

**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL**

CRIMINAL APPEAL NO 071 OF 2014

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

10 **KYOTERA ANTHONY}APPELLANT**

VERSUS

UGANDA}RESPONDENT

*(Appeal from the judgment of the High Court of Uganda (Kiiza, J) at
Kamwenge delivered on the 5th of March 2014)*

JUDGMENT OF THE COURT

The appellant was indicted for the offence of Aggravated Defilement contrary to section 129 (3) & (4) (a) of the Penal Code Act Cap 120 of the laws of Uganda. The facts of the indictment were that on 4th March, 2013 at Ganyenda Village Kamwenge District the appellant performed a sexual act
20 with one K.J, a girl aged 8 years. The hearing of the prosecution case proceeded on 4th March, 2014 when the prosecution called three witnesses and closed its case. Summing up to assessors was made on 5th March, 2014 and on the same day the appellant changed his plea to that of guilty.

The charges were again read to the appellant whereupon the appellant
25 pleaded guilty as charged. The facts the appellant accepted as true are that on 4th March, 2013, the appellant at around 4 PM in the afternoon at Ganyenda Village in Kamwenge District found K.J, a girl aged 8 years and her young brothers untying goats. The appellant then proceeded to defile the victim after sending her brothers away. He gave the victim shillings

5 100/=. The victim later on told her parents about the act of defilement by the appellant. The appellant was summoned by the parents and admitted the fact of having defiled the victim and begged for forgiveness but the matter was taken to police and the appellant was detained. The victim was medically examined and was found defiled.

10 The appellant was convicted on his own plea of guilty and sentenced to 28 years imprisonment. Being aggrieved with the sentence alone, the appellant with the leave of court appeal against sentence only on two grounds in the alternative that:

15 1. The learned trial judge erred in law and in fact when he imposed on the appellant a sentence of imprisonment for 28 years without complying with the Constitution of the Republic of Uganda and in the result rendering the sentence illegal.

20 2. That in the alternative the sentence of imprisonment for 28 years imposed on the appellant was unfair, harsh and excessive in the circumstances.

The appellant prayed that the appeal is allowed and the sentence substituted with a lesser sentence or set aside. Further, that, any other order is issued by this court as would meet the ends of justice.

Representation

25 At the hearing of the appeal learned counsel Mr Collins Acellam appeared for the appellant while learned State Attorney Ms Joanita Tumwikirize appeared for the respondent.

Submissions of the appellant

30 Mr Collins Acellam adopted his written submissions filed on court record on 14 June 2019 as the submissions of the appellant.

5 On the first ground of appeal, the appellant's counsel submitted that in sentencing the appellant, the learned trial judge did not take into account the period the appellant had spent in lawful custody as required by Article 23 (8) of the Constitution of the Republic of Uganda 1995 as amended. He criticised the wording of the learned trial judge that: "... *Putting everything*
10 *into account, I sentence the accused to 28 (twenty-eight) years imprisonment.*" The appellant's counsel further relied on the Supreme Court judgment in **Rwabugande Moses v Uganda; Criminal Appeal No 25 of 2014 [2017] UGSC 8** for the interpretation of Article 23 (8) of the Constitution and the holding that a sentence couched in general terms that
15 the court has taken into account the time the accused had spent on remand is ambiguous. He further relied on other authorities that we do not have to refer to because the learned the State Attorney conceded to the ground of appeal that there was non-compliance with Article 23 (8) of the Constitution and the sentence was illegal.

20 On the alternative ground of appeal that the sentence of imprisonment for 28 years imposed on the appellant was unfair, harsh and excessive in the circumstances, the appellant's counsel submitted that an appropriate sentence is always at the discretion of the trial judge. He relied on **Kyalimpa Edward v Uganda; SC Criminal Appeal No 10 of 1995**
25 (unreported) for the proposition that one of the aims of punishment is to reform the prisoner and this cannot be achieved by lengthy terms of imprisonment.

The appellant's counsel submitted that there is no record that while on remand, the appellant misconducted himself or in any way tried to escape
30 from lawful custody. What is on the record is that the appellant is a first time offender and was remorseful. This ought to have guided the court that the appellant had a high likelihood of reforming. Mr. Acellam submitted that the court ought to be a centre for the manifestation of justice and

5 peace and should not be bent on the punitive element of sentencing. The court ought to have given the appellant, on the basis of his age, a chance for rehabilitation while imposing the sentence. The appellant was a young man of 20 years and sentence of 28 years imprisonment was harsh in the circumstances. He prayed that this court exercises its jurisdiction under
10 section 11 of the Judicature Act, Cap 13 to impose an appropriate sentence.

Mr. Acellam submitted that the appellant was 20 years old at the time of the commission of the offence, was a first time offender, was remorseful, and never resisted arrest. The appellant also sought forgiveness. Imprisonment for 28 years of such a young person who has a high
15 likelihood of reforming is equivalent to punishing the entire nation that could benefit from his youthful age. He prayed that this court imposes a suitable sentence.

