

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT ARUA**

**CRIMINAL APPEAL NO. 440 OF 201**

KOMAKECH

SAMUEL.....

.....

.....APPELLANT

VERSES

UGANDA.....

.....

.....RESPONDENT

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*(Appeal from the decision of the High Court of Uganda sitting at Arua before his Lordship Hon. Justice Nyanzi Yasin dated 14/03/2012)*

**CORAM:**

**Hon. Justice Remmy Kasule, JA**

**Hon. Lady Justice Hellen Obura, JA**

**Hon. Justice Simon Byabakama Mugenyi, JA**

## **JUDGEMENT OF THE COURT**

### **Introduction**

The appellant was convicted of aggravated defilement contrary to section 129 (3) and (4) (a) of the Penal Code Act and sentenced to 16 years imprisonment by the High Court of Uganda at Arua before Hon. Justice Nyanzi Yasin. He has appealed to this Court against sentence only.

### **Background to the Appeal**

The facts of this case as found by the trial Judge are as follows:

The victim, Pikwo Bairon an 8 year old girl studying at Anyole Primary School at the time, was left at home by her mother, Harriet Owira (PW1). The appellant who stayed in the same homestead asked the victim at about the middle of the day on 30<sup>th</sup> June 2010 to go with him to collect maize from the field. While in the field the victim claimed that the appellant had sexual intercourse with her.

The victim revealed the incident to her mother, PW1, who in turn informed the victim's father, Ngecha Godfrey (PW2). The matter was reported to the school authorities and the Police whereupon the appellant was arrested and charged. He was subsequently indicted, tried, convicted and sentenced to 16 years imprisonment, hence this appeal.

The appellant sought the leave of this Court to appeal against sentence only pursuant to Section 132 (1) (b) of the Trial on Indictment Act and leave was accordingly granted. There was only one ground of appeal that faults the learned trial Judge for meting out a harsh sentence of 16 years' imprisonment upon the appellant.

At the hearing of this appeal, Mr. Ben Ikilai appeared for the appellant on State brief while Ms. Jackline Okui, Senior State Attorney represented the respondent.

### **Submissions for the appellant.**

It was submitted for the appellant that the sentence of 16 years imprisonment meted out on the appellant was harsh. Counsel further submitted that the trial Judge did not take into account the period the appellant had spent on remand. He argued that although the trial Judge stated that he had taken the said period into account, he did not specify that period and yet he ought to have done so as per the guidance given by the Supreme Court in the case of **Kabwiso Issa vs Uganda Criminal Appeal No. 7 of 2002.**

Counsel also cited the case of **Naturinda Tamson vs Uganda CACA No. 13 of 2011** where this Court held that where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spent 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 contended that, considering the age of the appellant at the time and that of the victim, the sentence of 16 years imprisonment was too harsh in the circumstances to cause the appellant as a young man to reform.

Counsel cited the case of **Birungi Moses vs Uganda CACA No. 177 of 2014** where the appellant who was aged 35 years was convicted of the offence of aggravated defilement of a girl aged 8 years and sentenced to 30 years imprisonment. On appeal, this Court reduced the sentence from 30 years to 12 years imprisonment. On the basis of that precedent, he prayed that the appeal be allowed and the sentence reduced to 8 years imprisonment.

### **Submissions for the respondent**

In reply, counsel for the respondent opposed the appeal and supported the sentence imposed by the trial Judge. She submitted that the trial Judge considered the period the appellant had spent on remand and had indeed deducted the period before imposing the sentence of 16 years imprisonment. She argued that the trial Judge did not have to use the exact words used by the Supreme Court. All he needed to do was to take into account the period and that would suffice. She also submitted that the sentence meted out was commensurate with the circumstances of the case as the trial Judge considered all the other factors and arrived at a sentence of 16 years imprisonment.

Counsel further submitted that the sentence falls within the sentencing range for aggravated defilement. She cited the case of **Ndaula James vs Uganda criminal Appeal No. 29 of 1999** where the appellant who was aged 29 years was convicted of the offence of aggravated defilement of a girl aged 7 years and sentenced to 16 years imprisonment. On appeal, this Court upheld the sentence and found that the sentence given was commensurate in the circumstances. She therefore prayed that this Court dismisses the appeal and upholds the sentence.

