THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO 072 OF 2014

(Coram: Egonda – Ntende, Obura & Madrama, JJA)

KINENGERE GAD} .....APPELLANT

VERSUS

UGANDA} .....RESPONDENT

(Appeal from the judgment of the High Court of Uganda (Kiiza, J) delivered at Fort Portal on the 5th of March 2013)

JUDGMENT OF THE COURT

The appellant was charged with the offence of aggravated defilement contrary to section 129 (3) & (4) (c) of the Penal Code Act, Cap 120 laws of Uganda. The particulars of the offence were that the appellant on 22nd January, 2013 at Kagadi II Village in Kamwenge District, being a father of NS, a girl aged 14 years, performed a sexual act with her. The prosecution called three witnesses and closed the prosecution case. On 5 March 2014, the appellant changed his plea from that of not guilty to guilty and again the indictment was read to him whereupon he pleaded guilty to the offence as charged. The brief facts which the appellant agreed to are that; on 22nd of January 2013 at 7 PM in the evening, at Kagadi II in Kahunge, the appellant lured the victim, his daughter NS to an unfinished house. He made her remove her clothes and had sex with her. She went and informed her elder brother Rogers and reported to police and the appellant was arrested and charged with the offence of aggravated defilement. Medical evidence proved that the victim was sexually ravaged.

The appellant was convicted on his own plea of guilty and sentenced to 35 years imprisonment. Being aggrieved with the sentence, the appellant with the leave of court appealed against sentence only on the ground that:

> The sentence passed by the learned trial judge was illegal as it contravened Article 23 (8) of the Constitution or in the alternative the sentence was harsh and manifestly excessive in the circumstances.

Representation

At the hearing of the appeal the appellant was represented by learned counsel Richard Bwiruka while the respondent was represented by the learned Senior State Attorney Ms Rachel Namazzi. The appellant was present in court.

Submissions of the appellant

Mr. Bwiruka adopted his submissions filed on court record as the submissions of the appellant. In the written submissions, the appellant's counsel stated that the learned trial judge in sentencing the appellant's stated the reasons thereof and that he was to deduct the period the appellant had spent on remand that he actually did not deduct that period. The appellant was sentenced to 35 years imprisonment without deducting the period spent on remand.

Mr Richard Bwiruka submitted that the appellant was charged and remanded on 30th of January 2013 and was sentenced on the 5th March, 2014. He had spent one year and one month in lawful custody. This period in lawful custody had not been deducted in compliance with Article 23 (8) of the Constitution. Further, that this court under section 11 of the Judicature Act has power to set aside the sentence and substitute it with an appropriate sentence.

In the alternative, he submitted that the period of 35 years imprisonment was harsh and excessive in the circumstances. The appellant according to police from 24 was 63 years old at the time of commission of the offence. The charge sheet shows that the appellant was 65 years. He pleaded guilty and this signified that he realised his mistake and was remorseful. He saved the court's valuable time and resources. In the premises counsel submitted that though the appellant defiled his own daughter, he should be shown some leniency.

The appellants counsel relied on **Oyoo Peter v Uganda; Court of Appeal Criminal Appeal No 67 of 2015** cited in the **Katende Ahamad v Uganda; SCCA No 6 of 2004 [2007] UGSC 11** where the Supreme Court sentenced the convict to 10 years imprisonment in circumstances where the convict had defiled his biological daughter aged nine years. He prayed that this court allows the appeal and sentences the appellant to 10 years imprisonment less the period the appellant had spent on remand.

Submissions of the respondent

In reply, Ms Rachel Namazzi opposed the appeal and supported the sentence. With reference to the record, she submitted that the learned trial judge had taken into account the period of one year and three months before imposing sentence and the sentence was not illegal.

Secondly, as far as the alleged harshness of the sentence is concerned, she supported the sentence on the ground that the appellant had mercilessly and brutally ravaged his own daughter which was also incest.

Consideration of the appeal

We have carefully considered the appellant's appeal, the submissions of counsel and the applicable law. In considering the facts, our role as a first appellate court is to reappraise the evidence and draw our own inferences of fact (See Rule 30 (1) (a) of the Rules of this court).

We do not however see any factual controversy except to make the point that the appellant pleaded not guilty initially and the prosecution called three witnesses and closed the case. Subsequently, counsel for the appellant and the Resident State Attorney submitted on whether, the case had been made out. The record does not indicate whether any ruling was made on whether the appellant had a case to answer sufficient to put into his defence. The record has one line indicating that there was a summing up to assessors on 5 March 2014. Subsequently the record shows that the appellant's counsel informed the court the same day that the appellant wanted to change his plea to that of guilty whereupon his plea was taken afresh and the appellant pleaded guilty and was convicted.

On the basis of the above proceedings we cannot rely on the testimony of witnesses produced by the prosecution when the appellant had pleaded not guilty. That testimony is only relevant if the court was going to evaluate the evidence and come to a conclusion as to whether the offence had been committed, if a reasonable tribunal addressing its mind to the evidence and the law would reach that conclusion and therefore the accused has a case to answer. Secondly, it would be material only after the accused had been put to his defence and the matter was coming for judgement to establish the guilt of the appellant and the appropriate sentence if found guilty.