The appellant's counsel relied on the several authorities in support of the appeal. In the **Katende Ahamad v Uganda; (Criminal Appeal No 6 of
20 2004) [2007] UGSC 11**, the appellant was convicted on his own plea of guilty for defilement of his own daughter aged nine years and was sentenced to 10 years imprisonment whereupon the Supreme Court confirmed the sentence. Further, in **Agaba Job v Uganda; (Criminal Appeal No 230 of 2003) [2006] UGCA, 14** this court upheld a sentence of
25 8 years imprisonment for an appellant who had been convicted on his own plea of guilty for the offence of defilement.

The appellant's counsel prayed that the court invokes its discretion to set aside the sentence imposed by the trial judge and to resentence the appellant to 8 years imprisonment after deduction of the period on remand
30 and considering remorse of the appellant, his age and the fact that the appellant pleaded guilty and did not waste court's time.

5 **Submissions of the respondent**

In reply Counsel Joanita Tumwikirize conceded to ground 1 of the appeal which is that the learned trial judge erred in law and in fact when he imposed on the appellant a sentence of imprisonment for 28 years without complying with the Constitution of the Republic of Uganda and in the
10 result rendering the sentence illegal. She addressed the court on the second and alternative ground which is that the sentence of imprisonment for 28 years imposed on the appellant was unfair, harsh and excessive in the circumstances.

Ms Tumwikirize submitted that she concedes to the order for the sentence
15 to be set aside and for this court to exercise its jurisdiction under section 11 of the Judicature Act to impose an appropriate sentence. She submitted that a sentence of 28 years imprisonment was appropriate in the circumstances of the case. This is because the victim was 8 years old at the time she was defiled. Secondly, the appellant had worked with the victim's
20 family in a position of trust. Thirdly, the victim was traumatised and a lot of fear had been instilled in her which would affect her health. Moreover, counsel contended that the maximum penalty for the offence of aggravated defilement is death. It follows that the sentence of 28 years imprisonment is not harsh or excessive in the circumstances.

25 **Consideration of the appeal**

We have carefully considered the appellant's appeal, the submissions of counsel and the law generally. In the circumstances, we are required to consider whether the sentence imposed on the appellant is illegal, or unfair, harsh and excessive. We have also noted that there is no factual
30 controversy for resolution and we do not have to reappraise the evidence except to refer to relevant facts to aggravation or mitigation of the offence.

5 The above notwithstanding, the concession by the respondent that she will
not contest ground 1 of the appeal is not sufficient for us to reach the
conclusion that the sentence was illegal. We would therefore consider
ground 1 of the appeal which is whether the learned trial judge erred in law
and in fact when he imposed on the appellant a sentence of imprisonment
10 of 28 years without complying with the Constitution of the Republic of
Uganda and in the result rendered the sentence illegal. The relevant fact
was that the appellant had pleaded guilty to the offence of aggravated
defilement. The sentencing notes of the learned trial judge are as follows:

15 Accused is allegedly a first offender. He has changed his plea from not guilty to
guilty, albeit so belatedly after the full hearing of the case.

He has been on remand for one year and two months which period is deducted
from the sentence.

20 I will imprison him. He is said to be remorseful and repentant, as he is said to
have told the father of the victim that, he wanted to be forgiven. He also
voluntarily accompanied the victim and her father to the police. However,
accused has committed the offence. The maximum sentence, upon conviction is a
possible death penalty. This shows how seriously law treats convicted defilers. Girl
children must be protected by court in imposing exemplary sentences.

25 In the present law, the victim was only 8 years of age. Given the adult nature of
the accused, he was fit to at least be a father or elder brother to her.

Society expects him to take care or protect the victim from attack, like this one,
but the accused decided to have her sexually.

The medical report (PE1) showed that girl had suffered bruises and freshly
ruptured hymen in her private parts. She was also bleeding from there.

30 While testifying the victim sobbed extremely while narrating her ordeal at the
hand of the accused. This showed that she had been traumatised extremely,
which could have a negative impact in her future sex life.

In the present circumstances, the accused deserves a stiff sentence, to fit his lust.

5 Putting everything in account, I sentenced him to 28 (twenty-eight) years imprisonment. Right of appeal explained.

It is the last paragraph quoted above; the sentence "*putting everything in account*" purports to comply with Article 23 (8) of the Constitution of the Republic of Uganda. We noted that at the beginning of the sentencing notes, the learned trial judge had specified that the appellant had been on remand for one year and two months which period is deducted from the sentence. At this point of the proceedings, he had not yet arrived at any sentence. It has to be supposed that the learned trial judge meant the sentence that he would impose. The wordings that the learned judge used were not appropriate. Even if read together with the last sentence in the sentencing notes quoted above, putting everything into account is a vague statement. The first relevant sentence had purported to deduct the period of remand from the undetermined sentence. Article 23 (8) of the Constitution of the Republic of Uganda provides that:

20 (8) 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 period that the convict spends in lawful custody is taken into account in imposing the term of imprisonment. To make the sentence clear as being in compliance with the above cited article, it has to be shown that the period in lawful custody prior to conviction has been taken into account while passing the sentence. Even if the learned trial judge did take it into account, this does not appear explicitly clear from the record. In the premises, we find that the sentence is ambiguous and therefore does not comply with Article 23 (8) of the Constitution of the Republic of Uganda.