### **Resolution by the Court**

We have considered the principles upon which the Court can interfere with the sentence of the trial Judge. These principles were considered by this Court in **Semakula Yosam vs Uganda CACA No. 322 of 2009** where it declined to interfere with the sentence imposed by the trial Court.

Also see **James vs R (1950) 18 EACA**

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In the instant case, the trial Judge is being faulted for meting out a harsh sentence, and for not taking into account the period the appellant had spent on remand. The need to take into account the period spent on remand while sentencing a convict is a mandatory constitutional requirement enshrined in **Article 23(8) of the Constitution** which provides;

*“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 trial Judge in this case, so far as it is relevant to this point, while sentencing the appellant stated;

*“.....However a very long custodial sentence may also be not the most appropriate as it misses offering to the convict any chance to reform. At 24 years the accused should be given a chance to reform. I have considered the period he has spent on remand. He is sentenced to 16 years imprisonment. ”*

We are not persuaded by the argument of counsel for the appellant that the learned trial Judge did not take into account the period the appellant had spent on remand. The trial Judge did not have to apply a mathematical formula to deduct the period spent on remand in order to demonstrate that he had taken into account the said period. (See: **Kizito Semakula vs Uganda; Supreme Court Criminal Appeal No. 24 of2001**).

We find that by the trial Judge stating that he had considered the period the appellant had spent on remand, he was alive to the need to take into account that remand period, and he actually did so, before arriving at a sentence of 16 years imprisonment. In our view, the statement; “ **I have considered the period he has spent on remand**” suffices for purposes of complying with the Constitutional provision reproduced above and we so hold.

On severity of sentence, we do not accept the contention of counsel for the appellant that a sentence of 16 years imprisonment is harsh, in the circumstances of this case. The appellant was convicted of the offence of aggravated defilement which carries a maximum sentence of death.

The trial Judge considered all the factors, both aggravating and mitigating, as well as the circumstances of the case and arrived at a sentence of 16 years imprisonment. That sentence, in our view, is within the sentencing range for cases of similar nature.

In the case of **Kobusheshe vs Uganda; (Criminal Appeal No. 110 of 2008)** [2014] UGCA 5, the appellant who was aged 30 years at the time the offence was committed was indicted for defilement of a girl aged 5 years, tried and sentenced to 17 years imprisonment. On appeal against both the conviction and sentence, this Court upheld the conviction and sentence. The Court stated in respect of the sentence, that it did not find anything in the case to suggest that the trial Judge acted upon a wrong principle or overlooked any material factor. It thus held that the sentence of 17 years imprisonment was not harsh and excessive in the circumstances of the case.

In another case, **Ninsiima Gilbert vs Uganda Criminal Appeal No. 0180 of 2010 COA**, the appellant was convicted of the offence of aggravated defilement of a girl aged 8 years old and was sentenced to 30 years imprisonment. On appeal to this Court, the sentence of 30 years imprisonment was set aside and substituted with a sentence of 15 years imprisonment.

On the whole, in the instant case, it is our finding that the learned trial Judge took into account all the factors including the period the appellant had spent on remand and carefully considered them before imposing the sentence. We have not found any important matter, circumstance or principle, which the learned trial Judge ignored. Therefore, we hold that the learned trial Judge imposed an appropriate sentence in the circumstances of this case and we find no reason to interfere with it.

In conclusion, this appeal fails and it is accordingly dismissed. We uphold the sentence of 16 years imprisonment.

We so order.

**Dated at Arua, this 6<sup>th</sup> day of JUNE 2016.**

**Hon. Justice Remmy Kasule**

**JUSTICE OF APPEAL**

**Hon. Lady Justice Hellen Obura**

**JUSTICE OF APPEAL**

**Hon. Justice Simon Byabakama Mugenyi**

**JUSTICE OF APPEAL**

