THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT GULU

Criminal Appeal No. 138 of 2010.

Coram: Kakuru, Tuhaise, & Kasule, JJA

Opio Francis ..... Appellant

Versus

Uganda..... Respondent

(*An Appeal arising from the decision of Paul K. Mugamba J, as he then was, in Criminal Case No. 204 of 2008, dated 11th June 2010 at the High Court of Uganda at Gulu*)

Judgement of the Court

The appellant, Opio Francis, was convicted of aggravated defilement contrary to section 129 (3) and (4) (a) of the Penal Code Act and sentenced to life imprisonment by the High Court of Uganda at Gulu. He was dissatisfied with the sentence passed by the trial court and filed this appeal on the ground that:-

1. The learned trial Judge erred in law and fact when he passed a sentence of life imprisonment that is manifestly harsh and excessive in the circumstances, thereby occasioning a gross miscarriage of justice.

Background to the Appeal

The appellant and Aromarach Scovia (the victim), who was a girl aged 6 years, were residents of Alokolum IDP camp. They were known to each other as neighbours. During the afternoon of 23rd February 2008 the appellant paid a visit to the home of the victim

where he found her with her siblings, Irene Apiyo and Ronald Okeny. They were peeling cassava. The appellant suggested that the victim accompanies him to his home in order to collect yams which could be cooked together with cassava for their meal. The appellant left with the victim.

After sometime Irene Apiyo was concerned that the victim had been gone for too long. She went out looking for the victim and inquired about the whereabouts of the appellant at his home. The appellant was not at home. Irene Apiyo later returned home but soon after, the victim arrived crying and alleging that the appellant had had sexual intercourse with her in an abandoned hut. Irene Apiyo examined the victim and observed blood in her private parts. She alerted neighbours and informed the Local Council (LC) I Chairperson about the matter.

The following day, Odong Serafina, the victim's father returned. When he learnt about the incident, he reported the matter to Lacor Police Post from where the victim and her father were referred to Lacor Hospital. The victim was examined by PW5 who recorded his observations on Police Form 3 which he later returned to Police. A search for the appellant was made by the police (PW4) but it was not successful until about one week later, on 2nd March 2008, when the appellant was arrested. He was subsequently indicted for the offence of aggravated defilement, tried, convicted and sentenced to life imprisonment, hence this appeal.

Representation

At the hearing of this appeal, Ms. Shamim Amolo, learned Counsel, appeared for the appellant on state brief. Mr. Patrick Omia, learned State Attorney, appeared for the respondent.

Submissions for the Appellant

The appellant's counsel sought leave of this Court to have the appellant's Notice of Appeal, which had been filed in this Court out of time, regularized. She also sought leave to appeal against sentence alone, pursuant to section 132 (1) (b) of the Trial on Indictments Act. The respondent's counsel had no objection to both prayers, and, on that basis, this Court allowed both prayers.

The appellant's counsel submitted that the sentence of life imprisonment imposed against the appellant by the learned trial Judge was manifestly harsh and excessive in the circumstances of the case. According to Counsel, the learned trial Judge did not seriously weigh the mitigating factors presented to court by the appellant during *allocutus* proceedings.

Counsel prayed that this Court sets aside the sentence and imposes a more lenient sentence. She submitted that a sentence of 10 years imprisonment would be appropriate in the circumstances of this case. She cited the cases of **Matovu Leonard V Uganda, Court of Appeal Criminal Appeal No. 117 of 2014** and **Turyanyomwe Moses V Uganda, Court of Appeal Criminal Appeal No. 0020 of 2013** to support her submissions.

Submissions for the Respondent

The respondent's counsel conceded that the sentence of life imprisonment was too harsh. He submitted that a sentence of 20 years imprisonment would be appropriate in the circumstances of this case where the victim was aged 6 years while the appellant was aged 35 years at the time the offence was committed. He cited the cases of **Chombe V Uganda, Court of Appeal Criminal Appeal No. 74 of 2005;** and **William Owinji V Uganda, Court of Appeal, Criminal Appeal No. 106 of 2013** to support his submissions, but he did not avail to this Court copies of the

judgments of the court cases he cited although he undertook to do so.

