

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT JINJA
CRIMINAL APPEAL NO. 554 OF 2014**

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EDEREMA TOMASI:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

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HON. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE NIGHT PERCY TUHAISE, JA

JUDGMENT OF COURT

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The appellant was charged and convicted of Aggravated Defilement contrary to sections 129 (3), (4) (b) and (c) of the Penal Code Act and sentenced to 25 years imprisonment.

The appellant was dissatisfied with the sentence passed by the trial court and filed this appeal on grounds that;

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1. That the trial Judge erred in law and fact when he failed to take into account the period the appellant spent on remand as he was sentencing him.

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2. That the trial Judge erred in law and fact when he sentenced the appellant to a harsh and an illegal sentence of 25 years given the obtaining circumstances.

3. In the alternative, without prejudice to the former, the sentence be substituted with 10 years imprisonment.

Background

The background to this case is that on 26th February, 2012, at around 5.30 am, the victim was coming from her sister's place going to her father's home at Amagoro. Before she arrived home at a place called Koitangiro, three men riding a motorcycle Reg. No. UDP 077L approached her from the same direction. They stopped and one of them jumped off the Motorcycle, pulled her aside and ordered her to lie down and remove her clothes. She refused, another man joined and twisted her hand and threw her down, removed her trousers plus the knickers then the first man had forceful sexual intercourse with her. All the three men had sex with her consecutively.

As one was having sex with her, the remaining two were holding her neck and covering her mouth in order to prevent her from making an alarm. However, due to too much pain she was able to make an alarm which attracted some people such as Obwana and others. As a result, the assailants ran away and abandoned their motor cycle and their shoes. Mr. Obwana one of the first people to reach the scene found the victim completely naked. His wife took the victim to their home and gave her clothes to dress.

Thereafter, as the victim was being escorted to the police they met with her father who reported a case of defilement. On that same day the appellant went to police claiming for his motorcycle that it had been impounded due to unknown reasons. While at police, the victim identified him and she informed the police that the accused was the rider of the said motorcycle and is one of the three men who defiled her. Upon arrest and subject to interrogation the appellant admitted having seen the victim but alleged that she was defiled by his other two brothers.

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Representation

At the hearing of the appeal, Ms. Mutamba Berna appeared for the appellant while Ms. Joanita Tumwikirize appeared for the respondent

Submissions of the appellant

5 Counsel sought and was granted leave to appeal against sentence only under section 132 of the Trial on Indictments Act. Counsel submitted that the sentence imposed by the trial Judge was harsh and excessive in the circumstances of the case. The trial Judge considered the HIV status of the appellant and the fact that the appellant infected the victim as an aggravating factor and yet it was
10 not proved that the appellant infected the victim with the HIV virus. The victim was examined 2 days after the incident and found to be HIV positive according to the medical report. That the appellant could not have infected the victim with the virus which could be seen within two days.

15 In addition, that the sentence was harsh considering the fact that the appellant was a 1st time offender and counsel prayed for the sentence of 25 years to be reduced to a sentence of 10 years.

Respondent's reply

20 Counsel for the respondent opposed the appeal and submitted that the sentence was neither harsh nor excessive. Under section 129 of the Penal Code Act, among the aggravating factors in an offence of defilement is the HIV status of the appellant. Whether the victim was infected or not is not relevant. At the time of the medical report, the victim was HIV negative but she testified 2 years later and at this
25 time, the family had found out that she was HIV positive. It was a gang defilement after which the victim became a social reject considering her HIV status.

Review of sentence

We have perused the judgment of the lower court and have also considered the submissions of counsel together with their authorities. The only ground of appeal is the legality of the sentence of 25 years imprisonment imposed on the appellant by the trial Judge
5 although the grounds were listed as three. The issue therefore is, whether the appellant has made out a case in this appeal to warrant this court's interference with the sentence imposed by the trial court on the ground of illegality as alleged by counsel for the appellant.

An appellate Court is not to interfere with the sentence imposed by a
10 trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered
15 when passing the sentence or where the sentence imposed is wrong in principle. (See **Kyalimpa Edward v. Uganda SC Cr. App. No. 10 of 1995 and Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001**).

We have borne the above principles in mind in resolving this appeal.
20 We note that the learned trial Judge did not examine the mitigating factors. We consider that it is incumbent upon a trial Judge to weigh the mitigating and aggravating factors before he/she passes sentence.

The learned trial Judge also omitted to take into account the
25 mitigating factors and the remand period which makes the sentence illegal as it flouts the requirement of Article 23(8) of the Constitution. It provides:

"23. Protection of personal liberty

*(8) Where a person is convicted and sentenced to a term of
30 imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of*

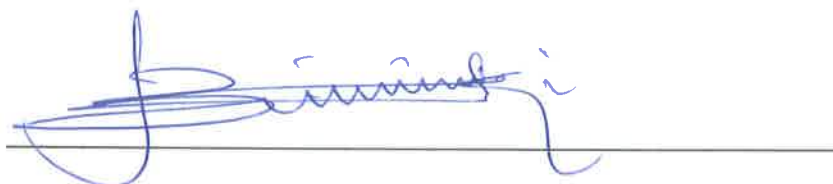
his or her trial shall be taken into account in imposing the term of imprisonment.”

5 The Supreme Court has stated that taking the remand period into account is not a mathematical exercise such as subtracting that period from the sentence but that it must be considered and that consideration must be noted in the judgment. See **Abelle Asuman Vs Uganda S.C.C.A No 66 of 2016**. We observe that no note was made of this period in the sentencing judgment. This makes the sentence illegal. For the above reasons, we set the sentence of 25
10 year’s imprisonment aside.

Invoking our powers under S.11 of the Judicature Act we now proceed to determine what the appropriate sentence is. The appellant was a first offender. He is has a dependent child and was remorseful. We also note that he had spent 2 and a half years on
15 remand. On the aggravating side, the appellant knew he was HIV positive at the time the offence was committed. Although the victim was initially found to be HIV negative, she had tested positive at the time of trial of the appellant. Aggravated defilement carries a maximum sentence of death. Taking into account the period the
20 appellant spent on remand and all mitigating and aggravating factors, we sentence him to 18 years’ imprisonment from the date of conviction of 11th June, 2014. The appeal is therefore allowed.

Dated this 23rd day of July, 2019

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Hon. Justice Cheborion Barishaki, JA



Hon. Justice Stephen Musota, JA

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Hon. Lady Justice Night Percy Tuhaise, JA

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