

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

5 **CRIMINAL APPEAL NO.236 OF 2010**
*(Arising from Criminal Session Case No. 4 of 2010 before Hon.
Justice Eldad Mwangusya)*

10 **ISABIRYE MAGEMESO AWALI :::::::::::::::::::::::::::::: APPELLANT**

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

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

HON. LADY JUSTICE NIGHT PERCY TUHAISE, JA

JUDGMENT OF COURT

20 The appellant was indicted and convicted of Aggravated Defilement
contrary to section 129 (4) (a) of the Penal Code Act and sentenced to
imprisonment for life. The appellant was dissatisfied with the finding
of the trial court and filed this appeal on 4 grounds. At the hearing
of the appeal, the appellant abandoned grounds 1, 2, and 3 and
remained with one ground that;

25 *“The learned trial Judge erred in law and fact when he passed a harsh
and excessive sentence to the appellant.”*

Ms. Namutamba, learned counsel for the appellant sought leave under section 132(1) (b) of the TIA to appeal against sentence only and court granted it.

5 **Brief facts**

On the 25th March 2009 the appellant called the victim through her brother Franco Idiru. The victim was 5 years old and resident of Busowa central zone Bugiri District and the appellant was a fellow village mate to the victim. When the victim went where the appellant was, the appellant chased away the other children and then defiled her. The appellant had sex with the victim while holding her mouth. The victim's mother was away for a funeral and when she came back, she found the victim missing. After a while the victim returned home, crying. Her mother asked what the problem was and upon
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interrogation, she revealed that the appellant had had sexual intercourse with her.

The victim was taken for medical examination and later the appellant was arrested. The appellant was subjected to medical examination and was found to be HIV Positive.

20 **Representation**

At the hearing of the appeal, Ms. Berna Mutamba (holding brief for Mr. Nasser Mudiobole) appeared for the appellant while Mr. David Ateenyi Ndamurani (Senior Assistant DPP) appeared for the respondent.

25 **Appellant's submissions**

Counsel submitted that the mitigating factors court ought to have considered in sentencing the appellant included the fact that the appellant was a first time offender who is HIV positive. Counsel relied on the case of **Naturinda Yosamu vs. Uganda Criminal Appeal No. 30 91 of 2013** in which this court reduced a sentence of life

imprisonment to 15 years for aggravated defilement. Counsel also relied on **Chandia James vs. Uganda Criminal Appeal No. 66 of 2010** in which the life imprisonment sentence was reduced to 14 years for the offense of aggravated defilement.

5 **Respondent's submissions**

In reply, counsel for the respondent submitted that the maximum penalty for the offence of aggravated defilement is death and a sentence for life, in the circumstances of the case was appropriate. The victim was a child of tender years and the appellant is HIV
10 positive. According to the sentencing guidelines, the maximum penalty for aggravated defilement is death while the starting sentence is 30 years imprisonment.

Consideration of the appeal

We recall the duty of a first appellate court, which is to re-appraise
15 the evidence as a whole and subject it to a fresh and exhaustive scrutiny, weighing conflicting evidence and drawing its own inferences and conclusion. This duty is recognized in **Rule 30(I) (a)** of the **Rules of this Court**. The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also
20 succinctly re-stated this principle. Furthermore, a first appellate court has to bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowances in that regard (**Selle and Another v Associated Motor Boat Company [1968] EA 123**).

25 It has been held in a number of cases both by the Supreme Court and the predecessor Court of Appeal for East Africa, and more specifically in the case of **Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993 [unreported]** that:

30 *'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in*

*view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See **Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.***

5 We have borne these principles in mind in resolving this appeal.

The learned trial Judge, while sentencing the appellant, stated that;

10 *“As rightly pointed out by the prosecution there are two aggravated factors to this case and each one on its own is aggravating enough to call for a very heavy punishment against the accused. The accused, who is stated to be a father if he deserves to be called that, deserves no mercy for subjecting a five years old child to an act of sexual intercourse at that age. This court still encounters cases of toddlers including babies being defiled by adult men and it is the duty of the court without heavy*
15 *punishment not only to sound a warning to the entire society about these acts but also to punish the perpetrators of the vice. I will therefore show no mercy. In the circumstances the convict is sentenced to IMPRISONMENT FOR LIFE.”*

20 Having thoroughly subjected the facts of this case to a fresh scrutiny and appraisal and relied on the court precedents cited above, we have come to the conclusion that the sentence of life imprisonment that the learned Judge imposed upon the appellant was manifestly excessive and harsh. The learned trial Judge put emphasis on the aggravating factors in isolation of the mitigating factors in this case.
25 He did not take into account the time spent on remand. These omissions rendered the sentence illegal. We have no alternative but to set it aside. This court has the same powers as the High Court, pursuant to Section 11 of the Judicature Act. We shall therefore proceed to invoke those powers and sentence the appellant afresh.

30 In the case of **Oroma Denis Vs Uganda Crimina Appeal No. 604 of 2014**, the appellant was convicted of aggravated defilement and

sentenced to 35 years imprisonment. On appeal to the Court of Appeal, the sentence was reduced to 18 years imprisonment.


Likewise in **Okurut David Vs Uganda Criminal Appeal No. 45 of 2001**, the appellant had been convicted of aggravated defilement and on appeal to this court, the sentence of 20 years imprisonment was set aside and substituted with 18 years' imprisonment.

On the mitigating factors, the appellant is a first offender and had been on remand for two years. The appellant is also HIV positive, he has children to look after and was remorseful. On aggravating factors, the victim was only 5 years at the time the offence was committed, the appellant was HIV positive although he did not infect the victim and had children much older than the victim. The appellant committed a very serious offence whose maximum punishment is the death penalty.

Considered both the aggravating and mitigating circumstances of the case and the period the appellant spent on remand, we are satisfied that a sentence of 18 years imprisonment from the date of conviction will meet the ends of justice in this case. The sentence of life imprisonment is set aside and substituted with 18 years imprisonment. This appeal therefore succeeds.

Dated this 17th 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 Percy Night Tuhaise, JA

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