

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA) AT

KAMPALA

CRIMINAL APPEAL NUMBER 28 OF 2010

**(Arising from the High Court at Masaka in Criminal Case No.60
2008)**

SSEKANDI ZEBRON ::::::::::::::::::::::::::::::::::::::: APPELLANT

VS

UGANDA ::::::::::::::::::::::::::::::::::::::: RESPONDENT

CORAM:

HON. MR JUSTICE REMMY KASULE, JA

HON. MR JUSTICE RICHARD BUTEERA, JA

HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA



JUDGMENT OF COURT

This is an appeal against the sentences passed against the Appellant by Hon. Lady Justice Kiggundu Jane F.B on 29.03.2010 at the High Court of Uganda at Masaka. The particulars of the case are that the Appellant pleaded guilty and was convicted on two counts of aggravated defilement. The Appellant was then sentenced on both counts I and II to 15 and 17 years imprisonment respectively. The sentences were ordered by the trial judge to be served consecutively.

Background

The facts on which the Appellant's conviction was based are that on the 22.02.2008 at Buseke village in Masaka district, two victims Nambatya Noelina aged 9, a pupil of Kyamusoke Primary School and Nakamate Josephine Birabwa aged 5, a pupil at Stensera Primary School, both residents of Masaka district, while on their way to the well to fetch water encountered the Appellant. The Appellant lured the two girls to go with him to his home by deceiving them that he was going to give them passion fruits. Upon reaching his home, the Appellant took the two girls to his bedroom, closed the door and had sexual intercourse with each one of the girls one after the other. The Appellant warned the two victims not to reveal what had happened and sent them away. The girls then proceeded to the well.

Upon their arrival at home, Nakamate revealed to her grandmother that the Appellant had defiled them. Nakamate's grandmother later informed Nambatya's parents of the incident who then reported the matter at Masaka Police Station.

At the trial, the Appellant pleaded guilty to the 2 charges. He was then sentenced to 15 years and 17 years imprisonment respectively to be served consecutively. The Appellant now appeals to this Court against the sentence.



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The Appellant prays this Court sets aside the consecutive sentences and substitutes the same with a concurrent sentence.

Ground of Appeal

The Learned Trial Judge erred in law and fact by sentencing the Appellant to consecutive sentences of 15 and 17 years on counts I and II of aggravated defilement c/s 129 (3) (a) Penal Code Act, to the prejudice of the Appellant.

Representation

At the hearing of the Appeal, Mr. Kasirivu Yunusu represented the Appellant whereas Mr. Oola Sam, Senior Principal State Attorney, represented the Respondent State.

Duty of Court

It is our duty, as a first appellate court, to re-evaluate all the evidence and come up with our own conclusions in accordance with **Rule 30 (1) (a) of the Rules of this Court** which provides that:


“On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) reappraise the evidence and draw inferences of fact.”

This rule has been fortified in the cases of **KIFAMUNTE HENRY V UGANDA: SCCA NO. 10 of 1997** and **BANCO ARABE V BANK OF UGANDA: SCCA NO.8 of 1998**

Appellant’s submission

It was submitted by the Appellant’s counsel that the trial judge erred when she ordered for a consecutive serving of the sentences by the Appellant instead of a concurrent service.


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He further submitted that there were no justifiable strong reasons to impose two consecutive sentences. Counsel invited this court to look at the record where the learned trial judge's reason was that, "the appellant having defiled the girls one after another, the Appellant was also to serve the sentences one after the other." According to the Appellant's counsel, this reason was not sufficient to warrant a consecutive service of the sentences.

Counsel argued that although the Appellant defiled the 2 girls, he did not repeat the sexual act on each of the victims. He supported his submission with the authority of **R V SIMPSON (1972) CRIMINAL LAW REVIEW page 383** which is to the effect that a cumulative sentence which runs consecutively can be found by the Court to be harsh.

Respondent's Submission

Counsel for the State submitted that for an appeal against sentence to succeed, it must be shown that the sentence imposed was illegal or manifestly excessive or harsh as to amount to injustice. He further submitted that the maximum sentence in this case is death. That however, the trial judge having considered the aggravating and mitigating factors had come to the right conclusion of sentencing the appellant to 15 and 17 years imprisonment respectively in respect of count I and II of the charge. That the sentences given by the trial judge were supported by **Section 122 (1) of the Trial On Indictments Act** which provides that:

"Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him or her under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him or her under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the



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former sentence or of any part of it; but it shall not be lawful for the court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under section 110 (c) (i) or any part of it.”

