

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 85 OF 2012

(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

OCHWO LASTON :::APPELLANT

VERSUS

UGANDA :::RESPONDENT

(Appeal from the sentence of the High Court of Uganda at Kampala before Hon. Lady Justice Monica K. Mugenyi dated 19/03/2012 in Criminal Case No.301 of 2010)

JUDGMENT OF THE COURT

This appeal arises from the decision of the High Court sitting at Kampala delivered on 19th March, 2012 before Monica K. Mugenyi, J in which the appellant was convicted of the offence of aggravated defilement contrary to sections 129 (3) & (4) of the Penal Code Act and sentenced to 17 years imprisonment.

Background to the Appeal

The facts giving rise to this appeal as ascertained from the court record are that on 4th April, 2009 the appellant performed a sexual act on a one Nyakecho Agnes (the victim) a girl aged 7 years at the time while she was asleep. On that night PW1, Annet Namubiru (the complainant and mother to the victim) returned home from visiting relatives upcountry and upon opening the door to the house, she saw the appellant running out of the room where the victim was sleeping. She called the neighbor with whom they went in the room and found the victim soaked in semen and also observed some semen around her private parts. The

5 appellant was arrested and taken to Ntinda Police Station where he was charged with the offence of aggravated defilement. He was tried and convicted of the offence and was sentenced to 17 years imprisonment. Being dissatisfied with the decision of the trial Judge, the appellant appealed to this Court against sentence only. The ground of appeal as set out in his memorandum of appeal is;

10 *“That the learned trial Judge erred in law and fact when she sentenced the appellant to 17 years imprisonment without considering all the mitigating factors which resulted into a serious miscarriage of justice.”*

Representations

At the hearing of this appeal, the appellant was represented by Ms. Susan Wakabala on State Brief while Ms. Joanita Tumukirize, a State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Appellant’s Case

At the commencement of the hearing, counsel for the appellant was granted leave under section 132 (1) (b) of the Trial on Indictment Act to appeal against sentence only and to also amend the ground in the memorandum of appeal as follows:

“That the learned trial Judge erred in law and fact when she sentenced the appellant to 17 years imprisonment based on erroneous mitigating factors which resulted into a serious miscarriage of justice.”

Counsel then submitted that the learned trial Judge stated that she had been advised that the appellant was 23 years. However, the medical report PF24 indicated that he was 19 years at the time of committing the offence and that is the age that should have been considered as a mitigating factor. Counsel also faulted the trial Judge for insinuating that the appellant’s

5 Christian exposition while in prison should have made him admit the offence. Further that the appellant also alluded to the fact that he was a total orphan which should have mitigated his sentence. She referred to the case of **Oola Alex vs Uganda, CACA No. 183 of 2012** to support her submissions and prayed that the sentence be reduced to 10 years imprisonment.

Respondent's Case

10 Counsel for the respondent opposed the appeal and prayed that this Court upholds the sentence of 17 years imprisonment. She submitted that the appellant was already an adult of 19 years at the time he committed the offence. She referred to the case of **Candia Akim vs Uganda, CACA No. 181 of 2009**. She also pointed out that the appellant was a cousin of the victim.

15 **Resolution by the Court**

The obligation of this Court as a first appellate court is to evaluate the evidence on record and come up with its own conclusion as was held by the Supreme Court in the case of **Kifamunte Henry vs Uganda, SCCA No 10 of 1997**. We have carefully perused the court record and considered the submissions of both learned counsel as well as the law and authorities cited
20 to us. It is contended by the appellant that the trial Judge relied on erroneous mitigating factors while sentencing the appellant. From the record, the trial Judge stated thus;

*"I have listened carefully to both counsel, as well as the convict, in mitigation. I have been advised that the convict is a first offender, has spent 3 years on remand to date and is 23 years old. I do take this into account as I consider appropriate sentence.
25 However, I am also acutely aware that sexual offences are fast becoming endemic in today's society. I am also extremely mindful of the fact the victim in the present case was a young child at the time she was sexually violated. Even more perturbing id the fact that she was defiled by a relative. The incidence of sexual violence meted upon*

5 *young girls is also on the increase. I must also point out that the convict opted to deny
guilt of an offence he now admits, his Christian exposition while on remand
notwithstanding. This would appear to me to be quite contradictory to his new self-
10 styled religiosity. Nonetheless, I do take into account the convict's family situation and
the connotation that he lacked parental guidance hence his present predicament. He
does appear quite remorseful too. Further, I do agree with defence counsel that he is
young enough to retrace his footsteps back to exercise self-restraint and minimum
standards of decency. With remorse to the totality of all the foregoing considerations,
I do hereby sentence the convict to 17 years imprisonment to run from the date hereof."*

15 It was submitted for the appellant that the age that was taken into consideration was not the
rightful age of the appellant at the time of committing the offence. Further that, there are some
other mitigating factors which the trial Judge did not take into consideration.

