

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL APPEAL NO. 175 OF 2010**

10 **OMONDI IVAN:.....APPELLANT**

**VERSUS**

**UGANDA:.....RESPONDENT**

*(Appeal from the decision of the High Court of Uganda at Jinja delivered on 13<sup>th</sup> August, 2010 in Criminal Case No. 0006 of 2009 by Hon. Lady Justice Elizabeth*  
15 *Ibanda Nahamya)*

**CORAM: HON. MR. JUSTICE EGONDA NTENDE, JA**

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

**HON. MR. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT**

20 The appellant was indicted and convicted of the offence of aggravated defilement contrary to Sections 129(3) and (4) (a) of the Penal Code Act Cap.120. The particulars of the offence were that on 19<sup>th</sup> May 2009, the appellant aged 21 years performed unlawful sexual act with Nabwana Proscovia a girl aged 7 years at Kakira Polota Village in Jinja district. He was sentenced to 15 years

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

**1. The learned trial Judge erred in law and in fact when she sentenced the appellant to a period of 15 years imprisonment, which sentence was illegal and ambiguous in the circumstances and thus**  
10 **occasioned a failure of justice.**

The brief facts of the case are that on 19<sup>th</sup> May 2009, the victim Nabwana Proscivia a pupil of Factory Primary School and a resident of Polota Village Kakira Town Council in Jinja District went to watch a movie at a neighbour's house. On her way home from the neighbour's house, the appellant blocked her way and  
15 warned her not to make any alarm or even inform her parents. He then removed his trouser halfway, undressed the victim and had sexual intercourse with her. The victim felt a lot of pain and even blood started flowing from her vagina. After the act, the appellant ran away from the crime scene and the victim went home and narrated everything to her mother who took her for treatment and she was  
20 treated at Buluba hospital. The victim's mother told her father what had happened in his absence. The matter was reported at CPS Jinja and the appellant arrested as he tried to escape. The victim was medically examined and found with signs of penetration and a ruptured hymen.

At the hearing of the appeal, Mr. Wanambugo Innocent appeared for the  
25 appellant while the respondent was represented by Ms. Kabajungu Ann, Senior State Attorney. The appellant was present in court.

5 Counsel for the appellant sought and was granted leave to appeal against sentence only. He submitted that the sentence was ambiguous, illegal and invited court to look at page 75 of the record of proceedings specifically the second last sentence where the learned trial Judge stated that this was an offence that required a long custodial sentence and the period of one year and  
10 two months spent on remand by the convict should be considered. At page 76 of the record, the trial Judge considered the fact that the convict was a youth with personal problems and could be useful to society hence sentencing him to a term of 15 years imprisonment.

He argued that whereas the trial Judge stated that the period spent on remand  
15 should be considered, she did not consider it when passing sentence. For that reason the trial Judge left the sentence ambiguous. He relied on the cases of **Kibaruma John versus Uganda, CACA No. 225 of 2010 (Unreported) and Semakula Grace and Another versus Uganda, CACA No. 104 of 2013.**

Counsel for the appellant submitted that the ambiguous sentence passed by the  
20 trial Judge should be set aside and the court imposes a new sentence under Section 11 of the Judicature Act which grants this court powers of the trial court.

In response, Counsel for the respondent submitted that the sentence was not illegal due to an ambiguity. She argued that the trial Judge stated that the period spent on remand of one year and two months will be considered. According to  
25 Counsel, the trial Judge considered all the mitigating and aggravating factors before passing the sentence of 15 years imprisonment, and the period spent on

5 remand was considered as required under the Constitution despite the trial Judge not using the approach of deducting or carrying out a mathematical formula. The sentence was not ambiguous and the same should be upheld.

Counsel for the respondent further submitted that although the appellant was 21 years and a youth who could be useful to society, the trial court considered  
10 the fact that the victim was only 7 years old at the time of commission of the offence and suffered an infection of vaginitis due to the defilement. She argued that the offence is rampant, serious and carries the maximum sentence of death penalty meaning that the 15 years imprisonment was not harsh but within the range of 15 to 18 years imprisonment imposed by court in such cases.

15 She submitted that the sentence of 10 years imprisonment would not be appropriate considering the aggravating factors and prayed that the 15 years imprisonment was appropriate in the circumstances.

On the issue of illegality of the sentence due to ambiguity, the sentencing Judge while sentencing the appellant said;

20 *“All parties’ submissions in aggravation and mitigation have been heard and duly considered. This particular offence will require a long custodial sentence and the period the convict has spent on remand of one year and two months will be considered. The fact that he is still a youth and can be useful to society plus his personal problem, have been considered therefore, I sentence you to a term of*  
25 *imprisonment of fifteen (15) years.”*

5 Counsel for the appellant argued that the sentencing Judge did not take into account the period spent on remand by the appellant despite stating that the remand period will be considered hence the ambiguous sentence.

In response, Counsel for the respondent submitted that the sentence was not illegal due to an ambiguity because the trial Judge did state that the period spent  
10 on remand of one year and two months will be considered. It is a constitutional command that the period a convict has spent in lawful custody must be taken into account.

