THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO.286 OF 2014

ARIGANYIRA ISAAC::APPELLANT

VERSUS

UGANDA::RESPONDENT

(An Appeal from the decision of the High court of Uganda sitting at Rukungiri delivered on 13th December, 2012 in criminal session case No.0067 of 2017 by Justice J.W. Kwesiga)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA

JUDGMENT

The appellant was indicted of the offence of aggravated defilement contrary to sections 129(3) (4) (a) (b) of the Penal Code Act. However, on conviction, the learned trial Judge convicted him of the offence of simple defilement contrary to section 129 (1) of the Penal Code Act. The particulars of the offence were that on the 25th day of April, 2011, the appellant at Nyamirama Village in Kanungu District performed a sexual act with A. M a girl aged 13 years. He was sentenced

to 15 years imprisonment and being dissatisfied with the sentence, he appealed to this Court against sentence only on the following ground that:

The learned trial Judge erred in law when he imposed a sentence of 15 years imprisonment which was harsh and manifestly excessive in the circumstances.

At the hearing of the appeal, Mr. Kabagambe Peter appeared for the appellant while the respondent was represented by Ms. Joanita Tumwikirize, a State Attorney.

Counsel for the appellant sought and was granted leave to appeal against sentence only. He submitted that the sentence of 15 years imposed by the trial Judge was harsh and excessive bearing in mind the offence of simple defilement which the appellant was convicted of. Further that the trial Judge did not consider the time that the appellant had spent on remand hence rendering the sentence illegal. Counsel pointed out that the appellant was remanded on 24th April, 2011 and convicted on 14th December, 2012, he had therefore been on remand for one year and 8 months and has been in lawful custody for 6 years since his conviction and relied on ***Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014*** for the proposition that failure to take into account the period spent on remand before conviction and sentence renders the sentence illegal.

Counsel further submitted that in meting out the sentence, the trial Judge did not consider the age of the appellant who was 22 years at the time of conviction

and faulted the trial Judge for not finding the age of the appellant as a mitigating factor which to him caused a miscarriage of justice to the appellant. Counsel further submitted that this Court should maintain consistency in sentencing and urged Court to follow the decision in ***Ssenyomo John V Uganda, Court of Appeal Criminal Appeal No.98 of 2012*** where the appellant was convicted of simple defilement and sentenced to 15 years but on appeal, this Court reduced the sentence to 7 years and this Court should also reduce the appellant's sentence to 7 years.

Counsel for the respondent submitted that the appellant had offended Rule 74 of the Rules of this Court because he had submitted on matters which were not contained in his Memorandum of Appeal without leave of Court. That while the sole ground of appeal challenged only harshness and excessiveness of the sentence, the appellant had gone ahead and submitted on illegality of the sentence. He prayed Court expunges the submissions regarding illegality.

As to whether the trial Judge took into account the period the appellant had spent on remand, counsel argued that the learned trial Judge had done so because while sentencing the appellant, the Judge stated that he had considered what had been submitted for and against the accused persons. He relied on ***Abelle Asuman V Uganda, Supreme Court Criminal Appeal No.66 of 2016*** for the proposition that where the sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with.

Regarding the harshness of the sentence, counsel submitted that the sentence of 15 years imprisonment imposed by the trial Judge was neither harsh nor excessive considering the circumstances of the case since the medical report revealed a freshly raptured hymen with injuries at the lower end of vaginal introitus. Counsel prayed that Court upholds the sentence of 15 years.

In rejoinder, counsel for the appellant conceded that the issue of the illegality of the sentence had not been raised in the Memorandum of Appeal. Counsel invited this Court to consider the Supreme Court reasoning in ***Rwabugande Moses (supra)*** where the appellant raised an issue which had not been dealt with by the first appellate Court. The Supreme Court found that there were exceptions to Rule 70 (1) (a) of the Supreme Court Rules and the Court could not sanction what was illegal. The Supreme Court went ahead to determine the issue.

The background to the case is that on the evening of 25th April, 2011 at about 7:00pm, A. M aged 13 years (victim) was on her way to Nyamirama trading centre in Kanungu District having been sent by her grandmother to buy paraffin when she met the appellant who was well known to her. The appellant grabbed her and forcefully took her to the nearby bush and had sexual intercourse with her. She kept on crying while being defiled and the noise attracted people including one Muhire who moved closer to establish what was happening. Muhire saw the appellant defiling the victim. The appellant tried to escape but Muhire ran after him and arrested him. He was taken to Nyamirama police post. He was tried,

convicted of simple defilement and sentenced to 15 years imprisonment hence the appeal against sentence.

The duty of this Court as the first appellate Court is to reappraise the evidence and draw inferences of fact. ***See Rule 30(1) (a) of the Rules of this Court***. We shall take the above principles into consideration.

Before we delve into the merits of the appeal, we would like to deal with the submission of counsel for the respondent on the issue of expunging the submissions of the appellant on the illegality of the sentence. According to counsel for the respondent, the appellant, in his Memorandum of Appeal only appealed against sentence but during submissions, he argued the issue of illegality of the sentence which was not specified in the Memorandum of Appeal without leave of Court.

