

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT MBARARA**

**CRIMINAL APPEAL NO.218 OF 2011**

**KATUTSI ELISAMU Alias KAHIMA:::::::::::::::::::::::::APPELLANT**

**VERSUS**

10 **UGANDA:::RESPONDENT**

*(Appeal from the decision of the High Court of Uganda sitting at Kabale delivered by the Hon. Mr. Justice J.W Kwesiga on 8<sup>th</sup> September, 2011 in Criminal Session Case No. 235 of 2009)*

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA**

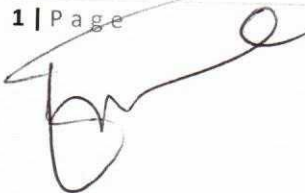
15 **HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

**HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA**

**JUDGMENT**

The appellant was indicted and convicted of aggravated defilement contrary to section 129(3) and (4) (a) of the Penal Code Act on 8<sup>th</sup> September, 2011.

20 The particulars of the offence were that on 5<sup>th</sup> November, 2008 at Kinyungu Cell, in Kamwezi, Kabale District, the appellant, Katutsi Elisamu unlawfully performed a sexual act with N. M alias Agatha a girl aged 10 years. The appellant was sentenced to 14 years imprisonment. Dissatisfied with the sentence, the appellant appealed to this Court.






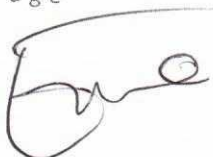
5 Initially, the appellant had appealed against both conviction and sentence. However, he sought leave of this Court which was granted to appeal against sentence only. The ground of appeal as it appeared in the amended Memorandum of Appeal stated thus;

10 **1. The learned trial Judge erred in law and fact when he acted on a principle and meted out a subjective as opposed to an objective sentence and occasioned a failure of justice.**

At the hearing of the appeal, Mr. Sam Dhabangi appeared for the appellant whereas Ms. Angutoko Immaculate, Senior State Attorney appeared for the respondent.

15 Counsel for the appellant submitted that the sentence passed by the learned trial Judge was harsh and excessive because he did not take into account the mitigating factors as presented to him by the defence Counsel. He invited Court to look at page 19 of the Record of Proceedings where the defence counsel stated that the convict was a young man of 30 years married with 3  
20 orphans, had been on remand for 2 years and 9 months and remorseful but the learned trial Judge did not put any of the mitigating factors into consideration. Counsel further submitted that the learned trial Judge merely stated that "given the period spent on remand, I find 14 years imprisonment appropriate" without mathematically deducting the period of 2 years and 9  
25 months spent on remand.

In reply, counsel for the respondent submitted that the trial Judge properly exercised his discretion in sentencing. Counsel argued that the decision of the Supreme Court in **Rwabugande Moses V Uganda, Supreme Court Criminal**




5 ***Appeal No.25 of 2014*** departed from the earlier decisions of the Supreme Court which were to the effect that Article 23(8) did not require arithmetic deduction however, this position has now been settled by the Supreme Court in ***Abelle Asuman V Uganda, Supreme Court Criminal Appeal No.066 of 2016*** where Court stated that the where a trial Court has clearly  
10 demonstrated that it has taken into account the period spent on remand, the sentence would not be interfered with by the appellate Court only because the sentencing Judge used different words in their judgment or missed to state that they deducted the period spent on remand.

Counsel submitted that the law at the time the appellant was sentenced did  
15 not necessitate the trial Judge to mathematically deduct the remand period. She prayed that this Court upholds the sentence of 14 years.

The facts of this case are that on the 5<sup>th</sup> day of November, 2008 at around 5:00pm, the victim, N. M alias A had gone alone to collect firewood near her home when the appellant appeared. The appellant got hold of her, took her  
20 behind the trees, undressed her and had sexual intercourse with her. The victim made an alarm which attracted some people who found the appellant having sex with the victim. The appellant was arrested and forwarded to Kamwezi Police Post. The victim was examined and found to be 10 years old; the hymen had been ruptured and had multiple bruises in her private parts.  
25 The appellant was examined and found to be of normal mental health.

We have listened to the submissions of counsel for and against this appeal. We have also studied the Court record and the authorities relied upon for which we are grateful.

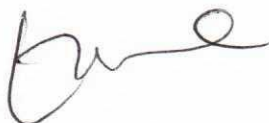




- 5 As the first appellate Court, our duty is to re-appraise the evidence and come up with our own inferences on all questions of law and fact. See **Rule 30(1) of the Rules of this Court, Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997 and Bogere Moses V Uganda Supreme Court Criminal Appeal No.1 of 1997.**
- 10 An appellate Court will only alter a sentence imposed by the trial Court if it is evident that 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. See **Livingstone Kakooza V Uganda Supreme Court Criminal Appeal No.17 of 1993 (unreported)**
- 15 Counsel for the appellant faulted the learned trial Judge for not mathematically deducting the period of 2 years and 9 months the appellant had spent on remand and for ignoring the appellant's mitigating factors as presented to him by defence counsel.

In passing the sentence, the trial Judge stated that;

- 20 "The accused person/ convict has been found guilty of an offence of juvenile sexual exploitation the worst violence against children of this country. This offence is alarmingly on the increase. Defilement is a threat to the girl child the future mother of this country who must be protected by punishing the convicts adequately with a hope that it will deter similar
- 25 crimes. I am not impressed by the submissions that the convict be treated leniently because he has responsibility over other children. A responsible man does not abuse the children's right to innocence. He was employed in a school and he was in a position where society expects him to protect



5 children which he betrayed. For these reasons I will give him a punishment to keep him away long enough to reform. Given the period he has been on remand. I find 14 years imprisonment appropriate. I sentence the convict to 14 years imprisonment."

**Article 23(8)** of the Constitution provides that;


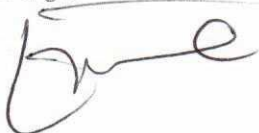
10 "Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."

Further, section 15(2) of the Constitutional (Sentencing Guidelines for Courts  
15 of Judicature) (Practice) Directions, 2013 enjoin court to deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.

We agree with counsel for the respondent's submission that the law at the time the appellant was sentenced did not necessitate the trial Judge to  
20 mathematically deduct the remand period.

The appellant was sentenced on 8<sup>th</sup> September, 2011 before the Supreme Court decision in **Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014**. The trial Judge's sentence above was in line with the earlier decisions of the Supreme Court for example **Kizito Senkula vs. Uganda SCCA NO. 24 of 2001 and Katende Ahamad vs. Uganda SCCA NO.6 of 2004** among others.  
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We cannot therefore fault the trial Judge for holding as he did.





5 The principle of stare decisis which is applicable in our jurisdiction obliges  
this Court to follow the decisions of the Supreme Court. The Supreme Court  
in **Rwabugande Moses (supra)** while departing from its earlier decisions in  
**Kizito Senkula vs. Uganda SCCA NO. 24 of 2001; Kabuye Senvewo vs.**  
**Uganda SCCA NO. 2 of 2002; Katende Ahamad vs. Uganda SCCA NO.6**  
10 **of 2004 and Bukenya Joseph vs. Uganda SCCA No. 17 of 2010** held that  
the words "to take into account" does not require a trial court to apply a  
mathematical formula by deducting the exact number of years spent by an  
accused person on remand from the sentence to be awarded by the trial court.  
The Supreme Court clarified its position on this issue in the more recent  
15 decision of **Abelle Asuman V Uganda, Supreme Court Criminal Appeal**  
**No.066 of 2016** when it held that;

"What is material in that decision is that the period spent in lawful  
custody prior to the trial and sentencing of a convict must be taken into  
account and according to the case of **Rwabugande** that remand period  
20 should be credited to a convict when he is sentenced to a term of  
imprisonment. This Court used the words to deduct and in an arithmetical  
way as a guide for the sentencing Courts but those metaphors are not  
derived from the Constitution.

Where a sentencing Court has clearly demonstrated that it has taken into  
25 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



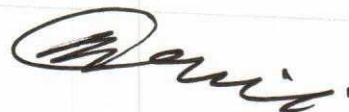
5 remand. These may be issues of style for which a lower Court would not  
be faulted when in effect the Court has complied with the Constitutional  
obligation in Article 23(8) of the Constitution.”

Since then, this Court has followed the holding in **Abelle Asuman (supra)**. In  
**Muyitira Sande V Uganda, Court of Appeal Criminal Appeal No.126 of**  
10 **2013** while handling an appeal which required interpretation of Article 23(8)  
of the Constitution held that:

“Given these 3 decisions of the Supreme Court (*Rwabugande, Abelle and*  
*Osherura*) it appears now the position is that a sentencing court can  
either take into account the period spent on remand (apply the non-  
15 mathematical formular as per *Kabwiso Issa V Uganda (supra)*; or it can  
deduct the period spent on remand from the appropriate sentence (apply  
the arithmetical formula as per *Rwabugande V Uganda (supra)*. Either  
option will be found to comply with the article 23(8) of the Constitution.  
Whatever the merits of this situation our duty is to comply with the  
20 Supreme Court decision.”

In the instant case, the trial Judge found a sentence of 14 years imprisonment  
appropriate given the period the appellant had been on remand. He did not  
mathematically subtract the remand period from the sentence but noted it in  
his Judgment.

25 In view of the decision in **Abelle Asuman (supra)**, we find that the learned  
trial Judge took into consideration the period of time that the appellant had  
spent in lawful custody as per **Article 23(8)** of the Constitution.



5 Counsel for the appellant also submitted that the sentence passed by the learned trial Judge was harsh and excessive because he did not consider the mitigating factors as presented to him by the defence Counsel.

The trial Judge stated that he was not impressed by the submissions that the appellant be treated leniently because he had the responsibility over other  
10 children.

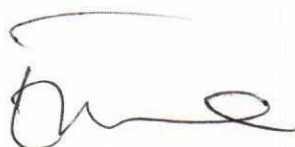
We agree that the appellant's behaviour was in itself immoral and should be deterred. However, the appellant was a young man of 30 years, married and looking after orphans. He was remorseful and a first offender.

In *Sam Buteera V Uganda, Supreme Court Criminal Appeal No.21 of*  
15 *1994*, the Supreme Court confirmed a sentence of 12 years imprisonment for defilement of a victim of 11 years.

We therefore, after taking into account both mitigating and aggravating factors do exercise our discretion and set aside the sentence of 14 years imprisonment and substitute it with 12 years. The said sentence shall run  
20 from 8<sup>th</sup> September, 2011, the date of conviction of the appellant.

**We so order**

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



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**HON. LADY JUSTICE ELIZABETH MUSOKE**  
**JUSTICE OF APPEAL**





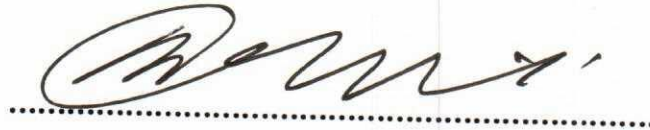
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**HON. JUSTICE BARISHAKI CHEBORION**

**JUSTICE OF APPEAL**

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**HON. JUSTICE CHRISTOPHER IZAMA MADRAMA**

**JUSTICE OF APPEAL**

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