arriving at the sentence considered all mitigating factors provided by the appellant`s counsel and arrived at a sentence of 25 years after deducting the period the appellant had spent on remand. The appellant was rightly sentenced and we find no reason to fault the learned trial judge.

Having found no merit in the appeal, this appeal stands dismissed. The sentence of 25 years imprisonment passed by the learned trial Judge upon the appellant is hereby upheld. The appellant is to continue serving the sentence from the date of conviction (20.01.2015) up to completion

We so order.

Dated this.....15th.....day of.....Oct.....2021



Cheborion Barishaki

Justice of Appeal

Stephen Musota

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