

THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT MBARARA****CRIMINAL APPEAL NO.0095 OF 2013****KAJUNGU MICHAEL:.....APPELLANT****VERSUS****10 UGANDA:.....RESPONDENT**

(Appeal from the decision of the High Court of Uganda sitting at Mbarara delivered on 18th June, 2013 in Criminal Session Case No. 0067 of 2013)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA**HON. MR. JUSTICE CHEBORION BARISHAKI, JA****15 HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA****JUDGMENT****Introduction**

This appeal arises from the sentence of the High Court at Mbarara in which the appellant was convicted on his own plea of guilt of the offence of
20 aggravated defilement contrary to sections 129 (1) (3) & 4 of the Penal Code Act and sentenced to 18 years imprisonment. Being dissatisfied with the sentence, he appealed to this Court against sentence only. The sole ground of appeal is that;

5 *That the learned trial Judge erred in fact and law when he acted on
a wrong principle, accorded scanty weight to the plea of guilty came
to an erroneous decision when giving sentence and occasioned a
miscarriage of justice.*

At the hearing of the appeal, Mr. Sam Dhabangi appeared for the appellant
10 while Ms. Alleluya Glory, Senior State Attorney represented the respondent.

Counsel for the appellant submitted that in passing the sentence, the trial
Judge considered the gravity of the offence where the convict exposed the
victim to the dangers of HIV/AIDS. According to counsel, the trial Judge
should have accorded the appellant a lesser sentence because he had no
15 knowledge that he was HIV Positive. Further that the appellant pleaded guilty
hence saving Court's time and resources. That the period of ten months he
had spent on remand which was not taken into consideration by the trial
Judge and it rendered the sentence illegal. Counsel prayed for Court to
resentence the appellant to 10 years.

20 Counsel for the respondent conceded that the sentencing Judge had not taken
into account the period spent by the appellant on remand. He however invited
this Court to give an appropriate sentence considering the fact that the
appellant had exposed the victim to HIV/AIDS. He prayed that the appellant
be re-sentenced to 15 years imprisonment from which a period of 10 months
25 spent in lawful custody should be deducted to make it 14 years and 2 months.

The background to the appeal is that in July, 2012, the appellant, Kajungu
Micheal, found the victim aged 15 years alone at home. The appellant told K.



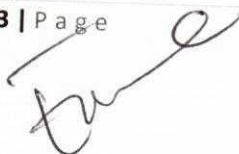
5 A (the victim) that he wanted to take her to work as a bar maid in Inshongororo town. On 15th July, 2012 at around 16:00 hours the appellant came with one Grace, picked her on a motorcycle and took her to Grace's bar in Ishongororo where she started working as a bar maid.

On 20th July, 2012 at around 17:00hours the appellant found the victim at
10 Grace's bar and informed her that her father was looking for her. Both the appellant and the victim boarded a motorcycle which took them to the appellant's home. The appellant put the victim on his bed and forcefully had sexual intercourse with her. The following day the appellant locked the victim in his house and went away. The following day, the appellant came back with
15 a woman and told the victim to leave his house. The victim tried to resist and the appellant got a stick and beat her. He pushed the victim out of his house and locked her out.

The victim reported the matter to Rushango Police Post and the appellant was arrested and later transferred to Ibanda Police Station. The victim was
20 examined, found to be of 15 years and it was established that her hymen had been recently ruptured. The accused was also medically examined and found to be 20 years old with a normal mental condition. The medical report further revealed that he was HIV Positive.

He was charged with aggravated defilement and sentenced to 18 years
25 imprisonment, which sentence he now challenges as being erroneous.

We have carefully perused the Court record and considered the submissions of both learned counsel. The duty of this Court as the first appellate Court is



5 to rehear the case on appeal by considering all the materials which were before the trial Court, and make up its own mind. **See Rule 30(1) of the Rules of this Court, Bogere Moses and another V Uganda, Supreme Court Criminal Appeal No.1 of 1997.**

An appellate court will only alter a sentence imposed by the trial court if it is
10 evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration. **See Livingstone Kakooza V Uganda Supreme Court Criminal Appeal No.17 of 1993 (unreported)**
15 **and Ogalo S/O Owoura V R (1954) 21 E.A.C.A. 270.**

While sentencing the appellant, the learned trial Judge stated as follows;

"In arriving at sentence, the following are the considerations:-

- i. *The gravity of the offence, where the convict exposed the victim to dangers of HIV/AIDS*
- 20 ii. *The fact that the offence is grave in nature*
- iii. *The need to protect the girl child in society*
- iv. *The fact that the convict has already admitted the offence*

All factors taken into account the convict is hereby sentenced to 18 (eighteen) years imprisonment."

25 Although it was not raised as a ground of appeal, upon perusal of the record, we note that the learned trial Judge did not take into consideration the period



5 of 10 months which the appellant had spent in lawful custody. **Article 23(8) of the Constitution** makes it mandatory that where a person is convicted to a term of imprisonment for an offence, any period spent in lawful custody in respect of the offence before completion of trial should be taken into account while imposing the sentence.

10 A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with the mandatory constitutional provision. **See Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014.**

We therefore find that the sentence of 18 years imposed by the trial Judge
15 was illegal and therefore set it aside.

This Court is mandated under **section 11 of the Judicature Act** and **Rule 32(1) of the Judicature (Court of Appeal rules) Directions** to exercise the original jurisdiction of the Court from which this appeal arose from. The section provides;

20 "For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated."

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5 According to the appellant's counsel, the sentencing judge should have sentenced the appellant to a lesser term because he did not know that he was suffering from HIV/AIDS.

We have taken into consideration the aggravating factors namely; the appellant committed a serious offence which carries a maximum sentence of
10 death on conviction. The victim was 15 years old and the appellant was 20 years old. The appellant is HIV Positive and hence put the life of a young girl at risk. However, there were also some mitigating factors which included; the appellant had been on remand for 10 months, was first offender, a young man aged 20 years, he pleaded guilty hence saving Court's time and was taking
15 care of his mentally sick mother.

We are alive to the need to have uniformity in sentences for offences committed in similar circumstances. The Supreme Court in **Rugarwana Fred V Uganda, Supreme Court Criminal Appeal No.39 of 1995** upheld the appellant's sentence of 15 years for aggravated defilement of a 5 year old girl
20 and in **Kitambuzi Ramathan V Uganda, Court of Appeal Criminal Appeal No.197 of 2009**, the appellant was convicted of the offence of aggravated defilement of his 12 year old daughter and was sentenced to 15 years. On appeal, this Court confirmed the sentence and dismissed the appeal.

25 Having taken into account both the aggravating and mitigating factors set out above, we sentence the appellant to 15 years from which we deduct a period

5 of 10 months being the period he spent on remand. The appellant will serve a term of 14 years and 2 months from 18th June, 2013, the date of conviction.

We so order

Dated at Mbarara this.....*2nd*.....day of.....*October*.....2018

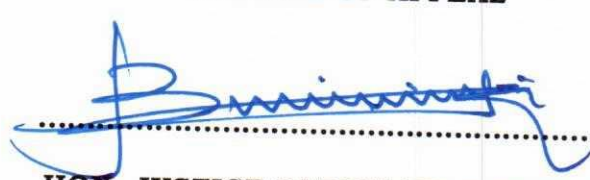
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JUSTICE OF APPEAL

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