

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT MBARARA**  
**CRIMINAL APPEAL No. 95 OF 2010**

*(An appeal against sentence, upon conviction, by Katutsi J., in High Court Criminal Session Case No. 0051 of 2010 at Rukungiri)*

NATURINDA AMON.....APPELLANT

**VERSUS**

UGANDA.....RESPONDENT

**CORAM:**

- 1. HON. MR. JUSTICE KENNETH KAKURU, J.A.**
- 2. HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.**
- 3. HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.**

**JUDGMENT OF THE COURT**

The Appellant was convicted of aggravated defilement in contravention of section 129 (3) and 4 (a) of the Penal Code Act; and sentenced to 24 (twenty-four) years imprisonment. He had appealed against both conviction and sentence; but, at the hearing of the appeal, he abandoned the appeal against conviction. He then obtained leave of Court and appealed against sentence only. He contends that the learned trial judge erred in law, and caused a miscarriage of justice, when he sentenced him to serve 24 (twenty-four) years imprisonment; which he claims is severe in the circumstance of the case. Counsel for the Appellant urged this Court to intervene and reduce the sentence to ten years.

The facts of the case are that on the 24<sup>th</sup> day of October 2007, at Ndeemba village in Kanungu, the Appellant had unlawful carnal knowledge of Katushabe Evalyne who was only 10 (ten) years of age. At the allocutus, following the conviction, the defence Counsel prayed for leniency; submitting

that the Appellant was a first offender, and had been on remand for over two years before conviction. State Counsel however urged Court to impose the maximum sentence on the ground that the Appellant had abused the hospitality he had been accorded; and further that defilement of young defenceless girls was rampant.

In his sentencing ruling, the learned trial judge had this to say:-

*"It is the duty of this Court to give every protection to the future mothers of this country. Sexually ravishing a small girl of 10 years is unacceptable and those responsible must be shown the anger the community attaches to this type of beastly behaviour. Talking of beasts, even beats know their young property. No bull can climb a calf of six months. Moreover men are becoming more beats than beats themselves. This must stop. The only way to stop it is to send away those with inclination of such behaviour out of the reach of young children. In the circumstances I deem a sentence of 24 years not to be a day longer. He is accordingly sentenced."*

Thus, in the mind of the trial judge, the aggravating factors exceeded the mitigating factors presented to Court for the Appellant; as for a man to have sex with a child was the height of perversion, which is not even found in beasts. In his exercise of the discretion he enjoyed in sentencing, the learned trial judge deemed that the proper way to curtail this human aberration was 'to send away those with inclination of such behaviour out of the reach of young children'; hence the 24 years imprisonment.

Counsel Jackson Agaba, who appeared for the Appellant, submitted that the sentence of 24 years imprisonment, imposed on the Appellant, was quite harsh, and manifestly excessive in the circumstance of the case. He pointed out that the Court had not considered the mitigating factors such as the Appellant being a first offender, a young man of only 18 (eighteen) years at the time of committing the offence, and had spent three years on remand before conviction. He therefore urged this Court to reduce the sentence to 10 (ten) years in jail.

Senior State Attorney Adrine Asungwire, Counsel for the Respondent, opposed the appeal; and supported the sentence. She conceded that the trial judge had

not considered the mitigating factors; and, more importantly, had also not complied with Article 23(8) of the Constitution providing for Court's consideration of the period the convict had spent on remand before conviction. However, she reiterated the aggravating factors the State Counsel had highlighted at the allocutus; and added that the Appellant had not been remorseful, and had committed an offence which society viewed with repugnancy. She therefore urged this Court to confirm the sentence imposed by the trial Court as being appropriate in the circumstance of the case.

As an appellate Court, we can only interfere with a sentence imposed by a trial Court in very limited circumstances. We can do so only where the sentence is either illegal, or founded upon a wrong principle of the law, or the Court has failed to consider a material factor. We can also do so if the sentence is harsh and manifestly excessive in the circumstance - (*see James vs R. (1950) 18 E.A.C.A. 147, Ogalo s/o Owoura vs R. (1954) 24 E.A.C.A. 270, Kizito Senkula vs Uganda - S.C. Crim. Appeal No. 24 of 2001, Bashir Ssali vs Uganda - S.C. Crim. Appeal No. 40 of 2003, and Ninsiima Gilbert vs Uganda - C.A. Crim. Appeal No. 180 of 2010*). Outside of that, this Court will not interfere with the trial Court's sentence even if we would have imposed a different sentence.

The case of *Kyalimpa Edward vs Uganda - S.C. Crim. Appeal No. 10 of 1995*, is one where the Supreme Court, re stated the fact that the primary responsibility for sentencing is on the trial Court. It also clarified further on the principles governing interference, by the appellate Court, on sentence; stating that: -

*"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate Court, this Court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal, or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 270, R. vs Mohamedali Jamal (1948) 15 E.A.C.A. 126."*

In *Livingstone Kakooza vs Uganda - S.C. Crim. Appeal No. 17 of 1993*, the Supreme Court reaffirmed the legal position that an appellate Court will also

interfere with a sentence where the sentencing trial Court has '*overlooked some material factor*'. It also added that '*sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See **Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 270.***' In the case of **Kiwalabye Bernard vs Uganda - S.C. Crim. Appeal No. 143 of 2001**, the Court advised as follows:

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*"The appellate Court is not to interfere with the sentence imposed by the trial Court which has exercised its discretion on sentence, unless the exercise of the 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 a trial Court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."*

Although crimes are not identical or committed under exactly the same circumstance, nonetheless, Court must always, in exercising its discretion during sentencing, which is its responsibility to do, maintain consistency or uniformity in sentencing; see **Kalibobo Jackson vs Uganda - C.A. Crim. Appeal No. 45 of 2001**, **Naturinda Tamson vs Uganda - C.A. Crim. Appeal No. 13 of 2011**, **Kyalimpa Edward vs Uganda** (supra), and **Livingstone Kakooza vs Uganda** (supra). In **Mbunya Godfrey vs Uganda - S.C. Crim Appeal No. 4 of 2011**, the Supreme Court stated as follows: -

*"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing"*

It is therefore necessary to seek guidance from precedents of sentences imposed in cases similar in the commission of the offence with the instant case before us, to enable us determine the appropriate sentence for the case before us.

***In Attorney General vs Susan Kigula & Others - S.C. Const. Appeal No. 1 of 2005, although the Court was referring to circumstances under which murders are committed, it made the point of universal relevance that the circumstances under which crimes, even of the same type, are committed, vary. It also pointed out that criminals do not have one particular character; as some are first offenders, and some have remorse. The Court should then***

***consider these factors in the course of exercising its sentencing discretion.***

There are other factors for Court's consideration, such as the need to afford a convict the opportunity to reform and reconcile with the community where he or she had committed the crime for which he or she has been convicted. Such a circumstance arose in ***Mbunya Godfrey vs Uganda*** case (supra), where the Appellant who had hacked his wife to death was handed a relatively lenient custodial sentence because he was a first offender; hence, there was room for him to reform and be of use to the society he lived in. In the ***Ninsiima Gilbert vs Uganda*** case (supra), this Court found the sentence of 30 (thirty) years, for defilement of a victim of 8 (eight) years, harsh and manifestly excessive.

Therein, Court distinguished the case of ***Bukenya Joseph vs Uganda - C.A. Crim. Appeal No. 222 of 2003***, where it had confirmed the Appellant's sentence of life imprisonment, for the reason that the sentence had been imposed at a time when life sentence was 20 (twenty) years imprisonment under the Prisons Act. Hence, the Appellant was sentenced to 20 (twenty) years in prison; although it was referred to as life imprisonment. The Appellant in ***Kizito Senkula vs Uganda - S.C. Crim. Appeal No. 24 Of 2001***, was sentenced to 15 (fifteen) years in prison for defiling an 11 (eleven) year old girl.

The Supreme Court found the sentence appropriate in the circumstance, but reduced it to 13 (thirteen) years because it was not clear from the record whether the trial Court had taken into account the 2 (two) years the Appellant had been on remand by the time of his conviction. Similarly, in ***Sam Buteera vs Uganda - S.C. Crim. Appeal No. 21 of 1994***, the Court found the sentence of 12 (twelve) years, for a case of defilement of an 11 (eleven) years by the Appellant who was an adult, appropriate; so it confirmed the sentence. The Appellant in the ***Bashir Ssali vs Uganda*** case (supra), was sentenced to 16 years in prison for defiling a school girl- child of P.3 class.

However, although the issue of legality of the sentence was neither raised as a ground of appeal, nor was it canvassed at the hearing of the appeal, the Supreme Court however raised and dealt with it. This arose from the fact that the trial Court had not abided by the provisions of Article 23 (8) of the

Constitution, requiring that in the exercise of its sentencing discretion, Court must consider the period a convict has spent in lawful custody before he or she was convicted. Accordingly, the Supreme Court took into consideration, the four years the Appellant had spent on remand before conviction, and reduced the sentence to 14 years.

In the instant case before us, on the information before Court, the Appellant had no previous record of conviction. He had been a remand prisoner for three years before conviction. It is a mandatory requirement under the provision of clause (8) of Article 23 of the Constitution, for the sentencing Court, in the exercise of its sentencing discretion, to consider the period the Appellant has spent in lawful custody before conviction. When he was sentencing the Appellant, the trial judge never considered any of these factors presented in mitigation; but instead focused solely on the aggravating factors. Failure to consider the period the appellant had spent on remand rendered the sentence illegal; and so, we are entitled to interfere with the sentence.

The other matter that we find we must raise of our own volition is the apparent failure of the learned trial judge to consider then issue of the age of the appellant at the time he committed the offence for which he was convicted. The information on the police charge sheet dated the 28<sup>th</sup> day of October 2007, indicates that the appellant was 18 (eighteen) years of age at the time. The offence for which he was charged had been committed four days earlier. However, in his testimony in defence in 2010, which he gave on oath, the appellant stated that he was 20 (twenty) years of age at the time he was testifying in Court; which was four years after the commission of the offence in 2007.

Neither was this evidence challenged during cross- examination, nor was it controverted by adverse evidence. On the evidence then, he was 17 (seventeen) years of age when he committed the offence for which he was convicted; hence, he was a juvenile offender. This important revelation raised a relevant matter the learned trial judge ought to have considered during sentencing. Had he done so, he would certainly have handled the issue of sentencing the appellant in an altogether different manner. This therefore

presents before us the issue of illegality of the sentence imposed on the appellant; which we find we must address in this appeal

Accordingly then, it is pertinent to consider the various provisions of the law relevant in this regard. Article 28 of the Constitution, which enshrines the right to a fair hearing, stipulates as follows: -

*"(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed."*

This provision of the Constitution is pertinent for the instant case before us. It covers a situation where a person is tried when he or she is 18 years of age or above, but for a crime committed when he or she was a juvenile offender. In such a situation then, the provision of the Constitution cited above prohibits any court from imposing a sentence exceeding what would have been imposed on the convict at the time of the commission of the crime. This caters for provisions of the law, such as section 93 of the Children Act which denies the family and children court the jurisdiction to try any offence punishable by death. The Act gives jurisdiction for such trial to a superior court; but provides under section 100 thereof as follows: -

*"(3) Where a child is tried alone or jointly with an adult in a court superior to a family or children court, the child shall be remitted to a family and children court for an appropriate order to be made if the offence is proved against him or her."*

Furthermore, section 104 (3) of the Act provides as follows: -

*"In any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children."*

Therefore, in the instant case before us, the High Court had the exclusive jurisdiction to try the appellant who was charged with defilement; and it is an offence he was liable to suffer death for upon conviction. Nevertheless, upon being found guilty as charged, he could not be punished by a sentence exceeding what would have been imposed on him at the time he committed the

offence in 2007 as a juvenile offender. He could only be punished in accordance with the provisions of the law governing sentencing under the Children Act. In this regard, section 104 of the Children Act is quite instructive. It provides as follows: -

*"(2) Where a child is tried jointly with an adult in the High Court, the child shall be remitted to the family and children court for an appropriate order to be made if the offence is proved against the child."*

For this, section 94 of the Act empowers the family and children court as follows: -

*"(1) A family and children court shall have the power to make any of the following orders where the charges have been admitted or proved against a child -*

*(g) detention for a maximum of.....in the case of  
an offence punishable by death, three years in respect of any  
child."*

It follows that upon finding the appellant guilty as charged, the trial judge ought to have remitted him to the Children Court for an appropriate order. In the light of the fact that the offence for which the appellant was convicted attracted a

maximum of death sentence, the highest punishment the Children court might have imposed on him would not have exceeded three years in detention. Accordingly then, the sentence of 24 years in prison imposed on the appellant by the learned trial judge was illegal; and for this reason we are justified in interfering with it by setting it aside, and substituting therefor a sentence of three years in prison, to run from the date of his conviction by the trial judge.

The appellant has now spent some 6 (six) years in prison; very much in excess of the maximum of three years he would have been sentenced to detention, as is provided for under the Children Act. In the event we find that the appellant has already more than served the punishment that he should have been subjected to; and, accordingly, we are left with no other option but to set him



free. He should therefore be released forthwith; unless he is being held under some lawful purpose.

Dated at Mbarara; this 6<sup>th</sup> day of December 2016

HON.MR. JUSTICE KENNETH KAKURU,JA

HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA,JA

HON.MR. JUSTICE ALFONSE C OWINY-DOLLO,JA