**Article 23(8) of the 1995 Constitution of Uganda** provides that;

*"Where a person is convicted and sentenced to a term of imprisonment for an  
15 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. "*

In **Abelle Asuman versus Uganda, SCCA No.66 of 2016**; it was held that where a sentencing Court has clearly demonstrated that it has taken into account the  
20 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  
25 Constitutional obligation in Article 23(8) of the Constitution.

5 In **Kibaruma John versus Uganda, CACA No. 225 of 2010**, it was held that a sentence of court should always be clear and unambiguous. An accused person is entitled to know with certainty the punishment the court has imposed on him or her.

From the wording of the sentence at page 95 of the record, the sentencing Judge 10 indicated that the period spent on remand “will be considered”. When it came to considering, she only considered the fact that the convict was still a youth and his other personal problems. She did not consider the period he had spent on record. To us this was not a matter of style.

We find that there was ambiguity in the sentence because it is not clear whether 15 or not the period spent on remand had been taken into account. For that reason the sentence was illegal and we set it aside. Since the conviction was not challenged, we shall proceed under the provision of Section 11 of the Judicature Act and resentence the appellant.

**Sections 129 (3) and (4) (a) of the Penal Code (Amendment) Act 8, 2007** 20 provides that;

*“Any person who performs a sexual act with another person and where the person against whom the offence is committed is below the age of fourteen years commits a felony called aggravated defilement and is, on conviction by the High Court liable to suffer death.”*

25 In **Part 1 of the Third Schedule to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**, the sentencing range

5 for aggravated defilement is from 30 years imprisonment to death which is the maximum penalty upon consideration of the mitigating and aggravating factors.

In **Semakula Grace and Another versus Uganda, CACA No. 104 of 2013**, the trial Judge in passing sentence stated that;

“.....I have considered paragraph 21 of the Sentencing Guidelines particularly  
10 the fact that you are a first timer. I took into account the fact that even at your age, you simply followed Katerega; the time spent on remand and your family responsibilities. I will go along with the State Attorney’s prayer to give 35 years  
pursuant to paragraph 19, part 1 of the 3rd schedule of the Sentencing  
Guidelines. I therefore hereby sentence you to 35 years imprisonment. The  
15 period spent on remand to be deducted”.

Counsel for the appellant submitted that the appellant was a first offender with no previous record, likely to reform and reconcile with the community where he committed the crime once afforded the opportunity. He submitted that the appellant was a young man of 21 years working as the head of contractors  
20 Financial Department of Kakira Sugar Works at the time of commission of the offence and was the bread winner of his family comprising of his wife, 3 year old child and two of his siblings whom he was educating. The appellant had plans of going back to school and advance his career therefore a sentence of 12 years imprisonment after deduction of the pre – trial remand period of one year and 2  
25 months would be appropriate.

5 In response, Counsel for the respondent submitted that though the appellant was 21 years and a youth who could be useful to society, the trial court also considered the victim who was 7 years old at the time of commission of the offence and suffered an infectiona vaginitis due to defilement. She submitted that the 15 years imprisonment was within the range of 15 to 18 years  
10 imprisonment imposed by court in such cases and was appropriate and lenient compared to the proposed 10 years imprisonment.

In **Komakech versus Uganda, CACA No.440 OF 2016**; the appellant was convicted of aggravated defilement contrary to section 129 (3) and (4) (a) of the Penal Code Act and sentenced to 16 years imprisonment by the High Court of  
15 Uganda at Arua. He appealed against sentence only. Court held that the learned trial Judge imposed an appropriate sentence in the circumstances of the case and there was no reason to interfere with it. The appeal was accordingly dismissed and the sentence of 16 years imprisonment upheld.

In **Ninsiima Gilbert versus Uganda, CACA No. 0180 OF 2010**; the appellant  
20 was convicted of the offence of aggravated defilement of a girl aged 8 years old and was sentenced to 30 years imprisonment. On appeal, the sentence of 30 years imprisonment was set aside and substituted with a sentence of 15 years imprisonment.

From the foregoing and after considering both the aggravating and mitigating  
25 factors including the fact that the appellant was only 21 years old at the time the offence was committed with the possibility of reform to a better person, we



5 sentence him to 10 years imprisonment. From this we deduct the period of one  
year and two months spent on remand. He will therefore, serve a sentence of 8  
years and 10 months from the date of conviction.

**We so order**

Dated at Kampala this.....15th.....day of.....July.....2019

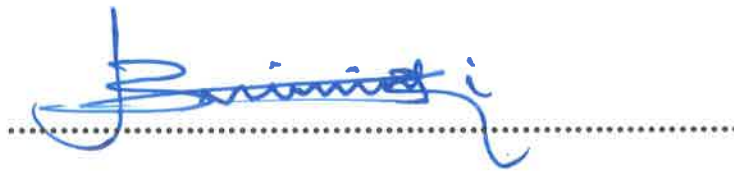
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**HON. MR. JUSTICE EGONDA NTENDE**

**JUSTICE OF APPEAL**

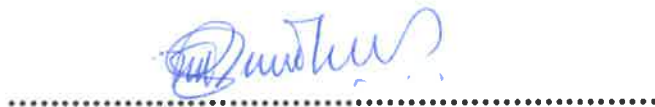
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**HON. MR. JUSTICE CHEBORION BARISHAKI**

**JUSTICE OF APPEAL**

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**HON. MR. JUSTICE STEPHEN MUSOTA**

**JUSTICE OF APPEAL**