Where the accused pleads guilty, the only facts which are available for consideration are the facts read out after the plea of guilty and which the accused admits as being true on the basis of which he or she is convicted. In the premises, we cannot rely on the evidence adduced by the prosecution but only on the facts in the indictment and the facts read out after the plea of guilty. Both are the facts we can consider in addressing our mind on the issue of sentence and they are facts which are not in controversy. We do not in the circumstances need to reappraise the

evidence but may draw our own inferences of fact on the basis of the summary of facts and the indictment as admitted by the appellant.

The first question for consideration is whether the learned trial judge took into account the period the appellant spent in lawful custody prior to his conviction in imposing the sentence. This is what the learned trial judge said on the question of the pre-trial remand:

> I will also deduct the time he is spent on remand, of one year and three months from the sentence as I am imposing it. That is; the final sentence will be short of this time accused spent on remand.

Subsequently, after considering other factors in mitigation and aggravation relevant to sentence, this is what the learned trial judge said about the sentence:

> Putting everything into consideration I sentence accused to 35 (thirty-five) years imprisonment.

The learned trial judge indicated that the final sentence would be short of the period of 1 year and 3 months. The final sentence that he imposed is the 35 years imprisonment which means that he intended to impose a period of over 36 years and 3 months imprisonment. It is hard in the circumstances to say that the learned trial judge had not deducted the period the appellant spent in lawful custody prior to his conviction in imposing the sentence of imprisonment. Article 23 (8) of the Constitution of the Republic of Uganda provides that:

> Where a person is convicted and sentenced to a term of 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.

The above article was interpreted in **Rwabugande Moses v Uganda;[2017] UGSC 8** where the Supreme Court held that a sentence

arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. Secondly, the Supreme Court held that there has to be an arithmetic deduction of the period the appellant spent in lawful custody in terms of article 23 (8) of the Constitution when they said:

> It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.
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> We must emphasise that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the sentence. Article 23 (8) of the Constitution (supra) makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first offender; remorsefulness of the convict and others which are discretional mitigating factors which the court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors and the courts determination of the sentence cannot be quantified with precision.

In **Rwabugande Moses v Uganda** (supra), an ambiguous sentence is one couched in general terms to the extent that it cannot be ascertained that the court accounted for the remand period in arriving at the sentence. To be able to ascertain whether the court had taken into account the period the appellant had spent in lawful custody before his conviction, the Supreme Court held that the period can be established with precision. In the appellant's case, the learned trial judge established the period with precision and indicated that it was one year and three months. Secondly, the question is whether it to this into account in imposing the sentence of 35 years imprisonment. He said that the final sentence will be less than the period the appellant had spent in lawful custody. It cannot in all fairness be said that the final sentence was not less than the period the learned trial

judge had specified as being the period the appellant had spent in lawful custody before his conviction. In fact the Supreme Court clarified that the decision in **Rwabugande Moses v Uganda** (supra) in the subsequent case of **Abelle Asuman v Uganda; [2018] UGSC 10** when they held that:

> The Constitution provides that the sentencing Court must take into account the period spent on remand. It does not provide that the taking into account has to be done in an arithmetical way.

The Supreme Court further reconsidered what it held in **Rwabugande Moses v Uganda** (supra) and held that:

> What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of the convict must be taken into account and according to the case of **Rwabugande** that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.
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> Where a sentencing Court has clearly demonstrated that it has taken into account the 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 the 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 constitutional obligation in Article 23 (8) of the Constitution.

In the premises, the learned trial judge demonstrated that the sentence that he was going to impose would be less by the period which he had specified. This clearly means that the learned trial judge took the period into account in imposing the sentence of imprisonment. It was just a style of taking into account the period the appellant has spent in lawful custody prior to his conviction. He did not have to do an arithmetic deduction but clearly indicated that the sentence would be less by the period the appellant had spent in lawful custody prior to his conviction and sentence. The first limb of the appeal avers that the sentence is illegal for

contravention of Article 23 (8) of the Constitution of the Republic of Uganda has no merit and is disallowed.

On the question of whether the sentence imposed by the learned trial judge's harsh or excessive, the principles upon which an appellate court can interfere with a sentence imposed by the trial judge are set out in the judgment of the East African Court of Appeal in **Ogalo s/o Owoura v R (1954) 21 EACA 270.** In that appeal, the appellant appealed against a sentence of 10 years imprisonment with hard labour and the East African Court of Appeal held that:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would 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 has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case

This appeal falls under the last criteria as to whether the sentence is manifestly excessive in view of the circumstances of the case. This is when the learned trial judge said prior to sentencing the appellants to 35 years imprisonment:

> Accused is allegedly a first offender. He changed his plea from that of not guilty to that of guilty. Though this was after the full hearing of the case I will take it into account also while imposing the sentence. I will also deduct the time he spent on remand, of 1 year and 3 months from the sentence as I am imposing it. That is, the final sentence will be short of this time accused spent on remand. He said to be the sole breadwinner of his family.
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> He has prayed for leniency and he says he needs to complete his house, and take care of all these under his responsibility.

