THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT MASAKA

Criminal Appeal No. 0054 of 2015

(Original High Court at Masaka Criminal Session Case No. 0026 of 2012)

Misezero Philip :: Appellant

versus

Uganda ::Respondent

Coram: Hon. Lady Justice Elizabeth Musoke, JA
Hon. Justice Ezekiel Muhanguzi, JA
Hon. Justice Remmy Kasule, Ag. JA

JUDGMENT

The appellant appeals against sentence only of 35 years imprisonment passed on him in a Judgment (Rugadya Atwoki, J.) dated 29th January, 2015, in **High Court at Masaka Criminal Session Case No. 0026 of 2012,** whereby after a full trial, the

appellant was convicted of aggravated defilement **c/s 129(3)(4)(a)** of the **Penal Code Act, Cap. 120**.

Learned Counsel Edith Namata appeared for the appellant on State Brief while learned Senior State Attorney Ivan Nkwasibwe was for the respondent.

Counsel for the appellant applied for leave for the appellant to proceed with an appeal against sentence only pursuant to **Section 132(1)(b)** of the **Trial on Indictments Act, Cap. 23** and **Rule 43(3)(a)** of the Rules of this Court. Counsel for the respondent consented to the application. This Court accordingly granted the same.

The facts, as found by the trial Court, were that on 31st July, 2011 at Mbirizi village, Rakai District, the appellant committed an act of aggravated defilement to a girl aged 8 years. The girl who, at the material time, lived with her mother was doing some cooking in the kitchen when the appellant grabbed her and forcefully carried out the act. When her mother came to know of this, she reported the matter to police who arrested the appellant. He was indicted, tried, convicted and sentenced.

The sole ground of appeal is:

> *"The learned Judge erred in law and fact when he sentenced the appellant to 35 years imprisonment which sentence is harsh and manifestly excessive in the circumstances".*

Appellant's Counsel submitted that the sentence of 35 years was harsh and manifestly excessive. The fact that the appellant was 72 years old, at the time of his conviction, ought to have been taken

by the trial Court as a mitigating factor, but that Court had not done so. The trial learned Judge had also not considered, in favour of the appellant, that he was a first offender with no record of previous conviction and had spent 3 years and 5 months on remand.

Counsel further submitted, that there was need for Courts of law to maintain consistency and uniformity in sentence. In this regard Counsel invited Court to consider the case of **Kalibobbo Jackson vs Uganda: Court of Appeal Criminal Appeal No. 45 of 2001** where a 25 year old appellant had raped a woman of 70 years and had been convicted and sentenced to 17 years imprisonment. The Court of Appeal had reduced the sentence to 7 years imprisonment.

Counsel prayed that, bearing in mind that the appellant, had, all in all, spent 6 years in custody, the sentence of 35 years be reduced to 10 years imprisonment.

Learned Counsel for the respondent opposed the appeal. He submitted that the learned trial Judge was correct in sentencing the appellant to 35 years imprisonment, given the fact that the maximum sentence for the offence is death. The learned Judge had also considered both the mitigating and the aggravating factors before he passed sentence. Counsel invited this Court to consider the case of **Bukenya Joseph vs Uganda, Criminal appeal No 222 of 2003 (COA)** where the accused aged 70 years, married with three wives, defiled a six year old girl and the Court of Appeal upheld a sentence of life imprisonment.

In resolving this ground of appeal, this Court appreciates the law that an appellate Court may only interfere with a sentence imposed by the trial Court, if that sentence is illegal, or is founded upon a wrong principle of the law, or where the trial Court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances. See: **Kizito Senkula vs Uganda, Supreme Court Criminal Appeal No. 24 of 2001.**

The primary responsibility for sentencing is on the trial Court in the judicious exercise of its discretion. Each case presents its own facts. An appellate Court will not normally interfere with the discretion of the sentencing trial Court except in instances stated above.

Sentences imposed in previous cases of a similar nature, while not necessarily being precedents, are relevant material for the sentencing Court to examine for guidance so as to maintain consistency and/or uniformity in sentencing: See: **Livingstone Kakooza vs Uganda: Supreme Court Criminal Appeal No. 4 of 2011.**

On re-appraising the trial proceedings this Court observes that the learned trial Judge considered before sentencing the appellant, as aggravating factors, the fact that the victim was eight years old, the pain caused to the victim, the threat by the appellant to kill the victim if she disclosed to anyone else what had happened to her; the lack of remorse on the part of the appellant and the fact that the offences of that nature had become rampant.

As to mitigating factors, the trial Court took into account the fact that the appellant was 72 years old, was a bit intoxicated at the material time, the victim had not sustained permanent injuries, and the appellant had spent 3 years and 5 months on remand. The Court then sentenced the appellant to 35 years imprisonment, **"after deducting"** the remand period.

In **Bukenya Joseph vs Uganda, Court of Appeal Criminal Appeal No. 222 of 2003**, the accused aged 70 years and married with three wives; defiled a young girl aged only 6 years. The trial Court sentenced him to life imprisonment which at that time, was being interpreted to be 20 years imprisonment following Section 47(6) of the Prisons Act, before the decision of the Supreme Court in **Tigo Stephen vs Uganda, Criminal Appeal No. 08 of 2009,** that held that life imprisonment means imprisonment for the rest of one's life.

In **Supreme Court Criminal Appeal No. 34 of 2014: Okello Geoffrey vs Uganda,** the sentence of 22 years imprisonment passed by the trial Court was left undisturbed both by the Court of Appeal **(Criminal Appeal No. 329 of 2010)** and the Supreme Court. In the case the accused was aged 25 years, was a primary school teacher. He performed a sexual act with a young girl, a pupil at the school where the accused was a teacher. The teacher was thus a guardian of the victim. He was convicted of aggravated defilement and sentenced to 22 years.

Counsel for appellant referred this Court to the authority of **Kalibobbo Jackson vs Uganda (Supra)** where a 25 year old appellant raped a 70 year old lady. The appellant was convicted

and sentenced to 17 years imprisonment, which the Court of Appeal reduced to 7 years on the ground that the original sentence was harsh and excessive. With respect to appellant's Counsel, the facts of that case are not at all relevant to the facts of this appeal where it was the appellant, the wrong doer, who was aged 70 years defiling a victim of only 6 years of age. In the **Kalibobbo case**, apart from being a case of rape and not aggravated defilement, it was the victim who was aged 70 years and it was the youth of 25 years old who was the wrong doer.

The learned trial Judge in the case, the subject of this Judgment, in sentencing the appellant stated that:

> *"I therefore sentence accused after deducting the remand period to 35 years imprisonment".*

The learned Judge did not disclose from which set of years he deducted the remand period. The sentence of 35 years imprisonment is also, in the considered judgment of this Court, harsh and excessive. It is also out of range and thus not consistent and not in uniformity with the past Court decisions in cases of similar facts some of which have been cited above.

This Court therefore sets aside the sentence of 35 years imprisonment passed upon the appellant. Instead a sentence of 25 years imprisonment is substituted as the most appropriate sentence. Out of this 25 years is deducted the remand period of 3 years and 6 months, that is from 31st July, 2011 (date of arrest) to 29th January, 2015 the date of conviction and sentence of the appellant. So the appellant is to serve a sentence of 21 (twenty

one) years and 6 (six) months as from the said date of conviction and sentence of 29th January, 2015.

This appeal is so resolved.

Dated at Masaka this.....18th..... 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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Sammy Kasule
Ag. Justice of Appeal