THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

SITTING AT MBALE

(Coram: Egonda-Ntende, Cheborion Barishaki & Muzamiru Kibeedi, JJA)

CRIMINAL APPEAL NO.250 OF 2016

BETWEEN

KATONGOLE BENEDICTO :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal against the decision of the High court of Uganda at Mukono (Hon Lady Justice Margaret Mutonyi) made on 03.09.2016 in High Court Criminal Session Case No.060/2016)

JUDGMENT OF THE COURT

Background

On the 09th of March 2012 when the complainant, Ms Nagawa Rehema, had taken her mother, Ms Nantabazi Isha, to Bweyogerere for an operation, she left her two daughters, Ms Nsangu Amina (aged 12 years), and Ms Nakabugo Lukia (aged 13 years) to keep the home of their sick grandmother. In the night of 09th March 2012 the Appellant entered into the house where the said two little girls were sleeping and had forceful sexual intercourse with each one of them. The matter was reported to the LC1 Chairperson who caused the Appellant to be arrested and detained at Seeta Nazigo Police Station on 11th March 2012. Each one of the girls was medically examined and their respective

hymen found to have been captured. The Appellant was also examined and found to be of the apparent age of 40 years with sound mental faculties.

The Appellant was thereafter indicted with the offence of aggravated defilement contrary to Section 129(3)&(4)(a) of the Penal Code Act under Criminal Case No.0031 of 2016 Uganda Versus Katongole Benedicto. The particulars of the offence were that the Appellant on the 09th of March 2012, at Kantete "B" Village in Mukono District, unlawfully had sexual intercourse with Lukia Nakabugo a girl aged 13 years.

A second file was also opened up against the Appellant under which he was indicted with Aggravated defilement contrary to section 129(3) & (4)(a) of the Penal Code Act. It was registered as Criminal Case No. 060 of 2016, Uganda Versus Katongole Benedicto. The particulars of the offence stated that on the 09th of March 2012 at Kantete 'B' Village in Mukono District the Appellant unlawfully had sexual intercourse with Amina Nsangu a girl aged 12 years.

From the proceedings of the trial court, the two files were handled as if they were simply two counts of the same Indictment. But no injustice appears to have been occasioned since the Appellant pleaded to each of the charges separately.

As far as the defilement charges in respect of Ms Amina Nsangu are concerned, the Appellant pleaded guilty and was convicted on his own Plea of Guilty of the offence of Aggravated Defilement. The Appellant was sentenced to 20 years' imprisonment *"period spent on remand inclusive"*. Court further ordered that the Appellant should serve the

sentence concurrently with the one in CRB 680/2012 (i.e. Criminal Case No. 31 of 2016).

As for defilement Charges in respect of Ms Nakabugo Lukia, the Appellant likewise pleaded guilty and was convicted on his own plea of guilty to the offence aggravated defilement. The prosecution informed court that they had entered into a Plea Bargain Agreement (PBA) and agreed on 13 years' imprisonment. Court after confirming that the Appellant had consented to, and voluntarily signed, the PBA stated that it had endorsed the PBA and the "sentence of 14 years (sic!) effective from today". But in the Warrant of Commitment of the Convict to serve the prison term that was personally signed by the trial Judge on the 03rd of September 2016 she stated that the Appellant "was sentenced to serve 13 (thirteen) years imprisonment" in Court Case No.0031 of 2016.

In the Notice of Appeal, the thumb print ostensibly affixed to it by the Appellant on 16th September 2016, it was stated that the appeal was against the decision of Hon. Lady Justice Margaret Mutonyi in *"Criminal Case No.31 of 2016"* made on the 03rd of September 2016 whereby the Appellant was charged with Aggravated Defilement C/S 129(3)(4)(a) of the PCA and sentenced to 20 years' imprisonment. However the record of the trial court indicates that the impugned sentence 20 years had infact been imposed in Criminal Session Case No.060 of 2016 (where the victim was Ms AMINA NSAGU) and not in Criminal Session Case No.0031 of 2016 (where the victim was Ms NAKABUGO LUKIA).

The mix up found its way into the Memorandum of Appeal that was filed in Court on 21.07.2020. Its title states that the appeal arises from Criminal Case No.031 of 2016. However, in the body of the

Memorandum of Appeal it is stated clearly that the appeal is against the sentence by the Hon. Lady Justice Mutonyi Margaret delivered on 03/09/2016 in Criminal Case No.060 of 2016, "wherein [the Appellant] was convicted for Aggravated Defilement C/S 129(3) & (4) of the Penal Code Act, Cap.120 and sentenced to 20 years' imprisonment".

As no injustice appears to have been occasioned by the said mix up, we exercised our discretion by focusing on the substance of the appeal in accordance with Article 126 (2)(e) of the Constitution of the Republic of Uganda, 1995 which is to the effect the appeal is against the sentence in criminal case No 060 of 2016 of 20 years' imprisonment.

Ground of Appeal

The sole ground of appeal as set out in the Memorandum of Appeal is:

> *"That the learned trial judge erred in law and fact when she sentenced the Appellant to a harsh and excessive sentence of 20 years."*

Representations & Arguments

At the hearing, the Appellant was represented by Ms Agnes Kanyago of Ms Dagira & Co. Advocates, while the respondent was represented by Mr. Mugisha Peter, a State Attorney in the Office of the Director of Public Prosecutions (DPP). They adopted their written submissions which they had earlier on filed in court.

Counsel for the Appellant submitted that the sentence of 20 years imprisonment was illegal, harsh and/or excessive on account of the remand period not having been deducted by the trial judge and the failure of the trial judge to consider the mitigating factors, especially the

fact of the Appellant having pleaded guilty to the indictment and being remorseful.

Counsel for the respondent did not agree.

Counsel submitted that the trial judge was magnanimous as the sentences meted out to the Appellant fall far below the recommended sentencing regime for the offence of Aggravated Defilement as set out in the 3rd schedule to the Sentencing Guidelines namely: 30 years up to death with 35 years being the starting point.

Further, Counsel submitted that the trial judge considered the fact that the Appellant had readily pleaded guilty as a sign of remorsefulness otherwise he would have deserved a deterrent sentence owing to the circumstances surrounding the commission of the two offences in issue which were quite brutal and traumatizing to the little girls of tender years in contrast to their predator who was a whopping 40 years at the time of committing the offence.

As regards the issue of deduction of the remand period, counsel submitted that the principle of an arithmetic computation of the remand period as enunciated by the Supreme Court of Uganda in Rwabugande v Uganda [2017] UGSC 8 was not applicable to the instant matter whose decision was made on 3rd Sept 2016 long before the decision in the Rwabugande case dated the 3rd March 2017.

Counsel further that the Supreme Court of Uganda has since stated that the arithmetic approach is not a mandatory requirement in the case of *Abelle Asuman Vs Uganda Supreme Court Criminal Appeal No 66 of 2016*.

Counsel concluded by inviting us to uphold the sentence of the trial judge.

Analysis

For this court, as a first appellate court, to interfere with the sentence imposed by the trial court, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law, or that the trial court failed to take into account an important matter or circumstance, or made an error in principle, or imposed a sentence which is harsh and manifestly excessive in the circumstances. (*See* *Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No.16 of 2000 (Unreported); Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported); Wamutabanewe Jamiru Vs Uganda, Supreme Court Criminal Appeal No. 74 of 2007* and *Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014)*

In sentencing the Appellant to 20 years imprisonment, the trial judge stated thus:

> *"I can't imagine what happened that night with these little girls. The convict was 40 years at the time he committed [the] crime. He abused the child who was 28 years younger than him. The Police Form 3A shows that he had penetrative sex with this child. This is a sign of a deprived mind and this court has no kind words for him. He was monstrous in his conduct. He therefore deserves a deterrent sentence. The age difference is an aggravating factor much as he pleaded guilty. In the result he is sentenced to twenty years imprisonment, [the] period spent on remand inclusive. He should also serve the sentence concurrently with that one in CRB 680. He is free to appeal against the sentence if he is not satisfied. You couldn't have done such a terrible thing defiling one child after the other. That was very bad on your part. Even if you a widower you should have looked for another widow not innocent children.*

You notice the difference in these two files. Here is somebody who goes: you defile one child and you go to another. They were all screaming, shouting. That was very bad. If it was one child [you would have] gotten away with 13 years. We had swallowed it much as it is. But you defile one of 13, you even go to that one who is younger and you are a 40 years old. That is very bad, you should have gone to a fellow old woman, who can resist and fight you. I sympathize with those widowers but why not to look for another woman. Even people who are HIV positive when you go for ARVs you find their fellow people who are HIV positive and the two can love each other and have a normal life. But you go to unleash your lust on two small kids, [which] was too bad. Even if the state had asked for 15, I still thought that was a bit low for you. The children have to be protected because his libido is very high. A normal man cannot sleep with one and then another. Your high libido should be toned from the prison."

