THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 697 OF 2014

JAGWE MUSITAFA.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal against sentence of the High Court at Masaka in Criminal Session Case No. 0010 of 2012 before V.F Musoke Kibuuka, J dated 13/3/2013)

Coram: Hon. Lady Justice Elizabeth Musoke, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

Introduction

This is a first appeal against the decision of the High Court at Masaka (V.F Musoke Kibuuka, J) wherein the appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) & (4) (a) of the Penal Code Act, Cap. 120 on his own plea of guilt and sentenced to 20 years imprisonment.

Brief background

The brief facts of this case as found by the learned trial Judge are that the victim was 10 months old at the relevant time and the appellant was a cousin to the victim and a resident of the same village. On 28th

September, 2011 the victim's grandmother went to dig leaving the victim behind with her two elder sisters who were 15 and 10 years old. While in the garden she was informed that the victim had been defiled.

When she went back home she found the victim crying. She noticed that she was bleeding from her private parts and had also defecated on herself. She found the appellant at her home and one of her granddaughters, Nabuuma Shakira was bathing the victim but the blood was still oozing out of her private parts.

When she asked Nabuuma what had happened, Nabuuma told her that the appellant had sent her and Ndagire Zuraika to the market to buy jack fruit while he remained at home with the victim. When they came back they found the victim crying and bleeding from her private parts. She had also defecated on herself.

The appellant was arrested. At Mpumudde Police Post, the victim was issued with Police Form 3. Upon examination she was found to be 10 months old. There were signs of penetration with a ruptured hymen. This had occurred only a few hours before examination. She had inflammations around her private parts. The accused was examined on PF24 and found to be aged 26 years and mentally normal. When the above facts were read to him, the appellant confirmed the same to be correct. He was thereafter duly convicted and sentenced to 20 years imprisonment.

Having sought and been granted leave under section 132(1) (b) of the Trial on Indictments Act and Rule 43(3) of this Court's rules, the appellant appealed to this court against sentence alone on the sole ground of appeal stated in the memorandum of appeal as follows:-

"The learned trial Judge erred in law and fact when he sentenced the convict to 20 years of imprisonment, even after pleading guilty which was harsh thus occasioning a miscarriage of justice."

Representation

When this appeal was called for hearing on the 19th September 2019, Mr. Alexander Lule, learned counsel represented the appellant on State Brief while Mr. Peter Mugisha, learned State Attorney appeared for the respondent. The appellant was in court.

Submissions by the appellant

Counsel submitted that the learned trial Judge erred in law and fact when he sentenced the appellant to 20 years imprisonment without considering the mitigating factors that were available to the appellant. He appointed out that counsel for the appellant at trial during allocutus pointed out to court that the appellant was 26 years old with a family of 4 children. He had spent 5 months on remand and he pleaded guilty to the offence which saved courts time. The above factors were not put into consideration by the learned trial Judge while sentencing the appellant.

Counsel asked court to invoke its powers under section 11 of the Judicature Act and set aside the trial courts sentence and substitute it with 10 years imprisonment, a sentence he considers appropriate in the circumstances of this case.

Submissions by the respondent

In reply, the learned State Attorney opposed the appeal and supported the sentence of the trial court. He submitted that the sentence of 20 years imprisonment was neither harsh nor excessive considering the fact that the victim was aged only 10 months and she sustained injuries due

to the acts of the appellant. Further that the appellant was a cousin to the victim, who ought to have protected her from such evil acts.

Counsel relied on ***Bukenya Joseph v Uganda***, ***Supreme Court Criminal Appeal No. 17 of 2010,*** where court upheld a sentence of 20 years imprisonment for the offence of aggravated defilement. He asked court to uphold the trial courts sentence.

Consideration by court

We have carefully listened to the submissions from counsel on each side, and perused the court record and considered the law and authorities cited to us and those not cited but relevant to the resolution of this appeal.