Resolution of Court

This court, as a first appellate court, has a duty to re-evaluate the evidence and come to its own conclusion as required under rule 30 (1) of the Judicature (Court of Appeal Rules) Directions. It will however be mindful of the fact that, unlike the trial court, it had no opportunity to observe the demeanour of the witnesses as they testified. Also see: **Pandya V R [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No. 10 of 1997; Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997.**

This is an appeal against sentence alone. The law is now well settled as to when an appellate court can properly interfere with a sentence passed by a trial Judge. In **Kiwalabye Bernard V Uganda, Supreme Court Criminal Appeal No. 143 of 2001** the Supreme Court stated the principle that the appellate court is not to interfere with the sentence imposed by a trial court in the exercise of its discretion, 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 circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle.

In the instant appeal, the learned trial Judge is faulted for passing a sentence of life imprisonment that is manifestly harsh and excessive in the circumstances, thereby occasioning a gross miscarriage of Justice.

The record shows on page 35 that the learned trial Judge had the following to say when sentencing the appellant:-

"I have heard what has been said regarding evidence from the prosecution, Counsel for the convict and the convict himself. I have heard the convict mentioning his home issues. Sadly his feelings are nothing compared to the eternal shame and stigma he selfishly visited on that unsuspecting child. The child was trusting. The convict should have been her protector. He chose to put aside any humanity and ravished her. He should in the circumstances pay for that role. In the circumstances, I find a sentence of life imprisonment appropriate for him to keep him away from society to which he is a danger. He is sentenced to life imprisonment."

The maximum penalty for aggravated defilement is death. The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions set out as the starting point, 35 years imprisonment as minimum sentence for a person convicted of aggravated defilement.

In the case from which this appeal arises, the mitigating factors were that, the convict was a first offender and had no previous record. He had been on remand for 2 years and 3 months. At the time of his arrest, he had 3 children and 2 other children of his dead brother. He had dependants whom he was taking care of. He prayed for leniency.

The aggravating factors were that the appellant shattered the innocence of a child to whom he should have been a father figure.

In addition to addressing the mitigating and aggravating factors when sentencing, there is a necessity for courts to maintain consistency and uniformity in sentencing, taking into account the circumstances under which the offences are committed.

In **Turyayomwe Moses V Uganda, Court of Appeal Criminal Appeal No. 20 of 2013**, the appellant was convicted of

aggravated defilement and sentenced to 15 years imprisonment by the trial court. This Court upheld the sentence of 15 years imprisonment as appropriate in the circumstances of the case. It only deducted the period the appellant had spent on remand and let the appellant serve a sentence of 13 years and 17 days imprisonment.

In **Birungi Moses V Uganda, Court of Appeal Criminal Appeal No. 177 of 2014,** the accused was convicted of aggravated defilement and sentenced to 30 years imprisonment. This Court reduced the sentence of 30 years imprisonment to 12 years imprisonment where the appellant was a first offender and had spent 3 years on remand prior to his conviction.

In the instant appeal, we agree that, the offence of aggravated defilement for which the appellant was convicted is very serious and attracts a maximum penalty of death. We note however, that although the learned trial Judge took into account both the mitigating and aggravating factors highlighted above before sentencing the appellant, the sentence of life imprisonment passed against the appellant was manifestly harsh and excessive, in the circumstances of this case. The sentence is inconsistent with sentences imposed by this Court and the Supreme Court in other cases of similar circumstances, some of which have been cited above.

We accordingly set aside the sentence of life imprisonment imposed by the learned trial Judge against the appellant, on the ground that it is manifestly harsh and excessive. We, in exercise of our powers under section 11 of the Judicature Act, and taking into account all the factors in the instant appeal as set out above, including the circumstances of the case, substitute the sentence of life imprisonment with a sentence of imprisonment for 20 years. However, considering that the appellant spent 2 years and 3

months in lawful custody prior to his conviction, this period shall be deducted from the 20 years imprisonment pursuant to Article 23 (8) of the Constitution of Uganda.

In the result, this appeal is allowed. The appellant will serve a sentence of 17 years and 9 months imprisonment, starting from the date of his conviction, of 11th June 2010.

It is so ordered.

Dated at Gulu this ..... **day of** .....**2020.**

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Kenneth Kakuru

Justice of Appeal

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Percy Night Tuhaise

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal