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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 041 OF 2010

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ADOLI DICKENS..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

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[Appeal from the decision of the High Court at Lira Holden at Apac before Hon. Lady Justice C. A. Okello dated 28th day of April 2010 in Criminal case No. 26 of 2008]

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**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA
HON. LADY JUSTICE HELLEN OBURA, JA**

JUDGMENT OF THE COURT

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This appeal arises from the decision of the High Court at Lira Holden at Apac in High Court Criminal Case No.41 of 2010 before Hon. Lady Justice Caroline Okello delivered on the 28th day of April 2010, in which the appellant was convicted of the offence of aggravated defilement and sentenced to 20 years imprisonment.

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The appellant now appeals against sentence only having obtained leave of this Court to do so at the commencement of the hearing of this appeal.

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The appellant was represented at the hearing of this appeal by learned Counsel *Mr. Ochorobiya Lloyd* while the respondent was represented by *Mr. Onencan Moses* learned Principal State Attorney.

5 **Appellant's case**

10 The appellant submitted that, a sentence of 20 years imprisonment was harsh and excessive in the circumstances of this case, the trial Judge having not taken into account the age of the appellant which was an important mitigating factor in his favour. Counsel contended that, had the trial Judge taken into account the age of the appellant, who was 19 years old at the time of the commission of the offence she would have imposed a much lesser sentence. For the above proposition he relied on *Birungi Moses vs Uganda, Court of Appeal Criminal Appeal No. 177 of 2014* and *Ninsima Gilbert vs Uganda, Court of Appeal Criminal Appeal No. 0180 of 2010*. He asked this Court to reduce the sentence to 17 years imprisonment.

15 **The Respondent's reply**

20 For the respondent Mr. Onencan opposed the appeal and supported the sentence. He submitted that the appellant was convicted of aggravated defilement, an offence that attracts a maximum penalty of death. In the instant case, the appellant was sentenced to only 20 years in prison. Counsel submitted that, before passing the sentence the learned trial Judge had taken into account the fact that, the victim was only 2 ½ years at the material time. She also took into account all the mitigating factors in favour of the appellant.

Counsel submitted further, that this Court cannot interfere with sentence passed by the High Court unless it is manifestly excessive or harsh.

30 Counsel, however, concluded that the trial Judge did not, while passing the sentence consider the age of the appellant, and as such the sentence warrants the interference of this Court on that account only. He asked Court to consider, the age of the victim, who was only 2 ½ years old and the serious injuries she sustained as a result of the sexual assault. He asked Court to reduce the sentence to 17 years imprisonment.

5 **Resolution of issues**

Both Counsel agree that, the sentence of 20 years imprisonment imposed by the trial Judge ought to be set aside, as she did not take into account the age of the appellant at the material time. This omission, both Counsel agreed warrants Court's interference with the sentence.

It is settled law that:-

15 *"The appellate Court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that its 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". See: Kiwalabye Bernard vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.*

In this case we find that, the learned trial Judge ignored to consider the age of the appellant at the material time when in her judgment she stated as follows:-

25 *"The offence of aggravated defilement carries the maximum sentence of death. There are however mitigating factors brought out in the allocutus of the convict. I have also noted his years of remand from 2/4/08. All the same, sexual intercourse with 2 ½ year old girl deserves a sentence that will convey the disapproval of the Court for such behaviour. I therefore*
30 *sentence the convict to 20 (twenty) years imprisonment"*

We also note that the Judge, did not comply with the provisions of Article 23 (8) of the Constitution which requires the Court to take into consideration the pre-trial

5 detention period before passing sentence, by deducting that period from the sentence that would otherwise have been imposed.

See: *Rwabugande Moses vs Uganda Supreme Court Criminal Appeal No. 25 of 2014 (unreported)*.

10 Because of the above omission alone, we find that the sentence imposed by the trial Judge is a nullity as it contravenes the Constitution.

15 Having found so, we now invoke the provisions of Section 11 of the Judicature Act which grants this Court the same power as that of the trial Court in circumstances such as we now find ourselves, to impose a sentence we consider appropriate in the circumstances of this appeal.

20 The victim in this case was only a 2 ½ years old baby girl, too young to be subjected to any form of sexual assault. In this case, she sustained serious injuries that may have long lasting effects on her anatomy. These are serious aggravating factors.

25 However, the appellant was a very young man, aged only 19 years old at the time. He was barely an adult. Had he committed an offence a year earlier, he would have been sentenced as a child, to a maximum of 3 years imprisonment. He was a first offender. He was found to have been HIV negative at the time. He had spent 2 years and 3 weeks on remand.

30 In *Birungi Moses vs Uganda, Court of Appeal Criminal Appeal No. 177 of 2014 at Fort Portal*, the appellant was convicted of the offence of aggravated defilement and sentenced to 30 years imprisonment. The victim was 8 years old at the time she was defiled. The appellant was 35 years and had spent 3 years on remand. This Court after taking into account the period of 3 years the appellant had spent on remand reduced the sentence to 12 years.

35 In *Kabwiso Issa vs Uganda, Supreme Court Criminal Appeal No. 7 of 2002* [unreported] the appellant was convicted of aggravated defilement and sentenced to 15 years imprisonment. On appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme Court the court found that the trial Judge had not taken into account the period the appellant had spent on remand and reduced the sentence to 10 years imprisonment.

5 In *Katende Ahamad vs Uganda, Supreme Court Criminal Appeal No. 6 of 2004*, the
appellant was convicted of defilement and sentenced to 10 years imprisonment. On
10 appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme
Court the Court upheld sentence of 10 years imprisonment.

Having taken all the above factors and decided cases into account, we consider that
10 in this case a term of imprisonment of 12 years will meet the ends of justice and is in
line with decided cases at this Court and the Supreme Court. We now deduct from
the 12 years, 2 years and 3 weeks the appellant spent in pre-trial detention and
order that he serves 9 years, 11 months and 1 week in prison starting from 28th
April 2010, the day he was convicted.

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We so order.

Dated at Gulu this 28th day of September 2017.

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE F.M.S EGONDA -NTENDE
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL