REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA
AT FORT PORTAL

CRIMINAL APPEAL NO. 142 OF 2010

German Benjamin:::Appellant

Versus

Uganda :::Respondent

Coram: Hon. Mr. Justice Remmy Kasule, JA

Hon. Mr. Justice Eldad Mwangusya, JA

Hon. Mr. Justice F.M.S. Egonda-Ntende, JA

JUDGMENT

The appellant was indicted for the offence of Defilement c/s 129(1) of the Penal Code Act. It was alleged that on the 19th day of November 2005 at Mukaru village, Kijogobya Parish, Mpara Sub County, Kyenjojo District he had unlawful sexual intercourse with Kamashazi Hope, a girl under the age of 18 years.

He was tried by the High Court sitting at Fort Portal (Akiiki-Kiiza, J.) and was, on 19th July, 2010 convicted as indicted and sentenced

to a term of imprisonment of twenty years. He had appealed against both the conviction and sentence, but when the case was called for hearing, all the grounds relating to conviction were abandoned and Mr. Cosmas Kateeba Counsel for the appellant applied for and was granted leave to argue the appeal against sentence only. The ground of appeal relating to sentence was framed as follows:-

"That the learned trial Judged erred in law and fact in passing a harsh and excessive sentence which occasioned a miscarriage of justice to the appellant".

The facts of the case, as accepted by the trial Judge, were that the victim of the Defilement, then aged five years, was left at home by her parents, and while they were away, the accused had sexual intercourse with her. The prosecution called a witness Kabasa James (Pw3) who found the victim crying and the appellant wiping her tears. The victim informed Pw3 that the appellant had had sexual intercourse with her. She told her parents the same story when they returned home. The mother of the victim examined her and observed blood and semen in her private parts.

According to the Clinical Officer who examined the victim, he established her age to be five years, there was penetration and the hymen was ruptured. He could not tell when the sexual intercourse took place and found no fresh injuries in the victim's private parts. He found that the victim's vagina looked bigger than that of a five years old. The examination was done on 23.11.2005 about four days after the commission of the offence.

These facts have been highlighted because they seem to have had the biggest influence on the punishment meted out by the trial Court. The prosecution had prayed for a deterrent sentence after stating that the appellant had no past record, but that he had committed a serious offence against a child of five years whom he had taken advantage of. On the other hand the defence prayed for

a lenient sentence on the basis that appellant was remorseful and repentant for his action, was married with four children who were still young and had spent four years and six months on remand. He was aged 35 years.

The trial Judge after repeating what had been stated in mitigation concluded as follows:-

"However, the accused committed a serious offence. The victim in this case was only a toddler of 5 years. He ravaged her sexually and mercilessly. The mother of the victim said she found blood in her private parts soon after the defilement. The victim told the prosecution witness that she felt pain and that's why she was crying. The accused is said to have given the victim sweet pepsi perhaps as an inducement for her to come to him. And thereafter he took advantage of her. Accused is fit to be a father to the victim, he should have felt mercy for her.

In the above circumstances, this Court cannot be lenient to him. In my considered view this is one of those cases where the Court shows its disapproval of defilement, and impose a stiff sentence. Putting everything into consideration I sentence the accused to 20 (twenty) years imprisonment".

In his submissions, Mr. Kateeba Counsel for the appellant, pleaded that for a first offender who had already spent four years and six months on remand, the sentence of twenty years imprisonment was excessive. He added that although the sentence was within the discretion of the trial Judge, one of the aims of punishment which is reform, cannot be achieved by such lengthy terms of imprisonment. He submitted that the appellant was capable of reforming because for the time he has spent in prison he has gone back to school and is an Assistant Archdeacon in Luzira Prison. He prayed Court to exercise leniency and reduce the lengthy sentence.

Ms. Tumuheise Rose, Principal State Attorney, for the Respondent opposed the Appeal. She submitted that given the age of the appellant and that of the victim who was *'mercilessly ravaged'* to use the words of the trial Judge, a heavy sentence was justified and she prayed for its confirmation.

We have considered the submissions of both Counsel on the length of the sentence. We also bear in mind the decision in the case of **Ogalo s/o Owoura V.R (1954) 21 EACA 270** where the Principles for interfering with a sentence imposed by the trial Court were discussed. These are as follows:-

"The Principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. One, Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James V.R, (1950) EACA 147 it is evident the Judge has acted upon some wrong principle or overlooked some material factor. To this we would add a third consideration, namely, that the sentence is manifestly excessive in view of the circumstances of the case ....."

While this Court agrees with the trial Judge that the appellant deserved no mercy for defiling a five year old toddler, we find that a sentence of twenty years on top of the four years and six months that the appellant had spent on remand to be manifestly excessive on a first offender. It should also be observed that Courts tend to lean more on the punitive element of sentencing and lose sight of one of the most crucial elements of sentencing which is rehabilitation of the offenders. Although as an appellate Court, we cannot rely on the post conviction behavior of the appellant in determining sentence, the fact that the appellant has gone back to

school and turned religious while in prison illustrates the point, that given a chance some offenders convicted of the most heinous crimes are capable of reforming. Taking into account the aggravating and mitigating factors as well the period spent on remand, a sentence of fifteen (15) years imprisonment will meet the ends of justice. The main aggravating factor was that the appellant who was aged thirty five years had had sexual intercourse with a five year old girl.

In the circumstances the appeal against sentence is allowed, the sentence of 20 years is set aside and substituted with one of 15 (fifteen) years.

It is so ordered.

Dated at Fort Portal this 18th day of December 2014.

Hon. Justice Remmy Kasule
Justice of Appeal

Hon. Justice Eldad Mwangusya
Justice of Appeal

Hon. Justice F.M.S. Egonda-Ntende
Justice of Appeal