That basing on the above provision of law, the trial Judge acted within her rights and judicial power to order the sentences to be served consecutively. He further argued that the total sentence of 32 years imprisonment was not excessive in the circumstances given the gravity of the offences and the circumstances surrounding their commission.

In conclusion, counsel for the Respondent State submitted that **Section 122 of the Trial On Indictments Act** does not explicitly state the circumstances that warrant a concurrent serving of a sentence but rather it gives discretion to the trial judge. He then invited this court to find that the trial judge exercised her discretion judiciously and properly when she imposed the sentences and when she ordered that the same be served consecutively.

He prayed that this Court upholds the sentences imposed by the trial judge and the appeal be dismissed.

Resolution of Court

It is a settled position of law in our criminal justice system that sentencing is a matter of discretion of the judge: **See R V HAVILAND (1983) 5 Cr. App. R(s) 109** and **KYALIMPA EDWARD V UGANDA SCCA 10 of 1995.**

This Court is invited to determine whether by ordering a consecutive sentence, the trial Judge exercised her discretion judiciously.



An in-depth understanding of the term judicial discretion will be of great benefit in enabling us resolve the above. Discretion arises in circumstances where there is more than one viable option.

Black's law dictionary 6th edition, 1990 at page 466 defines **judicial discretion** to mean discretionary action of a judge or court, and may mean discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances.

In **AFRICAN CONTINENTAL BANK V NNAMANI (1991) NWLR (part 186) 486**, the Nigerian Court held that:

“the exercise of the Court’s discretion is said to be judicial if the judge invokes the power in his capacity as judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling Statutes. On the other hand, an exercise of discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge as judex. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

It follows from the foregoing definitions that, a judge lumbered with the responsibility of exercising discretion is required to reach every decision based on the facts and circumstances placed before him or her and apply the applicable law.

Where a convict is convicted of several offences at the same trial the Court may direct in the exercise of its discretion, that sentences shall be served concurrently, that is together or at the same time, or that the sentences are to run consecutively, that is the sentences follow one upon the other.

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In the appeal before us, the sentencing order and reason of sentence stated as follows:

"... I have carefully considered the mitigating factors presented to court. I have taken into account the period the convict spent on remand. I think a sentence of 15 years imprisonment on count I and 17 years imprisonment on count II is appropriate in the circumstances. Since the convict defiled the children one after another, he should equally service one sentence after the other i.e consecutively. I therefore sentence him to 15 years on the first count and 17 years on the second count to serve the sentences consecutively."

We find that the Learned Trial Judge considered the facts and the circumstances under which the 2 victims were defiled. The Judge then applied the law to the circumstances of the case by considering the mitigating factors, the gravity of the offence and death as the maximum penalty of the offence of defilement under the Penal Code Act. The Judge then ordered for a consecutive service of the sentence on both counts which is also provided for under the law. **Section 2 (2) of the Trial On Indictments Act** provides:

"When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as the court may direct, unless the court directs that the punishments shall run concurrently."



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We consider our earlier interpretation of the above provision in **NO.652 S.P.C MAGARA RAMADHAN V UGANDA CRIMINAL APPEAL NO. 0146 of 2009** as still binding. The court stated:

“Our understanding of Section 2 of the Trial On Indictments Act is that the general rule is for the High Court to impose consecutive sentences and directing sentences to run concurrently is the exception.”

We therefore do not accept the Appellant counsel’s submission that the general rule is for courts to order concurrent sentences in case of convictions for 2 or more offences. In the MAGARA case (supra), this Court held that the law overrides practice and we maintain this position in this appeal.

We hasten to add that justice, which we are enjoined to dispense, would be downplayed if an offender, like the Appellant, received the same penalty as the man who defiled only one child.

For the foregoing reasons, we dismiss this appeal and uphold the sentences of the trial Judge.

The Appellant is to continue serving the sentences consecutively as ordered by the trial Judge.

Dated at Kampala, this^{12th} day of.....^{JUNE} 2015.



Remmy Kasule

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HON. JUSTICE REMMY KASULE, JA

Richard Buteera

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HON. JUSTICE RICHARD BUTEERA, JA

Lillian Ekirikubinza Tibatemwa

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HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA