

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORTPORTAL

(Coram: F.M.S Egonda-Ntende, Hellen Obura & Christopher Madrama, JJA)

CRIMINAL APPEAL No. 260 of 2010

10 **MUCUNGUZI PASCAL:.....APPELLANT**

VERSUS

UGANDA :.....RESPONDENT

(Appeal from the decision of the High Court at Fort Portal before His Lordship Hon. Justice J.B Katutsi J in High Court Criminal Session Case No. 0052 of 2008 dated 24th September, 2010)

JUDGMENT OF COURT

The appellant was convicted by Katutsi, J of the offence of aggravated defilement contrary to section 129(3) and (4) (a) & (c) of the Penal Code Act and was sentenced to 15 years imprisonment, against which he now appeals.

20 The brief facts as found by the trial Judge are that on 7/04/2008 at Kezirangi village in Kyenjojo District, the appellant had unlawful carnal knowledge of K.R (the victim), a 9 year old girl who was staying with her aunt, Kayesigyire Mary (PW3). On 6/04/2008 at about 6:00 pm, the victim together with PW3 and her husband Assimwe Eric, went to Kinyansi Trading Centre to take PW3's child to hospital. At about 7:30pm, the appellant went to PW3 and asked
25 her to allow the victim move with him because he wanted to buy her pancakes. PW3 consented to that request and the appellant moved with the victim but instead of taking her to the shop, he carried her in his arms and took her to a nearby cassava garden where he proceeded to have sexual intercourse with her. PW3 heard the victim crying and when she went to where she was, she found blood oozing from the victim's vagina. PW3 and her
30 husband took the victim to a one Mande Werren the LCII Chairman from where they checked the victim. The matter was reported to the police and the appellant was arrested but he denied

5 the allegation. He was charged with the offence of aggravated defilement and he was tried, convicted and sentenced to 15 years imprisonment. Being dissatisfied with the decision of the trial court, the appellant appealed to this Court against sentence only on one ground;

“That the sentence of imprisonment for 15 years imposed on the appellant was clearly illegal, harsh and manifestly excessive in the circumstances.”

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At the hearing of this appeal, Mr. Cosma A. Kateebe together with Claude Arinaitwe represented the appellant whereas Mr. David Ndamurani Atenyi Senior Assistant Director Public Prosecutions represented the respondent.

15 Counsel submitted that the sentence imposed on the appellant by the trial Judge was illegal for failure to comply with the constitutional requirement under Article 23 (8) of the Constitution which enjoins courts to take into account the period a convict spent in lawful custody before imposing a sentence. He argued that in the instant case, the trial Judge did not take into account the period of 2 years and 5 months, the appellant spent on remand. Counsel invited this Court to set aside the sentence for being illegal and taking into consideration the
20 mitigating factors, impose a sentence of 10 years from which the 2 years and 5 months the appellant spent on remand should be deducted thus leaving a period of 7 years and 7 months to be served by the appellant from the date of conviction.

Conversely, counsel for the respondent conceded in part that the sentence was illegal as Article 28(3) of the Constitution was not complied with. He therefore invited this Court to
25 invoke section 11 of the Judicature Act which confers this Court the same powers as the High Court to impose an appropriate sentence. Counsel prayed that this Court taking into consideration parity of sentence imposes an appropriate sentence of 15 years from which the period of 2 years and 5 months spent on remand should be deducted.

Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions places a duty on this
30 Court, as first appellate court, to re-appraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it has

5 neither seen nor heard the witnesses. **Also see: Oryem Richard vs Uganda, SCCA No. 22 of 2014.**

We have carefully perused the record and considered the submissions of both learned counsel as well as the law and authorities cited to us. While sentencing the appellant, the trial Judge stated as follows;

10 *“Defilement is on an alarming increase in this area. 80% of the cases I have are on defilement. Something must be done to curb the trend. This can only be through deterrent sentences. Convict sentenced to 15 years.”*

We note that indeed the learned trial Judge did not take into consideration the period the appellant had spent in lawful custody. Article 23 (8) of the Constitution requires court to take
15 into account, while passing a sentence, the period a convict spent in lawful custody prior to completion of his trial. Failure to do so renders the sentence illegal as was held in **Rwabugande Moses vs Uganda, SCCA No. 25 of 2014.**

We therefore find that the sentence of 15 years imposed upon the appellant was illegal. We set it aside and now invoke section 11 of the Judicature Act which clothes this Court with the
20 power, authority and jurisdiction of the trial court to impose an appropriate sentence.

We take into consideration the aggravating factor that defilement is on the increase. A deterrent sentence was prayed for. The mitigating factors presented were that; the appellant is a first offender, he was 20 years old when he committed the offence and therefore at his age there is hope to reform. A lenient sentence was prayed for.

25 We have also considered the range of sentences in the following cases decided by this Court in similar offences.

In **Lukwago Henry vs Uganda, CACA No. 0036 of 2010** this Court upheld a sentence of 13 years imposed upon the appellant for the offence of aggravated defilement.

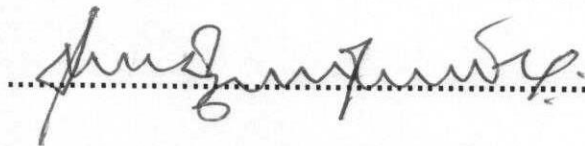
5 In *Kibaruma John vs Uganda, CACA No. 225 of 2010* the appellant was convicted of the offence of aggravated defilement of a 9 year old girl and was sentenced to 15 years imprisonment. On appeal to this Court, his sentence was reduced to 11 years imprisonment.

Having taken into account both the aggravating and mitigating factors set out above and the range of sentences in cases of aggravated defilement, we are of the considered view that a
10 sentence of 13 years will be appropriate in the circumstances of this case. We deduct the period of 2 years and 5 months from the 13 years and sentence the appellant to 10 years and 7 months imprisonment which he shall serve from the date of conviction, which is 24/09/2010.

We accordingly allow this appeal in the above stated terms.


We so order.

15 Dated at **FortPortal** this...^{15th}...day of...*June*.....2019



F.M.S Egonda-Ntende

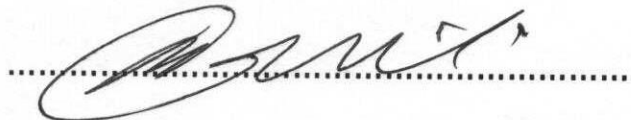
JUSTICE OF APPEAL



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Hellen Obura

JUSTICE OF APPEAL



Christopher Madrama

JUSTICE OF APPEAL