20 We shall consider both the aggravating and mitigating factors presented by both counsel at
trial as we resolve this appeal. In mitigation, it was presented that: the appellant is a young
man of 23 years and has been on remand for 3 years, the appellant informed court that he
has reformed because in prison he has been attending bible studies and has attended school
up to S. 3, the appellant is an orphan who was living in a torn family, the family was quite
disjoined and dysfunctional, counsel prayed for a lenient sentence. In aggravation, it was
presented thus; the appellant has been found guilty of aggravated defilement, the appellant
took the state through a protracted trial, he wasted court's time and resources, appellant
25 showed no sign of remorse, counsel prayed for a deterrent sentence.

30 It was contended for the appellant that the trial Judge did not take into account the fact that
the appellant was a total orphan. However, from the above excerpts of the sentencing record,
we find that the trial Judge considered that factor when she stated that "*I do take into account
the convict's family situation and the connotation that he lacked parental guidance hence his
present predicament.*" We therefore do not find merit in that contention.

5 It was also contended for the appellant that the trial Judge should have considered the appellant's age of 19 years at the time of committing the offence instead of the 23 years which she considered. We note that while presenting the mitigating factors, counsel for the appellant informed court that the appellant was 23 years old and from the sentencing proceedings that is the age that the court considered.

10 Guideline 34 of the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** enjoins court to take into account the age of the victim while considering a sentence for defilement. The relevant age for purposes of sentencing is as at the time the offence was committed. In this case it was indicated on the appellant's medical examination form (Police Form 24) that his approximate age was 19 years. We therefore
15 accept counsel for the appellant's submission that this is the age which the trial Judge should have considered while determining the appropriate sentence for the appellant.

We find that by considering the appellant's age as at the time of sentencing, the trial Judge applied a wrong principle which justifies interfering with the sentence imposed. **See: Kiwalabye Bernard vs Uganda, Criminal Appeal No.143 Of 2001 (Unreported); James
20 vs R, (1950) 18 EACA 147 and Ogalo s/o Owoura vs R, (1954)24 EACA 270.** Had the trial Court considered the appellant's age of 19 years at the time of committing the offence she would have noted that he had just crossed into adulthood and that would have attracted a lesser sentence.

We have also considered the range of sentences in similar offences and where the appellant
25 was aged between 18-20 years.

In **Ongwench Wilfred v Uganda, CA Criminal Appeal No. 142 of 2014** (unreported), the appellant was charged and convicted on his own plea of guilty of the offence of aggravated defilement. The victim was a 13 year old girl and the appellant was 20 years at the time of commission of the offence. He was sentenced to serve a period of imprisonment for 18 years.

5 On appeal to this Court, it was found that the trial court did not take into account the period spent on remand and reduced the sentence to 9 years and 3 months imprisonment.

In **Adoli Dickens v Uganda, CA Criminal Appeal No. 041 of 2010**, (unreported) the appellant was indicted and convicted of the offence of aggravated defilement. The victim was 2½ years and the appellant was 19 years. The appellant was sentenced to 20 years of imprisonment but on appeal to this Court the sentence was reduced to 9 years, 11 months and 1 week upon taking into account the period spent on remand.

In **Katende Ahamad v Uganda, SC Criminal Appeal No. 6 of 2004**, (unreported) the appellant was convicted of defilement and sentenced to 10 years imprisonment. On appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme Court the court upheld the sentence of 10 years imprisonment.

From the above authorities, the sentence of 17 years is out of range of the sentences for aggravated defilement by appellants of the same age group. We therefore set it aside as it was imposed basing on a wrong principle and consequently it is harsh and excessive in the circumstances.

We now invoke our powers under section 11 of the Judicature Act to impose a sentence we consider appropriate after taking into account the aggravating and mitigating factors already highlighted above. We are of the view that a sentence of 13 years is appropriate. We deduct the 3 years the appellant spent on remand and sentence him to 10 years imprisonment. The sentence will be served from the date of conviction which is 19th March 2012.

We so order.

Dated at Kampala this 25th day of June 2019

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Elizabeth Musoke
JUSTICE OF APPEAL

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Hellen Obura
JUSTICE OF APPEAL

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Ezekiel Muhanguzi
JUSTICE OF APPEAL