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THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT GULU  
CRIMINAL APPEAL NO. 146 OF 2014

OKELLO WILLIAM:.....APPELLANT

VERSUS

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UGANDA:.....RESPONDENT

*(Appeal from the sentence of the High Court of Uganda at Gulu by Hon. Justice Alfonse Owiny Dollo dated 21/06/2013 in Criminal Case No. HCT-02-CO-SC-193 of 2012)*

(Coram: Kenneth Kakuru JA, F.M.S Egonda-Ntende JA, & Hellen Obura JA)

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**JUDGMENT OF THE COURT**

This appeal arises from the decision of the High Court sitting at Gulu delivered on 21<sup>st</sup> June, 2013 by Hon. Alfonse Owiny Dollo, J (as he then was) in which the appellant was convicted on his own plea of guilt of the offence of aggravated defilement contrary to sections 129 (3) & (4) of the Penal Code Act and sentenced to 18 years imprisonment.

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**Background to the Appeal**

The facts giving rise to this appeal as they appear on court record are that on 08<sup>th</sup> August, 2012 at around 3:00 p.m while the 10 year old victim, Aciro Irene, was playing with other children at her home, the appellant who was her relative living within the same household, told her to enter the house and pick for him something near his bed. When the victim entered  
25 the house, the appellant followed her, grabbed her and put her on his bed from where he had sexual intercourse with her while threatening to beat her if she made any noise or reported to any person. After the incident, the victim felt a lot of pain in her private parts, anus and thighs which prompted her to narrate her ordeal to a one Ayet Benedeta who informed the victim's father and other relatives leading to the arrest of the appellant. The appellant was taken to

- 5 the police station from where he confessed to having committed the offence in his police charge and caution statement.

The appellant was indicted and he pleaded guilty of the offence. He was convicted of the offence of aggravated defilement and sentenced to 18 years imprisonment. Being dissatisfied with the decision of the trial Judge, the appellant appealed to this Court on sentence only.

- 10 The ground of appeal as set out in his memorandum of appeal is as follows;

*"That the learned trial Judge erred in law and fact when he imposed a sentence of 18 years imprisonment which sentence was harsh and manifestly excessive in the circumstances of the case."*

#### **Representations**

- 15 At the hearing of this appeal, the appellant was represented by Mr. Simon Ogen on state brief while Ms. Nabasa Caroline Hope, a Senior Assistant Director of Public Prosecutions represented the respondent.

#### **Case for the Appellant**

- At the commencement of the hearing, the appellant was granted leave to amend the memorandum of appeal and include an additional ground of appeal on illegality of sentence.  
20 The new ground was set out as follows:

*"The learned trial Judge erred in law and fact when he failed to comply with Article 23 (8) of the Constitution of the Republic of Uganda and in the result rendering the sentence a nullity."*

- 25 Counsel argued this additional ground of appeal first. He submitted that the learned trial Judge did not take into account the period the appellant spent in lawful custody while sentencing the appellant which is mandatory under Article 23 (8) of the Constitution. He implored court to

5 invoke section 11 of the Judicature Act to impose an appropriate sentence. Counsel added  
that the appellant was a 1<sup>st</sup> offender aged 22 years at the time of commission of the offence  
and he pleaded guilty. He implored court to consider these mitigating factors and the  
sentencing range in similar cases. He referred to the decision of this Court in **Lukwago Henry  
vs Uganda, Court of Appeal Criminal Appeal No. 0036 of 2010** where this Court upheld a  
10 sentence of 13 years imposed upon the appellant for the offence of aggravated defilement on  
his own plea of guilt.

He also cited the decision of this Court in **Kibaruma John vs Uganda, Court of Appeal  
Criminal Appeal No. 225 of 2010** in which the appellant was convicted of the offence of  
aggravated defilement of a 9 year old girl on his own plea of guilt and sentenced to 15 years  
15 imprisonment. On appeal to this Court, his sentence was reduced to 11 years imprisonment.

Counsel proposed a sentence of 10 years from which the period of 10 months and 13 days  
the appellant had spent in lawful custody prior to his conviction would be deducted.

#### **The Respondent's reply**

Counsel conceded that the sentence was illegal as it clearly appears to have been passed  
20 without the trial Judge taking into account the provisions of Article 23 (8) of the Constitution.  
She agreed with counsel for the appellant that this Court should invoke its powers under  
section 11 of the Judicature Act and impose an appropriate sentence upon the appellant.  
Counsel proposed a sentence of 12 years imprisonment from which the period the appellant  
spent in lawful custody would be deducted.

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5 **Resolution by the Court**

We have carefully perused the court record and considered the submissions of both learned counsel as well as the law and authorities cited to us. The first issue to be determined in this appeal is the legality of the sentence.

While sentencing the appellant, the trial Judge stated thus;

10        *"The convict here was 22 years of age when he savaged the 10 year old child who was his relative, and they stayed in the same compound. His acts like this make people feel insecure about the movement of their children who should be going about their activities unmolested and without any fear of abuse. One would have expected that the convict would be the protector of the poor child instead of luring her to his hut to*  
15        *savage her. While I accept his plea of guilt which has been consistent from the moment he was found out, this type of behavior must attract severe punishment and serve as a warning that our children are not play things for those who do not have the decency and dignity to control themselves. I sentence the convict to serve 18 (eighteen) years. Right of Appeal explained."*

20        We note that the learned trial Judge did not take into consideration the period the appellant had spent in lawful custody. Article 23 (8) of the Constitution requires court to take into account, while passing a sentence, the period a convict spent in lawful custody prior to completion of his trial. Failure to do so renders the sentence illegal. It was held by the Supreme Court in **Rwabugande Moses vs Uganda, SCCA No. 25 of 2014**, that:-

25        *"A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision."*

5 We therefore find that the sentence of 18 years imposed upon the appellant was illegal and we set it aside and invoke section 11 of the Judicature Act which permits this Court to exercise the power of the trial court to impose an appropriate sentence.

We take into consideration the aggravating factors namely; the gravity of the offence, the fact that the appellant was a senior to the victim and should have protected her. The mitigating  
10 factors presented include; the appellant is a first offender and has two brothers who suffer mental illness, their mother is old, he was under the influence of alcohol and drugs at the time of commission of the offence which impaired his judgment, he deserves a sentence that would promote and enable him reform.

Counsel for the appellant implored this Court to consider the sentencing range in similar cases  
15 and cited to us the cases of **Lukwago Henry vs Uganda (supra) and Kibaruma John vs Uganda (supra)** which we have considered in addition to the ones we have cited below.

In **Rugarwana Fred vs Uganda, SCCA No. 39 of 1995** the Supreme Court upheld the appellant's sentence of 15 years for aggravated defilement of a 5 year old girl.

In **German Benjamin vs Uganda, Court of Appeal Criminal Appeal No. 142 of 2010** the  
20 victim aged 5 years was sexually assaulted by a 35 year old appellant who was convicted and sentenced to 20 years imprisonment. On appeal this Court set aside the sentence and substituted it with a sentence of 15 years imprisonment.

In **Bikanga Daniel vs Uganda, Court of Appeal Criminal Appeal No. 038 of 2000 (unreported)** the appellant who was aged 21 years was convicted of the offence of defilement  
25 of a girl under 18 years and sentenced to 21 years imprisonment. On appeal, the sentence was found to be harsh and excessive and this Court substituted it with a sentence of 12 years.

Having taken into account both the aggravating and mitigating factors set out above and the range of sentences in cases of aggravated defilement, we are of the considered view that a

5 sentence of 10 years will be appropriate in the circumstances of this case. We deduct the  
period of 10 months and 13 days from the 10 years and sentence the appellant to 9 years, 1  
month and 17 days which he shall serve from the date of conviction, which is 21/06/2013.

We so order.

Dated at Gulu this <sup>7<sup>th</sup></sup> day of *November* 2017

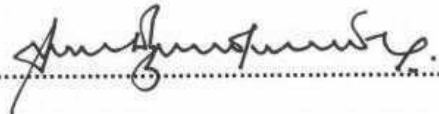
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Hon. Mr. Justice Kenneth Kakuru

**JUSTICE OF APPEAL**

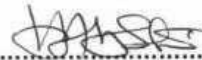
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Hon. Mr. Justice F.M.S Egonda-Ntende

**JUSTICE OF APPEAL**

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Hon. Lady Justice Hellen Obura

**JUSTICE OF APPEAL**