The first leg of the complaint of the appellant about the sentence in this case is that the trial judge did not deduct the remand period from the sentence as required by Article 23(8) of the Constitution of the Republic of Uganda, 1995, Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice)Directions, 2013. Counsel relied on the principle of "arithmetic deduction" which was set out by the Supreme Court in the case of *Rwabugande Moses Vs Uganda, SCCA No. 25 of 2014*.

Article 23 (8) of the Constitution of the Republic of Uganda imposed an obligation on the trial judge to take into account the period spent on remand by the appellant. It provides as follows:

> *"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." [Emphasis added]*

The question before us is whether the style of expression used by the trial judge while sentencing the appellant to twenty years imprisonment, *"period spent on remand inclusive"* is indicative that it indeed met the constitutional standards. In the circumstances of this case, we are satisfied that it did not. The sentence imposed by the trial judge was vague and confusing. The trial judge did not indicate when the sentence commences. Section 106 (2) of the Trial on Indictments Act requires that sentences are to commence from the day the sentence is imposed.

When the learned Judge ordered that *'the period spent on remand inclusive'* in the sentence that could suggest that it would commence to run from the time the appellant was remanded to pre-trial custody. Yet this would be contrary to Section 106 (2) of the Trial on Indictments Act as noted above. This kind of order leaves it to the implementing authority to interpret what the order actually means and how it can be given effect to. The sentencing order must clear such that there is no need for further interpretation.

To that extent, the sentence is illegal for failure to comply with a mandatory constitutional provision. See *Wamutabanewe Jamiru Vs Uganda, Supreme Court Criminal Appeal No.74 of 2017* **and** *Rwabugande Moses v Uganda [2017] UGSC 8.*

In the result we must set aside that sentence and exercising our powers under section 11 of the Judicature Act, proceed to impose a fresh sentence upon the appellant. It is unnecessary to consider the second leg of the complaint, whether or not the sentence was harsh and excessive.

Section 11 of the Judicature Act, cap 13, provides as follows:

> *"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."*

As the trial judge rightly stated, the age difference of about 28 years between the Appellant and the victim and the traumatizing and brutal circumstances under which the Appellant committed the offence are aggravating factors. The Appellant subjected two little girls to painful and traumatizing penetrative sex at a time when their overriding need was psycho-social support to face the high anxiety and stress levels ordinarily generated by the admission of a dear one, in this case the grandmother, into a Medical Facility for an operation.

On the other hand, we consider the fact that he pleaded guilty and appeared remorseful as mitigating factors.

In accordance with Sentencing principle No. 6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 - Legal Notice No. 8 of 2013, we are likewise obliged to maintain consistence or uniformity in sentencing - albeit while being mindful that cases are not committed under the same circumstances.

In **Anyolitho Robert Vs Uganda, CACA N0.22 of 2012,** the Appellant who was the paternal uncle of the victim, a girl aged 14 years, was convicted of the offence of Aggravated Defilement and sentenced to 18 years' imprisonment. This Court confirmed the sentence on appeal.

In ***Candia Akim Vs Uganda, CACA No.0181 of 2009,*** where the Appellant was a step-father of the 8-year-old victim, this Court

confirmed a sentence of 17 years' imprisonment for the offence of Aggravated Defilement.

In ***Kitambuzi Ramathan Vs Uganda, CACA No.197 of 2009,*** the Appellant was convicted of the offence of Aggravated Defilement of his 12-year-old daughter and was sentenced to 15 years' imprisonment. On appeal to this Court, the sentence was confirmed and the appeal dismissed.

More recently, on 30th July 2018, this court handed down a sentence of 18 years' imprisonment to a paternal uncle aged 28 years who was convicted of the Aggravated Defilement of a 7 years victim, vide: ***Kavuma Edward Vs Uganda, Court of Appeal Criminal Appeal No. 37 of 2014.***

In ***Ntambala Fred Vs Uganda, Supreme Court Criminal Appeal No.34 of 2015,*** the Supreme Court handed down a sentence of 14 years' imprisonment to a father for Aggravated Defilement of his 14 year old daughter in the Judgment delivered on 18th January 2018.

From the above decided cases, the sentence range for the offence of aggravated defilement has been 14 to 20 years. The distinguishing features between the above cases and the instant one is that there was a blood relationship between the Appellants and the victim which, in our opinion, is an aggravating factor.

DECISION.

1. The appeal is allowed.

2. The appropriate sentence in the circumstances of this case is 15 years' imprisonment.

3. From that sentence, the Appellant would be entitled to credit on the account of having pleaded guilty to the offence, which we put at 5 years. The credit would reduce the term of imprisonment from 15 years to 10 years.

4. Further, we deduct the period of 4 years 5 months and 22 days that the Appellant spent on pre-trial detention.

5. We therefore sentence the Appellant to a term of 5 years 6 months and 9 days' imprisonment to be served from the 3rd day of September 2016, the date of conviction.

6. The above sentence shall run concurrently with the sentence in Criminal Session Case No. 31 of 2016 Uganda Vs Katongole Benedicto.

Consequential Orders in respect of Criminal Session Case No. 31 of 2016 Uganda Vs Katongole Benedicto

As we indicated in the background to this appeal, during the trial, Criminal Session Case No. 31 of 2016 and Criminal Session Case No. 60 of 2016 were handled as though they were not separate files but as different counts of the same Indictment. And this partly contributed to the mix up in the documents which instituted this appeal which we have already pointed out.

We note from the Record of the Trial Court in this matter that in Criminal Session Case No. 31 of 2016 the trial judge sentenced the Appellant to

serve a "sentence of 14 years...effective today[03.09.2016]". The sentence is clearly illegal for not taking into account the remand period as required by the Constitution of the Republic of Uganda.

Even if the sentence has not been the subject of this appeal, this Court cannot close its eyes to matters of illegality which come to its attention. In *Kaddu Kavulu Lawrence Vs Uganda, Supreme Court Criminal Appeal No.72 of 2018* where the trial court had not taken into account the period the convict had spent in custody while sentencing him, and the said illegality was not one of the grounds of appeal, the Supreme Court held that where a trial judge fails to comply with Article 23(8) of the Constitution, the Supreme Court on its own motion can correct the sentence by considering the period that was spent in lawful custody before conviction.

The intervention by this court on its own motion in the instant matter becomes even more critical since the sentence in Criminal Session Case No. 31 of 2016 has a bearing on Criminal Session Case No. 60 of 2016 as the sentences in the two cases are to be served concurrently.

The sentence in Criminal Session Case No. 31 of 2016 was the outcome of the Plea Bargain Agreement (PBA) in which the parties had agreed upon a term of imprisonment of 13 years. They did not specify as to when computation of the 13 years would commence.

While endorsing the PBA the trial judge stated:

> *"Plea Bargain agreement is endorsed by court in view of the fact that the State Attorney, Defence Counsel, and accused [have consented to the agreement and signed]. Sentence of 14 years is endorsed effective today"*

The learned trial Judge entered a sentence of 14 years imprisonment while the agreed sentence under the PBA was 13 years imprisonment, without explanation. Where a sentence is entered by court, pursuant to a PBA, the trial court is obliged to give assent to the sentence proposed in the plea bargain agreement. Where the learned trial Judge does not approve of any element of the plea bargain agreement, including sentence, the trial Judge is obliged to set aside the plea bargain proceedings pursuant to rule 13 of the Judicature (Plea Bargain) Rules. It was an error for the learned trial judge to vary the sentence agreed in the PBA

Accordingly, we set aside the sentence in Criminal Session Case No. 31 of 2016 and substitute it with a sentence of 13 years imprisonment as agreed by the parties in the PBA.

From the said sentence we deduct the period of 4 years 5 months and 22 days that the Appellant spent on pre-trial detention.

We therefore sentence the Appellant to a net term of imprisonment of 8 years 6 months and 9 days' imprisonment to be served from the 3rd day of September 2016, the date of conviction.

The above sentence shall run concurrently with the sentence in Criminal Session Case No. 60 of 2016 Uganda Vs Katongole Benedicto.

We so Order.

Signed, dated and delivered at Mbale this 15th day of September **2020**.

FREDRICK EGONDA-NTENDE
Justice of Appeal

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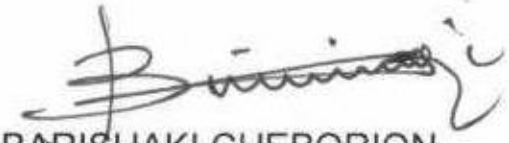

BARISHAKI CHEBORION
Justice of Appeal

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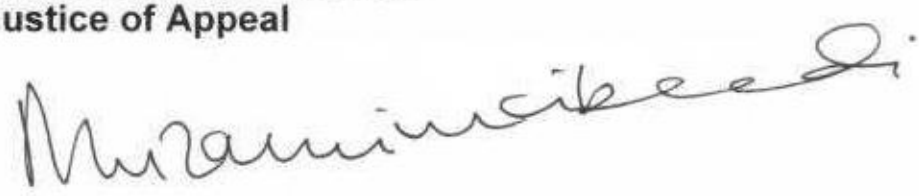

MUZAMIRU KIBEEDI
Justice of Appeal