We are mindful of our duty as a first appellate court, to re-evaluate all the evidence adduced at the trial and come up with our own conclusions on all issues including sentence. See: *Rule 30* of the *Judicature (Court of Appeal Rules) Directions SI 13-10* and ***Bogere Moses v Uganda***, ***Supreme Court Criminal Appeal No. 1 of 1997.***

The principles under which an appellate court may interfere with the sentence imposed by the trial court were considered in ***Kizito Senkula v Uganda,*** *Supreme Court Criminal Appeal No. 024 of 2001* where court observed as follows:-

> ***"...in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James v R (1950) 18 EACA 147, it is evident that the judge had acted upon some wrong principle or overlooked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."***

The same principles were reiterated by the Supreme Court in ***Kiwalabye Bernard v Uganda***, *Criminal Appeal No. 143 of 2001* where it stated:-

> ***"The appellant court is not to interfere with sentence imposed by a 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 when passing the sentence or where the sentence imposed is wrong in principle."***

While passing sentence on page 12 of the record of appeal, the learned trial Judge stated as follows:-

> ***"What this convict did in committing this offence is so despicable that he himself feels inhibited to pronounce it. He has tried to cover it up and present it as any act of anger in which he sued (sic) his finger to pierce the private parts of the victim of this case, a baby of only 10 months. Court has considered all the available mitigating factors i.e plea of guilty, first offender position, his young age of 26 and the period of one year and about 8 months spent on remand.***
>
> ***In court's view this convict is not penitent nor is he remorseful. He is only ashamed and angry that he was caught and placed under this judicial process.***
>
> ***Court agrees that his conduct shows not only perversion but outright disregard of what is taken to be descent under the African culture. It appears to court that he needs to undergo extensive rehabilitation and consentianal (sic) process in order to tit (sic) again in any civilized community.***
>
> ***Court in the circumstances, sentences him to imprisonment for 20 years."***

We find that while passing sentence of 20 years imprisonment, the learned trial Judge took into account that the appellant pleaded guilty

and that he was a first offender. Further that he was aged 26 years old and had spent one year and 8 months on remand. As to aggravating factors the learned trial Judge noted that the victim was of a young age of 10 months and that the appellant was not remorseful.

In our view, we find that the learned trial Judge took into account all the mitigating factors that were available to the appellant. However, we are alive to the need for courts to maintain consistency and uniformity in sentencing.

In ***German Benjamin v Uganda, Court of Appeal Criminal Appeal No. 142 of 2010,*** the victim aged 5 years was sexually ravaged mercilessly by the appellant. The appellant was 35 years and a first offender. Court set aside the sentence of 20 years imprisonment and substituted the same with one of 15 years imprisonment.

In a decision **of *Kobusheshe Karaveri v Uganda, Criminal Appeal No. 110 of 2008,*** this court upheld a sentence of 17 years imprisonment for the offence of aggravated defilement. In that case, the appellant defiled a neighbour's daughter of 5 years old.

In ***Kisembo Patrick v Uganda, Court of Appeal Criminal Appeal No. 441 of 2014,*** the appellant had been convicted of aggravated defilement of a child of 4 years. He had spent 2 years on remand. His sentence was reduced from life imprisonment to18 years imprisonment.

In ***Kato Sula v Uganda, Court of Appeal Criminal Appeal No. 30 of 1999,*** this Court confirmed an 8 year imprisonment sentence noting that it was rather lenient.

In ***Ntambala Fred v Uganda, Supreme Court Criminal Appeal No. 34 of 2015*** the Supreme Court confirmed a sentence of 14 years where the victim was a daughter of the appellant.

In ***Candia Akim v Uganda, Court of Appeal Criminal Appeal No. 0181 of 2009,*** this Court upheld a sentence of 17 years imprisonment for the offence of aggravated defilement. The appellant in this case was a step-father of the 8 year old victim.

The above cited cases are distinguishable from the instant case in respect of the age of the victim. In those cases the age of the victims range from 4 years to 8 years which is slightly higher than the age of 10 months in this case.

Taking into account all the aggravating and mitigating factors in this case and considering the range of sentences for the offence of aggravated defilement in the above cited cases of this Court and those of the Supreme Court, we are satisfied that, a sentence of 20 years imprisonment was not harsh or excessive in the circumstances and will meet the ends of justice. This appeal is therefore dismissed for lack of merit and the sentence of 20 years imprisonment is hereby upheld.

We so order.

Dated at Masaka this 9th day of Dec 2019.

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Elizabeth Musoke

Justice of Appeal

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Ezekiel Muhanguzi

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal

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