5 We accordingly allow the appeal and set aside the sentence and will impose a sentence of our own using the jurisdiction of this court under section 11 of the Judicature Act, Cap 13 laws of Uganda.

Further, in light of the order setting aside the sentence, we do not have to consider whether the sentence imposed by the learned trial judge is harsh and excessive. The offence of defilement is aggravated by the law if the
10 victim is under the age of 14 years of age. Aggravated defilement is therefore to be treated as a very serious offence according to the standard imposed by the law. The victim was eight years of age and the additional aggravating circumstances was the ruptured hymen and the bleeding as
15 well as the psychological trauma that the victim underwent.

As far as mitigation is concerned, the appellant was 20 years old at the time of commission of the offence. Secondly, the appellant gave himself up and went with the father of the victim to the police voluntarily. Thirdly, the appellant, even if he did it after completion of the prosecution case,
20 pleaded guilty and saved the court's time.

As far as age is concerned, the consideration is whether the appellant can reform and resettle in society after serving sentence. In **Kabatera Steven v Uganda; (Criminal Appeal No. 123 of 2001)** (unreported) this Court held that the age of an accused person is a material factor that should be taken
25 into account in imposing sentence. The Court found that the appellant in that case was a young offender:

... the learned trial Judge should have considered the age of the appellant at the time he committed the offence before passing sentence. He was a young offender and a long period of imprisonment would not reform him.

30 This decision was followed in **Bikanga Daniel v Uganda; (Criminal Appeal No 38 of 2000) [2006] UGCA 75** where the appellant was 21 years old at the time of commission of the offence. This Court held that the age of an

5 accused person is a material factor that ought to be taken into account before a sentence is imposed. In addition reform is an important objective of a term of imprisonment and should be weighed with the objective of punishing the offender. In **German Benjamin v Uganda; (Criminal Appeal No 142 of 2010) [2014] UGCA 63** this court held that rehabilitation while
10 in prison was also an important objective of imprisonment which ought to be considered in imposing sentence when it stated that:

It should be observed that courts tend to lean more on the punitive element of sentencing and lose sight of one of the most crucial elements of sentencing which is rehabilitation of the offender.

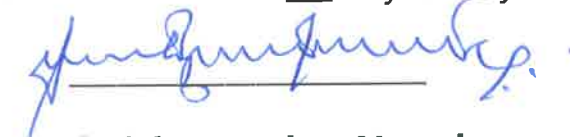
15 We have further considered the fact that the appellant pleaded guilty though belatedly. A plea of guilty made immediately after charges are read to the accused mitigates sentence as held by this court in **Nkurunziza Julius v Uganda; Criminal Appeal No 12 of 2009**.

We have also considered precedents on sentencing in cases of aggravated
20 defilement. In **Katende Ahamad v Uganda; (Criminal Appeal No. 6 of 2004) [2007] UGSC 11** the appellant defiled his biological daughter who was 9 years at the material time. On appeal, the Supreme Court sentenced the appellant to 10 years imprisonment after deducting the period of 2 ½ years he had spent in lawful custody prior to his conviction. In **Ogarm Iddi v Uganda; (Criminal Appeal No. 0182 of 2009) [2016] UGSC 13**, the
25 victim was 13 years old and the Court of Appeal upheld a sentence of 15 years' imprisonment for the offence of aggravated defilement. In **Kizito Senkula v Uganda; (Criminal Appeal No. 24 of 2001) [2002] UGCA 36** the victim was 11 years and a sentence of 15 years was held to be
30 appropriate. Last but not least in **Ninsiima Gilbert v Uganda; (Criminal Appeal No. 0180 of 2010) [2014] UGCA 65** the victim was 8 years old and the trial court sentenced the convict of the offence of aggravated defilement to 30 years imprisonment. On appeal, this court reduced the

5 sentence to 15 years imprisonment. In the above decisions, we see a range
of sentences of between 12 years imprisonment and 15 years
imprisonment.

10 Taking into account the aggravating circumstances as well as the fact of the
age of the appellant and what happened after commission of the offence,
we find that a sentence of 12 years would be appropriate. From that period
we deduct the period the appellant had spent in lawful custody of one year
and two months and sentence him to 10 years and 10 months
imprisonment which sentence shall commence running from the date of his
conviction on 5th March, 2014.

15 Dated at Fort Portal the 30th day of July 2019



Frederick Egonda - Ntende

Justice of Appeal



Hellen Obura

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Justice of Appeal



Christopher Madrama

Justice of Appeal

Collins Accellam for Appellant
WAGSIVA Adom for Resp.
Appellant is with
Judgment delivered.

10 
30th July 2019.