> However, accused has committed a serious offence. A maximum sentence in such cases is a death sentence. This shows the seriousness of the offence in the eyes of the law. The accused in this case severally and mercilessly ravaged his own flesh and blood. His own daughter. As pointed out by the learned Resident State Attorney, it is incest and taboo in our African society. The accused exhibited the animal nature in him, in lusting after his own young and vulnerable daughter.
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> He took advantage of the absence of his wife and mother of the victim to ravage her sexually. The victim told court and the medical report shows that the accused is not only had sex with her but also bit her and put her body parts in an effort to subdue her. (Sic)
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> It is my considered view that, in the above circumstances, the accused clearly deserves a harsh sentence to fit the crime.
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> Putting everything into consideration I sentence accused to 35 (thirty-five) years imprisonment.

The learned trial judge after plea taking took into account facts which are not in evidence. As we held before, the only evidence in the circumstances are those in the plea taking exercise. Plea taking requires the presiding judge to ask questions to establish whether the plea is equivocal or unequivocal and for purposes of assessing sentence as held by the East African Court of Appeal in in **Adan v Republic [1973] 1 EA 445.** The court after setting out the procedure for plea taking which ought to be followed by every court gave one of the reasons for following the procedure and particularly that of reading of the statement of facts after the accused pleads guilty at pages 446 – 447 as:

> The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it

is for this reason that it is essential for the statement of facts to precede the conviction.

The above passage establishes that the statement of facts is the evidence upon which to assess sentence. The testimony of the witnesses ought not to be used because the court made no findings about those statements. The appellant pleaded guilty and facts were read to him that he agreed to as being true apart from facts in addition to any past record of conviction that can be presented by the prosecution and which may be relied on in the assessment of sentence.

In the premises, the details relied on by the learned trial judge which came from the testimony of the witnesses cannot be relied upon and make the sentence unlawful for relying on extraneous matters which have not been established in evidence. On that basis alone we allow the appeal against sentence and set it aside.

Having set aside the sentence, we do not need to decide whether the sentence imposed by the learned trial judge was harsh or excessive.

We shall straight away determine the facts of the case and precedents in similar cases. In this case the appellant had defiled his own daughter stated to be 14 years of age. It would have been simple defilement but for the fact that the victim is his daughter. The aggravation of the offence as far as the law is concerned is the commission of the offence of incest. The fact that the appellant committed incest cannot aggravate the offence further because the law already takes that into account, otherwise it would be simple defilement. The facts which are recorded on record are quite simple. At the material evening in question, the appellant lured his daughter to an unfinished house and made her remove clothes and had sex with her. Thereafter she went and informed her elder brother Rogers and reported it to the police whereupon the appellant was arrested and charged with the offence. The medical report was admitted and is relevant. Medical report

shows that the victim was about 14 years old. She had been forced into sex by a drunken father on the night of 22nd January, 2013. It is written in the report that the mother had been chased from the home earlier during the previous evening. The victim had teeth marks below the left ear and teeth marks on the right breast. There were further teeth marks on the right scapular. There were teeth marks on the right-hand below the elbow and right hip. There was a bruising on the genital parts on account of the forced sex.

The offence was therefore further aggravated by violence. According to the medical examination, the appellant was 63 years at the time of commission of the offence.

We have considered precedents of decisions in offences committed under similar circumstances. Secondly, we have taken into account the need for consistency in sentencing.

In **Kizito Senkula v Uganda; Criminal Appeal No. 24 of 2001)) [2002] UGSC 36** the Supreme Court held that a sentence of 15 years imprisonment for the offence of defilement where the victim was 11 years was an appropriate sentence. Further, in **Katende Ahamad v Uganda, Criminal Appeal No. 6 of 2004 [2007] UGSC 11**, the appellant defiled his daughter who was 9 years old at the material time of commission of the offence and the Supreme Court decided that a 10 years' imprisonment after deducting a period of 2 ½ years spent on remand was appropriate. In **Lukwago Henry v Uganda; Court of Appeal Criminal Appeal No 0036 of 2010 [2014] UGSA 34**, the victim of aggravated defilement was 13 year old and this court held that a sentence of 13 years imprisonment imposed on the appellant was appropriate.

In the premises, having weighed all the facts and circumstances stated above, including previous precedents we hold that the sentence of 11 years

imprisonment would be appropriate. From that period we deduct the period of one year and three months and sentence the appellant to 9 years and 9 months imprisonment. The sentence shall commence running from the date of conviction on 5th March, 2014. Her Lordship Hon. Lady Justice Hellen Obura does not agree that a sentence of 9 years and 9 months imprisonment is appropriate in the circumstances and has accordingly not endorsed this judgment.

Dated at Fort Portal the 30th day of July 2019

Frederick Egonda – Ntende

Justice of Appeal

Christopher Madrama

Justice of Appeal

Ruling read on state brief
for Appellant
Wasswa Adams SRSA holding brief
for Rachel Nkangi for Resp.
Appellant in court.
Judgment delivered

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