

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL APPEAL NO. 303 OF 2010**

BABUA

ROLAND.....

.....

.....APPELLANT

VERSUS

UGANDA.....

.....

.....RESPONDENT

b

*(Appeal from the decision of the High Court of Uganda at Arua before his Lordship Hon.*

*Justice Kwesiga Wilson dated 3<sup>rd</sup>/1 1/2010)*

**CORAM: Hon. Justice Remmy Kasule, JA**

**Hon. Lady Justice Hellen**

**Obura, JA Hon. Justice**

**Simon Byabakama Mugenyi,**

**JA**

***JUDGEMENT OF THE COURT***

The appellant, Babua Roland was indicted, tried and convicted by the High Court

for aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act. He was sentenced to life imprisonment. He has now appealed to this Court.

The facts as found by the trial Judge were that the appellant was married to the victim's aunt called Amadruru Vivian and the couple lived with the victim, Awekonimungu Brenda aged 12 years (PW2) at Arua Hill, Arua Municipality. The victim left the appellant's home on 9<sup>th</sup> August 2009 alleging that the appellant had defiled her. The matter was reported to Police and the appellant was arrested and charged with aggravated defilement. The appellants defence was that he did not defile the victim but he only beat her with a stick because of a mischief she had committed at home and she ran away.

The assessors and the trial Judge believed the victim's evidence and disbelieved the appellant who was found guilty, convicted and sentenced to life imprisonment. His appeal to this Court is based on the following two grounds;

- 1. The learned trial Judge erred in law and fact when he failed to evaluate the evidence on record properly thus arriving at a wrong decision.***
- 2. The learned trial Judge erred in law and fact by imposing a severe sentence of life imprisonment.***

At the hearing of this appeal, Mr. Henry Odama appeared for the appellant on State brief and Ms. Harriet Adubango represented the respondent.

Counsel for the appellant abandoned the first ground of appeal and sought leave of this Court to only argue the second ground on sentence. Leave was accordingly granted. Counsel then submitted that the sentence of life imprisonment was harsh and excessive. He argued that the trial Judge was notified about the mitigating factors but he disregarded them. He further argued that had the mitigating factors been considered the sentence would not have been life imprisonment. He cited the case of ***Ninsiima Gilbert vs Uganda; Criminal Appeal No. 80 of 2010***, where

the appellant was convicted of the offence of aggravated defilement and sentenced to 30 years. On appeal, this Court considered the mitigating factors and found the sentence of 30 years imprisonment to be harsh and excessive and it reduced it to 15 years imprisonment.

Counsel also submitted that according to the Prison's Act, the term life imprisonment refers to 20 years imprisonment. However, the trial Judge did not pronounce himself on that. Thus, given the mitigating factors, even 20 years would be excessive.

Counsel for the respondent supported the sentence. He submitted that the sentence was not harsh and excessive since the appellant was charged with aggravated defilement where the maximum penalty is death sentence. He further submitted that the trial Judge did consider the mitigating factors and exercised leniency by sentencing the appellant to life imprisonment. The learned trial Judge gave reasons for his sentence, that the appellant had authority over the victim whom he was expected to protect. The appellant was also a teacher who was expected to exercise responsibility in society. Counsel, however, conceded that the trial Judge did not consider the fact that the appellant was a first time offender and did not also take into account the period spent on remand.

Counsel also urged court to distinguish the case of *Nisiima Gilbert vs Uganda (supra)* from the instant case and depart from it. He argued that whereas in *Ninsiima's case* the victim was the appellant's village mate, in the instant case the appellant had authority over the victim who lived in his house. He prayed that this Court interprets life imprisonment to mean imprisonment for the natural life of the appellant.

This Court can only interfere with the sentence of a lower court where, in the exercise of its discretion, the court imposes a sentence which is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. *See: Kiwalabye Bernard vs. Uganda; Criminal Appeal No.143 Of 2001(Unreported): James vs. R:*

***(1950) 18 EACA 147 and Ogalo s/o Owoura vs. R (1954)24 EACA 270***

We note that in the instant case, the trial Judge while sentencing the appellant stated;

***“The accused person/convict was a guardian of the victim; he is an educated person, a teacher by profession responsible for young people in category of the victim. He should have been the best person to protect children of his age. The accused is a disgrace to the teaching profession whom society has high expectation in moral upbringing of children he chose to do the contrary. My view is that he deserves a deterrent sentence to serve as an example and a warning to other defenders especially teachers who are supposed to lead by example. I do hereby sentence the accused person to LIFE IMPRISONMENT. ”***

From the above wording by the trial Judge, we observe that he neither considered the mitigating factors nor the period of 13 months spent on remand by the appellant. ***Article 23(8) of the Constitution*** 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. ”***

It is our considered view that the failure by the trial Judge to take into account the period the appellant had spent on remand was an error in law as this is a mandatory constitutional requirement according to the provision cited above. Therefore, it is our finding that the sentence of life imprisonment passed by the trial Judge was wrong in law and we accordingly set it aside.

We shall now consider the mitigating factors and the aggravating factors presented by both counsel so as to meet the ends of justice. Counsel for the respondent submitted that the appellant had no record of previous

conviction. He was 32 years old and had been on remand for 14 months. He was a husband to the victim's aunt and a teacher who ought to have protected the victim other than defiling her. He was not remorseful. He prayed that a deterrent sentence be given as a lesson to the appellant and others.

Counsel for the appellant submitted that the convict was a first offender and a family man with responsibility. He was a youthful offender aged 32 years and capable of reforming. Further, that he was a teacher with Certificate in Primary School Teacher Education. He urged court to consider the period of 13 months the appellant had spent on remand.

We have considered the case of *Ninsiima Gilbert vs. Uganda (supra)* cited by counsel for the appellant. We are persuaded by the decision of this Court in that case where it set aside a sentence of 30 years passed by the trial Judge on the ground that it was harsh and manifestly excessive and substituted it with a sentence of 15 years imprisonment.

We ourselves, having considered the above factors and taken into account the period of 13 months spent on remand by the appellant, are of the view that apart from the trial Judge erring by failing to take into account the period spent on remand and the fact that the appellant was a first offender, the sentence of life imprisonment itself was also harsh and manifestly excessive in the circumstances of this case.

We believe that the ends of justice will be served if the appellant is sentenced to 18 years imprisonment which is in the range of sentences for the offences of this nature.

In the result, we allow this appeal and substitute the sentence of life imprisonment, which we have already set aside for being wrong in law, with a sentence of 18 years imprisonment. The appellant shall serve that sentence from the date of his conviction of 3<sup>rd</sup> November, 2010.

We so order.

Dated at Arua, this 7<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

