THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA) AT KAMPALA

CRIMINAL APPEAL NUMBER 0036 OF 2010

LUKWAGO HENRY::APPELLANT

VS

UGANDA::: RESPONDENT

CORAM:

HON. MR JUSTICE S.B.K. KAVUMA, JA

HON. MR JUSTICE ELDAD MWANGUSYA, JA

HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA

FINAL

(Arising from the conviction and sentence of the Learned Judge of the High Court of Uganda at Masaka, the Hon Justice Jane Kiggundu in Criminal Session Case No. 033/2009)

THE JUDGMENT OF COURT:

The appellant was represented by Mr. Ruyondo Edison, on State Brief. The State Respondent was represented by Principal State Attorney, Fred Kakooza.

The appellant was in Court.

According to the Memorandum of Appeal, the appeal was only on one ground, as follows:

1. The learned Trial Judge erred in Law and fact when she sentenced the appellant to 13 years imprisonment, a sentence which is unduly harsh and excessive.

Counsel for the appellant prayed that he be allowed to proceed with this one ground under the provisions of ***Section 132 1(b) of the Trial on Indictments Act*** and ***Rule 43 (3) (a) of the Rules of this Honorable Court*** which enjoin an appellant to seek leave of court to appeal against sentence only.

Leave was accordingly granted by Court.

The brief facts of the case were that the appellant, in January 2009, defiled a girl aged 13 years. The appellant pleaded guilty to the offence and was accordingly convicted on his own plea. He

FINAL

was sentenced to a term of 13 years imprisonment. The appellant appealed against the sentence as being unduly harsh and excessive in the circumstances.

At the trial, counsel for the accused presented several factors in favor of mitigation of sentence. The factors submitted were that the appellant was a troubled man when he committed the offence, because his merchandise fish (*mukene*) had been confiscated by authorities and he had lost his wife during labor. It was further submitted that the convict had a family of five children. Based on the above, counsel for the convict had prayed for lenience. Counsel for the Appellant repeated the same factors before this court. In addition, Appellant's Counsel stated that he had interviewed the appellant who had confided in him that he had since learnt his lesson and was full of remorse.

Counsel also repeated what the appellant had stated in his allocutus at the trial: he had prayed for mercy and stated that he did not know why he had committed the offence.

Counsel submitted that this Court has the powers to vary a sentence if that sentence is harsh or so excessive as to occasion a miscarriage of justice. He referred Court to the case of ***Nyasio Bumali vs. Uganda [2006] HCB vol. 1*** in which an appeal against a sentence of 8 years imprisonment was dismissed. The appellant had been convicted on his own plea of guilty to defilement of a 6 year old child. In that case, the appellant argued that although the sentence of 8 years was lawful, it was harsh and

FINAL

if the trial Judge had considered all the relevant mitigating factors, he would have imposed a lower sentence. The Supreme Court had maintained the 8 year sentence. Counsel argued that since in the appeal before this court, the victim was 13 years, as opposed to the victim in the **Nyasio** case (supra) who was 6 years, and thus much younger, the sentence of 13 years be varied and substituted with a sentence of 8 years.

Counsel also pointed to the fact that the appellant was a first offender, he pleaded guilty and thus saved Court's time and State resources. He argued that although the Judge considered these factors, she never applied them and that is why she gave a sentence of 13 years. He also prayed that the 1 year and 2 and a half months period spent on remand be deducted from the sentence.

In essence, Counsel prayed that with the deduction of the remand period, the sentence be 6 years and 10 months.

On the other hand, Counsel for the State opposed the appeal. He submitted that the sentence was neither illegal nor excessive or so harsh as to occasion a miscarriage of justice. He argued that this Court should not interfere with the sentence of the trial court, since in arriving at the sentence, the Judge considered whatever was there to consider in mitigation and arrived at a fair sentence under the circumstances. He prayed that this Court confirms the sentence and dismisses the appeal.

Court Resolution

FINAL

The principles upon which an appellate Court should interfere with a sentence were considered by the Supreme Court in the case of **Kyalimpa Edward versus Uganda, Criminal Appeal No. 10 of 1995** .The Supreme Court referred **to Rvs Haviland (1983) 5 Cr. App. R(s) 109** and held 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 126." 21 EAC.A.270 And R.V Mohamedali Jamal (1948) 15 E.A.C.A 126."**

FINAL

We are also guided by another Supreme Court case, **Kamya Johnson Wavamuno vs. Uganda** in which the court said:

> *It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise a discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that*

the members of the Court would have exercised their discretion differently.

We note that before the sentencing by the trial Court, counsel for the accused then, submitted on matters in favor of the appellant. Furthermore, in his *allocutus*, the accused also cited factors in mitigation. The matters were repeated by counsel for the appellant before this Court. The Trial judge specifically stated that she had considered the mitigating factors presented to court. She also made specific mention of the factors that were aggravating the case against the appellant. The Trial judge gave convincing justification for the sentence imposed on the appellant. There is nothing to show that based on both the aggravating and mitigating factors; the sentence imposed by the trial judge was manifestly excessive, harsh or illegal and thus calls for our interference.

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) as follows:

> *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.*

Whereas the maximum sentence to which the appellant was liable after conviction is death, the Judge gave a sentence of 13 years. We find nothing illegal in that sentence.

FINAL

Counsel also submitted that the period spent on remand should be deducted from the sentence given by the trial Court. We note that after stating that she had considered all the mitigating factors presented to Court, the Trial Judge went on to say: "I have also considered the period of 1 year and 2 and ½ months which the convict has spent on remand."

It is thus on record that the Judge was alive to the importance of taking into account the period spent on remand as provided for by ***Article 23 (8) of the Constitution of Uganda*** that:

> **Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.**

And in the case of ***Kabwiso Issa vs. Uganda [2001- 2005] HCB 20,*** the Supreme Court held that:

> *Clause (8) of Article 23 of the Constitution of Uganda is construed to mean in effect that the period which an accused person spends in lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the Court pronounces the term to be served.*

FINAL

We find that the trial Judge in the appeal before us specifically made mention of the period spent on remand as one of the factors that she took into account in arriving at the sentence. We are also alive to the decision of the Supreme Court in **Katende Ahamad vs. Uganda, Criminal Appeal No.6 of 2004** where it was held that in **Article 23 (8) of the Constitution,** the words "to take into account" does not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by the trial court. This court is bound by the said decisions of the Supreme Court.

We therefore find no merit in the appeal.

Order of Court

Having found no merit in the appeal, this appeal stands dismissed. The sentence of 13 years imprisonment passed by the Trial Judge upon the appellant is hereby upheld. The appellant is to continue serving the sentence from the date of sentence (26.03.2010) up to completion.

FINAL

Dated at Kampala, this …16.. day of……July………….2014

……………………………………………………………………………………

HON. MR JUSTICE S.B.K KAVUMA, JA

……………………………………………………………………………………

HON. MR JUSTICE ELDAD MWANGUSYA, JA

……………………………………………………………………………………

HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA

16.07.14

FINAL

FINAL