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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL No. 091 OF 2013
(Arising out of High Court Criminal Case No. 032 of 2009)
NATURINDA YOSAMU :::::::::::::::::::::::::::::::::: APPELLANT
VERSUS
UGANDA :::::::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kabale before His Lordship Mr. Justice J.W. Kwesiga in High Court Criminal Session case No. 032 of 2009 delivered on 5th April, 2011)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

This is an appeal from the decision of Kwesiga, J in High Court Criminal Session Case No. 032 of 2009 at Kabale wherein the appellant was convicted of the offence of Aggravated Defilement contrary to Section 129 (3) & (4) (a) of the Penal Code Act, Cap 120 and sentenced to life imprisonment on 5th April, 2011.

The particulars of the offence were that on 10th November, 2009, the appellant performed a sexual act with a girl aged 4 years while she had gone to a well to fetch water. He was convicted and sentenced to life imprisonment.

The appellant with leave of Court under Section 132 (1) (b) of the Trial on Indictments Act now appeals against sentence only. The appellant sets forth one ground of appeal as follows:-



"The learned trial Judge erred in law and fact when he passed a harsh and excessive sentence of life imprisonment against the appellant."

Representations

At the hearing of this appeal, Mr. Nuwagaba Collin, learned Counsel appeared for the appellant on State Brief, while Ms. Immaculate Angutuko, learned Senior State Attorney represented the respondent. The appellant was present.

Submissions

It was submitted for the appellant that the sentence of life imprisonment which was passed following a plea of guilt by the appellant was harsh and excessive and yet the said plea saved Court's time and showed remorse on behalf of the appellant.

Counsel further submitted that by the time the sentence was passed in this case on 5th April 2011, the authority of **Tigo Steven Vs Uganda Supreme Court Criminal Appeal No. 08 of 2009 (unreported)** which stipulated that a term of life imprisonment meant imprisonment for the duration of the life of the convict had not yet been decided. In his view, the sentence of life imprisonment meant that the appellant was subject to imprisonment for 20 years for the purpose of applying Article 23 (8) of the Constitution and that this term in itself was harsh and excessive.

He prayed for a more lenient sentence and proposed a term of 15 years' imprisonment.

In reply, Counsel for the respondent opposed the appeal and submitted that sentencing was a discretion of a sentencing Judge or trial court and

5 each case presented its own facts upon which a Judge could exercise his
or her discretion. Counsel referred Court to **Kiwalabye Benard vs.
Uganda, Supreme Court Criminal Case No.143 of 2001**, cited with
approval in **Ssemanda Christopher and Another vs. Uganda, Court
of Appeal Criminal Appeal No. 077 of 2010**, for the proposition that
10 this Court does not ordinarily interfere with the discretion exercised by a
trial Judge unless it is evident that the Judge has acted upon some
wrong principle or overlooked some material factor and/or where the
sentence was manifestly excessive in view of the circumstances of the
case.

15 Regarding the harshness of the sentence, the learned Senior State
Attorney relied on Section 129 of the Penal Code Act Cap 120 to submit
that the offence of Aggravated Defilement attracts a maximum penalty
of death and therefore, by passing a sentence of life imprisonment, the
learned trial Judge was being lenient. She contended that the learned
20 trial Judge considered all the mitigating and aggravating factors in this
case and came to an appropriate sentence within the provisions of the
law and there was no miscarriage of justice.

She prayed that the sentence be upheld and the appeal dismissed.

In rejoinder Counsel for the appellant submitted that keeping the
25 appellant in prison for the rest of his life after he had readily pleaded
guilty was unjust. He reiterated his earlier submissions and invited Court
to allow the appeal.

Decision of the Court

We have listened to the submissions of learned counsel on either side
30 and carefully studied the record. We have also reviewed the law and
authorities relied upon.

5 This is a first appeal and as such, we are required by law to re-evaluate
the evidence at the trial and come up with our own decision on all
matters of law and fact. This requirement is set out in **Rule 30(1) of**
the rules of this court. See also Fr. Narcensio Begumisa &
Others versus Eric Tibebaaga, Supreme Court Criminal Appeal
10 **No. 017 of 2002; and Kifamunte Henry versus Uganda Supreme**
Court Criminal Appeal No. 010 of 1997.

