

**THE REPUBLIC OF UGANDA** *on remand*  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO.040 OF 2006**  
**(ARISING FROM HCT-03-CR-SC 85/2006)**

5 **KASEREBANYI JAMES..... APPELLANT**

**VERSUS**

**UGANDA .....RESPONDENT**

**CORAM: HON.JUSTICE S.B.K.KAVUMA, AG.DCJ**  
**HON.JUSTICE RICHARD BUTEERA, JA**  
10 **HON.JUSTICE SOLOMY BALUNGI BOSSA, JA**

**JUDGMENT OF THE COURT**

**Introduction**

15 This is an appeal against the sentence of the High Court of Uganda sitting at Mukono, before His Lordship the Hon. Justice E.K.Muhanguzi, dated 24<sup>th</sup> November 2006. The appellant was convicted of defilement c/s 129(1) of the Penal Code Act cap 120 and sentenced to life imprisonment.

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## **Background**

The background to this appeal is that the victim of the offence of defilement is a biological daughter of the appellant. Her mother and the appellant had divorced.

5 In 2004, he collected the victim from her mother's place and she started staying with him at his home. There were step children in the appellant's home. He started subjecting her to forceful sexual intercourse with threats to throw her out of the house at night and she gave in. She became  
10 pregnant.

The neighbors then noticed that the girl's shape had changed and they informed the mother about it. The victim's mother went to the school where the victim was studying and realized that she was pregnant. The girl was  
15 aged 15 years at the time.

Medical examination of the victim revealed that she was 15 years old with a ruptured hymen (4 months to exam) and a pregnancy of 16 weeks.

The victim's mother reported to the Local Council (LC)  
20 officials who interrogated the victim and she revealed that it was the appellant who had been sexually abusing her

leading to the pregnancy. The LCs arrested the appellant took him to Police where he was re-arrested and charged accordingly.

At the hearing, the appellant pleaded guilty and he was convicted upon that plea. In mitigation, he stated that he had been on remand for about 1 year and three months and had no previous record.

Court noted that he was a first offender, he was the biological father of the victim, he was 45 while the victim was 15 years at the time of the commission of the offence and that he committed the offence under threats and force. Court thus sentenced him to life imprisonment.

### **Ground of Appeal**

The single ground of appeal laid out in the Memorandum of Appeal was:

**“That the learned trial Judge erred in law when he sentenced the appellant to life imprisonment which is deemed to be harsh and excessive in the circumstances of the case”**

## **Representation**

At the hearing of the appeal, the appellant was represented by counsel, Ms Suzan Sylvia Wakabala, while the State was represented by Mr. Alule Gilbert, a Principal State Attorney  
5 from the Directorate of Public Prosecutions.

## **The case for the appellant**

Counsel for the appellant submitted that in passing Judgment and giving the reasons for the same, the learned trial Judge did not take into account some of the mitigating  
10 factors that had been pleaded, including family responsibilities. Counsel stated that it was noted at the trial that the appellant is a family man and the sole bread winner since his 2<sup>nd</sup> wife had been chased away from their house by evil spirits/ demons. She argued that at the  
15 moment the children of the appellant are suffering and they are six in number aged between 27 and 6 years at the time of the trial. It was her contention that had the learned trial Judge taken into account the family responsibilities of the appellant, he would have come out with a more lenient  
20 sentence. She thus prayed that this court takes into account the family responsibilities and come up with a more lenient sentence.

Counsel further argued that the appellant was very remorseful about his acts. She referred to the case of **Yunus Wanaba Vs. Uganda Criminal Appeal Number 156 of 2001** where the Court of Appeal observed that though  
5 the learned Judge observed that the appellant was a first offender aged 30 and was remorseful, this appeared not to have been taken into account and the court in the particular circumstances of the case imposed a sentence that would result in the appellant's immediate release.

10 She stated that in the instant case, the learned trial Judge likewise referred to the mitigating factors generally. The learned Judge stated that the appellant was a first offender. He pleaded guilty and saved state resources. The Judge took into consideration that the appellant had  
15 already served one year and three months period on remand. He considered those as favorable factors to the appellant. However, counsel argued that it was not shown that they were taken into account while passing the sentence. Counsel for the appellant referred Court to  
20 **Article 23(8)** of the Constitution which states 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. Counsel cited the case of **Kizito Semakula Vs. Uganda Supreme Court Criminal Appeal Number 24 of 2001** where the trial Judge in passing sentence, noted that *“in the premises, the most leniency this court can extend to an accused who on the face of it is unrepentant is to reduce the sentence from death to a term of 15 years imprisonment, the period spent on remand since 15<sup>th</sup> May 1997 inclusive”* (sic). The Supreme Court Justices went ahead to state that in that case, it was clear that the learned trial Judge took into account the period of two years the appellant had spent on remand but it was not clear whether he considered that the sentence to be imposed should be 17 years reduced by two years to make 15 years or whether the sentence was 15 years to be reduced by two years to 13 years. The Supreme Court then held that **Article 23(8)** of the Constitution of Uganda demands that in sentencing an accused person, the court should take into account the period the accused has spent on remand.

It was counsel's submission that in the present case the sentence was said to have included the period of remand but it was not shown how or whether the court would subtract the two years the appellant spent on remand from 5 15 years given by the trial court and therefore substitute the sentence of 13 years.

Counsel pointed out that the learned Judge referred to the period that the appellant had spent on remand as one year and 3 months but did not take it into account while 10 passing the sentence. She contended that it was not clear whether the learned Judge had subtracted or added the time spent in custody before sentencing as he simply referred to it generally.

Counsel finally prayed that this Court allows the appeal, 15 sets aside the sentence and substitutes it with a more lenient one.

### **The case for the respondent**

Counsel for the respondent submitted that the trial Judge considered both the mitigating and the aggravating factors 20 of this case specifically looking at the fact that the appellant pleaded guilty, did not waste court's time and

that he was a first offender. Counsel pointed out that the learned Judge looked at the fact that the appellant was the biological father of the victim, aged 45 and the victim was 15 years. He further noted that the trial Judge also looked  
5 at the fact that the offence was committed under threat and he was therefore right to have arrived at the decision and sentence he did.

It was counsel's submission that the life sentence which the trial Judge imposed was not the maximum sentence for  
10 the offence given that defilement attracts a maximum sentence of death. To counsel, the fact that the trial Judge did not impose the death sentence means that he looked at both the mitigating and the aggravating factors of the case.

He submitted that the sentence which was imposed by the  
15 trial Judge was legal, it was within his discretion and there was nothing wrong with it. He prayed that the appeal be dismissed.



## **Court's resolution of the issue of the appropriate sentence**

The appellant challenges the sentence that was imposed on him by the trial Court as being excessive and harsh with a prayer for this Court to reduce it to a more lenient one.

We find it appropriate at this stage to state the legal position on the duty of an appellate court in respect of sentencing. This was stated by the Court of Appeal for East Africa in the case of **Ogalo s/o Owoura v R [1954] 24 EACA 270**. The Court held:

**“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The 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) 18 E.A.C.A. 147, “it is evident that the Judge has acted upon some wrong principle or overlooked some material**

factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. v. Shershewsky*, (1912) C.C.A. 28 T.L.R. 364."

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The Supreme Court has quoted with approval the above stated principle in **Kizito v Uganda SCCA 24/2001** (unreported). The Supreme Court has also had occasion to consider and state the principles upon which an appellate court can interfere with the sentence of the trial Judge in **Kiwalabye Bernard versus Uganda; Criminal Appeal No. 143 of 2001** (unreported) as follows:

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**"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the 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 principle.”**

We shall now proceed to consider the submissions by counsel for the appellant that the trial Judge did not take into consideration some of the mitigating factors that were raised for the appellant. It was counsel’s view that in contravention of **Article 23(8)** of the Constitution, the trial Judge did not take into consideration the period the appellant had spent on remand. We quote the court record for ease of reference. The court record is as follows:-

**“Court noted that the convict:-**

- 1. May be a first offender who pleaded guilty and saved State resources. He has already served 1 year and 3 months period on remand\_\_ These are favourable factors to the convict.**
- 2. He is the biological father of the victim.**
- 3. He was 45 years old while the victim was 15 years old at the time of commission of the tippel offence.**
- 4. He committed the offence under threats and force. These are extremely aggravating factors.**

**In the circumstances, Court hereby sentences the convict to life imprisonment...” (sic)**

From the above, it is our view that the learned Judge considered all the mitigating and aggravating factors before sentencing the appellant. The Supreme Court considered the import of **Article 23(8)** of the Constitution in the case of **Katende Ahmad v Uganda Criminal Appeal No. 6 of 2004**. The clause states:

**“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.”**

The Supreme Court went ahead to re-state the principle it had earlier stated in **Kizito Semakula** (supra) where it held as follows:

**“in Article 23(8), the words “to take into account” does not require a trial court to apply a mathematical formular by deducting the exact number of years spent by an accused**

**person on remand from the sentence to be awarded by trial court.” (sic)**

The Supreme Court made it clear that what is important is the clarity by the trial Judge. He/ she should explain and be clear that the period spent on remand has been taken into consideration. That is the demand of the Constitution in **Article 23(8)**.

This Court has recently stated this position of the law and followed the same in the cases of **Tom Sande Sazi alias Hussein Sadam v Uganda Criminal Appeal No.127 of 2009** and **Ssemanda Christopher & Muyingo Dennis v Uganda, Criminal Appeal No. 77 of 2010**.

In the instant case, we find that the learned trial Judge took into consideration the mitigating and aggravating factors before deciding to sentence the appellant to life imprisonment. If anything, his reasons for the sentence were crystal clear and devoid of any ambiguities. The arguments by counsel for the appellant that he did not take into account the time spent by the appellant on remand before conviction are without merit. This renders the cases cited by counsel for the appellant distinguishable and inapplicable to the instant case.

Based on the above, we see no reason to interfere with the sentence because of **Article 23(8)** of the Constitution and its interpretation. We are not persuaded that the trial Judge was wrong to exercise his discretion as he did.

5 Counsel for the appellant submitted that this Court should be lenient to reduce the 20 years as that is the interpretation given to life imprisonment. We wish to clarify here that the question of what ‘life imprisonment’ means has also been settled by the Supreme Court in the case of  
10 **Tigo Stephen v Uganda Criminal Appeal No. 8 of 2009**, where the Supreme Court held:

**“We hold that life imprisonment means imprisonment for the natural life term of a convict, though the actual period of  
15 imprisonment may stand reduced on account of remissions earned.”**

The appellant in our view deserves a sentence that is serious and deterrent. We are of the view that the trial Judge was justified in imposing the sentence of life  
20 imprisonment that he did.

We dismiss the appeal as a result. We confirm the conviction and sentence of the High Court in this case.

We so order.

Dated at Kampala this ..... day of  
5 .....2014.

S.B.K.Kavuma

**Ag. Deputy Chief Justice**

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Richard Buteera

**Justice of Appeal**

15 Solomy Balungi Bossa

**Justice of Appeal**