Rule 74 of the Rules of this Court state that;

1. *At the hearing of an appeal-*

a) *the appellant shall not, without leave of Court, argue any ground of appeal not specified in the Memorandum of Appeal or in any supplementary memorandum lodged under rule 67 of these Rules; and*

b) *the arguments contained in any statement lodged under rule 68 of these Rules shall receive the same consideration as if they had been advanced orally at the hearing.*

We agree with counsel for the respondent that the Memorandum of Appeal on record raised one sole ground against sentence however counsel for the appellant

submitted on the illegality of the sentence contrary to what was in the Memorandum of Appeal.

In ***Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014,*** the Supreme Court noted that the issue of not considering the remand period had not been challenged in the Court of Appeal. What was challenged was the harshness of the sentence. The general rule is that an appellate Court will not consider an argument raised for the first time on appeal. Rule 70 of the Supreme Court Rules which is in para materia with Rule 74 of the Court of Appeal Rules provides that at the hearing of an appeal;

> *The appellant shall not, without leave of the Court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 63 of these rules;*

The Court however, went ahead to hold that there are exceptions to this general rule and gave the example explained in a well-known legal maxim, "Ex turpi causa non oritur action", a Court of law cannot sanction what is illegal. (See Kisugu Quarries V The Administrator General SCCA No.10 of 1998)

The Court went further to hold that the circumstances of that case warranted a departure from the general rule, the issue dealt with a Constitutional imperative in the nature of a fundamental right of a convict as guaranteed by the Constitution.

The Court proceeded to address the issue of failure by the lower Court to consider the period which the convict had spent on remand even though it was not raised on first appeal.

While mitigating for the appellant, the defence counsel stated that the appellant had been on remand since 25th April, 2011 and in sentencing the appellant, the trial Judge stated that;

> *"I have considered what has been submitted for and against the accused person. He forcefully defiled the victim. The accused person deserves a punishment that will send a warning to all potential defilers to stop this mischief which is almost an epidemic in this region. There is no age that gives anybody to commit the offence. I do not find the accused persons age a mitigating factor, therefore I do sentence the accused/convict to 15 years imprisonment."*

In ***Abelle Asuman V Uganda, Supreme Court Criminal Appeal No.66 of 2016*** the Supreme Court appears to have revisited the decision in Rwabugande Moses (supra) when it held that;

> *"Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in*

effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution."

We note that the trial Judge stated that he had considered what had been submitted for the appellant in mitigation and also the aggravating factors. The defence counsel had clearly stated in mitigation that that the appellant had been on remand since 25th April, 2011. This meant that the trial Judge had, in our view, considered the remand period although he did not expressly state it. We find that the requirements of Article 23(8) of the Constitution were met.

Regarding the harshness and or excessiveness of the sentence, an appellate Court will only alter a sentence imposed by the trial Judge if it is 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).***

Counsel for the appellant faulted the learned trial Judge for imposing a harsh and excessive sentence of 15 years. According to counsel, the trial Judge did not consider the age of the appellant who was 22 years at the time of conviction.

The learned trial Judge in sentencing the appellant did not find the appellant's age as a mitigating factor because there is no age that allows anybody to commit an offence.

In ***Kabatera Steven V Uganda, Court of Appeal Criminal Appeal No.123 of 2001,*** the appellant was convicted of defilement and sentenced to 10 years imprisonment and appealed to this Court that the learned trial Judge did not take into account the age of the appellant before imposing a sentence. In agreeing with him, the Court held that the only factor that he did not take into account was the age of the appellant. We are of the opinion that the age of an accused person is always a material consideration that ought to be taken into account before a sentence is imposed.

The offence with which the appellant was charged carries a maximum sentence of imprisonment for life on conviction. The medical report revealed that the victim was only 13 years old while the appellant was an adult while the appellant was 23 years old and a first offender. He was convicted of a lesser offence of simple defilement although he had been charged with aggravated defilement. He however was remorseful and had been on remand since 25th April, 2011.

In ***German Benjamin V Uganda, Court of Appeal Criminal Appeal No.142 of 2010,*** the appellant was convicted of defilement and sentenced to 20 years imprisonment. On appeal, this Court substituted the sentence with 15 years' imprisonment after taking into account that the appellant had spent 4 and half years on remand, was a first offender and was ready to reform.

In ***Bikanga Daniel V Uganda, Court of Appeal Criminal Appeal No/38 of 2000 (unreported),*** the appellant was convicted of defilement and sentenced to

21 years imprisonment. This Court reduced the sentence to 12 years because the sentence was found to be harsh and excessive.

We find that while sentencing the appellant, the trial Judge did not take into the fact that he was 22 years at the time he committed the offence. Had he done so, he would not have sentenced him as he did to the term of 15 years. We consider a sentence of 11 years and 8 months will meet the ends of justice. We shall deduct therefrom the period of 1 year and 8 months the appellant spent on remand. He shall serve a sentence of 10 years from 13th December, 2012, the date of conviction.

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 BARISHAKI CHEBORION
JUSTICE OF APPEAL

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HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA
JUSTICE OF APPEAL