This appeal is against sentence only, and this court can only interfere
with the sentence of the trial Court if that sentence is illegal or is based
on a wrong principle or the Court has overlooked a material factor, or
15 where the sentence is manifestly excessive or so low as to amount to a
miscarriage of Justice. **See Kizito Senkula vs. Uganda, Supreme**
Court Criminal Appeal No. 24/2001.

We note that before passing the sentence, the trial Judge considered a
number of both mitigating and aggravating factors to justify life
20 imprisonment and then gave reasons for the sentence as follows:-

*"The accused person, a man aged 21 years is convicted of
aggravated Defilement of a girl of extreme tender age (4) years
only. The accused person has readily accepted his guilt and
saved court's time. He has been on remand for 1 year and 4
25 months. The offence he is convicted of is a capital offence that
attracts a death sentence and I have considered all this..."*

*...I find it beastly for a man of 20 years to have sexual
intercourse with a baby of 4 years only. Even dogs do not do
that with their young ones. All in all, the convict does not
30 deserve to be kept in society. I must give him a sentence that
keeps him away from society and that will serve as a warning to
potential defilers. In view of the above, I do hereby sentence the
convict to life imprisonment."*

5 We note that Article 23 (8) of the 1995 Constitution states:-

10 *“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 completion of his or her trial shall be taken into account in imposing the term of imprisonment.”*

15 In **Rwabugande Moses vs. Uganda, Criminal Appeal No. 025 of 2014**, the Supreme Court stated that the taking into account of the period spent on remand by a court is necessarily arithmetical because the said period is known with certainty and precision, and therefore consideration of the remand period should necessarily mean reducing or subtracting that period from the final sentence. It was further held that a sentence couched in general terms that the court has taken into account the period spent on remand was ambiguous and vague.

20 This Court has in the recent decision of **Ogwal Alberto Vs Uganda, Court of Appeal Criminal Appeal No. 46 of 2014**, discussed in depth what life imprisonment is as follows:-

25 *“Is life imprisonment [or imprisonment for life which is the expression used in the Constitution and statutes] a term of imprisonment? We are unaware of anything that would suggest that it is not term of imprisonment. Whether one considers the ordinary meaning of the words or even contextually, life imprisonment is a term of imprisonment. Does Article 23 (8) of the Constitution apply to life imprisonment? We see nothing in the words of Article 23 (8) which would suggest otherwise. Those provisions apply to all terms of imprisonment including life imprisonment.”*

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Ogwal Alberto vs. Uganda (supra) held as follows:-

“In our view a trial court imposing life imprisonment as a sentence must comply with article 23 (8) of the Constitution and

5 *deduct from that sentence the period that a convict would have
spent in lawful custody prior to the completion of his or her
trial. Until otherwise defined in law life imprisonment would be
deemed to be twenty years imprisonment for the purpose of
applying article 23 (8) of the Constitution. In the instant case
10 the trial court failed to do so and therefore the sentence it
imposed was a nullity."*

15 **See:- Ogwal Nelson and 4 others vs Uganda, Court of Appeal
Criminal Appeal No. 606 of 2015, Kia Erin vs Uganda Court of
Appeal Criminal Appeal No.172 of 2013 and Oryem Francis and
Another vs Uganda, Court of Appeal Criminal Appeal No. 231 of
2011.**

20 However, there are other decisions of this Court that suggest that
imprisonment for life or life imprisonment is not a defined term of
imprisonment and the death sentence, Article 23 (8) of the Constitution
is not applicable to it.

**See:- Byamukama Naboth vs Uganda, Court of Appeal Criminal
Appeal No. 316 of 2009 and Tigo Stephen vs Uganda Supreme
Court Criminal Appeal No. 08 of 2009 (unreported).**

25 **Magezi Gad vs Uganda, Supreme Court Criminal Appeal No. 17
of 2014,** settled this issue on appeal to the Supreme Court where the
Court held as follows:-

30 *"It was further contended that the learned trial judge in passing
sentence of life imprisonment did not take into account the
period of five years the appellant had spent on remand contrary
to Article 23 (8) of the Constitution.*

The above Article provides as follows:-

*"Where a person is convicted and sentenced to a term of
imprisonment for an offence, any period he or she spends*

5 *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".*

10 *The above Article is about legality of sentence. It is mandatory for a trial court sentencing a convicted person to take into account the period spent in custody; see Bashir Ssali VS Uganda, Criminal Appeal No. 40 of 2003 (SC), where a trial judge fails to comply with Article 23 (8) of the Constitution, the Supreme Court even in its own motion can correct the sentence by considering the period spent in lawful custody before conviction; see Sebide VS Uganda, Criminal Appeal No. 22 OF 2002 (SC).*

20 *We are of the considered view that like a sentence for murder, life imprisonment is not amenable to Article 23 (8) of the Constitution. The above Article applies only where sentence is for a term of imprisonment i.e. a quantified period of time which is deduct able. This is not the case with life or death sentences."*

25 We are therefore bound by this decision of the Supreme Court as set out under Article 132 (4) of the Constitution and the doctrine of *stare decisis*. We accordingly find that Article 23 (8) did not apply and the sentence passed in this case was not illegal.

30 Regarding severity of sentence, we have considered both the mitigating and aggravating factors on record as well as the period of 1 year and 4 months spent on remand in order to come to an appropriate sentence. We note that the offence committed was grave and, therefore, the sentence imposed must reflect the severity of the appellant's unlawful conduct. It was pleaded in mitigation that the appellant was a first time offender who had been on remand for 1 year and 4 months. He was aged 20 years at the time of sentencing, and prayed for leniency.

5 **Objective 3(e) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**, provides that the guidelines should enhance a mechanism that will promote uniformity, consistency and transparency in sentencing. The ultimate responsibility to determine the appropriate sentence, however, lies with
10 the Court after weighing all relevant factors and then exercising its discretion judiciously.

In **Kizito Senkula vs Uganda, Supreme Court Criminal Appeal No. 024 of 2001**, the appellant defiled a child of 11 years. The Supreme Court found the sentence of 15 years appropriate but had to
15 reduce the same to 13 years because the two years spent on remand had not been considered.

The Supreme Court in **Sam Buteera vs. Uganda, Criminal Appeal No. 21 of 1994**, upheld a sentence of 12 years' imprisonment as appropriate where an adult herdsman defiled an 11 year old girl.

20 In another case of **Rugaranwa Fred vs. Uganda, Supreme Court Criminal Appeal No. 039 of 1995**, the Supreme Court upheld the appellant's sentence of 15 years for aggravated Defilement of a 5 year old girl.

In yet another case of **German Benjamin vs. Uganda, Court of Appeal Criminal Appeal No. 142 of 2010**, the victim aged 5 years
25 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.

30 Having thoroughly subjected the facts of this case to a fresh re-appraisal and relied on the court precedents cited above, we have come to the

5 conclusion that the sentence of life imprisonment that the learned trial Judge imposed upon the appellant was harsh and manifestly excessive.

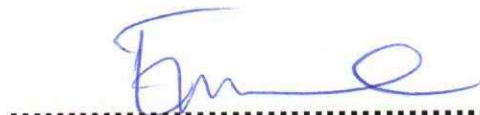
We find that a sentence of 15 years imprisonment would meet the ends of justice. From that sentence we deduct the 1 year and 4 months which the appellant had spent on pre-trial detention. We sentence him to a
10 term of 13 years' and 8 months imprisonment to be served from 5th April, 2011, the date of his conviction.

For the foregoing reasons, the appeal against sentence is allowed.

We so order.

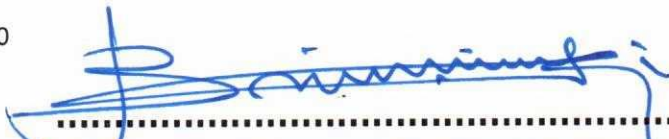
Dated at Mbarara this 2nd day of October 2018

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HON. LADY JUSTICE ELIZABETH MUSOKE
JUSTICE OF APPEAL

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HON. MR. JUSTICE CHEBORION BARISHAKI
JUSTICE OF APPEAL

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HON. MR. JUSTICE CHRISTOPHER MADRAMA
JUSTICE OF APPEAL

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